

Corporate Transparency Act's Reporting Requirements: Is Your Company Prepared?

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To give law enforcement additional tools to fight financial crime and fraud, Congress passed the Corporate Transparency Act (the “**CTA**”). The CTA requires certain legal entities (each, a “reporting company”) to report, if no exemption is available, specific information about themselves, certain of their individual owners and managers (“beneficial owners”), and certain individuals involved in their formation (“company applicants”) to the Financial Crimes Enforcement Network (“**FinCEN**”) of the U.S. Department of Treasury.

As the first of three rulemakings required by the CTA, FinCEN issued the Beneficial Ownership Information Reporting Requirements final rule (the “**BOI Rule**”) on September 30, 2022. More recently, FinCEN released the first version of a Small Entity Compliance Guide and an updated list of Frequently Asked Questions. FinCEN intends to issue additional materials and guidance.

The BOI Rule imposes new and significant reporting burdens on affected companies. ***As a business owner or manager, you may need to prepare now.***

When do the new reporting requirements come into effect?

- The BOI Rule is set to take effect on January 1, 2024.
- Reporting companies created or registered to do business in the United States prior to January 1, 2024 must file their initial BOI Reports by January 1, 2025.
- Reporting companies created or registered to do business in the United States on or after January 1, 2024 will have 30 days after receiving notice of the company's registration or

creation to file their initial BOI Reports under the BOI Rule. On September 27, 2023, FinCEN announced a **proposed amendment** to the BOI Rule that would extend this period to 90 days, but only for reporting companies created or registered in calendar year 2024.

Which entities are subject to the new reporting requirements?

An entity is classified as a “reporting company” if it is any of the following and does not qualify for a specific exemption:

- A corporation, limited liability company, or other entity created under the laws of a U.S. state or Indian tribe by the filing of a document with a secretary of state or similar office under the law of a U.S. state or Indian tribe.
- An entity created under the laws of a foreign country and registered to do business in any U.S. state or tribal jurisdiction by filing a document with a secretary of state or similar office of the U.S. state or Indian tribe.

Whether trusts and partnerships qualify as “reporting companies” depend on statutes, regulations and procedures of the state or tribe under whose laws they were formed.

Which entities are exempt from the new reporting requirements?

A reporting company is exempt only if it falls into one of twenty-three prescribed exemptions, including SEC reporting companies, insurance companies, financial institutions, broker-dealers, investment companies and advisers, and other publicly registered entities.

Exemptions of particular interest to privately held companies include:

- **Large operating companies** that directly employ more than 20 full time employees in the United States, have an operating presence at a physical office in the United States, and have filed a federal income tax return or information return demonstrating more than \$5 million in gross receipts or sales from sources within the United States;
- **Subsidiaries of certain exempt entities**, where the entity’s ownership interests are held, directly or indirectly, by certain enumerated exempt entities; and
- **Inactive entities** formed prior to January 1, 2020, not engaged in active business or owned in whole or in part by a foreign person, which has not undergone a recent change in control and holds no assets (including interests in any other legal entity).

Additionally, there is a three-pronged exemption for tax-exempt entities. Specifically, the following types of tax-exempt entities are exempt from the CTA’s reporting requirements:

- **Organizations described in IRC 501(c)**, determined without regard to IRC 508(a);
- **Certain political organizations**; and
- **Certain non-exempt charitable or split interest trusts.**

The first prong encompasses all IRC 501(c) organizations, including most charities, schools and other educational institutions, churches and other religious organizations, private foundations, social welfare organizations, labor organizations, trade associations, chambers of commerce, and social clubs. Notably, this prong applies without regard to whether the qualifying organization has filed an application for recognition of tax-exempt status pursuant to IRC 508(a).

Keep in mind, however, that other types of tax-exempt entities exist but fall outside the exemption from the CTA's reporting requirements. For example, homeowner associations, including condominium associations, tax-exempt under IRC 528 are not exempt from these requirements.

Note that if a reporting company is relying on an exemption and subsequently loses that exemption, it must file a report to stay compliant within 30 days of the loss of the exemption. However, if a qualifying tax-exempt entity loses its IRC 501(c) status, the organization has a 180-day grace period during which it will continue to be deemed an IRC 501(c) organization solely for purposes of the exemption.

Importantly, there is no separate exemption for holding companies – FinCEN expressly declined to provide for one. For example, if a large operating company is owned by an entity that does not qualify for a prescribed exemption and is a reporting company, the parent (or holding company) will need to file BOI Reports even though its subsidiary (the large operating company) does not.

What information must be provided by or on behalf of reporting companies?

A nonexempt reporting company must submit to FinCEN a report (a “**BOI Report**”) containing specific information about itself and each of its beneficial owners and certain company applicants:

- The **reporting company** must provide its legal name, all trade names or DBAs, a complete address for the reporting company's principal place of business in the United States, its jurisdiction of formation or first place of U.S. registration, and its employer identification number (EIN) or taxpayer identification number (TIN).
- The reporting company must provide, **for each beneficial owner and company applicant**, his or her full legal name, date of birth, complete U.S. residential (or, for certain company applicants, business) address, and information from (along with an image of) the individual's unexpired U.S. passport, state driver's license or other government-issued identification document.

Reporting companies created or registered to do business in the United States prior to January 1, 2024 are exempt from the requirement to provide disclosure with respect to company applicants.

Who qualifies as a “beneficial owner”?

A “beneficial owner” is any individual who, directly or indirectly, (1) owns or controls at least 25 percent of the **ownership interests** of the reporting company or (2) exercises **substantial control** over the reporting company.

An individual's **ownership interest** in the reporting company will be determined by examining ownership of equity, stock or voting rights; capital or profits interests; convertible instruments (as converted); options or privileges (as exercised); and any other instrument, contract, arrangement, understanding, relationship or mechanism used to establish ownership. Reporting companies will need to “look through” ownership interests held by intermediary companies to identify the individuals who beneficially own such interests. Special rules apply to interests held by trusts.

An individual may exercise **substantial control** over the reporting company if such person is:

- a senior officer of the reporting company;
- a person who has the authority to appoint or remove certain officers or a majority of the board

of directors;

- a person who directs, determines or has substantial influence over important decisions of the reporting company, including decisions about its business, finances or structure; or
- a person who otherwise exercises substantial control over the reporting company.

Any individual holding the position or exercising the authority of a President, Chief Financial Officer, General Counsel, Chief Executive Officer or Chief Operating Officer is a “senior officer.” Each individual serving on the board of directors (or equivalent body) exercises substantial control.

Among other areas of concern, it may be challenging for a reporting company to identify the individuals with substantial influence over important decisions of the reporting company. Importantly, “substantial control” is determined independently from the “ownership interests” determination. FinCEN expressly contemplates a situation where a reporting company is structured such that multiple individuals (e.g., LLC members) exercise “essentially equal authority” over important decisions, in which case each such individual likely has substantial influence even though no single individual directs or determines them.

There is no limit to the number of beneficial owners of each reporting company that may be subject to reporting requirements under the BOI Rule.

Who qualifies as a “company applicant”?

A “company applicant” is:

- the individual who directly filed the document (either physically or electronically) causing the reporting company to be created or registered to do business in the United States; and
- if more than one individual was involved in the filing, the individual primarily responsible for directing or controlling such filing.

In no event will a reporting company have more than two company applicants.

Does a reporting company need to update FinCEN when any reported information changes?

Yes, and this aspect of the BOI Rule will require active monitoring of relevant information. Reporting companies will be required to report any change in the information required to be reported within 30 days after the date on which the change becomes effective. Changes that may require an updated BOI Report include:

- Any change to the legal or trade name of the reporting company, or any new trade name.
- Any change of the “beneficial owners” of the reporting company, which could occur as a result of the death, resignation or replacement of an officer or director; a change in equity ownership (including via sale transaction); an equity owner turning 18 years of age; or a change to certain provisions of the governance documents of the reporting company.
- Any change of name, address or unique identifying number (e.g., driver’s license or passport number) as reported to FinCEN for any beneficial owner.
- The loss of an exemption previously held by the reporting company, or a reporting company gaining exempt status.

Companies that fail to submit timely updates may be subject to criminal and civil penalties. Liability extends to senior officers, as well as those who willfully cause a company not to file a required BOI Report or to report incomplete or false information to FinCEN.

How do I file?

BOI Reports must be completed and submitted to FinCEN via online portal that remains under development, referred to as the Beneficial Ownership Secure System (“**BOSS**”). FinCEN has reported that information collected and stored on BOSS will not be publicly available or subject to public information requests and will be securely maintained.

Reporting companies may submit information to BOSS directly or via third-party service provider.

What are the penalties for failing to satisfy the new reporting requirements?

Persons who fail to meet these new reporting requirements or who engage in unauthorized disclosure of reported information may be subject to civil or criminal penalties:

- A person who willfully fails to file a correct and complete initial BOI Report or an updated BOI Report required by law is subject to a fine of \$500 per day, up to a maximum fine of \$10,000, and is subject to imprisonment for up to two years.
- A person who knowingly discloses reported information without authorization is subject to a fine of \$500 per day, up to a maximum fine of \$250,000, and is subject to imprisonment for up to five years.

If a person voluntarily submits a report correcting inaccurate information within 90 days of the deadline for the original report, the person may benefit from a safe harbor from penalty. However, the willful failure to report complete or updated beneficial ownership information to FinCEN, or the willful provision of or attempt to provide false or fraudulent beneficial ownership information, is not protected by the safe harbor. Note that senior officers of an entity that fails to file a required BOI report may be held accountable.

For example, according to FinCEN, providing false or fraudulent beneficial ownership information could include providing false identifying information about an individual identified in a BOI report, such as by providing a copy of a fraudulent identifying document.

Additionally, if an individual who qualifies as a beneficial owner or a company applicant refuses to provide required information, or if such an individual provides false information to a company knowing that information is meant to be reported to FinCEN, that person may be held accountable.

What should I do to prepare my company to comply with these reporting requirements?

Get organized – make sure you have your company’s current capitalization table, governing documents, and equity and debt documents. You will need to account for contractual rights of control and ownership, in addition to outstanding ownership interests.

Make a plan – if your company is subject to the reporting requirements, you will need to consider how to collect the required information from direct and any indirect owners and others. You will also need

to continuously monitor for changes that may trigger reporting requirements. Companies with complex beneficial ownership structures may want to designate a CTA compliance officer.

Companies may also consult FinCEN's BOI website at www.fincen.gov/boi for additional information, including its Small Entity Compliance Guide and list of Frequently Asked Questions.

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