

## Corporate Transparency Act: Best Practices Part 2

The purpose of this Article is to provide practical guidance for senior executives and legal practitioners who are beginning to tackle the reporting requirements of the Corporate Transparency Act. This Article suggests provisions that can be incorporated in common organizational documents to lay the groundwork for going-forward compliance.

### Background

Effective as of January 1, 2024, the Corporate Transparency Act (the “CTA”) together with recently finalized regulations being implemented by the Financial Crimes Enforcement Network (“FinCEN”) require entities that are formed or registered to do business in the United States and that do not qualify for applicable exemptions (“Reporting Companies”) to submit a report declaring beneficial ownership information (a “BOI Report”) to FinCEN. BOI Reports are required to be filed with respect to each “Beneficial Owner.”

The CTA defines a Beneficial Owner as any natural person who directly or indirectly (i) exercises “substantial control” over a Reporting Company or (ii) owns or controls 25% or more of the ownership interests of a Reporting Company. Individuals with “substantial control” over a Reporting Company include managers and senior officers, such as a president, CEO, or CFO and persons who otherwise have substantial influence over important decisions made by the Reporting Company (which may be in the form of contractual rights).

### Addressing the Requirements of the CTA

In the BOI Report, the Reporting Company must provide information regarding each Beneficial Owner’s (i) full legal name, (ii) date of birth, (iii) current address, and (iv) unique identifying number from an acceptable identification document (e.g., driver’s license or passport), and must also submit a copy of such identification document. While much of this information would need to be provided to the Reporting Company from the Beneficial Owner, it is the Reporting Company that is nevertheless responsible for filing the BOI Report (and doing so by the applicable deadline) and is liable if any of this information is false.

To try and preempt the risk that reluctant Beneficial Owners simply refuse to provide the requisite information or provide inaccurate information, we recommend that certain protective language requiring Beneficial Owners to provide this information be included in (a) subscription agreements, operating agreements, shareholders’ agreements, or similar agreements that govern the rights and obligations of equityholders of a Reporting Company and/or (b) executive services agreements, employment agreements, appointment or offer

letters, or similar agreements that govern the services and responsibilities of senior officers to the Reporting Company. Ultimately, the substance of our recommended provisions is key, regardless of the form of document where these are incorporated.

### Suggested Provisions

The provisions we suggest incorporating into the above types of agreements include: (i) an acknowledgment by the member<sup>1</sup> that the applicable company is required to report to FinCEN certain beneficial ownership information regarding such member as a result of such member being deemed a “beneficial owner” pursuant to and within the meaning of the CTA, (ii) a covenant that the member provide all requested information to such company, including regarding such member’s individual direct and indirect owners, as well as any subsequent changes to such information, to permit the company to satisfy its obligations to FinCEN under the CTA in respect of beneficial ownership information, and (iii) a representation and warranty that any beneficial ownership information provided to the company by such member, is true, correct, and complete. We also recommend including in the language the option that the member can satisfy the foregoing obligations by providing to the Company the FinCEN Identifier<sup>2</sup> pertaining to such member or its individual direct or indirect owner who is deemed the beneficial owner under the CTA. In such case, there should be a corresponding acknowledgment that such member understands they would be responsible for updating FinCEN in the event of any changes to the personal information they had provided to FinCEN in connection with obtaining their identifier.

We appreciate the reluctance that parties may have to “reopen” already-existing executed agreements, particularly to place additional burden on individuals (and exposure to legal risk) where it did not previously exist and for which there is no clear consideration. We offer the above guidance so that business owners, investors, joint venture partners, and other deal team members from corporate clients and private funds can consider incorporating such provisions on a going-forward basis when they execute new transactional or organizational agreements. Seward & Kissel has prepared sample language to cover these concepts, that we are happy to share.

\*\*\*

For background on the Corporate Transparency Act, including regarding (i) the entities to which the regulations apply and applicable exemptions, (ii) further information on how Beneficial Owners are defined, and (iii) other reporting requirements and deadlines, please refer to our introductory article, [“\*FinCEN Reporting Requirements Under the Corporate Transparency Act: Guidance from the Business Transactions Group.\*”](#)

---

<sup>1</sup> For ease, we refer to “member” herein (such as in the context of operating agreements), but the language can be conformed in respect of a subscriber, stockholder, employee, or executive, as applicable, and for use in subscription agreements, shareholders’ agreements, services agreements, employment agreements, etc., as the case may be.

<sup>2</sup> A “FinCEN identifier” is a unique identifying number that FinCEN will issue to an individual upon request after the individual provides to FinCEN their name, date of birth, address, unique identifying number and issuing jurisdiction from an acceptable identification document, and an image of the identification document – the same information the Reporting Company would have needed to submit about such individual as its Beneficial Owner.

For recommendations on other policies and procedures your organization may wish to implement in respect of the CTA, please refer to our article “[Corporate Transparency Act: Best Practices Part 1.](#)”

Please reach out to your Seward & Kissel relationship attorney or a member of the S&K Corporate Transparency Act Committee if you would like more information on the CTA. Seward & Kissel can help you navigate this new law and its compliance obligations. We will share more information on the CTA and reporting requirements as these become available.

**\*Update\***

On March 1, 2024, a federal district court in the Northern District of Alabama<sup>3</sup>, entered a final declaratory judgment, concluding that the Corporate Transparency Act exceeds the Constitution’s limits on Congress’s power and enjoining the Department of the Treasury and FinCEN from enforcing the Corporate Transparency Act against the plaintiffs in the case. The Justice Department, on behalf of the Department of the Treasury, filed a Notice of Appeal on March 11, 2024 and issued a public release stating that while the litigation is ongoing, FinCEN will continue to implement the Corporate Transparency Act as required by Congress, and would comply with the court’s order solely with respect to the particular individuals and entities subject to the court’s injunction. Otherwise, FinCEN’s continuing guidance is that reporting companies are still required to comply with the law and file beneficial ownership reports as provided in FinCEN’s regulations.

---

<sup>3</sup> *National Small Business United v. Yellen*, No. 5:22-cv-01448 (N.D. Ala.)