

It's Here. Now What?

A Corporate Practitioner's Guide to the Corporate Transparency Act

by Katie Kalkowski,
with an introduction and board engagement perspective by Megan Belcher

I. A View of the Impact of the Corporate Transparency Act from the General Counsel's Seat

I, like many general counsels of privately held companies—overseeing multiple entities that form the backbone of our organizations—have watched with great interest a recent crossroad of legal intricacies and corporate governance. In an innovation that continues to drive the push for transparency in the ever-evolving landscape of business regulation, there has emerged a legislative milestone that demands the attention of corporate counsel across industry—the Corporate Transparency Act (the “CTA” or the “Act”).

In the realm of the merging worlds of governance and corporate responsibility, the name of the game continues to be transparency. If the past two decades have firmly revealed one insight, it is that transparency will continue to remain a cornerstone of stakeholder expectations for business operations of any size and scope—with a particular focus on those com-

panies that sit closer to the consumer. As part of that trend, the CTA ushers in a new era of disclosure requirements for privately-held companies, bringing with it a wave of implications that demands careful diligence and consideration by corporate counsel guiding organizations through compliance with the Act.

Why should corporate counsel engaging with or on behalf of impacted organizations delve into the intricacies of this piece of legislation? Because the Act has the potential to reshape the foundations upon which we build and sustain our businesses.

In addition, understanding the Act is important given it is an emerging and novel compliance regime, and it offers a (admittedly incomplete) map to guide impacted private companies through uncharted waters. The Act introduces a mandatory reporting regime, compelling certain private companies to disclose their beneficial ownership information to the U.S. Department of the Treasury Financial Crimes Enforcement Network (“FinCEN”). For corporate practitioners, this means navigating through the labyrinth of related compliance require-



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ments and ensuring that entities are in lockstep with the new reporting obligations.

As we delve deeper, it becomes apparent that the Act is not merely a compliance hurdle, it is also a continuation of the expanding demand for transparency that does not appear to be slowing. The disclosure of beneficial ownership information is intended to enhance transparency and curb illicit financial activities, such as money laundering and terrorism financing. As stewards of risk and compliance within affiliated organizations, corporate counsel must grasp the broader goals behind the legislation while thoughtfully safeguarding the interests of client-companies.

Notably, the implications of the Act extend beyond mere compliance checkboxes. Corporate counsel, and more specifically in-house counsel, play a pivotal role in mitigating risks and leveraging opportunities that arise from this regulatory shift. Understanding how the Act interacts with existing corporate structures, contractual relationships, and day-to-day operations is essential for crafting a proactive legal strategy that not only ensures compliance but prevents potential pitfalls.

In this article, corporate lawyer Katie Kalkowski takes a detailed look to reveal the nuances of this law, as she has followed its development closely to explore its key provisions, challenges, and opportunities for private companies. In the analysis that Katie offers in this review, she unpacks the varying layers of the Act, offering practical insights and actionable advice tailored to the unique challenges by privately held companies. From untangling the complexities of beneficial ownership reporting to devising internal protocols that streamline compliance processes, her exploration aims to equip you with the knowledge and tools needed to navigate this new regulatory landscape with confidence. I will separately offer some in-house insights for those charged with navigating the topic with their boards of directors, as well as functional and operations partners within their companies.

II. The Ins and Outs of the Corporate Transparency Act

As of January 1, 2024 (the “Effective Date”), the CTA finally became effective. This broad federal legislation creates new requirements for many business entities to report certain information identifying the individual(s) behind a corporate entity (beneficial ownership information (“BOI”)) to FinCEN and, for certain business entities formed after the Effective Date, to disclose information about who creates the entity or registers it to do business in the U.S.

Business advisors must understand the CTA reporting requirements in order to assist their clients with compliance. It is particularly important for corporate practitioners to understand their obligations to assist clients, as a non-lawyer’s

authority to assist can only extend so far. This article provides (1) an overview of the CTA; and (2) a discussion of the role of the corporate attorney in assuring CTA compliance.

A. Reporting Companies.

The CTA reporting requirements apply to “reporting companies,” unless they are exempt. “Reporting companies” include corporations, limited liability companies, and other entities created by filing documents with a secretary of state or similar office.¹ The CTA places the burden to file on reporting companies, rather than the beneficial owners, to submit reports with FinCEN.²

The CTA exempts 23 categories of entities from its reporting requirements, including publicly traded companies, governmental authorities, banks and other financial institutions, registered investment companies and investment advisers, insurance companies, and specified tax-exempt entities, all of which are already subject to substantial federal oversight.³ Large, U.S.-based operating companies, meaning companies with greater than 20 full-time employees, greater than \$5 million in gross receipts or sales, and physical presence in the U.S., and inactive entities are also exempt. Notably, there is no exemption for small entities.

B. Information to Disclose.

A reporting company must disclose the following information regarding itself and its business operations:⁴

- Full legal name;
- Any trade names or “doing business as” name it operates under;
- Complete current address;⁵
- Jurisdiction of formation or registration; and
- Tax Identification Number (TIN) or Employer Identification Number (EIN).

Each reporting company that was formed prior to the Effective Date must provide information regarding itself and its “beneficial owners.”⁶ A “beneficial owner” is any individual who, directly or indirectly, either (i) owns or controls at least 25% of the ownership interests in the reporting company or (ii) exercises substantial control over the reporting company.⁷

An individual can exercise substantial control over a reporting company in a number of ways. For example, individuals who serve as senior officers or who have the authority to appoint or remove certain officers qualify as those exercising substantial control over the company. Of note, FinCEN has specifically identified that individuals holding the position of general counsel of a reporting company qualify as a “senior officer” and thus qualify as a beneficial owner.⁸ Additionally, individuals who are “important decision-makers” can be considered individuals exercising substantial control. According to

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FinCEN, important decision-makers are those who direct or have substantial influence over important decisions regarding a reporting company's structure (e.g., reorganization, dissolution or merger), finances (e.g., sale, lease, mortgage, or other transfer of any principal assets), and business in general (e.g., selection or termination of business ventures or geographic focus).⁹ Other forms of substantial control are discussed further in FinCEN's "Small Entity Compliance Guide".¹⁰

Reporting companies formed on or after the Effective Date must also provide information regarding their "company applicants." A "company applicant" includes both (i) the individual who directly files the document that forms or registers the reporting company and (ii) if more than one individual was involved in such filing, the individual primarily responsible for directing or controlling the filing.¹¹

A reporting company must disclose the following specific information regarding its beneficial owners and, if formed or registered after the Effective Date, its company applicants:¹²

- Full name;
- Date of birth;
- Complete current residential address (except that a company applicant who forms or registers entities in the course of its business can submit its business address);
- A unique identifying number and the issuing jurisdiction from an identification document, including:
 - a non-expired U.S. passport;
 - a non-expired state or local government ID or Indian tribal document;
 - a non-expired state-issued driver's license; or
 - a non-expired foreign passport if no other identification document is available; and
- An image of the identification document which shows the unique identification number.

C. Report Submission Timelines.

The CTA's filing deadlines depend on when the company was formed or registered.¹³ As of now, reporting companies formed or registered before the Effective Date have until January 1, 2025, to submit their initial BOI report. On December 12, 2023, the U.S. House of Representatives passed the Protect Small Business and Prevent Illicit Financial Activity Act (HR 5119). Such bill, if enacted, would delay CTA compliance for existing companies (entities formed or registered before the Effective Date) to January 1, 2026. To date, the bill has been received by the U.S. Senate, read twice, and referred to the Committee on Banking, Housing, and Urban Affairs.¹⁴

Reporting companies created or registered on or after the Effective Date through December 31, 2024, must file the initial BOI report with FinCEN within 90 days of formation or registration. Reporting companies formed or registered on and after January 1, 2025, must submit their initial BOI report within 30 days. Exempt entities that subsequently lose their exempt status must submit their initial BOI report within 30 days after loss of exemption.¹⁵

D. Submission System.

FinCEN is securely storing BOI reported under the CTA in a centralized, nonpublic database.¹⁶ Access to this data is not generally available as it is strictly controlled and protected by "controls typically used in the Federal government to protect non-classified yet sensitive information systems at the highest security level."¹⁷ Although not available to the general public, BOI will be accessible to certain authorized recipients, including certain federal agencies, certain state, local, and tribal law enforcement agencies with court authorization, and U.S. Department of the Treasury personnel, among others.¹⁸

E. Ongoing Responsibility to Report.

In addition to the initial reporting requirements, reporting companies must continuously update their BOI reports within 30 days of any change in the reported information.¹⁹ Changes warranting updates include, but are not limited to,



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the company's name, address or home jurisdiction, and changes to beneficial ownership upon a transfer, issuance, or death of a beneficial owner.²⁰ A change to a beneficial owner's name, or address also triggers an amendment.²¹ Reporting companies must report changes to any required information, not just material changes.²² In the event a reporting company submits inaccurate information in its BOI report, it must file a correct report within 30 days after the date it becomes aware or has reason to know of the inaccuracy.²³

F. Penalties for Noncompliance.

Noncompliance with the Act could result in civil and criminal penalties as it is unlawful to willfully report false BOI or to willfully fail to report complete or updated BOI.²⁴ Willful failure to report or update BOI can result in a fine of up to \$500 per day (capped at \$10,000) and up to two years imprisonment.²⁵ Knowingly disclosing BOI is subject to additional penalties of \$500 per day (capped at \$250,000) and up to five years imprisonment.²⁶ Punishment for noncompliance can extend to individuals who influence the reporting company not to report, as well as senior officers of the reporting company in charge at the time of noncompliance. The CTA offers a safe harbor for reporting companies that voluntarily correct inaccuracies within 30 days of detection and no more than 90 days after submission of the report.²⁷

III. Role of the Attorney

A. General Role of the Corporate Practitioner

Corporate practitioners must do their part to advise clients regarding CTA compliance. The corporate practitioner should consider:

- assessing those clients that are subject to the CTA reporting requirements;
- guiding clients through reporting timelines and methods for compliance, including identifying beneficial owners and, if applicable, company applicants in preparation for reporting deadlines;
- submitting the initial BOI report with FinCEN pursuant to client requests;
- encouraging recordkeeping of reported information, including changes in ownership, to ensure a process for ongoing compliance; and
- educating clients, senior officers, and boards of directors on CTA compliance.

In addition to client-facing obligations, attorneys must also consider internal procedures related to the CTA. For newly-formed entities, attorneys should consider including language in their engagement letters that specifies the new entity's potential need to comply with the CTA. The engagement letter could inform the client that the CTA exists and assert

that, absent an affirmative engagement by the client for CTA compliance assistance, the attorney will not perform any CTA-related analysis or filings. Put another way, the engagement letter could include:

- a statement that analysis of CTA applicability and ultimate CTA compliance are the responsibilities of the entity;
- a clarification that, upon specific request by the client, the attorney can analyze whether the entity is a reporting company and, if necessary, prepare the initial filing;
- a statement informing the client of the CTA's perpetual compliance obligation on reporting companies; and
- a declaration of the fact that such obligation remains that of the client and not the attorney.

The attorney could offer to submit updates in response to changes in beneficial ownership upon written request from the client but could specify that such requests would be subject to a new engagement letter. There are alternative ways to structure CTA-related engagements, but the key is to ensure the role of the attorney with regard to CTA compliance is clear to the client.

B. Law Firms as Part of a Thoughtful Compliance Program

In the event clients affirmatively ask for CTA compliance assistance, including filing the initial BOI report, attorneys must consider which individuals serve as "company applicants" for purposes of the initial BOI report. As previously mentioned, a "company applicant" includes both the individual who directly files the document that forms or registers the reporting company and, if more than one individual was involved in such filing, the individual primarily responsible for directing or controlling the filing.

Determining the company applicant is particularly important in a law firm setting where the following scenario could occur:

A partner could have a client who requests the creation of a new Nebraska limited liability company. Such partner could ask an associate to prepare the formation documents, including the Certificate of Organization (the "Certificate"), and coordinate the filing. Such associate could prepare the formation documents, and in the meantime, the partner could maintain all client contact, including requesting the client's signature on the Certificate. Upon receipt of the signed Certificate, the associate could then request the assistance of a paralegal or a legal courier to directly file the formation document with the Nebraska Secretary of State, whether in person or through online filing.

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In the above scenario, whoever submits the initial BOI report with FinCEN will need to include personal information of the company applicant. The individual who directly files the document is a company applicant, so clearly the paralegal or legal courier would qualify as a company applicant. What is less clear is whether the associate or the partner should be considered the additional company applicant as they are both arguably responsible for directing or controlling the filing. The question is which individual is primarily responsible? The FAQs and other guidance released by FinCEN do not yet provide explanations for what it means to be “primarily responsible” for the filing, but perhaps further explanation is forthcoming. Importantly, a company that must report its company applicants may only submit up to two individuals as its company applicants. Thus, attorneys have internal considerations for in-firm processes aside from the CTA’s applicability to their newly-formed entity clients.

Attorneys will surely play a role in existing entities’ CTA compliance efforts, too. Surely, many attorneys have already received requests from clients to assess whether and how the CTA applies to that particular entity or entities in which a client possesses ownership. These requests will require the attorney to review the CTA and analyze whether the entity at issue qualifies under one of the 23 exemptions. If none of the exemptions apply, the entity must file the BOI report with FinCEN and is subject to the ongoing compliance requirements.

The CTA’s requirement for perpetual compliance can result in additional challenges for attorneys and, upon client request, could result in the attorney’s role extending beyond the initial BOI filing. Attorneys should clarify this ongoing need for compliance and updated reporting to their clients. Continued compliance should be the responsibility of the client as there is no way to guarantee attorneys will know of all beneficial own-

ership changes as they occur in real time. Accordingly, clear communication of this need to update the BOI report in the event of changes is key to ensuring the attorney can adequately fulfill the role of advisor. Importantly, this need for communication extends to attorneys with clients that currently qualify as “reporting companies” as well as those entities that could be at risk of losing their exempt status.

C. Board Engagement as Part of a Thoughtful Compliance Program.

In-house counsel should also not forget to effectively manage their executive teams, cross functional partners, and ultimately their boards of directors through the process. Navigating the intricacies of the CTA requires a nuanced approach, especially when navigating board sensitivities. As with most new compliance schemes, the most effective approach with the board is a transparent and well-articulated dialogue, ensuring directors comprehend the new compliance landscape and the implications it holds for their company’s corporate governance and the effectiveness of the its overarching compliance program.

When engaging your board on the CTA, it will be important to summarize the complexities into easy to understand insights that align with the board’s typical information sharing practices, while also highlighting how this legal shift could change visibility to what would have previously been non-reported information. Counsel should start by highlighting the CTA’s basic turn toward enhanced beneficial ownership disclosure and its intent of curbing financial crimes. Drawing attention to aligning the relevant company’s internal financial, accounting, and compliance practices with new reporting obligations, and helping the board to understand its obligations to this new layer of expectation around ethical business conduct will be counsel’s ultimate goal.



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Counsel should also not ignore any strategic considerations the new disclosure requirements may create. Board members should be positioned to have the right discussion, along with senior management, about internal protocols and external affairs management that will both ensure compliance and navigate any related consequences of disclosure. By bringing together the board, after a thoughtful cross functional approach and the leadership of management, corporate counsel can guide boards in proactively addressing the transformative effects of the CTA, ensuring that companies not only meet regulatory standards but also emerge stronger in the face of this new compliance landscape.

D. Practical Management of Compliance Obligations.

Attorneys may consider delegating administrative tasks connected to their role in CTA compliance, such as by engaging a third party to assist in submission of BOI reports. The process for engaging these third parties is still developing due to the recent effectiveness of the CTA, but these third parties will likely look similar to those already in existence serving as corporate registered agents for entities around the country. Although there is debate regarding whether the involvement of a non-lawyer in the beneficial ownership analysis constitutes the unauthorized practice of law, third parties have already begun advertising services for assistance in submitting BOI reports. Even if attorneys end up utilizing these third-party

vendors for submitting the filing, it will still be an attorney's responsibility to analyze the CTA and determine its applicability to clients.

In essence, the CTA not only imposes obligations on most privately-held businesses, but it also imposes an obligation on attorneys to be informed and adequately advise clients of the CTA's applicability. In terms of practical steps for attorneys moving forward, consider the following:

- If you form a new entity, communicate clearly with the client regarding the necessity to comply with the CTA.
- For reporting companies formed on or after the Effective Date, file BOI reports with FinCEN within ninety days of formation.²⁸
- For reporting companies formed prior to the Effective Date, file BOI reports with FinCEN by the end of 2024.
- For all reporting companies, assist clients in identifying beneficial owners, controlling persons, and company applicants.
- Encourage businesses to train employees on CTA duties and responsibilities related to reliable recordkeeping of changes in beneficial owners.



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- Consider retention of third party providers to actually make filings with FinCEN.
- Be vigilant of reporting requirements as FinCEN releases additional guidance.
- Provide resources to clients, including the Small Business Compliance Guide as prepared by FinCEN.

Conclusion

The CTA commences a new and ongoing responsibility for businesses to comply with federal beneficial ownership reporting, impacting nearly all privately-held entities. Although some logistics are still forthcoming, attorneys and business entities need to understand the key provisions, timelines, and implications of this far-reaching legislation, particularly considering compliance for newly-formed entities is required now. Even individuals, including attorneys, ordinarily associated with entities qualifying for a CTA exemption need to understand the legislation as it is likely these individuals have other engagements, whether it be through ownership or leadership involvement, with entities qualifying as reporting entities. With a proactive approach, attorneys can successfully advise clients to navigate these demanding and continuously-developing rules to avoid penalties associated with noncompliance.²⁹ 

Endnotes

- ¹ 31 U.S.C. § 5336(a)(11).
- ² 31 U.S.C. § 5336(b)(1)(A).
- ³ 31 C.F.R. § 1010.380(c)(2) (West 2024). The CTA includes an exemption for tax-exempt entities, specifically applying to (i) nonprofit organizations described in Section 501(c) of the Internal Revenue Code ("IRC") and exempt under IRC Section 501(a); (ii) political organizations as defined in IRC Section 527(e)(1) and exempt under IRC Section 527(a); and (iii) trusts as described in IRC Section 4947(a). *Id.*
- ⁴ 31 C.F.R. § 1010.380(b)(1)(i).
- ⁵ The reporting company's address must reflect either its main business location in the U.S., if applicable, or the primary location in the where the reporting company conducts business. 31 C.F.R. § 1010.380(b)(1)(i)(C).
- ⁶ 31 C.F.R. § 1010.380(b)(1)(ii).
- ⁷ 31 C.F.R. § 1010.380(d). *Beneficial Ownership Information Reporting Frequently Asked Questions*, FIN. CRIMES ENFORCEMENT NETWORK (Jan. 12, 2024), Questions D.1-D.4, <https://www.fincen.gov/boi-faqs>.
- ⁸ *Frequently Asked Questions*, *supra* note 9, at Question D.6.
- ⁹ *Frequently Asked Questions*, *supra* note 9, at Question D.3.
- ¹⁰ *Small Entity Compliance Guide*, FIN. CRIMES ENFORCEMENT NETWORK, Version 1.1 (Dec. 2023), https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide_FINAL_Sept_508C.pdf.
- ¹¹ 31 C.F.R. § 1010.380(e). No reporting company will have more than two company applicants. *Frequently Asked Questions*, *supra* note 9, at Question E.1.
- ¹² 31 C.F.R. § 1010.380(b)(1)(ii).
- ¹³ 31 C.F.R. § 1010.380(a)(1).
- ¹⁴ Protect Small Business and Prevent Illicit Financial Activity Act, H.R.5119, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/5119>.
- ¹⁵ However, tax-exempt entities that initially qualify as exempt from CTA reporting requirements that subsequently lose tax-exempt status have 180 days to file their BOI report. 31 C.F.R. § 1010.380(c)(2)(xix).
- ¹⁶ See *BOI E-Filing System*, FIN. CRIMES ENFORCEMENT NETWORK, <https://boiefiling.fincen.gov/> (last visited Jan. 15, 2024).
- ¹⁷ See *supra* note 11, at vi.
- ¹⁸ See *Fact Sheet: Beneficial Ownership Information Access and Safeguards Final Rule*, FIN. CRIMES ENFORCEMENT NETWORK, (Dec. 21, 2023) <https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-access-and-safeguards-final-rule>.
- ¹⁹ 31 C.F.R. § 1010.380(a)(2)(i).
- ²⁰ 31 C.F.R. § 1010.380(a)(2).
- ²¹ 31 C.F.R. § 1010.380(a)(2)(i).
- ²² Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498, 59,524 (Sept. 30, 2022). FinCEN does not require a reporting company to file an updated report in the event of a reporting company termination or dissolution. *Id.* at 59,514.
- ²³ 31 C.F.R. § 1010.380(a)(3).
- ²⁴ 31 U.S.C. § 5336(h); 31 C.F.R. § 1010.380(g).
- ²⁵ 31 U.S.C. § 5336(h)(3)(A).
- ²⁶ 31 U.S.C. § 5336(h)(3)(B).
- ²⁷ 31 U.S.C. § 5336(h)(C)(i); 31 C.F.R. § 1010.380(a)(3).
- ²⁸ For entities formed as of the Effective Date and until December 31, 2024, file the BOI report within ninety days of formation. For entities formed in 2025, file the BOI report within thirty days of formation.
- ²⁹ Please note, this article is current as of January 15, 2024.



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