

# Understand Your Obligations Under the New Corporate Transparency Act

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**A** new federal law, the Corporate Transparency Act (“CTA”), becomes effective on January 1, 2024. The CTA will force more than 30 million privately-held companies to register with the federal government and disclose certain personal information about their owners and management. It applies to companies formed in the U.S. as well as companies formed outside the U.S. and registered to do business in the U.S. The federal government will enforce compliance with significant civil and criminal penalties on companies, senior management and owners who fail to comply with the CTA. This article summarizes a company’s obligations under the CTA.

## Question 1: Is Your Company Required to Report?

The CTA requires (1) all domestic companies created by the filing of a document, and (2) all foreign companies formed under the laws of a foreign country and registered to do business in the United States, with a secretary of state (or any similar office under the laws of a state or an Indian tribe), to file a report with the U.S. Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”), unless exempt.



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## Question 2: Is Your Company Exempt?

The CTA exempts 23 categories of companies from the requirement of filing reports,

but these companies are primarily larger, highly regulated, or subject to different ownership reporting requirements. Exempt companies include publicly-held companies, public utilities, banks and credit unions, insurance companies, accounting firms, and large operating companies.

## Question 3: What Must You Report?

A reporting company must report its full legal name, any other names used in its business, its primary U.S. address, its state of formation or registration, and taxpayer ID number. It must also report the following beneficial ownership information (“BOI”) about its beneficial owners and company applicants: (1) Full legal name; (2) date of birth; (3) current business or residence address; (4) unique identifying number from a non-expired (a) U.S. passport, (b) driver’s license, or (c) identification document issued by a state or local government or Indian tribe (if an individual does not have any of the foregoing documents, a passport issued by a foreign government may be used); and (5) an image of the identification document from which the unique identifying number was obtained.



With the implementation of the Corporate Transparency Act (CTA), companies must make transparency part of their core corporate guidelines.

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#### Question 4: Who is a Beneficial Owner?

A “beneficial owner” is any natural person who, directly or indirectly, either (1) exercises substantial control over the reporting company or (2) owns or controls 25% or more of the ownership interests of the reporting company. A reporting company must have at least one beneficial owner.

#### Question 5: What is Substantial Control?

A person with substantial control includes a person: (1) Serving as a senior officer, such as the president, chief executive officer, general counsel, chief financial officer, chief operating officer, and any other officer, regardless of title, performing similar functions; (2) having authority over the appointment or removal of a senior officer or a majority of the board of directors or other governing body; (3) directing, determining, or having substantial influence over important decisions, such as sale of principal assets, major investments, issuance of equity, incurrence of significant debt, compensation for senior officers, and actions related to significant contracts and governing documents; or (4) having any other form of substantial control over the reporting company. A person’s title is not determinative. Instead, it is the person’s authority or function that determines substantial control or influence.

#### Question 6: What is a 25% or More Ownership Interest?

A person who owns or controls 25% or more of the ownership interests of the reporting company is a beneficial owner. Ownership or control includes not only stock and other equity, but also convertible debt, warrants, options, etc. and anything else that may give a person ownership or control. This analysis is done on a fully-diluted basis assuming the exercise of all warrants/options and conversion of all debt into equity. Further, a company with entity owners is required to “drill down” until it has the BOI of a natural person owning or controlling such entities.

A person may have ownership or control in a variety of ways, including: (1) through joint ownership; (2) as a trustee of a trust; (3) as a beneficiary of a trust; (4) as the grantor or settlor of a revocable trust; and (5) having ownership or control of entities that own or control ownership interests of the reporting company. The CTA provides that certain individuals, such as minor children, nominees, intermediaries, custodians, agents, employees, and certain creditors, are not beneficial owners.

#### Question 7: Who is a Company Applicant?

A reporting company formed or registered on or after January 1, 2024 must also identify any “company applicant”, including the “direct filer” and the individual who “directs or controls the filing action”. A direct filer is the person who directly files the document forming a domestic company or registering

a foreign company to do business in the U.S. A person who directs or controls the filing is primarily responsible for directing or controlling the filing of the document by another, if more than one person is involved in the filing.

#### Question 8: When Must You File the Report?

A company created or registered on or after January 1, 2024 must file an initial beneficial ownership information report (“BOI Report”) within 90 days after receiving notice that the company has been formed or registered. A company created or registered before January 1, 2024 must file an initial BOI Report before January 1, 2025. A company created or registered on or after January 1, 2025 must file an initial BOI Report within 30 days after receiving notice that the company has been formed or registered.

#### Question 9: When Must You Update or Correct Your Report?

A reporting company is obligated to update or correct its report within 30 days after (1) a

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change in information of the company or a beneficial owner or (2) becoming aware that previously reported information is inaccurate.

#### Question 10: Where do You File The Report?

A reporting company must file its reports electronically, either through FinCEN’s secure filing system or engaging a third-party service provider (e.g., registered agent company).

#### Question 11: What is a FinCEN Identifier?

A FinCEN identifier is a unique identifying number that FinCEN will issue to individuals and entities upon request. For example, an individual may electronically apply for a FinCEN identifier by providing the same information required in BOI reports. Once a beneficial owner has a FinCEN identifier, she may provide the reporting company with her FinCEN identifier rather than her personal information.

#### Question 12: Who Has Access to Your Personal Information?

FinCEN will store BOI in a secure non-public database – the Beneficial Ownership Secure System (“BOSS”). The general public will not have access to BOI. It will remain confidential and cannot be used or disclosed except as authorized in the CTA and its regulations. For example, FinCEN is authorized to disclose BOI to federal agencies engaged in national security, intelligence, or law enforcement activities.

#### Question 13: What Happens if You Don’t Comply?

The CTA provides for significant civil and criminal penalties for reporting violations, such as willfully (1) failing to report BOI to FinCEN, (2) providing false or fraudulent BOI to FinCEN, and (3) failing to update BOI. The civil penalty is not more than \$500 for each day that the violation continues or has not been remedied. The criminal penalties are fines of not more than \$10,000, imprisonment for not more than 2 years, or both. The penalties may apply to (a) the reporting company, (b) senior officers of the reporting company, and (c) any individual who causes a reporting company not to report. Therefore, if a beneficial owner fails to provide BOI to a reporting company, the beneficial owner is subject to the penalties under the CTA.

#### Question 14: What Should You do Now?

You should do an analysis to determine whether you are a reporting or exempt company. If a reporting company, determine your beneficial owners and gather BOI from them. You should amend your governing documents (e.g., bylaws, shareholder agreements, operating agreements, etc.) and any other applicable agreements (e.g., executive employment agreements, stock option plans, convertible debt, etc.) to (1) require owners, management, etc. to provide their BOI and required documentation to the company, (2) impose penalties for failing to do so (e.g., indemnification of the company for FinCEN fines), and (3) provide that the company will maintain the confidentiality of the BOI, except to comply with the CTA.

#### Conclusion

This article is only the tip of the iceberg. For a more comprehensive analysis of the CTA, please review the advisory at <https://www.archerlaw.com/understanding-your-obligations-under-the-corporate-transparency-act>. 📌

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