

Alert | Financial Regulatory & Compliance



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Beneficial Ownership Reporting Requirements: FinCEN Issues Final Rule for Implementation of Corporate Transparency Act

Go-To Guide:

- Final Rule requires U.S. entities and foreign entities registered to conduct business in the U.S. to report beneficial ownership information to FinCEN unless they meet an enumerated exception.
- Beneficial owners include each individual who, directly or indirectly, either (1) exercises substantial control over a reporting company, or (2) owns or controls at least 25% of the ownership interests of a reporting company.
- Individuals who create a reporting entity also are required to report personal identifying information to FinCEN.
- The Final Rule takes effect Jan. 1, 2024.

On Sept. 29, 2022, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued a **final rule** (Final Rule) implementing the beneficial ownership information (BOI) reporting provisions of the Corporate Transparency Act (CTA). The CTA is part of the **Anti-Money Laundering Act of 2020** (AML Act) and through the Final Rule, establishes BOI reporting requirements for certain types of corporations, limited liability companies, and other similar entities created or

registered to do business in the United States. The Final Rule largely adopts the language of the proposed rule that FinCEN published in December 2021, with certain discrete modifications to address comments from industry members, some of which are discussed below.

As FinCEN notes in its [press release](#), the Final Rule is intended to enhance the ability of FinCEN and other agencies to protect the U.S. financial system from illicit use, responding to criticism from the international community, including the Financial Action Task Force (FATF), that anonymous shell companies pose a systematic threat to the U.S. anti-money laundering (AML) regime. In the preamble to the Final Rule, FinCEN explains that the United States will now join at least 30 other countries that have implemented some form of central register of beneficial ownership information in the interests of enhanced transparency.

The Final Rule takes effect Jan. 1, 2024.

The Final Rule addresses, among other things: (1) which entities must report BOI (and which are exempt); (2) who is a beneficial owner (and who is not a beneficial owner); (3) who is a company applicant; (4) what information reporting companies must provide; and (5) when reporting companies must report. This GT Alert provides an overview of each of these five categories.

Which Entities Must Report BOI?

The Final Rule requires the following domestic and foreign companies (collectively, “reporting companies”) to report BOI to FinCEN:

- **Domestic reporting companies:** Any corporation, limited liability company (LLC), or other similar entity created by the filing of a document with a secretary of state or similar office of a state or Indian tribe.
- **Foreign reporting companies:** Any corporation, LLC, or other entity formed under the laws of a foreign country **registered to do business** in any U.S. state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office.

In a [factsheet](#) FinCEN published concurrently with the Final Rule, FinCEN stated it expects these reporting companies to include limited liability partnerships, limited liability limited partnerships, business trusts, and most limited partnerships, in addition to corporations and LLCs, as such entities are generally created by a filing with a secretary of state or similar office.

Reporting Company Exemptions: Despite the broad scope of legal entities under the Final Rule’s definition of a reporting company, 23 types of entities are exempt from the definition of “reporting company” (each an “Exempt Entity”), including:

- issuers of a class of securities registered under section 12 of the Securities Exchange Act of 1934 **or** that are required to file supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934;
- entities already required to disclose BOI publicly or to federal regulators – e.g., banks, credit unions, depository institution holding companies, insurance companies, registered money services businesses, broker/dealers, investment companies, investment advisers, certain venture capital fund advisers, and exchange or clearing agencies;
- pooled investment vehicles operated or advised by a bank, a credit union, a broker/dealer, an investment company or investment advisor, or an exempt venture capital fund adviser;

- registered entities as defined in section 1a of the Commodity Exchange Act, including futures commission merchants, introducing brokers, swap dealers, major swap participants, commodity pool operators, or commodity trading advisors;
- public accounting firms registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002;
- state-licensed insurance producers subject to supervision by the insurance commissioner or a similar official or agency of a U.S. state and that have an operating presence at physical offices within the United States;
- certain tax-exempt entities, including (i) 501(c)-tax exempt entities, (ii) political organizations, as defined in section 527(e)(1) of the U.S. Internal Revenue Code (Code), and (iii) trusts described in paragraph (1) or (2) of section 4947(a) of the Code, and entities that operate exclusively to provide financial assistance to, or hold governance rights over, the tax-exempt entities listed in this paragraph;
- any entity whose ownership is controlled or wholly owned, directly or indirectly, by an Exempt Entity. FinCEN notes that this exemption **does not** apply to entities partially owned by an Exempt Entity. Notably, in the Final Rule, FinCEN **excluded** from this “subsidiary exemption” the subsidiaries of (i) money services businesses, (ii) pooled investment vehicles, (iii) entities that assist a tax-exempt entity, and (iv) certain inactive entities; and
- **large operating companies**, which include **any entity** that: (1) employs more than 20 employees on a full-time basis in the United States; (2) filed in the previous year federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales, excluding gross receipts or sales from sources outside the United States; **and** (3) has an operating presence at a physical office within the United States.

Clarifications to the “large operating company” exemption.

With respect to the “large operating company” exemption, FinCEN largely adopts into the Final Rule the clarifications included in its original [proposed rule](#) as follows:

- **Full-time employee:** The Final Rule references the Internal Revenue Service definition of full-time employee, which definition generally counts anyone employed an average of at least 30 service hours per week or 130 service hours per month, with adaptations for non-hourly employees. FinCEN has declined to permit companies to consolidate employee headcount across affiliated entities; the entity in question must have the requisite 20 employees.
- **Federal Income Tax Filing:** Regarding the \$5,000,000 filing threshold, FinCEN makes clear that the relevant filing may be a federal income tax or information return in the United States, and that the \$5,000,000 must be reported as gross receipts or sales (net of returns and allowances) on the reporting entity’s IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120-S, IRS Form 1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined under federal income tax principles.
- **United States Presence:** Under the Final Rule, an entity with an “operating presence at a physical office within the United States” is one for which a physical office is owned or leased by such entity, and that such office is physically distinct from the place of business of any other unaffiliated entity. The Final Rule eliminates the proposed rule’s limitation of physical offices to those that are “not the place of residency of any individual.” FinCEN recognizes that this change means the large operating company exemption will apply more broadly than it would have under the proposed rule.

Who is a “Beneficial Owner”?

Under the Final Rule, a beneficial owner of a reporting company is “**any individual who, directly or indirectly, exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company.**” (Emphasis added.) The Final Rule defines “substantial control,” “direct or indirect exercise of substantial control,” and “ownership interest” as follows:

- ***Substantial Control:*** The Final Rule sets forth a range of activities that could constitute substantial control of a reporting company, which captures an individual who:
 - holds the position or exercises 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 at the reporting company (each a “senior officer”);
 - has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
 - directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding:
 - the nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
 - the reorganization, dissolution, or merger of the reporting company;
 - major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;
 - the selection or termination of business lines or ventures, or geographic focus, of the reporting company;
 - compensation schemes and incentive programs for senior officers;
 - the entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;
 - amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or
 - has any other form of substantial control over the reporting company.

FinCEN notes in the Final Rule that the reference to “substantial control” in this last provision is meant to cover varying and flexible governance structures, such as series LLCs and decentralized autonomous organizations, for which different indicators of control may be relevant.

- ***Direct or Indirect Exercise of Substantial Control:*** The Final Rule clarifies that an individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company 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 (formal or informal) with other individuals or entities acting as nominees; or
 - any other contract, arrangement, understanding, relationship, or otherwise.
- **Ownership Interest:** The Final Rule provides standards and mechanisms for determining whether an individual owns or controls a 25% “**ownership interest**” in a reporting company, which is defined as:
 - any equity, stock, or similar instrument; preorganization certificate or subscription; or transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights;
 - any capital or profit interest in an entity;
 - any **instrument convertible**, with or without consideration, into any share or instrument described in the preceding two clauses, any **future** on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described in the preceding two clauses, regardless of whether characterized as debt;
 - any put, call, straddle, or other option or **privilege of buying or selling** any of the items described in the preceding three clauses (unless such option or privilege is created and held by a third party without the knowledge or involvement of the reporting company); or
 - any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

In the Final Rule, FinCEN clarifies that the catch-all provision included in the definition of “ownership interest” is designed to ensure that any individual or entity that establishes an ownership interest in a reporting company through a contractual or other relationship not otherwise described in the definition is subject to the beneficial owner reporting requirements.

Additionally, the Final Rule defines “**ownership or control of ownership interest**” to address means through which a beneficial owner can “own or control” a reporting company, specifically providing that an individual may “directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise,” including through joint ownership, nominees, intermediaries, custodians, agents, trust arrangements or ownership or control of one or more intermediary entities, that separately or collectively own or control ownership interests of the reporting company.

Moreover, the Final Rule provides certain methods to calculate and determine whether an individual owns or controls at least 25% of the ownership interest of a reporting company, including:

- for **corporations, entities taxed as corporations, and other entities that issue shares of stock**, the applicable ownership percentage is calculated based on a “vote or value” approach, under which an individual’s percentage of ownership interests is the greater of: (1) the total combined voting power of all classes of ownership interests of the individual as a percentage of total outstanding voting

power of all classes of ownership interests entitled to vote, or (2) the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests; and

- for **entities that issue capital and profit interests** (including entities treated as partnerships for tax purposes), the individual’s total capital and profit interests are compared to the total outstanding capital and profit interests of the reporting company.

Who is Not a “Beneficial Owner”?

The Final Rule exempts the following individuals from the definition of “beneficial owner”:

- a minor child (as defined under state law or Indian tribe laws where the reporting company is formed or first registered; *provided* the reporting company reports the required information regarding a parent or legal guardian of the minor child);
- an individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;
- an individual acting solely as an employee of a reporting company (excluding senior officers);
- an individual whose only interest in a reporting company is a future interest through a right of inheritance; and
- creditors of a reporting company.

Who is a Company Applicant?

A “company applicant” is defined under the Final Rule to be the individual who directly files the document that forms a U.S. entity or first registers a foreign entity to do business in the United States. In addition, for both domestic and foreign reporting companies, the individual primarily responsible for directing or controlling such filing is also considered a company applicant, if more than one individual is involved.

Notably, the Final Rule does not **require entities created before the effective date of Jan. 1, 2024, to report company applicant information**. Additionally, under the Final Rule, while newly created entities are required to report company applicant information, they are not required to update such information.

What Information Must be Reported?

Under the Final Rule, reporting companies must submit to FinCEN an initial report identifying information for the reporting company itself, each of its beneficial owners and, for entities created after the Jan. 1, 2024, effective date, information of its company applicant(s). This initial report must include:

- Reporting Company:
 - the full legal name and any trade name or “doing business as” name of the reporting company;
 - the complete current address, which can be either (i) the street address of a reporting company with a principal place of business in the United States or (ii) the street address of the primary location in the United States where the reporting company conducts business;
 - the State, Tribal, or foreign jurisdiction of formation or initial registration of the reporting company; and

- the Internal Revenue Service Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the reporting company or, for foreign reporting companies that have not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.
- Beneficial Owners and Company Applicants:
 - the full legal name of the individual;
 - the date of birth of the individual;
 - a complete current address consisting of (i) the street address of the business in the case of company applicants, or (ii) the individual’s residential street address for all other cases;
 - a unique identifying number and issuing jurisdiction from (i) a non-expired photo identification document issued to the individual by the United States government, State, local government or Indian tribe (e.g., a passport or driver’s license) or (ii) a non-expired passport issued by a foreign government if the individual does not possess any of the foregoing documents; and
 - an image of the identification document described above.

Special Rule:

If an individual is a beneficial owner of a reporting company exclusively by virtue of that individual’s ownership interest in one or more Exempt Entities that have a direct or indirect ownership interest in the reporting company, then the report may include the names of the Exempt Entity or Entities in lieu of the BOI of the individual. This option does not apply to an individual who exercises substantial control over a reporting company through one or more Exempt Entities; these individuals must be reported.

FinCEN Identifiers

A FinCEN Identifier (FinCEN ID) is a unique identifying number that FinCEN will issue to individuals or reporting companies **upon request**, subject to certain conditions. For individuals, FinCEN will issue a FinCEN ID if an individual submits to FinCEN the same BOI as is required from a beneficial owner or company applicant (i.e., the individual’s full legal name, date of birth, current residential or business street address, and a unique identifying number from an acceptable identification document). 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.

FinCEN will allow a reporting company to use an individual or entity’s FinCEN ID *in lieu* of providing BOI with respect to such individual or entity.

When Would an Entity Need to Report?

The Final Rule takes effect Jan. 1, 2024. Therefore, reporting companies will be required to comply with the following timeframes:

- **One Year for Existing Companies:** Domestic reporting companies created, or foreign reporting companies registered to do business in the United States before, Jan. 1, 2024, must file their initial report with FinCEN *no later than Jan. 1, 2025*.
- **30 Calendar Days for New Companies:** Domestic reporting companies created, or foreign reporting companies registered to do business in the United States, *on or after Jan. 1, 2024*, must file their

initial report with FinCEN within 30 calendar days of the date when they are effectively created or registered.

- **30 Calendar Days for Companies no longer exempt:** Any entity that no longer meets the criteria to remain an Exempt Entity must file a report within 30 calendar days of the date when it no longer meets the criteria for an exemption.
- **30 Calendar Days for Updates:** Reporting companies will have 30 calendar days to file an updated report if there is a change in the information previously reported to FinCEN.
- **30 Calendar Days for Error Corrections:** If a reporting company filed a report containing information that was inaccurate at the time of filing, and such information remains inaccurate, the reporting company must file a corrected report within 30 calendar days of the date it becomes aware, or has reason to know, that the information is inaccurate.

Failure to comply with the reporting requirements of the Final Rule can result in the imposition of civil money penalties ranging from \$25,000 to \$250,759 (*see* 31 C.F.R. § 1010.821), depending on the nature of the violation, and criminal liability (*see* 31 C.F.R. § 1010.840(d)). The Final Rule indicates that a person is responsible for a willful violation of the reporting requirements if the person caused the failure to report or is a senior officer of the reporting entity at the time of the violation.

Additional Rulemaking and Guidance

The Final Rule is one of three rulemakings planned to implement the CTA. FinCEN will engage in additional rulemakings to: (1) establish rules for who may access BOI, for what purposes, and what safeguards will be required to ensure the information is secured and protected; and (2) revise FinCEN's customer due diligence (CDD) rule to bring it into conformance with the CTA.

FinCEN continues to develop the infrastructure to administer the Final Rule's requirements, including the information technology system that will be used to store BOI in accordance with the strict security and confidentiality requirements of the CTA and the information technology system that will be used to store beneficial ownership information: the Beneficial Ownership Secure System (BOSS).

In addition, in advance of the Final Rule's effective date, FinCEN will publish in the Federal Register for public comment the reporting forms that will be used to comply with the obligations under the Final Rule. FinCEN also has indicated it intends to prioritize education and outreach to ensure all reporting companies and individuals are aware of and on notice regarding their reporting obligations. FinCEN will develop compliance and guidance documents to assist reporting companies in complying with the Final Rule.

Conclusion

The AML Act and the CTA substantially changed and modernized the U.S. Bank Secrecy Act (BSA) and related AML laws and regulations. However, because many of the new statutory provisions will require rulemakings, reports, analyses, and other measures, its full impact remains to be seen and may be slowly realized over the next few years.

Nonetheless, the Final Rule is a significant step in the implementation of this enhanced BSA/AML regulatory framework. As noted above, with the Final Rule, the United States now joins at least 30 other countries that have implemented some form of central register of beneficial ownership information. Entities that may qualify as reporting companies under the Final Rule should prepare their stakeholders,

including boards of directors, foreign affiliates, and BSA/AML compliance personnel, for these changes so they can begin to evaluate how the Final Rule may impact their day-to-day operations well in advance of the effective date.

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