

December 29, 2023

# Corporate Transparency Act – Beneficial Ownership Information Reporting

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## Beneficial Ownership Information Reporting Requirements Under the Corporate Transparency Act Effective January 1, 2024

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### BACKGROUND

The Corporate Transparency Act was enacted by Congress on January 1, 2021 as part of the Anti-Money Laundering Act of 2020 and was designed to establish beneficial ownership information reporting requirements for certain types of entities. On September 30, 2022, the Financial Crimes Enforcement Network (FinCEN) issued a final rule implementing the reporting requirements of the Corporate Transparency Act, which will become effective on January 1, 2024. This memorandum briefly summarizes the requirements under this final rule, as well as the New York LLC Transparency Act recently signed into law by Governor Hochul. For both the Corporate Transparency Act and the New York LLC Transparency Act, any information reported will be available to certain law enforcement and regulatory authorities, and under the Corporate Transparency Act, this information will also be available to financial institutions (with the consent of the reporting company) and Department of the Treasury personnel.

### DISCUSSION

Beginning on January 1, 2024, “reporting companies” that do not fall under certain narrowly defined exemptions will be required to file a beneficial ownership report through FinCEN’s online portal, known as the Beneficial Ownership Secure System. Domestic reporting companies formed in 2024 will have 90 days to file their initial report, and existing reporting companies will be required to file their initial report by January 1, 2025. The same timelines apply for foreign reporting companies registered to do business in the United States. The information reported to FinCEN by reporting companies will not be publicly available but

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will be accessible by certain law enforcement agencies, regulatory agencies, financial institutions (only with the consent of the reporting company) and Department of the Treasury personnel.

### **A. WHAT IS A REPORTING COMPANY?**

A domestic reporting company is a corporation, limited liability company, limited partnership or other entity created by the filing of a document with a Secretary of State or any similar office. A foreign reporting company is a foreign corporation, limited liability company or other entity that has registered to do business in any United States jurisdiction by filing a document with a Secretary of State or any similar office. General partnerships, sole proprietorships and donative trusts generally do not constitute reporting companies.

A company that otherwise meets the definition of a reporting company will not be required to file a report with FinCEN if it meets one of the 23 exemptions detailed in the final rule. Some notable exemptions are for banks, credit unions, SEC reporting companies, tax-exempt entities, investment advisors registered with the SEC, subsidiaries controlled or wholly owned by exempt entities and large operating companies (as defined by the final rule).

### **B. WHAT MUST BE REPORTED?**

A reporting company that does not fall under one of the exemptions must report: (1) background information about the reporting company; (2) its beneficial owners; and (3) for a reporting company formed (or, for foreign reporting companies, registered to do business in the United States) after January 1, 2024, its “company applicants” (discussed below).

The background information required for a reporting company is: (1) its legal name; (2) any trade names or “doing business as” names; (3) the address of its principal place of business in the United States (or, if none, the primary location in the United States where it conducts business); (4) its jurisdiction of formation; (5) for a foreign reporting company, the United States jurisdiction where it first registered; and (6) its IRS-issued taxpayer identification number (“TIN”) (or, for a foreign reporting company without a TIN, a tax identification number issued by a foreign jurisdiction and the name of the issuing jurisdiction).

For a “beneficial owner” or “company applicant,” the reporting company must report: (1) the individual’s legal name; (2) the individual’s date of birth; (3) the individual’s residential address (or, for a company applicant who formed or registered a reporting company in the course of his or her business, the individual’s business address); (4) an identifying number from the individual’s driver’s license, passport or other approved identification document; (5) the issuing jurisdiction of the identification document from which the identifying number was obtained (the “identification document”); and (6) an image of the identification document.

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## C. WHO IS A BENEFICIAL OWNER?

A “beneficial owner” is an individual who either (1) directly or indirectly owns or controls at least 25% of the ownership interests of a reporting company or (2) directly or indirectly exercises substantial control over a reporting company. An individual’s ownership interests are calculated as of the time of reporting and any options or similar interests are treated as having been exercised.

There is no maximum number of beneficial owners that must be reported but at least one must be reported for each reporting company under the substantial control prong.

An “ownership interest” in a reporting company is defined as any of the following: (1) equity, stock or similar interests, even if such interest is transferable or does not include voting rights; (2) capital or profit interests; (3) any instrument convertible into an interest described in part (1) or (2) of this paragraph; (4) options or other non-binding privileges to buy or sell any of the interests described in parts (1) through (3) of this paragraph; or (5) “any other instrument, contract or other mechanism used to establish ownership.”

An individual has “substantial control” over a reporting company if he or she: (1) serves as a senior officer of the reporting company (e.g., the President, CFO, CEO, COO or General Counsel); (2) has the authority to remove or appoint any senior officer or a majority of the Board of Directors (or similar governing body) of the reporting company; (3) directs, determines or has substantial influence over important decisions made by the reporting company (e.g., decisions regarding the company’s business, structure or finances); or (4) exercises “any other form of substantial control” over the reporting company (e.g., through Board representation or as a trustee of a trust which owns a majority of the voting rights of the reporting company).

### 1. Exceptions to the Definition of a Beneficial Owner

FinCEN has carved out the following as specific exceptions to the beneficial ownership definition: (1) minor children (a minor’s parent or guardian must be reported instead); (2) nominees, custodians, intermediaries or agents; (3) employees (*i.e.*, an employee who is not a senior officer and whose substantial control over, or economic benefits from, the reporting company are derived solely from his or her status as an employee of the reporting company); (4) inheritors (*i.e.*, an individual whose only interest in a reporting company is through a right of inheritance upon another individual’s death); and (5) creditors acting solely in a creditor capacity (*i.e.*, holders of non-convertible debt).

### 2. What Must Be Reported On Behalf of a Trust?

When a trust owns an interest in a reporting company, the trust itself is not reported. Instead, when a trust directly or indirectly owns or controls at least 25% of the ownership interests of a reporting company, the following individuals must be reported: (1) each trustee (and 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

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a distribution or withdrawal of substantially all of the trust assets; and (4) the grantor, if he or she has the right to revoke the trust or otherwise withdraw trust assets. The introduction to the final rule makes it clear that this list is not exhaustive and that an individual who otherwise “directly or indirectly owns or controls” the ownership interest held by a trust must also be reported.

### **D. WHO IS A COMPANY APPLICANT?**

A “company applicant” is (1) the individual who directly filed the document that formed or first registered the reporting company in the United States and (2) the individual primarily responsible for directing or controlling such filing.

A company applicant must be an individual and not an entity. At least one but no more than two company applicants must be reported for each reporting company formed (or, for foreign reporting companies, registered to do business in the United States) after January 1, 2024.

### **E. WHEN ARE THE REPORTS DUE?**

Reporting companies created before January 1, 2024 have until January 1, 2025 to file their reports. Reporting companies created in 2024 must file their initial reports within 90 days after receiving actual or public notice that the company’s creation or registration became effective. Reporting companies created in 2025 and thereafter will have only 30 days to file their initial reports. The same timelines apply to foreign reporting companies based on when they registered to do business in the United States.

### **F. WHEN MUST A COMPANY FILE AN AMENDED REPORT?**

While reporting companies need not file an annual report, a reporting company must file an updated report within 30 days of a change: (1) in its beneficial owners;<sup>1</sup> (2) of any of the reportable information for the reporting company described in Part B above; or (3) of any of the reportable information for a beneficial owner.<sup>2</sup> Changes to reportable information for a company applicant do not need to be reported.

A reporting company must also file a corrected report to fix any inaccuracies within 30 days after it becomes aware of, or has reason to know of, an inaccuracy in its prior report.

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## **THE NEW YORK LLC TRANSPARENCY ACT**

In June of 2023, the New York State legislature passed the New York LLC Transparency Act (the “NYLTA”), which applies to limited liability companies formed or qualified to do business in New York. The NYLTA was signed by Governor Hochul on December 23, 2023 and will take effect one year after its adoption. The NYLTA is modeled after the Corporate Transparency Act and incorporates many of the same definitions and rules. Notably, a controversial provision that would have made the names and business addresses of beneficial owners reported under the NYLTA publicly available in a searchable database was not included in the final legislation that Governor Hochul signed into law. Instead, like the Corporate Transparency Act,

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information reported under the NYLTA will only be available to certain law enforcement and regulatory authorities. Other state legislatures are considering similar legislation.

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## GOING FORWARD

Clients should consider whether they or their affiliated entities will be required to file reports with FinCEN under these new rules.

For entities formed in 2024, those reports will be due 90 days after formation and will need to include company applicant information. Clients should not form new entities without assessing the implications of the Corporate Transparency Act, including whether an exemption is available and who would be the company applicants and beneficial owners.

For existing entities, although initial reports are not required until the end of 2024, clients should identify entities that may be reporting companies and assess the availability of the required information, including beneficial ownership information, which may not currently be available.

For any client that either is a reporting company or oversees a reporting company, systems and controls should be put in place to capture the information required to be reported, including any later changes to beneficial ownership information.

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## ENDNOTES

- <sup>1</sup> A change in beneficial owners due to a beneficial owner's death is deemed to occur when the deceased beneficial owner's estate is settled.
- <sup>2</sup> An updated report does not need to be filed if the image on a beneficial owner's driver's license, passport or other approved identification document changes, as long as the name, date of birth, address and unique identifying number on the identification document remain the same.

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