

Deciphering the Details: Demystifying the Corporate Transparency Act

Maci B. Followell

On January 1, 2024, the Corporate Transparency Act (CTA) took effect, impacting millions of businesses across the country. Enacted in 2021 as part of a larger effort by Congress to enhance corporate transparency and anti-money laundering protections, the CTA seeks to deter illicit financial activities, such as tax fraud, money laundering and terrorism funding, by compiling a database of information regarding the individuals associated with entities operating or engaging in business within the U.S. market. This article provides a high-level overview of the CTA, including who and what must be reported, timelines for reporting and penalties for noncompliance.

Who Must Report?

The CTA casts a wide net and applies to any domestic or foreign entity that falls within the CTA's definition of a "reporting company." A "reporting company" is broadly defined to include any corporations, limited liability companies or other entities created by the filing of a document with a U.S. secretary of state or similar office, as well as any entities created under the laws of a foreign country and registered to do business in the U.S. by the filing of a document with a U.S. secretary of state or similar office.

However, an entity will not be deemed to be a "reporting company" if it falls within one of the CTA's 23 enumerated exemptions. Generally, these are very narrow exemptions that are aimed at highly regulated entities with preexisting disclosure obligations, such as publicly traded companies and certain tax-exempt entities, or entities that may be viewed as less likely to present the types of risks that the CTA seeks to protect against, such as governmental and inactive entities. Below is a list of the 23 exemptions that are available under the CTA and the regulations issued by the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN):

- Securities reporting issuers
- Governmental authorities
- Banks
- Credit unions
- Depository institution holding companies
- Money services businesses
- Securities brokers or dealers
- Securities exchanges or clearing agencies
- Other Securities Exchange Act of 1934 registered entities
- Registered investment companies and investment advisers
- Venture capital fund advisers
- Insurance companies
- State-licensed insurance producers
- Commodity Exchange Act registered entities
- Public accounting firms
- Public utilities

- Financial market utilities
- Pooled investment vehicles
- Tax-exempt entities
- Entities assisting a tax-exempt entity
- Large operating companies
- Inactive entities
- Subsidiaries of certain exempt entities

What Must Be Reported?

Under the CTA, domestic and foreign entities satisfying certain criteria must file a Beneficial Ownership Information (BOI) Report with the FinCEN, disclosing specific information regarding themselves and the individuals associated with their organization.

The level of detail required to be contained in a BOI Report varies based on when the reporting company came into existence. Reporting companies formed on or after January 1, 2024 must disclose information regarding each of their "beneficial owners" and "company applicants" — including the individual's full legal name, date of birth, current address (business address for company applicants and residential street address for beneficial owners), and a government-issued identifying number from a U.S. or foreign passport or driver's license, along with a copy of the issuing document. However, reporting companies formed prior to January 1, 2024 may omit information concerning company applicants from their initial report.

Every reporting company must also provide its full legal name, any trade or alternative business name, its business address, jurisdiction of formation (and, for foreign reporting companies, the U.S. jurisdiction in which they were first registered), and a taxpayer identification number.

Notably, however, individuals may obtain a FinCEN identifier — a unique identifying number assigned by FinCEN — by application, which reporting companies can in turn include in their report in lieu of providing detailed information for such individual. A FinCEN identifier may be particularly helpful for individuals who will routinely serve as company applicants, like lawyers or paralegals.

Who is a "Beneficial Owner?"

As discussed above, the CTA requires disclosure of certain information regarding the "beneficial owners" of a reporting company. Beneficial owners are natural persons who,

directly or indirectly, either (a) own or control at least 25% of the ownership interests in a reporting company or (b) exercise "substantial control" over a reporting company. The CTA defines "ownership" and "substantial control" broadly, and there is no limit to the amount of beneficial owners that a company may have.

Ownership

The CTA defines "ownership interests" to include equity interests in a reporting company, as well as interests in the capital and profits of a reporting company, convertible instruments and other rights and options to acquire equity or other such interests in a reporting company. Ownership may be direct or indirect and may be attributed to an individual through any contractual or other arrangement, understanding or relationship, including, without limitation, as trustee or beneficiary of a trust holding an ownership interest or as joint owner of an undivided interest in an ownership interest.

Substantial Control

Under the CTA, an individual may have "substantial control" by (a) serving as a senior officer of the reporting company, (b) having authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar governing body) of a reporting company, (c) directing, determining or having substantial influence over "important decisions" made by the reporting company — such as the issuance of equity, incurrence of significant debt or amendments to the reporting company's governing documents — or (d) having "any other form of substantial control" over the reporting company. For purposes of the CTA, an individual may be a "senior officer," regardless of title, if they exercise the authority of a president, chief financial officer, general counsel, chief executive officer or chief operating officer or any other officer who performs a similar function to those described above.

Like ownership, control may also be directly or indirectly attributed through any contract, arrangement, understanding, relationship or otherwise, including, without limitation, board representation or ownership or control of voting rights or power.

Who is a "Company Applicant?"

The CTA also requires reporting companies formed on or after January 1, 2024 to identify their "company applicants." Unlike the number of beneficial owners, which FinCEN notes are unlimited, a reporting company will never

have more than two company applicants: (1) the individual who directly files the document creating the reporting company or, in the case of a foreign reporting company, the document that first registers the reporting company in a U.S. jurisdiction; and (2) the individual who is primarily responsible for directing or controlling such filing, if more than one individual is involved.

When are Reports Due?

Existing reporting companies formed prior to January 1, 2024, must file an initial report by January 1, 2025. Entities formed on or after January 1, 2024, but prior to January 1, 2025 are required to report within 90 days after filing their formation documents, while entities formed on or after January 1, 2025 will be required to report within 30 days of filing. Any changes in required information previously submitted must be reported within 30 days after the occurrence of such change.

What are the Consequences for Failing to Report?

The CTA imposes both civil and criminal penalties for willfully providing false information or failing to provide complete or updated information. These penalties include up to \$10,000 in fines and up to 2 years imprisonment.

Is the CTA Unconstitutional?

Recently, in *National Small Business United, d/b/a the National Small Business Association, et al. v. Yellen, et al.*, the U.S. District Court for the Northern District of Alabama declared the Corporate Transparency Act unconstitutional. However, it's important to note that this ruling applies specifically to the parties involved in the case, and there is no nationwide injunction in place. Therefore, entities not part of the litigation should continue complying with the CTA while the case undergoes appeal.

Amidst this legal uncertainty, legal professionals play a pivotal role in guiding businesses through evolving regulatory landscapes. As businesses grapple with the intricacies of compliance, lawyers offer essential support by providing strategic advice and ensuring adherence to regulatory standards. In this dynamic environment, legal practitioners must stay informed and adaptable to effectively navigate the shifting terrain of corporate transparency regulations.

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