

GUIDE TO NEW LAW TO FIGHT MONEY LAUNDERING



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1. NEW LAW TO FIGHT MONEY LAUNDERING IN THE USA

A new law to fight money laundering will become effective January 1, 2024 known as the Corporate Transparency Act (CTA), it is part of the Anti-Money Laundering Act of 2020. The focus is the use of legal entities in connection with money laundering and other illegal activity.

Specifically, the new law directs the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) to create a database of beneficial ownership information that will allow the government to identify the individual owners of all manner of privately held assets. The failure to comply could result in civil and criminal penalties.



2. REPORTING COMPANIES SUBJECT TO THE CTA

CTA will apply to Reporting Companies which are defined as any corporation, LLC, or “similar entity” that is:

- Created by filing a document with a U.S. state or Indian tribe, or
- Formed in a foreign jurisdiction and registered to do business in the United States through the filing of a document with a U.S. state or Indian Tribe

The primary factor to determining whether an entity must report is whether it was formed (or registered to do business) by the filing of a document with a state or tribal government office. Thus, the determination of which entities must report will necessarily involve a state-by-state analysis. A trust or a foreign company is not considered a reporting company unless it has an interest in another reporting company.

The CTA provides 23 categories of entities that are exempt from reporting, most of which focus on entities already subject to substantial federal or state oversight (e.g., banks, SEC registrants, insurance companies, public accounting firms, public utilities, and tax-exempt entities). Also exempt from reporting are dormant companies and “large operating companies.” The scope of the 23 exemptions is defined in detail in both the statute and the implementing regulations. A careful analysis of all exemptions is needed to see if it applies.

3. REPORTING REQUIREMENTS

The reporting requirements for a reporting company are to report its own name, address, jurisdiction of formation, and taxpayer identification number (e.g., IRS EIN). Reporting companies must also report the name, date of birth, address, and “unique identifying number” for each “beneficial owner” and “company applicant” (as defined below). In addition, an image of the document from which the identifying number was obtained (e.g., driver’s license, state identification, passport) must also be submitted to FinCEN.

A beneficial owner and company applicant must have a FinCen ID, they may apply for a “FinCEN identifier” from the agency. While the process for obtaining a FinCEN identifier does not yet exist, it is anticipated that individuals will provide their personal information directly to FinCEN, which will then supply the individuals with an identifying number that may be given to reporting companies instead of the individuals’ personal information.

A FinCEN identifier has benefits both individuals and reporting companies. For individuals, it will eliminate the need to disseminate sensitive personal information (including photos of identification) to all of the various entities with which the individual is involved. For reporting companies, if an individual provides a FinCEN identifier, the entity will no longer be responsible for updating that person’s information with FinCEN when, for example, their address changes, that burden is shifted to the individual, who will need to update their own information directly with FinCEN.

4. REPORTING OF BENEFICIAL OWNERS

The CTA requires for reporting companies to determine who must be reported as a beneficial owner. The term “beneficial owner” is complicated as provided in the statute and regulations.

The term beneficial owner means an individual who, directly or indirectly:

- Exercises substantial control over the entity, or
- Owns or controls at least 25 percent of the entity’s ownership interests
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Indirect ownership or control may be accomplished through a variety of means, including board representation, control over intermediate entities, control of a majority of the voting rights of a company, or rights associated with financing agreements.

Substantial control is defined as having direction or substantial influence over important decisions of the reporting company, including acting as a senior officer (e.g., president, CEO, COO, CFO, general counsel) or having the authority to appoint or remove any senior officer or a majority of the board of directors.

Ownership is broadly defined to include not just stock, voting and nonvoting shares, and capital or profits interests but also any interests convertible into one of the above, and any put, call, straddle, or other option.

For trusts, the beneficial owners include (i) the trustee or other individual with the authority to dispose of trust assets; (ii) a beneficiary who is the sole permissible recipient of income and principal or who has the right to demand a distribution of/withdraw substantially all of the trust’s assets; and (iii) grantors/settlors with the right to revoke the trust or withdraw its assets.

5. COMPANY APPLICANTS SUBJECT TO THE CTA

The CTA requires the reporting of company applicants, defined as the individual(s) who:

- Directly file the document that creates or first registers a reporting company with a U.S. state or Indian tribe, and/or
- Are primarily responsible for directing or controlling such filing

Even a paralegal who files the required documents with the state of formation, and the lawyer who advised the client to form the entity and instructed the paralegal to make the filing. Companies need not report more than two company applicants. Further, the company applicant does not need to be reported for entities in existence prior to January 1, 2024.



6. REPORTING DUE DATES

An entity formed (or registered to do business in the U.S.) on or after January 1, 2024, must report to FinCEN within 30 days of formation/registration. However, FinCEN recently published a Notice of Proposed Rulemaking extending the deadline for companies formed/registered in 2024 to 90 days following such action. (The 30-day deadline would continue to apply to companies formed/registered beginning in 2025.)

An entity formed before January 1, 2024, must file an initial report with FinCEN no later than January 1, 2025. Thus, if a new entity is likely to be needed sometime in 2024, forming that entity before the end of 2023 may be advisable to both buy some extra time to report to FinCEN and avoid the company applicant reporting requirement. Conversely, if an entity that would otherwise be reportable is no longer needed, it could make sense to dissolve that entity prior to year-end.

Any changes or corrections to reports must be filed within 30 days of a change to previously submitted information or the discovery of an error. An exempt entity that ceases to qualify for exemption must similarly report to FinCEN within 30 days of the triggering change.

7. CIVIL AND CRIMINAL PENALTIES

The penalties for failure to comply include: (1) Civil penalties of up to \$500 per day may be imposed, but only for willful noncompliance, i.e., intentional behavior, and (2) Criminal penalties include fines of up to \$10,000, two years in prison, or both.

8. LIMITED DISCLOSURE TO CTA DATABASE

The disclosure of the beneficial ownership information is limited for law enforcement purposes. Requests for information may be rejected by FinCEN for any number of reasons, including “other good cause.” Permissible recipients include federal agencies (for national security, intelligence, or law enforcement purposes); state, local, and tribal law enforcement agencies (for use in civil or criminal investigations, if authorized by a court); and foreign law enforcement, prosecutors, or judges (only when requested through a U.S. federal agency).

9. CONCLUSION

We are Tax Attorneys and Advisors, we strive to provide our clients the highest quality of legal and tax representation in the complex area of tax law.

This document has provided only general information and specific factual scenarios may change any conclusions that would apply.

Please let us know if you have any questions on these matters or require assistance on the reporting requirements of your companies, our legal and tax advisors will be available to discuss your specific situation.

*Sincerely,
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The Flores Group*



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Ruben Flores, Jr., CPA, JD, brings more than 35 years of experience in tax and business matters.

With a Business Administration degree, a Masters of Public Accounting in taxation, and a Juris Doctor, he specializes in both international and domestic business including the formation of international corporate structures, acquisitions and mergers between the United States and foreign companies, international tax planning for foreign investors, and estate planning for both United States and foreign persons.

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