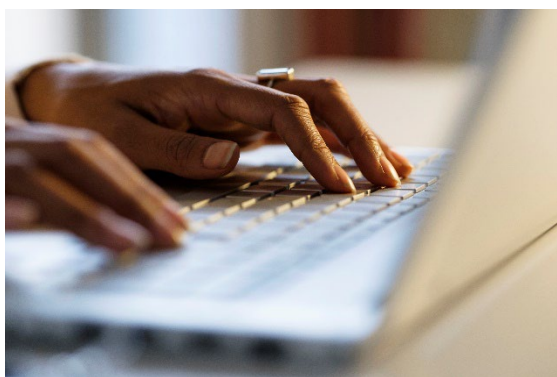


What Family Offices, Private Companies and Family Businesses Need to Know about the New Corporate Transparency Act



Due to a new law going into effect on January 1, 2024 many domestic and foreign entities, that register to do business in the United States, will be required to file a report containing personal identifiable information about the company's beneficial owners and applicants with the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN").

This new law, commonly referred to as the Corporate Transparency Act (the "CTA") became law on January 1, 2021 and FinCEN has now issued final rules governing the initial registration requirements under the CTA.

Any entity meeting the definition of a "reporting company," that does not qualify for an exemption, must file the initial report with FinCEN by the following deadlines:

- **Prior to January 1, 2025** for entities created (or, in the case of non-US

reporting companies, registered to do business in the US) before the 2024 calendar year;

- **Within 90 days** after formation for entities created (or, in the case of non-US reporting companies, registered to do business in the US) during the 2024 calendar year; and
- **Within 30 days** after formation for entities created (or, in the case of non-US reporting companies, registered to do business in the US) during the 2025 calendar year.

Registration and reporting will take place with FinCEN electronically through a secure filing system that will not be available until January 1, 2024. There will not be any fees for registering or making reports required under the CTA and beneficial ownership and company applicant information reported to FinCEN will not be publicly available.

Who is Required to File Reports?

Every "reporting company" that does not qualify for an exemption will be required to register and file reports with FinCEN under the CTA. A **domestic reporting company** is a corporation, limited liability company or any entity that is created by the filing of a document with the secretary of state (or similar office) under the law of a **State** or Indian tribe. A **foreign reporting company** is a corporation, limited liability company or entity formed under the law of a foreign country that has registered to do business in any **State** or Indian tribal area by the filing of a document with the secretary of state (or similar office). However, the entity will not be considered a reporting company if it can meet one of the 23 exemptions set forth in the CTA. Most of the exemptions are applicable to entities that are already subject to

regulatory oversight (under which their beneficial ownership may already be known). However, some of these exemptions could be applicable to Family Offices or large operating businesses.

It is important to note that certain entities, such as trusts, sole proprietorships, and other general partnerships are typically formed **without the filing of a document with the secretary of state (or similar office)** and will therefore not be reporting companies subject to the CTA. Additionally, it is important to note that for purposes of the CTA, “**State**” means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other commonwealth, territory, or possession of the United States.

What are the 23 Exemptions?

Under the CTA, the term “reporting company” does not include:

1. *Securities Reporting Issuer.* Any issuer of securities that is an issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934 (the “**Exchange Act**”) or required to file supplementary and periodic information under section 15(d) of the Exchange Act.

2. *Governmental Authority.* Any entity that is 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 Indian tribe, state, or political subdivision.

3. *Bank.* Any bank, as defined in the Federal Deposit Insurance Act, the

Investment Company Act of 1940 (the “**Company Act**”) or the Investment Advisers Act of 1940 (the “**Advisers Act**”).

4. *Credit Union.* Any federal credit union or state credit union, as those terms are defined in the Federal Credit Union Act.

5. *Depository Institution Holding Company.* Any bank holding company as defined in the Bank Holding Company Act of 1956 or any savings and loan holding company as defined in the Home Owners’ Loan Act.

6. *Money Transmitting or Money Services Business.* Any money transmitting business and any money services business registered with FinCEN.

7. *Broker or Dealer.* Any broker or dealer, as those terms are defined in the Exchange Act, that is registered under the Exchange Act.

8. *Securities Exchange or Clearing Agency.* Any exchange or clearing agency, as those terms are defined in the Exchange Act, that is registered under the Exchange Act.

9. *Other Exchange Act Registered Entity.* Any other entity that is registered with the Securities and Exchange Commission (the “**SEC**”) under the Exchange Act.

10. *Investment Company or Investment Adviser.* Any entity that is an investment company as defined in the Company Act, or is an investment adviser as defined in the Advisers Act **and registered** with the SEC under the Company Act or the Advisers Act.

It is important to note that this exemption does not expressly include Family Offices that do not register as an investment adviser due to their reliance on the

Advisers Act Rule 202(a)(11)(G)-1, more commonly referred to as the “Family Office Rule,” which effectively excludes Family Offices from the broad definition of investment adviser under the Advisers Act. Consequently, unregistered family offices should plan to register with the CTA.

11. *Venture Capital Fund Adviser.* Any investment adviser that is described in section 203(l) of the Advisers Act and has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the SEC.

12. *Insurance Company.* Any insurance company as defined in the Company Act.

13. *Insurance Producer.* Any entity that is an insurance producer that is authorized by a state and subject to supervision by the insurance commissioner or a similar official or agency of a state and has an operating presence at a physical office within the United States.

14. *Commodity Exchange Act Registered Entity.* Any entity that is a registered entity as defined in section 1a of the Commodity Exchange Act or is: (i) a futures commission merchant, introducing broker, swap dealer, major swap participant, commodity pool operator, or commodity trading advisor, each as defined in section 1a of the Commodity Exchange Act, or a retail foreign exchange dealer as described in section 2(c)(2)(B) of the Commodity Exchange Act and (ii) registered with the Commodity Futures Trading Commission under the Commodity Exchange Act.

15. *Accounting Firm.* Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002.

16. *Public Utility.* Any entity that is a regulated public utility that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States.

17. *Financial Market Utility.* Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010.

18. *Pooled Investment Vehicle.* Any pooled investment vehicle that is operated or advised by a person described in exemptions 3, 4, 7, 10 or 11 above. For purposes of this exemption, the term “**pooled investment vehicle**” means: (i) any investment company, as defined in section 3(a) of the Company Act or any company that would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of the Company Act and is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the SEC or will be so identified in the next annual updating amendment to Form ADV required to be filed by the applicable investment adviser pursuant to rule 204-1 under the Advisers Act.

19. *Tax-Exempt Entity.* Any entity that is: (i) an organization that is described in section 501(c) of the Internal Revenue Code of 1986 (the “**Code**”) (determined without regard to section 508(a) of the Code) and exempt from tax under section 501(a) of the Code, except that in the case of any such organization that ceases to be described in section 501(c) and exempt from tax under section 501(a), such organization shall be considered to continue to be described in this exemption for the 180-day period beginning on the date of the loss of such tax-exempt status; (ii) a political

organization, as defined in section 527(e)(1) of the Code, that is exempt from tax under section 527(a) of the Code; or (iii) a charitable trust or split-interest trust described in paragraph (1) and (2) of section 4947(a) of the Code.

20. Entity Assisting a Tax-Exempt Entity.

Any entity that: (i) operates exclusively to provide financial assistance to, or hold governance rights over, any entity described in exemption 19; (ii) is a United States person; (iii) is beneficially owned or controlled exclusively by one or more United States persons that are United States citizens or lawfully admitted for permanent residence; and (iv) derives at least a majority of its funding or revenue from one or more United States persons that are United States citizens or lawfully admitted for permanent residence.

21. Large Operating Company. Any entity that: (i) employs more than 20 full time employees in the United States, with “full time employee in the United States” having the meaning provided in 26 CFR 54.4980H-1(a) and 54.4980H-3, except that the term “United States” as used in 26 CFR 54.4980H-1(a) and 54.4980H-3 has the meaning provided in § 1010.100(hhh) (which includes the states, the Indian lands, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands and all other territories and possessions of the United States); (ii) **has an operating presence at a physical office within the United States**; and (iii) has filed a federal income tax or information return in the United States for the previous year demonstrating more than \$5,000,000 in gross receipts or sales, as reported as gross receipts or sales (net of returns and allowances) on the entity’s IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120-S, IRS Form

1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined under federal income tax principles. For an entity that is part of an affiliated group of corporations within the meaning of 26 U.S.C. 1504 that filed a consolidated return, the applicable amount shall be the amount reported on the consolidated return for such group.

The phrase “has an operating presence at a physical office within the United States” means that an entity regularly conducts its business at a physical location in the United States that the entity owns or leases and that is physically distinct from the place of business of any other unaffiliated entity.

22. Subsidiary of Certain Exempt Entities. Any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more entities described in exemptions 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19 or 21.

23. Inactive Entity. Any entity that: (i) was in existence on or before January 1, 2020; (ii) is not engaged in active business; (iii) is not owned by a foreign person, whether directly or indirectly, wholly or partially; (iv) has not experienced any change in ownership in the preceding twelve month period; (v) has not sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve month period; and (vi) does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.

What Information Must be Reported?

An initial report of a reporting company shall include general information about the reporting company, such as its name, trade names, address, state of formation and beneficial owners. For every individual who is either a **beneficial owner** or **company applicant** of such reporting company, the reporting company shall include their name, date of birth, residential address (or company address for company applicants who form or register the entity in the course of such applicant's business), a unique identifying number, such as a driver's license or passport number, and an image of the document from which the unique identifying number was obtained. Under the CTA, a "**company applicant**" is defined as the individual who directly files the document that creates the domestic reporting company or registers the foreign reporting company to do business in a state and the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in filing the document. For example, in a law firm setting, the company applicant may include both the attorney primarily responsible for overseeing the filing of formation documents and the paralegal who directly files the documents. The final rules clarified that the definition of "company applicant" is limited to only one or two individuals. **However, if a reporting company was created or registered before January 1, 2024, the reporting company shall report that fact, but is not required to report information with respect to any company applicant.**

The failure to timely file such reports, or the providing of false beneficial ownership information in such reports, that is not corrected under the safe harbor processes outlined in the CTA, can subject the reporting company and other relevant persons to

substantial civil penalties and criminal fines. FinCEN provides a 30-day safe harbor window, beginning on the day such reporting company becomes aware or has reason to know of any inaccuracy, to correct any previously filed report so long as the corrected report is filed within 90 days after the date of the inaccurate report. Updates to initial reports are also required within 30 days of any changes that make any information previously submitted to FinCEN incorrect for any reason. For example, an updated report will be required upon: (i) the transfer or sale of an ownership interest by a beneficial owner; (ii) a minor beneficial owner (previously reported under the name of their parent or legal guardian) reaching the age of majority; (iii) the death of a beneficial owner (upon the settlement of the estate); or (iv) a change to any beneficial owner information, such as a name change, unique identifying number change due to expiration of such document or updated address.

Who is a Beneficial Owner?

Under the CTA and subject to a few exceptions, a "**beneficial owner**" includes any individual who, directly or indirectly, either exercises "**substantial control**" over such reporting company or owns or controls **at least 25 percent** of the "**ownership interests**" of such reporting company. There are specific rules in the CTA regarding calculating and determining what constitutes an ownership interest that need to be carefully analyzed. For example, owning a convertible instrument, warrant or stock option would be deemed an ownership interest. There are also complex rules related to what it means to exercise substantial control (directly or indirectly) over a reporting company that will need to be carefully analyzed before reporting beneficial owners.

What Now?

The CTA is intended to enhance the ability of FinCEN and other agencies to protect the United States national security and financial system from illicit use and to provide essential information to national security, intelligence, financial institutions and law enforcement to help prevent drug traffickers, fraudsters and other bad actors from laundering or hiding money and other assets in the United States. Unfortunately, this will require many Family Offices, private companies and family businesses that do not meet any of the 23 exemptions to be subject to the CTA and its reporting requirements.

This article has discussed some, but not all, of the provisions of the final rule. Interested persons should review the final rule with counsel and advisors as soon as possible. Handler Thayer, LLP can assist in determining if you are a reporting company subject to the reporting requirements of the CTA or a beneficial owner that will be listed in the reports.

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