

Nothing to Hide

New Reporting Requirements Under the Corporate Transparency Act

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Many real estate professionals and investors make use of business entities such as corporations, limited liability companies (LLCs), limited partnerships, and the like. Those doing business through entities should be aware of new requirements under the Corporate Transparency Act, as it is highly likely that the filing of a Beneficial Ownership Information Report is required.

The Corporate Transparency Act is a federal law passed by Congress in 2021 as part of the National Defense Authorization Act for Fiscal Year 2021. The act was passed as a national security measure with the intention of preventing the use of business structures to hide corruption, launder money, finance terrorism, and commit crimes such as drug trafficking, human trafficking, fraud, and proliferation of weapons of mass destruction. The use of various business entities provides a way for domestic and foreign individuals to hide their involvement in such activities, evade taxes, and obscure their identities from law enforcement.

Key Takeaways

- Real estate professionals have new requirements for transparency.
- Prevents business structures from hiding corruption.
- Reporting companies must disclose beneficial owners and company applicants.
- Providing false information can bring civil and criminal penalties.
- Lending docs and leases may need to be revised.

Business entity formation is usually a state matter, regulated only by state laws, and many states do not require information about the beneficial owners of those entities. This act marks the first time the federal government has required the filing of such information.

Since the passage of the act, the Treasury Department has promulgated several sets of regulations to implement the law's provisions. The last of the regulations was issued on Dec. 21, 2023. The regulations are outlined [here](#).

Who is Required to Report?

Entities required to file a Beneficial Ownership Information Report are called *reporting companies*, of which the act defines two types: domestic and foreign. If an entity meets one of the following definitions and does not qualify for an exemption, it is a reporting company.

A *domestic reporting company* is any entity that is created by filing a document with a secretary of state or a similar office under state law or the law of an Indian Tribe. This includes corporations, limited liability companies (LLCs), and other entities required to file with the secretary of state. It generally includes limited partnerships, but does not include general partnerships, which do not require a filing. A trust is generally not a reporting company unless a filing with the secretary of state is required.

A *foreign reporting company* is an entity, including a corporation, LLC, or other entity formed under the law of a foreign country that is registered to do business in the United States by filing a document with a secretary of state or a similar office under state law or the law of an Indian Tribe. A foreign entity registered to do business by *any one* of the United States or the jurisdiction of *any* Indian Tribe is considered “registered to do business in the United States” and is a foreign reporting company.

What Companies Are Exempt from the Requirements?

There are 23 exceptions to the definition of a reporting company:

- Securities reporting issuers
- Governmental authorities
- Banks
- Credit unions
- Depository institution holding companies
- Money services businesses
- Brokers or dealers in securities
- Securities exchanges or clearing agencies
- Other Exchange Act registered entities
- Investment companies or investment advisers
- Venture capital fund advisers
- Insurance companies
- State-licensed insurance producers
- Commodity Exchange Act registered entities
- Accounting firms
- Public utilities

- Financial market utilities
- Pooled investment vehicles
- Tax-exempt entities
- Entity assisting tax-exempt entities
- Large operating companies
- Subsidiary of certain exempt entities
- Inactive entities

More specific definitions of these exempt entities are provided in the regulations. The exemptions generally include bank-type entities, publicly traded entities, certain tax-exempt entities, and registered investment companies.

Among other requirements, exemption as a *large operating company* requires the company to have more than 20 full-time employees employed in the United States. Exempt companies that drop below 20 full-time employees lose their exemption and are required to report.

To qualify as an *inactive entity*, *all* of the following six criteria must be met:

- The entity must have existed on or before Jan. 1, 2020.
- The entity must not be engaged in active business.
- The entity must not be owned, directly or indirectly, wholly or partially, by a foreign person. A foreign person means a person who is not a citizen or resident of the United States, a domestic partnership or corporation, or other estates or trusts.
- The entity must not have had any change in ownership in the preceding 12-month period.
- The entity must not have sent or received any funds in an amount greater than \$1,000 in the preceding 12-month period, either directly or through any financial account in which the entity or any of its affiliates had an interest.
- The entity must not otherwise hold any type of assets, whether in the United States or elsewhere, including any ownership interest in any corporation, LLC, or other similar entity.

What are the Reporting Requirements?

Reports are required to be made to FinCEN—the Financial Crimes Enforcement Network, which is part of the U.S. Department of the Treasury. Filings must include information on two types of individuals: beneficial owners and company applicants.

A *beneficial owner* is an individual who owns or controls at least 25 percent of the ownership interests of the company

or has substantial control over the company. The ownership or control may be direct or indirect. Thus, an individual may have substantial control over one entity if he owns or controls an interest in one entity that owns or controls an interest in another.

A person with *substantial control* includes:

- any senior officer,
- a person who has authority to appoint or remove senior officers or a majority of the board of directors,
- an important decision-maker, or
- any other person with substantial control over the company.

Senior officers are considered persons with substantial control *per se*. This includes individuals with titles such as president, CEO, COO, CFO, general counsel, and the like. Individuals who perform such functions are considered persons with substantial control even if they have a different title.

Individuals with the authority, usually by virtue of their ownership interest, to appoint a majority of the board have substantial control. This includes any structure analogous to a board of directors, such as the managers of an LLC. Additionally, anyone with authority to appoint or remove senior officers has substantial control.

Important decision-makers or other persons with substantial control include persons with the ability to direct, determine, or have substantial influence over important decisions made by the reporting company. This includes major business decisions; financial decisions; sale or lease of principal assets; major expenditures; and reorganization, dissolution, or merger.

The act also includes a catch-all provision to include any person who otherwise has substantial control over the reporting company. This could include trustees, beneficiaries, or settlors of trusts who hold ownership interests in the reporting company.

Certain persons are excepted from the definition of a beneficial owner:

- a minor child (if the information of the parent/guardian is otherwise reported),
- an individual acting as a nominee, intermediary, custodian, or agent of a beneficial owner,
- an employee of reporting company acting solely as an employee but who is not a senior officer and does not otherwise exercise substantial control,

- an individual whose only interest is a future interest through inheritance, and
- a creditor of a reporting company.

A creditor is a person who meets the beneficial owner's definition only by virtue of a right or interest for the payment of a predetermined sum of money, such as a debt incurred by the reporting company, or a loan covenant intended to secure the right to receive payment on such a loan.

A *company applicant* is an individual who directly files the document that created a domestic reporting company or first registered a foreign reporting company (i.e., the person who actually files the document with the secretary of state). It also includes a person, if any, who was primarily responsible for directing or controlling such filing. For example, if Sam prepares and files the articles of incorporation with the secretary of state, Sam is the company applicant. If, on the other hand, Sam has his attorney or CPA file the document, then both Sam and the attorney or CPA are company applicants. There may be one or two company applicants, but not more. Company applicants must be individuals, not legal business entities.

An entity created or registered before Jan. 1, 2024, is not required to report company applicants. Entities created or registered on or after Jan. 1, 2024, are required to report company applicants.

What Information Must Be Reported?

A *reporting company* must file specific information about the entity itself, its beneficial owners, and its company applicants.

Each reporting company must file its full legal name, any trade name or "DBA," the current United States address of its principal place of business, and the state, tribal, or foreign jurisdiction in which it was formed. If the principal place of business is not in the United States, the company must report the primary location in the United States where it conducts business. A foreign reporting company must report the state or tribal jurisdiction in the United States in which it first registered.

All reporting companies must report their Taxpayer Identification Number (TIN), which includes an Employer Identification Number (EIN). Foreign reporting companies that have not been issued a TIN must report a tax identification number issued by a foreign jurisdiction, specifying the name of the jurisdiction.

Reporting companies must report the *personally identifiable information* of its *beneficial owners* and, if required, its *company applicants*.

This information includes:

- Full name.
- Date of birth.
- Complete current address.
 - A company applicant who forms or registers a company in the course of her business, such as a paralegal, may report her business street address, which need not be in the United States.
- A unique identifying number, issuing jurisdiction, and image of one of the following:
 - United States passport,
 - driver license, or
 - identification card issued by a state or local government or Indian Tribe.

A foreign passport must be reported if an individual does not have any of those documents.

Reporting companies, beneficial owners, or company applicants may, but are not required to, request a FinCEN identifier. This unique identifying number is tied to the required information and may be submitted as a substitute for the information.

When is Filing Required?

FinCEN started accepting reports, which may be filed electronically, on Jan. 1, 2024. Reporting companies already in existence or already registered prior to that date must file by Jan. 1, 2025. Reporting companies created or registered between Jan. 1, 2024, and Jan. 1, 2025, must file within 90 calendar days after receiving actual or public notice that the creation or registration is effective. Reporting companies created or registered on or after Jan. 1, 2025, must complete the filing within 30 days of such notice.

If the required information changes, an update must be filed within 30 days. Errors in the information reported must be corrected within 30 days of the time the company becomes

aware of the inaccuracy. Changes due to the death of a beneficial owner must be reported within 30 days of the settlement of the estate. If a beneficial owner who is a minor child becomes an adult, an update is required. Reporting companies that become exempt should file an updated report showing that they are exempt. Termination or dissolution of a reporting company does not require a report.

What Is Done With the Information?

The required information is not public. It is entered into a secure federal database and may only be disclosed to certain recipients under specific circumstances.

The information is available on request by federal agencies for law enforcement, intelligence, or national security purposes.

State, local, and tribal law enforcement may obtain information for investigation purposes only by court order.

Foreign authorities may request information only under certain circumstances and only through federal agencies.

Banks may access the information for compliance with customer due diligence requirements, but only with the reporting company's consent. Likewise, federal regulators may access the information to perform their function.

Information is also available to the Treasury Department for official use.

FinCEN retains the information for five years after the entity is terminated.

Are There Penalties for Failing to File?

For willful failure to report complete or updated information, or for an attempt to provide false or fraudulent information, there are civil and criminal penalties.

Civil penalties may be assessed for up to \$500 per day while the violation continues. Criminal penalties include fines of up to \$10,000 and imprisonment for up to two years.

UPDATE: On March 1, an Alabama District Court held the Corporate Transparency Act unconstitutional, holding that the statute, as written, exceeds the enumerated powers of Congress. *Nat'l Small Bus. United v. Yellen*, No. 22-cv-1448, 2024 WL 899372 (N.D. Ala. Mar. 1, 2024). The impact of this ruling remains to be seen and an appeal is likely. The injunction is limited to the plaintiffs in the case. Pending new developments, it is prudent for nonexempt reporting companies to comply with the requirements of the Act.

What Now?

In addition to compliance with the reporting regulations, those engaging in real estate transactions may need to evaluate their practices in light of the new reporting requirements. Lending documents and leases may need to be revised to obligate parties to comply with the new regulations.



Additional information about filing requirements may be found on the FinCEN website at www.fincen.gov or by scanning the QR code.

Nothing in this article should be considered legal advice. For representation or advice on a specific situation, consult an attorney. ➡

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