

# NAVIGATING THE CORPORATE TRANSPARENCY ACT

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September 2024

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# DISCLAIMER

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**The information contained in this presentation is solely for informational and educational purposes and does not constitute legal advice.**

# PURPOSE

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- Regulations implement §6403 of the Corporate Transparency Act, enacted into law as part of the National Defense Authorization Act for fiscal year 2021.
- Require certain types of entities to file reports with the Financial Crimes Enforcement Network, Treasury (FinCEN) that identifies two types of individuals:
  1. beneficial owners of the entity; and
  2. those who have filed the application(s) with the governmental agency that form the entity or registers it to do business in the U.S.

# KEY ISSUES

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Who must file?

What  
information  
must be filed?

When must such  
information be  
filed?

What happens if  
you don't file?

# WHO MUST FILE?

## REPORTING COMPANIES

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### Domestic Reporting Companies

- Entities **created** through the filing of a document with a state government.

### Foreign Reporting Companies

- Foreign entities **registering** to do business in the U.S. through the filing of a document with a state government.

# EXEMPTIONS

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1. Securities reporting issuer;
2. Governmental authority;
3. Bank;
4. Credit union;
5. Depository institution holding company;
6. Money services business;
7. Broker or dealer in securities;
8. Securities exchange or clearing agency;
9. Other Exchange Act registered entity;
10. Investment company or investment advisor;
11. Venture capital fund adviser;
12. Insurance company;
13. State-licensed insurance provider;
14. Commodity Exchange Act registered entity;
15. Accounting firm;
16. Public utility;
17. Financial market utility;
18. Pooled investment vehicle;
19. Tax-exempt entity;
20. Entity assisting a tax-exempt entity;
21. Large operating company;
22. Subsidiary of certain companies; and
23. Inactive entity.

# LARGE OPERATING COMPANY

## EXEMPTION 21

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"(A) 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);

(B) Has an operating presence at a physical office within the United States; and

(C) 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."

# WHAT INFORMATION MUST BE FILED?

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Reporting  
Company's  
"Beneficial  
Owner"

Reporting  
Company's  
"Applicant"

Reporting  
Company's *Own  
Information*



# WHO IS A BENEFICIAL OWNER?

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"...with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise- (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity."

# WHO IS **NOT** A BENEFICIAL OWNER?

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- i. A minor child, as defined in the state in which the entity is formed, if the information of the parent or guardian of the minor child is reported in accordance with this section;
- ii. An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;
- iii. An individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person;
- iv. An individual whose **only interest** in a corporation, limited liability company, or other similar entity is through **a right of inheritance**; or
- v. A creditor of a corporation, limited liability company, or other similar entity, unless the creditor meets the requirements of subparagraph (A).

# WHAT IS SUBSTANTIAL CONTROL?

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## **An individual exercises substantial control over a reporting company if the individual:**

- A. Serves as a senior officer of the reporting company;
- B. Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- C. Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding:
  - 1. The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
  - 2. The reorganization, dissolution, or merger of the reporting company;
  - 3. Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;

# WHAT IS SUBSTANTIAL CONTROL?

CONTINUED

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4. The selection or termination of business lines or ventures, or geographic focus, of the reporting company;
  5. Compensation schemes and incentive programs for senior officers;
  6. The entry into or termination, or the fulfillment or non-fulfillment, of *significant* contracts;
  7. Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures;
- D. Has any other form of substantial control over the reporting company.

# WHAT IS DIRECT OR INDIRECT SUBSTANTIAL CONTROL?

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**An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through:**

- A. Board representation;
- B. Ownership or control of a majority of the voting power or voting rights of the reporting company;
- C. Rights associated with any financing arrangement or interest in a company;
- D. Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
- E. Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- F. Any other contract, arrangement, understanding, relationship, or otherwise.

# WHAT IS DIRECT OR INDIRECT SUBSTANTIAL CONTROL?

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**An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through:**

- "trusts or similar arrangements" can take a wide range of forms. Accordingly, FinCEN finds it appropriate'.....'to specify that a trustee of a trust can, in fact, exercise substantial control over a reporting company through the exercise of his or her powers as a trustee over the corpus of the trust, for example, by exercising control rights associated with shares held in trust."

# WHAT IS AN OWNERSHIP INTEREST?

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- A. Any equity, stock, or similar instrument; preorganization certificate or subscription; or transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights;
- B. Any capital or profit interest in an entity;
- C. Any instrument convertible, with or without consideration, into any share or instrument described in paragraph (d)(2)(i)(A), or (B) of this section, any future on any such instrument, or any warrant *or right to purchase*, sell, or subscribe to a share or interest described in paragraph (d)(2)(i)(A), or (B) of this section, regardless of whether characterized as debt;
- D. Any put, call, straddle, or other option or *privilege of buying or selling* any of the items described in paragraph (d)(2)(i)(A), (B), or (C) of this section without being bound to do so, except to the extent that such option or privilege is created and held by a third party or third parties without the knowledge or involvement of the reporting company; or
- E. Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

# OWNERSHIP OR CONTROL OF AN OWNERSHIP INTEREST?

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**An individual may directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise, including:**

- A. Joint ownership with one or more other persons of an undivided interest in such ownership interest;
- B. Through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual;
- C. With regard to a trust or similar arrangement that holds such ownership interest: (1) As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets; (2) As a beneficiary who: (i) Is the sole permissible recipient of income and principal from the trust; or (ii) Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or (3) As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or
- D. Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company.



# OWNERSHIP OR CONTROL OF AN OWNERSHIP INTEREST?

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**An individual may directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise, including:**

- "Assets, such as the ownership interests of a reporting company, can be held in trust. The final rule identifies the trustee as an individual who will be deemed to control trust assets for the purpose of determining which individuals own or control 25 percent of the ownership interests of the reporting company. In addition to trustees, the final rule specifies that other individuals with authority to control or dispose of trust assets are considered to own or control the ownership interests in a reporting company that are held in trust. The final rule identifies circumstances in which ownership interests held in trust will be considered as owned or controlled by a beneficiary: if the beneficiary is the sole permissible recipient of income and principal from the trust, or if the beneficiary has the right to demand a distribution of, or withdraw substantially all, of the assets in the trust. In addition, trust assets will be considered as owned or controlled by a grantor or settlor who has the right to revoke the trust or withdraw its assets. One consequence of this—to confirm the reading that one comment suggested was possible and requested clarification on—is that, depending on the specifics of the trust arrangement, the ownership interests held in trust could be considered simultaneously as owned or controlled by multiple parties in a trust arrangement."

# OWNERSHIP OR CONTROL OF AN OWNERSHIP INTEREST?

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**An individual may directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise, including:**

"The precise moment at which an individual acquires an ownership interest in an entity through inheritance may be subject to a variety of existing legal authorities, such as the terms of a will, the terms of a trust, applicable state laws, and other valid instruments and rules. FinCEN intends the application of the inheritor exception, and the meaning of a "right of inheritance" in this paragraph (d)(3)(iv), to conform to the governing legal authorities. Should those authorities not provide sufficient direction for purposes of this inheritor exception, FinCEN is prepared to consider supplemental guidance or FAQs."

# WHO IS A COMPANY APPLICANT?

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1. For a domestic reporting company, the individual who directly files the document that creates the domestic reporting company as described in paragraph (c)(1)(i) of this section;
2. For a foreign reporting company, the individual who directly files the document that first registers the foreign reporting company as described in paragraph (c)(1)(ii) of this section; and
3. Whether for a domestic or a foreign reporting company, the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document.

# WHAT IS DIRECT OR CONTROL?

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## Example from rules:

- "In many cases, company applicants may be employed by a business formation service or law firm. For example, there may be an attorney primarily responsible for overseeing the preparation and filing of incorporation documents and a paralegal who directly files them with a state office to create the reporting company. In this example, this reporting company would report two company applicants – the attorney and the paralegal – but additional individuals who may be indirectly involved in the filing would not need to be reported."

# WHAT INFORMATION MUST BE FILED?

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- A. The full legal name of the individual;
- B. The date of birth of the individual;
- C. A complete current address consisting of: (1) In the case of a company applicant who forms or registers an entity in the course of such company applicant's business, the street address of such business; or (2) In any other case, the individual's residential street address;
- D. A unique identifying number and the issuing jurisdiction from one of the following documents: (1) A non-expired passport issued to the individual by the United States government; (2) A non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual; (3) A non-expired driver's license issued to the individual by a State; or (4) A non-expired passport issued by a foreign government to the individual, if the individual does not possess any of the documents described in paragraph (b)(1)(ii)(D)(1), (b)(1)(ii)(D)(2), or (b)(1)(ii)(D)(3) of this section; and
- E. An image of the document from which the unique identifying number in paragraph (b)(1)(ii)(D) of this section was obtained.

# REPORTING COMPANY INFORMATION

## GENERAL

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- A. The full legal name of the reporting company;
- B. Any trade name or "doing business as" name of the reporting company;
- C. A complete current address consisting of: (1) In the case of a reporting company with a principal place of business in the U.S., the street address of such principal place of business; and (2) In all other cases, the street address of the primary location in the U.S. where the reporting company conducts business;
- D. The state, tribal, or foreign jurisdiction of formation of the reporting company;
- E. For a foreign reporting company, the state or tribal jurisdiction where such company first registers; and
- F. The Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the reporting company, or where a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.

# FinCEN IDENTIFIER

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(i)

- A. An individual may obtain a FinCEN identifier by submitting to FinCEN an application containing the information about the individual described in paragraph (b)(1) of this section.
- B. A reporting company may obtain a FinCEN identifier by submitting to FinCEN an application at or after the time that the entity submits an initial report required under paragraph (b)(1) of this section.
- C. Each FinCEN identifier shall be specific to each such individual or reporting company, and each such individual or reporting company (including any successor reporting company) may obtain only one FinCEN identifier.

(ii)

- A. If an individual has obtained a FinCEN identifier and provided such FinCEN identifier to a reporting company, the reporting company may include such FinCEN identifier in its report in lieu of the information required under paragraph (b)(1) of this section with respect to such individual.

(iii)

- A. Any individual who has obtained a FinCEN identifier shall update or correct any information previously submitted to FinCEN in an application for such FinCEN identifier.

# WHEN MUST INFORMATION BE REPORTED?

## DOMESTIC REPORTING COMPANY

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Any domestic reporting company created on or after January 1, 2024, shall file a report **within \*30 calendar days of the earlier date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice**, such as through a publicly accessible registry, that the domestic reporting company has been created.

\* FinCEN has extended to 90-day period for 2024 only. As of January 1, 2025, 30-day period to file.



# WHEN MUST INFORMATION BE REPORTED

## FOREIGN REPORTING COMPANY

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Any entity that becomes a foreign reporting company **on or after January 1, 2024**, shall file a report **within \*30 calendar days of the earlier date on which it receives actual notice that it has been registered to do business or the date on which a secretary of state or similar office first provides public notice**, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business.

\* FinCEN has extended to a 90-day period for 2024 only. As of January 1, 2025, 30-day period to file.

# WHEN MUST INFORMATION BE FILED

COMPANY CREATED BEFORE JANUARY 1, 2024

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Any domestic reporting company **created before January 1, 2024**, and any entity that became a foreign reporting company before January 1, 2024, shall file a report **not later than January 1, 2025**.

# NO LONGER AN EXEMPT ENTITY?

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Any entity that no longer meets the criteria for any exemption under paragraph (c)(2) of this section shall file a report within 30 calendar days after the date that it no longer meets the criteria for any exemption.

# WHAT HAPPENS IF YOU DON'T FILE?

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"...willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with subsection (b); or "(B) willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with subsection (b)."

*"Shall be liable to the United States for a civil penalty of not more than \$500 for each day that the violation continues or has not been remedied; and (ii) may be fined not more than \$10,000, imprisoned for not more than 2 years, or both."*

# UNAUTHORIZED DISCLOSURE?

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"(2) UNAUTHORIZED DISCLOSURE OR USE.—Except as authorized by this section, it shall be unlawful for any person to knowingly disclose or knowingly use the beneficial ownership information obtained by the person through— (A) a report submitted to FinCEN under subsection (b); or (B) a disclosure made by FinCEN under subsection (c).

Any person that violates paragraph (2)— (i) shall be liable to the United States for a civil penalty of not more than \$500 for each day that the violation continues or has not been remedied; and (ii)(I) shall be fined not more than \$250,000, or imprisoned for not more than 5 years, or both; or (II) while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period, shall be fined not more than \$500,000, imprisoned for not more than 10 years, or both."

# HOW MAY INFORMATION BE USED?

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"FinCEN may disclose beneficial ownership information reported pursuant to this section only upon receipt of— (i) a request, through appropriate protocols – (I) from a **Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity;** or (II) **from a State, local, or Tribal law enforcement agency, if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation;** (III) **a request from a Federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country,** including a foreign central authority or competent authority (or like designation), under an international treaty, agreement, convention, or official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries when no treaty, agreement, or convention is available – (I) issued in response to a request for assistance in an investigation or prosecution by such foreign country; and (II) that – (aa) requires compliance with the disclosure and use provisions of the treaty, agreement, or convention, publicly disclosing any beneficial ownership information received; or (bb) limits the use of the information for any purpose other than the authorized investigation or national security or intelligence activity; (iii) a request made by a financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law; or (iv) a request made by a Federal functional regulator or other appropriate regulatory agency consistent with the requirements of subparagraph (C)."

# HOW IS INFORMATION REPORTED?

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**If your company is required to file a BOI report, you must do so electronically through a secure filing system.**

- FinCEN's filing system.
- FinCEN published instructions and other technical guidance on how to complete the BOI report form. This guidance is available at: [www.fincen.gov/boi](http://www.fincen.gov/boi). Note: There may be certain circumstances in which a reporting company is unable to electronically file a BOI report through FinCEN's secure filing system. In those cases, the reporting company should contact FinCEN: [www.fincen.gov/contact](http://www.fincen.gov/contact)
- Excerpt from FinCEN's Small Entity Compliance Guide.

# RESOURCES

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1. [Baker Donelson Corporate Transparency Act, Firm Practice Page](#)
2. [Countdown to the Corporate Transparency Act | Baker Donelson](#), October 4, 2023
3. [To Be or Not to Be... A Reporting Company Under the Corporate Transparency Act | Baker Donelson](#), November 7, 2023



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Mr. Sofferman represents clients in business transactions, including corporate structuring, reorganizations, mergers and acquisitions, shareholder and member disputes, trademark, copyright, licensing, software, technology, Internet, publishing, privacy, and export compliance. He prepares and negotiates complex partnership and limited partnership agreements and advises clients on complex commercial transactions. He also has experience advising clients on advertising, First Amendment, and right of publicity issues.

Perry regularly represents corporate boards, both for-profit and not-for-profit, on corporate governance matters. Prior to Baker Donelson, he served as general counsel for a technology manufacturer and as legal counsel for Scholastic, Inc., the Fortune 500 global media and publishing company. Perry has prepared and/or negotiated some of the most successful works in publishing history. He is also the author of the Limited Liability Company Forms and Practice Manual, published by Data Trace Publishing, which is the authoritative work on Florida LLCs.



# Q&A DISCUSSION

PRESENTER

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