

The Corporate Transparency Act: Are You Ready?

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On January 1, 2024, new direct reporting requirements to the Financial Crimes Enforcement Network (“**FinCEN**”), a bureau of the United States Department of the Treasury, became effective – known as the Corporate Transparency Act (the “**CTA**”).

Who must file?

The CTA, and the regulations promulgated thereunder, apply to corporations, limited liability companies, limited partnerships and similar legal entities either formed in the United States (a “**Domestic Reporting Company**”) or formed outside the United States but registered to do business in the United States (a “**Foreign Reporting Company**”). Such entities must identify their natural person beneficial owners and “company applicants” (i.e. the person(s) responsible for the formation or registration of the entity), and disclose certain personal information with respect to each of them.

Persons and businesses covered under these new compliance obligations will be confronted with potentially difficult initial reporting and subsequent reporting requirements. Beneficial ownership information (“**BOI**”) will be reported directly to the federal government. Civil and criminal penalties may apply for non-compliance. Required BOI for each beneficial owner will include, amongst other things, full name, residential address, date of birth, and a photo page of a non-expired U.S. government ID (or, in absence, a foreign passport photo page).

When will filing obligations start?

For non-exempt Domestic Reporting Companies and Foreign Reporting Companies formed on and after January 1, 2024, an initial report must be filed within 90 days following corporate formation or registration. For non-exempt entities formed or registered prior to January 1, 2024, entities must file an initial report by January 1, 2025. After making an initial report, all entities will be required to file amended reports within 30 days after becoming aware that a previous filing was inaccurate or requires updating (for example, in connection with a change in beneficial ownership). Information disclosed to

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FinCEN will not be publicly available, but may be obtained by federal agencies engaged in national security, intelligence, or law enforcement activity, certain federal regulators, and certain state, local and tribal law enforcement agencies. Further, certain foreign officials, and certain financial institutions and banks subject to customer due diligence requirements, may also be granted access via submission of a request through a U.S. federal government agency.

Who is exempt from the new rules?

The intent of the CTA is to collect and compile BOI for legal entities whose ownership and management is not otherwise available. While the CTA provides 23 exemptions to the reporting requirements, most of the available exemptions are limited to regulated entities (e.g., banks and healthcare companies) or large companies with a substantial employee, revenue and operating presence in the United States.

Note that most Canadian issuers that conduct business in the U.S. typically do so through a structure that utilizes one or more U.S. subsidiaries. Under this structure, the parent itself typically does not conduct business in the United States and is not qualified to do business in the United States. Accordingly, under this most common structure, the parent would not be a Foreign Reporting Person and therefore would not be subject to the CTA directly. However, its U.S. subsidiaries would need to file if they are not themselves exempt.

For most Canadian issuers, the three key exemptions most likely to be relevant are (1) “securities reporting issuers,” (2) “large operating company” and (3) “subsidiary of certain exempt entities.”

Securities Reporting Issuer

A “Securities Reporting Issuer” is an entity that (i) has a class of securities registered under the U.S. Securities Exchange Act of 1934, as amended (the “34 Act”), and (ii) has a current reporting obligation under the 34 Act.

All Canadian issuers that file annual reports on forms 40-F, 20-F and 10-K, including all issuers cross-listed on Nasdaq, NYSE or NYSE American, will qualify as Securities Reporting Issuers. Issuers that are traded on the over-the-counter market in the U.S. (i.e. the OTCQX, OTCQB or OTC Pink) and rely upon an exemption from registration under the 34 Act will not qualify as a Securities Reporting Issuer.

Large Operating Company

A “Large Operating Company” is an entity that, in simplified form, has more than 20 full-time employees in the U.S., has gross revenues in excess of \$5 million in the U.S. and has a physical operating presence in the U.S.

In the typical cross-border structure described above, the Canadian parent would not have a physical presence in the U.S., so the top-tier U.S. subsidiary (if there are multiple

entities) would likely be the entity for which the analysis would be applicable.

Note that each portion of this test, other than revenue (which may be computed on a consolidated basis), is determined on a separate entity-by-entity basis. Accordingly, some U.S. subsidiaries of Canadian parent companies may be exempt under this test, while others may not be. For some companies, we anticipate that a reevaluation of their subsidiary structure might provide an opportunity to qualify for an exemption from the CTA.

Subsidiary of Certain Exempt Entities

A Subsidiary of Certain Exempt Entities is any entity that is “controlled or wholly owned, directly or indirectly, by one or more entities” that meet one of the other categories of exemptions under the CTA (although not the exemptions for money services businesses and certain pooled investment vehicles). Notable, however, that FinCEN declined to define “control” in determining the applicability of the subsidiary exemption (although appeared to suggest in its Final Rule that control through *majority* ownership may not be sufficient for this exemption to apply).

All Canadian issuers that are cross-listed in the U.S. will themselves be eligible for an exemption from the CTA reporting requirements. In addition, their direct and indirect wholly-owned subsidiaries will also be exempt. Less than majority-owned subsidiaries may also be exempt, depending on the circumstances. Other issuers with operations in the U.S. may also be eligible for an exemption, though careful analysis will likely be necessary.

Please refer to our long-form update on the CTA [HERE](#). Our attorneys are ready to assist with any questions you may have.