

CORPORATE TRANSPARENCY ACT

CTA



Corporate
Transparency Act
held
Unconstitutional
by U.S. District
Court in Northern
District of Alabama



On March 1, 2024, the U.S. District Court for the Northern District of Alabama in *National Small Business United et al. v. Janet Yellen et al.*, Case No. 5:22-cv-1448-LCB, held the Corporate Transparency Act (the “CTA”) to be unconstitutional. U.S. District Court Judge Liles C. Burke's [Memorandum Opinion](#) stated on page 52 “The CTA is unconstitutional because it cannot be justified as exercise of Congress’ enumerated powers.”

The Court’s [holding](#) asserts Congress lacks the authority to require companies to disclose personal beneficial owner information to the U.S. Treasury Department's criminal enforcement arm, the Financial Crimes Enforcement Network (FinCEN). The Court in so ruling, then [permanently enjoined](#) FinCEN from enforcing the CTA against the plaintiffs. Notably, the ruling applies narrowly to the plaintiffs in this case, leaving uncertainty regarding its implications for companies not a party to the litigation. It is anticipated Treasury will file an appeal to the U.S. Court of Appeals for the Eleventh Circuit.



WHAT IS THE CORPORATE TRANSPARENCY ACT and WHY DO I NEED TO KNOW ABOUT IT?

The Corporate Transparency Act (“CTA”) was adopted as Title LXIV (64) of the 2021 National Defense Authorization Act ([31 U.S.C. §5336](#)) and mandates the creation of a national database for the “beneficial ownership” information of many businesses

ASSIDE: the NDAA passed in the House and Senate with veto-proof margins and President Trump’s December 23, 2020 veto was overridden on January 1, 2021

The Reporting Rule [87 FR 59498 \(9/30/22\)](#) was promulgated on September 30, 2022 and is codified in [31 CFR §1010.380](#)

The CTA requires business entities (except those expressly exempted) to report certain information about their company, their Beneficial Owners, and the individuals who created or registered them to do business (including their lawyers in some cases), their applicants to **FinCEN**.

A tool to prevent Money Laundering



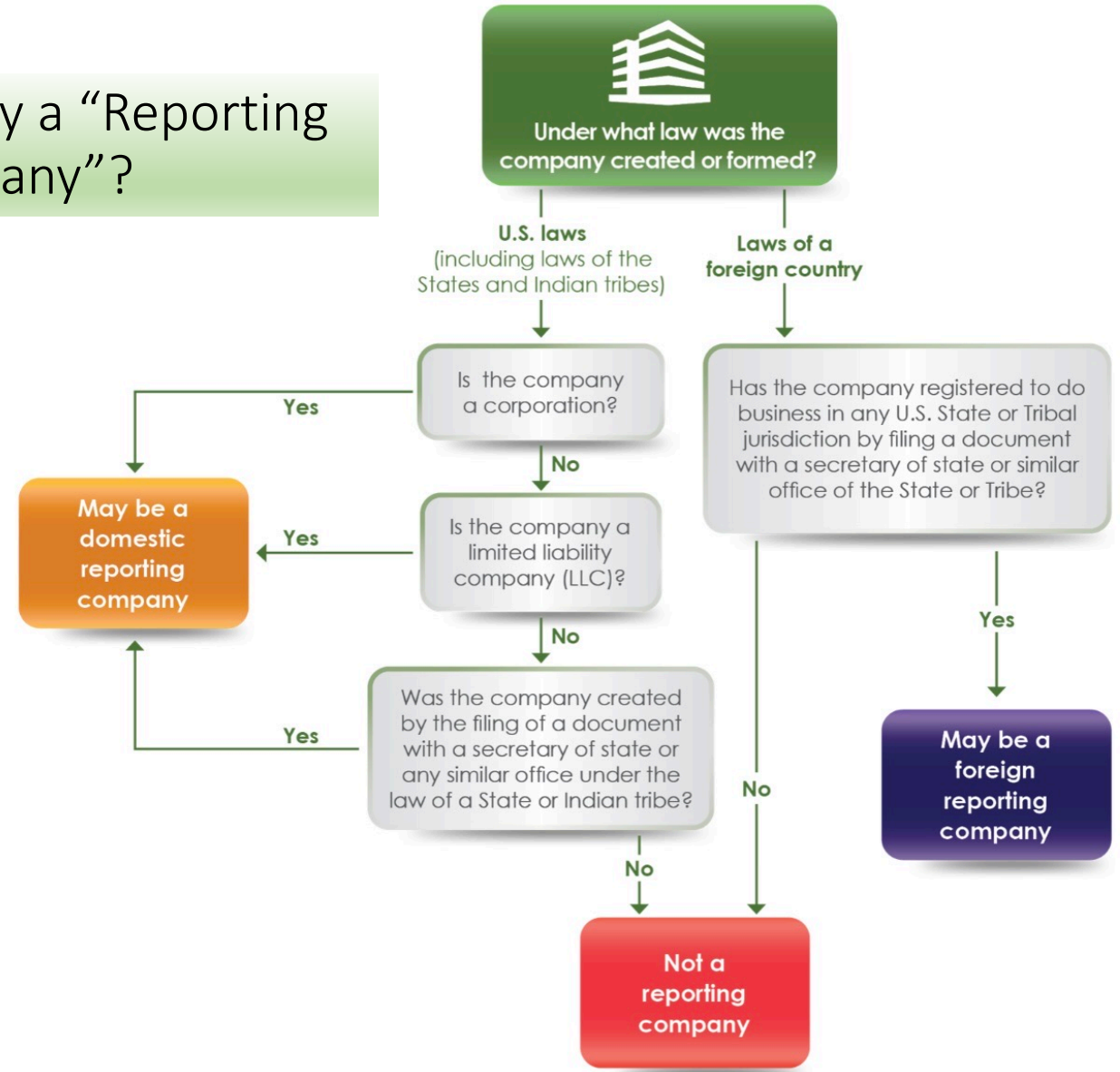
TREASURY DEPARTMENT

Who is FinCEN?



Is My Company a “Reporting Company”?

All Non-Exempt Reporting Companies Must File a Beneficial Ownership Report



What Companies May Not Meet that Definition?

- ✓ LLPs (not “created” by filing)
- ✓ Massachusetts (but not Delaware) business trusts
- ✓ Entities resulting from a statutory conversion process, because most conversion statutes say the resulting entity is the same entity as pre-conversion, so not “created” by the filing
- ✓ Any foreign entity that simply doesn’t bother to register to do business

Reporting Company Exemptions

Chart 2 – Reporting company exemptions

Exemption No.	Exemption Short Title
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 adviser
11	Venture capital fund adviser
12	Insurance company
13	State-licensed insurance producer
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 exempt entities
23	Inactive entity

Special rule for foreign pooled investment vehicles.

If an entity meets the criteria of Exemption #18 and is formed under the laws of a foreign country, the entity is subject to a separate reporting requirement. These companies are referred to as “foreign pooled investment vehicles” in the Reporting Rule and their reporting requirement is explained in [Chapter 4.2](#) of this Guide.

See special rule at 1010.380(b)(2)(iii).

23 Entity Types Exempt from Beneficial Ownership Information Reporting

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

Large Operating Company Exception

SATISFACTION OF **ALL** OF THE FOLLOWING:

- More than 20 employees
- More than 20 employees in United States
- Physical presence in United States
- \$5,000,000 or more gross receipts in **prior year**
- Reporting of all gross receipts to IRS
- If gross receipts include foreign receipts, then gross receipts less foreign receipts must be in excess of \$5,000,000

WATCH OUT: If Large Operating Company ceases to meet these requirements, it is no longer exempt.

Inactive Entity Exception

- If in existence before January 1, 2020
- No change of ownership in last 12 months
- No receipts of over \$1,000 in past year
- Owns no assets





When to Report

- ❖ If entity formed prior to January 1, 2024, then **by January 1, 2025**
- ❖ If formed after January 1, 2024 and prior to January 1, 2025, then within **90 days of filing**
- ❖ If formed after January 1, 2025, then within **30 days of filing**
- ❖ **If change occurs, report must be updated within 30 days of change**
- ❖ **If become aware of inaccuracies, then must correct within 30 days**

What happens when Driver License, ID, or Passport expires? - Must amend within 30 days, unless FinCEN ID used, then holder of FinCEN ID must amend within 30 days!

Reporting Company's Information

- Entity's legal Name,
- Entity's DBA (if any) *(name used on Tax return?)*
- Entity's State of Formation,
- Entity's US street address, and
- Entity's TIN or EIN

For each Company Applicant (if entity formed after 1/1/24)

Either the individual's FinCEN ID Number or

- full legal name,
- business** address,
- date of birth,
- Driver's licenses, Government issued ID, or Passport number, and
- Image of Driver's License, ID, or Passport used

For each Beneficial Owner

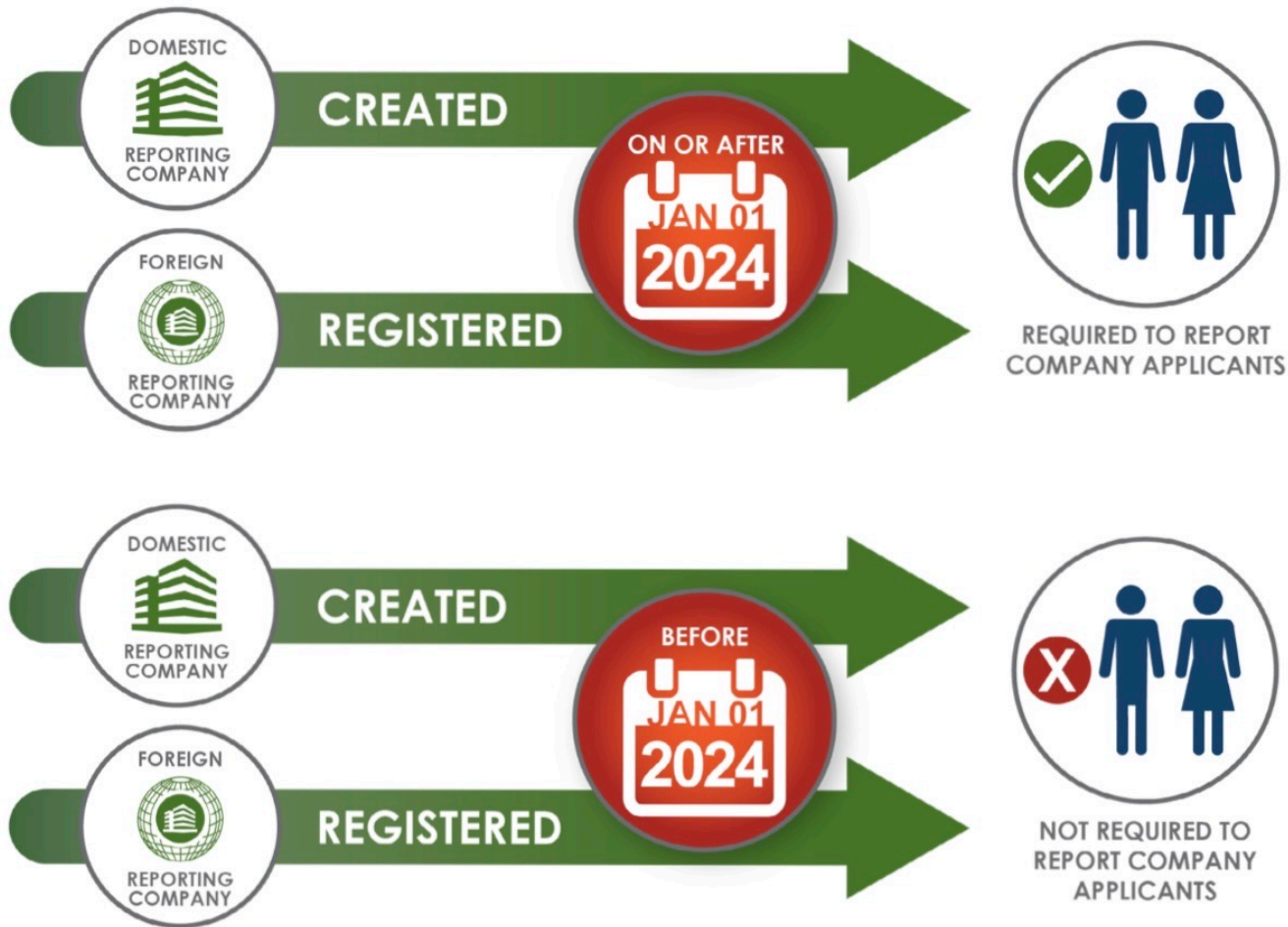
Either the owner's FinCEN ID Number or

- full legal name,
- residential** address,
- date of birth,
- Driver's licenses, Government issued ID, or Passport number, and
- image of Driver's License, ID, or Passport used



What
must
be
reported?

Chart 5 – Company applicant reporting requirement



Is my Company
required to
report its
company applicants?

The special rule concerning company applicant reporting can be found at 1010.380(b)(2)(iv) and is discussed further in the next chapter ([section 4.2](#)).

Practice Tip: When a company formed prior to January 1, 2024 E-files their BOIR, they must affirmatively check the box that Company applicant does not need to be disclosed for the company

Who's a "Company Applicant"?

- ❑ Any [i.e., can be up to two] individual who files the document that creates the domestic reporting company, including any individual who "directs or controls" that filing by another person
- ❑ For purposes of two applicant limit, the person who files plus the person most responsible for causing the filing
- ❑ For a foreign reporting company, any individual who files the document that first registers the foreign reporting company, including any individual who "directs or controls" that filing
- ❑ Companies existing as of January 1, 2024 need not file applicant info, and reporting companies need not update applicant info after filing (provided you affirmatively check the non-applicability box on your initial filing).

Who is Beneficial Owner?

A Beneficial Owner is an individual who directly or indirectly:

- ❖ exercises Substantial Control, or
- ❖ owns or controls 25% of ownership or voting interest of the entity

Subject of course to a few limited exceptions

**SENIOR OFFICER**

any individual holding the position or exercising the authority of a:

1. President
2. Chief financial officer (CFO)
3. General counsel (GC)
4. Chief executive officer (CEO)
5. Chief operating officer (COO)

or any other officer, regardless of official title, who performs a similar function as these officers

**APPOINTMENT OR REMOVAL AUTHORITY**

any individual with the ability to appoint or remove any **SENIOR OFFICER** or a majority of the board of directors or similar body

**IMPORTANT DECISION-MAKER**

any individual who directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding the reporting company's:

1. **Business**, such as:
 - Nature, scope, and attributes of the business
 - The selection or termination of business lines or ventures, or geographic focus
 - The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts
2. **Finances**, such as:
 - Sale, lease, mortgage, or other transfer of any principal assets
 - Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget
 - Compensation schemes and incentive programs for senior officers
3. **Structure**, such as:
 - Reorganization, dissolution, or merger
 - 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

**CATCH-ALL**

any other form of substantial control over the reporting company. Control exercised in new and unique ways can still be substantial. For example, flexible corporate structures may have different indicators of control than the indicators included here

What is “Substantial Control”?



EQUITY, STOCK, OR VOTING RIGHTS

any interest classified as stock or anything similar, regardless whether it confers voting power or voting rights, and even if the interest is transferable

EXAMPLES include:

- equity, stock, or similar instrument
- preorganization certificate or subscription
- 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



CAPITAL OR PROFIT INTEREST

any interest in the assets or profits of a company organized as an LLC, which is similar to stock in a corporation and sometimes referred to as a 'unit'



CONVERTIBLE INSTRUMENTS

any instrument convertible into **equity, stock, or voting rights** or **capital or profit interest**, whether or not anything needs to be paid to exercise the conversion. The **RELATED** items are also ownership interests:

- any future on any convertible instrument
- any warrant or right to purchase, sell, or subscribe to a share or interest in **equity, stock, or voting rights** or **capital or profit interest**, even if such warrant or right is a debt



OPTION OR PRIVILEGE

any put, call, straddle, or other option or privilege of buying or selling **equity, stock, or voting rights, capital or profit interest, or convertible instruments**, EXCEPT if the option or privilege is created and held by others without the knowledge or involvement of the reporting company

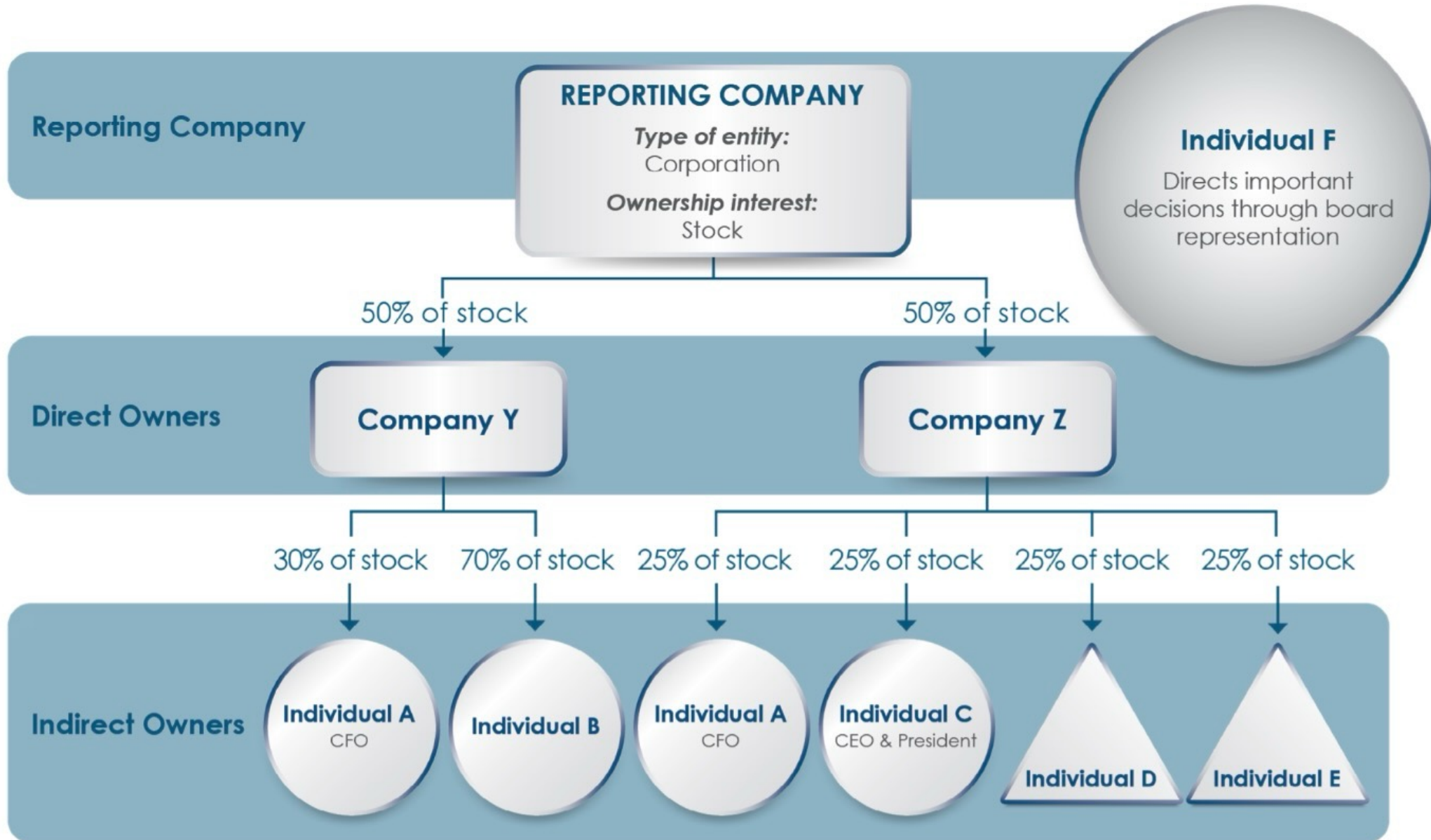


CATCH-ALL

any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership

What is “Ownership Interest”?

Example 4: A reporting company is a corporation with multiple indirect owners through Company Y and Company Z.



Beneficial Ownership Exceptions

- Minors** (provided parent or guardian reported)
- Employee who is not a Senior Officer (or similar person)** and who does not own or control at least 25%
- Individual who merely advises or acts on behalf of a Beneficial Owner** (i.e. power of attorney or conservator)
- Person whose only interest is as **recipient of future inheritance**
- Creditor (unless creditor hold control feature)**
- If individual ownership is indirect through a large operating company, then the individual need not be disclosed provided the large operating company is disclosed.



Beneficial Ownership Informational Report

The Beneficial Ownership Information Report can **ONLY** be filed electronically via [BOI E-Filing System](#)

Two ways to file electronically:

1. Download PDF form to fill offline and then follow instructions on PDF form to upload form.
2. Complete and submit online

[Frequently Asked Questions](#)



FINANCIAL CRIMES
ENFORCEMENT NETWORK

[BOI E-FILING](#) [FILE BOIR](#) [HELP](#)

Submission Status Confirmation

SUBMISSION INFORMATION

Status **FILING SUCCESSFUL. You may download the transcript below.**

BOIR ID **500000** [REDACTED]

Submission Tracking ID **BOIR24** [REDACTED]

Received Timestamp (UTC) 2024-01-09T20:59:02Z

Reporting Company FinCEN ID 2000- [REDACTED]

SUBMITTER INFORMATION

First name [REDACTED]

Last name [REDACTED]

E-mail address [REDACTED]

IMPORTANT! Before closing this page, we strongly recommend downloading your transcript below.

Beneficial
Ownership
Informational
Report
Results

FinCEN ID

Info needed:

- Full legal name
- Address
- Date of Birth
- Type of identification (Government ID, DL, Passport)
- Upload of electronic copy of the identification

[Welcome to the FinCEN ID Application for Individuals](#)

FinCEN Identifier (FinCEN ID) Application

OMB No. 1506-0076

Filers must provide information in EVERY field marked with the * symbol in ALL CIRCUMSTANCES. Filers must also provide information in all fields not marked with the * symbol that are applicable to the filer. For example, the "Middle Name" field is not marked with a * symbol; the filer MUST provide information in that field IF the relevant individual's legal name includes a middle name. Notwithstanding any other instruction, individuals must provide all information required pursuant to 31 CFR 1010.380(b).

Full legal name and date of birth

 **Need help?**

* First name

Thomas

Middle name

Adam

* Last name

Gorczynski

Suffix

* Date of birth

mm/dd/yyyy



FinCEN ID

Results



FINANCIAL CRIMES
ENFORCEMENT NETWORK

Generated: 01/02/2024

FinCEN ID: 3000- [REDACTED]

Full legal name and date of birth	
First name	[REDACTED]
Middle name	[REDACTED]
Last name	[REDACTED]
Suffix	[REDACTED]
Date of birth	[REDACTED]

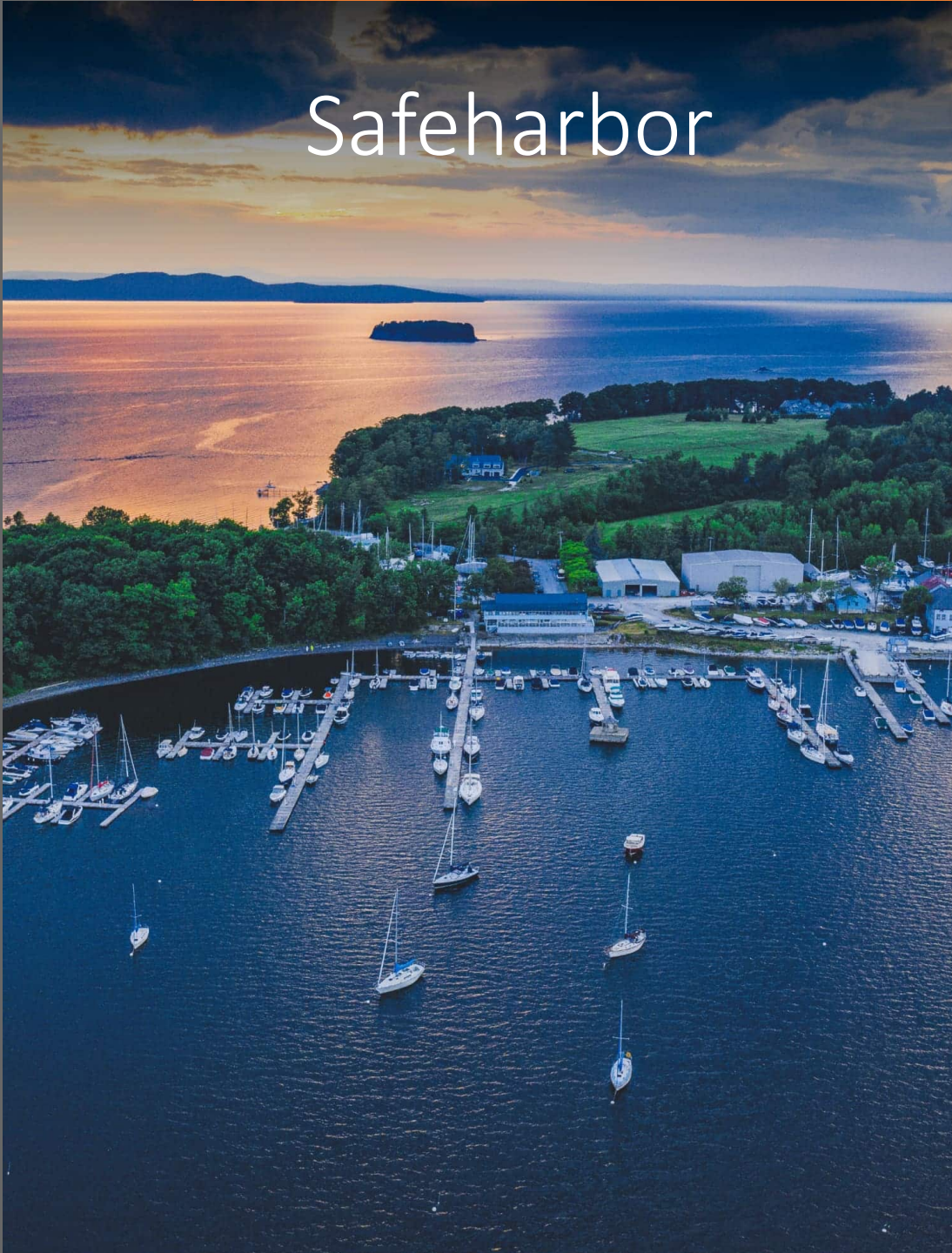
Addresses	
Address #1	
Address type	Residential Address
Street address	[REDACTED]
Country/jurisdiction	UNITED STATES
State	ALABAMA
City	[REDACTED]
Zip or foreign postal code	[REDACTED]

Form of identification and issuing jurisdiction	
Identification type	State-issued driver's license
Identification number	[REDACTED]
Document attached	Drivers License_001.pdf
Issuing country/jurisdiction	UNITED STATES
State	ALABAMA
Local/Tribal	
Other Local/Tribal Description	

- All Senior Officers responsible
- Individual responsible if individual fails to supply company with necessary information or inaccurate information
- \$500/day up to \$10,000 penalty for willful failure to report, correct, or update
- Up to two (2) years imprisonment



Safeharbor



Fixing inaccurate
report within 90 days
from the discovery of
the inaccuracy

Each **Secretary of State** is to inform its database of CTA's requirements.

Duty to Notify?

What about Attorney's duty:

- Maryland does not require attorneys to notify former clients.
- Oklahoma does not require attorneys to notify former clients.
- What about clients for whom the representation has never been terminated?
- What about current clients?

**Don't Forget
to Notify!**

Drafting Suggestions?

- Limit confidentiality clauses
- Impose express obligation that individuals obtain and maintain a FinCEN ID and provide that ID to Company
- Impose express obligation upon members and managers to provide information necessary for company to submit and update beneficial ownership information.
- Add the following clause:

Beneficial Ownership Reporting: Each Member agrees and covenants to provide to the Company such information, including all personal identifying information and an “acceptable identification document,” required by the Company to comply with the Corporate Transparency Act 31 U.S.C. §5336

Engagement Letter CTA Clause

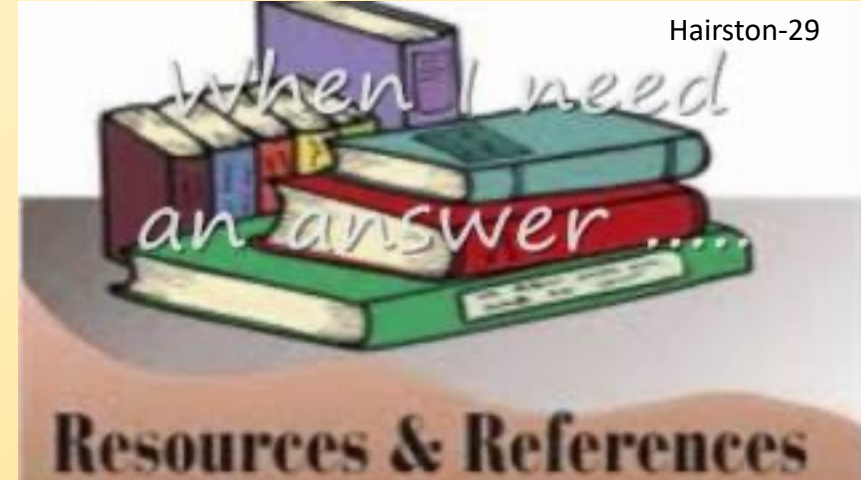
U.S. Corporate Transparency Act (“CTA”) Compliance. You may know that federal law now requires many entities to report beneficial ownership and other entity information to the federal government. Compliance with the CTA is the responsibility of the reporting entity. Our engagement does not include any such filing or reporting or legal advice relating to compliance with the CTA, absent a further express written agreement. Even if our engagement includes assistance in connection with (i) forming or registering an entity, or (ii) a transaction that may trigger a reporting obligation, we will not advise you in connection with the CTA absent an express written agreement to do so. Finally, you agree that we will not monitor changes in the law or in your business that may require updating your CTA reports, and that we will not suggest any such changes.



No Bearer Shares / LLC Interests

- ❖ “NO BEARER SHARE CORPORATIONS OR LIMITED LIABILITY COMPANIES.
- ❖ A corporation, limited liability company, or other similar entity formed under the laws of a State or Indian Tribe may not issue a certificate in bearer form evidencing either a whole or fractional interest in the entity.”
- ❖ Application to existing corporations and LLCs?

Resources



B **I** | BENEFICIAL OWNERSHIP INFORMATION

- [Corporate Transparency Act](#)
- [Small Entity Compliance Guide](#)
- [31 U.S.C. 5336 \(Beneficial ownership information reporting requirements\)](#)
- [87 FR 59498 \(9/30/22\)](#)
- [31 CFR 1010.380 \(excerpt from Beneficial Ownership information Reporting Requirements Final Rule\)](#)
- [Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024](#)
- [Use of FinCEN Identifiers for Reporting Beneficial Ownership Information of Entities](#)
- [Beneficial Ownership Information Reporting Requirements Final Rule](#) and [Fact Sheet](#)
- [Beneficial Ownership Information Access and Safeguards Final Rule](#) and [Fact Sheet](#)
- [Introduction to Beneficial Ownership Information Reporting](#)
- Or if all else fails, simply [CONTACT FinCEN](#)



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