



## **The Corporate Transparency Act** **April 1, 2024**

The Corporate Transparency Act (CTA) is a new federal law that impacts certain business entities. The CTA was adopted as part of a government effort to prevent financial crimes, seeking transparency in who owns or controls certain business entities. It gathers information about *individual* beneficial owners of small business entities through digital filings submitted to a special division of the US Treasury, the Financial Crimes Enforcement Network (FinCEN), which will maintain a federal database of the beneficial ownership information (BOI). The law applies to small businesses that were formed under the laws of a secretary of state, or similar law of an Indian tribe or the equivalent office, including corporations, LLCs and certain partnerships (all called “reporting companies” in the FinCEN materials, and those are the entities referred to in this explanation); foreign entities have similar requirements. Thus, the perception that only large businesses must concern themselves with this new law is not correct. Quite the opposite, only businesses with fewer than 20 employees and gross receipts or sales under \$5,000,000 must comply. The responsibility for compliance falls on the business entity itself, and entities should put a plan for compliance in place to collect the required data and file the BOI timely and accurately.

Recently, an Alabama US District Court held the CTA is unconstitutional because it exceeds the Constitution’s limits on Congress’ power; however, this ruling is specific only to the Plaintiffs in that case. Thus, the CTA continues to apply to everyone else and so it is prudent to proceed accordingly.

### **Due dates for filings**

The dates for initial filings with FinCEN are as follows: (i) commencing January 1, 2025 for organizations already in existence at the beginning of 2024; or (ii) within 90 days of formation for organizations formed in 2024; or (iii) within 30 days of formation for entities formed after 2024. The timelines and regulations governing the time for filing have been changing rapidly and may continue to change; the links below are updated constantly. The filings must be kept current, with updates for any change in information relating to beneficial owners or the entity itself to be made within 30 days of the entity becoming aware of the change; in addition, inaccurate filings can be corrected within 90 days of the erroneous filing, apparently without penalty. The penalties for noncompliance are, as of this writing, substantial, with accruing monetary penalties for each failure to comply with an element of the CTA, and potential criminal penalties as well in some circumstances.

### **What information must be reported?**

The basic BOI required starts with details about the company, including name, legal address, where it is formed, DBA names and its EIN. The more nuanced reporting covers detailed information for individual beneficial owners of the entity, including full legal name, date of birth, residential

street address, unique ID number from an individual's identification document and issuing jurisdiction of acceptable, unexpired ID document (e.g., driver's license, US passport, state-issued ID, etc.), and an image of the ID document from which the unique ID number was obtained. For entities formed after January 1, 2024, in addition to the information for beneficial owners, similar information must be filed for the "company applicant" being the person (or up to two people) who accomplished the actual filing of the documents with the secretary of state's office to create the entity (such as a lawyer or paralegal). Company applicant information need not be kept up to date. The Company has a duty to have copies of the identification documents and the other sensitive individual information for beneficial owners on hand.

### **Who is a beneficial owner?**

Under the CTA, there are two reasons an individual might be deemed a "beneficial owner." The first is fairly simple: any individual who owns or controls at least 25% of the ownership interests of an entity is a beneficial owner. The other is more nuanced: any individual who, directly or indirectly, exercises "substantial control" over an entity is also considered a beneficial owner (even if the individual does not own any equity in the Company). Identifying who is a beneficial owner can be simple for a small entity with only one or two individual owners who also control every facet of the Company. But for entities with more complicated corporate structures or owners that are not individuals, determining the beneficial owners will require some analysis to look through non-individual owners and identify the *individuals* who, directly or indirectly, either exercise substantial control over the entity or own at least 25% of the entity. "Ownership" includes stock or capital/profits ownership, LLC interests, partnership interests, and more abstract or indirect "ownership" through options or warrants. Thus, determining ownership when an entity has other entities, either trusts, estates, or business entities, as owners will be complex in some cases. "Substantial control" consists of important decision making or controlling those who make important decisions, and thus an individual with substantial control would include senior management (company presidents, CEO, COO, or other high-ranking officers), most directors, or individuals who can replace directors (i.e., through voting rights), or who have substantial influence over important corporate matters, either through corporate documents or otherwise. Shareholder agreements, LLC agreements, and partnership agreements that give individuals voting and veto rights, for example, may result in a finding that many more individuals have "substantial control" and therefore count as "beneficial owners" than one might think.

### **How does the law apply to Trusts and Estates?**

Trusts and estates often own interests in entities that are required to make BOI filings with FinCEN. A trust itself is not a "reporting company" that must make a BOI itself, but the individuals involved with a trust that owns an interest in a reporting company may well be beneficial owners. A trust, through its trustee, thus must cooperate in analyzing the situation and furnish appropriate information to the business entity that must make the filing. The application of the law to trusts and estates requires a thoughtful analysis of both the entity and the terms of the trust. For example, an *individual serving as trustee of a trust* that owns 25% or more of an entity would be a beneficial owner. In addition, the material from FinCEN makes clear that sole current beneficiaries of all trust income or principal, or those who can withdraw substantially all trust assets, as well as grantors or settlors who can revoke the trust, are beneficial owners if the trust

holds the requisite ownership. Right now, it seems unclear how trusts that use corporate trustees may be treated. In addition, it is a bit unclear whether the Personal Representative of an estate of a deceased owner would be a beneficial owner. The interest of the decedent is not deemed passed on until the settlement of the decedent's estate, but the current federal guidance does not address control issues during the time of estate administration. We expect that these kinds of issues related to trusts and estates will be resolved by FinCEN in time, but currently the CTA and related guidance leaves many unanswered questions.

### **Are there exemptions and exceptions?**

Some entities are *exempt* by definition. As of this writing, the list exempts twenty-three categories of organizations, primarily covering industries whose ownership and control is already regulated by another federal agency, such as securities agents, certain financial firms, accounting firms, and tax-exempt entities. If there is a doubt as to whether an entity qualifies for an exemption, the entity should check its status carefully. In addition, there are five categories of individuals who are *exceptions* from reporting requirements: minors, nominees or agents, holders of future interests, creditors, and employees who do not otherwise count as beneficial owners because of their level of control or ownership interests.

### **What should entities be doing at this point?**

Entities should be starting the process of adopting policies detailing (i) how reporting will be handled, (ii) who in the organization will be responsible for the reporting, (iii) how beneficial owners and those with substantial control will be identified, and (iv) what information will be needed. The entity must impress on the beneficial owners that if there is any change in the information that has been reported – for example if a beneficial owner moves, renews an ID document, or transfers an ownership interest (including a death or inheritance) – the entity is compelled to update the filing promptly and can be fined if it does not. Any individual who is uncomfortable providing the required personal information to the entity may instead obtain a special “identifying number” by filing directly with FinCEN. The individual can then provide that FinCEN ID to the entity, which then must include the number in its filing. Anyone who has a FinCEN ID is responsible to maintain accurate information directly with FinCEN, and consequently the entity is absolved from that requirement of reporting changes for the individual. Entities should begin collecting beneficial owner information well in advance of their required filing date, as it will be a time-intensive task for some entities. For example, some family businesses may have elderly shareholders without a valid driver's license or passport, and it could take time for them to obtain a valid and unexpired ID document for the CTA filing. More detailed discussion of what companies should do to comply with the CTA is provided in a detailed LeBlanc & Young companion memorandum (available on our website or please contact us if you would like a copy), or on the FinCEN website, linked below.

The following sources are maintained by FinCEN, which seem to be updated regularly:

- <https://www.fincen.gov/sites/default/files/shared/BOI%20Informational%20Brochure%20508C.pdf>
- [https://www.fincen.gov/sites/default/files/shared/BOI\\_Small\\_Compliance\\_Guide.v1.1-FINAL.pdf](https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf)
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