



## Alerts

### The Corporate Transparency Act Is Almost Here - Are You Ready?

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*Hinshaw Alert*

Over two years ago, Congress enacted the little-known Corporate Transparency Act (the Act) in a stated effort to increase the transparency of private company ownership and to "help prevent and combat money laundering, terrorist, financing, tax fraud, and other illicit activity." The Act was specifically intended to, and will, affect and obligate virtually every company formed or otherwise licensed to operate in the United States. While the reporting requirement under the Act will not formally take effect until January 1, 2024, all private U.S. companies, as well as their owners, should determine and understand exactly what their new obligations are under the Act, or they could find themselves facing serious penalties once the Act goes into effect.

#### Background

The Act was enacted by Congress on January 1, 2021, and will become effective on January 1, 2024. Essentially, the Act requires each entity that qualifies as a "reporting company" (as discussed below) to file a report (each a **BOI Report**) with the Department of Treasury's Financial Crimes Network (**FinCEN**), identifying information about each "beneficial owner" (as discussed below), and each "company applicant" (as discussed below), of such entity.

Congress left FinCEN in charge of developing the administrative rules and regulations that reporting companies will have to adhere to under the Act. FinCEN recently released those [final rules and regulations](#) on September 29, 2022 (collectively, the **CTA Rules**). The CTA Rules specify, among other things, the criteria for determining whether an entity will be subject to the Act (i.e., be considered a "reporting company") and the kind of information that covered entities will be required to report.

#### Which Companies Have To Report?

The Act applies to all "reporting companies," which is broadly defined in the CTA Rules. More particularly, any entity which falls within one of the following categories will (subject to certain limited exceptions discussed below) be deemed a "reporting company" subject to the reporting obligations under the Act:

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- **Domestic Reporting Company:** Any corporation, limited liability company (LLC), or other entity that is created/formed by the filing of a document with a secretary of state or any similar state or tribal regulatory office.
- **Foreign Reporting Company:** Any corporation, limited liability company (LLC), or other entity that is created/formed under laws of a foreign country AND is registered/qualified to do business in the U.S by the filing of a document with a secretary of state or any similar state or tribal regulatory office.

The foregoing definitions were intentionally left broad by FinCEN and are expected to cover virtually all legally respected entity types, including limited partnerships (including limited liability partnerships (LLPs) and limited liability limited partnerships (LLLPs)), business trusts, and any other entity which is otherwise created/formed or registered/qualified (as applicable) by filing with a U.S state or tribal regulatory body.

Notwithstanding the above, the CTA Rules do provide for certain categories of entities that are excluded from the reporting obligations under the Act, even if the entity would otherwise fall within one of the above definitions. These exempt categories include (among others) governmental authorities, banks and depository institution holding companies, "money services businesses," securities brokers and dealers, and accounting firms.

## What Does a Company Have To Report?

If an entity falls within the definition of a "reporting company," then it will be subject to the requirements of the Act and will be required to file a BOI Report with FinCEN, which identifies all the following information:

- With respect to the reporting company, its:
  - legal name (and any d/b/a names),
  - principal business address,
  - jurisdiction of formation/registration (as applicable), and
  - unique identification number (e.g., the entity's TIN (including an EIN), Dun & Bradstreet Data Universal Numbering System (DUNS) number, Legal Entity Identifier (LEI), or FinCEN "identifier").
- With respect to each individual who qualifies as a "beneficial owner" or "company applicant" of the reporting company, such individual's:
  - full legal name,
  - date of birth,
  - current residential street address (and, for "company applicants," their current business address as applicable), and
  - unique identifying number (e.g., their social security number or FinCEN "identifier"), together with a scanned copy of the identification document evidencing such number.

For the avoidance of doubt, each BOI Report is intended to clarify the ownership of the respective reporting company all the way down to the individual, natural person, and beneficial owners, regardless of how many layers of intermediate holding entities there may be. It should also be noted that the CTA Rules provide for a process whereby an individual/entity can obtain a unique FinCEN "identifier." Such individual/entity can then simply reference their FinCEN "identifier" for purposes of the BOI Report in lieu of submitting the required personal information. This is particularly beneficial for individuals/entities (e.g., corporate and formation agents, investment funds, and repeat investors) who would otherwise be required to repeatedly provide the above information.

The CTA Rules do not currently specify exactly who, on behalf of the entity, must submit the BOI Report (e.g., whether it must be submitted by an officer or not). However, under the CTA Rules, the entity will be directly responsible for the truth and accuracy of all information filed in its BOI Report, and there are civil and criminal penalties for willfully providing false or fraudulent information.



## Who Qualifies as a "Beneficial Owner"?

Under the CTA Rules, with respect to a particular reporting company, a "beneficial owner" is any individual who (directly or indirectly through one or more entities) either: (a) exercises "substantial control" (as discussed below) over such company; or (b) owns or controls 25 percent (or more) of the "ownership interests" of such company.

For purposes of the foregoing, whether or not an equity holder has "substantial control" over the subject reporting company (*and thus needs to be identified in its BOI Report*) is somewhat subjective and will require a factual analysis. However, generally speaking, an individual will be deemed to have "substantial control" over a reporting company if they (directly or indirectly):

- serve as a senior officer of the reporting company,
- have authority over the appointment or removal of any senior officer, or a majority or dominant minority of the managing board,
- controls the direction, determination, or decision of, or otherwise have substantial influence over, any material matter affecting the business or operation of the reporting company, or
- otherwise have authority to exercise any other form of substantial control over the reporting company.

Notwithstanding the generality of the above, per the CTA Rules, an individual who would otherwise qualify as a "beneficial owner" of a particular reporting company will **NOT** need to be identified on such company's BOI Report if the subject individual is:

- a minor child (provided the reporting company's BOI Report includes the respective personal information of the child's parent or legal guardian);
- acting as nominee, intermediary, custodian, or agent on behalf of another individual,
- an employee of the reporting company who is acting solely as an employee and whose substantial control or economic benefits from the reporting company are derived solely from their status as an employee,
- an individual whose only interest in the reporting company is a further interest through a right of inheritance, or
- a creditor of the reporting company.

## Who Qualifies as a "Company Applicant"?

Under the CTA Rules, who qualifies as a "company applicant" with respect to a particular reporting company will depend on whether that reporting company is a domestic or foreign entity. If the reporting company is a domestic reporting company, the "company applicant" would be the individual who directly filed the **documents that first created/formed such reporting company**. However, if the reporting company is a foreign reporting company, the "company applicant" would be the individual who directly filed the **documents that first registered/qualified such reporting company to do business in the United States**.

## When Does a Company Have To File a BOI Report?

Under the CTA Rules, each domestic reporting company that is formed and each foreign reporting company that is registered/qualified to do business in the U.S.:

- **before January 1, 2024**, will need to file their initial BOI Report **prior to January 1, 2025**; or
- **on or after January 1, 2024**, will need to file their initial BOI Report **within 90 calendar days** of the earlier of: (a) the date on which it receives actual notice that its creation/formation or registration/qualification (as applicable) has become effective; or (b) the date on which a secretary of state or similar office first provides public notice of such creation/formation or registration/qualification (as applicable).



With respect to any reporting entity that otherwise qualifies for exemption from the reporting requirements of the Act, if such reporting entity (at any time and for any reason) no longer meets the respective exemption criteria, such reporting company will need to file an initial BOI Report **within 30 calendar days** from the date that it no longer meets said criteria

In addition to the above required initial BOI Report, if:

- any of the information provided in the most recent BOI Report submitted by a reporting company is inaccurate, such reporting company will need to file an updated BOI Report **within 30 calendar days** after the date on which such it becomes aware, or otherwise has reason to know, of the inaccuracy.
- At any time, a change occurs with respect to any of the information provided in the most recent BOI Report submitted by a reporting company (including any change with respect to who is a beneficial owner and/or the information reported for any particular beneficial owner), such reporting company will need to file an updated BOI Report **within 30 calendar days** after the date on which such change occurs.

## What Happens if You Don't Comply With the Act?

The failure of any person (i.e., any reporting company, other entity, or individual) who is subject to the Act to fully comply with the Act's reporting requirements can lead to significant civil and criminal penalties. More specifically, the CTA Rules provide that any person who fails to file any required BOI Report (or to otherwise provide any required information in connection with such report) or who willfully provides (or attempts to provide) false or misleading information in connection with any BOI Report (including any false or fraudulent identifying photograph or document), will face civil penalties of \$500 a day while such violation continues, as well as be fined up to \$10,000 or be imprisoned for up to two years (or both).

## What Happens to the Information You Provide?

Given the confidentiality of the information being collected, FinCEN is required to maintain the information that it collects under the Act in a "confidential, secure, and nonpublic database." Unlike similar databases in other countries like the U.K., FinCEN's database of such information will not be readily available to the public. That being said, FinCEN is expressly authorized to share the collected information (or any portion thereof) with certain government agencies, financial institutions, and regulators, subject to appropriate protocols in furtherance of national security, intelligence, or law enforcement activity.

It should also be noted that under the CTA Rules, any person that improperly discloses, or otherwise uses, any confidential information regarding beneficial owners will face civil penalties of \$500 a day while such violation continues, as well as be fined up to \$250,000 or be imprisoned for up to five years (or both). Further, because a reporting company will be obtaining and disclosing certain "personally identifiable information" with respect to each beneficial owner/applicant, such reporting company will most likely be subject to (and have other material obligations under) other federal/state regulations governing the secure maintenance and transfer of such information. All such applicable regulations should be reviewed by reporting companies (with counsel) to ensure compliance because non-compliance under such regulations can often carry significant civil and/or criminal liabilities.

We will continue to follow the Act and offer updates as further developments arise.

The full text of the Act is available [HERE](#); Please note, the Act is codified as §§ 6401 - 6403 of the "[National Defense Authorization Act for Fiscal Year 2021](#)"

For clarity, these rules are the first of three (3) sets of final rules to be issued pursuant to the Act. The other rules however relate to different portions of the Act and are not expected to affect the current reporting obligations of reporting companies under the referenced CTA Rules.

There are currently 24 categories of exempted entities (see [31 U.S.C. 5336\(a\)\(11\)\(B\)\(i\)-\(xxiv\)](#) for the full list). However, FinCEN retains the authority to adopt further categories of exempt entities.



Please note that the provided address cannot be the address of an agent or a third-party nominee.

Please note, the requirement to supply information with respect to “company applicants” will only apply to reporting companies that are created/formed or registered/qualified (as applicable) on or after January 1, 2024.

The CTA Rules have adopted a broad definition for what constitutes “ownership interest.” Specifically, “ownership interests” has been defined as “*any instrument, contract, arrangement, understanding or mechanism used to establish ownership, such as any equity, stock, capital, or profit interest.*” The final rule, has clarified that this broad definition was created to ensure that any individual or entity that establishes an ownership interest in a reporting company is subject to beneficial ownership requirements.

Please note, the typical “major decision” rights (or the like) granted to limited equity holders will most likely be deemed to constitute “substantial control” based on the sample categories provided in the CTA Rules (and therefore require each such limited equity holder to be identified in the entity’s BOI Report) even if such limited equity holders otherwise have no other voting or management rights.

Please note, regardless of whether the reporting company is a domestic or foreign entity, per the CTA Rules if more than one individual is involved in the actual filing of the subject documents, both the filing individual and the individual who is primarily responsible for directing or controlling such filing would need to be identified on the reporting company’s BOI Report (e.g. if the documents were filed by a law firm both the filing paralegal and the overseeing attorney would need to be identified).

Please note, this 90 calendar day period was created by a special amendment to the CTA rules and regulations recently approved by FinCEN and only applies with respect to the filing of an initial BOI Report by a reporting company that was formed/qualified during 2024. For any a reporting company that is formed/qualified on or after January 1, 2025, they are still currently required to file their initial report within 30 calendar days.

It should also be noted that per the CTA Rules any reporting company that subsequently become exempt from its reporting obligations under the Act will need to report that change to FinCEN.

Please note, the if the unauthorized disclosure or use violation occurs while violating another federal law, or as part of a pattern of any illegal activity involving less than \$100,000 in a 12 month period, the criminal penalties will be increased to \$500,000 or ten years’ imprisonment (or both).