
Corporate Transparency Act: Required Disclosure of Beneficial Ownership of Reporting Companies and Related Considerations

Overview

In December, 2020, the Corporate Transparency Act (the “CTA”) was enacted pursuant to the National Defense Authorization Act for Fiscal Year 2021 (the “NDAA”)¹ to combat money laundering, terrorism, drug trafficking and other illicit activities. The CTA became law when Congress overrode President Trump’s veto of the NDAA. The CTA is intended to assist law enforcement in combating criminal activity undertaken through corporate structures. Among other things, the CTA will require “reporting companies” to report information regarding their “beneficial owners” to the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”). It is anticipated that much of the administration of the required reporting will be handled at the state level, as the CTA requires that the Secretary of the Treasury, among other things, to the greatest extent practicable, establish partnerships with state, local, and Tribal governmental agencies to collect information through existing processes and procedures, and to minimize burdens and compliance costs on legitimate reporting companies. The disclosure requirements of the CTA shall not take effect until rules are prescribed by the Secretary of Treasury, which shall occur no later than January 1, 2022.

In general, under the CTA:

“**reporting company**” includes a corporation, limited liability company, or other similar entity that is (i) created or formed pursuant to the laws of a State or an Indian Tribe, or (ii) formed under the laws of a foreign country and registered to do business in the United States; but excludes, among other things, the following:

- Companies with (a) more than 20 employees, (b) annual gross receipts or sales of more than \$5 million, and (c) a physical presence in the United States, as well as clearing agencies, registered investment companies, insurance companies.



Brian A. Haskel

Brian A. Haskel, a Member of Sills Cummis & Gross, may be reached at bhaskel@sillscummis.com.

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¹ The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2020) § 6403, is available [here](#).

- Companies operating in certain industries already subject to significant regulation, such as public companies, banks, credit unions, investment companies as defined in the Investment Company Act of 1940 (the “Investment Company Act”), entities that are excluded from the Investment Company Act by the exclusions in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act², registered brokers and dealers, registered exchange public accounting firms, public utility companies, and 501(c) charitable organizations.

“**beneficial owner**” means a person who: (a) exercises substantial control over a corporation or limited liability company, (b) owns 25 percent or more of the equity interests of a corporation or limited liability company, or (c) receives substantial economic benefits from the assets of a corporation or limited liability company; although the following persons are not considered beneficial owners:

- A minor child, provided that the information of such child’s parent or guardian is reported properly;
- An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;
- An individual acting solely as an employee of the applicable entity whose control is derived solely as a result of such individual’s employment status;
- An individual whose only interest in the applicable entity is through a right of inheritance; and
- A creditor of the applicable entity, unless the creditor otherwise meets the requirements of a beneficial owner.

Required Beneficial Ownership Information

Unlike current state laws, which generally do not require the disclosure of beneficial ownership information of a corporate entity, the CTA requires each reporting company to disclose the following information about each of its beneficial owners to FinCEN, first at the time of its formation and, subsequently, on an annual basis:

- i. full legal name;
- ii. date of birth;
- iii. current residential or business street address; and
- iv. a non-expired, government-issued identifying number from an “acceptable identification document” (such as passport, driver’s license or other state-issued identification document, and if no U.S. issued identification, a non-expired passport issued by a foreign government).

Initial Reporting and Updates

- Entities in existence prior to the effective date of the FinCEN regulations must report the required information in a timely manner, and not later than two years after the effective date of the regulations;
- Entities formed after the effective date of the FinCEN regulations must file the required information at the time of formation or registration; and
- A reporting company must also update the information reported to FinCEN upon a change in its beneficial ownership no later than one year after there is a change in such information.

² Notably absent from the exception is Section 3(c)(5) of the Investment Company Act, which is often relied upon in connection with pooled investments in real estate. Accordingly, such pooled real estate investments must also qualify under 3(c)(1) or 3(c)(7) of the Investment Company Act in order to be excluded from the disclosure requirements of the CTA.

Penalties

Civil penalties for violations of the CTA may be up to \$500 for each day that the violation continues and criminal fines may be up to \$10,000 and/or imprisonment for up to two years. Civil penalties for the unauthorized disclosure or use of beneficial ownership information collected under the CTA may also be up to \$500-per-day and may also result in more severe criminal penalties of up to \$250,000 and/or a maximum term of imprisonment of five years. In addition, if the unauthorized disclosure or use of beneficial ownership information collected under the CTA occurs in conjunction with the violation of another domestic law as part of a pattern of illegal activity involving more than \$100,000 during a 12-month period, the disclosing party shall be fined up to \$500,000 and/or may be imprisoned for up to 10 years.

The CTA contains a safe harbor from civil or criminal liability for the submission of inaccurate information if the person submitting such information voluntarily and promptly submits a report containing corrected information no later than 90 days after the submission of the original information.

Restricted Access to Data

The CTA contains numerous provisions regarding FinCEN's data protection procedures. FinCEN must store the information submitted to it in a private database not accessible to the public. Under the CTA, the collected information may only be released pursuant to a request, through appropriate protocols, including by:

- A federal agency engaged in, and in furtherance of, national security, intelligence or law enforcement activity;
- A state, local, or tribal law enforcement agency with court authorization in connection with an investigation;
- A federal agency making the request on behalf of a foreign law enforcement agency;
- A financial institution subject to customer due diligence requirements under applicable law, with the consent of the relevant customer, such as anti-money laundering (AML) and know-your-customer (KYC) requirements; and
- A federal regulatory agency authorized to supervise and enforce the compliance of a financial institution.

Disclosure and Enforcement Action

Similar regulations to those contained in the CTA are already in effect in many foreign jurisdictions. Once reporting companies are required to comply with the CTA, we expect federal and state law enforcement to use the information reported to work both domestically and with foreign law enforcement agencies to combat criminal activities such as money laundering, the funding of terrorist activities, and other illegal activities.