

Compliance Memo For Williams Mullen Clients

The purpose of this memo is to provide our clients with an overview of the Corporate Transparency Act (CTA) and steps necessary to take to be compliant with the CTA.

The CTA was enacted into law on January 1, 2021 as part of the Anti-Money Laundering Act of 2020. It will impact any “legal entity,” including any domestic or foreign corporation, limited liability company, limited partnership, statutory business trust or other form of entity created by the filing of a document with a secretary of state or other similar office.

For some legal entities, the impact of the CTA will be limited to determining if they are exempt. Any legal entity that is not an Exempt Entity (as discussed below) will be designated as a Reporting Company required to report information about its Beneficial Owners and Company Applicants to the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) or be subject to civil or criminal penalties. Most are required to comply with the CTA beginning on January 1, 2024 and all will be required to comply by January 1, 2025.

We have created two forms to help clients navigate the Act: **A Corporate Transparency Act Exemption Certification** designed to help clients determine whether or not they are a Reporting Company, and if so, a **Beneficial Ownership Questionnaire** designed to gather the information required to be reported to FinCEN.

The Corporate Transparency Act Exemption Certification will help you determine whether

or not you are a Reporting Company. All legal entity clients should complete, sign and return the Certification to the attorney who is their point of contact at the firm. Please contact a Williams Mullen attorney if you have any questions while completing the Corporate Transparency Act Exemption Certification or whether you need to complete the Corporate Transparency Act Exemption Certification. Please keep this form handy as it should be completed whenever a new legal entity is formed, when it is registered to do business in any U.S. State or when there is any potential change in their Exempt Entity eligibility.

The Beneficial Ownership Questionnaire is intended to gather the beneficial ownership and company applicant information required to be reported to FinCEN pursuant to the CTA. Any time a client cannot certify an exemption on its Corporate Transparency Act Exemption Certification, they will be asked to complete, sign and return the Beneficial Ownership Questionnaire. It will also be necessary to complete, sign and return the Beneficial Ownership Questionnaire any time there is a change in your beneficial ownership.

Please contact a Williams Mullen attorney if you have any questions regarding the Beneficial Ownership Questionnaire or whether you have experienced a change in beneficial ownership.

Background

The CTA was intended to enhance beneficial ownership transparency in the U.S. in order to “protect the U.S. financial system from illicit use and impede malign actors from abusing legal entities, like shell companies, to conceal proceeds of corrupt and criminal acts.” On September 30, 2022, the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN) issued the final rule to implement the beneficial ownership reporting requirements of the CTA.

On December 8, 2021, FinCEN issued notice of Final Rulemaking on this same subject (the “Proposed Rule”) and the Final Rule reflects comments received by it during the public comment period. Under the CTA, each “Reporting Company” is required to report certain identifying information regarding such company and its “Beneficial Owners” and “Company Applicants” (each term described below) to FinCEN. Currently, companies do not generally need to report this information to federal or state governmental authorities, except under FinCEN’s existing Customer Due Diligence Rule (the “CDD Rule”), which requires covered U.S. financial institutions to collect beneficial ownership information (BOI) from certain legal entity customers in connection with opening new accounts for those customers. When the CTA becomes effective, Reporting Companies will have an ongoing obligation to report their BOI any time there is a change in their BOI.

Summary of Key Aspects of the CTA

Entities Required to File Reports

Definition of Reporting Companies

The BOI reporting requirements under the CTA apply to “Reporting Companies,” which include foreign and domestic corporations, limited liability companies and other legal entities.

Exemptions

Any legal entity that is not exempt is a Reporting Company. The CTA and its implementing regulations include 23 specific exemptions (as noted in the list to the right). The specific exemptions mainly apply to larger U.S. entities or U.S. regulated entities.

One notable category of Exempt Entities is for “large operating companies.” A legal entity qualifies as a “large operating company” if it (a) employs more than 20 full-time employees in the U.S., (b) has filed a federal tax return or, if applicable, consolidated federal tax return recording more than \$5 million in gross receipts or sales in the previous year and (c) has an operating presence at a physical office in the U.S. Under the Final Rule, the direct and indirect wholly-owned subsidiaries of most Exempt Entities are themselves exempt.

However, any change in eligibility for the exemption (for example, a Large Operating Company dips below 20 employees or no longer has a physical presence in the United States), will, at a minimum, require the legal entity to again evaluate whether it is eligible for any other exemption.

Summary of Exempt Entities

Public Securities Issuers

Domestic Governmental Authorities

Banks

Domestic Credit Unions

Bank Holding Companies and Savings and Loan Holding Companies

Registered Money Transmitting Businesses

Broker-Dealers

Securities Exchange or Clearing Agents

Other Exchange Act Registered Entities

Registered Investment Companies and Advisers

Venture Capital Fund Adviser

State-Regulated Insurance Companies

State-Licensed Insurance Producers

Commodity Exchange Act Registered Entities

Public Accounting Firms

Public Utilities

Financial Market Utilities

Pooled Investment Vehicles

Tax Exempt Entities

Entities Assisting Tax Exempt Entities

Large Operating Companies

Subsidiaries of Exempt Entities

Inactive Entities

Information Required to be Reported by Reporting Companies

FinCEN has been directed to develop a secure portal that facilitates the reporting of the required information, which, as we elaborate on below, will include personally identifiable information for Beneficial Owners and Company Applicants. This portal is not yet operational but we will update our clients on the reporting processes when FinCEN makes information about the portal available.

A Reporting Company will be required to submit the following information to FinCEN:

With respect to the Reporting Company:

- > Its full name
- > Any alternative names through which the company engages in business
- > Its business street address
- > Its jurisdiction of formation or registration
- > Its taxpayer identification number (TIN)

With respect to each Beneficial Owner and Company Applicant of the Reporting Company, the individual's:

- > Full legal name
- > Date of birth
- > Residential/business current street address
- > Unique identifying number (usually a SSN or TIN) from an acceptable identification document (as well as a scanned copy of this underlying document).

Beneficial Owner

A “Beneficial Owner” directly or indirectly, (a) exercises substantial control over a Reporting Company or (b) owns or controls at least 25% of the ownership interests of a Reporting Company.

“Substantial control” and “ownership interests” are defined broadly, and, unlike under the CDD Rule applicable to banks, a Reporting Company must report all Beneficial Owners to FinCEN. A Reporting Company would be required to list and provide BOI for each and every individual that satisfies either of the two prongs of the definition of “beneficial ownership,” subject to specific exceptions.

FinCEN expects that each Reporting Company will identify at least one Beneficial Owner with substantial control.

Ownership Interests

The Final Rule also includes an expansive definition of “ownership interests.” While the CDD Rule only considers equity interests in a legal entity, under the CTA, “ownership interests” include equity interests in the Reporting Company, as well as capital or profit interests, convertible instruments, warrants or rights or other options or privileges to acquire equity, capital or other interests in a Reporting Company. Any debt instrument is also deemed to be an “ownership interest” to the extent it enables the holder to exercise the same rights as one of the specified equity or other interests in the definition of “ownership interests,” including the ability to convert the instrument into one of the specified equity or other interests.

When determining whether an individual owns or controls 25% or more of the “ownership interests” of a Reporting Company, the individual’s aggregated ownership interests across all categories of “ownership interests” should be compared to the “undiluted ownership interests” of the Reporting Company.

An individual may directly or indirectly own or control an ownership interest of a Reporting Company through a variety of means, including through the following, among others:

- > Joint ownership with one or more other persons of an undivided interest in an ownership interest;
- > Control of such ownership interest owned by another individual; and
- > With regard to a trust or similar arrangement that holds an ownership interest: acting as a trustee of the trust or other individual (if any) with the authority to dispose of trust assets; being a beneficiary of the trust who (a) is the sole permissible recipient of income and principal from the trust or (b) has the right to demand a distribution of or withdraw substantially all of the

assets from the trust; or being a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust: (a) through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the Reporting Company; or (b) through any other contract, arrangement, understanding or relationship.

Substantial Control

Under the Final Rule, “substantial control” means (a) service as a senior officer of a Reporting Company, (b) authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar governing body) of a Reporting Company, (c) direction, determination or decision of, or substantial influence over, important matters of a Reporting Company or (d) any other form of substantial control over the Reporting Company.

The Final Rule provides that an individual can assert “substantial control” over a Reporting Company through a variety of means, including through the following, among others:

- > Board representation;
- > Ownership or control of a majority of the voting shares of the Reporting Company;
- > Rights associated with any financing arrangement or interest in a company;
- > Control over one or more intermediary entities that, separately or collectively, exercise substantial control over a Reporting Company;
- > Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- > Any other contract, arrangement, understanding, relationship or otherwise.

Timeframe for Filing Reports

All Reporting Companies created or first registered to do business in the U.S., as applicable, before January 1, 2024 will have until January 1, 2025 to file their respective initial reports with FinCEN.

FinCEN has amended the beneficial ownership information (BOI) reporting rule to extend the filing deadline for certain BOI reports. Under the Reporting Rule prior to this amendment, entities created or registered on or after the rule's effective date of January 1, 2024, had to file initial BOI reports with FinCEN within 30 calendar days of notice of their creation or registration. The amendment extends that filing deadline from 30 calendar days to 90 calendar days for entities created or registered on or after January 1, 2024, and before January 1, 2025, to give those entities additional time to understand the new reporting obligation and collect the necessary information to complete their filings. Entities created or registered on or after January 1, 2025, will continue to have 30 calendar days to file their BOI reports with FinCEN.

This rule is effective January 1, 2024.

Company Applicants

Reporting Companies must also identify the "Company Applicants," which include (a) the individual who files the entity formation documents (in the case of a domestic Reporting Company) or (b) the individual who files the first registration document allowing the foreign entity to do business in the U.S. (in the case of a foreign Reporting Company). Furthermore, in order to ensure that the Reporting Company provides information on individuals that are responsible for the decision to form or register a Reporting Company, any individual who directs or controls the filing of any such document by another person also constitutes a "Company Applicant." The term "Company Applicant" is limited to two people at most: the first being the individual who directly files the document to create or register the Reporting Company, and the second being the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing.

Penalties for Reporting Violations

The CTA provides for significant civil and criminal penalties in the event of certain violations of the BOI reporting obligations. Any person that willfully provides or attempts to provide, false or fraudulent beneficial ownership information to FinCEN or willfully fails to report complete or updated beneficial ownership information to FinCEN, may be liable for a civil penalty of up to \$500 for each day a violation continues or has not been cured, and may be fined up to \$10,000 and imprisoned for up to two years (or both) for a criminal violation.

Any Reporting Company, Beneficial Owner, Company Applicant and others involved with any erroneous filing are potentially liable for violations of the CTA. Notably, if a Reporting Company fails to make a filing either initially or in connection with a change in BOI, only a person who "either causes the failure, or is a senior officer of the entity at the time of the failure," is liable.

Please contact a Williams Mullen attorney if you have any questions about Corporate Transparency Act compliance.