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February 16, 2024 | Client Alert

The Corporate Transparency Act: Implications and Challenges for US Companies and Owners

This Client Alert follows, and may be read in conjunction with, our January 22, 2024 Client Alert titled [The Corporate Transparency Act: Implications and Challenges for Foreign Companies and Foreign Owners — Pierson Ferdinand LLP \(pierferd.com\)](#). For a more detailed discussion of the requirements of the Corporate Transparency Act¹ (the “CTA”) and its impact on foreign entities and owners, please refer to our January Client Alert.

The CTA, which went into effect on January 1, 2024, seeks to counteract money laundering, fraud and other illegal activity by imposing ownership disclosure requirements on private companies in the United States to an unprecedented extent. It is estimated that over 30 million US companies will be required to comply with the CTA.² This Client Alert considers the implications of the CTA for US companies, with a focus on large companies and groups that may incorrectly assume that they are exempt from the CTA.

I. Background and Summary

Enacted in 2021, the CTA instituted a beneficial ownership information (“BOI”) reporting database administered by the United States Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”). Beginning January 1, 2024, companies that are either incorporated or registered to do business in the United States must file certain beneficial ownership information on the FinCEN BOI database, unless an exemption applies. Failure to comply with the CTA may result in stiff penalties, including criminal liability.

Information reported to FinCEN under the CTA will not be made public but may be shared with other U.S. government agencies, law enforcement, the judiciary, and financial institutions and their regulators (with consent of the reporting company).³

The CTA applies mostly to closely held companies and SMEs that are not otherwise heavily regulated. While many larger companies, especially listed companies, are mostly exempt from the CTA, not all large companies fall under an exemption.

II. Who Must Comply?

Companies required to report BOI (“reporting companies”) to FinCEN include all corporations, limited liability companies, or other similar entities created in the United States⁴ (“domestic reporting companies”⁵)

¹ 31 USC 5336. The CTA was established by the National Defense Authorization Act for Fiscal Year 2021, PL 116-283.

² [Yellen says 100,000 firms have joined a business database aimed at unmasking shell company owners \(msn.com\)](#)

³ See generally 31 USC 5336(c)(2).

⁴ For purposes of this Client Alert, “United States” means any of the 50 States; the District of Columbia; Puerto Rico; Guam; the U.S. Virgin Islands; any other commonwealth, territory or possession of the United States; and any Indian or Alaska Native tribe listed as such under U.S. federal law.

⁵ See 31 USC 5336(a)(11)(A)(i) (“created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe”).

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or formed in a foreign country and registered to do business in the United States (“foreign reporting companies”⁶). For purposes of the CTA, creation or registration specifically requires the filing of a document with a secretary of state or similar office in the United States.

Exempt Entities:

There are 23 specific categories of companies that are exempt from reporting under the CTA.⁷ These are mostly institutions and companies already subject to significant regulation. They include (i) issuers of registered securities; (ii) financial institutions⁸; (iii) certain brokers and advisers⁹; and (iv) tax-exempt companies, among others. The exemptions relevant to most companies are:

- a) Large operating company: An entity qualifies for this exemption if *all* of the following conditions are met:
 - o The entity employs more than 20 full-time employees employed in the United States¹⁰;
 - o The entity has an operating presence at physical offices in the United States¹¹; and
 - o The entity has over \$5,000,000 in gross receipts or sales from sources in the United States, as declared to the IRS in a U.S. income tax or information return.¹²
- b) Subsidiaries of Exempt Companies: A company that is controlled or wholly owned by one or more exempt entities other than by: (i) a pooled investment vehicle; (ii) money transmitting or money services business; (iii) an entity that operates exclusively to provide financial assistance to, or hold governance rights over, tax-exempt entities; or (iv) an inactive entity.¹³ Therefore, a wholly-owned subsidiary or controlled affiliate of a large operating company would qualify for exemption under the CTA.

Large companies and affiliated groups of companies should pay close attention to the “large operating company” exemption of the CTA, which initially may appear to apply to them but upon closer examination may not. A group may have certain affiliates that meet this exemption and others that do not. A company may meet the exemption now but lose the exemption in the future, triggering an obligation to report.

Application of the “large operating company” exemption requires a close reading of the CTA and its implementing regulations. For example, the \$5,000,000 gross receipts condition includes the aggregate receipts or sales in the United States of other entities both owned by the company and through which the company operates.¹⁴ Furthermore, the \$5,000,000 threshold must have been declared in a federal income

⁶ See 31 USC 5336(a)(11)(A)(ii) (“formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office of a State or Indian Tribe”).

⁷ See 31 USC 5336(a)(11)(B)(i) – (xxiii).

⁸ Including banks, credit unions, bank holding or savings and loan holding companies, and money transmitting businesses. *Id.* at subparagraphs (B)(iii) – (vi).

⁹ Including securities broker dealers, investment companies, investment advisers; venture capital fund advisers. *Id.* at subparagraphs (B)(vii), (x) – (xi).

¹⁰ With full time employees meaning anyone who works at least 30 hours a week or 130 hours a month.

¹¹ FinCEN has made clear that the “physical office” requirement can be satisfied with a personal residence. See <https://www.federalregister.gov/d/2022-21020/p-557>

¹² *Id.* at subparagraph (B)(xxi).

¹³ *Id.* at subparagraph (B)(xxii).

¹⁴ See 31 USC § 5336(a)(11)(B)(xxi).

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tax return filed for the previous year.¹⁵ If the company seeks to claim the exemption based on the receipts of its controlled affiliates, the aggregate receipts or sales must be declared in a consolidated return for the previous year. Separate tax filings by controlled affiliates will not satisfy the requirements of this exemption. Similarly, gross receipts from sources outside the United States do not count towards the threshold.

Furthermore, while FinCEN allows aggregation of gross receipts or sales for purposes of the “large operating company” exemption, it does not allow companies to aggregate employees or operations in physical offices. Such analysis are performed on an entity by entity basis. For example, a company that may otherwise be required or allowed to aggregate employees within a group for other tax or regulatory purposes may not do so under the CTA.¹⁶ Determination of what is a “full-time employee in the United States” may require careful application of tax regulations, particularly in areas of employee secondment or intra-company transfers.

III. What Information Must Be Provided?

A reporting company must report and provide basic identifying information about itself and the following information for each beneficial owner and (where applicable) company applicant:

- Full legal name and date of birth
- Residential street address, except for company applicants who form or register companies in the course of their business—e.g. paralegals—for whom a business street address may be reported.
- Unique identification number, issuing jurisdiction, and image of any of the following:
 - U.S. passport
 - State driver’s license
 - Identification issued by state, local government or Indian tribe
 - Foreign passport, but only if none of the preceding three items are available
- If the individual has applied for and obtained a FinCEN identifier,¹⁷ the reporting company may report the FinCEN identifier instead of the individual’s BOI.

FinCEN Identifiers:

The CTA allows for the use of unique identifying numbers issued by FinCEN to an individual or reporting company, which may be reported instead of the required information about beneficial owners or company applicants.¹⁸ These “FinCEN identifiers” are meant to simplify the reporting process for individuals and entities that may own or control multiple reporting companies. “Company applicants” (discussed below) may also use FinCEN identifiers in lieu of their BOI. A reporting company may report another entity’s FinCEN identifier and full legal name instead of the entity’s BOI if:

¹⁵ Id.

¹⁶ See e.g. 26 CFR § 54.4980H-2 (applying “applicable large employer” status to all the member entities that comprise the applicable large employer for purposes of determining employer health coverage).

¹⁷ See *infra* “FinCEN Identifiers.”

¹⁸ 31 USC 5336(b)(3)(C).

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- The other entity has obtained a FinCEN identifier and provided it to the reporting company;
- An individual is or may be a beneficial owner of the reporting company by virtue of an *ownership interest* in the other entity (as opposed to other forms of control); and
- The beneficial owners of the other entity and the reporting company are the same individuals.¹⁹

Updates and Corrections:

If and when information reported to FinCEN under the CTA changes or is determined to be inaccurate, the reporting company must file an updated or corrected report within 30 days of the change or when the inaccuracy was detected.²⁰ If a reporting company becomes exempt from reporting subsequent to having filed a report, it must file an updated report.²¹ The CTA also provides a safe harbor for any person who voluntarily corrects an inaccurate report within 90 days of filing the report.²²

Who is a Beneficial Owner?

A beneficial owner is any individual who, directly or indirectly, (i) exercises “substantial control” over a reporting company or (ii) owns or controls at least 25% of the “ownership interests” of a reporting company.²³ Every individual meeting this criterion must be reported, and there is no maximum number of individuals who must be reported.

“Substantial control” means any of the following criteria:

- The individual is a senior officer, such as a C-suite executive or general counsel, or performs the functions of such an officer, regardless of title;
- The individual has authority to appoint or remove certain officers or a majority of directors from the reporting company;
- The individual is an “important decision-maker”—i.e. has substantial influence over important decisions made by the reporting company, such as regarding its business, finances, or structure;
- The individual has any other form of substantial control over the reporting company. This could include managers and authorized members of a limited liability company that do not otherwise have the requisite ownership interest to be a beneficial owner.²⁴

¹⁹ 31 CFR 1010.380(b)(4)(ii)(B). *See also* [Federal Register :: Use of FinCEN Identifiers for Reporting Beneficial Ownership Information of Entities](#)

²⁰ 31 CFR 1010.380(a)(2) and (a)(3) [eCFR :: 31 CFR 1010.380 -- Reports of beneficial ownership information](#). Note that this requirement does not include updating previous information about company applicants. It does include corrections of inaccurate information about company applicants. *Id.* at Section (b)(3).

²¹ *Id.*

²² 31 USC 5336(h)(3)(C).

²³ 31 CFR 1010.380(d).

²⁴ 31 CFR 1010.380(d)(1).

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“Ownership interest” includes equity, stock, voting rights, capital interests, profits interests, convertible instruments, options or other non-binding privileges to buy or sell any of the foregoing, and any instrument, contract or other mechanism to establish ownership.²⁵

Ownership or control may also be exerted by contract, arrangement, understanding, relationship or otherwise, including: (i) joint ownership; (ii) through a nominee, intermediary, custodian or agent; (iii) as a trustee or as a beneficiary with certain rights; or (iv) through other intermediary entities that separately or collectively own or control ownership interests of the reporting company.²⁶ In particular, control may be evidenced by contractual or non-contractual relationships (including, for example, family relationships).

Company Applicants:

Reporting companies formed after January 1, 2024 (if a domestic reporting company) or registered to do business in the United States after January 1, 2024 (if a foreign reporting company) are required to also report its company applicants to FinCEN.²⁷

Company applicants are (i) individuals who directly filed the document that created a domestic reporting company or registered a foreign reporting company to do business in the United States (a “direct filer”) and (ii) individuals who were primarily responsible for directing or controlling the filing of the formation or registration document, even though such individual did not actually file the document themselves (such individual “directs or controls the filing action”).²⁸ At most, a reporting company may have two company applicants, a direct filer and an individual who directs or controls the filing action.

IV. What are the Consequences of Non-Compliance?

The willful failure to report or update BOI to FinCEN or the willful provision of false or fraudulent BOI (including false or fraudulent information about a person in a BOI report) may result in civil penalties of up to \$500 per day or criminal penalties including imprisonment for up to two years and/or a fine of up to \$10,000.²⁹ Senior officers of an entity that fails to file required BOI may be held accountable for such failure. Any person (including a beneficial owner or a company applicant) who willfully causes a company not to file a required BOI report or to report incomplete or false BOI may also be subject to civil and/or criminal penalties.³⁰

V. Filing Deadlines

Reporting companies must file their initial BOI report as follows:

- a) If the reporting company was formed or registered to do business in the United State before 2024, by January 1, 2025.³¹

²⁵ 31 CFR 1010.380(d)(2).

²⁶ 31 CFR 1010.380(d)(2)(ii).

²⁷ 31 CFR 1010.380(b)(1)(ii). *See also* 31 CFR 1010.380(b)(2)(iv).

²⁸ 31 CFR 1010.380(e).

²⁹ 31 USC 5336(h)(3)(A).

³⁰ 31 USC 5336(h)(1).

³¹ 31 CFR 1010.380(a)(1)(iii).

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- b) If the reporting company is formed or registered to do business in the United States in 2024, within 90 days after receiving actual or public notice of its formation or registration.³²
- c) If the reporting company is formed or registered to do business in the United States in 2025 and thereafter, within 30 days after receiving actual or public notice of its formation or registration.³³

VI. What Should Companies Do Now?

U.S. companies with U.S. or foreign ownership and foreign companies that have any direct or indirect connection to the United States should first determine if they or any of their subsidiaries or affiliates are a reporting company under the CTA or qualify for an exemption from reporting. Careful analysis of the CTA's application should be conducted on an entity-by-entity basis, particularly for persons or groups with numerous affiliated or controlled entities. Companies that are or may be reporting companies under the CTA should at a minimum formally (i) designate an officer responsible for CTA reporting to FinCEN, (ii) set out the rights and responsibilities of both the CTA reporting officer and the owners of the reporting company to furnish required BOI for reporting to FinCEN,³⁴ (iii) prepare a confidential database of such information to be managed by the CTA reporting officer, and (iv) file the reporting company's initial BOI report to FinCEN within the applicable deadline, which for most reporting companies will be before January 1, 2025.

PierFerd attorneys are knowledgeable in corporate and compliance matters and are available to assist you with your CTA reporting obligations. For additional information, please contact any of the following or your regular PierFerd contact for assistance:

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³² See [Federal Register :: Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024](#) (extending the reporting rule from 30 to 90 days for reporting companies created or registered on or after January 1, 2024 and before January 1, 2025).

³³ Id.

³⁴ Formalizing these roles, rights and responsibilities may require *inter alia* amending the reporting company's corporate bylaws, shareholders agreement, operating agreement, partnership agreement, or trust agreement, as the case may be.