

# The CTA and FinCEN's Final Rule

---

March 8, 2023 Andrew Lo

---

**PRACTICES** Corporate, Capital Markets and Securities, Emerging Companies and Venture Capital

---

The Corporate Transparency Act (“**CTA**”) was passed by Congress as part of the Anti-Money Laundering Act of 2020. It requires certain types of entities (“reporting companies”) to report beneficial ownership information (“**BOI**”) about the company, its beneficial owners, and company applicants to the Financial Crimes Enforcement Network (“**FinCEN**”). It was designed to protect the U.S. financial system from money laundering, terrorist financing, corruption, tax fraud, and other illicit activity while minimizing the burden on entities doing business in the U.S.

On September 29, 2022, FinCEN released a final rule implementing the BOI reporting requirement of the CTA. The final rule largely adopts FinCEN’s proposed rules from December 2021 while making certain modifications and further clarifications to: (1) who must file a report, (2) what information must be provided, and (3) when a report is due.

## 1. Who Must File a Report

Under the final rule, all reporting companies, including domestic and foreign companies, must file a report with FinCEN. Domestic companies include corporations, limited liability companies, and other similar entities created by a document filed with a secretary of state or similar office. Foreign companies are those formed under the law of a country other than the U.S. that is registered to do business in a U.S. state by a document filed with a secretary of state or similar office. Entities that are not created by filing a document with a secretary of state or similar office are excluded from the reporting company definition. Moreover, there are 23 entities that are explicitly exempt from the reporting company definition. This list includes publicly traded companies that issue securities under the Securities Exchange Act of 1934, banks, governmental authorities, money services businesses, and accounting firms. Another exemption is for large operating companies, defined as entities with: (i) 20 or more full-time employees, (ii) a U.S. income tax return for the previous year of \$5 million of gross receipts from U.S. income, and (iii) an operating presence at a physical office in the U.S. Notably, FinCEN has the power to provide an exemption for other entities but has currently not done so.

## 2. What Information Must Be Disclosed

Companies subject to the CTA must report company information, beneficial owner information, and company applicant information.

### A. Reporting Company Information

Each reporting company must disclose to FinCEN: (i) the full legal name of the reporting company, (ii) any trade name or “doing business as” name, (iii) the current address of the reporting company, (iv) the jurisdiction of formation, and (v) an IRS Taxpayer Identification Number (“**TIN**”). Reporting companies who have a principal place of business in the U.S. are required to provide the street address of that principal place of business. Reporting companies who have a principal place of business outside the U.S. are required to provide the street address of the primary location where business is conducted in the U.S. FinCEN is aware that there may be issues with companies that

lack a physical address, operate completely online, are uncertain of principal place of business and will provide further clarification or FAQs in the future.

## **B. What Are Beneficial Owners?**

Beneficial owners include individuals who either: (i) exercise substantial control over a reporting company, or (ii) own or control at least 25% of the ownership interests of a reporting company. The final rule explains what “substantial control” entails. Individuals who: (i) serve as a senior officer of the reporting company, have authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body), (iii) direct, determine, or have substantial influence over important decisions made by the reporting company, or have any other form of substantial control over the reporting company exercise substantial control over a reporting company. The final rule also describes what an “ownership interest” in a reporting company means. The definition of ownership interest is broad and includes any equity, stock, or similar instrument, any capital or profit interest in an entity, any option or privilege of buying or selling any items described in this section of the rule, and any other instrument used to establish ownership. Individuals may own or control an ownership interest directly or indirectly. The 25% ownership requirement is calculated by an aggregate of all the individual’s ownership interests in the company. Exclusions to the beneficial owner definition are: (i) minor children if a parent or guardian is reported under the CTA, (ii) nominees, intermediaries, custodians, and agents, (iii) employees whose economic benefit is derived only from their employment status, (iv) inheritors, and (v) creditors, unless the creditor meets the definition of substantial control or own 25% or more of the company.

The reporting of beneficial owner information includes: (i) the individual’s full legal name, (ii) date of birth, (iii) current residential or business street address, (iv) a unique identifying number from an acceptable identification document (e.g., a passport) or the individual’s FinCEN number, and (v) an image of the document that provided the unique identifying number that also includes a photograph of the individual.

## **C. What Are Company Applicants?**

The CTA also requires the reporting of company applicant information. The final rule establishes that company applicants are: (i) the individual who directly files the creation document of the entity or registers a foreign entity to do business within the U.S., and/or (ii) the individual who is primarily responsible for directing or controlling the filing of the relevant document. The final rule limits company applicants to one or two individuals.

The information that must be disclosed is generally the same requirements as for beneficial owners. Importantly, the company applicant definition is broader and requires the incorporator of a corporation or the organizer of a partnership or LLC to disclose their own personal information. While it can be burdensome on the company applicant to provide their own sensitive personal information, they can alternatively obtain a FinCEN identifier which is a number issued by FinCEN that is specific to the individual intended to simplify reporting. However, company applicants that opt for this method are under a perpetual obligation to update their application information every 30 days.

## **3. When a Report is Due**

The final rule is effective January 1, 2024. Reporting companies that were created before this date have until January 1, 2025 to file their initial reports. These reporting companies must submit the

information required for reporting companies and beneficial owners but do not have to disclose BOI for company applicants.

Reporting companies created after January 1, 2024 have 30 days after they receive notice of their creation or registration to file their initial reports. These reporting companies are required to report changes to the information in any filed reports and to correct any outdated information within 30 days of when they become aware or have reason to know of the inaccuracy but are not required to update the company applicant information.

Currently, all information is expected to be delivered electronically to FinCEN through an online interface that is under development. This system will securely store any data submitted to it.