



The Corporate Transparency Act

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Part 1 – Executive Summary

The Corporate Transparency Act (the “**Act**”) established reporting requirements for many closely-held or privately owned corporations, limited liability companies, limited partnerships and other similar entities created, or registered to do business in the United States. The Act became law in January 2021, and the U.S. Treasury’s Financial Crimes Enforcement Network (“**FINCEN**”) issued rules implementing the beneficial ownership information reporting requirements of the Act in September 2022 (the “**Regulations**”). **The Regulations go into effect on January 1, 2024.**

Key Terms

- “**Reporting Company**” – An entity that is required to submit reports to FINCEN under the Act (*e.*, an entity that does not benefit from an exemption under the Act).
- “**Beneficial Owner**” – A natural person who, directly or indirectly, owns or controls 25% or more of the ownership interests of a Reporting Company or exercises **substantial control** over a Reporting Company.
- “**Company Applicant**” – A natural person who forms a Reporting Company.

Primary Compliance Requirement – Every Reporting Company must submit reports to FINCEN providing information about:

- Itself;
- Its Beneficial Owner(s); and
- Its Company Applicant(s).

Deadline for Reporting Companies to file an Initial Report



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- If the Reporting Company *already exists* or is *formed before January 1, 2024*, the Reporting Company has until December 31, 2024 to file its Initial Report.
- If the Reporting Company is formed *after January 1, 2024*, the entity has thirty (30) days after its date of formation to file its Initial Report.

Purpose of the Act:

The Federal Government determined that criminal actors, tax cheats, and individuals facing sanctions (such as Russian oligarchs) use anonymous companies registered in the U.S. to obscure their ownership, fund illicit activities and hide illicit proceeds.

The Act will eliminate the anonymity surrounding such companies by requiring Reporting Companies to disclose information regarding their ownership and control to FINCEN.

Focus of the Act:

The Act does not focus on publicly traded companies because public companies are already subject to high levels of government regulation. Instead, the Act focuses on investment entities and small businesses that are created by filing a formation or organizational document with a U.S. State (*e.g.*, corporations, limited liability companies and limited partnerships).

The Act also applies to foreign entities that are required to register in the U.S. to do business, but that is beyond the scope of this alert which is focused on domestic entities.

Real estate investors, in particular, are expected to be subject to significant reporting requirements under the Act as a result of how real estate ownership is typically structured. Real estate is commonly owned by a special (or 'single') purpose entity ("SPE") and ownership of the SPE is usually structured through a chain of additional entities. Under the Act, the SPE and every other entity in the chain of ownership will likely be Reporting Companies, and each entity will be individually subject to the reporting obligations.



Are there penalties for failure to comply?

Yes, and they can be severe. While the most severe penalties will likely be reserved for those who file intentionally false or fraudulent reports, penalties may be assessed against any Reporting Company that fails to provide timely and accurate information to FINCEN. Fines of \$500 per day may be assessed for each day (x) a report is overdue, or (y) a filed report contains inaccurate information. Criminal penalties can also be assessed, which include a fine of up to \$10,000 and up to two years in prison.

If a mistake is made and an incorrect report is submitted, the Regulations provide for a safe harbor to correct the report, but there is a very short window to comply with the safe harbor. The safe harbor is available only if an accurate, corrected report is filed with FINCEN no more than 90 days after the date of the submission of the inaccurate report. The safe harbor is not available to Reporting Companies that file corrected reports after this 90-day window, even if a correction is promptly filed after first becoming aware (or having reason to know) that an inaccurate report needs to be corrected. The regulations do not include any standard of good faith regarding the requirements to correct or update the reports.

The penalties assessed against a Reporting Company may be imposed upon such company's senior officers.

Part 2 – Definitions and Analysis of Key Terms

Who is subject to the Act?

Reporting Companies, Beneficial Owners and Company Applicants, unless an exemption applies.

Reporting Company Exemptions:



General partnerships and sole proprietorships that have not registered with the state are not subject to the Act.

Charitable organizations and many other nonprofits such as private foundations generally are not Reporting Companies under the Act.

Estate planning trusts are not Reporting Companies under the Act; however, trustees, grantors, settlors and beneficiaries may be Beneficial Owners of Reporting Companies. This will be addressed below.

A 'large operating company' exemption applies to any company that has:

1. An operating presence at a physical office in the U.S.;
2. \$5 million of annual gross revenue with certain accounting adjustments; and
3. More than 20 full-time employees (full-time is defined under the Affordable Care Act for this purpose, but generally, it includes people that work 30 hours a week or 130 hours a month).

Other specific exemptions may apply and should be discussed on a case by case basis.

A Note about Real Estate Investors: Many entities that own real estate will not be able to take advantage of the Act's exemptions, and therefore will be subject to the Act as Reporting Companies. For example, SPEs are unlikely to qualify as a 'large operating company' because SPEs typically do not have employees or physical office space.

Beneficial Owners:

Only a natural person (an individual) can be a Beneficial Owner of a Reporting Company.

An individual may qualify as being a Beneficial Owner of a Reporting Company by:



- Directly or indirectly owning or controlling 25% or more of the “ownership interests” of a Reporting Company; or
- Having the ability to exercise “substantial control” over a Reporting Company.

Any number of individuals may qualify as Beneficial Owners of a given Reporting Company depending on the particular facts and circumstances.

Direct Ownership of 25% or More of the Ownership Interests in the Company:

Ownership Interests include any of the following, with or without voting rights:

- Equity/stock;
- Membership interests;
- Profit interests;
- Warrants, options or future rights to acquire any of the above; and
- Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

Indirect Ownership or Control:

An individual may indirectly own or control an Ownership Interest in a Reporting Company in many ways, though the most common are through (i) ownership through one or more intermediary entities and (ii) trust arrangements.

A Note about Intermediary Entities: For indirect ownership of a Reporting Company through one or more intermediary entities, the determination as to whether the 25% threshold is met depends on the proportionate interest in such entity (or entities) that owns the Ownership Interest in each entity down the chain. To determine which of the intermediary entities an individual owner will qualify for as a Beneficial Owner, one would need to trace that through proportionately on a case by case basis.



A Note about Trusts: A trust is not a Reporting Company nor a Beneficial Owner; however, trustees, beneficiaries, or grantors of a trust may be Beneficial Owners, as illustrated below. In each illustration below “**Assets**” means Ownership Interests in Reporting Companies.

- A trustee (or other individual) with the authority to dispose of trust Assets.
- A beneficiary who: (i) is the sole permissible recipient of income and principal derived from Assets; or (ii) has the right to demand a distribution of or withdraw substantially all of the Assets from the trust.
- A grantor or settlor who has the right to revoke the trust or otherwise withdraw the Assets of the trust.

Substantial Control of a Reporting Company:

Individuals who have the ability to exercise “substantial control” over a Reporting Company are Beneficial Owners, irrespective of ownership.

The Regulations specifically identify certain types of individuals who are deemed to exercise substantial control, and also include a broad catch-all description of substantial control that likely will require individual determinations on a case-by-case basis.

Specific individuals deemed to have ‘substantial control’ by the Regulations

- “Senior Officers”
 - Expressly includes the President, CEO, CFO, COO, and general counsel.
 - Also includes anyone else holding a similar position, or those powers or authority, even under a different name or title.
- One who has authority over the appointment or removal of any Senior Officer or a majority of the board of directors (or equivalent body).

Catch-all description for determining other individuals who have direct substantial control

- One who directs, determines, or has substantial influence over important decisions made by the Reporting Company, including but not limited to:
 - The sale, lease, mortgage, or other transfer of any principal assets;
 - The reorganization, dissolution, or merger;



- Major expenditures or investments;
- The incurrence of any significant debt;
- The approval of the operating budget;
- The selection or termination of business lines or ventures, or geographic focus;
- Compensation and incentives for Senior Officers;
- The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts; or
- Amendments of any substantial governance documents of the Reporting Company, including the articles of incorporation or similar formation documents, bylaws and operating agreements.

The substantial control catch-all description could, as a practical matter, make all members of an LLC Beneficial Owners, even if the LLC has five members that each have a 20% vote, with none of them owning more than 25%. The Regulations provide that if multiple individuals can exercise the power(s) together, each has an equal vote, or all participate in that vote, they will attribute that power to all individuals.

Grantors and Trustees of trusts that own Reporting Companies should consider if they qualify as Beneficial Owners based on the substantial control catch-all description.

Company Applicants:

The natural person who actually forms the Reporting Company by filing the formation document with the applicable state office, and the natural person who directs the filer, if those are different people.

Part 3 – Disclosure and Reporting Requirements

Who is responsible for filing reports with FINCEN?



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The Act places the reporting responsibility squarely on Reporting Companies, including the obligation to accurately report information and keep the reports up to date.

The reports must disclose required information about the Reporting Company and its Beneficial Owners and Company Applicants. A Reporting Company is responsible for acquiring the required information from all of its Beneficial Owners and Company Applicants.

The reporting responsibility can be *partially* shifted to Company Applicants and Beneficial Owners through the use of FINCEN Identifiers, as will be described below.

Information to be disclosed and kept current about a Reporting Company:

1. Full legal name;
2. All alternate names used by the Reporting Company including ‘doing business as’ (DBA) names, and trade names;
3. Jurisdiction of formation;
4. Tax identification information such as the Reporting Company’s “TIN” or “EIN”; and
5. Business address –
 1. The address of the ‘principal place of business’; or
 2. If the company has no official ‘principal place of business’, the address of the ‘primary location’ where business is conducted.

Information to be disclosed and kept current about a Beneficial Owner (“CTA Information”):

1. Full legal name;
2. Date of birth;
3. A picture of an official ID card, which must be a Passport or state issue ID, such as a driver’s license; and
4. Residential address (not a PO Box or mailing address, must be the residential address).



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We recognize that the nature of the CTA Information is the very information we are all told to keep private to prevent identity theft. Instead of providing CTA Information to a Reporting Company, a Beneficial Owner may provide it directly to FINCEN in exchange for a FINCEN Identifier.

Practice Tip:

For new real estate investments, gather CTA Information from Beneficial Owners during the initial questionnaire and investment process, or require each investor to obtain their own FINCEN Identifier and provide it to the company.

Information to be disclosed and kept current about a Company Applicant:

Subject to the exceptions listed below, a Company Applicant must disclose the same CTA Information about itself as a Beneficial Owner. A Company Applicant may also apply for a FINCEN Identifier in the same manner as a Beneficial Owner.

Exceptions:

1. A Company Applicant may provide their business address as opposed to their residential address.
2. Information regarding Company Applicants does not need to be disclosed in the Initial Reports filed by any Reporting Company existing prior to January 1, 2024.

Use of FINCEN Identifiers

Beneficial Owners and Company Applicants may, instead of providing CTA Information to Reporting Companies, provide CTA Information to FINCEN in exchange for a FINCEN Identifier.



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Beneficial Owners and Company Applicants with a FINCEN Identifier need only provide the FINCEN Identifier to the Reporting Company in lieu of providing CTA Information.

Individuals who have a FINCEN Identifier bear the responsibility of keeping their CTA Information current with FINCEN and must report a change of any CTA Information within thirty (30) days after such change.

Benefits of FINCEN Identifiers

The use of a FINCEN identifier has three important benefits:

1. The CTA Information a Reporting Company must provide to FINCEN about Beneficial Owners and Company Applicants is highly sensitive personal information. Beneficial Owners and Company Applicants can better preserve the confidentiality of CTA Information by acquiring a FINCEN Identifier, and Reporting Companies can avoid potential liability for inadvertent disclosure of CTA Information by dealing only with FINCEN Identifiers.
2. For a Reporting Company, receiving and reporting a FINCEN Identifier shifts the burden to the Beneficial Owner/Company Applicant to keep current with FINCEN all of the CTA Information. **Note** that the Reporting Company always has the burden of reporting changes due to the addition or removal of a Beneficial Owner.
3. Makes reporting more efficient for individuals who are the Beneficial Owner of numerous Reporting Companies, and for clients who repeatedly use the same internal employees, lawyers or service companies as Company Applicants to form Reporting Companies.

What are the reporting deadlines?

Initial Report deadlines:



- If the Reporting Company *already exists* or is *formed before January 1, 2024*, the Reporting Company has until *December 31, 2024* to file its Initial Report.
- If the Reporting Company is formed *after January 1, 2024*, the entity has *thirty (30) days after its date of formation* to file its Initial Report.

Updated Report deadlines (FINCEN Identifiers not used):

- *Thirty (30) days* after the change to:
 - Information about the Reporting Company;
 - CTA Information about any existing Beneficial Owner; or
 - Addition or removal of a Beneficial Owner

Updated Report deadlines (using FINCEN Identifiers):

- *Thirty (30) days* after the change to:
 - Information about the Reporting Company; or
 - Addition or removal of a Beneficial Owner

Part 4 – Access to Disclosed Information

Is this public information/Who has access?

No, this is not public information. The FINCEN database will not be publicly accessible or available for commercial purposes, nor will the FINCEN database be subject to discovery during civil litigation or to Freedom of Information Act requests.

The Regulations only allow Federal U.S. law enforcement and taxing agencies to have immediate access to Reporting Company information and CTA Information in the FINCEN database.



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The Act authorizes FINCEN to disclose Reporting Company information and CTA Information to authorized state government authorities, certain foreign governments and financial institutions, subject to effective safeguards and controls in order to “provide essential information to law enforcement, national security agencies, and others to help prevent criminals, terrorists, proliferators, and corrupt oligarchs from hiding illicit money or other property in the United States” as FINCEN has stated.

While there is certainly a concern about data breaches, some comfort can be found in the fact that it is not a database that is accessible by the general public.

Next Steps

For further information and guidance regarding compliance with the Corporate Transparency Act, please reach out to the authors – Adam Haberfield or Jack Vrablik in the firm’s Corporate and Real Estate practice groups – or reach out directly to your regular OLSS contact.

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