

The New Federal Law on Corporate Transparency – What Business Owners and Their Advisors Need to Know Now

This article was originally published in May 2021, and updated January 2022 and March 2023.

Approved by Congress in January 2021, the Corporate Transparency Act (CTA) is a new federal law requiring many business entities to identify to the Treasury Department the individuals who own a 25 percent or greater interest in the entity or who otherwise exercise substantial control over the entity. The CTA seeks to identify entities used for money laundering and other criminal activities by requiring entities to disclose their ownership and control.

On September 30, 2022 the Treasury issued final regulations implementing the CTA effective January 1, 2024. There are several things business owners and their advisors should know now in planning to prepare to comply:

- **New Federal Information Filings Required Beginning in 2024.** This requirement will apply generally to every entity having less than \$5 million in annual U.S. revenues or less than 20 U.S. full-time employees. While many business entities will meet this requirement, many of these entities will have affiliated entities that do not meet the requirements.

An entity formed before 2024 will have until January 1, 2025 to file. Entities formed after 2023 will be required to file within 30 days.

- **The Filings Report Identifying Information About Persons Participating in the Ownership or Control of the Entity.** The persons covered will include most individuals who own interests in the entity, either directly or indirectly through another entity, or who serve as senior officers of entity. Certain aspects of the tests for who is covered are deliberately vague and open-ended, which will cause uncertainty in many cases.
- **Changes in Information are Required to be Promptly Reported.** Any changes in the persons for whom information is required to be reported or in the identifying information previously reported for a person are required to be reported within 30 days. This will require an entity to institute measures to monitor for changes.
- **Entities Should Consider Amending Their Organizational and Employment Documents Now.** An entity is required to report and update identification information about individuals participating in the ownership or control of the entity. The CTA does not impose an obligation on individuals to provide this information to an entity for its use in meeting its reporting obligation, so an entity should consider amending its organizational and employment

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documents to require affected individuals to provide this information. To reduce the entity's burden in reporting changes in the individual's information, the entity should consider requiring an affected individual to obtain a new identifying number from the Treasury which will have the effect of shifting to the individual the burden of reporting changes in the individual's information.

More detail on the CTA is provided below:

- **No Public Disclosure.** The information reported to the Treasury will *not* be made publicly available but will be used on a confidential basis for law enforcement and national security purposes.^[1] So for business entities formed in North Carolina, Delaware, and most other states, information about the entity owners^[2] will continue not to be available to the public.
- **Individuals to be Identified.** While the CTA refers to individuals who own a 25 percent or greater interest or who exercise substantial control over an entity as “beneficial owners,” it is important to note that this is not limited to individuals who actually own interests in the entity. The CTA refers to “directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise.” For example, this will include an individual owning an interest in another entity that owns an interest in the reporting entity. The regulations broadly define “substantial control” to include service as a “senior officer,” the ability to appoint or remove a senior officer or a majority of a board of directors or similar body, or “substantial influence” over “important decisions” made by the entity, including but not limited to the matters listed in the regulations.^[3]
- **Information Required.** An entity is required to identify individuals by their full legal name, *residential street* address, date of birth, and the number on an individual's passport, driver's license or other government issued ID. The regulations require that a photocopy of the identifying document containing the number with a photograph of the individual must be submitted.^[4]
- **Entities do the Reporting.** The business entity, and not an individual who is required to be identified as a “beneficial owner,” must file the reports with the Treasury. Subject to the exemptions noted below, corporations, limited liability companies, and other types of entities that are created by a filing with a state or that are created under foreign law and doing business in the U.S. are “reporting companies.”^[5]
- **Identifying Number Alternative.** An individual may obtain from the Treasury an identifying number, known as a “FinCEN identifier,” by submitting the individual's personal information outlined above. The individual can provide the individual's FinCEN identifier to a reporting company so that the reporting company can report that number in lieu of reporting the individual's personal information.^[6]

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- **Reporting Updates.** A reporting company is required to report to the Treasury *any* change in the information earlier reported within 30 days of the change.^[7] For example, a change in the address of any “beneficial owner” will trigger a requirement to report the update.^[8] An individual who has obtained a FinCEN identifier is required to report to the Treasury any change in the information submitted to obtain the FinCEN identifier within 30 days of the change.^[9]
- **Obtaining the Information to be Reported.** The CTA itself does not impose on a reporting company’s owners and officers an obligation to provide the reporting company the information required for the reporting company’s compliance with the CTA.^[10] A reporting company should consider imposing this obligation in its organizational and employment agreements.^[11]
- **Existing Entities.** Unless exempt (see below), entities that are formed before January 1, 2024 will be required to file their first report with the Treasury by January 1, 2025.^[12]
- **New Entities.** Unless exempt, entities created on or after January 1, 2024 will be required to file their first report within 30 days after creation.^[13]
- **Identification of Persons Forming Entities.** In addition to identifying individuals who are “beneficial owners,” a reporting company that is created on or after January 1, 2024 is required to provide generally the same identifying information about an individual who is a “company applicant.”^[14] The regulations define “company applicant” as the individual “who directly files” the document creating the company and “the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document.”^[15] Fortunately, the regulations do not require a reporting company to report subsequent changes in the personal information of a company applicant, in contrast to changes in the personal information of a “beneficial owner.”^[16]
- **Exemptions.** Many types of business entities are exempt^[17] from the CTA, including public companies, various types of entities for which there is already substantial regulatory reporting, certain tax-exempt entities, general partnerships^[18], and certain existing dormant entities.^[19] Of broadest potential impact is an exemption for an entity that has at least 20 full-time employees, more than \$5 million in annual revenues, and an office in the U.S. from which the business is conducted.^[20] However, even if an entity operating a business meets these size requirements, that entity frequently will have one or more affiliated entities that do not meet both requirements, such as a “sister” entity that owns real estate leased to the entity operating the business that itself has few (if any) employees and/or does not itself have more than \$5 million in annual revenues or a holding company that owns the entity operating the business that itself has few (if any) employees.^[21]
- **Penalties.** The CTA imposes substantial criminal and civil penalties for “willfully” failing to report information or providing false information.

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Businesses subject to the CTA will face significant new reporting and related record-keeping obligations. However, it is important to note that the CTA requires reporting information that in most cases is already being provided to the Treasury through federal income tax returns. And like income tax return information, the information reported will not be publicly available.

[1] The preamble to the legislation cites the use of business entities by “malign actors” to conceal their involvement in “illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption[.]” The regulations confirm that the information will not be publicly available.

[2] Like many other states, North Carolina requires business entities to publicly disclose the names of the persons who manage the entity but not the names of the owners.

[3] See 31 CFR § 1010.380(d)(1).

[4] See 31 CFR § 1010.380(b)(1)(ii).

[5] The CTA refers to a “similar entity that is created by the filing of a document with a secretary of state or a similar office . . .” The regulations define two terms: “domestic reporting company” (which are corporations, limited liability companies, and other entities “created by filing a document with a secretary of state or any similar office under the law of a State or Indian tribe”) and “foreign reporting company” (which are corporations, limited liability companies, or other entities that are “[f]ormed under the law of a foreign country” and are “[r]egistered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe”); see 31 CFR § 1010.380(c)(1).

[6] See 31 CFR § 1010.380(b)(4). A reporting company that has provided Treasury with the required information may also obtain a FinCEN identifier. See *id.* The proposed regulations had proposed that a reporting company may provide its FinCEN identifier to another reporting company in which the first company owns an interest in lieu of providing information about the first company’s ownership to the second company, with the second company then reporting the first company’s FinCEN identifier to the Treasury instead of identifying the individuals who own interest in the first company. This would allow a reporting company to avoid disclosing information about its ownership to another reporting company. However, in response to objections and questions raised, in the final regulations Treasury reserved this for further study, stating in the preamble that Treasury intends to address this before the final regulations go into effect on January 1, 2024.

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[7] The regulations require a company to file an updated report within thirty calendar days “after the date on which there is any change with respect to any information previously submitted to FinCEN . . . including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner.” See 31 CFR § 1010.380(a)(2). See the discussion later in the text of this article regarding “company applicant.”

[8] This will also trigger a requirement to show an updated photograph via an updated driver’s license or other government issued ID. See 31 CFR § 1010.380(a)(2)(v).

[9] See 31 CFR § 1010.380(b)(4)(iii).

[10] The CTA prohibits an entity from issuing interests in “bearer form” that can be transferred without registering the identity of the new owner.

[11] As noted later in the text of this article, the CTA imposes civil and criminal penalties for “willful” failure to provide the required information. It is not yet clear how this standard will be applied if a reporting entity cannot provide the required information about an individual because the individual – or an entity through which the individual owns an indirect interest in the reporting entity – refuses to provide the information. Imposing a contractual obligation on the entity’s owners to provide the required information may help avoid a penalty in this circumstance.

[12] See 31 CFR § 1010.380(a)(1)(iii).

[13] See 31 CFR § 1010.380(a)(1)(i), which requires a newly created reporting company to file its first report within 30 days of “the earlier of the date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice . . . that the domestic reporting company has been created.”

[14] See 31 CFR § 1010.380(b)(1)(ii), (b)(2)(iv), and (e). If a company applicant has a FinCEN identifier, in lieu of providing the address, etc., of the company applicant the reporting company can provide the company applicant’s FinCEN identifier.

[15] The preamble to the regulations indicates that not more than two individuals will be reported as company applicant. The preamble provides an example of an entity created by a law firm’s paralegal submitting the creation document to the secretary of state. The paralegal would be a company applicant. If a lawyer in the firm oversees the paralegal’s work in submitting the document, the lawyer would also be a company applicant. While this example is helpful, uncertainty remains. What if the lawyer, and not a paralegal, submits the document at the request of the client? The lawyer is a company applicant; would the client also be a company applicant? What if the client signed the document as “incorporator”, “organizer”, “authorized person”, etc.?

[16] See 31 CFR § 1010.380(b)(3)(i).

[17] If a company initially not eligible for an exemption later becomes eligible, the company must report this within 30 days. See 31 CFR § 1010.380(a)(2)(ii).

[18] As noted earlier in the text of this article, the reporting requirements generally only apply to entities that are created by a filing with a state or that are created under foreign law. Under North Carolina law, creation of a general partnership does not require a filing and so North Carolina general partnerships appear to be exempt from the CTA. It is not clear whether this exemption from the CTA would include a North Carolina general partnership that is a registered limited liability partnership, which provides liability protection of the partners; this status requires a filing with the state. Where there is ambiguity in the CTA, Treasury generally has opted in the regulations to expand CTA's coverage, so Treasury may be expected to take the position that a registered limited liability partnership is covered by the CTA.

[19] The regulations limit the dormant entity exemption to entities that were in existence on or before January 2, 2020. See 31 CFR § 1010.380(c)(2)(xxiii).

[20] See 31 CFR § 1010.380(c)(2)(xxi).

[21] While revenues are measured on a consolidated basis the entity must itself have the 20 or more full-time employees. See 31 CFR § 1010.380(c)(2)(xxi) and the preamble to the regulations. There is an exemption for a wholly-owned subsidiary of an entity meeting the revenue and employee requirements but the regulations do not extend the exemption to a sister or parent of that entity other than giving a parent credit for revenues determined on a consolidated basis. See 31 CFR § 1010.380(c)(2)(xxii).

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