



# The Corporate Transparency Act: Why You Need to Know — Now

By Phyllis Horn Epstein

The latest effort of Congress to combat terrorism, money laundering and other nefarious activities like tax fraud and corruption resulted in the enactment of the Corporate Transparency Act (CTA), which became effective Jan. 1, 2024. The CTA requires detailed reporting and updating of personal information by reporting companies, beneficial owners and company applicants into an online federal data bank that will be overseen and enforced by the Department of Treasury's Financial Crimes Enforcement Network or FinCEN. From the beginning, the CTA has been controversial. Businesses, owners, lawyers, accountants and employees will all feel the impact of its reporting requirements. Noncompliance will result in the imposition of substantial, costly penalties and the risk of incarceration. Given the severity of penalties, all attorneys should become acquainted with the requirements of the CTA and raise awareness of the filing requirements with their clients. Attorneys should clarify the limits of their representation, preferably in writing, to avoid confusion.



## What Is a Reporting Company?

Reporting companies subject to the CTA are generally smaller unregulated organizations, both foreign and domestic, with fewer than 20 full-time employees and less than \$5 million in sales or gross receipts. These are organizations that were formed by registering with the secretary of state or other state office within the jurisdiction of the secretary of state, or foreign entities registered to do business in the U.S. Reporting companies include corporations, LLCs, LPs, LLPs and business trusts. Partnerships and trusts that are not created by a state registration document are not covered by the CTA.

## Exceptions Worth Mentioning

There are 23 specific listed company exceptions in the CTA. They represent highly regulated organizations like banks, credit unions and securities brokers and large U.S. companies with 20 or more full-time employees and \$5 million in gross sales or receipts.

**Tax Exempt Entities.** Some but not all tax-exempt companies are excluded from the CTA. Those that are exempt are 501(c)(3) organizations. Other types of organizations, for example, a homeowners' association that is exempt under Section 528, are not exempt from CTA.

**Large Operating Companies.** A "large operating company" is exempt from CTA reporting if it meets the following requirements:

1. The company employs more than 20 employees on a full-time basis in the U.S.

2. The company filed in the previous year federal income tax returns showing more than \$5 million in gross receipts or sales, including the receipts and sales of subsidiaries.

3. The company has an operating presence in the U.S.

These requirements must be met on the initial filing date and subsequent years. If, for example, in Year 1 the company has only 19 employees but in Year 2 has 21 employees, then there is no reporting requirement for Year 2.

**Inactive Companies.** Companies that were in existence on Jan. 1, 2020, are not actively engaged in business, have no assets, have not negotiated more than \$1,000 through their accounts, have had no change in ownership and no foreign owners may meet the definition of an inactive company exempt from reporting.

## What Information Must Be Reported?

Reporting companies formed before Jan. 1, 2024, have until Jan. 1, 2025, to file an initial report that must include:

- Full legal name of the company
- DBA (doing business as) and trade names
- Jurisdiction information
- Employer Identification Number (EIN) of company
- Complete current street address (not a P.O. box)
- Information about beneficial owners

Reporting companies formed after Jan. 1, 2024, have 30 days to provide the above



information plus the identity of the company applicant.

While the FAQs issued state that companies without beneficial owners need not file, it is recommended that inactive companies fully dissolve to avoid confusion.

## Who is a Company Applicant?

From 2024 onward, a company applicant is the person who files the document to legally create an organization that is a reporting company and, in addition, the person who is “primarily responsible for directing or controlling” the filing of that document. These may or may not be the same person and so they are both designated as a company applicant. The good news for attorneys or others who have a file room of old registered companies is that there is no obligation to self-identify as a company applicant for companies formed prior to 2024.

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A company applicant may be an attorney, a paralegal or any other third party. If the company owner or the owner's attorneys direct someone else, a paralegal perhaps, to do the actual filing, then the owner or attorney will also be a company applicant because he/she is primarily responsible for directing or controlling the filing of that document by asking the paralegal to do the work.

The federal FAQs offer this example: "[A]n attorney at a law firm that offers business formation services may be primarily responsible for overseeing preparation and filing of a reporting company's incorporation documents. A paralegal at the law firm may directly file the incorporation documents at the attorney's request. Under those circumstances, the attorney and the paralegal are both company applicants for the reporting company."

## Who Is a Beneficial Owner?

A beneficial owner is someone who either exercises "substantial control" over the company or owns or controls (directly or indirectly) at least 25% of the company. It includes someone who receives substantial economic benefits from the assets of a reporting company. A beneficial owner is an individual and not a company.

A reporting company must report to FinCEN the following information for each of its beneficial owners:

The full legal name and FinCEN ID number or

- Full legal name
- Date of birth
- Current residential street address
- ID number from current driver's license or passport, along with a copy of the document

A few noted exceptions to the definition of beneficial owner are minors, intermediaries, custodians, agents, nominees, employees (acting solely as employees), creditors and owners of future interests. A partnership representative or tax matters partner may also be an exception. The definition of creditor is expansive: "[I]t would be fruitless to attempt to enumerate, or even describe, the universe of creditor rights that do not amount to ownership or control." But a word of caution: Any individual who might otherwise be an exception could through indirect influence and the exercise of substantial control become a beneficial owner.

## Ownership

The 25% corporate ownership interest covers ownership interests beyond merely

stock. It encompasses equity, capital, profit interests, interests convertible to equity, warrants and other rights to purchase, sell or subscribe (regardless if characterized as debt). Puts, calls, straddles or other options, other instruments or contracts to establish ownership are all indicial of ownership. According to the regulations, an ownership interest includes “[a]ny other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.” 1010.380(d)(2)(i)(E). The regulations include any other form of ownership regardless of whether mentioned.

## Substantial Control

There is no statutory definition of “substantial control,” but substantial control and indirect substantial control would cause these individuals to be considered beneficial owners:

- Senior officers (president, CEO, general counsel)
- Those with authority to appoint or remove officers or directors
- Those who direct or have substantial influence over important decisions on behalf of the business
- Those with the power to appoint or remove a majority of the board of directors

What are “important decisions”? Generally important decisions impact the business, finances and structure of the company. The act “recognizes that control exercised in novel and less conventional ways can still be substantial.” See BOI Reporting Final Rule, 87 Fed. Reg. at 59,527. The preamble to the final regulations states that someone has “substantial influence” if he or she plays “a significant role in the decision-making process and outcomes with respect to those important decisions.” 87

Fed. Reg 59498, 59527 (Sept. 30, 2022).

A good example of a board member exercising substantial control is found in the FinCEN Compliance Guide (P. 27): “Individual F is on the company’s board of directors and makes important decisions on the reporting company’s behalf, thereby exercising substantial control over it. Individual F does not own or control any stock in the reporting company. Individual F is therefore a beneficial owner by exercising substantial control over the reporting company, but not through holding ownership interests in it.”

## Indirect Substantial Control

The presence of substantial control may be direct or indirect. Indirect ownership or substantial control can arise directly or indirectly through “contracts, arrangements, understandings, relationships or otherwise,” including joint ownership.

## Special Situations, Including Trusts

A reporting company owned at least 25% by a trust may cause the grantor, trustee and beneficiary to be considered beneficial owners. According to the regulations: An individual may directly or indirectly own or control an interest in a reporting company, either as 1) a trustee; 2) any other individual with authority “to dispose of trust assets”; 3) the sole income and principal beneficiary of a trust; 4) a beneficiary with the “right to demand a distribution of or withdraw substantially all of the assets from the trust” or 5) a grantor with the right to revoke the trust or withdraw assets. The predominant point is whether the individual has control over a reporting company via an alternative arrangement such as a trust.

The trustee becomes a beneficial owner if the trust holds at least 25% control of a reporting company.

## Updating

The filing requirements of the CTA are ongoing and can be triggered any time during the year as facts and circumstances of ownership change. There is no annual reporting requirement, but updates and corrections must be reported within 30 days. This short window of compliance is the source of much dissatisfaction with the CTA.

Changes that must be reported include a change of name, the change of beneficial owners and the change of beneficial owner information. The change must be reported 30 days from the date of change, not from the date the company learned of the change. A reporting company also needs to update when it no longer is a reporting company (more than 20 employees and \$5 million in receipts for example) or when it is no longer exempt. Any inaccurate reports and information must be corrected within 30 days.

Beneficial owners must update with FinCEN new or changed information within 30 days of the change. That means a change of an address, a renewal of a driver’s license or passport, a change of living address — all must be reported. Reporting updates are required when the estate of a deceased beneficial owner is settled if that person was a beneficial owner “by virtue of property interests or other rights subject to transfer upon death” and when a beneficial owner who is a minor attains the age of majority. When a reporting company becomes exempt, it should report that as well.

Where a trust is involved because it owns 25% or more of a reporting company, changes that should be reported include:



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- Change of situs that causes a change in address of the trustee
- Resignation, removal or appointment of a trustee, advisor or protector
- When a minor beneficiary reaches the age where he or she holds a power to control or dispose of trust assets
- Death of a beneficiary or grantor who was a beneficial owner
- Any other event such as a change of address for a beneficiary or grantor

## Using a FinCEN Identifier

There is concern about all of this personal information being added to the data banks and unsecured records of recording companies and others. One way for individuals to avoid having to provide and update their personal information to each and every entity in which they are a beneficial owner or company applicant is to obtain a FinCEN identifier number. Rather than disclose personal information, the individual can disclose the FinCEN identifier number. It

is incumbent upon an individual to timely update the personal information associated with that number. Some are concerned that a FinCEN identifier cannot be “deactivated” and must be updated indefinitely.

## Penalties – Why This Is Important

The CTA imposes a daily civil penalty of \$591 in 2024 for noncompliance, an amount adjusted annually for inflation. There is also a maximum \$10,000 criminal fine with possible imprisonment up to two years associated with willful violations of the act. Willful misconduct requires the showing of “voluntary, intentional violation of a known legal duty.” Specifically, the CTA makes it unlawful “to 1) willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document; or 2) willfully fail to report complete or updated beneficial ownership information.”

This opens many questions: What is the obligation of the reporting company to acquire this information? What if someone refuses to give the information to the reporting company? The regulations do not specify who is liable in that situation. Should a reporting company file with incomplete information? Can the reporting company file with incomplete information?

## Is It Constitutional?

The case of *National Small Business United d/b/a/ the National Small Business Association, et al. v. Janet Yellen* was filed March 1, 2024, in the U.S. District Court for the Northern District of Alabama. The court issued an injunction covering only members of the NSBA as of March 1, 2024. District Court Judge Liles C. Burke held:



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## Attorneys and clients should expect this law to be implemented now ... and become familiar with the CTA to avoid the harsh penalties for noncompliance.

“The Corporate Transparency Act is unconstitutional because it cannot be justified as an exercise of Congress’ enumerated powers.” The decision is on appeal to the 11th Circuit, where arguments and briefings are taking place as this article was being prepared. New York State presently has its own LLC Transparency Act modeled after the CTA (adopted Dec. 22, 2023), and other states like Maryland, Massachusetts and California are contemplating similar laws. The constitutionality of all of these laws will ultimately be decided. As of June 6, cases challenging the CTA have been brought in Ohio, Maine, Texas and Massachusetts.

### Questions for Attorneys

1. If you submit a beneficial owner report, you have to certify that the information is true, correct and complete. Will you be willing to make this affirmation, and will your firm allow you to make this affirmation on behalf of a client?
2. Should you refer your clients to third-party vendors? Accountants? Have the client do their own filing? Should you assist with the initial filing and then put in writing to the client that you have no responsibility for updating the records with FinCEN as circumstances change. When is the lawyer a “company applicant”?
3. Do you have data security issues? The information being provided with a FinCEN registration is sensitive. If clients are


emailing you this information, can you assure its security?

4. Can you refuse to assume the responsibility for updating reports with address changes, etc.? Should an engagement letter or subsequent letter clarify responsibilities or the law firm’s refusal to update?
5. Will you be willing to issue an opinion of counsel on whether someone is a beneficial owner? Whether an exemption applies? Whether beneficial owner reports are true, correct and complete?
6. How should a company handle a situation where a member or other beneficial owner refuses to provide the personal information?

### Impact of the Law and Developments

It was anticipated that in 2024 there would be 30+ million FinCEN filings; however, only about 800,000 were filed through March 2024. Many might be waiting until the end of the year since the obligation to update could result in having to file again before the end of the year. Others may be watching to see if the law is upheld as constitutional. CTA compliance may become written into legal documents for operating agreements, corporate shareholder and buy-sell agreements, trusts, real estate and banking. New regulations are anticipated by the end of 2024 — perhaps another reason for the overwhelming delay in filing.

While efforts are underway in Congress to delay implementation of the law, that is unlikely to happen. Executive leadership of the American Institute of Certified Public Accountants, hoping to delay its effective date, have written to the U.S. Department of the Treasury expressing “grave concerns.” Attorneys and clients should expect this law to be implemented now — with the exception of the limited plaintiff group in the 11th Circuit litigation — and become familiar with the CTA to avoid the harsh penalties for noncompliance.

More information is available on the FinCEN website, <https://www.fincen.gov>. For more answers, check the FinCEN Small Entity Compliance Guide at <https://www.fincen.gov/boi/small-entity-compliance-guide>. 



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