

# **CLIENT ALERT:**

## **Corporate Transparency Act – Reporting**

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The Corporate Transparency Act (“CTA”) became effective January 1, 2024, as means to combat money laundering, terrorist financing, corruption and fraud. **However, a federal district court in Alabama recently held that the CTA was unconstitutional.** *National Small Business United v. Yellen*, No. 5:22-cv-01448 (N.D. Ala. March 4, 2024). The decision, which for now only relieves the plaintiffs (including members of the National Small Business Association) of their obligations under the CTA, is likely to be appealed. FinCEN’s notice concerning the decision can be found here: <https://www.fincen.gov/news/news-releases/notice-regarding-national-small-business-united-v-yellen-no-522-cv-01448-nd-ala>.

Those reporting companies still subject to the CTA – which FinCEN estimates is currently more than 32 million and growing by 5 million new entities per year – will need to identify their beneficial owners, collect beneficial ownership information (and information about the company applicants), and submit such information online using FinCEN’s portal, the Beneficial Ownership Secure System: <https://boiefiling.fincen.gov>. Failure to do so carries significant penalties.

**Deadlines:** Existing reporting companies have until January 1, 2025, to file their initial report, and those formed or registered on or after January 1, 2024, but before January 1, 2025, have 90 days. Reporting companies formed or registered on or after January 1, 2025, have 30 days to file their initial report. Any changes to reported information must be submitted within 30 days of the change.

More information about the CTA’s obligations is available in the Small Entity Compliance Guide

on FinCEN’s website here:

<https://www.fincen.gov/boi/small-entity-compliance-guide>.

### **What Is a Reporting Company?**

A domestic reporting company is an entity formed by a filing with a Secretary of State or any similar office. A foreign reporting company is a foreign entity that has registered to do business in the United States by a filing with a Secretary of State or any similar office. There are many exemptions to the reporting company definition, including for public companies, tax-exempt entities, subsidiaries controlled by exempt entities, and large operating companies. A “large operating company” is an entity that employs more than 20 full-time employees, has an operating presence at a physical address within the United States, and has filed a federal income tax or information return in the United States for the previous year demonstrating more than \$5 million in gross receipts or sales excluding gross receipts or sales from sources outside the United States.

### **What Information Does a Reporting Company Report?**

A reporting company must report (1) the full name of the company; (2) any trade name or “doing business as” name; (3) the company’s principal place-of-business street address; (4) the jurisdiction in which it was formed or first registered as a business; (5) the company’s taxpayer identification number; and (6) information on the company’s beneficial owners and, for reporting companies formed on or after January 1, 2024, company applicants.

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### **Who Are Beneficial Owners and Company Applicants?**

Beneficial owners are individuals who, directly or indirectly, exercise *substantial* control over the reporting company, or who own or control 25% or more ownership interest of the reporting company. An individual exercises substantial control over a reporting company if the individual (1) is a senior officer, such as a president, CEO, or CFO; (2) has authority to remove or appoint senior officers or a majority of the reporting company's board or similar governing body; (3) directs important decisions of the reporting company; or (4) has any other form of substantial control over the reporting company. At least one individual must be reported as having substantial control. The ownership interest threshold is measured at the time of reporting, with options or similar interests treated as exercised. Ownership interests include equity, stock, capital or profit interest, and instruments convertible into, or exercisable for, equity, stock or capital or profit interest.

A company applicant is the individual who directly filed a document that creates a reporting company and the individual who is primarily responsible for directing such filing. A reporting company created or registered after January 1, 2024, is required to submit information on up to two company applicants.

### **What Information Do Beneficial Owners and Company Applicants Report?**

Beneficial owners and company applicants must disclose the following information: (1) full legal

name; (2) date of birth; (3) current address; (4) unique identifying number from an acceptable identification document such as a driver's license or passport; (5) the issuing jurisdiction of the acceptable identification document; and (6) an image of the identification document.

Significantly, if there is any change to the beneficial owner's submitted information, an updated report must be filed no later than 30 days after the change. Changes in information for company applicants do not need to be reported.

**Trusts as Beneficial Owners:** When a trust owns or controls at least 25% of the ownership interest of the company, such information for the following individuals must be reported: (1) each trustee (or any other individual with the authority to dispose of trust assets); (2) a beneficiary who is the sole permissible recipient of trust income and principal (even if his or her interest in the trust is completely discretionary); (3) a beneficiary with a right to demand a distribution or withdrawal of substantially all of the trust assets; and (4) the grantor, if the grantor has the right to revoke or otherwise withdraw trust assets.

### **What Are the Penalties for CTA Noncompliance?**

Willfully reporting or attempting to report false or fraudulent beneficial ownership, or willfully failing to report or make updates to the reported information shall be punished with a civil penalty of up to \$500 for each day the violation continues, or criminal penalties, including imprisonment for up to two years and/or a fine of up to \$10,000.

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### **RECOMMENDATIONS FOR CTA COMPLIANCE PROGRAM**

The CTA will significantly increase resources required to form and maintain a small business. Responsible individuals must implement a rigorous CTA compliance program. We suggest the following:

- Before any new entity is formed, its beneficial owners should be identified and beneficial ownership information obtained as an integral part of the formation process.
- Reporting companies need to institute policies and procedures to educate the individuals responsible for CTA filings and to monitor changes to reported information, including requiring beneficial owners to promptly report any changes to their beneficial ownership information.
- Each beneficial owner should obtain FinCEN identifiers, and require their

company applicants to provide FinCEN identifiers, to facilitate future filings. To obtain a FinCEN identifier, please use the following link after creating a login.gov account: <https://fincenid.fincen.gov>.

- In light of the recent *National Small Business United v. Yellen* decision, reporting companies could marshal the necessary filing information now but delay making the filing, without missing the applicable deadlines, to allow additional time for announcements concerning the status of the Act and whether it will be repealed or the decision will be affirmed on appeal.

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