

Updates on U.S. Corporate Transparency Act Beneficial Ownership Reporting Requirements

December 14, 2023

The Financial Crimes Enforcement Network (FinCEN) issued a final rule (as amended, BOI Rule) on September 29, 2022, implementing Section 6403 of the Corporate Transparency Act (CTA). The CTA and BOI Rule require certain entities to file reports with FinCEN identifying and providing information about their beneficial owners and applicants.¹ This unprecedented collection of information by the government is intended to curtail the deliberate misuse of legal entities and deter illicit financial activity and national security threats that result therefrom.

- The practical result of the BOI Rule is that any company created or registered in the United States that is not already subject to federal or state regulation, otherwise required to disclose its beneficial ownership information to a government authority, or not otherwise exempt will be required to report such information to FinCEN.
- The BOI Rule requires each **reporting company** to file with FinCEN reports with information on the reporting company itself, every individual who is a **beneficial owner** of such reporting company, and every individual who is a **company applicant** with respect to such reporting company.
- The BOI Rule requires companies in existence before January 1, 2024, to file a report no later than January 1, 2025. Companies that are formed or registered, as applicable, on or after January 1, 2024, are required to file a report within 90 calendar days of the date of formation or registration under applicable law from January 1, 2024, until December 31, 2024, or thereafter on the date 30 calendar days of the date on which the formation or registration becomes effective under applicable law.
- The BOI Rule also requires a reporting company to update a report if there are changes concerning the reporting company or its beneficial owners and to correct inaccurately filed information.

Background

The CTA, enacted into law on January 1, 2021, as part of the Anti-Money Laundering Act of 2020, is designed to combat the use of shell companies by persons seeking to evade anti-money-laundering and

economic sanctions laws. Specifically, the CTA amended the Bank Secrecy Act to (i) require certain U.S.-domiciled or -registered entities, including foreign entities that operate in the U.S., to report the identities of their beneficial owners to FinCEN and (ii) require FinCEN to establish and maintain a secure, nonpublic database of this beneficial ownership information that may be accessed by, among other parties, law enforcement or certain financial institutions for customer due diligence (CDD).

The BOI Rule completed the first of three phases of implementing the requirements of Section 6403 of the CTA. FinCEN is currently engaged in two additional rulemakings as follows: (i) a rulemaking to implement the statute's protocols for access to and disclosure of beneficial ownership information and (ii) a rulemaking to revise the existing CDD requirements for financial institutions at 31 C.F.R. § 1010.230 (CDD Rule). Regarding the former, FinCEN issued a Notice of Proposed Rulemaking relating to the statute's protocols for access to and disclosure of beneficial ownership information (the Access NPRM). On September 13, 2023, FinCEN published a Notice of New System of Records relating to the database referred to as the Beneficial Ownership Secure System, in which information will be received, stored, and maintained, and certain policies and practices for the storage, retrieval, retention and disposal of records.² FinCEN specified that the database will be nonpublic and that FinCEN will use methods and controls typically used by the federal government to protect nonclassified but sensitive information systems at the highest federal level. In addition, FinCEN indicated that access to the database is restricted to individuals who have appropriate permissions and for the uses specified in the September 13, 2023, n Notice, which uses include disclosure to law enforcement at the federal, state, and local levels, other federal regulators, or financial institutions, provided they are using the information to comply with CDD requirements and have obtained the consent of the reporting company to which the BOI pertains. On November 8, 2023, FinCEN amended a portion of the BOI Rule relating to the use of FinCEN Identifiers (FinCEN IDs), which item was also included in the Access NPRM. However, FinCEN has not finalized the other rules includes in the Access NPRM. In addition, FinCEN has not yet amended the CDD Rule, including protocols FinCEN will use to verify the accuracy of the information reported by reporting companies and how financial institutions may access and use reported information to fulfill their diligence obligations under the CDD Rule.

The CTA imposes criminal and civil penalties for any person who willfully provides, or attempts to provide, false or fraudulent beneficial ownership information to FinCEN or willfully fails to report complete or updated beneficial ownership information to FinCEN. In light of these penalties, reporting companies should identify the relevant timeframe within which they must submit reports and start planning for the submissions. For example, they should consider what information about the company will be required and the beneficial owners whose information will need to be included. Moreover, given the significance of the information collection, financial institutions should begin to think about how they will use the information once they have access to it, recognizing that the two forthcoming rulemakings discussed above will affect that consideration.

Companies That Are Required to File Reports

The BOI Rule requires a reporting company to file a report with FinCEN including the information discussed below. A "reporting company" is defined to mean a domestic or foreign reporting company, as follows:

- A “domestic reporting company” means any entity that is (i) a corporation, (ii) a limited liability company, or (iii) created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.
- A “foreign reporting company” means any entity that is (i) a corporation, limited liability company, or other entity (ii) formed under the law of a foreign country and (iii) registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.

Reporting Company Exemptions

The BOI Rule includes 23 categories of exemptions from the definition of “reporting company” from the CTA for entities already generally subject to substantial United States federal or state regulation under which beneficial ownership may be known. These exemptions include, among others, banks, insurance companies, public companies registered with the Securities and Exchange Commission (SEC), broker-dealers, certain investment funds, investment advisers and pooled investment vehicles, certain tax-exempt entities, subsidiaries of certain exempt entities, and a category of “large operating companies.”

FinCEN declined in the BOI Rule to add exemptions not included in the CTA but will continue to consider potential exemptions, including the extent to which certain entities may already report their beneficial owners to the federal government through means other than the CTA, and will continue to consider suggestions for additional exemptions.

“Large Operating Company” Exemption

The “large operating company” exemption applies to an entity that (i) employs more than 20 full-time employees in the United States, (ii) has an operating presence at a physical office in the United States, and (iii) has filed a federal income tax or information return in the United States for the previous year demonstrating more than \$5 million of gross receipts or sales, excluding gross receipts or sales from sources outside the United States.

Subsidiary Exemption

The “subsidiary” exemption applies to certain entities whose ownership interests are “controlled or wholly owned,” directly or indirectly, by one or more other exempt entities (excluding pooled investment vehicles). As discussed further below in this Update, the BOI Rule does not define “control” for this exemption, and FinCEN has not released guidance regarding the same.

Beneficial Owners of a Reporting Company

A “beneficial owner” under the BOI Rule is defined as any individual who, directly or indirectly, either exercises **substantial control** over a reporting company or owns or controls at least **25% of the ownership interests** of a reporting company.

Substantial Control Over a Reporting Company

“Substantial control” over a reporting company includes an individual who

- serves as a senior officer of the reporting company (any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function)
- has authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors (or similar body)
- directs, determines, or has substantial influence over important decisions made by the reporting company
- has any other form of substantial control over the reporting company

The BOI Rule includes both specific examples of important decisions made by the reporting company and examples of ways in which an individual may directly or indirectly exercise substantial control over a reporting company.

Ownership Interests in a Reporting Company

With regard to ownership, the BOI Rule includes a detailed definition of “ownership interest.” The definition of “ownership interests” is broad, including both equity and other types of interests, including capital and profits interests, convertible instruments, warrants or rights, or other options or privileges to acquire equity capital, or other interests. Equity, stock, or similar instruments are included without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights. The “ownership interest” definition includes a catch-all provision for “[a]ny other instrument, contract, arrangement, understanding, relationship, or other mechanism used to establish ownership.” FinCEN expressly intends this to ensure that any individual or entity that establishes an ownership interest in a reporting company through a contractual or other relationship not described is subject to the beneficial owner reporting requirements. FinCEN declined to exempt convertible instruments, including ones not immediately convertible.

The BOI Rule also states how an individual may own or control an ownership interest of a reporting company, including through joint ownership with one or more other persons of an undivided interest in such ownership or through control of such ownership interest owned by another individual. Finally, the BOI Rule clarifies that an individual’s ownership in an entity is determined at the present, on a fully diluted basis, and, as the case may be, based on the individual’s share of the capital and profit interests in the entity or based on the individual’s share of the voting power or value of ownership interests in the entity. FinCEN recognizes that partnership waterfalls, Simple Agreements for Future Equity, and other structures may complicate the calculation of the percentage of ownership interests, and the BOI Rule clarifies the manner of calculating ownership interests, and the timing of such calculations.

Exclusions

The BOI Rule excludes from the definition of “beneficial owner” (i) a minor child, (ii) an individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual, (iii) an employee of a reporting company, whose substantial control over or economic benefits from such entity are derived

solely from the employment status of the employee, provided that such person is not a senior officer of the reporting company, (iv) an individual whose only interest in a reporting company is a future interest through a right of inheritance, and (v) a creditor of a reporting company.

Company Applicants of a Reporting Company

A “company applicant” is defined to mean up to two individuals, consisting of:

- for a domestic reporting company, the individual who files the document that creates the domestic reporting company under state or tribal law;
- for a foreign reporting company, any individual who files the document that first registers the foreign reporting company under state or tribal law; and
- in the case of either a domestic reporting company or a foreign reporting company, the individual primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document

Reports Required to Be Filed With the U.S. Government by Domestic and Foreign Entities

Each reporting company is required to file an initial report with information on the reporting company and every individual (i) who is a beneficial owner of such reporting company and (ii) who is a company applicant with respect to such reporting company (with a modified rule for a reporting company created or registered before January 1, 2024), on the following timelines:

- a domestic reporting company created on or after January 1, 2024, until December 31, 2024, within 90 calendar days, and thereafter within 30 calendar days, 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 officer first provides public notice, such as through a publicly accessible registry, that the domestic reporting company has been created
- any entity that becomes a foreign reporting company on or after January 1, 2024, until December 31, 2024, within 90 calendar days, and thereafter within 30 calendar days of the earlier of the date on which it receives actual notice that it has been registered to do business or the date on which a secretary of state or similar officer first provides public notice, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business
- any domestic reporting company created before January 1, 2024, and any entity that became a foreign reporting company before January 1, 2024, and no later than January 1, 2025
- any entity that no longer meets the criteria for an exemption, within 30 calendar days after the date that it no longer meets the criteria for any such exemption

The BOI Rule also contains requirements to update a report if there are changes concerning the reporting company or its beneficial owners, and to correct inaccurately filed information, within 30 calendar days after the date on which the change occurs or the reporting company becomes aware or has reason to know of any inaccuracy, as applicable.

Special reporting rules apply to (i) a reporting company owned by an exempt entity, (ii) a minor child,

and (iii) a foreign pooled investment vehicle. In addition, FinCEN amended the BOI Rule in November 2023 to permit the use of FinCEN IDs (discussed further below) of affiliated reporting companies by certain intermediate reporting companies, where the beneficial owners of the other entity and the reporting company are the same individuals.

Required Information in a Reporting Company Report to FinCEN

Reporting company required information will include:

- full legal name of the reporting company
- trade name (d/b/a, fictitious names, or key names under which business is conducted)
- current address (street address of principal place of business in United States or primary location in the United States where business is conducted)
- jurisdiction of formation or registration
- taxpayer ID number issued by the IRS (or, where foreign entity has not been issued a taxpayer ID, a tax ID number issued by a foreign jurisdiction and name of jurisdiction)

Beneficial owner and company applicant required information will include:

- full legal name of the individual
- date of birth
- current street address (residential or office address for company applicants; current residential address for beneficial owners)
- unique identification number and issuing jurisdiction from either (i) nonexpired photo ID document issued by the United States government, state, local government, or tribe (e.g., passport or driver's license), or (ii) a nonexpired passport issued by a foreign government if the individual does not possess any of the foregoing, and a copy of such applicable government-issued document

In lieu of providing the foregoing information regarding beneficial owners or company applicants, the reporting company can provide such person's FinCEN ID.

There are also exceptions for individuals who are beneficial owners of a reporting company exclusively by virtue of such individual's ownership interest in an exempt entity that owns an interest in a reporting company, in which case the report may include the name of the exempt entity in lieu of BOI information required with respect to the individual beneficial owner.

FinCEN IDs

A FinCEN ID is a unique identifying number that FinCEN will issue to individuals or reporting companies upon request, subject to certain conditions.

A beneficial owner or company applicant may apply for a FinCEN ID by providing the same required

information. A individual's FinCEN ID can then be provided to FinCEN on a BOI report in lieu of the required information about the individual.

A reporting company may submit an application for a FinCEN ID at or after the time the reporting company submits its initial report to FinCEN.

Material Ambiguities Subject to FinCEN Clarification

FinCEN has not provided guidance or definitions regarding a number of material areas with ambiguity, including the subsidiary exemption.

Subsidiary Exemption "Control"

As noted above, the BOI Rule provides an exemption for entities whose ownership interests are "controlled or wholly owned," directly or indirectly, by certain exempt entities. **Neither the CTA nor the BOI Rule defines "control" for this exemption.** The BOI Rule modified the CTA exemption language to add "wholly" before "owned" but did not add "wholly" to modify "control." Congress clearly intended a distinction and for the subsidiary exemption to apply to entities either owned or controlled and not a requirement for both ownership and control. In commentary to the BOI Rule, FinCEN stated, "FinCEN does not need to add 'wholly' before 'controlled' because FinCEN assesses that the latter covers the intended concept of control set out in the CTA." Regarding ownership considerations alone, excluding control, FinCEN further clarified in the BOI Rule that "FinCEN also determined that extending the exemption to majority-owned subsidiaries would include entities unintended by the language of the CTA."

The absence of a definition of "control" and the BOI Rule commentary has created significant ambiguity in understanding the scope of this exemption. This ambiguity affects millions of existing entities owned, but not wholly owned, that would be viewed customarily as "controlled" under SEC and other definitions of "control."³

We may expect that FinCEN will interpret or define "control" in a manner that does not hinder the ability of law enforcement to swiftly investigate entities created and used to hide ownership for illicit purposes.⁴ That "control" definition may contrast to the definition of "substantial control" also used in the CTA.

In promulgating BOI regulations, the CTA expressly requires the Secretary of the Treasury, to the extent practicable, consistent with the purposes of the BOI section of the CTA, to "minimize burdens on reporting companies associated with the collection of beneficial ownership information ..., in light of the private compliance costs placed on legitimate businesses, including identifying any steps taken to mitigate the costs relating to compliance with the collection of information."⁵ The CTA will also require the Secretary of the Treasury to prepare and submit to Congress a report within one year after the effective date of the BOI Rule, to include an assessment of "the effectiveness of those procedures and standards in minimizing reporting burdens (including through the elimination of duplicative requirements)." Accordingly, FinCEN will need to consider the stated purpose of the scope of all CTA reporting company exemptions (to minimize reporting burdens) and whether the interpretation of

“control” of a subsidiary would undermine other CTA purposes with opportunities for evasion and hindering law enforcement investigations.

Exempt entities are all reasonably known or regulated entities, with known individuals based on regulatory or other filings reasonably available to respond to inquiries by law enforcement authorities. Those known and regulated entities, as well as subsidiaries controlled by them, are subject to similar regulatory oversight (including accounting controls) and are also presumably less likely to be used for illicit purposes.

We hope that FinCEN will take a reasonable and practical approach to this “control” definition to reduce reporting burdens, but it remains uncertain on how FinCEN will balance the competing purposes of the CTA and applicable exemptions. It is also possible that FinCEN could provide a general definition subject to guidelines on “control” issues based on different types of specified exempt entities and customary terms for their ownership interests (including (i) public companies that control entities also owned by nonexempt reporting companies, (ii) registered investment advisers controlling private equity fund portfolio companies that are not wholly owned (including customary management profits interests), and (iii) banks serving as corporate trustees of trusts that wholly own or control other entities and have express trustee powers to vote and dispose of ownership interests owned by such trusts).

Additional Potential Exemptions

In adopting the BOI Rule, FinCEN declined to exercise its statutory authority under the CTA to include any additional exemptions to the definition of “reporting company.”⁶ We anticipate that certain industry groups may further highlight to FinCEN customary financial products that do not otherwise qualify for existing exemptions, where additional exemptions may reduce reporting burdens and such information would not serve the public interest or be useful to law enforcement efforts to detect, prevent, and prosecute criminal activities. We cannot predict whether FinCEN will be amenable to such requests by sponsors, underwriters, or such entities.

¹ 87 Fed. Reg. 59,498 (Sept. 30, 2022), as amended, available at <https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf>; <https://www.govinfo.gov/content/pkg/FR-2023-11-30/pdf/2023-26399.pdf>; <https://www.govinfo.gov/content/pkg/FR-2023-11-08/pdf/2023-24559.pdf>.

² FinCEN, Privacy Act of 1974, System of Records, Notice of a new system of records, *Federal Register*/Vol. 88, No. 176/Wednesday, September 13, 2023/Notices, p. 62,889-62,892.

³ SEC Rule 405 under the Securities Act of 1933 defines “control” as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” The Committee on Foreign Investment in the United States (CFIUS) regulations in 31 C.F.R. 800.208 define “control” to include “formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the following [listed] matters, or any other similarly important matters affecting an entity.” Similarly, in the CTA itself, FinCEN notes that “substantial control” as defined may consist of “directing, determining, or having substantial influence over important decisions made by the reporting company,” and FinCEN’s definition of “substantial control” for the CTA also expressly acknowledges that such control does not require any direct equity interest.

⁴ See, e.g., United States G–8 Action Plan for Transparency of Company Ownership and Control (Jun. 2013), available at

<https://obamawhitehouse.archives.gov/the-press-office/2013/06/18/united-states-g-8-action-plan-transparency-company-ownership-and-control>; G8 Lough Erne Declaration (Jul. 2013), available at <https://www.gov.uk/government/publications/g8-lough-erne-declaration>; G20 High Level Principles on Beneficial Ownership (2014), https://www.g20.utoronto.ca/2014/g20_high-level_principles_beneficial_ownership_transparency.pdf; United States Action Plan to Implement the G–20 High Level Principles on Beneficial Ownership (Oct. 2015), <https://obamawhitehouse.archives.gov/blog/2015/10/16/us-action-plan-implement-g-20-high-level-principles-beneficial-ownership>.

⁵ 31 C.F.R. 5336(b)(1)(F)(iii). The “Statutory Notes and Related Subsidiaries” regarding the sense of Congress similarly provides “(8) in prescribing regulations to provide for the reporting of beneficial ownership information, the Secretary shall, to the greatest extent practicable consistent with the purposes of this title—

“(A) seek to minimize burdens on reporting companies associated with the collection of beneficial ownership information;

“(B) provide clarity to reporting companies concerning the identification of their beneficial owners; and

“(C) collect information in a form and manner that is reasonably designed to generate a database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators.” <https://www.govinfo.gov/content/pkg/USCODE-2021-title31/pdf/USCODE-2021-title31-subtitleIV-chap53-subchapII-sec5336.pdf>.

⁶ 31 C.F.R. 5336(a)(11)(xxiv). Additional exemptions may be included for “any entity or class of entities that the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, has, by regulation, determined should be exempt from the requirements of subsection (b) because requiring beneficial ownership information from the entity or class of entities— (I) would not serve the public interest; and (II) would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.”

Contacts

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