



# THE CORPORATE TRANSPARENCY ACT: BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS: A PRIMER FOR IN-HOUSE COUNSEL

MAY 16, 2024 | PRESENTED BY: JAMIE A. SCHAFER & JAMES F. VIVENZIO



# Who We Are



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# The Compliance Collective

- With this webinar, we are launching a monthly webinar series, “The Compliance Collective.”
- The webinar series will be hosted by a team of cross-disciplinary Perkins Coie lawyers providing a monthly overview and discussion forum on a critical hot topic in ethics and compliance. Each topic will provide a look at emerging issues and offer creative solutions to potential compliance problems.
- ***The webinar will be hosted at the same time each month: Third Thursday at 10:00 a.m. PT/12:00 p.m. CT/1:00 p.m. ET***
- ***Sign up on our website to receive invitations to our future webinars!***



# Agenda

- Overview of CTA
- Reporting Companies: Common Exemptions to CTA Reporting
- Beneficial Owners
- Liability Under the CTA
- In-House Counsel Considerations
- Constitutional Challenges



# **BRIEF OVERVIEW OF THE CTA**

# Historic and Controversial Change to Anti-Money Laundering (AML) Law

The CTA implements new - and highly controversial - **federal “beneficial ownership” filing and disclosure requirements effective Jan 1, 2024**, with vast impacts on corporate practices including:

- raising potential criminal and civil liability for failures to report;
- requiring beneficial owners, lawyers, paralegals and others involved in corporate formations To provide personal information (including copies of passports or driver’s licenses) as part of these newly required filings, and
- expands Bank Secrecy Act obligations to non-financial companies, lawyers and others.



CTA requires **all entities (“reporting companies”)** formed or registered in the U.S **subject to one of 23 exemptions** to report their natural person **“beneficial owners”** (a broad term encompassing direct or indirect equity ownership or “substantial control” or “influence” over an entity) and their **“company applicants”** in a federal database that will go live on January 1, 2024.

# Corporate Transparency Act: In A Nutshell

**Who must report?** “Reporting Companies” are domestic and foreign entities that are “created by the filing of a document” or “registered to do business by filing a document: in any State or tribal jurisdiction” and where no exemption applies

**What must be reported?** Information on Reporting Company and Identifying information (name, dob, address, identification) or FinCEN Identifier for all “beneficial owners” and “company applicants”

**When must this information be reported?** New entities formed after January 1, 2024 will have 90 days after formation to report (in 2024, then 30 days thereafter). Entities formed prior to 2024 will have until January 1, 2025 to report. Changes in ownership or in information previously submitted (i.e., name, address, identification number) must be reported within 30 days.

**Where is it reported?** The FinCEN database will be accessible under relatively restricted conditions to federal/state law enforcement and potentially to banks subject to Bank Secrecy Act customer due diligence requirements. Not subject to Freedom of Information Act.

**\*\*\*For a more detailed overview of the law, please access Perkins Coie’s CTA web page.**

[The Corporate Transparency Act | Perkins Coie](#)

# Formation Implications: Company Applicants

- In addition to reporting its beneficial owners, each Reporting Company must also report at least one but *no more than two* “**Company Applicants**” that must also be reported.
- The Company Applicants are:
  1. **Direct Formation Filer**: The individual who directly files the document (e.g. with the SOS) that creates the reporting company.
    - May be the third-party registered or filing agent (e.g. CSC, CT Corp, SingleFile).
  2. **Person Directing/Controlling Formation**: The individual who is primarily responsible for directing or controlling the filing action if more than one individual is involved in the filing of the document.
    - May be a lawyer that directs or controls the filing action.



# New York LLC Transparency Act (NYLTA)

- Modeled after the CTA and adopts most of its provisions/definitions.
- Will require limited liability companies formed, or qualified to do business, in the state of New York to report their individual beneficial owner information to the New York Department of State.
- ***Filings required on an annual basis to either confirm information/exemption or make updates***
- Effective in 2026 for new formations and 2027 for existing entities
- Similar laws being considered in several other jurisdictions – so watch this space! (and out client updates)



**REPORTING  
COMPANIES:  
COMMON  
EXEMPTIONS**

# Exemptions

- Issuers
- Governmental authorities (US only)
- **Various BSA regulated and SEC/Commodities Exchange Act registered entities** (e.g. banks, credit unions, depositor institution holding co, MSB, broker-dealer, securities exchange and other SEC registered entities)
- **Investment advisers/companies or VC fund advisers**
- **Pooled investment vehicles** (operated by bank, credit union, broker dealer, RIA)
- Insurance companies
- Accounting firms
- Public and financial market utilities
- Tax-exempt entities (and entities assisting same)
- **Large operating companies** (more than 20 FTE, physical operating presence in US and more than \$5,000,000 in gross receipts or sales in the prior year)
- **Subsidiaries of exempt entities (except for MSBs, Pooled Investment Vehicles, Inactive entities and entities assisting tax exempt entities)**
- **Inactive entities** (existed prior to January 1, 2020, no active business, wholly US owned, no ownership change, holds no assets (including ownership interests) and no transactions greater than \$1000 in the prior year)

Note: Some ambiguity remains surrounding whether certain entities must have registered or received approval (i.e. MSBs, tax-exempts, etc.) to claim the exemption

# Key Exemptions – Large Operating Company

- **Large Operating Company** – Does the company have more than 20 U.S.-based FTEs (per entity, no aggregated), an operating presence in the United States, and more than \$5 million in gross receipts or sales in the prior year as evidenced by a federal income tax return (can be consolidated)?

**Challenge:** Employee headcount cannot be aggregated among entities. Thus, servicing arrangements with dual employees requires an analysis of who controls the employee and full-time status (30 hours) above exempt entity.

**Practice Tip:** Newly formed entities that hit the 20 employee, U.S. presence and \$5 million thresholds must file CTA report in their first year since tax forms not filed until following year.

Also \$5 million in gross receipts/sales can be consolidated in a group tax return.

# Key Exemptions - Subsidiary

## Subsidiary Exemption

- Any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more exempt entities.
- EXCEPT:
  - MSB
  - Pooled investment vehicle
  - Entity assisting a tax-exempt entity; or
  - Inactive entity
- Other exemptions may be applicable to the subsidiaries of these entities (i.e. large operating company)

**Ambiguity:** The term “control” is not defined. However FinCEN recently issued an FAQ clarifying that if an exempt entity controls some but not all of the ownership interests of the subsidiary, the subsidiary does not qualify.

**Challenge:** JVs and partnerships between exempt entities and non-exempt entities/individuals (or circumstances where individuals hold profit or other ownership interests). Note that exempt entities can be reported by name without looking through to beneficial ownership.

**Practice Tip:** Wholly owned subsidiaries of reporting entities can report the FinCEN ID for their parent reporting company in lieu of beneficial ownership information assuming ownership is identical.

# Key Exemptions – Public Company Exemption

- *(i) Securities reporting issuer.* Any issuer of a class of securities registered under section 12 of the 1934 Act.; or required to file supplemental and periodic information under section 15(d) of the 1934 Act.
- *(ix) Other Exchange Act registered entity.* Any other entity that is not a securities reporting issuer, a broker dealer, or a securities exchange or clearing agency, that is registered with the SEC under the 1934 Act.

## **Challenges:**

- JVs and partnerships between public companies and non-exempt entities
- Issuers on foreign exchanges are not exempt

# Key Exemptions – Pooled Investment Vehicles

## Pooled Investment Vehicle

- “operated or advised by” a CTA-exempt registered investment adviser, VC fund adviser, bank, credit union, or broker-dealer

AND either

- An investment company, as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a– 3(a)); or
- Would be an investment company but relies on Section 3(c)(1)/(7) AND is identified on the Form ADV by an exempt RIA (or will be in the next annual update)

***Bottomline: the PIV exemption only applies to entities operated by an RIA or equivalent regulated entity. Entities used for the purposes of pooling family wealth investments will not be exempt unless they are managed by a regulated advisor.***

# Key Exemptions – RIAs and ERAs

## Registered Investment Adviser/ Venture Capital Fund Adviser

- An investment company under the Investment Company Act of 1940 (Section 3) or investment adviser under the Investment Advisers Act of 1940 (Section 202)

AND

- Registered with the SEC

OR

- An investment adviser described in section 203 of the Investment Advisers Act (ERAs)

AND

- Has filed with the SEC Item 10, Schedules A and B of Form ADV

**This exception does not apply to:** (i) state registered advisers; (ii) “exempt reporting advisers” relying on the private fund adviser exemption under the Investment Advisers Act of 1940 and have filed a partial ADV with the SEC, (iii) “exempt reporting advisers” that advise solely virtual currency funds and file partial ADV with states rather than the SEC, and (iv) small advisers requiring no federal or state registration.



# Key Exemption Criteria

## Tax Exempt Entity

- Entity meets 501(c) criteria (determined without regard to section 508(a) of the Code) and is tax exempt under section 501(a) of the Code
  - NB: It remains ambiguous whether 501(c) entity must file under the CTA if it is awaiting a formal determination from the IRS. Our reading at this time is that filing would not be required, but further guidance from FinCEN would be beneficial.
  - Where an entity ceases to be tax exempt, they retain their CTA exemption for 180 days after losing tax exemption
- A tax-exempt political organization, under section 527(e)(1) /527(a)
- A trust described in paragraph (1) or (2) of section 4947(a)

# Key Exemption Criteria

## Inactive Entity

- in existence on or before January 1, 2020
- not engaged in active business
- not owned by a foreign person, whether directly or indirectly, wholly or partially
- No change in ownership in prior year
- No assets anywhere in the world, including interests in other entities
- “Has not sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve-month period”
  - Query whether a parent or affiliate paying for services in relation to CTA advice would qualify as an indirect transaction that would defeat the exemption



# **BENEFICIAL OWNERS**

# Who is a Beneficial Owner?

- “any individual who, directly or indirectly, either ***exercises substantial control*** over such reporting company **or owns or controls at least 25 percent of the ownership interests** of such reporting company”
- “**Ownership**” includes “any put, call, straddle, or other option or privilege of buying or selling...”
- What does “**Substantial Control**” mean? Examples include:
  - Senior officers (“president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function”)
  - authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body)
  - Directs, determines, or has substantial influence over important decisions made by the reporting company
    - List of examples includes “major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company” and “the entry into or termination, or the fulfillment or non-fulfillment, of significant contracts” but also “has any other form of substantial control over the reporting company”
    - Also may have direct or indirect control, for instance as a trustee of a trust with control rights
  - Does NOT include employees EXCEPT for senior officers
- There will almost certainly be additional guidance from FinCEN on how to interpret this provision

***Practice Tip:*** For most companies, beneficial owners will be (1) owners of more than 25% of equity, (2) senior officers such as CEO, CFO, COO, GC and others who report to the Board, and (3) directors absent convincing evidence that they do not have substantial control.

# Executive Officers

- **“Senior officers” under the CTA specifically include:**
  - President;
  - Chief financial officer;
  - General counsel;
  - Chief executive officer; and
  - Chief operating officer.
- Other officers may include those that report directly to the Board.

**Include** the “manager” of the LLC as they typically perform the function of the chief executive officer.

**No requirement** to include the chief technology officer, unless they perform similar functions to “senior officer” or otherwise exercises “substantial control.”

# “Substantial Control” from Board of Directors

A director’s position as a beneficial owner is a **facts-and-circumstances determination** related to the director’s ownership or control of the reporting company.

*Practice Tip:* Assume all directors are beneficial owners for purposes of CTA absent convincing evidence that a director does NOT have substantial control.

Small Board  
Of Directors  
( $< 4$ )

Large Board  
of Directors  
( $\geq 7$ )

# “Look-Through” Rules for Beneficial Ownership

- For subsidiaries that do not qualify for an exemption, a beneficial owner of a parent reporting company may also be beneficial owners of certain downstream subsidiary reporting companies that are owned or controlled by the parent.

**Challenge:** If there are multiple downstream subsidiaries, the organization will need to determine which individual beneficial owners, including senior officers, exercise substantial control over these subsidiaries.

**Practice Tip:** It may be permissible to only report the FinCEN identifier of the parent or controlling company in lieu of every one of its individual beneficial owners, provided the ownership is the same.

# Beneficial Owner Reporting Exemptions

**Always Exclude** - Any individual in the following exempted categories (assuming the role below is their sole basis for triggering reporting):

- A minor child (provided a parent or guardian is reported);
- A nominee, intermediary, custodian, or agent on behalf of another individual;<sup>2</sup>
- An employee of a reporting company, solely if reported in their capacity as an employee (provided such employee is not a senior officer, who must be reported);
- An individual holding only a future interest through a right of inheritance; and
- A creditor of a reporting company.<sup>3</sup>

<sup>2</sup> This would generally include anyone who contractually disclaimed discretion or assigned discretion to a third party, such as certain administrative trustees.

<sup>3</sup> If in doubt, consult 31 CFR 1010.380 (c)(3)(v) for expanded definition and/or seek further guidance.



# Common FAQs

## **Does a conversion from an LLC to C corp or partnership require reporting?**

Generally no, the CTA definition of a reporting company is an entity “created by the filing of a document with the Secy of State.” In Delaware a conversion is not considered a creation.

## **To qualify for the subsidiary exemption do all the parent companies have to be related?**

No, the parent companies must be exempt, but do not have to be related.

## **Is a trust a reporting company?**

No, a trust is not included in the CTA’s definition of a reporting company, but a trust can be a beneficial owner if it owns or controls a reporting company.

## **What if an exempt entity is a beneficial owner?**

There is a special rule in the CTA that permits the naming of the exempt entity in lieu of all of its beneficial owners when the exempt entity is a beneficial owner solely through 25% equity interest.

## **If both/all the owners of an entity (like a joint venture) are exempt entities (say two public companies indirectly own this entity), does that impact the reporting obligation of the entity?**

Yes, the exemption would apply as long as all the owners are exempt entities.



# **LIABILITY UNDER THE CTA**

# Liability Provisions

- Liability runs to any person who can be said to have (**willfully or with willful blindness**) “caused” a failure to file or false/misleading filing or “was a senior officer of the entity at the time of the failure”
- Penalties for failing to report or inaccurate reporting are:
  - Civil penalties include a fine of \$500 per day for each day a violation is outstanding, up to a maximum of \$10,000.
  - Criminal penalties include a maximum of two years imprisonment.
- One major goal of this law is to create potential liability (and, thereby, diligence obligations) for “gatekeepers”, including:
  - Lawyers
  - Trustees
  - Accountants
  - Corporate Service Providers
  - Senior Officers/Directors
- ***This is where we are likely to see enforcement in the coming years***

## Opinion **Money laundering**

Gatekeepers beware: the new US corporate transparency act could be a game-changer

Previously there were no regulations requiring lawyers and accountants to ‘know their customers’

JAMIE SCHAFFER



The 'Tony Sopranos' of this world will find it more difficult to launder money using corporate service providers © Hbo/Kobal/Shutterstock

# Access to BOI Database

- Database treated with highest level of confidentiality within Federal governmental databases
  - ***Criminal penalties for misuse of information (penalties are higher than for willful violation of the CTA)***
  - Auditing of federal agency access to ensure proper authorities
  - Hacking risk persists
- FinCEN will permit Federal, State, local, and Tribal officials, as well as certain foreign officials who submit a request through a U.S. Federal government agency, to obtain beneficial ownership information for authorized activities related to national security, intelligence, and law enforcement.
- Financial institution access is limited to performance of legally mandated KYC and only with the consent of the reporting company; however, banks are continuing to press for broader access to alleviate their customer due diligence obligations.

**Apart from requesting a copy of the report confirmation from the initial reporter, there is no way for a private party to confirm whether a CTA BOIR was filed with regard to a particular entity.**



# **IN HOUSE COUNSEL CONSIDERATIONS**

# Timing

- **For entities in existence prior to 2024, consider filing CTA reports later in the year:**
  - 1-year filing grace period (filings would be due on January 1, 2025);
  - Avoid updating filings to address regulatory ambiguities that may be worked out over the next year;and
  - Allow constitutional challenge to play out further.
- **All entities formed in 2024 must file within 90-days**
- **Entities created prior to 2024 and restructure into another type of entity (LLC to GP) do not need to file until year end.**

# FinCEN Identifiers are a MUST!

## Individuals can apply to FinCEN and obtain a FinCEN ID

- Protects an individual from sharing PII with reporting companies.
- The individual is responsible for updates to name, address or ID number. ID document (drivers license or passport) will also need to be resubmitted if there is an update.
- Changes to the FinCEN ID will automatically flow through to all the entities that the individual is reported as a beneficial owner.

## Reporting Companies can obtain a FinCEN ID

- Changes to the FinCEN ID will automatically flow through to all the entities that the company is reported as a beneficial owner.
- Useful in situations when a non-exempt parent company controls many downstream subsidiaries with identical individuals in control. Simply include the FinCEN ID as the sole beneficial owner.

***Check out our Perkins  
FinCEN ID Tip Sheet!***

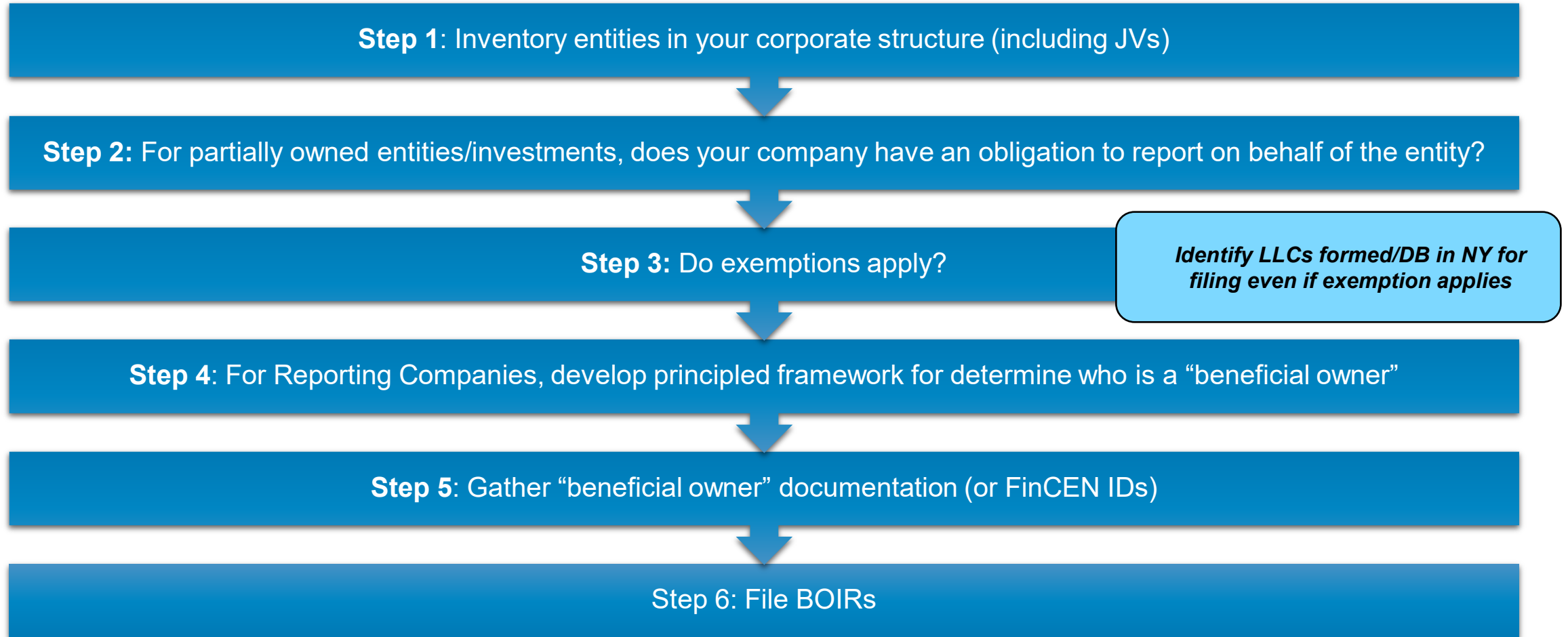
# Other Key Reporting Efficiencies

- **Exempt entity owners:** where an individual is a beneficial owner of a reporting company solely by virtual of ownership of one or more exempt entities, the reporting company may include the names of the exempt entities in lieu of information regarding the individual beneficial owner.
- **Updates to Document Images:** Expiration of identifying documents will not require CTA updates to impacted reports. The rule states that documents only need to be updated “when the name, date of birth, address, or unique identifying number on such document changes.”

***A Reporting Company will only need to include information in the CTA Report for each individual determined to be a “beneficial owner,” without reporting any information explaining the basis for or reasoning behind that determination.*** Once a determination is made that a particular individual’s interests or control over a Reporting Company triggers reporting, there may be no practical need to confirm whether there exists an alternate basis on which they may be considered “beneficial owners.”



# Compliance Process



# Does your company have a reporting obligation for this entity?

*Reporting obligation is clear for entities wholly-owned and controlled. However, this step should be considered for entities which the company holds interests but does not wholly-own or control.*

- (1) Senior Officer** – Is someone associated with the company a “senior officer” of the entity, defined as an individual who holds the position or exercises the authority of president, CFO, GC, CEO, COO, or any other officer, regardless of official title, who performs a similar function within the reporting company?
- (2) Causing a Violation** – Does someone associated with the company hold a role regarding the management of the reporting company such that they would be expected to make or be otherwise involved in required regulatory filings—for instance, as a result of a fiduciary duty, management responsibility, routine corporate administration of the entity, or a pattern and practice of making such filings?

*Even in the absence of an obligation to file a report on behalf of a reporting company, company personnel could have liability under the CTA for “causing a violation” by a reporting company if anyone associated with the Company provided false information or failed to provide required information with regard to “beneficial ownership” interests held in a reporting company.*

**Practice Tip:** Document in writing who is taking on the CTA filing obligations among partners and provision of required information to that party.

# Other Considerations

- Could structural changes be made to benefit from exemptions? (e.g. subsidiary exemption)
- Determine beneficial owners based upon analysis of formation documentation and limits of authority (among other documentation) and consider:
  - LLC managers and senior officers
  - Boards and committees
  - Trust arrangements
  - Investors with significant/major decision authority.
- Challenges and timing for obtaining FinCEN ID's (e.g. educating and sensitizing senior officers and owners).
- Obtaining information and FinCEN ID's from third-party partners including determining which entity will be filing the BOIR.

# Corporate Organization Structure

- Develop CTA language to include in organizational documents and employment agreements relating to FinCEN IDs, access to required information, access to BOIRs that may be filed by third parties, officer due diligence obligations, etc.
- Document CTA exemption and filing determinations
- If the structure is complex or subject to frequent changes (e.g. new entity formations), develop a CTA policy to address CTA compliance that includes:
  - Corporate governance and reporting.
  - A responsible person to monitor exemptions, update filings if necessary and liaise with FinCEN and law enforcement.
  - *Documents decision-making in regard to ambiguities in the reporting and ensures principled approach to reporting across entities and over time.*
  - Training of relevant directors, officers and employees.
  - A CTA framework will provide direction and mitigate liability.



# **CONSTITUTIONAL CHALLENGES**

# National Small Business Association (NSBA) v. Yellen (N.D. Ala.)

- On March 1, 2024, a Federal District Court ruled that the CTA is unconstitutional on the basis that corporate formation activity is an inherently intrastate activity that is not a permissible subject to federal regulation under the interstate Commerce Clause of the Constitution.
- The Court enjoined FinCEN from enforcing the CTA against the plaintiffs in that action: Members of the NSBA as of March 1, 2024.
  - ***Other than those subject to the court's injunction, reporting companies are still required to comply with the law and file beneficial ownership reports as provided in FinCEN's regulations.***
- FinCEN has appealed to the 11<sup>th</sup> Circuit Court of Appeals and we expect a lengthy court battle of this issue. Oral arguments will be scheduled for the Fall.
  - ***It is possible that the Supreme Court could issue an emergency stay prior to the January 1, 2025 deadline for existing entities, but likely would only consider it if the 11<sup>th</sup> Cir ruled in the NSBA's favor prior to the end of the year.***
- Moreover, even if this challenge were successful, there are legislative “fixes” to the CTA that could easily be made and which the District Court explicitly acknowledged would withstand constitutional scrutiny. If made, such a “fix” would not appear likely to significantly limit the impact of the CTA on most businesses.
- However, there are other constitutional challenges to the CTA still to be considered by the District Court and challenges in other states as well.
- ***Thus, it could be quite sometime before the fate of the CTA is confirmed by federal courts. In the meantime, the requirements remain broadly applicable.***

Questions?





- ***Remember to sign up on our website to receive invitations to our future webinars!***
  - ***Third Thursday at 10:00 a.m. PT/12:00 p.m. CT/1:00 p.m. ET***

### Upcoming Compliance Collective Webinars

- **06.20.2024:** Overview of key and emerging ESG and CSR issues— discussion of new SEC disclosure rules; greenwashing; forced labor statement requirements (in the United States and abroad); and Uyghur Forced Labor Prevention Act (UFLPA) and more!
- **07.18.2024:** Voluntary self-disclosure and new whistleblower reward program
- **08.15.2024:** Personal device and third-party messaging application policies—practical advice for navigating DOJ’s new expectations
- **09.19.2024:** Looking around the corner at foreign investment and foreign data sharing restrictions— navigating recent executive orders limiting investment in China and sharing data with China, Russia, and other “countries of concern”
- **10.17.2024:** What in house counsel needs to know about gatekeeper liability