

# THE CORPORATE TRANSPARENCY ACT

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## SUMMARY OF ENTITY REPORTING OBLIGATIONS



2049 Century Park East, Suite 2600  
Los Angeles, CA 90067  
GreenbergGlusker.com | 310-553-3610



# The Corporate Transparency Act: Summary of Entity Reporting Obligations

By Greenberg Glusker

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Under the Corporate Transparency Act, commencing on January 1, 2024, all corporations, limited partnerships, LLCs, LLLPs, and other entities formed by a filing with a secretary of state's office must file online reports with the U.S. government, reporting certain information, unless they meet certain exemptions. All such entities that were formed prior to 2024 and remain active must file the report by the end of 2024. All such entities that are newly formed after January 1, 2024, and before December 31, 2024, must file the report within ninety (90) days of formation and all such entities that are newly formed after December 31, 2024, must file the report within thirty (30) days of formation. There are criminal and civil penalties for not complying with the reporting requirements imposed by the Act.

The full text of the regulations providing additional detail and guidance on the reporting requirements under the Act can be found in §1010.380 of the Code of Federal Regulations (the "Regulations"). Below is a brief summary of the reporting obligations under the Act, and, in an attempt to clarify the reporting rules, this summary, in some instances, uses slightly different terminology than is used in the Act and Regulations.

This summary provides an overview of the reporting rules, but both the Act and the Regulations are lengthy and complex and there are numerous nuances, exceptions, and special rules, and, therefore, we encourage you to review the Regulations as well. There are numerous ambiguities in the Act and the Regulations that leave many unanswered questions, and this summary provides our best guess at how to answer these questions with sentences that begin, "We believe..."

## 1. Definitions

Capitalized words used herein have the following meanings:

- a. "Act" means the federal Corporate Transparency Act.
- b. "Beneficial Owners" has the meaning set forth in Paragraph 5 below.
- c. "Company Applicants" means (i) the individual that directly makes a State Filing, and (ii) if applicable, one other individual that directs the first individual to make a State Filing.
- d. "Exempt Entities" means entities that are exempt from having to file a Report as described in Paragraph 6 below.
- e. "FinCEN Identifier" means a number assigned to (i) each Reporting Company that files a Report and requests a FinCEN Identifier and (ii) each Beneficial Owner and Company Applicant if they file an Individual Application.

- f. "Individual Application" means an application for a FinCEN Identifier filed on the Portal by a Beneficial Owner or Company Applicant.
- g. "Individual Information" means the information required to be submitted on an Individual Application, as discussed in Paragraph 4 below.
- h. "Ownership" has the meaning described in Paragraph 5(b) below (referred to in the Regulations as an "ownership interest").
- i. "Parent" means any entity that has either (i) Substantial Control over, or (ii) 25% or more Ownership of, a Subsidiary.
- j. "Portal" means an online system for filing Reports and Individual Applications maintained by the Department of the Treasury pursuant to the Act that may be accessed at <https://www.fincen.gov/boi>.
- k. "Report" means a report required to be filed on the Portal by each Reporting Company.
- l. "Report Filer" means the individual who files a Report or an update to a Report.
- m. "Reporting Companies" means all entities that are legally formed by a State Filing other than Exempt Entities. This includes corporations, limited partnerships, LLCs, LLLPs, and, in some states (such as Delaware), general partnerships and statutory trusts.
- n. "Senior Executives" means the president, CEO, CFO, COO, and general counsel of an entity or any person with similar authority regardless of their title, and, therefore, would include the managers of an LLC and trustees of a statutory trust.
- o. "State Filing" means a filing with a secretary of state (or similar office) that either (i) is required to legally form a U.S. entity, or (ii) registers a foreign entity to do business in the state.
- p. "Subsidiary" means a Reporting Company that has one or more Parents.
- q. "Substantial Control" has the meaning set forth in Paragraph 5(a) below.

## 2. Requirement for Reports

Each Reporting Company must file an initial Report (a) within ninety (90) days of the creation of the Reporting Company if its State Filing is made during 2024, (b) within thirty (30) days of the creation of the Reporting Company if its State Filing is made after

2024, and (c) by the end of 2024 if its first State Filing was made before 2024. A Reporting Company is considered created on the earlier of the 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 that the Reporting Company has been created. An entity that was previously an Exempt Entity must file a Report within thirty (30) days of becoming a Reporting Company. An updated Report must be filed within thirty (30) days of (a) the entity becoming an Exempt Entity, (b) the entity becoming aware of any inaccuracy in the Report, or (c) any change to the information in the Report other than the following:

- a. Any change to the Individual Information for a Company Applicant;
- b. The renewal or expiration of the government-issued identification of a Beneficial Owner if the identification number does not change; and
- c. Dissolution or liquidation of the entity.

An updated Report is required even if a person who was previously a Beneficial Owner is no longer a Beneficial Owner due to a reduction in their Ownership or Substantial Control. If the change requiring the reporting is due to the transfer of Ownership upon the death of a Beneficial Owner, the thirty-day period for filing the Report starts upon the transfer of the Ownership from the estate, such as upon settlement of the estate, and not the death of the deceased Beneficial Owner.

An open question is what a Reporting Company must do when it learns of a change to the Individual Information of a Beneficial Owner, such as a change of address, if the Reporting Company used the Beneficial Owner's FinCEN Identifier, and not the Beneficial Owner's Individual Information, in the original Report. We believe that the Reporting Company does not have an obligation to update the Report in that situation because there is no change to the Beneficial Owner's FinCEN Identifier, but the Beneficial Owner would have an obligation to update their Individual Information associated with their FinCEN Identifier on the Portal within thirty (30) days of a change.

### 3. Content of the Initial Report

The initial Report must contain the following information:

- a. Name of the Reporting Company as shown on the State Filing.
- b. Any fictitious business name or "doing business as" name used by the Reporting Company.

- c. Primary business address of the Reporting Company in the U.S. This address cannot be a P.O. box, and it cannot be the address of a law firm or other firm representing the Reporting Company. There is no guidance on what to do if the Reporting Company does not yet have a business address, as will usually be the case for newly formed entities. We believe that the primary residence address of the main Beneficial Owner (or one of equal main Beneficial Owners) should be used in that situation.
- d. Name of the state of the State Filing for the Reporting Company.
- e. For U.S. Reporting Companies, the Reporting Company's IRS Taxpayer Identification Number, which will require even single-member LLCs to obtain an IRS Taxpayer Identification Number.
- f. For foreign Reporting Companies, the Reporting Company's country of formation and its IRS Taxpayer Identification Number if it has one, or otherwise its taxpayer identification number from its country of formation.
- g. For Reporting Entities with State Filings made on or after January 1, 2024, the Individual Information or FinCEN Identifier of up to two Company Applicants. There is no guidance on who the Company Applicants are if there is a chain of instructions, such as from a client to a firm partner to a firm associate to a paralegal to a corporate filing service. We believe that the Company Applicants should be the last two people in the chain.
- h. The Individual Information or FinCEN Identifier for each Beneficial Owner. There are two exceptions to this rule:
  - a. If an individual is a Beneficial Owner solely due to indirect Ownership in the Reporting Company through Ownership in an Exempt Entity, then just the name of the Exempt Entity is included in the Report. However, an individual who has indirect Substantial Control of a Reporting Company through Ownership or management of an Exempt Entity does not meet this exception and must be included in the Report.
  - b. If an individual is a Beneficial Owner of a Reporting Company through another Reporting Company and (a) the other Reporting Company has a FinCEN Identifier, (b) the individual is a Beneficial Owner of the Reporting Company solely due to Ownership in the other Reporting Company, and (c) all the Beneficial Owners of the Reporting Company and the other Reporting Company are the same individuals, then the Reporting Company may include just the full name and FinCEN Identifier of the other Reporting Company.

- i. The name of the Report Filer, who must certify that the Report is complete and accurate.

## 4. Individual Applications

Company Applicants and Beneficial Owners may obtain a FinCEN Identifier by submitting an Individual Application on the Portal with the following information ("Individual Information"):

- a. Full legal name.
- b. Date of birth.
- c. Address of current residence for a Beneficial Owner and business address for a Company Applicant. In each case, it cannot be a P.O. box. We believe that if a Beneficial Owner has multiple residences, the Beneficial Owner's primary residence address should be used.
- d. Photo ID from currently valid identification issued by any U.S. government, typically a passport or driver's license. If the person does not have such U.S. identification but has a valid foreign passport, then they may use that passport. There is no guidance on what to use if the individual does not have any of such identification.

After filing an initial Individual Application, a Beneficial Owner is required to update the information contained in the Individual Application within thirty (30) days of any change to the information, other than the renewal or expiration of their government-issued identification if the identifying number on the identification does not change on renewal (note that the U.S. passport number changes with each renewal, so if an individual uses a U.S. passport as their form of identification, the individual would be required to update the passport number within 30 days of each renewal). A Company Applicant is not required to update their information for any change to it except prior to making any further State Filings.

## 5. Beneficial Owners

"Beneficial Owners" is defined as all individuals who directly or indirectly have (i) Substantial Control over the Reporting Company, or (ii) hold 25% or more Ownership of the Reporting Company.

- a. Substantial Control. "Substantial Control" includes the following:

- i. Having majority voting control of an entity;
- ii. Having "substantial influence over important decisions," which can be exercised directly or indirectly, including through any form of contractual arrangements. The regulations include in this category all Senior Executives and any person who has the right to appoint or replace them, so we believe that all directors should be included in this category.
- iii. Having any other form of Substantial Control over the Reporting Company.

We believe the following rules should be applied in determining the individuals who should be included as having Substantial Control:

- All managers of an LLC and all directors of a corporation should be included.
  - Any individual who has the unilateral right to remove or replace one or more managers or directors should be included.
  - By analogy to the 25% threshold for Ownership (as discussed below), shareholders or members of an entity that hold at least 25% of the vote needed to replace or remove one or more directors or managers should be included. For example, if four or fewer shareholders or members with equal voting rights can vote by majority vote to remove or replace any director or manager, all of such shareholders or members should be included. However, if there are five or more such shareholders or members, none of them should be included.
  - If a trust has Substantial Control with respect to an entity, the trustees should be included, as well as any individuals that can replace the trustees.
  - The mere right of members or shareholders to block, veto, or approve proposals by other individuals with the authority to make such proposals should not constitute Substantial Control.
- b. Ownership. "Ownership" means any form of rights with respect to voting, distributions, or capital with respect to an entity, including through all possible forms of contractual rights, including contingent compensation, options, convertible debt, and ownership or control through intermediaries or trusts. The following rules apply in calculating if the percentage of Ownership is at least 25%:



- i. For Reporting Companies that are corporations for tax purposes, the calculation is based on the percentage owned of the greater of (i) voting power or (ii) the value of equity in the corporation.
- ii. For all other Reporting Companies (e.g., a limited partnership or LLC), the calculation is based on each owner's profit percentage plus capital percentage at the relevant time divided by two. For example, if an owner of an LLC has a 30% profits interest and a 20% capital interest, that owner is deemed to have 25% Ownership  $((30+20)/2)$ . Changes over time, such as those caused by a varying waterfall of cash distributions, must be considered on each day and may trigger the requirement to update a Report.
- iii. In making the calculations, assume that all options and conversion features that are currently exercisable have been exercised.
- iv. The calculation is made day by day. Thus, future changes in the relative percentages, such as due to a waterfall of distributions, will require updating a Report if the changes drop or add a Beneficial Owner.

If a trust has more than 25% Ownership of an entity, all trustees and "other individuals with authority to control or dispose of trust assets," including a settlor with the power to revoke the trust and a beneficiary who is "the sole permissible recipient of income and principal from the trust" or holds a "right to demand a distribution of, or withdraw substantially all, of the assets in the trust" must be included as individuals holding such Ownership.

- c. Parents. The determination of the Beneficial Owners becomes extraordinarily complex when a Subsidiary has a Parent because it is necessary to "look through" the Parent to determine which individuals have at least 25% Ownership or Substantial Control with respect to the Subsidiary, even if the Parent is a Reporting Company that has filed its own Report. Depending on the internal arrangements of the Parent, which the Subsidiary may not know, individual Senior Executives, managers, and/or owners of the Parent may be Beneficial Owners of the subsidiary. Where ownership of the Reporting Company includes discretionary trusts with multiple beneficiaries and fiduciaries of different kinds, the analysis is even more complex.
- d. Minors. If the Beneficial Owner is a child who is a minor applying the law of the State Filing, then the Report should include the Individual Information or FinCEN Identifier of a parent or legal guardian of the minor, with a statement that such person's information is in lieu of a minor. Any Report that includes such information will need to be updated within thirty (30) days of the minor reaching majority.

## 6. Exempt Entities

There is a list of twenty-three (23) Exempt Entities, which can be summarized as follows:

- a. Government entities.
- b. Entities that have to register with some branch of the federal government and are subject to some form of oversight by that branch.
- c. Entities that are publicly traded or are required to make periodic filings with the SEC.
- d. Tax-exempt entities.
- e. Most importantly, entities (referred to in the regulations as “large operating companies”) that (i) have more than twenty (20) full-time employees in the U.S., (ii) have an office in the U.S., *and* (iii) reported more than \$5 million of U.S. source gross receipts on their most recent federal tax return. This exception cannot apply to new entities at the time of their State Filing because they cannot meet the requirements at that time. The twenty-employee requirement does not aggregate affiliates, although the gross receipts test aggregates affiliates that file a consolidated federal corporate tax return.
- f. Subsidiaries that are “controlled” by an Exempt Entity, even if the Subsidiary has Beneficial Owners. We believe that this exception only applies if the Exempt Entity has more than 50% voting control of the Subsidiary.

## 7. Other Entities

Entities that are not formed by a State Filing do not need to file a Report, but Reporting Companies will have to “look through” such entities to identify Beneficial Owners. Notably, most common law trusts are **not** considered to be Reporting Companies because such trusts are not formed by the filing of a document with a secretary of state or similar office.

## 8. Access to the Report

Federal agencies may access a Report in furtherance of national security, intelligence, or law enforcement. State and local law enforcement agencies may access a Report if

authorized by a court as part of a criminal or civil investigation. Foreign authorities seeking information in furtherance of their national security, intelligence, or law enforcement must request a U.S. agency to obtain a Report on their behalf, and even if approved, they would not have direct access to the Report. With the consent of the Reporting Company, its Report may be furnished to financial institutions to help them comply with customer due diligence requirements. Finally, federal regulators can obtain Reports that have been provided to the financial institutions they regulate.

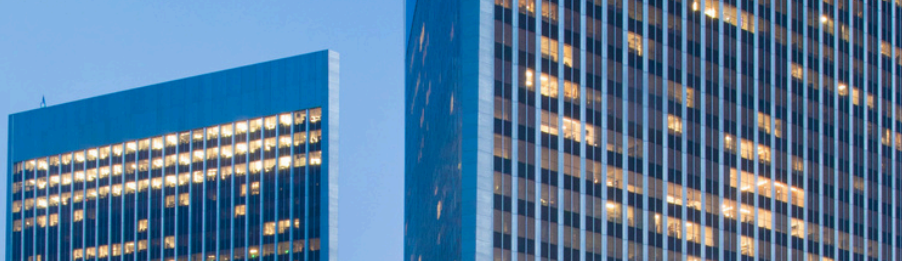
## 9. Penalty

The Regulations impose a civil fine of \$500 per day and a criminal fine of up to \$10,000 and jail for up to two years for any person who, directly or indirectly, willfully (a) fails to file a Report, (b) fails to update a Report when required, or (c) provides incomplete or false information for a Report or Individual Application. The Regulations state that no penalties will be imposed if an error on a Report or Individual Application is corrected within ninety (90) days of filing the Report or Individual Application, which implies that errors corrected after such ninety-day period may be subject to penalties. However, we believe that no penalty will be imposed if an error is corrected within thirty (30) days of discovery, even beyond the ninety-day period.

A difficult question is the scope of "any person" who is subject to the penalties. This should not include Company Applicants who do not otherwise willfully provide incomplete or false information for a Report, but it will certainly include the Report Filer because they must certify that the Report is correct and complete, and the regulations expressly include all Senior Executives and Beneficial Owners who refuse to provide their FinCEN Identifier or Individual Information or provide incorrect information. Because the regulations apply to any person that directly or indirectly provides false information, it would include outside lawyers or other third parties who intentionally and erroneously advise not to file or update a Report or on the identity of Beneficial Owners.

## 10. Amending Agreements

Reporting Companies may want to amend all agreements with Beneficial Owners, requiring them to (a) update their Individual Information within thirty (30) days of any change to it, and (b) promptly advise the Reporting Company in writing of any change to their status as a Beneficial Owner. Such agreements include (i) for a corporation, a subscription agreement, bylaws and shareholders agreement, (ii) for an LLC, the operating agreement, (iii) for a limited partnership, the partnership agreement, (iv) for a Delaware statutory trust, the trust agreement, and (v) for Senior Executives, their employment agreements.



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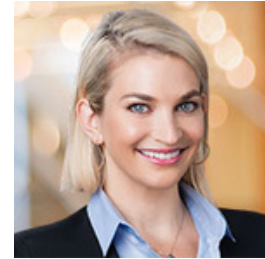
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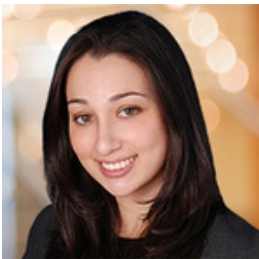
**Robin Finch**  
Partner  
[Email](#)



**James Han**  
Partner  
[Email](#)



**Sally James**  
Partner  
[Email](#)



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Partner  
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Partner  
[Email](#)



**Joel Weinstein**  
Partner  
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**Nancy Zhao**  
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