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NEW GUIDANCE ON THE CTA¹

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As has been mentioned before by me and others, the effectiveness of the federal Corporate Transparency Act (the “CTA”) has the potential of impacting every company doing business in the United States, whether formed in the United States or elsewhere. While not every company will be a Reporting Company, and while many Reporting Companies will be exempt from the reporting requirements, all businesses need to determine whether they are subject to the CTA reporting requirements and how to comply. It remains amazing how few lawyers, accountants, and businesses are actually concerned about this compliance obligation which is backed by potential civil and criminal sanctions as set forth in the CTA.

In the weeks since publishing my December newsletter article, FinCEN released several frequently asked questions (“FAQs”) on the application of the federal Corporate Transparency Act (“CTA”). Attorneys and others trying to understand the CTA are likely to find several of these FAQs to be particularly relevant to them.

In addition, on December 22, 2023, New York by Governor Hochul signed the New York LLC Transparency Act (“NYLTA”) was signed into law in. The NYLTA will come into effect beginning December 21, 2024, and will impose certain beneficial ownership reporting obligations similar to those imposed by the CTA, but solely with respect to limited liability companies that are organized or registered to do business in New York and for which an exemption under the NYLTA does not apply.

Filing Your Beneficial Owner Information Report

As discussed in several prior articles for the Business Law Section newsletter, the federal CTA is now effective and the portal that the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) has created is now available for filing Beneficial Owner Information Report (“BOIR”) and to obtain FinCEN Identification numbers (“FinCEN IDs”). In both cases, you must start at fincen.gov/boi which gives a number of options, including one that states “File”, offering a link to “File a report using the BOI E-Filing System”² and to “Create a

¹ Updates available at <https://ssrn.com/abstract=4717186>. See additional information about the CTA at Lidstone, Herrick K., *Will FinCEN Be Ready for the CTA*, available at <https://ssrn.com/abstract=4666412>, and *Considerations for Attorneys Resulting from the Corporate Transparency Act*, available at <https://ssrn.com/abstract=4414393> or <http://dx.doi.org/10.2139/ssrn.4414393>.

² <https://boiefiling.fincen.gov/>.

FinCEN ID (optional).”³ The person making the filing may either file a PDF BOIR where the person may either:

- prepare the report offline and then submit the report or
- prepare and submit the report online.

In both cases, the person making the filing may download the BOIR transcript upon submission.

Only Reporting Companies that are not exempt from BOIR filings need to complete the filing process. As noted elsewhere, there are twenty-three statutory exemptions for Reporting Companies, and FinCEN continues to explain the exemptions in its Small Entity Compliance Guide⁴ and its Frequently Asked Questions⁵

At the tab for “Company Applicant,” it will ask a question whether the Reporting Company is an existing company – that is one existing as of January 1, 2024. If so, the Company applicant information is unnecessary to complete. If that box is not checked, the Company Applicant information must be completed. As noted before:

1. There can be no more than two Company Applicants and (as discussed below) one is very likely to be the Reporting Company’s counsel. Where the Reporting Company is an existing company, the Company Applicant information does not need to be completed.
2. Information regarding the Beneficial Owners must be completed for each person who meets FinCEN’s definition of Beneficial Owner for the purposes of the CTA. As set forth in the Small Entity Compliance Guide and the FAQs, this is a very broad definition. For small Reporting Companies with few Beneficial Owners, it is an easy process. For Reporting Companies with a more complicated ownership and management structure, it can be very difficult.
3. When the Beneficial Ownership information is complete, the filing process is not difficult, and at the end, we strongly recommend that you download the transcript for record purposes. Of the information contained in the BOIR, the BOIR ID is

³ <https://fincenid.fincen.gov/landing>.

⁴ <https://www.fincen.gov/boi/small-entity-compliance-guide>.

⁵ <https://www.fincen.gov/boi-faqs>. The FAQs were most recently updated in January 2024. See FAQs A.3, B.1, B.4, B.5, B.6, C.7, D.11, D.12, E.5, E.6, E.7, F.10, F.11, G.3, L.6, M.2, M.3, and N.1.

the most important to allow the Reporting Company to locate its initial report and to make corrections as necessary.

New Interpretations

As noted above, FinCEN has issued a number of new interpretations in its FAQs since the CTA became effective – and without question other interpretations will be issued. A list of the updated FAQs is in footnote 4, above, and some of the more significant will be discussed here.

FAQ B.1 – Should my company report beneficial ownership information now. Perhaps needless to say, FinCEN does not answer the question. My answer would be that any person planning to file a BOIR should wait until shortly before it is due to be filed. There will be more interpretations and hopefully more clarity as time goes on. As noted in the FAQ, a pre-existing Reporting Company that is not exempt must file its first report not later than January 1, 2025; a Reporting Company formed in 2024 has 90 days from the date it is created or registered. Reporting Companies formed in and after 2025 must make their BOIR filing in 30 days.

These reporting periods will change if Congress adopts H.R. 5119 – the Protect Small Business and Prevent Illicit Financial Activity Act.⁶ This bill, if enacted, will amend the CTA to extent the filing requirements for existing companies until January 1, 2026 (rather than January 1, 2025). Companies formed in 2024 or thereafter will have 90 days to file their initial reports (currently 30 days for companies formed after 2024) and to file updates or changes (also currently a 30-day requirement). The House of Representatives has approved H.R. 5119; there is no indication that the Senate Committee on Banking, Housing, and Urban Affairs has taken any action.

FAQ D.11 – What should a reporting company report if its ownership is in dispute. This interpretation provides that if ownership of a Reporting Company is the subject of active litigation and an initial BOI report has not been filed, a person authorized by the company to file its beneficial ownership information should comply with the requirements by reporting:

- all individuals who exercise substantial control over the company, and
- all individuals who own or control, *or have a claim to ownership or control of*, at least 25 percent ownership interests in the company.

Of course, not all ownership disputes are subject to active litigation (and what does “active litigation” really mean – is there such a thing as inactive litigation?). In any case, when

⁶ <https://www.congress.gov/bill/118th-congress/house-bill/5119?s=1&r=46>.

the ownership issues are resolved, if there are changes to the BOIR as originally filed, an updated BOIR should be filed within 30 days (under the current rules).

FAQ D.12 – Who does a reporting company report as a beneficial owner if a corporate entity owns or controls 25 percent or more of the ownership interests of the reporting company? First of all, notwithstanding the question, this applies when any entity (not just a corporate entity) owns or controls 25 percent or more of the Reporting Company.

This FAQ makes it clear that, as discussed in Chapter 2.3 of the *Small Entity Compliance Guide*, the ultimate owners controlling the parent entity are the persons who need to report – not the intermediate entity. The FAQ identifies two exceptions to this, however:

1. Where the parent entity is itself a Reporting Company subject to one of the twenty-three exemptions (an “Exempt Reporting Company”), the BOIR must contain the name of the Exempt Reporting Company as the Beneficial Owner and does not have to go through to the underlying individuals.

2. If the Beneficial Owners of the Reporting Company and the parent entity are the same individuals, the Reporting Company may report the FinCEN identifier and full legal name of the parent company instead of the individuals’ information.

FAQ E. 5 – The company applicants of a reporting company include the individual “primarily responsible for directing the filing of the creation or registration document.” What makes an individual “primarily responsible” for directing such a filing? This discusses that the BOIR will identify no more than two Company Applicants who will be:

1. The person who directly files the document with a secretary of state or similar office, and
2. If more than one person is involved in the filing of the document, the person who is primarily responsible for directing or controlling the filing.

FAQ E.5 offers three Scenario, two of which clearly provide that the attorney who completes a company creation or reporting document using information supplied by the client will be a Company Applicant – even where the attorney uses a paralegal to actually complete the preparation of the document or a paralegal or a corporate service provider to file the document. In both cases, if a paralegal or employee of a corporate service provider actually pushes the button to make the filing with the secretary of state, that person also would be a Company Applicant.

The third Scenario is where no attorney is involved, the individual client who initiated the company creation will be the Company Applicant, as will be the person who actually makes the filing (pushes the button).

FAQ E.6 expands upon FAQ E.5 by making it clear that, where paper filings are made by a third-party courier or delivery service employee who only delivers the documents that create or register a Reporting Company, that person is not a Company Applicant.

FAQ L.6 – Does a subsidiary whose ownership interests are partially controlled by an exempt entity qualify for the subsidiary exemption? FinCEN’s answer to that question is a simple “NO.” FinCEN explains that if an exempt entity controls some but not all of the ownership interests of the subsidiary, the subsidiary does not qualify for the subsidiary exemption. To qualify, a subsidiary’s ownership interests must be *fully, 100 percent* owned or controlled by an exempt entity.

A subsidiary whose ownership interests are controlled or wholly owned, directly or indirectly, by certain exempt entities is exempt from the BOI reporting requirements. In this context, control of ownership interests means that the exempt entity entirely controls all of the ownership interests in the reporting company, in the same way that an exempt entity must wholly own all of a subsidiary’s ownership interests for the exemption to apply.

FAQ N.1 – Can a third-party service provider assist reporting companies by submitting required information to FinCEN on their behalf? In the past several months, there have been a large number of companies offering their services to assist Reporting Companies make their BOIR filings with FinCEN. Some of these are affiliated with law firms and others are affiliated with corporate service companies. In all cases, FinCEN says that Reporting Companies may use third-party service providers to submit beneficial ownership information reports. Third-party service providers will have the ability to submit the reports via FinCEN’s BOI E-Filing website or an Application Programming Interface (API).

Of course, this does not address the interpretive issues that completing a BOIR for a more complicated entity may be of concern – especially in interpreting who is a Beneficial Owner of the Reporting Company. As noted above, for simple companies this probably does not create any issues.

For more complicated ownership and control structures and for the determination whether the Reporting Company is subject to one of the twenty-three exemptions, there is likely legal analysis that is required as described in the FAQs and FinCEN’s Small Entity Compliance

Guide. Those who are not lawyers should consider whether offering this legal analysis constitutes the unauthorized practice of law.

Reporting Companies.

There remain unanswered questions about who are Reporting Companies and when the exemption is available. For example, the CTA provides an exemption for a tax-exempt entity. Even where an entity is formed on January 1 of any year and promptly files its application for tax exempt status, it is unlikely that it will be approved for tax exempt status before the initial BOIR is due. Similarly, a newly formed company will unlikely be able to become a securities reporting issuer within that 90-day period, and no company formed on January 1 of any year will be exempt as a larger operating company (requiring, among other things, \$5,000,000 of revenues in the previous fiscal year). Thus, these and other companies will have to report initially as a Reporting Company and then, when available, file an amended BOIR to reflect the exemption status.

Limited liability companies are clearly reporting companies because they are formed by a filing with the Secretary of State in all 50 states. At least 22 states, the District of Columbia, and Puerto Rico permit their LLCs to organize “series.”⁷ The Series LLC was first introduced by Delaware in 1996. A Series LLC consists of the “parent” or “umbrella” LLC with one or more series that are established under the parent. Each series has characteristics that are separate from the Series LLC itself and from every other series of the same umbrella LLC.

- Each series can have its own assets, members, managers, purpose, and business objectives.
- Each series may be obligated to file its own tax returns – separate from the umbrella LLC and the other series.
- If certain statutory requirements are met, the debts, liabilities, and obligations of one series are enforceable only against the assets of that series and not against the assets of any other series or the Series LLC.

As such, each series basically functions like a separate entity within the umbrella LLC.

For CTA purposes, what is important is that while the umbrella LLC does make a filing with the Secretary of State for its formation, it need make no filing when forming a series – forming a series under an umbrella LLC is an internal act of the umbrella LLC. While the formation document for the umbrella LLC will usually contain a statement that the umbrella

⁷ Wikipedia contains a list of states and territories where a Series LLC can be formed. See https://en.wikipedia.org/wiki/Series_LLC.

LLC may establish series which are protected from the liabilities of other series and the LLC itself, no further filing is required for the establishment of the underlying series which, as noted, may have different owners, different assets, separate liabilities. While the umbrella LLC will be a Reporting Company under the CTA and must file a BOIR unless exempt, the underlying series need make no filing and therefore would, under the current definition in the CTA, not be a Reporting Company and not be obligated to file any BOIRs.

The use of series LLCs and their underlying series may become much more popular to avoid CTA reporting requirements. Colorado has considered adopting legislation for series LLCs several times,⁸ but due to opposition from several sources it has never been passed.

FinCEN Identifiers.

I have suggested before that persons who will be engaged in the FinCEN filing process obtain FinCEN IDs to minimize the availability of their personal identifiable information (“PII”). With a FinCEN Identifier, a Company Applicant or a Beneficial Owner only has to provide the Reporting Company (or other person making the filing on behalf of the Reporting Company) a twelve-digit number and does not have to provide a passport or a driver’s license for identification purposes. While the PII will be available through FinCEN for those who have access to FinCEN information, it will be available in only a single place.

Without a FinCEN ID, each Company Applicant and Beneficial Owner named in a BOIR will have to give the Reporting Company the PII which dramatically expands its availability to unauthorized people.

A difficulty with a FinCEN ID, however, is that once a person has a FinCEN ID, that person is obligated to keep the FinCEN ID up to date. There is not yet a way for an individual to de-register his FinCEN ID.

Thus, whether to obtain and use a FinCEN ID or to provide one’s own PII to Reporting Companies and their filing agents is a decision to be made by each person involved.

New York LLC Transparency Act

⁸ Most recently, Colorado H.B. 2021-1026 would have permitted foreign protected series to do business in Colorado provided the umbrella LLC was also at risk.

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As discussed above, on December 22, 2023, New York Governor Kathy Hochul signed the LLC Transparency Act (“NYLTA”) was signed into law, to be effective beginning December 21, 2024.

Beginning on December 21, 2024, the NYLTA will require entities falling within the definition of a Reporting Company under the CTA to disclose information to the New York Department of State (“NY DoS”) for each beneficial owner of the Reporting Company⁹ that is a limited liability company formed or authorized to do business in the State of New York.

If a limited liability company qualifies for exemption under the CTA, it also is exempt from the disclosure requirements of the NYLTA. Unlike the CTA, however, the NYLTA requires a member or manager of the limited liability company to file a signed statement with the NY DoS indicating which provision or provisions of the CTA they rely on in claiming exemption.

A limited liability company reporting under the NYLTA must file a beneficial ownership disclosure with the NY DoS identifying each Beneficial Owner of the Reporting Company by the individual’s full legal name, date of birth, current business street address (as opposed to a current residential address as required by the CTA) and a unique identifying number from a valid identification document. The NY LLC Act does not require a copy of the valid identification document to be submitted with the disclosure as does the CTA. Additionally, the NY LLC Act does not require the disclosure of identifying information related to a Company Applicant, which is a concept that applies only to Reporting Companies under the CTA.

The most significant and problematic difference between the NYLTA and the CTA is that, as originally written, the NYLTA would make certain reported information accessible through a new publicly available database.¹⁰

In the case of a reporting limited liability company formed or registered to do business in the State of New York on or before December 21, 2024 (*i.e.*, the NYLTA’s effective date), an initial disclosure must be filed with NY DoS no later than January 1, 2025. For a reporting limited liability company formed or registered to do business in the State of New York after December 21, 2024, the initial disclosure is due at the time of filing of the articles of organization or application for authority. An updated disclosure must be filed within 90 days of

⁹ For the purposes of the NYLTA, the term “Reporting Company” takes its definition from the CTA.

¹⁰ It is likely that the New York legislature will amend this provision to provide for greater confidentiality for PII and to be more in line with the CTA’s access rules that disclosed information be accessible only by certain government agencies and officers and, with consent of the Beneficial Owner, to certain financial institutions.

any change to the information required to be disclosed to NY DoS by a reporting limited liability company.

If a reporting limited liability company fails to file a required disclosure under the NYLTA for a period exceeding 30 days, it will be shown either as “past due” or “delinquent” on the records of NY DoS until the disclosure is appropriately filed and, in some cases, a civil penalty of \$250 is paid.

Conclusion.

We are still learning things about the CTA, the FinCEN regulation of the CTA, and the FinCEN filing mechanisms. If Congress adopts, and the President signs, H.R. 5119, there will be more changes. Regardless, it is a safe speculation to say that there will be more changes to come in any event.

While the NYLTA only has effect in New York, since the state and city of New York are such a large national and international financial center, the NYLTA is likely to have broad effect nationally and internationally.