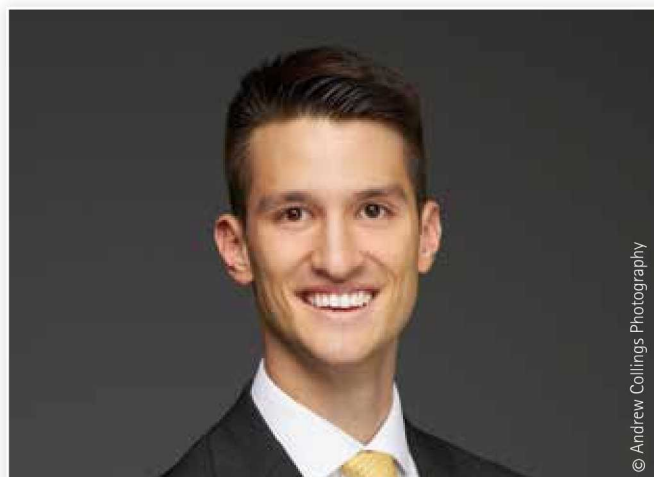




# The U.S.' Recently Enacted Corporate Transparency Act and Its Extensive Impact on Potentially Many Foreign-Owned Businesses



**Reinhold F. Krammer<sup>1</sup>**

Attorney at Law, Masuda, Funai, Eifert & Mitchell, LTD  
Austrian Honorary Consul

**Joshua M. Wilson<sup>2</sup>**

Attorney at Law, Masuda, Funai, Eifert & Mitchell, LTD

Due to an increase in inquiries from Austrian Investors and Businesses regarding the Corporate Transparency Act, I asked Reinhold F. Krammer, Partner, Attorney at Law and Austrian Honorary Consul of Austria in Chicago, and Joshua M. Wilson, Attorney at Law, to provide an overview over the new regulations and explain, how foreign investors and entities are affected by the new law. I would like to thank both Reinhold and Joshua for taking the time to provide this comprehensive overview. I also would like to thank Mr. Brogyányi, Mr. Holiczki and Mr. Tippow for providing the opportunity to discuss this important topic in English, as we think that a translation bears the risk of not providing a necessary, accurate and precise overview of the law.  
(Foreword by Stefan Groessbacher).

## Introduction

Due to the rise of terrorist threats, anti-money laundering legislation has ascended to the forefront of federal legislation within the United States. This enhanced focus on anti-money laundering legislation resulted in the U.S. adopting what is known as Division F of the William Mac Thornberry National Defense Authorization Act („NDAA“), which created, amended, and enhanced various U.S. anti-money laundering laws to enable the U.S. government to better detect and combat the financing of terrorism and other financial criminal activity.<sup>3</sup> In adopting

the NDAA, Congress enacted the Corporate Transparency Act („CTA“), which requires business entities to report to the U.S. government pertinent information about the entity and individuals substantially affiliated with the entity.<sup>4</sup>

Notwithstanding its enactment, the CTA did not immediately take effect, which gave affected business entities several years to prepare to comply with its obligations. On January 1, 2024, the CTA went into effect, which currently impacts and will continue to affect millions of entities doing business within the U.S.



Generally stated, the CTA requires that a „reporting company“ prepare and submit a „beneficial ownership information report“ („BOI report“) with the Financial Crimes Enforcement Network („FinCEN“) to prevent money launderers and other individuals committing financial crimes from conducting commercial activity within the U.S. under the guise of proper corporate structures while actually performing money laundering, financing terrorism, proliferating tax fraud, and committing other acts of corruption that harm the national security interests of the U.S.

Pursuant to its purpose of thwarting financial criminal acts which threaten the U.S. and its security interests, the CTA and its obligations not only extend to domestic U.S. business entities, but also to international business entities that conduct business within the U.S. through subsidiaries, branches, limited liability corporations, partnerships and other entities.

This article seeks to outline key aspects of the CTA, such as (1) who is required to file a BOI report with FinCEN, (2) what needs to be included within the BOI report, and (3) what are the deadlines and penalties associated with the CTA. Furthermore, this article highlights how the CTA significantly impacts foreign-owned entities that conduct business within the U.S. Finally, the article details the storage of an entity's beneficial ownership information, access to such information, and an entity's continued obligation to file updated BOI reports with FinCEN.

### Who needs to report? – „Reporting Company“

The CTA states that each „reporting company“ that does not qualify for an exemption under the law must submit to FinCEN a „beneficial ownership information“ report (see next section for BOI report information). Generally, a „reporting company“ is a business entity that is „created by the filing of a document with a secretary of state or similar office, or formed under the law of a foreign country and registered to do business in the U.S. by the filing of a document with a secretary of state or similar office.“<sup>5</sup> Alternatively stated, a reporting company may be a corporation, limited liability company, limited liability partnership, branch office, trust or other similar entity that files or registers with a secretary of state to do business. Therefore, if such entity has incorporated or filed to do business within a state, that entity also must file a BOI report with FinCEN.

Despite this broad language, a reporting company is **not** required to report its beneficial ownership information to FinCEN if it qualifies for an exemption. The CTA lists twenty-three (23) specific types of entities that negate the CTA requirement of needing to file a BOI report (please see Exhibit A below for the 23 entity types).

|                                   |  |                                      |                               |                                       |                           |
|-----------------------------------|--|--------------------------------------|-------------------------------|---------------------------------------|---------------------------|
| Securities Reporting Issues       | Governmental Authority                   | Bank                                 | Credit Union                  | Depositor Institution Holding Company | Money Services Business   |
| Broker or Dealer in Securities    | Securities Exchange or Clearing Agency   | Other Exchange Act registered entity | Investment Company or Adviser | Venture Capital Fund Adviser          | Insurance Company         |
| State-licensed Insurance Producer | Commodity Exchange Act registered entity | Accounting Firm                      | Public Utility                | Financial Market Utility              | Pooled Investment Vehicle |
| Tax-exempt Entity                 |  | Entity assisting a Tax-exempt Entity | Large Operating Company       | Subsidiary of Certain Exempt Entities | Inactive Entity           |

Exhibit A – Exempt Entities

While the diverse kinds of exempt entities offer the impression that many entities can qualify for an exemption and not be subject to the reporting obligations under the CTA, each exemption involves strict statutory definitions that must be met in order for a business entity to qualify for an exemption. Despite this fact, the CTA provides three (3) exemptions that should be widely applicable to many reporting companies. Such exemptions include, (i) the „Tax-exempt Entity“ exemption, (ii) the „Large Operating Company“ exemption, and (iii) the „Subsidiary of Certain Exempt Entities“ exemption. (Specifics regarding these three exemptions are further detailed in the subsection below).

If a reporting company qualifies for an exemption, such entity is not required to file a BOI report with FinCEN. Additionally, such entity does not need to communicate to FinCEN that it is exempt from the CTA's reporting requirements.<sup>6</sup> Although certain exempt entities may continue to be exempt from BOI reporting requirements, due to the nature of their business (such as the entity being a bank or public utility company), there may be instances where a reporting company has already filed a BOI report with FinCEN and later qualifies for an exemption because it has become a „Large Operating Company“ or a „Subsidiary of a Certain Exempt Entity“. In such instances, the entity must file an updated BOI report with FinCEN stating that the entity is exempt from the CTA's reporting requirements.

Conversely, there are also instances where an exempt entity loses its exempt status. For example, a business entity may lose its exempt status if it fails to meet statutory definitions associated with an exemption or if the business entity was originally tax-exempt, but fails to file an U.S. annual income tax return with the Internal Revenue Service for three consecutive years, thus





resulting in an automatic loss of its exempt status. If a business entity loses its exempt status, the formerly exempt entity must file a BOI report with FinCEN regarding the company's beneficial ownership information when it becomes aware that the company has lost its exempt status.<sup>7</sup>

Consequently, determining whether an entity is a „reporting company“, if it qualifies for an exemption, or if the entity should file a BOI report requires business entities to use significant effort, maintain appropriate records regarding the entity, monitor the number of personnel within the entity, and ensure that individuals within the entity remain informed of the CTA's reporting obligations. If an entity does not maintain internal checks to comply with the CTA, the entity can easily become non-compliant with the law and may be penalized. Therefore, ensuring that the entity remains compliant with the CTA and can appropriately determine if it is a „reporting company“ and whether it qualifies for an exemption is pivotal for all U.S. domestic and foreign entities.

### Common Exemptions

As mentioned, the CTA provides three common exemptions which businesses can utilize to alleviate their responsibilities of reporting beneficial ownership information to FinCEN.

#### I. Large Operating Company Exemption

While the „tax-exempt entity“ exemption (see below) allows a business entity to qualify for the exemption as long as one of five criteria is met, the „large operating company“ exemption requires that **all** criteria be met to apply. To qualify for the „large operating company exemption“, an entity must: (i) employ more than 20 full-time employees within the U.S.; (ii) have an operating presence at a physical office within the United States where it regularly conducts business; (iii) have filed a U.S. Federal income tax or information return during the previous year demonstrating more than \$5,000,000 in gross receipts and sales; and (iv) have more than \$5,000,000 in gross receipts or sales after excluding the gross receipts or sales from sources outside of the U.S.

FinCEN has offered guidance regarding consolidating employees and consolidating gross receipts from entities affiliated with the reporting company to qualify for the „large operating company“ exemption as well. FinCEN has stated that while a reporting company may consolidate gross sales and receipts to reach the \$5 million threshold to qualify for the „large operating company“ exemption, reporting companies may not consolidate employees across multiple entities and must solely employ more than 20 full-time employees to qualify for the exemption.

Analogous to the reporting obligations of a business entity that loses its tax-exempt status, a reporting company that qualifies as a „large operating company“ may also lose its exempt status and may be required to submit a BOI report to FinCEN. For instance, if the employment of the entity drops below 20 full-time employees, or a future tax return of the business entity

shows that the gross sales or receipts of the entity do not reach \$5 million in U.S. domestic gross receipts and sales, the business entity will likely lose its exempt status as a „large operating company“. As a result, it is crucial for entities to regularly monitor their employee numbers, gross receipts and sales to ensure compliance with the CTA and submit a BOI report when appropriate.

#### II. Subsidiary of Certain Exempt Entities Exemption

A wholly owned subsidiary of certain exempt entities is not required to submit BOI reports to FinCEN. Such exempt entities include securities reporting issuers, banks, credit unions, insurance companies, accounting firms, tax-exempt entities, and large operating companies, among others.<sup>8</sup>

Even though this exemption appears well-defined, the exemption is shrouded in controversy because of an answer published by FinCEN on their FAQ webpage. The statutory language of the CTA expressly states that a subsidiary qualifies for an exemption if the subsidiary is directly or indirectly owned or controlled by one or more exempted entities. However, FinCEN, in publishing its interpretation of the CTA on its FAQ webpage, states that „controlling the ownership interest“ of a subsidiary means that the controlling entity must wholly own all of the subsidiary's ownership interest for the exemption to apply.<sup>9</sup> Consequently, there is a growing importance for entities to continually monitor guidance issued by FinCEN, compare such answers with the original text of the CTA, and consult legal professionals to assist with determining whether a business entity qualifies for this exemption.

#### A Significant Obstacle for Foreign-owned Businesses to qualify for the „Large Operating Company“ and „Subsidiary of Certain Exempt Entities“ Exemptions

Foreign-owned businesses are particularly impacted by the CTA because the CTA seeks to enable the U.S. government to gather extensive information from business entities located outside of the U.S. that do business within the U.S. For this reason, several of the common exemptions that domestic U.S. business entities use to excuse themselves from reporting obligations are likely inapplicable to foreign-owned businesses.

In particular, qualifying for the „large operating company“ exemption or qualifying as a subsidiary of a large operating company may be difficult for foreign businesses. By way of illustration, a large corporation in Austria that employs 100 employees and has millions in gross sales may set up a branch office in the U.S. to do business. The branch office is likely a reporting company under the definition included in the CTA. Upon setting up the branch office, the branch office will not have filed a U.S. federal income tax return, nor have 20 full-time employees, nor have \$5 million in U.S. domestic gross sales or receipts for that year. As a result, the branch office will have to file a BOI report with FinCEN, which may need to include the personal information of overseas shareholders and other pertinent individuals.





Another example demonstrating the difficulty for foreign-owned businesses to qualify for these common exemptions relates to the „subsidiary of certain exempt entity (large operating company)" exemption. For U.S. domestic subsidiaries, if a subsidiary cannot qualify under any other CTA exemption, then the subsidiary may be exempt from submitting a BOI report to FinCEN if its parent company qualifies for an exemption. In many cases, such subsidiaries will likely seek to become exempt by claiming that its parent company is a „large operating company". A subsidiary of a large U.S. corporation would likely qualify for the exemption because such U.S. parent company will likely employ more than 20 full-time employees, operate within the U.S., have filed a U.S. Federal income tax return, and have more than \$5 million in U.S. domestic gross sales or receipts.

Notwithstanding, a large parent company in Austria may have established a small subsidiary in the U.S., and the subsidiary will look to claim that they are a subsidiary of a „large operating company" in Austria. However, the large parent company in Austria will also likely not satisfy the „large operating company" exemption criteria because while it employs more than 20 full-time employees, the Austrian entity does not employ such individuals within the U.S., nor file a U.S. Federal income tax return, and may not have \$5 million in U.S. gross sales or receipts. Therefore, this obstacle regarding the inability for many foreign-owned business entities to qualify for common exemptions under the CTA will force such entities to submit a BOI report to FinCEN.

### III. Tax-exempt Entity Exemption

To qualify for the „tax-exempt entity" exemption, a business entity must be any of the following: (i) an entity or organization that is described in section 501(c) of the U.S. Internal Revenue Code of 1986 („Code") and exempt from tax under section 501(a) of the Code; (ii) a 501(c) entity or organization that was exempt from tax under section 501(a) of the Code, but lost its tax-exempt status less than 180 days before; (iii) a political organization that is exempt from tax under 527(a) of the Code; (iv) a non-exempt charitable trust; or (v) a non-exempt split-interest trust.

Although ascertaining whether an entity is tax-exempt is likely a simple process, it may be challenging to determine the reporting requirements, deadlines, and the applicability of the exemption for an entity or organization that originally was described in Section 501(c) of the Code and exempt from tax under Section 501(a), but lost its tax-exempt status less than 180 days before. To offer a brief analysis, the originally tax-exempt entity is not required to immediately submit a BOI report to FinCEN when it loses its tax-exempt status. However, once the entity has lost its tax-exempt status and 180 days have passed since the entity lost its tax-exempt status, it will become a reporting company. Accordingly, such originally tax-exempt organizations must file a FinCEN report, which will include information applicable to the entity at the time.

### What needs to be reported? – „Beneficial Ownership Information"

A reporting company that does not qualify for an exemption is required to submit a BOI report. A BOI report includes information about the reporting company and each „beneficial owner", and may also include information regarding the „company applicants" of a business entity. „Company applicants" are individuals who file applications to form or register a business entity.<sup>10</sup> Information regarding company applicants will only be filed for entities that form or register to do business within the U.S. after January 1, 2024.

The most significant information to be included within a BOI report is information pertaining to „beneficial owners". A „beneficial owner" is a natural individual who, directly or indirectly, (i) „exercises substantial control over the [reporting company]" or (ii) „owns or controls not less than 25 percent of the ownership interest of the [reporting company]".<sup>11</sup> While this definition encompasses many individuals, the CTA clearly states that a reporting company does not need to gather information regarding beneficial owners who are minor children, creditors of the reporting company, agents of another individual, or individuals acting solely as and deriving their benefits from being an employee of the entity. Furthermore, an individual who only gains her interest in the reporting company through a right of inheritance is also not considered a beneficial owner.

#### I. Exercising Substantial Control

A reporting company must identify and report all natural individuals who exercise substantial control over a reporting company as „beneficial owners" in its BOI report to FinCEN. Such individuals include: (i) senior officers of the entity, (ii) any individual with the ability to appoint or remove any senior officer or a majority of the board of directors or similar body of the reporting company; (iii) any important decision-maker of the entity; and (iv) any other individual who may exercise substantial control by some other method or medium.

Of the individuals who exercise substantial control and must be identified to FinCEN, particular attention should be given in determining who is an „important decision-maker" for the reporting company. An „important decision-maker" is any individual who „directs, determines, or has substantial influence over important decisions made by the reporting company" which include the business, finances, and structure of the reporting company.<sup>12</sup> Thus, in preparing a BOI report, business entities should conduct a thorough review of their internal structure and determine what individuals within or outside of the reporting company directly and indirectly exercise substantial control over the entity.

#### II. Owning/Controlling 25 percent or more of the ownership interest of the reporting company

In addition to identifying beneficial owners who exercise substantial control over the entity, a reporting company is required to identify and report all natural individuals who control or own



25 percent or more of the ownership interest of the reporting company. Such ownership interests include the ownership of equity, voting rights, capital or profit interest, or convertible instruments and options among other interests.

Determining who the beneficial owners of a reporting company is simple if each controller of an ownership interest directly owns such interest and such ownership interest is held by natural persons. This obligation to identify and report all „natural“ individuals controlling or owning 25 percent or more of the ownership interest of the reporting company becomes more onerous, however, when the membership interests are not only owned by natural individuals, but also other entities. Because a reporting company must report „natural“ persons rather than business entities who control ownership interests, FinCEN requires that a reporting company inquire into the ownership of such other business entities. This inquiry is rooted in the fact that because a business entity controls the ownership interest of the reporting company, a natural person may indirectly control 25 percent or more of the ownership interest of the reporting company through the business entity's direct ownership interest in the reporting company.

Consequently, reporting companies must expend significant time and resources attempting to ascertain whether a natural person directly or indirectly owns 25 percent or more of the reporting company. Further, such efforts to determine direct and indirect ownership, and thus ascertain who is a beneficial owner, become more arduous if a business entity's corporate structure is complex. Provided below is Exhibit B which demonstrates how reporting companies may have difficulties gathering information to determine who is a beneficial owner of the entity for directly or indirectly owning/controlling 25 percent or more of the ownership interest of the reporting company.

Exhibit B demonstrates that in order to sufficiently report the beneficial ownership of a reporting company, a reporting company may need to inquire of the beneficial ownership information of several other entities to ultimately determine who is considered an indirect owner or controller of 25 percent or more ownership of the reporting company. This effort also becomes more taxing if business entities are unwilling to cooperate or share information with the reporting company regarding individuals who control ownership interests for their respective entity.

#### When and where does a BOI report need to be filed?

A reporting company must file a BOI report with FinCEN, which includes information about the entity and each of its beneficial owners. FinCEN does not require any payment from the reporting company for filing a BOI report. Regardless, businesses should be aware that scammers have recently begun sending letters attempting to impersonate government entities, claiming that a business entity is „required to report their beneficial information“ to such fake government entities. Such letters demand a filing fee and state that the reporting company must file immediately or within a certain number of days with the scammer. Instead of responding to such letters, business entities should file a BOI report directly at FinCEN's website or inquire of their attorney for more advice.

The filing deadlines for BOI reports differ based on when a reporting company was or is created or registered. If a reporting company was created or registered to do business before January 1, 2024, the entity must file a report with FinCEN by January 1, 2025. If the reporting company is created or registered after January 1, 2024, but before January 1, 2025, then the entity has 90 days after creation or registration to file. And for reporting companies created or registered after January 1, 2025, such entities must file within 30 days after creation or registration.

#### Penalties for Non-Compliance

A reporting company or individual who willfully fails to report complete or updated beneficial ownership information to FinCEN may be subject to criminal or civil penalties. Such penalties include being liable for up to \$500 for each day that the reporting company is non-compliant, and the total fine amount is capped at \$10,000. Another more severe penalty is that the senior officers of the reporting company may also be imprisoned for up to two years as well for non-compliance.

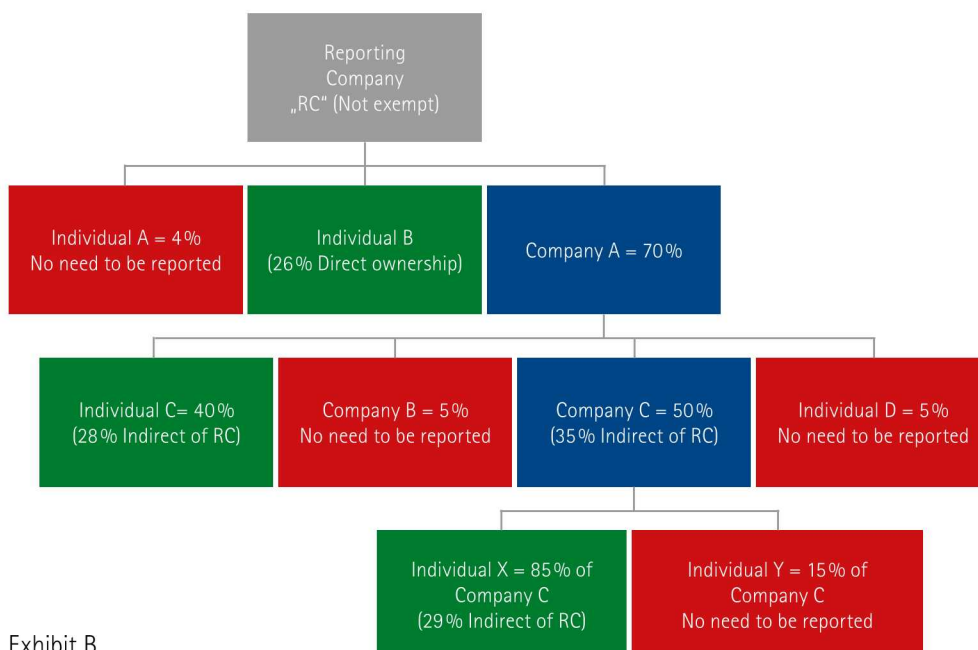


Exhibit B





### Who can access Beneficial Ownership Information

A key aspect related to the CTA is data retention and access. After filing a BOI report, FinCEN will store and maintain the BOI report and the information associated with the report for as long as the reporting company remains active, and for at least five (5) years after the termination of the company. The CTA also authorizes FinCEN to disclose beneficial ownership information that was received from reporting companies to certain entities. Such entities include foreign or U.S. federal agencies engaged in national security, or law enforcement, U.S. state or local law enforcement agencies, and financial institutions. Although financial institutions are included in the entities to which FinCEN can transmit beneficial ownership information, financial institutions may only receive such information after the reporting company consents to the disclosure of such information.

### Ongoing reporting requirements

A common misconception surrounding the CTA is that once a reporting company submits a BOI report with FinCEN, the reporting company is no longer required to report information to FinCEN. To the contrary, the CTA states that a reporting company must, within 30 days after the date on which there is a change in any information of the reporting company or its beneficial owners, submit an updated BOI report regarding the company and its beneficial owners. Therefore, if there is a change in the structure of the reporting company or a change in senior officers or other individuals who exercise substantial control over the entity, the reporting company must submit an updated BOI report to FinCEN. Moreover, if there is a change in the indirect or direct ownership of the reporting company, such changes should be reported as well. ■

8 31 U.S.C. § 5336(a)(11)(a)(xxii).

9 FinCEN Beneficial Ownership Information Reporting, Frequently Asked Questions H.6. (Issued January 12, 2024).

10 31 U.S.C. § 5336(a)(2).

11 Id. at (3).

12 Financial Crimes Enforcement Network – Small Entity Compliance Guide (last visited 3/12/2024).

## Conclusion

At first glance, the Corporate Transparency Act may seem inapplicable, narrow in scope, and simple to comply with. However, upon further review, businesses should be aware that the CTA impacts all entities doing business within the United States, and its scope extends even to business entities located internationally. Foreign-owned business entities doing business within the U.S., as detailed, currently face large hurdles regarding compliance with the CTA. Therefore, determining whether a business entity is a „reporting company“, who is a „beneficial owner“, and when the entity should file a BOI report with FinCEN will be difficult and tedious. However, through reviewing the law and consulting legal experts, business entities across the world will be able to follow this new U.S. law and take steps to establish internal systems and procedures to ensure future compliance with the CTA.

1 Reinhold F. Krammer's advice is sought by international-based companies, their U.S. subsidiaries, foreign governmental trade representatives and offices, and other domestic entities. Reinhold assists Austrian and other foreign-based companies enter the U.S., expand their existing U.S. operations, and protect their corporate interests throughout the country, and correspondingly, the overseas parent company's interests. Responsive and a resolute problem-solver, Reinhold is appreciated for the consistently high quality of his counseling and work product (contact information: rkrammer@masudafunai.com).

2 Joshua M. Wilson has knowledge regarding international government relations, cross-border data privacy law, and commercial and corporate matters. In his practice, he drafts and reviews agreements and terms and conditions of sale, and assists with corporate matters and transactions. Since the enactment of the Corporate Transparency Act, Joshua has also handled matters related to the Corporate Transparency Act, published several articles, and presented webinars (in English and Japanese) regarding the topic as well. Fluent in Japanese and Korean, he also has the ability to communicate with clients in their native language (Contact information: jwilson@masudafunai.com).

3 The William M. (Mac) Thornberry National Defense Authorization Act („NDAA“) for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

4 Corporate Transparency Act, 31 U.S.C. § 5336.

5 Id. at (a)(11).

6 FinCEN Beneficial Ownership Information Reporting, Frequently Asked Questions L.5. (Issued November 16, 2023).

7 FinCEN Beneficial Ownership Information Reporting, Frequently Asked Questions H.6. (Issued December 12, 2023).