



Lifting the Veil: Corporate Transparency Act Compliance for EB-5 Stakeholders



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The EB-5 compliance landscape is facing a new regulatory horizon with the introduction of the Corporate Transparency Act (CTA).² Enacted as part of the National Defense Authorization Act for Fiscal Year 2021,³ the CTA aims to enhance transparency and combat illegal activities by requiring certain business entities to disclose their beneficial ownership information to the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury. This legislation, which came into effect on January 1, 2024, holds significant implications for the EB-5 community, including regional centers, new commercial enterprises (NCEs), job-creating entities (JCEs), and their managers.

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The CTA was enacted to address a critical gap in the United States' anti-money laundering (AML) framework.⁴ Historically, the lack of a centralized registry for beneficial ownership information has been a significant challenge for law enforcement and regulatory agencies in combating illicit financial activities. Anonymous shell companies, which do not require disclosure of their true owners, have often been used to launder money, finance terrorism, evade taxes, and engage in other forms of corruption. The Financial Action Task Force (FATF), an international standard-setting body for AML and counter-terrorist financing measures, criticized the United States for its failure to collect beneficial ownership information, urging corrective action.⁵ In response to this criticism and the growing recognition of the risks posed by opaque corporate structures, Congress introduced the CTA as part of the broader Anti-Money Laundering Act of 2020.⁶ The CTA aims to enhance transparency, strengthen the integrity of the financial system, and provide law enforcement with the tools needed to track and prevent illicit activities facilitated through anonymous entities.

CTA REPORTING REQUIREMENTS

The CTA's reporting requirements introduce a crucial shift in regulatory expectations for certain U.S. entities. It designates as "reporting companies" certain entities either formed or registered to conduct business in the United States.⁷ These companies are required to file a Beneficial Ownership Information (BOI) report with FinCEN, the U.S. Treasury's financial intelligence unit. The BOI report must contain detailed information about the reporting company, such as its full legal name, alternative business names, current U.S. business address, jurisdiction of formation or registration, and its IRS Taxpayer Identification Number (TIN) or a foreign tax identification number, if applicable.⁸

Additionally, the report must include information on each "company applicant" and "beneficial owner." A company applicant is defined as the individual, such as a controller, an accountant, or a lawyer, who files the document that forms a domestic reporting company or first registers a foreign reporting company to do business in the United States. A beneficial owner is an individual who, either directly or indirectly, exercises substantial control over the entity or owns at least 25% of the entity's ownership interests. For each of these individuals, the BOI report must provide their full legal name, date of birth, current residential or business address, a unique identifying number from an acceptable identification document (such as a passport or driver's license), and a scanned copy of the identification document.⁹

The information submitted to FinCEN through the BOI report is not made publicly available, ensuring privacy and confidentiality. However, it can be accessed by U.S. federal law

enforcement agencies for investigative purposes. Additionally, with appropriate court approval, certain other enforcement agencies can access this data. Non-U.S. law enforcement agencies may also request this information through a U.S. federal agency. Financial institutions can access the disclosed information, but only with, among other things, the explicit consent of the reporting company. The reporting requirements introduced by the CTA represent a significant effort to enhance transparency and accountability within the U.S. business environment. This push for greater clarity has particular relevance in the EB-5 sector, with its often complex, multi-tiered transaction structures.

EB-5 ENTITIES AND CTA COMPLIANCE

The applicability of the CTA to the EB-5 industry introduces a new layer of regulatory oversight that impacts various entities involved in the typical EB-5 transaction structure. Regional centers, which sponsor EB-5 projects, play a pivotal role in ensuring compliance with applicable law, including the new requirements introduced by the CTA.¹⁰ As the entities responsible for overseeing compliance that extends to new commercial enterprises (NCEs) and job-creating entities (JCEs), regional centers must be particularly vigilant in adhering to the CTA's mandates.

NCEs, serving as the primary investment vehicles for EB-5 investors, are typically structured as limited liability companies or limited partnerships. These entities, along with their managers, may find themselves subject to the CTA's reporting obligations. Similarly, JCEs, which are the ultimate recipients of EB-5 funds for project development, could be required to comply with the CTA, depending on their organizational structure and business registration status.

The CTA's reporting requirements underscore the importance of transparency, clarity, and accountability among members of the EB-5 transaction team. As such, regional centers, NCEs, and JCEs must carefully assess their compliance obligations to navigate this evolving regulatory environment successfully.

EXEMPTIONS AND IMPLICATIONS

There are several exemptions to the reporting requirements of the CTA that mitigate the reporting obligations for certain entities. Understanding these exemptions is crucial for EB-5 entities to determine their compliance obligations.¹¹ One notable exemption applies to "large operating companies." Entities that employ more than 20 full-time employees in the United States, report over \$5 million in gross receipts or sales on their U.S. tax returns, including those of affiliates, and maintain an operating presence at a physical office within the U.S., are exempt from the CTA's reporting requirements.¹²

¹ The authors extend their sincere gratitude to Mine Ekim for her insights and contributions, which greatly enriched this article.

² Corporate Transparency Act of 2020, Title LXIV of Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 6401-6403, 134 Stat. 3388, 4528-36 (2021).

³ Id.

⁴ Comparatively, over many years, the European Union (EU) has implemented several directives aimed at increasing transparency and combating money laundering, such as the Fourth Anti-Money Laundering Directive (AMLD IV) and the Fifth Anti-Money Laundering Directive (AMLD V). These directives require member states to establish beneficial ownership registers and impose obligations on entities to provide accurate and up-to-date information on beneficial owners. Additionally, the EU has been working on further strengthening anti-money laundering regulations, with proposals for a Sixth Anti-Money Laundering Directive (AMLD VI) being discussed: https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-counteracting-financing-terrorism_en.

⁵ Beneficial Ownership Transparency in Corporate Formation, Shell Companies, Real Estate, and Financial Transactions, Congressional Research Service (July 8, 2019), <https://crsreports.congress.gov/product/pdf/R/R45798>

⁶ Corporate Transparency Act of 2020 §§ 6401-6403, 134 Stat. 3388, 4528-36 (2021).

⁷ 31 CFR § 1010.380(c)(1)(i).

⁸ 31 CFR § 1010.380(c)(1)(i).

⁹ 31 CFR § 1010.380(c)(1)(ii).

¹⁰ EB-5 Reform and Integrity Act of 2022, Title II of Division BB of the Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, §§ 2201-2207, 136 Stat. 49, 986-997 (2022).

¹¹ 31 CFR § 1010.380(c)(2).

¹² 31 CFR § 1010.380(c)(2)(xxi)

Additionally, the “subsidiary exemption” may be relevant for certain EB-5 entities. Under this exemption, entities that are wholly-owned or controlled, directly or indirectly, by one or more exempt entities might also be exempt from the reporting requirements.¹³ This could potentially apply to NCEs or JCEs that are subsidiaries of larger, exempt entities.

The pooled investment vehicle exemption under the CTA could also potentially apply to some EB-5 entities.¹⁴ For an EB-5 entity structured as a pooled investment vehicle to qualify for this exemption, it must be identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the Securities and Exchange Commission (SEC).¹⁵ While this exemption may be applicable to some EB-5 entities, it is important for each entity to carefully evaluate whether they meet the specific criteria set forth in the regulations.

For EB-5 entities, especially regional centers, it is essential to assess their eligibility for these exemptions based on factors such as size, activities, or regulatory status. NCEs and JCEs should also evaluate their exemption status based on their ownership structure and business registration status. For further details on the CTA’s exemptions and their implications for the EB-5 community, stakeholders are encouraged to refer to the guidance provided by FinCEN and consult with legal professionals specializing in EB-5 and corporate compliance.¹⁶

REPORTING TIMELINE

The CTA establishes specific deadlines for reporting companies to file their initial BOI reports with FinCEN. Entities formed or registered to do business in the U.S. before January 1, 2024, must submit their reports no later than January 1, 2025. For entities formed or registered between January 1, 2024, and December 31, 2024, the initial report must be filed within 90 calendar days of their formation or registration. Entities formed or registered on or after January 1, 2025, are required to file their reports within 30 days of formation or registration. These timelines are crucial for ensuring timely compliance with the CTA’s reporting requirements and avoiding potential penalties for late submissions.¹⁷

PENALTIES FOR VIOLATIONS

The CTA imposes penalties for non-compliance. Willful failure to report accurate beneficial ownership information or knowingly providing false or fraudulent information can result in civil penalties up to \$500 for each day the violation continues and criminal fines up to \$10,000, imprisonment for up to two years, or both. Moreover, the penalties for unauthorized disclosure of beneficial ownership information include civil penalties of up to \$500 per day and criminal penalties of up to \$250,000 and imprisonment for up to five years.¹⁸

SIGNIFICANCE OF THE YELLEN CASE

The constitutionality of the CTA was challenged in *National Small Business Association, et al. v. Yellen* (2024).¹⁹ The U.S. District Court for the Northern District of Alabama declared the CTA unconstitutional and suspended its enforcement against the plaintiffs, finding that it exceeded Congress’ power. The plaintiffs argued that the CTA’s disclosure requirements infringed upon their constitutional rights due to privacy and security concerns. The Justice Department, on behalf of the Department of the Treasury/FinCEN, filed a Notice of Appeal on March 11, 2024, to appeal the Court’s ruling.²⁰

The CTA is not currently being enforced against the Yellen plaintiffs: Isaac Winkles, reporting companies for which Isaac Winkles is the beneficial owner or applicant, the National Small Business Association, and members of the National Small Business Association (as of March 1, 2024). While FinCEN stated it will not enforce the CTA against the plaintiffs (pending appeal), the broader implications of this decision remain uncertain. Entities that are not plaintiffs in the Yellen action are expected to comply with the CTA. This legal development highlights the importance for EB-5 stakeholders to stay informed about the evolving legal landscape surrounding the CTA.

KEY COMPLIANCE CONSIDERATIONS FOR EB-5 ENTITIES

Navigating the CTA’s requirements demands diligence and a proactive approach from EB-5 stakeholders. Here are essential compliance considerations:

- 1. Determine Reporting Status.** Assess whether your EB-5 entity falls under the definition of a reporting company or qualifies for an exemption. This may require a thorough review of the entity’s structure, activities, and financials.
- 2. Identify Beneficial Owners.** Identify all individuals who meet the criteria of beneficial owners. This may involve reviewing ownership structures, control mechanisms, and equity interests.
- 3. Collect Required Information.** Gather the necessary information for each beneficial owner and company applicant, including legal names, addresses, and identifying numbers.
- 4. File Timely Reports.** Ensure that initial and subsequent reports are filed within the specified deadlines.
- 5. Maintain Records.** Keep records of the information submitted to FinCEN and any changes to beneficial ownership.
- 6. Monitor Legal Developments.** Stay informed about ongoing litigation and potential changes to the CTA and its implementing regulations. The outcome of cases like Yellen could have significant implications.
- 7. Changes to Investment/Organizational Documents.** Stakeholders should consider including representations, covenants, and indemnification provisions for CTA compliance in existing and new agreements.

CONCLUSION

The CTA introduces a new layer of regulatory oversight for EB-5 entities, aimed at enhancing transparency and combating illicit financial activities. Navigating the CTA’s requirements demands a proactive approach, with careful attention to the identification of beneficial owners, timely reporting, and adherence to exemptions. As the legal landscape evolves, particularly in light of recent challenges to the CTA’s constitutionality, EB-5 stakeholders must remain vigilant and prepared to adapt their compliance strategies.

This article provides a general overview and is not legal advice. EB-5 stakeholders should consult with legal professionals to understand their specific obligations under the CTA and the EB-5 Reform and Integrity Act of 2022. For further guidance on compliance with the CTA, visit FinCEN’s website and explore their resources, including FAQs and compliance guides. ■

¹³ 31 CFR § 1010.380(c)(2)(xxii).

¹⁴ 31 CFR § 1010.380(c)(2)(xxiii).

¹⁵ Form ADV, Part 1A, Schedule R, Section 2.A.

¹⁶ FinCEN, “Corporate Transparency Act: Overview and Resources,” <https://www.fincen.gov/boi>.

¹⁷ 31 CFR § 1010.380(a)(1)-(3).

¹⁸ 31 CFR § 1010.820; 31 CFR § 1010.840.

¹⁹ *National Small Business Association, et al. v. Yellen*, No. 5:22-cv-01448-LCB (N.D. Ala. Mar. 1, 2024).

²⁰ Updated: Notice Regarding National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.) (updated Mar. 11, 2024) <https://www.fincen.gov/news/news-releases/updated-notice-regarding-national-small-business-united-v-yellen-no-522-cv-01448>.