CLIENT ALERT - CERTAIN CANADIAN CORPORATIONS MAY BE SUBJECT TO US CORPORATE TRANSPARENCY ACT REPORTING REQUIREMENTS

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Introduction

Reporting obligations under the United States Corporate Transparency Act (the “CTA” or the “Act”) will take effect on January 1, 2024. The Act, which is intended to help prevent bad actors from laundering or hiding money and other assets in the United States, will require certain business entities (each, a “Reporting Company”) to disclose prescribed information (“beneficial ownership information” or “BOI”) concerning their beneficial owners (each, a “Beneficial Owner”) to the Financial Crimes Enforcement Network (“FinCEN”) on a non-public basis. Unfortunately, although aimed at identifying drug traffickers, fraudsters and corrupt oligarchs, the Act casts a broad net and certain Canadian companies will be subject to the BOI filing requirements.

Background: The U.S. Corporate Transparency Act

The CTA was signed into law in 2021, as part of the United States Anti-Money Laundering Act of 2020. The CTA is intended to aid in the detection of illicit shell and front companies that are used to launder money or hide assets.

Reporting Companies

FinCEN, a bureau of the United States Department of the Treasury, issued a final rule (1010.380 in title 31 of the Code of Federal Regulations, the “Reporting Rule”) implementing the BOI reporting provisions on September 29, 2022. The legislation distinguishes between U.S. domestic and foreign Reporting Companies. The term “domestic reporting company” is defined under the Reporting Rule to mean “any entity that is:

A. A corporation;
B. A limited liability company; or
C. Created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe.”
FinCEN has observed that, as so defined, domestic Reporting Companies would be expected to include, in addition to corporations and limited liability companies, limited liability partnerships, limited liability limited partnerships, business trusts, and most limited partnerships, since such entities are generally created by a filing with a secretary of state or similar office, but would likely exclude most trusts which are typically not created by filing such formation documents with state authorities.

The term “foreign reporting company” is defined to mean “any entity that is:

A. A corporation, limited liability company, or other entity;
B. Formed under the law of a foreign country; and
C. Registered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe.”

Beneficial Owners

The CTA requires a Reporting Company to identify, and file beneficial ownership information in respect of, its Beneficial Owners, including those individuals who directly or indirectly own over 25 percent of the Reporting Company’s outstanding equity interests, as well as those individuals who exercise substantial control over it.

In Beneficial Ownership Information Reporting Requirements, a Small Entity Compliance Guide, FinCEN observed, “An individual exercises substantial control over a reporting company if the individual meets any of four general criteria: (1) the individual is a senior officer; (2) the individual has authority to appoint or remove certain officers or a majority of directors of the reporting company; (3) the individual is an important decision-maker; or (4) the individual has any other form of substantial control over the reporting company.” The expansive definition of “substantial control” contained in the Reporting Rule provides a non-exclusive list of decisions which are considered important to a Reporting Company.

In the Small Entity Compliance Guide, FinCEN states that a director of a Reporting Company would be deemed to exercise substantial control if the director “makes important decisions on the reporting company’s behalf.” In other words, simply being a member of the Reporting Company’s board of directors does not necessarily cloak the director with the mantle of substantial control.

Company Applicants

A Reporting Company that is created on or after January 1, 2024, will also be required to identify and provide prescribed disclosure in its BOI report in respect of up to two company applicants. The legislation differentiates between two classes of company applicant, and will require a Reporting Company to name and provide particulars for: (a) the individual who directly filed the document that created the Reporting Company or, in the case of a foreign Reporting Company, that first registers it in the United States; and (b) the individual
who is primarily responsible for directing or controlling any such filing (if more than one individual is involved).

**No CTA Exemption for Canadian Public Companies Relying on Exchange Act Rule 12g3-2(b) for Exemption from Exchange Act Registration**

Consistent with the CTA, the Reporting Rule lists 23 categories of exempt entities, including:

- an issuer with a class of securities registered under section 12 of the United States Securities Exchange Act of 1934, as amended (the “Exchange Act”), or that is subject to periodic reporting obligations under section 15(d) of the Exchange Act (each, an “SEC Reporting Company”), and
- any entity (an “Exempt Subsidiary”) whose ownership interests are controlled or wholly owned, directly or indirectly, by an SEC Reporting Company or certain other exempt entities.

Thus, Canadian public companies that are listed on a U.S. national securities exchange (such as the New York Stock Exchange, NYSE American or Nasdaq), or that have registered a class of securities under section 12(g) of the Exchange Act (and are thereby required to file annual reports on Form 20-F, Form 40-F or Form 10-K), will be exempt from the BOI reporting requirements, as will any Canadian public companies that have not registered a class of securities under the Exchange Act but remain subject to reporting obligations thereunder as a result of having completed a securities offering that has been registered under the United States Securities Act of 1933, as amended.

In the adopting release for the Reporting Rule, FinCEN observed that extending the Exempt Subsidiary exemption to majority-owned subsidiaries - as had been proposed by certain commentators on the draft Reporting Rule - was not supported by the language of the relevant provisions of the Act.

Notably, Canadian public companies that rely on the exemption from registration under the Exchange Act provided by Rule 12g3-2(b) thereunder will **not** be exempt from the BOI reporting requirements if they are or become registered to carry on business in any state or tribal jurisdiction, unless another exemption from the definition of “reporting company” is available (e.g., the exemption for large operating companies provided by 1010.380(c)(2)(xxi)). Similarly, any U.S. subsidiary of such Canadian public companies will be a domestic Reporting Company absent another available exemption provided for under the Reporting Rule.

**Contents of BOI Reports**

Reporting Companies will be required to file BOI reports electronically through FinCEN’s website. It is anticipated that a secure portal, the Beneficial Ownership Secure System (BOSS), will be launched to facilitate such filings. The initial report will be required to include the following information:

(a) For the Reporting Company:
(i) Full legal name;

(ii) Any trade name or “doing business as” name;

(iii) Current address, consisting of:

(A) If the Reporting Company has a principal place of business in the United States, the street address thereof; and

(B) In all other cases, the street address of the primary location in the United States where the Reporting Company conducts business;

(iv) The state, tribal, or foreign jurisdiction of formation of the Reporting Company;

(v) For a foreign Reporting Company, the state or tribal jurisdiction where the company first registers; and

(vi) The United States Internal Revenue Service Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the Reporting Company, or where a foreign Reporting Company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction;

(b) For every Beneficial Owner and every company applicant:

(i) The individual's full legal name;

(ii) The individual's date of birth;

(iii) Current address, consisting of:

(A) In the case of a company applicant who forms or registers an entity in the course of their business, the street address of such business; or

(B) In any other case, the individual's residential street address;

(iv) A unique identifying number and the issuing jurisdiction of one of several prescribed identification documents issued in the United States (including a passport or driver's license), or, if none of those are available, a non-U.S. passport; and

(v) An image of the identification document referred to in paragraph (b)(iv).

The Reporting Rule permits individuals and Reporting Companies to voluntarily apply to FinCEN for a unique identifying number (referred to in the Reporting Rule as a “FinCEN Identifier”). In certain circumstances, a
Reporting Company will be able to meet its reporting obligations in respect of a Beneficial Owner or company applicant by including their FinCEN Identifier in the BOI report.

**Due Dates**

Reporting companies created before January 1, 2024, will have to file their initial reports no later than January 1, 2025. Reporting Companies created after January 1, 2024, will only have 30 days after receiving notice of their creation or registration to file their initial BOI report.

If there is any change to the information included in a BOI report, other than information relating to a company applicant, the Reporting Company will be required to file an updated report no later than 30 days after the date of the change.

**Penalties for Noncompliance**

Willful failure to comply with the BOI reporting requirements, or any attempt to provide false or fraudulent information, may result in a civil or criminal penalties, including civil penalties of up to US$500 for each day that the violation continues, or criminal penalties including imprisonment for up to two years and/or a fine of up to US$10,000. FinCEN has cautioned that senior officers of an entity that fails to file a required BOI report may be held accountable.

[1] BOI - Small Entity Compliance Guide

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**A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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