

Who must report under the CTA?

The Final Rules require a “Reporting Company,” its “Beneficial Owners,” and its “Company Applicant” (terms defined in the CTA and described below) to report specified beneficial ownership information (“BOI”) to FinCEN. Any Reporting Company formed on or after January 1, 2024 will have 30 days to submit its initial report. A Reporting Company in existence before January 1, 2024 will have until January 1, 2025 to submit its initial report.

- Domestic Reporting Company – any corporation, LLC, or other entity created by filing a document with the secretary of state or similar office, including tribal jurisdictions.
- Foreign Reporting Company – any corporation, LLC, or other entity that is (a) formed under the law of a foreign country and (b) registered to do business by the filing of a document with the secretary of state or similar office, including tribal jurisdictions.

FinCEN created twenty-two exemptions to the definition of Reporting Company. However, Reporting Companies are required to file an updated report with FinCEN upon qualifying for an exemption, and previously exempt companies falling out of exemption status must file a report with FinCEN within thirty days of no longer meeting the criteria for the relevant exemption.

FinCEN has instructed that these exemptions be construed narrowly, because “[b]road exemptions risk undercutting” the CTA “by creating loopholes that can be used to evade the CTA’s reporting requirements.”¹ These exemptions are limited to the following:

1. An issuer of securities registered under section 12 or required to file under section 15(d) of the Securities Exchange Act of 1934, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by such an issuer;²
2. An entity established under the laws of the United States, an Indian tribe, a State, or a political subdivision of a state, or under an interstate compact between two or more states and exercises governmental authority on behalf of the United States or any such state or political subdivision, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by such an entity;³
3. A bank or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by a bank;⁴
4. A Federal or state credit union or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by a such credit union;⁵

¹ 87 F.R. 189, 59540.

² 31 C.F.R. § 1010.380(c)(2)(i).

³ 31 C.F.R. §§ 1010.380(c)(2)(ii), (xxii).

⁴ 31 C.F.R. §§ 1010.380(c)(2)(iii), (xxii).

⁵ 31 C.F.R. §§ 1010.380(c)(2)(iv), (xxii).

5. A bank or savings and loan holding company, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by a bank or savings and loan holding company;⁶
6. A registered money transmitting business;⁷
7. A broker or dealer registered under section 15 of the Securities Exchange Act of 1934 or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by such a broker or dealer;⁸
8. An exchange or clearing agency registered under section 6 or 17A of the Securities Exchange Act of 1934, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by such an entity;⁹
9. Any other entity registered with the Securities and Exchange Commission (“SEC”) under the Securities Exchange Act of 1934, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by such an entity;¹⁰
10. An investment company or investment adviser registered with the SEC, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by such an entity;¹¹
11. An investment adviser as described in section 203(l) of the Investment Advisers Act of 1940 and has made certain filings with the SEC, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by an investment adviser;¹²
12. An insurance company as defined in the Investment Company Act of 1940, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by an insurance company;¹³
13. An insurance producer authorized by a state and subject to the state insurance commissioner and has a physical operating presence in the United States, or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by such an insurance producer;¹⁴
14. Commodity Exchange Act registered entities or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by a Commodity Exchange Act registered entity;¹⁵
15. Public accounting firms or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by a public accounting firm;¹⁶
16. Public utilities or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by a public utility;¹⁷

⁶ 31 C.F.R. §§ 1010.380(c)(2)(v), (xxii).

⁷ 31 C.F.R. § 1010.380(c)(2)(vi).

⁸ 31 C.F.R. §§ 1010.380(c)(2)(vii), (xxii).

⁹ 31 C.F.R. §§ 1010.380(c)(2)(viii), (xxii).

¹⁰ 31 C.F.R. §§ 1010.380(c)(2)(ix), (xxii).

¹¹ 31 C.F.R. §§ 1010.380(c)(2)(x), (xxii).

¹² 31 C.F.R. §§ 1010.380(c)(2)(xi), (xxii).

¹³ 31 C.F.R. §§ 1010.380(c)(2)(xii), (xxii).

¹⁴ 31 C.F.R. §§ 1010.380(c)(2)(xiii), (xxii).

¹⁵ 31 C.F.R. §§ 1010.380(c)(2)(xiv), (xxii).

¹⁶ 31 C.F.R. §§ 1010.380(c)(2)(xv), (xxii).

¹⁷ 31 C.F.R. §§ 1010.380(c)(2)(xvi), (xxii).

17. Financial market utilities or any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by a financial market utility;¹⁸
18. Pooled investment vehicles operated or advised by a bank, credit union, registered securities broker or dealer, investment company, or investment adviser;¹⁹
19. Tax-exempt entities;²⁰
20. Entities assisting tax-exempt entities;²¹
21. Large operating companies, which are defined as any entity with (a) more than 20 full time employees in the U.S., (b) an operating presence in the U.S., and (c) that filed a Federal tax return for the previous year with more than \$5,000,000 in gross receipts or sales;²²
 - Notably, the qualification of 20 full-time employees cannot be consolidated across entities.²³
22. Certain subsidiaries, as indicated in this list. The final rules “prevent[] entities that are only partially owned by exempt entities from shielding all of their ultimate beneficial owners—including those that beneficially own the entity through a non-exempt parent—from disclosure.”²⁴
23. Inactive entities, which are defined as any entity (a) in existence prior to January 1, 2020, (b) is not engaged in active business, (c) is not owned by a foreign person, (d) has not experienced any change of ownership in the preceding twelve months, (e) has not sent or received more than \$1,000 in funds in the preceding twelve months, and (f) does not otherwise hold any assets.²⁵

What must a Reporting Company Report?

In its initial report, a Reporting Company must disclose its (a) full legal name, (b) trade or “doing business as” name (if any), (c) address of principal place of business, (d) jurisdiction of formation, and (e) unique identification number such as a taxpayer identification number/employer identification number. Reporting Companies must also report the following information on all their Beneficial Owners: (a) full legal name, (b) date of birth, (c) current residential street address, (d) unique identifier from an acceptable document (a current U.S. passport, state or local ID, driver’s license, or—if the Beneficial Owner does not have any of the foregoing—a foreign passport), and (e) image of the identification document. All Company Applicants must disclose nearly all of the same information as the Beneficial Owners (replacing the residential address with a business address).

Who are Beneficial Owners?

A Beneficial Owner is an individual who, directly or indirectly, exercises “Substantial Control” over a Reporting Company. Generally, an individual exercises Substantial Control over a Reporting Company if they (i) are a senior officer (or have authority over the appointment or removal of senior officers or a majority of the board of directors) or (ii) direct, determine, or have substantial influence over important business decisions. Substantial Control may be held directly or indirectly. FinCEN

¹⁸ 31 C.F.R. §§ 1010.380(c)(2)(xvii), (xxii).

¹⁹ 31 C.F.R. § 1010.380(c)(2)(xviii).

²⁰ 31 C.F.R. § 1010.380(c)(2)(xix).

²¹ 31 C.F.R. § 1010.380(c)(2)(xx).

²² 31 C.F.R. § 1010.380(c)(2)(xxi).

²³ 87 F.R. 189, § 59543.

²⁴ 87 F.R. 189, § 59543.

²⁵ 31 C.F.R. § 1010.380(c)(2)(xxiii).

clarified that this can be as a trustee of a trust or similar arrangement, or through board representation, ownership or control of a majority voting power/rights, and any other contract, arrangement, understanding, relationship, or otherwise. Individuals holding less than 25% ownership interest may nevertheless be deemed "beneficial owners" simply because of their voting rights.

In addition to Substantial Control, an individual is a beneficial owner if they own or control 25% or more of a Reporting Company's "Ownership Interests".²⁶ Like the definition for Substantial Control, FinCEN defined Ownership Interests broadly, including—among other things—equity, stock, capital or profits interests.²⁷ Notably, Ownership Interests also include convertible instruments, futures, and warrants or “rights to purchase, sell, or subscribe to” any of the foregoing.²⁸ FinCEN included this provision because convertible instruments provide “significant opportunities for exerting influence and maintaining an economic interest tantamount to ownership.”²⁹ Notably, FinCEN acknowledged the potentially complicated nature of calculating some forms of convertible interests, particularly in situations where an interest is eligible for conversion only upon the occurrence of specified events. Nevertheless, FinCEN concluded that they should still fall within the scope of Ownership Interests because the holders of these types of convertible interests invest with the “expectation that they will receive a certain level of capital and profit interests.”³⁰

Additionally, Ownership Interests include puts, calls, straddles, or the like regarding all of the foregoing without being bound to do so, except if such option is “created and held by a third party or third parties without the knowledge or involvement of the reporting company.”³¹ The definition of Ownership Interests also includes a catchall provision stating, generally, that any other instrument or arrangement to establish ownership qualifies,³² including, generally, any other instrument or arrangement to establish ownership. Like Substantial Control, Ownership Interests may be held either directly or indirectly through the catchall of any “contract, arrangement, understanding, relationship, or otherwise.” Trust arrangements can also give rise to Ownership Interests. Such arrangements include, but are not limited to:

1. A trustee with authority to dispose of trust assets;
2. A sole beneficiary of both income and principal from a trust;
3. A beneficiary with the right to demand distribution/withdraw substantially all assets; or
4. A grantor or seller of a trust with the right to revoke the trust or otherwise withdraw its assets.

Ownership Interests must be calculated as of the present time “and any options or similar interests of the individual shall be treated as exercised.” There are particular requirements for Reporting Companies that issue capital or profit interests, and that issue shares of stock. In certain cases, “any individual who owns or controls 25 percent or more of any class or type of ownership interest of a reporting company shall be deemed to own or control 25 percent or more of ownership interests of the reporting company.” Options and similar interests are treated as exercised for purposes of this calculation, too.

²⁶ 31 C.F.R. § 1010.380(d).

²⁷ 31 C.F.R. § 1010.380(d)(2)(i).

²⁸ 31 C.F.R. § 1010.380(d)(2)(i)(C).

²⁹ 87 F.R. 189, 59531.

³⁰ 87 F.R. 189, 59531.

³¹ 31 C.F.R. § 1010.380(d)(2)(i)(D).

³² 31 C.F.R. § 1010.380(d)(2)(i)(E).

FinCEN created five exceptions from the definition of Beneficial Owner:

- i. Minor children, provided the required information of a parent or legal guardian of the minor child is reported (and the reporting company must submit an updated report when the minor child reaches the age of majority);
- ii. An individual acting as a nominee/intermediary/custodian/agent on behalf of another;
- iii. An employee with arguably Substantial Control but whose control is derived solely from the individual's status as an employee (excluding senior officers of a company exercising Substantial Control);
- iv. An individual who has solely a future interest through inheritance (the reporting company must update its report once the individual receives the inheritance); and
- v. Creditors of reporting companies.

Is Any Additional Reporting Required?

A "Company Applicant" is the individual who files the document that forms the entity **and** any individual responsible for directing or controlling such filing. FinCEN's rationale behind this broad definition is to retain information allowing it to "draw connections between and among seemingly unrelated reporting companies, beneficial owners, and company applicants." For example:

1. If an attorney is primarily responsible for overseeing the formation of an entity and that attorney's paralegal directly files the documents required with the state office to create the entity, *both* the attorney and the paralegal are considered Company Applicants.
2. If a Beneficial Owner of a Reporting Company files the requisite formation documents, they will file as both a Beneficial Owner and a Company Applicant. Notably, FinCEN clarified that where software or online tools aid in filing, they are not considered Company Applicants.

Company Applicants for entities created prior to January 1, 2024 are not required to report information with respect to any Company Applicant.

What Are The Penalties for Noncompliance?

The civil penalty for willful noncompliance of beneficial ownership reporting requirements is a fine of \$500 per day, and criminal penalties include a fine up to \$10,000, imprisonment, or both. While Reporting Companies are generally responsible for compliance under the CTA, individuals may be held liable for noncompliance. Congress created a safe harbor if a person corrects a BOI report within ninety days. Notably, however, this safe harbor does not encompass attempts to evade compliance where the person has actual knowledge that the report initially submitted is inaccurate. Congress has also created penalties for the unauthorized disclosure of BOI information.