

Notable Requirements Under FinCEN's Final Rule Implementing the Corporate Transparency Act Reporting Framework

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The material set forth below was developed before the 2024 and 2025 district court injunctions regarding the CTA (which were subsequently stayed and continue to be litigated). As a result, the material set forth below, including filing deadlines, may not be current. Please consult FinCEN's [website](#) for the latest filing due dates and other information regarding the CTA and its requirements.

This article has been updated as of November 30, 2023.

The Financial Crimes Enforcement Network (FinCEN) has published a final rule, implementing Section 6403 of the Corporate Transparency Act (CTA), with sweeping beneficial owner and company applicant reporting requirements that will impact businesses of various sizes and structures. All businesses will need to know these regulations to assess the reporting requirements applicable to each entity within a given business's organizational structure.

Background and Basic Framework

The CTA was enacted as part of the Anti-Money Laundering Act of 2020 in the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, which became law on January 1, 2021. FinCEN published a Notice of Proposed Rulemaking on the reporting requirements in December 2021, and published the [final rule](#) on September 30, 2022. The rule becomes effective on January 1, 2024.

FinCEN has described the new reporting requirements as "intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on entities doing business in the United States." It has also stated that the regulations will "support the growing international consensus" toward improved transparency of beneficial ownership and will prompt foreign jurisdictions to take similar measures.

In conjunction with the implementation of the new reporting rules, FinCEN is also developing the Beneficial Ownership Secure System (BOSS), a nonpublic database that will house the reported information.

Who Must Report?

The regulations apply to domestic and foreign reporting companies. A "domestic reporting company" is any entity

that is a corporation, limited liability company, or created by the filing of a document with a secretary of state or any similar office under the law of a state (defined to include any state of the United States, the District of Columbia, and all other commonwealths, territories, or possessions of the United States) or Indian tribe. A “foreign reporting company” is any entity that is a corporation, limited liability company, or other entity formed under the law of a foreign country and 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.

Any entity that fits into one of these definitions and does not meet an exemption (more on exemptions below) must report.

What Must Be Reported?

An initial report filed with FinCEN must include the following information for the reporting company:

- Full legal name;
- Any trade name or d/b/a;
- Complete current address;
- Jurisdiction of formation (and state or tribal jurisdiction where the company first registers, if a foreign reporting company); and
- Tax identification number.

Each reporting company must also provide the following information for every beneficial owner (each entity will have at least one beneficial owner), and each reporting company created on or after January 1, 2024 must also provide the following information for the company applicant (the individual who files an application to form a domestic entity or first register a foreign entity to do business):

- Full legal name;
- Date of birth;
- Complete current address;
- Unique identifying number and the issuing jurisdiction from one of the following documents:
 - Nonexpired passport issued by the United States (or by a foreign government if the individual does not possess any of the other applicable documents),
 - Nonexpired identification document issued by a state, local government, or Indian tribe,

- Nonexpired driver's license; and
- Image of the applicable document above.

Reporting companies must also submit updated reports within 30 days of any change to the required (reported) information concerning the company or its beneficial owners.

When Are Reports Due?

Domestic reporting companies created before January 1, 2024 and entities that became foreign reporting companies before January 1, 2024 will have until January 1, 2025 to file an initial report.

An entity created or becoming a foreign reporting company on or after January 1, 2024 but before January 1, 2025 must file an initial report within 90 calendar days after the earlier of (1) the date on which it receives notice of creation or registration to do business (in the case of foreign reporting companies) or (2) the date on which a secretary of state or similar office publishes notice of its creation or registration to do business (in the case of foreign reporting companies). The deadline for reporting companies formed or registered on or after January 1, 2025 is 30 days. Initially the 30-day deadline was set to apply to all reporting companies formed or registered on or after January 1, 2024, but on September 28, FinCEN published a Notice of Proposed Rulemaking in which it proposed to extend the original deadline from 30 days to 90 days for entities created or registered during 2024.

On November 29, FinCEN adopted that proposed rule. Thus, reporting companies created or registered in 2024 will have 90 calendar days from the date of receiving actual or public notice of their creation or registration becoming effective, to file their initial reports. The extension allows reporting companies more time to understand the new regulations in order to better comply with the requirements.

What Are the Penalties for Noncompliance?

Noncompliance with the reporting requirements — including failing to report complete or updated beneficial ownership information as required or reporting false or fraudulent information — can trigger a civil penalty of up to \$500 per day and criminal penalties, including up to \$10,000 in fines, imprisonment for up to two years, or both.

Who Is Exempt?

While the definition of “reporting company” is extremely broad, the regulations provide for 23 exemptions to the definition and thus the reporting requirements.

FinCEN has explained that the CTA is intended to target “generally smaller, more lightly regulated entities that may not be subject to any other BOI reporting requirements.” Therefore, many of the exemptions are directed toward more heavily regulated entities, with the goal of avoiding duplicative reporting requirements for those entities.

The 23 categories of exemptions from the definition of “reporting company” are as follows:

1. Securities reporting issuer;
2. Governmental authority;
3. Bank;
4. Credit union;
5. Depository institution holding company;
6. Money services business;
7. Broker or dealer in securities;
8. Securities exchange or clearing agency;
9. Other Exchange Act registered entity;
10. Investment company or investment adviser;
11. Venture capital fund adviser;
12. Insurance company;
13. State-licensed insurance producer;
14. Commodity Exchange Act registered entity;
15. Accounting firm;
16. Public utility;
17. Financial market utility;
18. Pooled investment vehicle;
19. Tax-exempt entity;
20. Entity assisting a tax-exempt entity;
21. Large operating company;
22. Subsidiary of certain exempt entities; and

23. Inactive entity.

Businesses should review the specific requirements of applicable exemptions in determining whether they qualify. Two exemptions that will be of interest to many businesses are the large operating company exemption and the subsidiary exemption.

A qualifying large operating company is an entity that:

- Employs more than 20 full-time employees in the United States;
- Has an operating presence at a physical office within the United States; and
- Filed a federal income tax or information return in the United States for the previous year, demonstrating more than \$5 million in gross receipts or sales.

A qualifying exempt subsidiary is any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more of the following subset of categories of exempt entities: securities reporting issuer, governmental authority, bank, credit union, depository institution holding company, broker or dealer in securities, securities exchange or clearing agency, Exchange Act registered entity, investment company or investment adviser, venture capital fund adviser, insurance company, state-licensed insurance producer, Commodity Exchange Act registered entity, accounting firm, public utility, financial market utility, tax-exempt entity, and large operating company.

If a company is wholly owned, directly or indirectly, by an entity in one of these categories, then that subsidiary will also be exempt. As an example, all wholly owned subsidiaries within the organizational structure of an exempt public company (*i.e.*, a securities reporting issuer) will be exempt from the reporting requirements.

However, further analysis will be required in cases where a public company (or other exempt entity) does not own 100% of the equity of a subsidiary. In those cases, companies must determine whether the other owner(s) are also exempt for the subsidiary to qualify for this exemption.

Determining Beneficial Owners

“Beneficial owner” is defined to mean “any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25% of the ownership interests of such reporting company.”

Substantial Control

In the first prong, “substantial control” is defined such that an individual exercises substantial control over a reporting company if the individual:

- Serves as a senior officer of the reporting company;
- Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar governing body);
- Directs, determines, or has substantial influence over important decisions made by the reporting company, including seven specific decisions listed in the regulations); or
- Has any other form of substantial control over the reporting company.

Substantial control can be exercised directly or indirectly, including as a trustee of a trust or similar arrangement through:

- Board representation;
- Ownership or control of a majority of the voting power or voting rights of the reporting company;
- Rights associated with any financing arrangement or interest in a company;
- Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
- Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- Any other contract, arrangement, understanding, relationship, or otherwise.

Ownership Interest

For the second prong, the term “ownership interest” includes equity and other types of interests (including but not limited to profits interests, convertible instruments, and options) as more fully defined in the rule. An individual can own or control ownership interests, directly or indirectly, through a number of arrangements more fully discussed in the rule (including, but not limited to, joint ownership, acting on behalf of another individual, in certain roles regarding a trust or similar arrangement, and through ownership or control of intermediary entities).

FinCEN stated an expectation that each reporting company will have at least one beneficial owner. Note that senior officers are deemed to exercise substantial control under the rule, and “senior officer” is defined to include “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.”

Key Takeaways

Companies should review the final rule and adopting release to aid in the facts and circumstances analyses required to determine which companies within an organizational structure are reporting companies, which are exempt, and the relevant beneficial owners of any reporting companies.

Companies will also need to develop internal processes to ensure compliance with the rule on an ongoing basis. Compliance will be a consideration in a variety of contexts, such as joint venture arrangements and in conducting due diligence on potential merger or acquisition targets.

Lastly, FinCEN has indicated that it will publish additional guidance to assist companies with compliance with the rule. It has created a beneficial ownership information website to host these resources at <https://www.fincen.gov/boi>. In September, it published updated FAQs and a Small Entity Compliance Guide, which includes various flow charts, tables, and hypothetical scenarios that are meant to assist members of the small business community. Companies should review any such future guidance produced by FinCEN, as it may provide important additional clarifications about the rule.

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