

INSIDE THE GROUNDBREAKING US CORPORATE TRANSPARENCY ACT

A new law has changed the way entities operating in the US – including offshore businesses – are expected to report their ownership status. Mayer Brown partners, Amanda Baker and Jon Van Gorp, discuss the content of the new law and how Australian securitisation issuers should be thinking about it in connection with their potential forays into US capital markets.

The *Corporate Transparency Act (CTA)* is a groundbreaking change in the way the US federal government tracks the beneficial ownership of “reporting companies”.

The CTA covers entities conducting business in the US. It is intended to help law enforcement agencies prosecute and deter money laundering, tax fraud and other fraudulent activities by requiring covered companies to file reports with the Financial Crimes Enforcement Network (FinCEN) about the company itself, its beneficial owners and its company applicants.

Effective 1 January 2024, most legal entities operating in the US – including domestic and foreign entities – must consider whether to file beneficial ownership information (BOI) reports with FinCEN, pursuant to the CTA¹.

Entities formed or registered on or before 31 December 2023 – including non-US entities registered to do business in any US state – will have a staggered compliance date (see table).

It is important for all domestic and non-US entities doing business in the country to ensure compliance, to avoid liability and penalties for violations. We recommend all business owners review the new reporting obligations and, if necessary, adopt policies and procedures to ensure ongoing compliance with the CTA.

In general, most Australian residential mortgage-backed securities (RMBS) transactions issued into the US capital market over recent years do not need to manage compliance with the CTA since none of the entities in the transaction are registered in the US or any state. If any entities are formed in any US jurisdiction, however, the securitisation entity must comply with the new legal requirements.

CTA SUMMARY

In 2021, Congress enacted the CTA, which requires FinCEN to implement a BOI reporting requirement, as part of the establishment of a national beneficial ownership registry. On 30 September 2022, FinCEN released a final rule to implement the CTA’s reporting requirements. This was amended on 29 November 2023².

The BOI reporting requirement applies to all domestic and foreign reporting companies. A domestic reporting company includes a corporation, limited liability company, limited partnership or any other entity created by the filing of a document with a secretary of state or similar office, including – in certain circumstances – limited liability partnerships and business trusts.

INITIAL COMPLIANCE DATES UNDER THE NEWLY ADOPTED EXTENSION³

Entity type	Timing for initial report
Entities formed or registered in 2024: - US reporting company created between 1 January and 31 December 2024. - Non-US reporting company registered to do business in any US state between 1 January and 31 December 2024.	Initial BOI report due within 90 calendar days of creation or registration.
Legacy entities existing in 2024: - US reporting company created on or before 31 December 2023. - Non-US reporting company registered to do business in any US state on or before 31 December 2023.	Initial BOI report due by 1 January 2025.
Entities formed or registered in 2025: - US reporting company created on or after 1 January 2025. - Non-US reporting company registered to do business in any US state on or after 1 January 2025.	Initial BOI report due within 30 calendar days of creation or registration.

SOURCE: MAYER BROWN NOVEMBER 2024

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A foreign reporting company includes similar entities formed under the law of a foreign country that is registered to do business in any jurisdiction within the US.

Unless an exemption applies, each reporting company must submit information regarding itself, each of its beneficial owners and its company applicants to FinCEN.

The penalties contemplated for non-compliance are severe. The CTA establishes civil penalties – of US\$500 per day, up to a total of US\$10,000 – and criminal penalties of up to two years imprisonment for individuals who willfully provide false or fraudulent information in connection with a BOI report, or who otherwise willfully fail to comply with the CTA reporting requirements.

Though the CTA contains 23 exemptions, they are narrowly tailored and must be claimed on an entity-by-entity basis. At this time, Mayer Brown expects most newly formed and existing entities operating in the US will not be exempt, unless they are wholly owned or controlled subsidiaries of:

- A regulated entity subject to regular reporting with an agency of the US government, for example public companies, banks, broker-dealers and investment advisers, as enumerated in the CTA.
- An entity able to rely on the “large operating company” exemption, which requires 20 full-time employees in the US, filing a US federal income tax or information return in the US demonstrating more than US\$5 million in US gross receipts or sales for the prior fiscal year, and an operating presence at a physical office in the US.

Notably, FinCEN currently interprets the statutory text as requiring an entity to be owned entirely by one or more specified exempt entities in order to qualify for the exemption, which may preclude controlled entities from qualifying. Therefore, pending further guidance from FinCEN, even if an entity is a controlled subsidiary of a public company for certain purposes – for instance accounting consolidation – it may not meet the definition of subsidiary for purposes of the CTA requirements unless it is, in fact, wholly owned.

An entity that was previously exempt from the BOI reporting requirement must file its initial BOI report within 30 calendar days of the date that it no longer meets the criteria for any exemption.

If the reported information changes, or if a reporting company becomes aware of an inaccuracy, it must file an updated

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or corrected BOI report with FinCEN within 30 calendar days of the date of the change to reportable information, or of the date it becomes aware or has reason to know of the inaccuracy.

Due to this ongoing requirement, some deals in the US are including language requiring investors to help facilitate compliance with the FinCEN requirements.

FINAL THOUGHTS

Market users should be aware of the BOI reporting requirements and how they may apply to legal entities they own, control or operate. All reporting companies should prepare for their applicable CTA compliance date by familiarising themselves with the CTA’s requirements, and by developing internal processes for identifying their beneficial owners and, if applicable, company applicants, as well as for collecting and updating the reportable information.

As noted, most Australian RMBS issued over recent years are not affected by the new reporting requirements as none of the entities are formed in US jurisdictions. Issuers in the securitisation market, however, should be mindful of the requirements to ensure compliance if any entities are registered in the US.

Any market users that would like assistance or guidance regarding compliance with the CTA should reach out to their regular Mayer Brown contact. ■

¹ FinCEN Extends Deadline for Companies Created or Registered in 2024 to File Beneficial Ownership Information Reports, 29 November 2023: tinyurl.com/fincenasj.

² Mayer Brown legal update on the final rule: tinyurl.com/mayerbrownasj.

³ A reporting company is deemed to be formed on the earlier of the date on which it receives actual notice that its creation or registration has become effective or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the reporting company has been created or registered.