

## **CORPORATE TRANSPARENCY ACT - IMPLEMENTING NEW REQUIREMENTS ON U.S. REAL ESTATE BUSINESSES**

### **REAL ESTATE INVESTMENT TRUSTS AND OTHER PROPERTY HOLDING ARRANGEMENTS WITHIN SCOPE**

As of January 1, 2024, it is estimated that more than 32 million legal entities are now required to file certain information with the U.S. Government about the persons that own and control them.<sup>1</sup> The requirement is part of a broader effort to make it easier for law enforcement to investigate illicit activities and associated money laundering through the use of companies and other legal structures.

Implementation of the rule may be relatively straightforward in some circumstances, but not in others, including situations involving legal structures regularly used to hold real property.

### **BE GENERAL BACKGROUND: ENTITIES SUBJECT TO REPORTING**

The reporting requirements of the Corporate Transparency Act and its corresponding rules (the "**Act**") apply to any entity that, through filing a document with the secretary of state or similar office, is either formed in the United States, or registered to do business in the United States and which does not qualify for an exemption from such requirements (such non-exempt entity, a "**Reporting Company**"). Both domestic and foreign companies doing business in the U.S. are generally subject to the Act and, as such, may need to file. The Act provides for 23 exemptions from the Act's reporting obligations, including entities which are public companies, large operating companies, banks, securities brokers or dealers, insurance companies, registered investment companies and advisers and pooled

<sup>1</sup> Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59549 (Sept. 30, 2022). This alerter replaces our alerter dated December 2, 2022.

investment vehicles, among others. Based on FinCEN's estimates, only 11% of entities registered or operating in the U.S. will qualify for an exemption.<sup>2</sup>

For most Reporting Companies, the information will be relatively simple to provide, but determining how the rule applies to particular entities and who must be reported as a Beneficial Owner (defined below) may be complicated in some situations. In addition, the requirement to update changes in beneficial ownership may create ongoing compliance difficulties. Businesses with abundant entities or complex structures may face greater compliance challenges under the Act. While the "subsidiary exemption" may apply for some subsidiaries, subsidiaries of exempted entities may nonetheless have filing obligations.

## REPORTING OBLIGATIONS

Reporting Companies are required to submit a Beneficial Ownership Information Report ("BOIR") to the Financial Crimes Enforcement Network ("FinCEN") which is the bureau of the U.S. Department of Treasury responsible for collecting, analyzing, and disseminating financial intelligence to support law enforcement.

Each Reporting Company will be required to report its full legal name (including names under which it does business), its business street address, jurisdiction of formation and taxpayer identification number.

Each Reporting Company also needs to identify and report information concerning its "Beneficial Owners", such as their full legal name, date of birth, residential address, and their identification number from an acceptable identification document (e.g., a driver's license or passport) together with a scanned copy of such document.

Entities formed or registered after January 1, 2024, will be required to file similar information about the individual(s) responsible for forming or registering the entity with a state authority; FinCEN defines these persons as the "company applicant(s)".<sup>3</sup>

## IDENTIFYING BENEFICIAL OWNERS

Beneficial Owners are those *individuals* who ultimately (directly or indirectly) exercise substantial control over the Reporting Company or own or control 25% or more of the ownership interests in the Reporting Company.

An individual is deemed to exercise "substantial control" through various functions generally corresponding to level of control they exert over the Reporting Company.<sup>4</sup> Note, however, property managers and those that exercise day-to-day managerial decisions, without additional control rights, would generally not be considered to exercise substantial control.<sup>5</sup> Although most trusts generally will not fit within the

<sup>2</sup> Id. at 59568. FinCEN estimates that approximately 4,024,577 entities will be exempt out of a total 36,581,506 entities registered or operating in the U.S.

<sup>3</sup> The company applicant is both (i) the individual who directly files the document that creates the Reporting Company or registers the company to do business in the U.S. and (ii) the individual who is primarily responsible for directing or controlling such filing. Two different people may be identified as a company applicant if the same person does not perform both roles; See 31 CFR 1010.380(e).

<sup>4</sup> The following constitute the exercise of substantial control: (i) serving as a senior officer of the entity, (ii) having the authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body), (iii) directing, determining or having substantial influence over important decisions made by the entity, or (iv) having any other form of substantial control over the entity. FinCEN acknowledges that not all members of a board of directors and not all officers of a company necessarily exercise substantial control for the purpose of CTA-reporting compliance.

<sup>5</sup> Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69934 (Dec. 8, 2021).

definition of a Reporting Company, trustees of trusts that have an ownership interest in, or otherwise control, Reporting Companies may need to be reported as beneficial owners of such Reporting Companies.

The aspect of owning or controlling at least 25% of the ownership interests in a Reporting Company is meant to capture a variety of ownership interests, regardless of form.<sup>6</sup> For Reporting Companies that issue capital or profit interests, the ownership interests are the capital and profit interests in the entity, calculated as a percentage of the total outstanding capital and profit interests in such entity.<sup>7</sup> For Reporting Companies that issue shares of stock, both voting and non-voting shares will factor into potentially complicated determinations of who is reported as a Beneficial Owner.<sup>8</sup>

## DEADLINES

Each Reporting Company existing prior to January 1, 2024 has until January 1, 2025 to file its report with FinCEN.

Each Reporting Company formed or registered in 2024, will have 90 days after the date such company receives notice (actual or constructive) that such company has been formed or registered to file its report with FinCEN. Reporting Companies formed in 2025 and beyond will have 30 days from establishment to comply with the reporting requirement.

In addition, if an in-scope entity's circumstances change so that it is no longer eligible for an exemption, it will be required to submit a BOI report to FinCEN within 30 days after the change in its status.

Furthermore, Reporting Companies are required to update its BOIR in the case of changes relating to the information a company has reported within 30 days after the change. Similarly, if a mistake exists on a submitted BOIR, a Reporting Company has 30 days following the date it knew or should have known of the mistake to file a corrected BOIR.

## NOTABLE EXEMPTIONS

Large Operating Company - Entities with more than 20 full-time U.S. employees, that have an operating presence at a physical office in the United States and that have filed a U.S. federal income tax return (or informational return) in the previous year showing in excess of \$5 million gross receipts or sales (each, a "**Large Operating Company**") can qualify for an exemption from the Act.<sup>9</sup> Note that for purposes of meeting the \$5 million gross receipts threshold, entities owned by such entity and those entities through which such entity operates are included in such calculation. The employee-related threshold, however, must be satisfied by a single legal entity, and employees cannot be aggregated with employees of other entities.

Securities Related Exemptions - There are several securities-related exemptions, including (a) issuers of securities that either (i) issue a class of securities registered

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<sup>6</sup> Debt instruments could be deemed to be ownership interests if such instruments enable the holder to exercise rights akin to those accompanied with equity (e.g., voting). As such, convertible debt could be considered ownership interests. Options or similar interests are to be treated as exercised.

<sup>7</sup> 31 CFR 1010.380(d)(2)(iii)(B).

<sup>8</sup> 31 CFR 1010.380(d)(2)(iii)(C).

<sup>9</sup> 31 CFR 1010.380(c)(2)(xxi).

under section 12 of the Securities Exchange Act of 1934 (the "**1934 Act**") or (ii) are required to file under section 15(d) of the 1934 Act (such issuer of securities, the "**Securities Reporting Issuer**") (e.g., public companies),<sup>10</sup> (b) investment companies and advisers that are registered with the Securities and Exchange Commission,<sup>11</sup> (c) venture capital fund advisers<sup>12</sup> and (d) pooled investment vehicles.<sup>13</sup> For a pooled investment vehicle to be exempt, it must be (i) operated by either a bank, domestic credit union, broker or dealer, registered investment company or adviser, or venture capital fund adviser, and (ii) either (x) an investment company as defined under the Investment Company Act of 1940 or

(y) would qualify as an investment company pursuant to such section but for an exclusion under 3(c)(1) or (3)(c)(7) of the Investment Company Act of 1940 and is identified by the applicable investment adviser in Form ADV.<sup>14</sup>

### *Subsidiary Exemption*

The subsidiary exemption applies to when all of the ownership interests of an in-scope legal entity are wholly owned or entirely controlled by one or more entities that are exempt under a specified subset of CTA exemptions.<sup>15</sup> For example, a legal entity that is wholly owned by an entity that qualifies for the CTA's large operating company exemption would qualify for the subsidiary exemption. Recent FinCEN guidance on this exemption clarified that a subsidiary would only qualify if its ownership interests are "fully, 100 percent owned or controlled by an exempt entity," reiterating that this criteria can be met through either ownership of ownership interests or control of ownership interests. A determination as to whether an entity's ownership interests are wholly owned or entirely controlled by one or more entities that qualify for one or more specified exemptions generally will involve a fact-specific inquiry and will need to be made on a case-by-case basis.

The subset of exemptions that permit reliance on the subsidiary exemption does not include the following exempt categories:

- money services businesses;
- pooled investment vehicles;
- entity assisting a tax-exempt entity; and
- inactive entities.

## **UPDATED REPORTS**

Updated reports need to be filed for "any change with respect to any information previously submitted to FinCEN concerning the Reporting Company or the beneficial owners of the Reporting Company."<sup>16</sup> If an entity begins to meet the criteria for an exemption, it must file a report indicating as such. In contrast, a

<sup>10</sup> 31 CFR 1010.380(c)(2)(i).

<sup>11</sup> 31 CFR 1010.380(c)(2)(x).

<sup>12</sup> 31 CFR 1010.380(c)(2)(xi).

<sup>13</sup> 31 CFR 1010.380(c)(2)(xviii).

<sup>14</sup> 15 U.S.C. 80a-3(c)(1) provides that the pooled investment vehicle has no more than 100 beneficial owners. 15 U.S.C. 80a-3(c)(7) is limited to investors that are qualified purchasers (an individual is a qualified purchaser if they own \$5 million or more in investments; \$25 million for entities).

<sup>15</sup> 31 CFR 1010.380(c)(2)(xxii). "Ownership interests" for purposes of the CTA is broadly defined to include non-voting shares as well as any instruments that are convertible into, or exercisable for, any equity, stock or similar instrument. "Control" over the ownership interests of a legal entity may be established pursuant to a contract, arrangement, understanding, relationship, or otherwise.

<sup>16</sup> Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59573 (Sept. 30, 2022).

Reporting Company does not need to file an updated report in connection with its termination or dissolution.

## **USE OF FINCEN IDENTIFIERS**

In addition, if an in-scope entity's circumstances change so that it is no longer eligible for an exemption, it will be required to submit a BOI report to FinCEN within 30 days after the change in its status.

FinCEN provides an option for persons to obtain a FinCEN Identifier ("FinCEN ID"), which is a unique identification number that can be used to identify the individual (and such person's personal information) in lieu of having to re-enter such person's information. The use of the FinCEN ID makes certain filings and any amendment thereof more efficient and can protect the privacy of individuals since they are providing the information one time through one channel, rather than through multiple channels and multiple occasions.

To apply for a FinCEN ID, individuals submit the required personal information together with an image of their identification directly to FinCEN via an online platform. A reporting company may also seek a FinCEN ID at the time it submits a report to FinCEN. It should be noted that after a person receives a FinCEN ID, they bear responsibility for reporting any changes in the information they provided to FinCEN as part of their application within 30 days after the change.

## **PENALTIES FOR NONCOMPLIANCE**

Reporting companies are directly liable for failures to comply and individuals who cause such failures may also be liable. This means that an individual who provides false information or refused to provide information necessary for a reporting company's filing may be liable under the CTA. Willful breach of the Act's reporting requirements can result in civil or criminal actions. A civil penalty of \$500 per day against the relevant entity or individual can be assessed for each day that such violation continues. Criminal penalties for companies and individuals and imprisonment for individuals are possible when there is evidence of knowing or intentional conduct. In addition to direct violation of the CTA, criminal liability can also attach under several other Federal criminal statutes. Based on its public statements, we do not believe that it is likely that FinCEN will take enforcement actions against a legal entity that makes an inadvertent mistake in complying with the CTA, although it may make an investigation for them to reach that conclusion. We expect that enforcement will be mostly in the context of those seeking to subvert the purposes of the CTA to facilitate or engage in illicit activity, or where prosecutors believe there is criminal activity, and the CTA is the easiest way to reach the perceived perpetrators.

## **SECURITY AND PRIVACY**

The information collected under the Act will be stored in a non-public database, encrypted with data security at the highest information security protection level under the Federal Information Security Management Act. Disclosure of information collected under the Act will be limited to various functions of state and federal governments, as well as financial institutions who have obtained consent for such access from Reporting Companies that are their account holders, via processes and

under restrictions outlined in a separate rulemaking prior to the implementation of the Act.<sup>17</sup>

## **LEGAL ENTITIES FOR REAL ESTATE INVESTMENT IN FOCUS:**

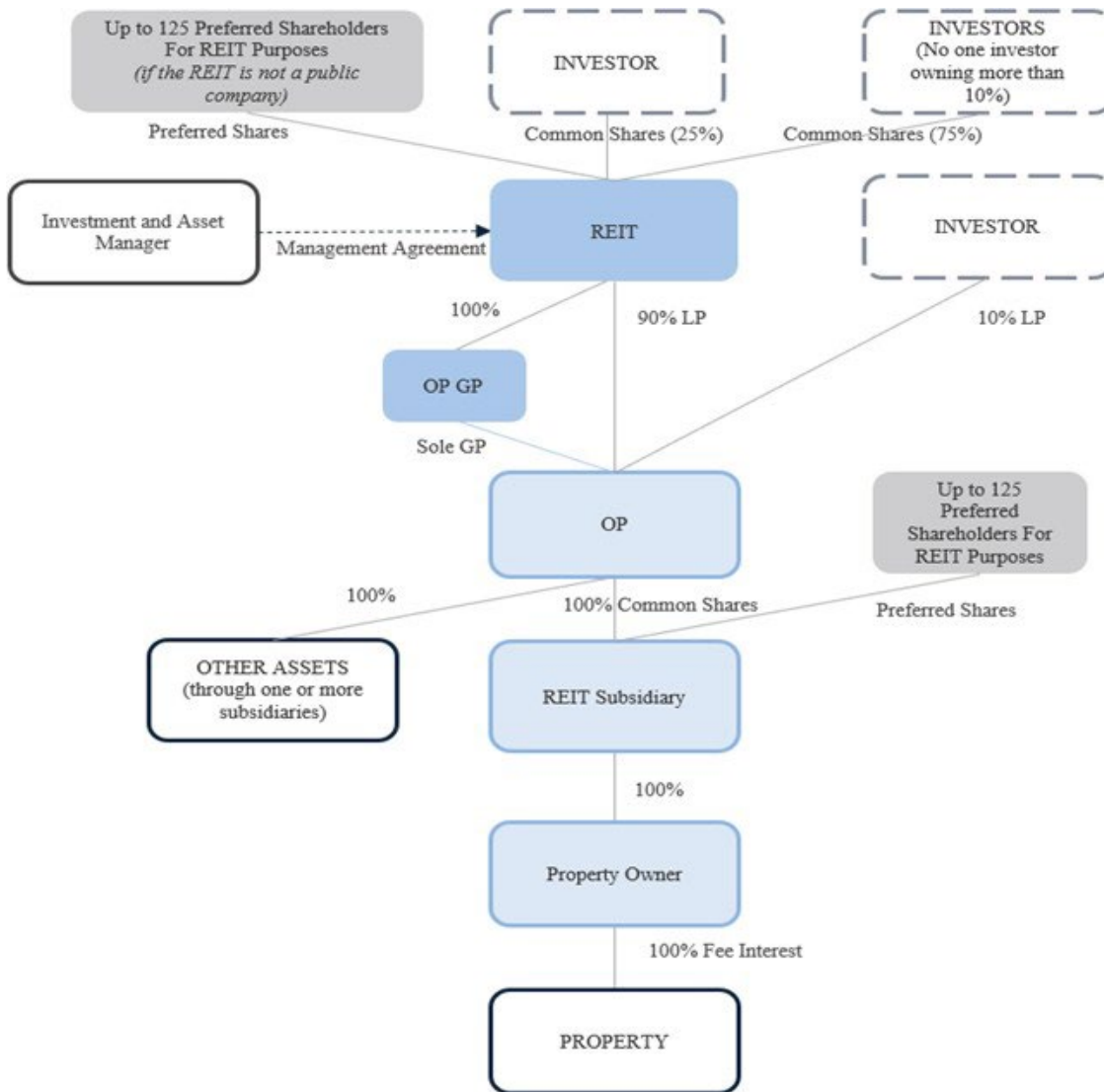
Commercial real estate in the U.S. is often owned through one or more limited liability companies or limited partnerships as well as other legal entities such as corporations, trusts or general partnerships. Generally, each real property asset is held in its own special purpose entity. For each asset, there could be any number of investors investing through one or more intermediate entities. Over a large portfolio of real properties, the multi-layered organizational structure can become complex and make analysis of an entity's obligations under the Act challenging. The analysis is further complicated when additional entities exist in an organizational structure to achieve specific objectives, such as holding real property through a real estate investment trust ("**REIT**").

Below is illustrative example of a particular multi-tiered structure involving a REIT and its subsidiary operating partnership ("OP") which is commonly referred to as an "UPREIT.". The following analysis focuses on application of the Act to the REIT and its subsidiaries (including the operating partnership) and does not include an analysis with respect to the investors in the REIT and/or the operating partnership.

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<sup>17</sup> See Final Rule for Beneficial Ownership Information Access and Safeguards, 88 FR 88808, Dec. 22, 2023, codified at 31 CFR 1010.955.

**EXAMPLE: APPLICATION OF THE ACT IN THE REAL ESTATE CONTEXT**



**STRUCTURE OF COMPANY:**

The structure in this example is a simple UPREIT which consists of the REIT, as the holder of 90% of the limited partnership interests of, and indirectly the general partner (the "GP") of, its OP, which holds all the assets of the REIT.

In our example, the REIT has multiple investors, including one that holds 25% of the common shares of the REIT and other investors, that collectively hold the balance of the common shares of the REIT, with no such investor in that group owning more than 10% of the common shares of the REIT. To meet the statutory

requirement for the REIT to have at least 100 shareholders, the REIT issued preferred shares to 125 shareholders.

The REIT is controlled by a board of directors (the "Board") appointed by one common shareholder who holds 5% of the REIT's common shares and advised by an external asset manager (the "Manager") pursuant to a management agreement.

The OP owns certain properties indirectly through a subsidiary REIT (the "Subsidiary REIT") and the OP owns all the common shares of the Subsidiary REIT. Similar to the REIT, the Subsidiary REIT issued preferred shares to 125 shareholders. The Subsidiary REIT in turn wholly owns a limited liability company (the "Property Owner") which owns a single property.

For the purposes of this example, we have assumed that all of the above entities were formed prior to January 1, 2024.

## **ANALYSIS:**

### ***Which Entities in this Structure are Reporting Companies?***

The first question to analyze is whether the REIT and its subsidiaries are Reporting Companies. In other words, are they subject to the Act and, if so, is there an exemption that would apply.<sup>18</sup>

We have assumed that the REIT, the OP and their respective subsidiaries shown on the chart are U.S. entities and thus they are all potentially subject to the Act unless they qualify for one of the exemptions from constituting a Reporting Company.

#### *The REIT:*

Considering the REIT first, if the REIT is a SEC-registered public company with shares listed on a national securities exchange, it would qualify as a Securities Reporting Issuer and would be exempt from the Act.<sup>19</sup>

If the REIT is not eligible for an exemption as a Securities Reporting Issuer, it may still qualify for other exemptions. For example, if the Manager is a registered investment adviser, and the REIT either (i) qualifies as an investment company under the Investment Company Act of 1940 or (ii) would qualify as an investment company but for an exclusion pursuant to Section 3(c)(1) or 3(c)(7) thereof (and it is identified by the Manager in Form ADV), then it would be exempt from the Act as a pooled investment vehicle.<sup>20</sup>

Also, if the REIT qualifies as a Large Operating Company then the REIT will be exempt from the Act.

For the purposes of our example, we will assume that the REIT satisfied one of the above exemptions other than a pooled investment vehicle (and, as such, does not constitute a Reporting Company).<sup>21</sup> Note that even though in our example the REIT has an investor which owns 25% of the common shares of the REIT, because the

<sup>18</sup> As we noted previously, this example focuses on the REIT and its subsidiaries. It may very well be the case that one or more of the REIT's investors are Reporting Companies subject to the Act.

<sup>19</sup> See 31 CFR 1010.380(c)(2)(i).

<sup>20</sup> See Notable Exemptions, *supra*. See also 31 CFR 1010.380(c)(

<sup>21</sup> We make this assumption because subsidiaries of pooled investment vehicles do not qualify for the Subsidiary Exemption.



REIT is exempt, the REIT need not disclose the identity of such investor or make any other disclosure pursuant to the Act.

*The GP:*

The GP would not be considered a Reporting Company under the Act because it is a wholly owned subsidiary of the REIT which is an exempt entity of the permitted exemption types within the Subsidiary Exemption.<sup>22</sup>

*The OP:*

In contrast with the GP, the OP is not wholly owned by the REIT as there are other investors holding a 10 percent stake in the OP. Depending on the facts and circumstances, however, an exemption may still apply.

First, if each of the other investors are also exempt from the Act and of the permitted exemption types within the Subsidiary Exemption (e.g., not a pooled investment vehicle), the Subsidiary Exemption may apply. For purposes of this example, however, we will assume that one or more of the investors in the OP (the "**OP Investor**") is not exempt from the Act or is pooled investment vehicle. As such, the OP must separately qualify for an exemption under the Act.

In our example, it does not appear that the OP would qualify for many of the exemptions that may apply to the REIT. The OP is not a public company and would not otherwise qualify as a Securities Reporting Issuer. Nor is the OP directly operated or advised by the Manager as was the case for the REIT, or another registered investment advisory so it would not qualify for the exemption applicable to pooled investment vehicles.

Nonetheless, based upon the specific facts, there may be another exemption that would apply to the OP. For example, if the OP could qualify as a Large Operating Company, it would be exempt. Note that if it is the OP's first year of operation, the OP will not have filed a U.S. federal income tax return (or informational return) in the previous year, meaning this exemption would not be available in its initial operating year.

In addition, depending on the facts and circumstances with respect to control over the ownership interests of the OP, there may be an argument that the ownership interests of the OP may be sufficiently controlled by the REIT to enable the Subsidiary Exemption to still apply.

*The Subsidiary REIT:*

As discussed above, all REITs are required to have at least 100 shareholders, meaning that in the Subsidiary REIT is not wholly owned by the OP. In order to satisfy this requirement, the Subsidiary REIT issued preferred shares to 125 shareholders. These shareholders are typically individuals and would therefore not be exempt entities. This means that, regardless of whether or not the OP constitutes a Reporting Company under the Act, the Subsidiary REIT may not be able to rely on the Subsidiary Exemption. A separate analysis would need to be performed as to whether or not the Subsidiary REIT is subject to the Act.

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<sup>22</sup> See 31 CFR 1010.380(c)(2)(xxii).

As was the case with respect to the OP, it does not appear at first glance that the Subsidiary REIT would qualify for many of the exemptions that may apply to the REIT. The Subsidiary REIT is not a public company and would not otherwise qualify as Securities Reporting Issuer. In addition, in our example the Subsidiary REIT is not directly operated or advised by a registered investment advisor, as was the case for the REIT, so it would not qualify for the exemption that may be applicable to pooled investment vehicles operated or managed by exempt registered investment advisers or the like.

Additionally, since in this example the Subsidiary REIT owns a single asset, there are likely many situations in which it would not have the requisite operating personnel (more than 20 full-time employees) nor the gross receipts or sales (i.e., \$5 million as reflected on its U.S. tax return (or informational return) necessary to qualify as a Large Operating Company.

However, absent any contrary guidance from FinCEN or any unique facts for a Subsidiary REIT we think there is a reasonable position that the ownership interest of the Subsidiary REIT may be sufficiently controlled indirectly by the REIT (or by the OP, if it is also exempt) to enable the subsidiary exemption to still apply here, though this would need to be analyzed in each specific transaction.

Thus, although it is possible that the Subsidiary REIT may be exempt it is also possible, depending on the facts and circumstances that the Subsidiary REIT would constitute a Reporting Company and be subject to the Act.

*The Property Owner:*

If the Subsidiary REIT is exempt from the Act, the Property Owner would also be exempt as a wholly-owned subsidiary thereof under the Subsidiary Exemption.

If the Subsidiary REIT is not exempt from the Act, the Property Owner would also not qualify for an exemption for the same reasons that precluded the Subsidiary REIT from qualifying for an exemption.

## **WHAT NEEDS TO BE REPORTED?**

*Initial Report:*

Per the above discussion, if the Property Owner and the Subsidiary REIT constitute Reporting Companies, they are required to file reports with FinCEN on or prior to January 1, 2025, containing the information set forth in the section entitled "Reporting Obligations" above. If the OP is a Reporting Company, it would also have to file such a report before such date.

In addition to including requisite information about the Reporting Company itself, each report will need to include personal information for all controlling individual beneficial owners and all direct and indirect individual beneficial owners of 25% or more of the applicable Reporting Company. However, with respect to any individuals who own or control solely through one or more exempt legal entities, the Reporting Company may exercise an option to report the exempt entity or entities

rather than the individual beneficial owner under a "special rule" contained in the Act.<sup>23</sup>

For both the Subsidiary REIT and the Property Owner in our above example, if the option under the "special rule" is not applicable or is not used, this means that their respective reports will need to list all ultimate beneficial owners exercising substantial control over such Reporting Company and all individuals that own or control 25% or more of such Reporting Company. In our example, while the individuals that exercise substantial control depends upon the facts and circumstances, there are no individuals that have a 25% or more ownership interest in the Subsidiary REIT or the Property Owner. Even when an individual investor holds any 25 percent interest in a publicly-traded REIT, that individual's interest in the Subsidiary REIT and the Property Owner would be less than 25 percent by virtue of the interests of other investors in the intermediary entities over the Property Owner.<sup>24</sup>

If the special rule applies and the Subsidiary REIT or the Property Owner exercises elects to avail itself of the same, then the Subsidiary REIT or the Property Owner, as applicable, would need to report the exempt entity or entities through which the individual has such ownership interest.

#### *Potential Use of FinCEN ID Numbers*

The CTA statute requires reporting companies to submit to FinCEN either 1) each beneficial owner and each individual company applicant's (who files an application to form or register the entity in the state) personal information, or 2) each beneficial owner or individual company applicant's FinCEN ID number.<sup>25</sup> If any of these individuals did not obtain a FinCEN ID number, that person is required to submit their 1) full legal name, 2) date of birth, 3) current residential or business street address, and 4) a unique identifying number from an acceptable identification document (e.g., a passport).<sup>26</sup> In summary, FinCEN's final Reporting Rule allows those beneficial owners or company applicants with FinCEN ID numbers to report their number in place of their otherwise required personal information on the BOIR.<sup>27</sup>

#### *Updated Report*

All of the entities that constitute Reporting Companies, will need to file an updated report with FinCEN within 30 days after certain changes in beneficial ownership or certain other changes or within 30 days after receipt of actual or constructive notice of a mistake.

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<sup>23</sup> See 31 CFR 1010.380(B)((2)9i) and 87 Fed. Reg. 59522, which notes "the final rule makes the use of this special rule optional, rather than mandatory, using "may" instead of "shall." A Reporting Company would therefore have the option to provide information about individuals who are beneficial owners of the Reporting Company by virtue of their interests in the exempt entity, rather than providing information about the exempt entity itself. This enables an exempt entity to avoid being identified, a concern expressed by a commenter, and instead provide information about a beneficial owner directly if the Reporting Company wishes to do so."

<sup>24</sup> Reminder: In this example all of the entities are formed prior to January 1, 2024, which results in a January 1, 2025, filing deadline. If an entity were formed on or after that date, in 2024 the filing by that entity with FinCEN would be due within 90 days. If the creation were in 2025 and beyond, the deadline would be 30 days after the entity's registration. Also Note, however, if an individual holds an aggregated 25% or more of the ownership interests in a Reporting Company through multiple intermediate entities, it would need to be disclosed as a beneficial owner.

<sup>25</sup> 87 Fed. Reg. 59507; See also 31 U.S.C. 5336(b)(2) (explaining that these types of information should be readily accessible to reporting companies and not unduly burdensome to submit to FinCEN).

<sup>26</sup> 87 Fed. Reg. 59507, 59590-91 (FinCEN's stated goal is to incentivize individual beneficial owners who perceive less risk in submitting personal identifiable information to FinCEN directly than doing so through one or more reporting companies and increase administrative efficiency).

<sup>27</sup> See FinCEN FAQ M.2, [https://www.fincen.gov/boi-faqs#M\\_2](https://www.fincen.gov/boi-faqs#M_2).

As we previously mentioned, if at any time any exempt entities cease to be exempt, this would trigger filing obligations for such entity within 30 days thereafter, and if any subsidiaries thereof were exempt because of such specified entity's exemption, they too would need to file.

## **CONCLUSION:**

Even in cases where an entity is exempt under the Act (for example, because it is a public company or a fund managed by a registered investment adviser), subsidiaries of such entity need to be separately analyzed under the Act and may, perhaps unexpectedly, be subject to the requirements thereof.

While such obligations on such subsidiaries might not require reporting of information about the ultimate investors of an exempt entity, careful analysis needs to be carried out to avoid any inadvertent non-compliance.

At the time that FinCEN finalized rule making, it chose not to expand the previously proposed exemptions, but did note that it would continue to take into consideration feedback from the business community for the purpose of considering future exemptions. Additional FinCEN guidance and clarification of the rules with respect to more commonly used structures may be necessary to ensure that the rule meets the purposes of the statute while mitigating unintended burdens.

In addition, apart from the Act, FinCEN has separate rulemaking initiatives underway to establish new anti-money laundering requirements specifically applicable to the residential real estate sector and the investment adviser sector. Issues that arise in both these sectors with respect to the implementation of the Act are likely to have an impact on how FinCEN approaches broader requirements for these sectors.

## **ADDITIONAL ANALYSIS**

Determining reporting obligations and exemption eligibility is fact specific and depends upon a wholistic review of the entity's circumstances. For further guidance, please contact a member of the Clifford Chance team listed below.

## CONTACTS

**Ness Cohen**  
Partner

**T** +1 212 878 8217  
**E** ness.cohen  
@cliffordchance.com

**Jeanne Roig-Irwin**  
Partner

**T** +1 212 878 3058  
**E** jeanne.roig-irwin  
@cliffordchance.com

**Jamal El-Hindi**  
Counsel

**T** +1 202 912 5167  
**E** jamal.elhindi  
@cliffordchance.com

**Anthony Norris**  
Associate

**T** +1 212 878 3065  
**E** anthony.norris  
@cliffordchance.com

**Amber Pirson**  
Associate

**T** +1 202 912 5094  
**E** amber.pirson  
@cliffordchance.com

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