

# The Corporate Transparency Act

Beneficial ownership reporting is here.

WRITTEN BY JEFF DODD

As most practitioners know, the beneficial ownership reporting requirements imposed by the Corporate Transparency Act, or CTA, and the final implementing rule, or the “Final Rule” of the Financial Crimes Enforcement Network, or FinCEN, of the U.S. Treasury Department are in full effect.<sup>1</sup> Reporting companies formed or registering after January 1, 2024, are already subject to the reporting requirements and, by the end of 2024, previously formed or registered entities will also be subject to such requirements—unless they qualify for an exemption. FinCEN estimates tens of millions of existing companies will be reporting soon—in addition to the over 5 million entities created or registering each year and their “company applicants.”<sup>2</sup> “Willful” failures to comply could result in civil and criminal penalties.

As industry associations have pointed out, the burden of compliance largely falls on smaller businesses,<sup>3</sup> many of which were unaware of what CTA required as late as December 2023.<sup>4</sup> That is changing. Complaints to Congress—and indeed from Congress—have grown louder as a result.<sup>5</sup> Legislation has been introduced to delay reporting and court challenges have ensued—including a successful constitutional challenge in one district court.<sup>6</sup> Nonetheless, the CTA and the Final Rule remain in force (save, for now, the plaintiffs in that case<sup>7</sup>), so business lawyers need to grapple with them. While we cannot canvass all the intricacies of those laws in this short article, we will outline the basic requirements and some ideas about what practitioners should be doing now.

## WHO MUST FILE?

Simply, “reporting companies.” Reporting companies are “domestic reporting companies” (entities created by filings with a secretary of state or equivalent in the U.S.) and “foreign reporting companies” (foreign entities registered to do business in the U.S. with a secretary of state or equivalent).

Twenty-three types of entities are excised from the “reporting companies” definition, including:

- Public companies and certain financial institutions (including, among others, banking institutions; broker dealers; registered investment companies and investment advisers; insurance companies).<sup>8</sup>
- “Large Operating Companies,” which are entities with a physical U.S. office, more than 20 “full-time” employees in the U.S., and more than \$5 million in gross receipts or sales (net of returns or allowances) reported on their last U.S. federal tax or information returns (excluding receipts or sales from non-U.S. sources). Importantly, an entity cannot consolidate its affiliate headcount, though revenue is tested on a consolidated basis. For example, a private holding company reporting \$50 million in

receipts, having no employees, is a reporting company.<sup>9</sup>

- Subsidiaries “whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more” specified exempt entities, including large operating companies.<sup>10</sup> Thus, a company owned 90% by an exempt entity (say a large operating company) and 10% by a non-exempt entity would be a reporting company unless it otherwise qualified for an exemption on other grounds.

## WHAT MUST BE FILED?

A reporting company must report its legal name and any trade and “doing business as” names, jurisdiction of formation, state of first registration for foreign reporting companies, physical address, and tax identification number. As to their beneficial owners and, for entities formed or registered in 2024 or thereafter, company applicants, they must report: full legal name, date of birth, current residential or business address, and a unique identification number from designated types of identification documents. Images of the identification document must be included.<sup>11</sup> However, if a beneficial owner or company applicant obtains a FinCEN identification, the reporting company can include that number in lieu of collecting and reporting the detailed personal information described above.<sup>12</sup>

The reporting company must also update reported information (except as to company applicants), including changes to direct and indirect beneficial owners.<sup>13</sup> The continuous reporting obligation will be especially tricky for companies with ownership interests held by entities with multiple layers of ownership themselves.

Despite the presence of the word “owner” in “beneficial owner,” the term includes each *individual directly or indirectly* exercising “substantial control over” a reporting company, as well as *individuals directly or indirectly* owning or controlling at least 25% of the reporting company’s entity’s ownership interests. We will make only three brief observations about the very complex rules regarding beneficial ownership determinations:

- The Final Rule forces a search for *individuals*, not the entities through which they exercise substantial control or have indirect ownership interests. Every reporting company will have at least one individual beneficial owner, even if only the under substantial control prong.
- The substantial control prong captures many executive officers (or equivalents) and some directors—but it also could sweep in investors and others with powers according them “substantial influence” over “important decisions.”<sup>14</sup> The rules concerning substantial control are broad and complex and, in some cases, difficult to apply.
- The ownership prong covers many interests well beyond voting equity and, importantly, covers indirect, up-the-chain owners, some of which may be beyond the visibility of the reporting company. The ownership prong is just as broad, complex, and difficult as the substantial control prong.

Beneficial ownership determinations will be among the knottiest and treacherous for a reporting company—and its counselors.

Company applicants are those who file formation or

registration documents and, importantly, “any individual who directs or controls the filing of such document by another person.” Here is where you and your paralegals may be covered: “For example, an 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.”<sup>15</sup>

### WHEN MUST FILINGS BE MADE?

Reporting companies formed or registered in 2024 or thereafter must file initial reports within 90 days after formation or registration (30 days after January 1, 2025); those formed or registered before then must file reports by January 1, 2025.

Updates must be filed within 30 days “after the date on which there is any change” as to reported information (except as to company applicants).

### SOME ACTIONS FOR NOW

Here are three of several actions practitioners should consider now—if they have not done so already:

- a) Revise engagement letters and communicate with your clients as to the relative responsibilities as to filings. We suggest that you clearly state that your client is ultimately responsible for the reports and all updates. Filing services are happy to assist—for a fee.
- b) If you or your paralegals will be “company applicants,” obtain a FinCEN identifier; otherwise, you will be providing personally identifiable information and documents to your clients.
- c) Revise your forms to cover CTA obligations. For example, governance documents should be revised to require equity owner entities to provide “indirect” ownership information changes. Your clients can expect push-back; you can expect counseling and diplomacy. **TBJ**

### NOTES:

1. 31 U.S.C. § 5336; *see also* 31 CFR § 1010.380, et. seq.
2. *See*, Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59488, 59565 (September 22, 2023)(the “Final Rule”)(“Summing the estimates of both domestic and foreign entities, the total number of existing entities in 2024 that may be subject to the reporting requirements is 36,581,506 and the total number of new companies annually thereafter is 5,616,362.”).
3. *See* Letter of a Coalition of Industry Associations to Senators Sherrod Brown and Tim Scott (March 14, 2024), <https://s-corp.org/wp-content/uploads/2024/03/CTA-Coalition-Letter-March-2024.pdf>.
4. *Financing Sales Survey*, NFIB Research Center, p. 5 (December 2023)(“The vast majority (83%) of small business owners are not at all familiar with the new federal regulation. Sixteen percent are somewhat familiar, and only 2% are very familiar.”), <https://strgnfibcom.blob.core.windows.net/nfibcom/Financing-Sales-Survey.pdf>.
5. *Supra note 4*; *see also* Letter from Senators and Members of Congress to Secretary Yellen and Director Gacki (December 18, 2023), <https://www.rickscott.senate.gov/services/files/0C5859CC-4BBB-475C-AEA7-E5212B04506D>.
6. *National Small Business United et al v. Yellen et al*, No. 5:2022cv01448-Document 51, <https://law.justia.com/cases/federal/district-courts/alabama/alndce/5:2022cv01448/183445/51/>.
7. FinCEN, UPDATED: Notice Regarding *National Small Business United v. Yellen* (“FinCEN is complying with the court’s order and will continue to comply with the court’s order for as long as it remains in effect. As a result, the government is not currently enforcing the Corporate Transparency Act against the plaintiffs in that action: Isaac Winkles, reporting companies for which Isaac Winkles is the beneficial owner or applicant, the National Small Business Association, and members of the

National Small Business Association (as of March 1, 2024). Those individuals and entities are not required to report beneficial ownership information to FinCEN at this time.”), <https://fincen.gov/news/news-releases/updated-notice-regarding-national-small-business-united-v-yellen-no-522-cv-01448>. FinCEN is appealing the judgment.

8. 31 CFR § 1010.380(c)(2)(i), (iii)-(xiv).
9. 31 CFR § 1010.380(c)(2)(xxi). *See also* Final Rule, *supra note 2*, p. 59543 (“Although the CTA specifies that gross receipts or sales are to be consolidated, the CTA contains no similar specification for employee headcount. To the contrary, it provides that the exception applies to an “entity that . . . employs” more than 20 employees, indicating that the determination of the number of employees is to be made on an entity-by-entity basis.”).
10. 31 CFR § 1010.380(c)(2)(xxii).
11. 31 CFR § 1010.380(b)(1).
12. 31 CFR § 1010.380(b)(4).
13. 31 CFR § 1010.380(a)(2), (b)(3).
14. 31 CFR § 1010.380(d)(1).
15. FinCEN, Frequently Asked Questions, E.3, [https://www.fincen.gov/boi-faqs#E\\_5](https://www.fincen.gov/boi-faqs#E_5); Further, “At most, two individuals need to be reported as company applicants: the person who directly files the document with a secretary of state or similar office, and if more than one person is involved in the filing of the document, the person who is primarily responsible for directing or controlling the filing. . . . Scenario 2: If the attorney instructs a paralegal to complete the preparation of the creation document, rather than doing so himself, before directing the corporate service provider to file the document, the outcome remains the same: the attorney and the individual at the corporate service provider who files the document are company applicants. The paralegal is not a company applicant because the attorney played a greater role than the paralegal in making substantive decisions about the filing of the document.” *Id.* at E.5.



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