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Corporate & Finance Alert

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## The Corporate Transparency Act—What you need to know

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The new federal anti-corruption law took effect January 1, 2024. How does it affect you?



### What's the impact?

- Creates new reporting obligations for a wide range of entities formed in the United States.
- Requires reporting companies to disclose information to the United States Treasury about their owners and persons who exercise control.
- Establishes tight reporting deadlines for entities formed after January 1, 2024.

**December 10, 2024 update:** On December 3, 2024, a federal judge in Texas entered an order blocking enforcement of the Corporate Transparency Act nationwide. This means that all beneficial ownership information (BOI) reporting deadlines are suspended until further action in the courts. Most importantly, this suspends the January 1, 2025, deadline for reporting companies to file BOI reports with FinCEN. The government has appealed the decision. In a prepared statement, FinCEN has announced that companies will not be subject to liability if they fail to file new or updated BOI reports while the order of the Texas federal court remains in effect.

The Corporate Transparency Act (CTA) took effect January 1, 2024. The CTA is designed to combat money laundering and other financial crimes by requiring a broad range of entities to disclose information about their owners and persons who exercise control to the Financial Crimes Enforcement Network (FinCEN), a bureau of the United States Treasury.

The CTA is simple in concept but technical in its application. The keys to navigating these new reporting requirements are the following:

- / Whether an entity is a reporting company that must report to FinCEN (or whether that entity falls into one of many enumerated exceptions to the reporting requirement);
- / Who are the beneficial owners and company applicants whose information must be reported; and
- / When reports are due to FinCEN.

It is the obligation of each reporting company to file reports with FinCEN. However, individual beneficial owners, senior officers, and company applicants may face civil and/or criminal liability for willful failure to provide required information or for providing false information.

## Overview of key CTA terms

- / **Reporting Company** includes most entities formed in or registered to do business in the United States. However, the act also creates numerous exemptions, which exclude certain categories of entities (as described below). Entities that fall within one of these exemptions are not required to file Beneficial Ownership Information (BOI) reports under the CTA.
- / **Beneficial Owner** is defined as any individual who (i) owns 25% or more of a reporting company or (ii) exercises “**substantial control**” over a reporting company. Many senior executives (such as a company’s president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer who performs a similar function) will be deemed beneficial owners under the CTA due to their control over a reporting company.
- / **Company Applicant** is an individual who directly files an entity’s formation documents with a relevant state or tribal authority or, if more than one person is involved in the filing, the individual primarily responsible for directing or controlling the filing.

## What is “substantial control” of a reporting company?

An individual is a beneficial owner with “substantial control” if the individual:

- / Is a senior officer or general counsel (such as a company's president, chief financial officer, chief executive officer, chief operating officer, or any other officer who performs a similar function);
- / Has authority to appoint or remove certain officers or a majority of directors;
- / Is an important decision-maker regarding the business, finance, or structure;
- / Has another form of substantial control over the reporting company, such as:
  - Has rights associated with any financing arrangement or interest in the Reporting Company;
  - Has control over one or more intermediary entities that separately or collectively exercise substantial control; or
  - Has arrangements or financial or business relationships, formal or informal, with other individuals or entities acting as nominees. (An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual does not need to report information).

## **Which interests make an individual a beneficial owner of a reporting company?**

The 25% ownership test relates to all direct and indirect beneficial owners. In order to identify who the individual beneficial owners are, an ownership interest assessment should be completed, which includes looking through intermediary entities. Additionally, owning any of the following interests in an amount that equates to 25% of the company's equity holdings could make an individual a beneficial owner of a reporting company and, thus, required to report information to FinCEN:

- / Equity, stock, or voting rights;
- / A capital or profit interest;
- / Convertible instruments;
- / Options or other non-binding privileges to buy or sell any of the foregoing; and
- / Any other instrument, contract, or other mechanism used to establish ownership.

If reporting is required, a beneficial owner can apply for a FinCEN identifier and provide it to the reporting companies for their BOI Report to avoid providing the same information to all reporting companies that the beneficial owners are involved with.

## **Which beneficial owners do NOT need to report information?**

The CTA exempts the following five types of individuals from reporting information under the definition of beneficial owner:

- / Minor children (provided that the Reporting Company reports the information regarding the minor child's parent or legal guardian);

- / An individual merely acting on behalf of an actual beneficial owner as the beneficial owner's nominee, intermediary, custodian, or agent;
- / A reporting company's employee whose substantial control over or economic benefits from the reporting company is derived solely from their employment status (i.e., not a senior officer);
- / An individual whose only interest in a reporting company is a future interest through a right of inheritance; or
- / An individual who is a creditor of the reporting company and qualifies as a beneficial owner solely through the rights or interests for the payment of a predetermined sum of money.

## Who is exempted from the CTA?

While large organizations are generally exempt from reporting requirements, all companies should nonetheless perform an analysis to determine whether they meet the technical requirements for exemptions to apply. The CTA has 23 exemptions for companies to consider when determining whether or not the company must file a BOI Report. For example, there are exemptions for public companies, large operating companies, investment companies and advisers, and subsidiaries of certain exempt entities (as described in further detail below).

- / **Large operating companies.** To qualify for this exemption, the entity must (i) have more than 20 full-time employees in the United States (a full-time employee generally means anyone employed an average of at least 30 service hours per week or 130 service hours per month), (ii) have an operating presence at a physical office, owned or leased by the exempted reporting company but not shared with non-affiliates within the United States, and (iii) report more than \$5 million in gross receipts or sales (net of returns and allowances) in the prior year, excluding gross receipts or sales from sources outside the United States.
- / **Public companies (securities reporting issuers).** To qualify for this exemption, the entity must be (i) an issuer of a class of securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the Exchange Act) or (ii) required to file supplementary and periodic information under Section 15(d) of the Exchange Act.
- / **Investment companies or investment advisers.** To qualify for this exemption, the entity has to be either (i) an investment company as per Section 3 of the Investment Company Act of 1940 (the Investment Company Act) or (ii) an investment adviser as per Section 202 of the Investment Advisers Act of 1940 (the Advisers Act). In addition, the entity must be registered with the SEC under either of these regulations.
- / **Venture capital fund advisers.** To qualify for this exemption, the entity must (i) be an investment adviser described in Section 203(l) of the Advisers Act, and (ii) have filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the SEC.

This allows a CTA exemption for investment advisers exempt from full registration with the SEC but still reporting certain information on a shortened Form ADV.

- / **Pooled investment vehicles.** To qualify for this exemption, the entity must (i) be operating or advised by a CTA-exempt bank, credit union, broker or dealer, investment company or investment adviser, or venture capital fund adviser, and (ii) either (a) an investment company, as defined in Section 3(a) of the Investment Company Act or (b) a company that would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of Section 3(c) of that Act. In addition, the entity must be identified by its legal name by the applicable investment adviser (whether such adviser is a registered adviser or exempted adviser) in its Form ADV (or successor form) filed with the SEC or so identified in the next annual updating amendment to Form ADV required to be filed by the applicable investment adviser pursuant to rule 204-1 under the Advisers Act. This exemption does not extend to pooled investment vehicles of exempt reporting advisers that are not venture capital fund advisers. There is no exemption for a pooled investment vehicle of an offshore exempt reporting adviser. If the entity is formed outside the United States, there may be special reporting requirements.
- / **Subsidiaries of certain exempt entities.** Any entity may be considered exempt under the subsidiary exemption if it is controlled or wholly owned, directly or indirectly, by another exempt entity (except an inactive entity).

## What are the deadlines for CTA compliance?

- / **Reporting companies formed between January 1, 2024, and December 31, 2024,** must file their initial BOI Report with FinCEN within 90 days after receiving actual or public notice, whichever is earlier, of their company's creation or registration.
- / Reporting companies created on or **after January 1, 2025,** will have **30 days** to file the required BOI Report.
- / Reporting companies created **before January 1, 2024,** must file their initial BOI Report by **January 1, 2025.**
- / Reporting companies created **before January 1, 2024,** are not required to identify their company applicants.
- / Updates: A reporting company must file an updated BOI Report whenever there is a change in (i) its basic information, (ii) beneficial owners, or (iii) status as a reporting company (i.e., if the company becomes eligible for an exemption). The updated report must be filed *no later than 30 days after the change.*

## What are the potential consequences of non-compliance?

- / A **willful failure** to report complete or updated beneficial ownership information to FinCEN or the willful provision of or attempt to provide false or fraudulent beneficial ownership information may result in **civil or criminal penalties**, including civil penalties of up to \$500 for each day the violation continues, or criminal penalties, including imprisonment of up to two years and/or a fine of up to \$10,000.
- / A person may be subject to civil and/or criminal penalties for **willfully causing** a reporting company not to file a required BOI Report or to report incomplete or false beneficial ownership information.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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