

# Client Alert

November 2023

## The Corporate Transparency Act takes effect on January 1, 2024 – does your company have to report its beneficial owners to the federal government?

On January 1, 2024, the Corporate Transparency Act (“CTA”) comes into effect. This sweeping new law imposes significant reporting obligations upon entities that are required to report beneficial ownership and registrant information to the U.S. Treasury’s Financial Crimes Enforcement Network (“FinCEN”). On September 29, 2022, FinCEN adopted its long-awaited final rule (the “Final Rule”) to implement the beneficial ownership reporting requirements of the CTA, although reporting forms and methodology are currently being finalized.

### Overview of the CTA

The CTA is many years in the making, and introduces major changes to transparency requirements of entities registered in the United States. No longer will anonymous shell companies, limited liability companies, and the like be able to shield the identities of their owners from the U.S. government and law enforcement. Aiming to end this phenomenon, which resulted in the United States becoming a leading “safe haven” jurisdiction for those seeking anonymity of ownership, the CTA establishes a central database of beneficial owners of corporations, LLCs, and other corporate entities, available to law enforcement agencies (but not the public), and an affirmative obligation on the entity to identify and report its beneficial ownership. The CTA requires, with very limited exceptions, all U.S. registered corporations, LLCs, or similar entities to report beneficial ownership information to FinCEN. The new registry will collect the names, dates of birth, addresses, and identification documents of individuals who own at least a 25% equity stake in the entity, or exercise substantial control over the entity, which will more directly tie the responsibility of the entity’s conduct to specific individuals.

At its core, the CTA’s requirements are straightforward. If an entity qualifies as a “reporting company,” it must submit a report to FinCEN containing the identifying information of the entity’s beneficial owners.

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**Importantly, FinCEN will hold the information in a confidential and secure database, only releasing the information upon: (i) a request from certain federal or state agencies engaged in national security, intelligence or law enforcement activity; (ii) certain types of requests from a federal agency on behalf of foreign authorities; (iii) a request by a financial institution “subject to customer due diligence requirements”; or (iv) a request by a federal regulator.**

**The Final Rule**

**1. Who Must Report**

***Definition of “Reporting Company”***

The scope of the definition of what constitutes a “reporting company” is broad, and includes any corporation, limited liability company, or other similar entity created by the filing of a document with the secretary of state or similar office of any U.S. state or territory, or formed under the laws of a foreign country and registered to do business in the United States. Effectively, this means that all such entities—with the notable exception of foreign companies that do not formally register to do business in the United States—will be subject to these requirements, unless they fall into one of 23 enumerated categories:

Exemption No.	Exemption Short Title
1	Securities reporting issuer
2	Governmental authority
3	Bank
4	Credit union
5	Depository institution holding company
6	Money services business
7	Broker or dealer in securities
8	Securities exchange or clearing agency
9	Other Exchange Act registered entity
10	Investment company or investment adviser
11	Venture capital fund adviser

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Exemption No.	Exemption Short Title
12	Insurance company
13	State-licensed insurance producer
14	Commodity Exchange Act registered entity
15	Accounting firm
16	Public utility
17	Financial market utility
18	Pooled investment vehicle
19	Tax-exempt entity
20	Entity assisting a tax-exempt entity
21	Large operating company
22	Subsidiary of certain exempt entities
23	Inactive entity

The Final Rule clarifies that one of these exempt categories is the “large operating company”, defined as any entity that (i) employs more than 20 employees on a full-time basis in the United States, (ii) had at least \$5 million in gross receipts or aggregate sales in the previous year, as demonstrated on its tax returns, and (iii) has an operating presence at a physical office within the United States. Consequently, the primary burden of compliance with the CTA will fall on small and medium-sized businesses that do not meet these thresholds.

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**2. Timeline for Reporting**

Reporting companies already in existence as of the Effective Date must submit their initial beneficial ownership reports to FinCEN by January 1, 2025 (within one year of the Effective Date).

Reporting companies that are formed or registered to do business on or after January 1, 2024 must submit their initial beneficial ownership reports within 30 days of such formation or registration. Any changes to previously submitted reports (including with respect to beneficial ownership or exemption status) must also be reported on an amended filing within 30 days.

The Final Rule notes that FinCEN is currently developing an online portal known as the Beneficial Ownership Secure System (“BOSS”) that will receive, store and maintain beneficial ownership information submitted by reporting companies. Reporting companies will be required to submit the required information via a standardized form, expected to be available on FinCEN’s website by the Effective Date.

### 3. Who Must Report

Each reporting company will have to file a report disclosing each beneficial owner’s name, date of birth, residential or business street address, and unique identifying number from an identification document.

#### *Who Qualifies as a Beneficial Owner?*

The information is required for any individual who, directly or indirectly, owns or controls 25% or more of the ownership interest in the entity, or exercises “substantial control” over the entity.

The Final Rule expands the definition of “ownership control” substantially beyond FinCEN’s 2016 customer due diligence rule. The Final Rule adds a catch-all provision to capture any “instrument, contract, arrangement, understanding, relationship, or other mechanism used to establish ownership”. In addition to equity, stock or similar instruments, this broad definition of ownership interest includes capital or profit interests, convertible interests, and puts, calls, straddles, or other similar options.

An individual may be deemed to have direct or indirect ownership of a reporting company through any contract, arrangement, understanding, relationship, or otherwise, including through:

- joint ownership with one or more other persons of an undivided interest in such ownership interest;
- another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual;
- with regard to a trust, its status (1) as a trustee with the authority to dispose of trust assets, (2) as a beneficiary who is the sole permissible recipient of income and principal from the trust, or has a right to demand a distribution of or withdraw substantially all of the assets from the trust, or (3) as a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or
- ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such

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entities, that separately or collectively own or control ownership interests of the reporting company.

### ***Substantial Control***

The Final Rule adopts a broad definition of “substantial control”, thereby significantly expanding the scope of the beneficial ownership concept. Under the Final Rule, an individual will be deemed to have substantial control if the individual:

- serves as a senior officer of the reporting company, defined as “any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function”;
- has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding: (1) the nature, scope, and attributes of the business (2) the reorganization, dissolution, or merger of the reporting company; (3) major expenditures or investments, issuances of any equity, or incurrence of significant debt; (4) the selection or termination of business lines or ventures, (5) compensation schemes and incentive programs for senior officers; (6) the entry into or termination, or the fulfillment or non-fulfillment, of significant contracts; or (7) amendments to any governance documents; or
- has any other form of substantial control over the reporting company.

The Final Rule also reduces the reporting burden for a reporting company’s “company applicants” (the individuals who signed the formation document on the reporting company’s behalf). Reporting companies in existence prior to the Effective Date will no longer be required to provide any information concerning company applicants, and reporting companies formed after the Effective Date will not need to make updates to company applicant information.

#### **4. Penalties for Non-Compliance**

The CTA establishes civil and criminal penalties for individuals who “willfully provide, or attempt to provide, false or fraudulent beneficial ownership information” or who “willfully fail to report complete or updated beneficial ownership information”. Willful failures to report

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complete or updated beneficial ownership information are punishable by civil penalties of up to \$500 per day that each violation continues, and in certain cases criminal penalties of up to \$10,000, two years' imprisonment, or both. Accordingly, we recommend that corporate clients who may be subject to the CTA promptly confirm their status, and make the requisite filing with FinCEN in order to comply with the statute.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have questions.

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