

The Corporate Transparency Act – An Overview of FinCEN’s Beneficial Ownership Reporting Requirements and Approaching Compliance Deadline: **UPDATE**

Update: The Financial Crimes Enforcement Network (FinCEN) issued a final rule on November 29, 2023, formally extending the timing for compliance reporting from 30 days to 90 days following formation for entities formed in 2024, to allow new entities to adjust to the filing requirements. The original rule stated that the deadline would be 30 days following formation. In 2025, it will revert to the original timing for all newly formed entities.

On September 30, 2022, FinCEN published its final rule implementing the beneficial ownership information reporting requirements of the Corporate Transparency Act (CTA), enacted by Congress as part of the Anti-Money Laundering Act of 2020. The rules will require, for the first time under federal law, that certain U.S. legal entities and foreign entities registered to do business in the United States report certain information about themselves, their beneficial owners, and company applicants. Congress identified concerns about the use of legal entities by illicit actors in various financial crimes, and in response to that concern, implemented the CTA. The reporting requirements seek to increase transparency to protect and strengthen U.S. national security by requiring those entities falling within the definition of “reporting companies” to provide information and access to law enforcement, the intelligence community, regulators, and financial institutions.

In developing the proposed regulation, FinCEN aimed to minimize burdens on reporting companies, including small businesses, to the extent practicable. FinCEN recently published guidance to implement the beneficial ownership reporting requirements (BOI) including the Small Entity Compliance Guide and FAQs that can be found here: https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide_FINAL_Sept_508C.pdf and <https://www.fincen.gov/boi-faqs>.

What is a “reporting company” under the CTA?

A “reporting company” includes domestic and foreign entities that do business in the United States. A domestic reporting company is any entity that is: (i) a corporation, (ii) a limited liability company, or (iii) created by the filing of a document with the secretary of state or any similar office under the law of a State or Indian tribe, such as limited partnerships. A foreign reporting company is 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.

What entities are exempt from the definition of “reporting company”?

The following entities are exempt: (1) public companies (i.e., companies with securities registered under the Securities Exchange Act of 1934 (the “Exchange Act”)); (2) governmental authorities; (3) banks; (4) credit unions; (5) depository institution holding companies; (6) money service businesses; (7) registered brokers or dealers in securities; (8) registered securities exchange or clearing agencies; (9) other entities registered under the Exchange Act; (10) registered investment companies or registered investment advisors; (11) venture capital fund advisers that are exempt from registration as investment advisers and are “exempt reporting advisers”; (12) insurance companies; (13) state-licensed insurance producers; (14) entities registered with the Commodity Futures Trading Commission under the Commodity Exchange Act; (15) registered public accounting firms; (16) public utilities; (17) financial market utilities designated by the Financial Stability Oversight Counsel; (18) Private Funds (as defined below) that are operated by registered investment advisers or exempt reporting advisers that are venture capital advisers; (19) tax-exempt entities; (20) entities assisting a tax-exempt entity; (21)

large operating companies (any entity that (i) has an operating presence at a physical office within the U.S., (ii) employs more than 20 employees on a full-time basis (at least 30 hours/week) in the U.S., and (iii) filed in the previous year U.S. federal income tax returns demonstrating more than \$5,000,000.00 in gross receipts or sales in the aggregate in the U.S. (whether individually or on a group consolidated basis)); (22) subsidiaries of certain exempt entities listed herein, further defined as any entity whose ownership interests are controlled or wholly owned, either directly or indirectly, by the following numbered entities in this list: 1 through 5, 7 through 17, 19 and 21; and (23) inactive entities.

With respect to item 22, it is noteworthy that subsidiaries of Private Funds are not automatically exempt from the reporting requirements but may be able to benefit from other exemptions or otherwise not be required to report in the event that the persons that control such entities are exempt and no other beneficial owners exist.

What does this mean for investment advisers and private funds?

Registered investment advisers and investment advisers that are exempt from registration under Section 203(l) of the Investment Advisers Act of 1940 (the "Advisers Act") as venture capital advisers are exempt from the reporting requirements. However, investment advisers that are exempt from registration under Section 203(m) of the Advisers Act as private fund advisers are not exempt from the reporting requirement and will be required to report. A private fund adviser is an investment adviser that provides investment advice exclusively to "Private Funds" (i.e., investment companies that are exempt from registration under the Investment Company Act of 1940 under Section 3(c)(1) or Section 3(c)(7) and have regulatory assets under management of under \$150 million). State registered investment advisers are also not exempt from the reporting requirements and will be required to report.

Certain Private Funds will be exempt from the reporting requirements if they are managed by registered investment advisers or venture capital advisers. However, Private Funds that are managed by private fund advisers or state registered investment advisers are not exempt from the reporting requirements and will be required to report.

As noted above, subsidiaries of Private Funds are not automatically exempt from registration. However, it is possible that if the subsidiaries of such Private Funds can benefit from another exemption, such subsidiaries will not be required to report.

All fund sponsors, whether exempt from reporting or not, should consider their fund structures to ensure that entities within their fund structures are themselves reporting companies or can benefit from another available exemption.

What needs to be disclosed to FinCEN?

If an entity is deemed to be exempt from the definition of "reporting company", no action is required and the entity is not required to report BOI under the CTA.

If an entity cannot benefit from an exemption, the entity must file a BOI report with FinCEN. The BOI report must include information about the reporting company, its beneficial owners, and its "applicants". The specific requirements for each category of reporting are expanded upon below.

Who is a beneficial owner?

A "beneficial owner" is any individual who, directly or indirectly (a) owns or controls at least 25% of the ownership interests of a reporting company or (b) exercises substantial control over a reporting company.

Ownership interests for this purpose is broadly defined to include equity ownership, voting rights, instruments convertible into equity, profits interests, etc., so a careful analysis should be completed to confirm which beneficial owners, if any, meet the 25% threshold.

An individual exercises substantial control over a reporting company if the individual meets any of four general criteria: (1) the individual is a senior officer (which includes the President, CEO, General Counsel, Chief Financial Officer, Chief Operating Officer, or any officer regardless of title with responsibilities and functions similar to any of the foregoing); (2) the individual has authority to appoint or remove certain officers or a majority of directors of the reporting company; (3) the individual is an important decision-maker; or (4) the individual has any other form of substantial control over the reporting company.

What information is required to be disclosed of each beneficial owner?

A reporting company may have one or more “beneficial owners.” Each must disclose on the BOI report: (a) full legal name, (b) date of birth, (c) current residential address, and (d) a unique identifying number from, and copy of, a U.S. passport, state driver’s license, other state or federal issued identification, or a foreign passport if the individual does not have any of the foregoing documents. Individuals and entities may apply for a FinCEN identifier, as more fully discussed below, which can be used in lieu of providing some of the detailed information above on each report that is required to be filed.

What information is required to be disclosed of the “reporting company?”

The reporting company must disclose its: (a) full legal name and any trade name or “doing business as” name, (b) current U.S. address, (c) jurisdiction of formation or registration and (d) Taxpayer Identification Number (TIN) from the IRS, or, for foreign reporting companies without a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction. Reporting companies may also use a FinCEN ID.

What is a “company applicant” and what information is required to be disclosed by “company applicants?”

Company applicants are natural persons, not entities, divided into two categories: (1) direct filers (the person that files with the state for formation or registration of the entity) and (2) individuals that direct or control the filing process. Company applicants can be representatives of the entity, but can also be third party providers (e.g., service providers and attorneys). Company applicants must provide (a) full legal name, (b) date of birth, (c) current business address and (d) a unique identifying number from, and copy of, a U.S. passport, state driver’s license, other state or federal issued identification, or a foreign passport if the individual does not have any of the previous documents. Company applicants may also use a FinCEN ID. Company applicant information is only required for entities formed after January 1, 2024 within 30 days of formation/registration.

FinCEN Identifier

FinCEN has set up a process through which individuals and reporting companies can obtain a “FinCEN Identifier,” which can be submitted by the reporting company or individual instead of resubmitting beneficial ownership information. This is useful for reporting companies or individuals that will need to make several filings. A reporting company can obtain a FinCEN Identifier by checking a box on the beneficial ownership reporting form when it is submitted to FinCEN. An individual can obtain a FinCEN Identifier through a separate electronic application to FinCEN, which will require the same information required from beneficial owners listed above.

Ongoing Reporting Requirements

While there is no express periodic filing requirement, reporting companies must file an amendment within 30 days after any change to their reported information. In practice, this will require beneficial owners to stay on top of reporting requirements, since an amendment will be required every time there is a change to either the reporting company’s information or the beneficial owner’s information (e.g., something as simple as a change of address of a beneficial owner or the reporting company).

If an entity was an exempt reporting company but has a change in circumstance such that it can no longer benefit from any of the aforementioned exemptions, the entity must file a BOI report within 30 days of such change in circumstance.

Privacy and Beneficial Ownership Reporting

FinCEN has provided assurances that beneficial ownership information will only be accessible to Federal, State, local, and Tribal officials, as well as certain foreign officials who submit a request through a U.S. Federal government agency, to obtain beneficial ownership information for authorized activities related to national security, intelligence, and law enforcement. FinCEN may also share beneficial ownership information with the consent of the reporting company (e.g., to financial institutions for KYC purposes). Further guidance is forthcoming on the exact policies and procedures to safeguard information from a cyber security perspective, but FinCEN has confirmed that safeguards will be put in place.

Penalties for Non-Compliance

Willful non-compliance with the requirements of the CTA (either willfully neglecting to file or filing inaccurate information) may result in both civil and criminal penalties for both the reporting company and its beneficial owners. Civil penalties of up to \$500 per day until the violation is corrected and criminal penalties including imprisonment for up to 2 years and/or fines up to \$10,000 may be imposed.

Key Dates and Timelines ***See update re: timeline extension, above***

Entities formed prior to January 1, 2024, will have one year from that date (i.e., until January 1, 2025) to file their initial BOI report and will be exempt from filing company applicant information.

New entities formed or registered (in the case of foreign entities) on or after January 1, 2024, must file their initial BOI report within 30 days after receiving actual or public notice that its creation or registration is effective. However, FinCEN has proposed extending this deadline to 90 days from formation or registration for entities formed after January 1, 2024 and before January 1, 2025, to allow reporting companies to adapt to the new reporting requirements. This proposal has not yet been adopted and FinCEN's comment period with respect to the proposed expired on October 30, 2023. The proposal is available here: <https://www.govinfo.gov/content/pkg/FR-2023-09-28/pdf/2023-21226.pdf>

FinCEN's secure filing system will be launched on January 1, 2024. FinCEN guidance on how to file is forthcoming and will be available at www.fincen.gov/contact.

Next steps

Both existing entities and new entities formed in 2024 will need to develop processes to address BOI reporting requirements. We are aware that some service providers are developing solutions for reporting compliance and streamlining the process.

We encourage existing businesses to begin to review organizational charts and individuals to review entities for which they are responsible in order to determine if an exemption is available for such entities in the coming months with a view towards complying with the reporting obligations prior to the January 1, 2025 deadline, if required. Entities formed in 2024 should be mindful of the same considerations upon formation, given the requirement to report within **90** days of formation. For many entities, determinations on exemptions and who is considered a beneficial owner will require a fact-intensive legal review and will require consultation with counsel. We encourage you to reach out with any questions.

Key Contacts

Feel free to contact one of the lawyers listed below if you would like additional information regarding the Corporate Transparency Act.

David P. LaGalia
Co-Chair, Corporate

D 212.735.8772
dlagalia@morrisoncohen.com

Brian R. Forman
Chair, Investment Funds & Advisers

D 212.735.8744
bforman@morrisoncohen.com

Jess Gorski
Associate

D 212.735.8785
jgorski@morrisoncohen.com

Randi Mason
Co-Chair, Corporate

D 212.735.8643
rmason@morrisoncohen.com

Tracy Sigal
Senior Counsel

D 212.735.8851
tsigal@morrisoncohen.com

Michael T. Wasenius
Associate

D 212.735.8801
mwasenius@morrisoncohen.com

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