



September 17, 2024

Dear Client:

The Corporate Transparency Act (the “CTA”) is a new law that requires all individuals who (1) directly or indirectly own or control at least 25% of the ownership interests of, or (2) exercise “substantial control” over, a limited liability company (including a single-member LLC and LLCs that just own real property), corporation, limited partnership or other company that is registered with a state (each, a “**Reporting Company**”), to file a beneficial ownership information report (the “**BOI Report**”) with an agency within the U.S. Department of Treasury called the Financial Crimes Enforcement Network (or “**FinCEN**”). The CTA refers to such individuals as the “**Beneficial Owners**” of a Reporting Company. The purpose of the CTA as described in its legislative history is to promote transparency in entity structures and ownership in order to combat money laundering, tax fraud, and other illicit activities. There are exemptions and exceptions from filing described in this letter – the most prominent exemption is for a company with an office in the United States that has more than \$5 million in gross sales per year and that employs more than 20 full-time employees.

The BOI Report for Reporting Companies created before January 1, 2024, must be filed with FinCEN before January 1, 2025. As it relates to you, absent an applicable exemption from reporting, this requirement applies to any and all limited liability companies, corporations, limited partnerships, and other companies that you own. The BOI Report filed with FinCEN for Reporting Companies created after January 1, 2024, must be filed within 90 days of the formation of the Reporting Company. **BOI Reports must be updated within 30 days of any change in beneficial ownership information.**

The scope of the CTA and its regulations are expansive and some of the provisions are vague, especially as they apply to Reporting Companies with complex ownership and control structures. For example, in such cases, it may be unclear what constitutes the exercise of “substantial control.” Although the CTA is expansive and vague, the penalties for violating the CTA are harsh, including monetary penalties of \$591 per day (adjusted annually for inflation) up to a maximum of \$10,000, and imprisonment for up to 2 years, for willfully failing to report complete or update beneficial ownership information. In addition to Reporting Companies, senior officers, individuals who file BOI Reports on behalf of Reporting Companies, and Beneficial Owners who refuse to provide required information to Reporting Companies, may be liable for violations.

It is the responsibility of each Reporting Company to identify its Beneficial Owners and file a BOI Report with FinCEN disclosing those Beneficial Owners. Odin, Feldman & Pittleman, P.C. (“OFP”) will not be responsible for filing a BOI Report, nor will OFP be liable for failure to file a BOI Report.

However, many Reporting Companies may have difficulty determining who their Beneficial Owners are because the CTA and its regulations are vague. This letter is to help Reporting Companies determine who their Beneficial Owners might be by providing an overview of the CTA and providing examples. OFP lawyers are also available to provide further legal guidance at OFP normal hourly billing rates on who should file a BOI Report and which owner and leaders of a Reporting Company are Beneficial Owners. Given the harsh penalties for violating the CTA, OFP generally encourages a cautious approach to ensure CTA compliance. Ultimately, though, each Reporting Company must determine who to disclose as Beneficial Owners in its BOI Report.

Who Must File

As noted, the CTA requires all individuals who (1) have at least 25% of the “ownership interests” of a Reporting Company, or (2) exercise “substantial control” over a Reporting Company, to be included in the Reporting Company’s BOI Report. There is no numerical limit on the number of Beneficial Owners that a Reporting Company must disclose, and a Reporting Company includes all types of companies, including companies whose sole purpose is to own a rental property or second home.

An individual’s ownership interest includes all ownership interests of a Reporting Company of any class or type. Any of the following may constitute an ownership interest: equity, stock (common or preferred), or voting rights; a capital or profit interest; convertible instruments; options or other non-binding privileges to buy or sell any of the foregoing; and any other instrument, contract, or other mechanism used to establish ownership. If an individual has at least 25% of any of the following: (1) the Reporting Company’s voting ownership interests; (2) the value of all the Reporting Company’s outstanding classes of ownership interests; or (3) the Reporting Company’s profits interests; then, in each case, the individual is a Beneficial Owner of the Reporting Company. Further, ownership interests may be either direct or indirect (e.g., ownership of a Reporting Company by virtue of ownership of a parent company of the Reporting Company).

The CTA regulations have detailed provisions for calculating ownership of different types of Reporting Companies with different types of ownership interests and derivatives. These provisions may be difficult to apply, particularly in the case of Reporting Companies (1) that have issued multiple classes or types of securities, derivative securities, or securities involving distribution waterfalls, liquidation preferences, or anti-dilution rights, or (2) that have joint owners or complex ownership structures. Please let OFP know if you need help calculating the ownership interests in your Reporting Company.

Substantial control is not defined in the CTA, but FinCEN has defined it expansively and vaguely in its final regulations. The term “substantial control” is defined in the final regulations to include the following: (1) individuals such as senior officers; (2) anyone who has authority over appointment/removal of any senior officer or a majority of the board of directors (or similar body); (3) anyone who directs and determines important decisions of the Reporting Company, which may be interpreted as all members of the Board of Directors, or (4) any other kind of substantial control. Important decisions can include hiring and firing key personnel, and approving major transactions, dissolution, compensation schemes for senior officers, and

amendments to governance documents. Substantial control cannot be determined simply from an individual's ownership interest. It is a facts and circumstances test. Some individuals, such as senior officers, are deemed to be Beneficial Owners even if they are not owners at all (i.e., they own no shares, units, or other securities).

Because of these harsh penalties and the expansiveness and vagueness of the CTA and its regulations, and given the dearth of definitive guidance from FinCEN, the most conservative approach would be for Reporting Companies to report all owners as "Beneficial Owners" when completing their BOI Reports. This would include all members of limited liability companies, all shareholders of corporations, and all limited partners of limited partnerships.

However, Reporting Companies may wish to consider omitting individuals with insignificant Reporting Company ownership from their BOI Reports if the Reporting Company's legal documents do not give those owners substantial control (which is deemed to include substantial influence over important decisions/actions) and those owners do not otherwise have substantial control or influence.

One example of an owner with insignificant ownership who nonetheless might be disclosed as a Beneficial Owner in a Reporting Company's BOI Report would be a 1% shareholder (or unitholder) who has the right to veto certain "major actions" (such as a merger) by virtue of the Reporting Company's shareholders' agreement (or operating agreement). Another example might be a 1% shareholder (or unitholder) who is the founder of a family Reporting Company, and the facts indicate that he has the ability to influence his children, who own most of the shares (or units), or the Reporting Company's management.

Some shareholders' agreements that OFP has prepared give each shareholder veto power over important decisions. **If your corporation has such a shareholders' agreement, then you may wish to consider including all shareholders in the Reporting Company's BOI Report (even if they hold less than 25% of the shares) because the CTA is intended to cast a wide net over anyone who might have control. If there is no shareholders' agreement, then shareholders that hold less than 25% of the Reporting Company's outstanding shares should be evaluated individually as to whether they hold substantial control or influence over important decisions of the Reporting Company.**

Some operating agreements and limited partnership agreements that OFP has prepared have veto and appointment powers, requiring all members and limited partners to approve certain actions and appointments. **If your limited liability company or limited partnership has an operating agreement or limited partnership agreement with those provisions, then you may wish to consider those provisions in determining whether those members or limited partners have substantial control or influence over important decisions of the Reporting Company (even if those members and limited partners own less than 25% of the ownership interests).**

In addition to the owners of a Reporting Company described in the preceding paragraphs, to ensure compliance with the CTA, you may wish to consider including the following individuals as "Beneficial Owners" in your Reporting Company's BOI Report:

(1) all managers of a limited liability company and individuals who may exert substantial control or influence over any manager; (2) all directors of a corporation and the individuals who may exert substantial control or influence over any director; (3) all general partners of a limited partnership and the individuals who may exert substantial control or influence over any general partners; (4) all senior officers (including Presidents, CEOs, CFOs, COOs, General Counsels, and any other senior officer, regardless of title, who has power and authority similar to these positions); and (5) any other individual who otherwise might have substantial control or influence over a Reporting Company.

If there is any doubt about whether an individual has substantial control or influence over a Reporting Company, then the safest course is to consider the individual to be a Beneficial Owner and include the individual in the Reporting Company's BOI Report. If an individual or individuals are deemed not to be a Beneficial Owners of a Reporting Company and are omitted from the BOI Report, then you may wish to prepare and retain a memorandum in the Reporting Company's files detailing the reasons for that determination.

The vagueness of the CTA and its regulations and the current dearth of definitive guidance has resulted in law firms taking varying approaches regarding how Reporting Companies should identify their Beneficial Owners. Some law firms are taking approaches that are less conservative than the approach described in this letter. For example, some law firms advise that individuals with less than 25% of a Reporting Company's ownership interests do not have to be disclosed in the Reporting Company's BOI Report unless they participate in or control the Reporting Company's management.

FinCEN has been regularly updating, and is expected to continue to regularly update, its guidance for completing BOI Reports on its website at fincen.gov/boi-faqs. **You therefore should consider reviewing your Reporting Company BOI Reports periodically against currently available FinCEN guidance to ensure that your Reporting Company BOI Reports are in compliance with current guidance (even if you previously have filed your BOI Reports).**

Initial Information that must be Submitted

The BOI Report must disclose the following information for reporting individuals:

1. the individual's full legal name;
2. date of birth;
3. current residential or business address;
4. a unique identifying number from an acceptable identification document (e.g., a non-expired driver's license issued by a state, a non-expired U.S. passport, or a non-expired identification document issued by the state, local government, or Indian tribe); and
5. an image of the document with the unique identification number.

The BOI Report must disclose the following information for the Reporting Company:

1. the Reporting Company's full legal name;

2. all trade names or “doing business as” names of the Reporting Company;
3. its principal place of address for a U.S. business or the street address of the primary location in the United States where the Reporting Company conducts business;
4. its jurisdiction of formation (i.e., state, tribal or foreign jurisdiction); and
5. its IRS tax identification number (e.g., employer identification number) or a tax identification number issued by a foreign jurisdiction and name of that jurisdiction (if the Reporting Company does not have an IRS tax identification number).
6. in some cases, its date of formation.

Reported beneficial ownership information is not publicly available and cannot be obtained through Freedom of Information Act (FOIA) requests. A statutorily defined group of governmental authorities and financial institutions, including federal, state, and local enforcement agencies, can acquire the information in BOI Reports.

Updating your Information once Filed

The CTA has strict requirements regarding updating information of the Reporting Company and each Beneficial Owner. **A Reporting Company that has any change to the reported information must file an updated report no later than 30 days after the date of the change.** This includes Reporting Company information, such as a new business name, and updated information on each Beneficial Owner, such as a change of name or address. If a Beneficial Owner obtains a new driver’s license or other identifying document that includes a changed name, address, or identifying number, then the Reporting Company would have to file an updated BOI Report with FinCEN, including an image of the new identifying document.

Exemptions and Exceptions

There are 23 exemptions from the Reporting Company requirement, but most apply to financial institutions or other extensively regulated companies and are narrow in scope. One notable exemption is for large operating companies, which exempts companies that have a physical office in the United States, employ more than 20 full-time employees and have more than \$5 million in gross sales per year. If your company does not meet the large operating company exemption, then your company likely will have to file a BOI Report.

The statute also has a few exceptions for certain groups of individuals. If an individual is (1) a minor child, (2) a nominee, intermediary, custodian, or agent on behalf of another individual, (3) solely an employee, (4) solely a creditor, or (5) an individual whose only interest is through a right of inheritance, then the Reporting Company does not have to file beneficial ownership information for those individuals.

Trusts

Most trusts used for estate planning are not Reporting Companies unless they are a trust that is registered with a state. However, there are special rules for trusts that own Reporting Companies. The trustee(s) of a trust must be listed as Beneficial Owner(s) of the Reporting Company in the Reporting Company’s BOI Report if the trustee(s) has authority to dispose of

the assets in the trust. In addition, if the settlor or grantor may withdraw the assets of the trust or revoke the trust, then the settlor or grantor of the trust must be listed as a Beneficial Owner in the BOI Report. If the trust has only one beneficiary or if the beneficiary has the right to demand a distribution of or withdraw substantially all of the assets from the trust, then the beneficiary of the trust must be disclosed as a Beneficial Owner of the Reporting Company in the BOI Report.

Many OFP clients own their Reporting Companies through their trusts and many trust documents that OFP has prepared are revocable and permit the trustee(s) to dispose of the assets of the trust. In this situation, you may wish to consider including the grantors, trustees, and beneficiaries described in the preceding paragraph in the Reporting Company's BOI Report.

Inactive, Terminated, and Dissolved Companies

Your company may be a Reporting Company even if it is inactive, has been terminated by its state of organization, or has been dissolved.

There is an exemption from the Reporting Company reporting requirements for inactive companies; however, the inactive company must meet all six of the following criteria: (1) the inactive company must have been in existence on or before January 1, 2020; (2) it must not be engaged in active business; (3) it must not be owned directly or indirectly by foreign individuals; (4) it must not have had any change in ownership during the preceding 12-month period; (5) it must not have sent or received any funds exceeding \$1,000 during the preceding 12-month period; and (6) it must not otherwise hold any assets (including securities).

If your company was administratively dissolved (e.g., dissolved for failure to pay fees to the state) prior to January 1, 2024, then your company may still have to file a BOI Report. FinCEN does not consider administrative dissolution to be permanent because the company's existence may be easily reinstated. States typically allow several years before an administrative dissolution becomes permanent – in Virginia, this period is 5 years. Thus, Virginia companies that were administratively (as opposed to formally) dissolved during the 5 years preceding January 1, 2024, are required to file BOI Reports.

If your company was dissolved after January 1, 2024, then your company is required to file a BOI Report, even if the company wound up its affairs, ceased doing business, and was dissolved through formal dissolution procedures before the Reporting Company's BOI Report filing deadline.

Additional Sources of Information

While the language of the CTA is expansive and vague, there are a few sources that help clarify some provisions. FinCEN's website has a Frequently Asked Questions (FAQs) page that is updated regularly. Many clarifications have been helpful. Another source of information is the *Small Entity Compliance Guide: Beneficial Ownership Information*, which is also on FinCEN's website. For some of the advice in this letter, OFP has relied on *The Corporate Transparency Act Compliance Guide* by Jonathan B. Wilson, which was published by the LexisNexis Group. Mr.

Wilson is a principal of FinCEN Report Company, LLC, which is a third-party provider of services referred to below.

Lawsuits Against the CTA

There are currently six lawsuits pending involving the CTA. One lawsuit, *National Small Business United v Yellen*, has been appealed to the United States Court of Appeals for the Eleventh Circuit by the U.S. Treasury Department after the United States District Court for the Northern District of Alabama (Northeastern Division) ruled that the CTA exceeds the Constitution's limits on Congress' power. Oral arguments are currently scheduled for September 27, 2024.

However, this case applies only to the plaintiffs, and FinCEN has released a notice stating that FinCEN will continue to implement the CTA for all Reporting Companies that are not the plaintiffs. The other lawsuits are still in the initial stages of litigation and likely will not be resolved before this year's filing deadline. The filing deadline for all Reporting Companies that are not the plaintiffs is still December 31, 2024, and Reporting Companies must ensure accurate filing by this date.

Next Steps

You will be responsible for filing a BOI Report for each of your Reporting Companies. OFP will not be responsible for filing a BOI Report, nor will OFP be liable for failure to file a BOI Report.

BOI Reports can be completed and filed directly with FinCEN at no cost using this link: www.FinCEN.gov. Keep in mind that filing directly with FinCEN could be complicated under some circumstances and may require preplanning to obtain the required information and consents if your Reporting Company has numerous Beneficial Owners.

Alternatively, you can file your BOI Report(s) with the help of a third-party service provider, such as: FinCEN Report Company (Jonathan Wilson, jwilson@fincenreport.com) or Jay Morris, jhmorris@fincenreport.com); CT Corporation (Scott Pfeiffer, Scott.Pfeiffer@wolterskluwer.com); Corporation Service Company (Monica Christian, Monica.Christian@cscglobal.com); and Cogency Global (Jody Patterson, japperson@cocencyglobal.com). Please note that the prices and services that these third-party service providers offer vary and that there are many other third-party service providers as well.

Given the scope of the CTA, Reporting Companies should consider designating a CTA compliance person within the Reporting Company or hiring a third-party service provider to ensure compliance with the CTA. Further, because a Reporting Company is dependent on its shareholders, directors, or other officers to provide accurate information for the Reporting Company's BOI Report, it may be necessary to update shareholders agreements, operating agreements, and other corporate documents to ensure that all parties provide the information required for the Reporting Company to ensure CTA compliance.

After you have had a chance to review this letter, please let your lawyer at OFP know if you have any questions or would like to set up a time to discuss beneficial ownership information reporting or compliance programs. Alternatively, clients may contact Olivia Grady at Olivia.Grady@ofplaw.com or (703) 218-2123, clients with Reporting Companies that hold real estate may contact Nathaniel Ralstin at Nathaniel.Ralstin@ofplaw.com or (703) 218-2103, and clients with Reporting Companies that are owned by one or more trusts may contact John Loveland at John.Loveland@ofplaw.com or (703) 218-2112. Billing for assistance with CTA reporting and compliance will be at usual hourly rates.

Very Truly Yours,

ODIN, FELDMAN & PITTLEMAN, P.C.