

The U.S. Corporate Transparency Act – Is Your Business Organization Ready to Comply?

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On September 30, 2022, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) published a rule (the Final Rule) implementing the beneficial ownership information reporting requirements of the Corporate Transparency Act (the CTA).^[1] The CTA establishes ultimate beneficial ownership (UBO) information reporting requirements for the vast majority of privately held corporations, limited liability companies and other similar entities created in, or registered to do business in, any of the states of the United States.^[2]

KEY TAKEAWAYS:

- **Compliance Dates.** The Final Rule became effective January 1, 2024. "Reporting companies" formed before January 1, 2024 will have until January 1, 2025 to file their initial reports. Reporting companies incorporated or formed after January 1, 2024 must file initial reports within 90 days of their creation or registration. Reporting companies incorporated or formed on or after January 1, 2025 will have 30 days. If an exempt entity ceases to be exempt, the entity must file a report within 30 days of losing its exempt status.
- **Reporting Companies and Exempt Companies.** Reporting companies must file reports that identify themselves and provide UBO information on their "beneficial owners" and "company applicants." 23 types of entities are exempt.
- **Penalties for Noncompliance.** The Final Rule adopts the CTA's penalty framework and clarifies that entities may incur liability for indirect or direct violations, and for acts or omissions. Any willful violation may result in civil penalties of up to \$500 per day a violation goes unremedied and criminal penalties of up to \$10,000 and/or imprisonment for up to two years.
- **CDD Rule Differences.** The Final Rule does not replace FinCEN's existing customer due diligence (CDD) rule requiring U.S. financial institutions to collect UBO information from their legal entity customers, although FinCEN will be revising the CDD rule to align it with the CTA. The Final Rule provides a broader definition of "beneficial owner" but exempts more companies. Thus, reporting companies can expect that they may have to provide more information to FinCEN and/or identify additional persons as UBOs than previously required to disclose/provide to their banks. For now, financial institutions may continue to collect UBO information from customers that may not otherwise be required to report to FinCEN.

FINAL RULE:

(1) Which Entities Are Reporting Companies That Must Comply with the Final Rule and Which Entities Are Exempt from Compliance?

The Final UBO Rule applies to U.S. domestic reporting companies and foreign reporting companies. A *domestic reporting company* is any corporation, limited liability company, or other similar entity created by the filing of a document with a secretary of state or any similar office under the law of a state (including U.S. territories and possessions) or Indian tribe (unless exempt). A *foreign reporting company* is any entity that is formed under the laws of a non-U.S. jurisdiction but is registered with a secretary of state or similar office to do business in that state or tribal jurisdiction in the United States (unless exempt).

Despite the CTA's broad definition of reporting companies, **the Final Rule exempts 23 types of entities** from the reporting requirements, including:

- **Entities already required to disclose beneficial ownership information** publicly or to federal regulators (e.g., U.S. banks and credit unions, U.S. branches and agencies of non-U.S. banks, securities broker-dealers, investment advisers registered with the SEC, and money services businesses registered with FinCEN);
- **Large operating companies** that (1) have 21 or more full-time employees, (2) filed U.S. federal income tax returns in the previous year demonstrating more than US\$5M in gross receipts or sales in the aggregate, **and** (3) have an operating presence at a physical U.S. office;
- **Inactive entities** that existed on or before January 1, 2020 but, among other requirements, are not engaged in active business and have not received or sent funds in an amount greater than \$1,000; and
- **Subsidiaries** whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more exempt entities, with exceptions.

FinCEN provided that any ambiguities in exemptions should be interpreted “reasonably narrowly,” as the exemptions were “carefully circumscribed.”

(2) What Information Must Be Reported?

Reporting Company Information

- Full legal name and fictitious names (i.e., “doing business as”);
- Address of principal place of business;
- Jurisdiction of incorporation or formation (for both domestic and foreign reporting companies) and initial registration in the United States (foreign reporting companies only); and
- Taxpayer Identification Number.

Beneficial Owners and Company Applicant Information

- Full legal name;
- Date of birth;
- Current residential address; and
- Unique identifying number from an acceptable identification document (or, by a FinCEN identifier).

(3) Who Are the “Beneficial Owners” and “Company Applicants” That Must Be Disclosed?

Beneficial Owners

Under the CTA, a “beneficial owner” of a reporting company is **“any individual, who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25**

percent of the ownership interests of such reporting company.”^[3] This definition is broader than the definition under the existing CDD rule (which called for the identification of a *single* individual with such control). Thus, a corporation with four 25% equity holders would report all four equity holders as UBOs.

- **Substantial Control**

An individual exercises substantial control over a reporting company if the individual:

1. Serves as a senior officer;
2. Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body); and
3. Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding: (i) a sale or other transfer of principal assets; (ii) reorganization, dissolution, or merger; (iii) issuance of any equity or incurrence of any significant debt; (iv) selection or termination of business lines or ventures; (v) compensation schemes and incentive programs for senior officers; (vi) entry into or termination of significant contracts; and (vii) amendments of any substantial governance documents.

- **“Direct or Indirect” Substantial Control**

An individual may directly or indirectly, **including as a trustee of a trust or similar arrangement**, exercise substantial control over a reporting company through: (i) board of directors representation; (ii) ownership or control of a majority of the voting power or voting rights of the reporting company; (iii) rights associated with any financing arrangement or interest in a company; (iv) control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; (v) arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or (vi) any other contract, arrangement, understanding, relationship, or otherwise.

- **Exemptions**

(i) Minor children; (ii) individuals acting as nominees, intermediary custodians, or agents on behalf of another individual; (iii) certain employees of reporting companies; (iv) individuals whose only interest in a reporting company is a future interest through a right of inheritance; and (v) certain creditors of reporting companies are “exempt” from the definition of “beneficial owner.”

Company Applicants

A “company applicant” is the individual who directly files the document that creates a domestic reporting company or first registers a foreign reporting company, as well as the individual who is primarily responsible for directing or controlling such filing (if there is more than one individual involved).

The Final Rule significantly expands the scope of information that certain entities must disclose and signals the U.S. Department of the Treasury’s prioritization of corporate disclosure. FinCEN published [Frequently Asked Questions \(FAQs\)](#) to address common questions about the Final Rule.

If you have any questions or need assistance with navigating the UBO reporting requirements in light of the Final UBO Rule, please contact [Carl Fornaris](#) (Partner and Co-Chair, Financial Services Practice), [Cari Stinebower](#) (Partner, Government Investigations, Enforcement, and Compliance Practice), or your Winston & Strawn relationship attorney. You can also contact [Abbe Lowell](#) or [Suzanne Jaffe Bloom](#), co-chairs of our Government Investigations, Enforcement, and Compliance Practice, or visit our practice webpage [here](#) for more information on this and related subjects. [Monica Lopez-Rodriguez](#) (Of Counsel, Financial Services Practice), [Dainia Jabaji](#) (Of Counsel, Government Investigations, Enforcement, and Compliance Practice), and [Ryan Greenberg](#) (Associate, Corporate Practice) contributed to this article.

^[1] See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498 (Sept. 30, 2022), *available at* <https://www.federalregister.gov/d/2022-21020>. FinCEN issued its proposed rule to implement the CTA’s beneficial ownership reporting requirements on December 8, 2021. See Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69,920 (Dec. 8, 2021), *available at* <https://www.federalregister.gov/d/2021-26548>.

^[2] A “state” in the United States includes the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other commonwealth, territory, or possession of the United States.

^[3] 31 U.S.C.A. § 5336(3)(A)(i)-(ii).

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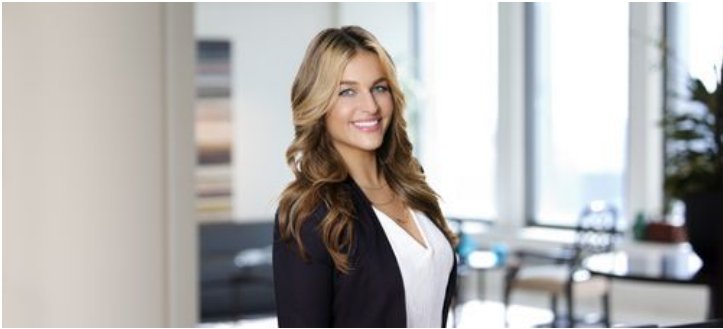
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