

## **Corporate Transparency Act**

Effective January 1, 2024, a new federal law called the Corporate Transparency Act (the Transparency Act) will likely impact your company. This brand-new law is still evolving. The rules and regulations of reporting under the Transparency Act are not yet finalized and are still being changed and modified at this late date. While there is a lot of unknown at this juncture, we want to make you aware of the Transparency Act and help prepare you to comply with this new law.

The Transparency Act will require all companies registered to do business in the U.S. (unless otherwise exempt) to disclose the individuals who ultimately own and control those companies to the U.S. Treasury's Financial Crimes and Enforcement Network (FinCEN). The exempt companies primarily include most large operating companies, certain charities, and other entities described below. All companies subject to the Transparency Act will need to submit a beneficial ownership information (BOI) report to FinCEN within the required time frames. These requirements are part of a broader global trend toward greater corporate transparency aimed at combating money laundering, the financing of terrorism, and other illicit activity. The penalties for failure to comply are severe including fines and even jail time.

The Transparency Act's reporting requirements will apply to virtually all small companies. Specific information about the reporting company, its beneficial owners and the company applicant is required to be reported. Beneficial owners are those individuals who (a) exercise "substantial control" over the entity, or (b) own or control at least 25% of the ownership interests of the entity. Companies formed prior to the end of 2023 have until December 31, 2024 to file their BOI reports, companies formed on or after January 1, 2024 have 90 days thereafter to file their BOI reports, and companies formed on or after January 1, 2025 have 30 days thereafter to file their BOI reports. It is important to understand that the database through which the reporting will be made is not yet available and nor is the BOI report form or format available. Given the evolving nature of this new law, the information set forth herein is subject to change.

### **Who Do The Transparency Act Reporting Requirements Apply To**

The Transparency Act reporting requirements apply to all domestic reporting companies (including corporations, limited liability companies and "other entities" created by filing a document with a Secretary of State (SOS) or similar office), foreign reporting companies (including corporations, limited liability companies or other entities created under foreign law and registered in the US by filing a document with a SOS), and "other entities" (including limited partnerships, limited liability partnerships, limited liability limited partnerships and general partnerships and certain types of trusts in some states). If an entity is not created by such a state filing (including sole proprietorships and most trusts), the entity is not considered a reporting company subject to the Transparency Act. Notably each and every entity qualifying as a reporting company will need to file its own BOI report – a parent company cannot file a single BOI report on behalf of a group of companies.

There are 23 specifically listed exceptions. These exempted entities are not required to comply with the reporting requirements of the Transparency Act. These exceptions include but are not limited to the following:

- Large operating companies that (i) have more than 20 full time US employees (employees of affiliated entities don't count), (ii) reported more than \$5 million in gross receipts or sales from US sources to the IRS for the prior year; and (iii) have an operating presence at a physical location in the US.
- Governmental entities, nonprofit entities (provided they're recognized as a 501(c)(3) entity by the IRS) and certain political organizations.
- Public companies, insurance companies, banks, and registered investment companies
- Inactive entities that (i) were in existence before January 1, 2020; (b) are not engaged in active business; (c) are not owned by a foreign person directly or indirectly, wholly or partially; (d) have not experienced any change in ownership in the preceding twelve months; (e) have not sent or received any funds greater than \$1,000, either directly or through any account the entity or an affiliate had an interest, in the preceding twelve months; and (f) do not hold any assets in the U.S. or abroad, including any ownership interests.

### **What is Required to be Reported and How Will it be Reported?**

Each reporting company will be required to submit BOI reports to FinCen. These reports must disclose certain information about the **reporting company**, its **beneficial owners** and its **applicant**. We understand that the reports will be submitted electronically through a private cloud-based high security database called the Beneficial Ownership Secure System (Boss). FinCEN is in the process of developing Boss to receive, store and maintain the BOI and has assured the public it will be available and ready for use on or by January 1, 2024. The information submitted to FinCen through Boss will only be accessible by a specific list of parties including federal and state law enforcement agencies.

### **Who is considered the “beneficial owners” and “applicant” of an Entity?**

The Transparency Act defines a “beneficial owner” to mean an individual who currently, and directly or indirectly, (a) exercises “substantial control” over the entity, or (b) owns or controls not less than 25% of the ownership interests of the entity.

Substantial control is broadly defined as an individual who: (1) serves as a senior officer of a reporting company; (2) has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body) of a reporting company; (3) directs, determines, or has substantial influence over important decisions made by a reporting company (functional or de facto authority); or (4) has any other form of substantial control over the reporting company. The Transparency Act regulations make clear that substantial control may be exercised directly or indirectly. Examples of individuals who exercise “substantial control” include but are not limited to: c-suite officers of a corporation including any individual who holds the position of a general counsel of a reporting company, managers of a limited liability company, trustees of a trust, and general partners of a limited partnership.

The Transparency Act regulations set forth a few exceptions to the definition of beneficial owner including (1) minor children, (2) nominees – individual acting as a nominee or custodian on behalf

of another, (3) employees – an individual acting solely as an employee, whose substantial control over or economic benefits from such entity are derived solely from the employment status of the employee, provided that such person is not a senior officer as well, (4) inheritance – an individual whose only interest in a reporting company is a future interest through a right of inheritance, and (5) creditors.

A company applicant is any individual who files the document that creates or registers the reporting company, or who is primarily responsible for directing or controlling such filing. By definition, a company applicant will be limited to one or two individuals.

### **What Must be Reported?**

The following information must be supplied about the reporting company:

1. Full legal name of the reporting company
2. Any trade name or dba
3. Address of the principal place of business
4. Jurisdiction of formation or registration
5. Unique identifying number (TIN or EIN)

The following information must be supplied about the “beneficial owners”:

1. Full legal name of individual
2. Date of birth
3. Residential street address
4. Unique identification number from one of the following: (a) non-expired passport issued to the individual by United States Government, (b) a non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual, (c) a non-expired driver’s license issued to the individual by a State; or (d) a non-expired passport issued by a foreign government to the individual, if the individual does not possess any of the documents described in clauses (a), (b), or (c).
5. An image of the document from which the unique identifying number in the preceding paragraph was obtained, which includes both the unique identification number and photograph in sufficient quality to be legible or recognizable.

The following information must be supplied about the “applicants”:

1. Full legal name of individual
2. Date of birth

3. Business (if providing business service as a corporate or formation agent) or residential street address
4. Unique identification number (same as for the beneficial owners above)
5. Image of the document (same as for the beneficial owners above)

The requirement to supply information about the applicant only applies to those companies formed on or after January 1, 2024.

Notably reporting companies, individual beneficial owners and applicants can obtain a FinCEN identifier by submitting to FinCen an application containing the information required above. Then reporting companies can use the FinCEN identifier on all future BOI reports in lieu of the unique identification numbers otherwise required.

Should any of the above information change or should an inaccuracy in the BOI report be discovered, the reporting companies are obligated to file an amendment within 30 calendar days of any change.

### **Who Reports the Required Information**

The reporting companies have the direct reporting obligation to FinCEN under the Transparency Act and its supporting regulations. Individual beneficial owners and company applicants will need to provide information about themselves to reporting companies to enable the reporting companies to comply with their obligations under the Transparency Act. Those individuals who cause the reporting company to fail to report or provide false or fraudulent information could be liable for a reporting violation.

Each person filing a report or application under the Transparency Act must certify that the report or application is “true, correct and complete.”

Third parties can handle submissions on behalf of reporting companies. Details on how these submissions will be handled and available third-party service providers have not been finalized.

### **Timing for Reporting**

Existing entities and those entities formed prior to January 1, 2024, have until December 31, 2024 to file its BOI report. Entities formed on or after January 1, 2024 will need to file their BOI reports within 90 days of formation. Entities formed on or after January 1, 2025 will have 30 days to file their BOI reports.

If you plan to form a new entity or start a new business in 2024, consider whether to form the entity in 2023 in order to take advantage of the extended deadline to comply with the Transparency Act.

### **Liabilities for Noncompliance**

The Transparency Act provides for both criminal and civil penalties against any “person” for noncompliance. Violations may result in penalties up to \$500 per day and/or imprisonment.

FinCen does not expect that an inadvertent mistake by a reporting company acting in good faith after diligent inquiry would constitute willfully false or fraudulent violation.

FinCEN obligates reporting companies to correct any errors or inaccuracies in previously filed reports within 30 days after the reporting company becomes aware of any error.

### **Conclusion**

The Transparency Act is a brand-new law effective January 1, 2024 and is still evolving. The Boss database is still being established. The BOI report form or format has not yet been finalized or published. Additionally, FinCEN is expected to announce additional rules around the Transparency Act before the end of 2023. With all of that, there is still a lot of unknown about the Transparency Act including how compliance will work in practice and how the law will be implemented and enforced. We as a firm will continue to stay informed.