

**The Corporate Transparency Act:  
*Coming Soon to a Family-Owned Entity Near You!***

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**I. Introduction**

**A. Setting the Context: Vulnerability of U.S. Companies for Use as Vehicles for Money Laundering or Hiding Assets**

1. Approximately 2 million corporations, limited liability companies, limited partnerships, limited liability partnerships, business trusts and other similar business structures (referred to in these materials as “legal entities”) are formed in the United States annually. Legal entities in the United States are generally formed through the filing of documents with a state agency; most typically by filing documents with the office of the Secretary of State of the state of formation. To form a legal entity, Secretaries of State and similar agencies require information be provided about the legal entity itself, such as its principal business address within the state, the names of its principal officers or managers, the identity and street address of the agent for service of process, and possibly other information about the legal entity. Rarely, however, is any information about the individuals who benefit financially, directly or indirectly, from the activities or assets of the legal entity required to be provided to form the entity.
2. Unless the legal entity will be engaged in a business, investment or other activity that is federally regulated, the only federal filing required upon formation of a legal entity is the Form SS-4 (the application for a taxpayer ID number or “TIN”). Thereafter, annual federal tax or information returns may or may not be required, depending upon the tax characteristics of the legal entity. Once a legal entity is officially created in a given state and a TIN is assigned by the IRS, the legal entity can acquire assets. Other than as may be required to open a bank or other financial account or to file state and federal income tax returns, little further information is generally collected thereafter about the legal entity or its beneficial owners.
3. Most legal entities are formed and operated for legitimate business, estate planning, asset protection or other similar purposes. However, the historic lack of transparency over the individuals who actually benefit economically or effectively control legal entities in the United States facilitates their use as vehicles to hide the spoils of illegal activities, to evade taxes, to fund terrorism, to undermine the U.S. democracy and influence its elections, to avoid the seizure of assets and other consequences of government sanctions, or for myriad other illegal or illicit purposes. Money launderers, tax

evaders, kleptocrats, and other criminals also use the reputation of the United States to represent their U.S.-based shell companies as legitimate businesses around the globe.

4. In an attempt to prevent foreign individuals from using domestic LLCs to obfuscate ownership of foreign accounts or other assets, the IRS treats domestic single member limited liability companies as domestic corporations solely for the purpose of IRC § 6038A. Treas. Reg. § 1.6038A-1(c)(1); Treas. Reg. § 301.7701-2(c)(2)(vi). The effect of the regulation is to require such single-member LLCs, the sole member of which is a nonresident alien, to disclose their beneficial owner to the IRS on IRS Form 5472. Disclosure of this kind is already required for corporations, which must disclose the persons who beneficially own 25% or more of the shares of the corporation. Of course, only the IRS will have this information, which may or may not make the information easily available to other law enforcement authorities in the United States.

## **B. Passage of the CTA.**

1. Despite repeated failure of corporate transparency legislation in the United States, in March 2019, shortly after the start of the 116th Congress, Representative Carolyn Maloney released a draft bill that was similar, but not identical to, the 2017 version of the Corporation Transparency Act (“CTA 2017”). On May 3, 2019, Representative Maloney officially introduced the final draft to the 116<sup>th</sup> Congress as H.R. 2513, the Corporate Transparency Act of 2019 (“CTA 2019”). An amended version of H.R. 2513 was submitted in October 2019 to the House Committee on Financial Services. The House passed the final amended version of H.R. 2513 on October 22, 2019, sending it to the Senate. The Senate referred the bill to the Committee on Banking, Housing and Urban Affairs and no action was thereafter taken on H.R. 2513.
2. On July 20, 2020, a number of amendments were submitted *en bloc* to the “must pass” William M. (“Mac”) Thornberry National Defense Authorization Act for Fiscal Year 2021 (the “2021 NDAA”). Bloc 1, introduced by Representative Adam Smith, contained 154 proposed amendments to the 2021 NDAA, including the Corporate Transparency Act of 2021, or the “CTA 2021,” as presented by Representative Maloney. Bloc 1 was provided only 30 minutes of debate.
3. On July 21, 2020, however, the House passed NDAA 2021, including the CTA 2021. On November 16, 2020, the Senate took up consideration of NDAA 2021. Among other things, Senator Mitch McConnell proposed a different iteration NDAA 2021 that did not include the CTA 2021. The Senate passed Senator McConnell’s iteration, but the House subsequently rejected it. Conferences were held in early December 2020 to reconcile the differences between the House and Senate versions of the 2021 NDAA.

CTA 2021 is not mentioned as one of the Sections under discussion in these conferences.

4. A reconciled version of the NDAA 2021, including the CTA 2021, was passed by the House on December 8, 2020 (335-78; Roll. No. 238) and by the Senate on December 11, 2020 (84-13; Record Vote Number 264). Then President Donald Trump, however, vetoed the legislation on December 23, 2020.
5. On January 1, 2021, Congress overrode President Trump’s veto by a 322-87 vote in the House (Roll No. 253) and an 81-13 vote in the Senate (Record Vote Number 292), resulting in the NDAA 2021, and the CTA, becoming law on that date as Public Law No. 116-283, 134 Stat. 3888). The provisions of CTA are in NDAA §§ 6401-6403. *See generally* NDAA § 6403 (properly cited as 31 U.S.C. § 5336, or “CTA § 5336” for purposes of this outline), contains the substantive provisions of the CTA discussed below.

## **II. CTA Rules and Requirements**

### **A. Basic Overview of the CTA.**

1. For domestic Reporting Companies created on or after January 1, 2024, and foreign Reporting Companies first registering in the U.S. on or after January 1, 2024, information must also be provided about certain persons who were involved in the legal formation or registration of the Reporting Company (referred to in the CTA as “Company Applicants”).
2. The information provided by the Reporting Companies about their Beneficial Owners and Company Applicants (Beneficial Ownership Information, or “BOI”) will be maintained by FinCEN in a secure national database called the Beneficial Ownership Secure System, or “BOSS”. Access to the information on the BOSS will only be available to certain law enforcement agencies, taxing authorities, and a limited number of other potential users for specified purposes upon request.
3. Congress charged FinCEN with administering and enforcing the CTA. On December 8, 2021, FinCEN released proposed regulations pertaining to the BOI reporting requirements. *See* 86 Fed. Reg. 69920. FinCEN received 240 comments on the proposed regulations, including from ACTEC, the ABA, the AICPA, various law enforcement, government and industry groups, and numerous Secretaries of State. ¶5. FinCEN promulgated final regulations under the CTA on September 30, 2022, which are now located in the Code of Federal Regulations at 31 CFR 1010.380. *See* 87 Fed. Reg. 59498 (RIN 1506-AB49)(the “CTA Final Regulations”). The September 30, 2022, release by FinCEN includes a substantial preamble that explains many features of the final regulations and the basis for the rules. *See id.* at

59498-59591 (referred to in this outline as the “Preamble”). The Preamble is 93 pages, while the final regulations themselves are only five pages. Over the coming year, FinCEN expects to issue further clarification and guidance, including FAQs and help lines, to assist in understanding and implementing the CTA. Preamble § II.E, 87 Fed. Reg. at 59509.

4. The effective date of the CTA is January 1, 2024.
  - a. Under the CTA Final Regulations, domestic Reporting Companies formed with an Applicable Agency before January 1, 2024, and foreign Reporting Companies that registered to do business in the U.S. through an Applicable Agency before January 1, 2024, must file their initial BOI reports with FinCEN by no later than *January 1, 2025*. 31 CFR § 1010.380(a)(1)(iii).
  - b. Domestic Reporting Companies formed on or after January 1, 2024, and foreign Reporting Companies who first register to do business in the United States by registering with an Applicable Agency on or after January 1, 2024, must file their initial BOI reports with FinCEN *within 30 calendar days* of the dates specified in 31 CFR § 1010.380(a)(1)(i),(ii), discussed below.
5. The CTA applies to corporations, limited liability companies, and other legal entities created by the filing of a document with a Secretary of State or a similar office under the law of a state (including for this purpose a commonwealth, territory or possession of the United States) or Indian tribe (referred to in this Outline as an “Applicable Agency”). CTA § 5336(a)(11)(A)(i). The CTA also applies to foreign legal entities that register to do business in the U.S. by filing registration documents with an Applicable Agency. CTA § 5336(a)(11)(A)(ii).
  - a. General partnerships, sole proprietorships and trusts (other than certain types of business trusts) are not usually *created* by filing a document with an Applicable Agency and therefore are not Reporting Companies under the CTA. Preamble, § III.E.i, 87 Fed. Reg. at 59537.
  - b. Even if an entity or trust must file some document with an Applicable Agency, unless the filing is necessary to actually *create* the entity or trust, it is not subject to the CTA. *Id.* Reporting may nevertheless be required of such a non-registered entity or trust if it is a Beneficial Owner of, or a Company Applicant with regard to, a Reporting Company, discussed below.
6. The following materials discuss the principal exemptions from the CTA, who will be considered a Beneficial Owner of Company Applicant, the nature and extent of the information that must be provided in BOI reports,

the timing for the filing of the initial BOI reports as well as corrections and updates, and the penalties for providing false information or failing to comply with the CTA.

## **B. Exemptions from CTA**

1. The principal targets of the CTA are shell companies used for illicit purposes. Therefore, legal entities that have significant business operations in the United States (referred to in the CTA Final Regulations as “Large Operating Companies”) are not subject to the CTA. CTA § 5336(a)(11)(B)(xxi).
2. To qualify as a Large Operating Company, a legal entity must meet all of the following requirements.
  - a. The legal entity must have an operating presence at a physical location in the U.S. 31 CFR § 1010.380(c)(2)(xxi)(B). The physical location must be where the legal entity regularly conducts business. The location must be owned or leased by the legal entity and it must be physically distinct from the place of business of any unaffiliated entities. 31 CFR § 1010.380(f)(6). However, the location may be a personal residence. Preamble § III.E.iii.h, 87 Fed. Reg. at 59542.
  - b. The legal entity must have at least 20 full-time employees in the U.S. CTA § 5336(a)(11)(B)(xxi)(I). To promote regulatory consistency, the CTA Final Regulations look to the Internal Revenue Code and related regulations under the Affordable Care Act to determine whether an employee is “full-time.” 31 CFR § 1010.380(c)(2)(xxi)(A). Under these rules, an employee who works at least 30 hours per week or 130 hours per month is a “full-time” employee, subject to adjustments and adaptations for salaried or other non-hourly workers. Paid vacation, holidays, jury duty and similar paid days off are counted toward the 30/130 hour requirement. 26 CFR § 54.4980H-1(a)(24)(i). Note that at least 20 full time employees must be employed *by the Reporting Company itself* and not by subsidiaries or other affiliates of the Reporting Company. Preamble § III.E.iii.h, 87 Fed. Reg. at 59542. Further, the number of employees is determined as of the date of the BOI report. *Id.*
  - c. The legal entity must have at least \$5 million of gross receipts or sales, in the aggregate, as shown on its prior year’s federal income tax or information return. CTA § 5336(a)(11)(B)(xxi)(II). “Gross receipts” for this purpose must be from U.S. sources only and must be calculated net of returns or allowances. Receipts and sales of other entities owned by the legal entity and through which the legal

entity operates are included in the legal entity's gross receipts. 31 CFR § 1010.380(c)(2)(xxi)(C).

- d. Legal entities that are wholly owned or controlled by one or more Large Operating Companies (or are wholly owned or controlled by a combination of one or more Large Operating Companies and any one or more of the types of CTA-exempt legal entities discussed below) are also CTA-exempt under the so-called *Subsidiary Exemption*. CTA § 5336(a)(11)(B)(xxii); 31 CFR § 1010.380(c)(2)(xxii). Importantly, there is no corresponding CTA exemption for a parent company or holding company of a Large Operating Company. Preamble § III.E.iii.i, 87 Fed. Reg. at 59543.
3. A legal entity that does not meet the criteria for a Large Operating Company will nevertheless be exempt from the CTA reporting requirements (a "CTA-exempt legal entity") if it satisfies any of the criteria set below. Further, legal entities whose ownership interests are wholly owned or controlled, directly or indirectly, by any one or more of the CTA-exempt legal entities described below (which may also include ownership or control by one or more Large Operating Companies) qualify for the Subsidiary Exemption discussed above. *Id.* As with Large Operating Companies, there is no corresponding CTA exemption for a parent company or holding company of any of these CTA-exempt legal entities. *See id.*
    - a. A legal entity that is a church, a charity, a nonprofit entity or other organization described in IRC § 501(c) and is exempt from income tax under IRC § 501(a). Such a legal entity will remain a CTA-exempt legal entity for a period of 180 days following the loss of its tax-exempt status. CTA § 5336(a) (11)(B)(xix)(I); 31 CFR § 1010.380(c)(2)(xix)(A).
    - b. A political organization defined in IRC § 527(e)(1) that is exempt from income tax under IRC § 527(a). CTA § 5336(a)(11)(B)(xix)(II); 31 CFR § 1010.380(c)(2)(xix)(B).
    - c. A charitable trust or charitable split interest trust described in IRC § 4947(a)(1) or (2). CTA § 5336(a)(11)(B)(xix) (III); 31 CFR § 1010.380(c)(2)(xix)(C).
    - d. Public accounting firms registered with the Public Company Accounting Oversight Board's Registered Firm's list pursuant to the Sarbanes-Oxley Act of 2002. CTA § 5336(a)(11)(B)(xv); 31 CFR § 1010.380(c)(2)(xv).
    - e. A legal entity that exercises governmental authority on behalf of the U.S., an Indian tribe, a state, or a political subdivision of a state if it is established under U.S. law, tribal law, the law of a state or a

political subdivision of a state by a compact between 2 or more states. CTA § 5336(a)(11)(B)(ii); 31 CFR § 1010.380(c)(2)(ii).

- f. Issuers of securities under Section 12 of the Securities Exchange Act (the “SEA”) who are required to file information or reports under Section 15(d) of the SEA. CTA § 5336(a)(11)(B)(i); 31 CFR § 1010.380(c)(2)(i).
- g. FDIC insured banks, U.S. credit unions, and deposit institution holding companies. CTA § 5336(a)(11)(B)(iii)-(v); 31 CFR § 1010.380(c)(2)(iii)-(v).
- h. Brokers or dealers in securities. CTA § 5336(a)(11)(B)(vii); 31 CFR § 1010.380(c)(2)(vii).
- i. Securities exchange or clearing agencies and other Securities Act of 1934 entities. CTA § 5336(a)(11)(B)(viii); 31 CFR § 1010.380(c)(2)(viii)-(xix).
- j. Registered investment companies and registered investment advisers. CTA § 5336(a)(11)(B)(x); 31 CFR § 1010.380(c)(2)(x).
- k. Venture capital fund advisers that are described in Section 203(1) of the Investment Advisors Act of 1940 and have filed Item 10, Schedule A as well as Schedule B of Part 1A of Form ADV with the SEC. CTA § 5336(a)(11)(B)(xi); 31 CFR § 1010.380(c)(2)(xi).
- l. Insurance companies. CTA § 5336(a)(11)(B)(xii); 31 CFR § 1010.380(c)(2)(xii). FinCEN has no opinion at this time as to whether this exception covers some or all captive insurance companies, including “micro captives.” Preamble § III.E.iii.d, 87 Fed. Reg. at 59541.
- m. Insurance producers if authorized by a state, and subject to supervision by the state insurance commissioner or similar state office, but only if the producer has an operating presence in a physical location in the United States. CTA § 5336(a)(11)(B)(xiii); 31 CFR § 1010(c)(2)(xiii). The physical location must be where the legal entity regularly conducts business. The physical location must be owned or leased by the legal entity, and it must be physically distinct from the place of business of any unaffiliated entities. 31 CFR § 1010.380(f)(6). There is no restriction imposed on whether this physical location is a business address or a residence address. Preamble § III.E.iii.e, 87 Fed. Reg. at 59541.
- n. Commodity Exchange Act registered entities, including futures commission merchants, introducing brokers, commodity pool operators and commodity trading advisers that are registered with

- the Commodity Futures Trading Commission. CTA § 5336(a)(11)(B)(xiv)(I)-(II)(AA); 31 CFR § 1010.380(c)(2)(xiv).
- o. Retail foreign exchange dealers registered with the Commodity Futures Trading Commission. CTA § 5336(a)(11)(B)(xiv)(II)(aa)(BB); 31 CFR § 1010.380(c)(2)(xiv).
  - p. Regulated public utilities within the meaning of IRC § 7701(a)(33)(A) providing telecommunications, electrical power, natural gas, water or sewer services. CTA § 5336(a)(11)(B)(xvi); 31 CFR § 1010.380(c)(2)(xvi).
  - q. Financial market utilities designated by the Financial Stability Oversight Council. CTA § 5336(a)(11)(B)(xvii); 31 CFR § 1010.380(c)(2)(xvii).
4. The following legal entities are also CTA-exempt. However, their direct or indirect ownership or control of another legal entity will disqualify that legal entity for the Subsidiary Exemption discussed above.
- a. A legal entity that operates exclusively to provide financial assistance to, or hold governance rights over, the CTA-exempt non-profit entities and trusts that are described above. To be CTA-exempt, this type of legal entity must be (1) U.S. person and (2) beneficially owned and controlled by, and derive a majority of its funding from, one or more U.S. persons that are U.S. citizens or lawful permanent U.S. residents. CTA § 5336(a)(11)(B)(xx); 31 CFR § 1010.380(c)(2)(xx).
  - b. Money transmitting businesses and money services businesses registered with FinCEN. CTA § 5336(a)(11)(B)(vi); 31 CFR § 1010(c)(2)(vi).
  - c. Pooled investment vehicles that are operated or advised by any of the following types of CTA-exempt legal entities: FDIC insured banks, U.S. credit unions and deposit institution holding companies; brokers or dealers in securities; registered investment companies and registered investment advisers; insurance companies; and public accounting firms. CTA § 5336(a)(11)(B)(xviii); 31 CFR § 1010.380(c)(2)(xviii). A CTA-exempt pooled investment vehicle that is formed under the laws of a foreign jurisdiction must submit a certified statement that provides the identifying information for an individual that exercises substantial control over the entity. CTA § 5336(b)(2)(C); 31 CFR § 1010.380(b)(2)(iii).
  - d. Inactive legal entities that are not owned directly or indirectly, in whole or part, by any foreign persons. These are also sometimes referred to as “grandfathered” CTA-exempt legal entities. To be



“grandfathered,” the legal entity must (a) have been in existence on or before January 1, 2020; (b) not be engaged in an active business; (c) hold no assets (including an interest in another legal entity); (d) not had a change of ownership in the prior 12-month period; and (e) not received, directly or through an affiliated entity, more than \$1,000 in the prior 12-month period. CTA § 5336(a)(11)(B)(xxiii); 31 CFR § 1010.380(c)(2)(xxii). Further, a legal entity that was grandfathered under this rule that ceases to meet the necessary criteria cannot regain its grandfathered status and will be required to submit a BOI report unless it is otherwise CTA-exempt. CTA § 5336(b)(2)(c); 31 CFR § 1010.380(a)(1)(iv).

5. The CTA authorizes FinCEN to add to the list of exempt legal entities. While no additions were made in the CTA Final Regulations, FinCEN acknowledges that additional exemptions may be deemed appropriate in the future. CTA § 5336(a)(11)(B)(xxiv); Preamble § III.E.ii.b, 87 Fed. Reg. at 59540.

### **C. Who are the Beneficial Owners of a Reporting Company?**

1. A Beneficial Owner of a Reporting Company is defined as any *individual* who, directly or indirectly, (A) exercises “substantial control” over a Reporting Company (regardless of any actual “ownership” of the legal entity) *or* (B) owns or controls 25% or more of the “ownership interests” in the Reporting Company. CTA § 5336(a)(3).
2. An individual can have “substantial control” over a Reporting Company based upon a variety of facts and circumstances. Further, multiple individuals can have substantial control over a Reporting Company, all of whom will be “Beneficial Owners” for purposes of the CTA reporting requirements.
  - a. The Senior Officers of a Reporting Company are all deemed to have substantial control. 31 CFR § 1010.380(d)(1)(i)(A). A “Senior Officer” is defined as any individual holding the position (or exercising the authority of) a President, CEO, CFO, COO, general counsel or any other officer regardless of title performing a similar function. 31 CFR § 1010.380(f)(8).
  - b. Any individual with the authority to remove any Senior Officer or a majority of the Board (or similar body) of a Reporting Company has substantial control. 31 CFR § 1010.380(d)(1)(i)(B).
  - c. Any individual who otherwise directs, determines or has “substantial influence” over “important decisions” is deemed to have substantial control. The CTA Final Regulations provide a non-exclusive list of “important decisions,” such as the disposition or

encumbrance of any principal assets; reorganizations, mergers and dissolutions; major expenditures; issuing equity; taking on significant debt; altering lines of business; approving operating budgets; setting compensation of Senior Officers; certain decisions regarding major contracts; changes to governing documents; and other similar major decisions affecting the Reporting Company. 31 CFR § 1010.380(d)(1)(i)(C). FinCEN has taken the position that when multiple individuals have equal control, they are each likely to be considered to have substantial influence over decisions even if no one of them controls the outcome. Preamble § III.C.i, 87 Fed. Reg. at 59527.

- d. An individual with “*any other form of substantial control*” over a Reporting Company is also a Beneficial Owner. 31 CFR § 1010.380(d)(1)(iv).
  - e. Substantial control can be exercised directly or indirectly, and it may be exercisable by a trustee of a trust or other similar arrangement. 31 CFR § 1010.380(d)(1)(ii). Substantial control also may be exercised, for example, through representation on the Board of Directors; majority ownership or control of voting rights or powers; rights derived from financing arrangements; control over intermediary entities that separately or collectively have substantial control; formal or informal arrangements with individuals or other entities acting as nominees; and other forms of contracts, arrangements, understandings, relationships or other mechanisms.  
*Id.*
3. An individual who *owns or controls* more than 25% of the “ownership interests” in a Reporting Company is also a Beneficial Owner. CTA § 5336(a)(3)(A)(ii).
- a. For this purpose, an “ownership interest” is broadly defined as any instrument, contract, arrangement, understanding, relationship or other mechanism used to establish ownership. Specific forms of ownership for this purpose include equity, stock or similar instruments; preorganization certificates or subscriptions; a transferrable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; and capital or profits interests in an entity (referred to in this outline as “Listed Forms of Ownership”). 31 CFR § 1010.380(d)(2)(i)(A)-(B). Instruments that are convertible into any of the Listed Forms of Ownership, any future on such an instrument, and any warrant or right to purchase, to sell, or to subscribe to any of the Listed Forms of Ownership also constitute an “ownership interest.” 31 CFR § 1010.380(d)(2) (i)(C).

- b. A Reporting Company must treat any put, call, straddle or other option or privilege of buying or selling any of the Listed Forms of Ownership or instruments described above as an ownership interest unless it was created and held by one or more third parties without the knowledge or involvement of the Reporting Company. 31 CFR § 1010.380(d)(2)(i)(D).
- c. Other instruments, contracts, arrangements, understandings, relationships or other mechanisms not described above could also be deemed to represent an “ownership interest.” 31 CFR § 1010.380(d)(2)(i)(E). Further, both ownership and control of an ownership interest in a Reporting Company can be held directly or indirectly. Indirect ownership or control can be represented through a contact, arrangement, understanding, relationship or other mechanism. Examples of indirect ownership or control provided in the CTA Final Regulations include joint ownership of an undivided interest; ownership through a nominee, custodian, intermediary or agent of an individual; ownership or control through the ownership or control of intermediary entities (or ownership interests in such entities) that separately or collectively own or control ownership interests in the Reporting Company. 31 CFR § 1010.380(d)(2)(ii)(A)-(B), (D).
- d. With regard to a trust that holds an ownership interest in a Reporting Company, multiple individuals could be deemed to own or control the same ownership interest. The CTA Final Regulations provide the following specific examples, but other circumstances could give rise to an individual being deemed to own or control the ownership interest in a Reporting Company held in a trust. Preamble § III.C.i, 87 Fed. Reg. at 59532.
  - (i) An individual trustee of a trust (or similar arrangement), or other individual, with the power to dispose of trust assets, will be deemed to control or own the ownership interest in the Reporting Company held in the trust. 31 CFR § 1010.380(d)(2)(ii)(C)(1). The reference to “other individual” in this context implies that individuals serving in such fiduciary positions with regard to the trust, such as investment directors, advisors, or committee members, or even in non-fiduciary positions, such as trust protectors or persons holding veto powers over certain actions of the trustee, could be deemed to be beneficial owners depending upon the circumstances.
  - (ii) A beneficiary of a trust who is the sole permissible recipient of income or principal of the trust, or who can withdraw substantially all of the assets from the trust, will be deemed

to own the ownership interest in the Reporting Company held by the trust. 31 CFR § 1010.380(d)(2)(ii)(C)(2). This implies that a beneficiary of a trust that has more than one current beneficiary will *not* be deemed to own the ownership interest in the Reporting Company held by the trust *unless* that beneficiary can withdraw substantially all of the assets from the trust. It would therefore seem relatively easy to create trusts to hold ownership interests in Reporting Companies that protect the identity of the beneficiaries (but not the trustees) from disclosure under the CTA. However, the beneficial interests described in the CTA Final Regulations are simply examples of the circumstances under which beneficiaries might be considered to own an interest in a Reporting Company held in a trust. Other beneficial interests are also likely to give rise to the beneficiary being deemed to own the interest depending upon the particular facts and circumstances.

(iii) The grantor of any trust will be deemed to control or own the ownership interest in the Reporting Company held by the trust if the grantor has the right to revoke the trust or otherwise withdraw assets from the trust. 31 CFR § 1010.380(d)(2)(ii)(C)(3).

e. The CTA Final Regulations provide a number of rules and guidelines for how to determine whether an individual controls or owns 25% or more of the ownership interests of a Reporting Company.

(i) Ownership and control are determined as of the “present time,” meaning the date of the report. 31 CFR § 1010.380(d)(2)(iii)(A). Further, any options or similar interests of the individual are treated as having been exercised. *Id.*

(ii) If a Reporting Company is a corporation, is taxed as a corporation for federal income tax purposes, or otherwise issues shares of stock, an individual who either possess at least 25% of the total outstanding voting power of all classes of ownership interests OR at least 25% of the outstanding value of all classes of ownership interests will be a Beneficial Owner of the Reporting Company. 31 CFR § 1010.380(d)(2)(iii)(C).

(iii) If a Reporting Company issues capital or profits interests, then an individual who owns at least 25% of all outstanding

capital or profits interests in the Reporting Company will be a Beneficial Owner. 31 CFR § 1010.380(d)(2)(iii)(B).

(iv) Finally, if none of the foregoing rules can be applied with reasonable certainty, then an individual who owns or controls at least 25% of any class of ownership interest in the Reporting Company will be considered a Beneficial Owner. 31 CFR § 1010.380(d)(2)(iii)(D).

- f. If an individual owns any interest in the Reporting Company through a CTA-exempt legal entity, but also owns an interest in the Reporting Company outside of its interests in the CTA-exempt legal entity, then the interests of the individual must be aggregated with the interests held through the CTA-exempt legal entity, to ascertain whether the individual is a Beneficial Owner. For example, if the individual owned a 23% interest in the Reporting Company through one or more CTA-exempt legal entities, and a 2% direct interest in the Reporting Company, that individual is a Beneficial Owner whose information must be included on the BOI report. Preamble § III.B.iv.a, 87 Fed. Reg. at 59521.
4. So long as an individual who would otherwise be a Beneficial Owner of a Reporting Company is a minor (determined under the laws of the state or Indian tribe in which a domestic Reporting Company was formed or a foreign Reporting Company was first registered), the Reporting Company may instead treat the parent or legal guardian of the minor as the Beneficial Owner. The same information and documentation that is required of any Beneficial Owner must be provided for the parent or legal guardian until the minor reaches the age of majority. 31 CFR § 1010.380(d)(3)(i). The BOI report must indicate that the Beneficial Owner so reported is the parent or legal guardian. 31 CFR § 1010.380(b)(2)(ii). When the minor reaches the age of majority, the former minor's information and documentation must be provided by the Reporting Company. 31 CFR § 1010.380(a)(2)(iv).
  5. Other individuals that might otherwise fall into the definition of a Beneficial Owner by applying the foregoing principles are specifically *excluded*.
    - a. These include individuals whose ownership interests are merely through a future right of inheritance, as well as individuals acting on behalf of another person as a nominee, intermediary, custodian, or agent. 31 CFR § 1010.380(d)(3)(ii), (iv).
    - b. Also excluded are employees of the Reporting Company (other than Senior Officers) acting solely in their capacities as employees, if their economic benefits from, or substantial control over, the legal entity are derived solely from their employment status. 31 CFR § 1010.380(d)(3)(iii).

- c. Creditors will not be treated as Beneficial Owners if their rights and interests relate only to the right to be repaid a predetermined sum of money, or to a loan covenant or similar right that is intended to ensure, or enhance the likelihood of, repayment of that sum of money. 31 CFR § 1010.380(d)(3)(v).
- d. Finally, “FinCEN does not envision that the performance of ordinary, arms-length advisory or other third-party professional services to a reporting company” would cause the individual providing those services to be a Beneficial Owner. Preamble § III.C.i, 87 Fed. Reg. at 59527.

**D. Who is a “Company Applicant?”**

- 1. A Company Applicant is defined in the CTA Final Regulations as any individual who files the document with an Applicable Agency that creates a domestic Reporting Company or who first registers a foreign Reporting Company with an Applicable Agency. CTA § 5336(a)(2). The CTA Final Regulations further define a Company Applicant as the individual, if any, who directs or controls the filing of such a document. 31 CFR § 1010.380(e). In most cases, as few as one, and no more than two individuals (the actual filer and the person directing the filer, or the person preparing the documents and the actual filer of the documents) will need be identified as “Company Applicants.” Preamble § III.D, 87 Fed. Reg. at 59536; 31 CFR § 1010.380(e)(3).
- 2. The proposed regulations provided that both existing and newly created legal entities would be required to report BOI with regard to Company Applicants. Under the CTA Final Regulations, no Company Applicant information need be provided by Reporting Companies created or registered before January 1, 2024. 31 CFR § 1010.380(b)(2)(iv).
- 3. The proposed regulations provided that the Company Applicant information provided in the initial BOI report would need to be kept current indefinitely. The CTA Final Regulations eliminated this requirement. *See* Preamble § III.A.ii, 87 Fed. Reg. at 59511-514.

**E. What Must be Reported?**

- 1. Reporting Companies must provide the following information about the Reporting Company itself:
  - a. Full legal name of the Reporting Company, as well as any other trade name or “d.b.a.” used by the Reporting Company.
  - b. If the Reporting Company’s principal place of business is in the U.S., then the street address of the principal place of business; otherwise, the street address of the primary location in the U.S. from

which the Reporting Company conducts business. This requirement is not satisfied by supplying a P.O. Box or the address of a third party, such as a company formation agent. Preamble § III.B.ii.b, 87 Fed. Reg. at 59516.

- c. The state, territory, possession or tribal jurisdiction of a domestic Reporting Company's formation or a foreign Reporting Company's first U.S. registration.
- d. The TIN or EIN for all domestic Reporting Companies and foreign Reporting Companies possessing a TIN or EIN; otherwise a foreign Reporting Company's taxpayer identification number issued by a foreign jurisdiction and the name of that jurisdiction.

31 CFR § 1010.380(b)(1)(i).

- 2. A Reporting Company must provide the following information for each of its Beneficial Owners. 31 CFR § 1010.380(b)(1)(ii). Domestic Reporting Companies created or registered on or after January 1, 2024, and foreign Reporting Companies registering in the U.S. for the first time on or after January 1, 2024, must also provide this information for one or more "Company Applicants." 31 CFR § 1010.380(b)(2)(iv).
  - a. Full legal name and date of birth. CTA § 5336(b)(2)(A)(i)-(ii).
  - b. For an individual Beneficial Owner or Company Applicant, that individual's residential street address. CTA § 5336(b)(2)(A)(iii); 31 CFR § 1010.380(b)(1)(ii)(C)(2). FinCEN recognizes that there may be situations in which Beneficial Owners or Company Applicants feel unsafe disclosing their residential street address, such as victims of domestic violence or other violent crimes. If general future guidance cannot address this issue, FinCEN will review each situation of this nature on a case-by-case basis. Preamble § III.B.iii.a, 87 Fed. Reg. at 59517.
  - c. If a Company Applicant is an entity that forms or registers legal entities in the ordinary course of its business, that entity's current business street address. 31 CFR § 1010.380(b)(1)(ii) (C)(1).
  - d. For an individual Beneficial Owner or Company Applicant, an official identifying number from a non-expired (1) U.S. passport; (2) driver's license issued by a state; or (3) identification card issued by a state, local government or Indian tribe. Only if none of the foregoing documentation is available may a non-expired foreign passport be used for this purpose. 31 CFR § 1010.380(b)(1)(ii)(D).

- e. An image of the identifying document from which the official identifying number described in “d” above was obtained, with the individual’s photograph. 31 CFR § 1010.380(b)(1)(ii)(E).
  - f. If an individual is a Beneficial Owner of a Reporting Company *exclusively* due to that individual’s interest in a CTA-exempt legal entity that owns an interest in the Reporting Company, then in lieu of providing BOI with regard to that individual, the Reporting Company *may* simply provide information about the applicable CTA-exempt legal entity. 31 CFR § 1010.380(b)(2)(i). The Reporting Company may choose to provide BOI for the individual, however, if the Reporting Company does not want to provide information to FinCEN about the CTA-exempt legal entity. Preamble § III.B.iv.a, 87 Fed. Reg. at 59521.
  - g. Individuals and entities that are Beneficial Owners or Company Applicants will be able to obtain a unique FinCEN identification number (a “FinCEN Identifier”). CTA § 5 336(b)(3); 31 CFR § 1010.380(b)(3)(iii)(4). Each person may obtain only one FinCEN Identifier. Once obtained, the FinCEN Identifier may be provided by a Reporting Company on the BOI report in lieu of the detailed information described above. 31 CFR § 1010.380(b)(3)(iii)(4) (ii)(A). The individual or entity must apply for the FinCEN Identifier by providing the same information that would otherwise have been provided about that individual or entity by the Reporting Company in a BOI report. 31 CFR § 1010.380(b)(3)(iii)(4) (i)(A). It is thereafter the responsibility of the individual or entity that obtained the FinCEN Identifier (rather than the Reporting Company) to keep the information provided up to date, to keep the image of the identifying document current, and to correct any inaccuracies in the information provided. CTA § 5336(b)(3)(A)(ii); 31 CFR § 1010.380(b)(3)(iii)(4)(iii). Note that a Reporting Company may also secure its own FinCEN Identifier, but only *after* submitting its initial BOI report to FinCEN. 31 CFR § 1010.380(b)(3)(iii)(4)(i)(b).
3. CTA-exempt legal entities that have ALWAYS been CTA-exempt have no filing requirement. Further, there is no procedure for such a legal entity to secure a “certification” of its CTA-exempt status. FinCEN “will continue to consider” whether to offer such a certification in the future. Preamble § III.E.iii.a, 87 Fed. Reg. at 59539.

#### **F. Deadlines for Initial BOI Reports**

- 1. FinCEN estimates that over 32.5 million initial BOI reports will be filed in the first year of the CTA, and approximately 5 million each year thereafter. Preamble § V.A.ii.e.1, 87 Fed. Reg. at 59562.



2. Domestic Reporting Companies that were created with an Applicable Agency before January 1, 2024, and foreign Reporting Companies that registered with an Applicable Agency to do business in the United States before January 1, 2024, must file their initial BOI reports with FinCEN by no later than January 1, 2025. 31 CFR § 1010.380(a)(1)(iii).
3. Domestic Reporting Companies formed on or after January 1, 2024, and foreign Reporting Companies who register to do business in the United States for the first time on or after January 1, 2024, must file their initial BOI reports within 30 calendar days of the first to occur of the following dates:
  - a. The date the Reporting Company receives actual notice that the Reporting Company has been created or registered as a legal entity with the Applicable Agency; or
  - b. The date that the Applicable Agency first provides public notice that the Reporting Company has been created or registered, such as through a publicly accessible registry.

31 CFR § 1010.380(a)(1)(i)-(ii).

4. Legal entities that are not required to file an initial BOI report within either of the timeframes described above because they are CTA-exempt must file their initial BOI reports within 30 calendar days of the first date the legal entity no longer qualifies for any exemption from the CTA. 31 CFR § 1010.380(a)(1)(iv).
5. Neither the CTA nor the CTA Final Regulations provide the opportunity to seek an extension of time to file a BOI report (or to correct or update such a BOI report, as discussed below). However, FinCEN has indicated that it may consider providing guidance or relief, as appropriate, depending upon the facts and circumstances. Preamble § III.A.i, 87 Fed. Reg. at 59511.
6. All BOI reports (and all applications for FinCEN Identifiers) must be certified by the person filing the report or application that the information provided therein is “true, correct and complete.” Preamble § III.B.i, 87 Fed. Reg. at 59514. FinCEN views this as a certification by the Reporting Company itself and not the individuals signing on behalf of the Reporting Company. *Id.*

#### **G. Correcting Errors in BOI Reports and Applications**

1. If any information in a BOI report filed with FinCEN contains information that is incorrect or inaccurate, the Reporting Company has 30 calendar days from when it first becomes aware of, or has reason to know of, the mistake or inaccuracy to file a corrected BOI report. 31 CFR § 1010.380(a)(3).

2. If an individual applies for a FinCEN Identifier and if the information in that application is incorrect or inaccurate, then that individual has 30 calendar days from when he or she first become aware of, or has reason to know of, the mistake or inaccuracy to file a corrected application. 31 CFR § 1010.380(b)(3)(iii)(4)(iii)(A)(2).
3. If a Reporting Company has secured its own FinCEN Identifier, and if the information in its application is incorrect, the Reporting Company has 30 calendar days from when it first becomes aware of, or has reason to know of, the mistake or inaccuracy to file a corrected application. 31 CFR § 1010.380(b)(3)(iii)(4)(iii)(B).

#### **H. Keeping BOI reports and Applications Up to Date**

1. It is the responsibility of each Reporting Company to keep its BOI report current with FinCEN. This is not an annual filing requirement but an “*as needed*” filing requirement, meaning the BOI report must be updated by the Reporting Company within 30 calendar days of the following events:
  - a. Any change in the information submitted about the Reporting Company itself. This includes a change of a Reporting Company from CTA-nonexempt status to CTA-exempt status. 31 CFR § 1010.380(b)(3)(ii). Of course, moving from CTA-exempt status to CTA-nonexempt status is also a reporting event. Note if an existing legal entity is CTA-exempt on January 1, 2024, and loses its exempt status in December of 2024, it may apply the normal 30 calendar day rule for reporting this change in status if that would be after January 1, 2025. Preamble § III.A.i, 87 Fed. Reg. at 59511. No updated report is required upon the dissolution or termination of a Reporting Company. Preamble § III.A.ii, 87 Fed. Reg. at 59513.
  - b. Any change to the identity of the Beneficial Owners. If a Beneficial Owner dies and that Beneficial Owner’s interests (or other rights) are transferrable upon death, then a change in the Beneficial Owner will be deemed to have occurred not upon death but rather upon the date that the estate has settled, whether through intestacy or a dispositive instrument. 31 CFR § 1010.380(a)(2)(iii). At that time, the BOI report must be updated. The update appears to be required even if none of the successor owners will be Beneficial Owners. Preamble § II.A.ii, 87 Fed. Reg. at 59513. However, each transferee of the deceased Beneficial Owner’s interest will be assessed independently following the transfer to determine whether the transferee is or is not a Beneficial Owner. *Id.*
  - c. Any change in the information previously submitted with regard to the Beneficial Owners. As discussed above, this includes when a minor Beneficial Owner attains the age of majority if the Reporting

Company previously submitted BOI for the minor’s parent or legal guardian. 31 CFR § 1010.380(a)(2)(iv). Changes to the image of the identifying documents submitted to FinCEN for a Beneficial Owner require an update only if the change pertains to the Beneficial Owner’s name, date of birth, residence address or unique identifying number. 31 CFR § 1010.380(a)(2)(v). Other changes to the identifying documents, such as the individual’s personal characteristic or expiration dates, do not require an updated BOI report. Preamble § III.A.ii, 87 Fed. Reg. at 59513.

- d. No update is required to the BOI report to reflect changes with regard to the information provided in the initial BOI report about Company Applicants. 31 CFR § 1010.380(a)(2); Preamble § III.A.ii, 87 Fed. Reg. at 59512.
2. If a Reporting Company is using a FinCEN Identifier for a Beneficial Owner, the obligation to keep the information on that Beneficial Owner up to date falls on the Beneficial Owner and not the Reporting Company. CTA § 5336(b)(3)(A)(ii); 31 CFR § 1010.380(b)(3)(iii)(4)(iii). Any such update must be reported by the Beneficial Owner within 30 days of when the change occurred. 31 CFR § 1010.380(b)(3)(iii)(4)(iii)(A)(1).
3. If a Reporting Company has secured its own FinCEN Identifier, the Reporting Company must update any change in the information in the application within 30 days of when the change occurred. 31 CFR § 1010.380(b)(3)(iii)(4)(iii)(B).

#### **I. Penalties for Violating the BOI Reporting Requirements**

1. It is unlawful for any individual, Reporting Company or other person to (A) knowingly provide or attempt to provide FinCEN false or fraudulent Beneficial Owner information, including false or fraudulent copies of identifying documents or (B) willfully fail to provide complete or updated Beneficial Ownership Information as required under the CTA and applicable regulations. CTA § 5336(h)(1)(A)-(B); 31 CFR § 1010.380(g). For this purpose, “Beneficial Ownership Information” means any information provided in a BOI report or other document submitted to FinCEN under the CTA BOI reporting requirements. 31 CFR § 1010.380(g)(2).
2. A violation of the CTA can be direct or it can be indirect, such as by providing another person with false or fraudulent information that will be included in a BOI report. 31 CFR § 1010.380(g)(3).
3. A civil penalty of up to \$500 per day may be imposed for each day that a person continues a violation described above until the violation is remedied. CTA § 5336(h)(3)(A)(i). A criminal fine of up to \$10,000 and/or

imprisonment of up to two years may also be imposed. CTA § 5336(h)(3)(A)(i).

4. A safe harbor is provided for persons who submit incorrect information on a BOI report if the correction is made within 90 days of the original incorrect filing. CTA § 5336(h)(3)(C)(i)(I). Any correction to a BOI report that is filed within both the 30 calendar day timeframe described in paragraph K.1 above and the 90 day timeframe described in this paragraph is deemed to satisfy this safe harbor. 31 CFR § 1010.380(a)(3). The safe harbor is not available, however, to anyone who provided the incorrect information to deliberately evade the CTA reporting requirements or who actually knew that the information was incorrect when filing the BOI report. CTA § 5336(h)(3)(C)(i)(II).
5. FinCEN has clarified that the following persons within a Reporting Company are in all cases responsible if the Reporting Company fails to satisfy its reporting obligations: (A) the specific persons who caused the failure and (B) any Senior Officer at the time of the failure. 31 CFR § 1010.380(g)(4); Preamble § III.F, 87 Fed. Reg. at 59546-59547. FinCEN believes this provides clarity on who could be found to have willfully violated the CTA and also ensures that the information filed with FinCEN is correct and up to date by appropriately assigning responsibility to those in charge of the Reporting Company. *Id.*
6. Commentators on the Proposed Regulations expressed concern that individuals acting on behalf of a Reporting Company in submitting BOI reports may be relying upon information from third parties that is incorrect without their knowledge. FinCEN has responded that Reporting Companies normally should be able to verify the information provided. However, “any assessment as to whether false information was willfully filed would depend on all of the facts and circumstances surrounding the certification and reporting of the BOI, but as a general matter, FinCEN does not expect that an inadvertent mistake by a reporting company acting in good faith after diligent inquiry would constitute a willfully false or fraudulent violation.” Preamble § III.B.i, 87 Fed. Reg. at 59515.

#### **J. Proposed BOI Form Issued for Comments**

1. On January 17, 2023, FinCEN released a notice describing the fields that will be included on the BOI Report and the information that must be provided in each field on the report. 88 Fed. Reg. No. 10 (Notices). The fields described in the Notice correspond with the CTA requirements and are in that regard not at all surprising.
2. The surprising aspect of the proposed BOI Report is the option to respond “unknown” to many fields. Specifically, for nearly every field in the BOI Report pertaining to a Company Applicant or a Beneficial Owner, the

proposed form permits the following answer: “Unknown (*check this box if you are unable to obtain this information about the [Company Applicant][Beneficial Owner]*). This has the potential for rendering the entire process useless by allowing Reporting Companies to simply make “unknown” if individuals simply refuse to provide the necessary information. Commentators have suggested that FinCEN lacks the authority to allow Reporting Companies NOT to comply with the CTA requirements by simply stating the information is “unknown.” Commentators have also suggested that by allowing an “unknown” response to BOI necessary to carry out the intent of the CTA, FinCEN has failed to comply with the mandate imposed upon it by Congress.

3. Comments to the proposed BOI Form were required to be provided to FinCEN by March 20, 2023. There is no currently indication as to when a revised form, taking the comments into consideration, will be published.

**K. Protection, Use and Disclosure of Beneficial Ownership Information.**

1. In light of the highly sensitive nature of the information provided in a BOI report or FinCEN Identifier application, Beneficial Ownership Information submitted to FinCEN is confidential. The CTA imposes strict confidentiality, security, and access restrictions on that information. *See* Preamble § II.B, 87 Fed. Reg. at 59507. FinCEN is charged under the CTA with maintaining Beneficial Ownership Information in a secure, nonpublic data base, using security methods and techniques that are appropriate to protect non-classified information security systems at the highest level. CTA § 5336(c)(8).
2. The information in the BOSS database may only be disclosed:
  - a. Upon the request of a federal agency for national security, intelligence or law enforcement purposes if the agency is engaged in such activities. CTA § 5336(c)(2)(B)(i)(I).
  - b. Upon request from a state, local or tribal enforcement agency, but only if authorized by a court of competent jurisdiction in connection with a criminal or civil investigation. CTA § 5336(c)(2)(B)(i)(II).
  - c. Upon request from a federal agency acting on behalf of a foreign prosecutor, judge or law enforcement agency pursuant to treaty, convention or similar agreement. CTA § 5336(c)(2)(B)(ii).
  - d. Upon direct request from a prosecutor, judge or law enforcement agency in a “trusted” foreign jurisdiction if certain conditions are met. CTA § 5336(c)(2)(B)(ii).

- e. Upon request from a financial institution to facilitate customer due diligence requirements under applicable law, but only with the consent of the Reporting Company. CTA § 5336(c)(2)(B)(iii).
3. In the September 30, 2022, final regulations FinCEN noted that it intended to issue further regulations governing the disclosure of Beneficial Ownership Information to authorized recipients that would require all recipients maintain “the highest security safeguards practicable.” Preamble § II.D, 87 Fed. Reg. at 59509. FinCEN will require permissible recipients of BOI to establish and maintain secure systems to store BOI, to provide reports on procedures that will be used to protect the security and confidentiality of BOI, to impose limits on who has access to BOI and to require those persons to have regular training, and to establish an audit trail (and conduct regular audits) on access to and use of BOI. Preamble § III.B.iii.b, 87 Fed. Reg. at 59520.
4. The improper use or disclosure of BOI provided by FinCEN is subject to civil penalties of up to \$500 per day for each day a violation continues and is not remedied. In addition, criminal penalties of up to \$250,000 and/or 10 years imprisonment can be imposed. If the criminal act is done in connection with the violation of another federal law or is part of any illegal activity involving more than \$100,000 over a 12-month period, the fine may be as high as \$500,000 and imprisonment can be as long as 10 years. CTA § 5336(h)(2)-(3).
5. FinCEN is charged with working with agencies receiving beneficial ownership information to establish security protocols for the proper use and protection of that information and the identification of violations. Preamble § II.B, 87 Fed. Reg. at 59507.
6. On December 15, 2022, FinCEN issued additional proposed rules for the use and disclosure of BOI residing in the BOSS system. 87 Fed. Reg. 77,404. These proposed rules deal specifically with the disclosure of such information to federal, state, local and tribal governmental agencies; law enforcement agencies, judges and prosecutors; financial institutions in connection with due diligence requirements imposed by law as well as federal regulator and regulatory agencies supervising financial institutions; and the Department of the Treasury. Comments to these proposed rules were required to be submitted by February 14, 2023.

#### **L. Take-Aways: Getting Prepared for the CTA**

For legal entities that already exist or are created in calendar year 2023, initial BOI reports are not due until January 1, 2025. Legal entities created or registered on or after January 1, 2025 will have thirty days from actual or constructive knowledge of their formation or registration to file their BOI report. The following are some suggestions to prepare our clients and ourselves for the implementation of the CTA.

1. **Secure FinCEN Identifiers as Soon as Possible.**

To protect the privacy of any person who will be considered a Beneficial Owner or a Company Applicant, these individuals should secure FinCEN Identifiers as soon as it is possible to do so. This will also ease the burden on Reporting Companies to ensure that information provided in the BOI report is accurate and, with regard to Beneficial Owners, up to date. For law firms, any paralegal, attorney or other person who will be filing documents with an Applicable Agency to create a corporation, LLC or other legal entity, or could be directing these people to file such documents, should also secure a FinCEN Identifier. This is not likely to be much more burdensome than securing and maintaining a PTIN with the IRS, but of course does require the person securing the Identifier to continually update his or her address and possibly other information on the application or be subject to penalties. Note that FinCEN estimates that, in the first year after it becomes available, there will be well over 325,000 applications for FinCEN Identifiers, and that there will be 50,000 applications filed yearly thereafter. Preamble § V.A.ii.e.i, 87 Fed. Reg. at 59562. So get in the line as soon as possible!

2. **Reduce Ownership Percentages.**

To protect the privacy of the shareholders, members or partners of a Reporting Company, consider whether it is possible to reduce their respective ownership percentages to below 25%. Keep in mind that, even if no one individual directly or indirectly owns or controls more than a 25% interest in a Reporting Company, the Reporting Company will still need to file a BOI report for those in control of the Reporting Company and will need to provide the basic information required about the Reporting Company itself.

3. **Inform (and Warn) Clients Now.**

Sometime this year, clients with existing legal entities will be notified of their BOI reporting requirements by the state or federal government. These communications could be confusing and even alarming. You can get ahead of that curve by notifying your clients now of what will be required and by when. You may want to assist them with the FinCEN forms when they become available if that is a service you wish to provide. You may also want to warn your clients to be wary of official-looking mail and emails, or even phone calls and text messages, from third parties offering assistance with their BOI reports. While there will be legitimate service providers, there will also be predators who will use the CTA as a means to spread fear (you can go to jail for up to two years!) to secure your clients' information and steal their identities.

4. **Be Clear if an Exemption Applies.**

Many people may wrongfully assume that their business entity is exempt from the CTA under one of the many technical exemptions for regulated businesses. It is very important to confirm that the exemption applies rather than assume it does, and to keep a record of what requirements must be satisfied for the exemption to be maintained.

5. **Monitor Smaller “Large Operating Companies.”**

Many legal entities with operating businesses may just marginally qualify for the “Large Operating Company Exemption.” If we enter a recession in 2023, some of these companies may suffer losses of revenue and employees that could affect their CTA-exempt status. Consider calendaring an annual review with clients to confirm whether they are likely to continue to qualify for the Large Operating Company Exemption on the basis of gross revenue. Importantly, changes to other characteristics, such as a reduction in the number of full-time employees below 20, could result in an immediate loss of this exemption that requires an initial or updated BOI report to be filed within the deadlines discussed earlier in this outline.

6. **Consolidate Entities.**

For clients that maintain multiple legal entities, consolidating entities might allow the consolidated legal entity to qualify as a Large Operating Company. Consolidation with a CTA-exempt legal entity might also qualify a CTA-nonexempt legal entity for the Subsidiary Exemption. Further, consolidation could dilute ownership such that no one individual owns 25% or more of the resulting legal entity. Of course, that will not eliminate the reporting requirement for those in substantial control unless the resulting legal entity is CTA-exempt.

7. **Analyze What is Required in the Context of Trusts Owning Interests in Reporting Companies.**

While common law trusts are not Reporting Companies, and most institutional Trustees are going to qualify for one of the exemptions from the CTA as a business entity, Trustees of trusts that own or control interests in Reporting Companies may have to provide BOI for their trust officers and possible other people as the “employee exception” described in Section II.C.5 of this Outline pertains to employees of Reporting Companies themselves, not employees of an institutional Trustee that controls a Reporting Company or owns or controls more than a 25% interest in a Reporting Company.



## 8. **BOI Reports as Part of Entity Pre-Formation Planning.**

If you are in the business of forming legal entities for clients for estate planning, asset protection or other purposes, add the BOI reports to your entity pre-formation checklist. Also, before your clients ask someone to be a Senior Officer, a Director, a Manager or to hold other positions with substantial control over the legal entity, or make anyone (including the trustee of a trust investment director or other similar fiduciary) a 25% owner within the meaning of the CTA, confirm these individuals will be willing and able to provide BOI to the Reporting Company in a timely manner.

Keep in mind that once the legal entity is formed, the 30-day deadline to file the initial BOI report is ticking down. There may not be enough time to secure FinCEN Identifiers for individuals who are reluctant to provide their BOI directly to the Reporting Company. Further, the Reporting Company must have a TIN in time to submit the initial BOI report.

Ideally, your clients will establish a protocol for keeping BOI information up to date, such as by assigning a person, group and/or advisory firm to monitor the Reporting Company's BOI, and to make updates as they are needed. The Reporting Company also needs to have a plan to protect the information collected as it could create a risk of both identity theft and even physical harm arising from the disclosure of individual's residence addresses if that is otherwise private information.

Finally, if you are an attorney, CPA or other service provider, and if you will be assisting clients with their initial BOI reporting obligation, you need to be clear on whether you intend to provide ongoing advice and assistance with regard to CTA compliance. In either case, you should be very clear about what responsibilities and specifically exclude those responsibilities you are not taking on in your engagement letters. As a service provider, you will need to decide whether you will simply *advise* your clients on what information to collect and how to report it to FinCEN, or if you will file the BOI Reports for your clients. If you take on the responsibility for collecting BOI information and/or filing the BOI Reports, you will bear responsibility for protecting the BOI from cyber attack, nosy employees or other security breaches and potentially be personally liable for damages if the BOI you have collected is compromised.