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The Corporate Transparency Act and Beneficial Ownership Reporting

Alert

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The Corporate Transparency Act and related regulations of the Financial Crimes Enforcement Network ("***FinCEN***") of the U.S. Department of the Treasury (collectively, the "***CTA***") became effective on January 1, 2024. It is estimated that more than 30 million companies will be required to file Beneficial Ownership Reports with FinCEN within the 2024 calendar year. This Client Alert summarizes certain key provisions of the CTA which may be applicable to you including, as discussed below, whether you are a "reporting company" that is required to file a beneficial ownership report under the CTA, or a "beneficial owner" required to disclose information to help a reporting company prepare such a report.

What Does the CTA Require?

The CTA requires a reporting company (as defined below) to file reports with FinCEN disclosing information regarding its direct and indirect beneficial owners (as defined below), including their legal name, date of birth, residential address and a copy of government issued identification (e.g., driver's license or passport). If the reporting company was first formed or registered to do business in the United States on or after January 1, 2024, then similar disclosures must be made regarding those individuals deemed to be company applicants (as defined below).

- Beneficial Owner. A "***beneficial owner***" of a company generally means any individual who: (i) directly or indirectly owns at least 25% of the company's equity, calculated on a fully diluted basis, or (ii) is a senior officer or other person having "substantial control" over the company. The rules for determining such ownership and control can be complex and at times ambiguous.
- Company Applicant. A "***company applicant***" means: (i) the individual who filed the formation/registration document with a secretary of state or similar office (e.g., a paralegal or a filing service company's employee); and (ii) if applicable, one other individual who is deemed to have primarily directed the filing (e.g., a supervising attorney).

Which Companies are Subject to the CTA?

The CTA applies to any "***reporting company***", which generally includes any corporation, limited liability company or other entity, which was formed in the United States, or foreign entity registered to do business in the United States, in each case through a document filed with a secretary of state or similar office. However, a company is not subject to the CTA's requirements if it meets one of 23 categories of exemptions, such as:

- Large Operating Company Exemption. A company is exempt as a "large operating company" if it (i) employs more than 20 full time employees in the United States (excluding employees of its parent, subsidiary or affiliate companies), (ii) has an operating presence at a physical office within the United States, and (iii) reported more than $5 million in gross receipts or sales from U.S. sources in its U.S. federal tax return or information return for the prior year.
- Inactive Entity Exemption. An inactive entity is exempt only if it (i) existed on or before January 1, 2020, (ii)

has no direct or indirect foreign owners, (iii) had no ownership changes in the preceding 12 months, (iv) did not send or receive, directly or indirectly, more than $1,000 of funds in the prior 12 months, and (v) has no other assets, including ownership interests in other entities.

- Regulated Entity Exemptions. There are exemptions for various types of regulated entities, such as publicly traded companies, banks, insurance companies, public utilities and tax-exempt entities.
- Subsidiaries. If a company is exempt, then its subsidiaries will generally be similarly exempt. Otherwise, a company and each of its subsidiaries will be required to make separate CTA filings.

When is the CTA Report Due?

The initial filing date of a CTA report depends on when the reporting company was first formed or registered to do business in the United States through the filing of a document with a secretary of state or similar office.

Year First Formed/Registered	CTA Report Due Date
Calendar year 2023 or earlier	January 1, 2025
Calendar year 2024	Within 90 days of formation/registration
Calendar year 2025	Within 30 days of formation/registration

What if There is a Change in the Information after a CTA Report is Filed?

After the initial report is filed, the reporting company must amend its report within 30 days of any change to the information in the report (e.g., an address change).

What Are the Penalties for Violating the CTA?

Violation of the CTA are punishable by civil penalties of up to $500 for each day that the violation continues, and also by criminal penalties of up to two years imprisonment and a fine of up to $10,000. Potential violations include a "willful" failure to file a report, a "willful" provision of false information or a "willful" failure to correct or update previously reported information. A reporting company's senior officers can be held personally liable for any company violations. Beneficial owners can also be held personally liable for willfully providing the company with false information or willfully failing to provide the required information to the company.

Is FinCEN's CTA Database Accessible to the Public?

No. The CTA limits access to the personal information in the database to federal, state and local governments for use in national security, intelligence or law enforcement activities. Financial institutions can also, with the reporting company's permission, access its CTA reports for customer due diligence purposes.

Should I Amend My Governing Documents to Address CTA Obligations?

If you are a reporting company, you should consider amending your governing documents (e.g., operating agreement, shareholders agreement, charter or bylaws) to require all owners to provide any information required by the CTA and to impose penalties for an owner's failure to do so.

Has FinCEN Published any Guidance Regarding Compliance with the CTA?

Yes, a good source of background information is the Small Entity Compliance Guide published by FinCEN (see https://www.fincen.gov/boi/small-entity-compliance-guide) to educate the market.

Are there Vendors that Specialize in Providing Assistance with the Preparation and Filing of Reports under the CTA?

Yes, there are a number of online filing service vendors that specialize in assisting companies with the preparation and filing of CTA reports. Some filing service vendors also maintain a record of the information and data the reporting company includes in its filings, which can prove useful for you in preparing CTA report amendments.

We anticipate that it would be more cost effective and efficient for you to use such filing service vendors for these CTA services, and that law firms are best suited to provide CTA legal advisory support. We can, upon request, provide you with the names of some of these filing service vendors.

Do such Filing Service Vendors Provide Legal Advice Regarding CTA Compliance?

No. While filing service vendors can assist you with the mechanics of preparing and filing CTA reports, these vendors do not provide substantive legal advice.

During the course of analyzing your potential obligations under the CTA or preparing a CTA report, you may have questions of a legal nature. For example, is your company a reporting company? If so, which individuals are considered your beneficial owners by virtue of their (direct or indirect) ownership of, or right to acquire, equity in your company, or their ability to exercise substantial control over your company? In some instances, these questions may involve an analysis of complex factual and legal issues.

What if I have Legal Questions?

Windels Marx has closely followed the CTA since the regulations were enacted and will continue to monitor it for any updates. Thus, while generally we will not be filing CTA reports on behalf of our clients, we will be available to consult with our clients and answer any questions they may have about the legal requirements related to potential obligations under the CTA and the completion of CTA reports.

If you would like assistance from our law firm, including how the CTA may affect you, please do not hesitate to contact your Windels Marx relationship lawyer or one of the following members of our Corporate and Securities Practice Group: **Charles Damato**, **Christopher Dean**, **Benjamin Fink**, **Jonathan Gray**, **Tom Huszar**, **Gregory Krauss**, **Jonathan Kret**, **Michael Moriarty**, **Robert Rossi** or **Robert Schwartz**.

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