

Alert | Financial Regulatory & Compliance



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Corporate Transparency Act: Compliance Deadline Approaching for FinCEN's Beneficial Ownership Information Reporting Requirements

Go-To Guide:

- The CTA will require certain U.S. legal entities and foreign entities registered to do business in the United States to report information about themselves, their beneficial owners, and company applicants.
- The CTA takes effect **Jan. 1, 2024**. Entities created before that date will have until Jan. 1, 2025, to file their beneficial ownership information report with FinCEN.
- FinCEN published a Small Entity Compliance Guide to assist the small business community in complying with the beneficial ownership information reporting rule.
- To give reporting companies more time to understand the new reporting obligation, FinCEN has proposed to extend the initial filing deadline for beneficial ownership reports from **30 to 90 days** for entities created or registered on or after Jan. 1, 2024, and before Jan. 1, 2025.
- FinCEN has also published proposed forms to submit beneficial ownership information and request FinCEN Identifiers (unique numbers that can be used to expedite the submission of BOI reports). Comments on these forms are due Oct. 30, 2023.

The Corporate Transparency Act of 2019 (CTA), enacted as part of the Anti-Money Laundering Act of 2020, requires, for the first time, that certain U.S. legal entities and foreign entities registered to do business in the United States disclose information regarding their beneficial owners and persons who register or form them to the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN). On Sept. 29, 2022, FinCEN published a [final rule \(Final Rule\)](#) implementing the beneficial ownership information (BOI) reporting provisions of the CTA.¹ Now one year later, FinCEN has published proposed rules and guidance to implement the BOI reporting requirements of the CTA, as described below.

The Final Rule takes effect Jan. 1, 2024. “Reporting Companies” created or registered before the effective date have until Jan. 1, 2025, to file their BOI report with FinCEN.

Which Entities Are “Reporting Companies”?

The following U.S. and foreign legal entities (collectively, “Reporting Companies”) must file BOI reports with 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 U.S. state (including any commonwealth, territory, or possession of the United States) or Indian tribe, unless exempt under the CTA.
- **Foreign Reporting Companies:** Any legal entity (e.g., corporations, LLCs, or other similar entities) formed under the laws of a foreign country that is *registered to do business* in any state within the United States, unless exempt under the CTA.

Reporting Company Exemptions

Despite the broad inclusion of legal entities under the CTA’s definition of Reporting Company, 23 entity types are exempt from reporting BOI to FinCEN (each an “Exempt Entity”), including:

- large operating companies, which is any entity that: (1) has an operating presence at a physical office within the United States; (2) employs more than 20 employees on a full-time basis (at least 30 service hours/week) in the United States; and (3) filed in the previous year U.S. federal income tax returns demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate in the United States (whether individually or on a group consolidated basis);
- issuers of a class of securities registered under section 12 of the Securities Exchange Act of 1934 (**1934 Act**) or that are required to file supplementary and periodic information under section 15(d) of the 1934 Act;
- certain entities already required to disclose BOI publicly or to federal regulators – e.g., national and state-chartered banks, federal and state credit unions, depository institution holding companies, insurance companies, money services businesses registered with FinCEN, broker-dealers registered pursuant to Section 15 of the 1934 Act, SEC-registered investment companies, SEC-registered investment advisers, and registered exchanges or clearing agencies registered pursuant to Sections 6 or 17A of the 1934 Act;

¹ GT covered the Final Rule in detail in a previous [GT Alert](#).

- pooled investment vehicles operated or advised by a national or state-chartered bank, federal or state credit union, registered broker-dealer, SEC-registered investment company or SEC-registered investment adviser, or an exempt venture 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, commodity trading advisers or retail foreign exchange dealers;
- 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;
- certain inactive entities with no assets and limited transaction activity; and
- any entity whose ownership is controlled or wholly owned, directly or indirectly, by an Exempt Entity. This exemption *does not* apply to entities only partially owned by an Exempt Entity, nor to subsidiaries of (i) money services businesses; (ii) pooled investment vehicles; (iii) entities that assist a tax-exempt entity; and (iv) certain inactive entities.

A full list of Exempt Entities can be found in [31 C.F.R. § 1010.380\(c\)\(2\)](#).

Who Is a “Beneficial Owner”?

The Final Rule defines “beneficial owner” of a Reporting Company as “any individual who, directly or indirectly, exercises *substantial control* over such [R]eporting [C]ompany or owns or controls at least 25% of the *ownership interests* of such [R]eporting [C]ompany.”

Substantial Control

The following individuals are deemed to have “substantial control” over a Reporting Company:

- *Senior Officers*: 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.²
- *Appointment or Removal Authority*: individuals who have authority to appoint or remove any senior officer or a majority of the board of directors or similar.
- *Important Decision-Makers*: individuals who are important decision-makers. FinCEN has identified a non-exclusive list of decisions that may signify control, including but not limited to decisions on major expenditures, reorganizations, and entry or termination of “significant” contracts.
- “*Catch-All*”: individuals who have any form of substantial control over the Reporting Company, including control exercised in new and unique ways.

² FinCEN has noted in its [FAQs](#) that individuals who manage a Reporting Company’s day-to-day operations as part of a service offered by an unaffiliated company may qualify as beneficial owners.

Direct and Indirect Substantial Control

Individuals may exercise substantial control over a Reporting Company either directly or indirectly. Examples of direct ways to exercise substantial control include (i) board representation (that must be considered on a director-by-director basis); (ii) ownership or control over a majority of voting power or voting rights; and (iii) rights associated with financing or interest.

Examples of indirect ways to exercise substantial control include (i) controlling one or more intermediary entities that separately or collectively exercise substantial control over the Reporting Company; and (ii) through arrangements or financial or business relationships with other individuals or entities acting as nominees.

Reporting Companies are required to identify **all** individuals who exercise *substantial control*, and there is no limit to the number of individuals who must be reported.

“Ownership Interest”

FinCEN provides standards and mechanisms for determining whether an individual owns or controls a 25% “ownership interest” in a Reporting Company. This ownership interest may be held by way of equity, stock, or voting rights; capital or profit interest; convertible instruments; option or privilege; or any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

Direct and Indirect Ownership Interests

Individuals may directly or indirectly own or control ownership interests in a Reporting Company. Examples of *direct* ways to own or control ownership interests include joint ownership with one or more other persons of an undivided interest in an ownership interest. Examples of *indirect* ways to own or control ownership interests include owning or controlling intermediary entities that separately or collectively own or control ownership interests of a Reporting Company, and owning or controlling ownership interests through another individual acting as a nominee, intermediary, custodian, or agent.

Who Is NOT a “Beneficial Owner”?

FinCEN exempts the following individuals 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 (the actual beneficial owner must still be reported); (iii) an individual acting solely as an employee of a Reporting Company (*excluding* senior officers); (iv) an individual whose only interest in a Reporting Company is a future interest through a right of inheritance; and (v) creditors of a Reporting Company.

Who Is a “Company Applicant”?

The CTA requires Reporting Companies to disclose not only their beneficial owners but also their “company applicant(s).” The Final Rule defines a “company applicant” as 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. The individual primarily responsible for directing or controlling such filing (if different) is also considered a company applicant. All company applicants must be individuals. **Companies or legal entities cannot be company applicants.**

Notably, any reporting company created *before* Jan. 1, 2024, is not required to report its company applicants.

What Information Must be Reported?

- **Reporting Company.** Reporting Companies must disclose their (i) full legal name and any trade name or “doing business as” name; (ii) current address; (iii) jurisdiction of formation/registration; and (iv) Internal Revenue Service Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) 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.** Beneficial Owners and Company Applicants must disclose (i) for individuals, full legal name and date of birth; and (ii) a complete current address consisting of (a) for individuals, their residential street address; and (b) business street address for company applicants.

Beneficial Owners and Company Applicants must also provide the image of, and an identifying number and issuing jurisdiction, from one of the following unexpired documents: (a) passport; (b) state driver’s license; (c) identification document issued by a state, local government, or tribe; or (d) if an individual *does not* have any of the previous documents, a foreign passport.

When and How Must Reporting Companies File Their Initial BOI Report?

Initial BOI reports are due to FinCEN as follows:

- Reporting Companies created or registered to do business in the United States *before* Jan. 1, 2024, must file their initial BOI report by **Jan. 1, 2025**.
- Reporting Companies created or registered to do business in the United States *after* Jan. 1, 2024, must file their BOI report due *within 30 days* after receiving actual or public notice that their creation or registration is effective.
- *However*, FinCEN recently published a **Notice of Proposed Rulemaking (NPRM)** to extend this 30-day deadline to **90 days** for Reporting Companies created or registered between **Jan. 1, 2024, and Dec. 31, 2024**. Reporting Companies created or registered on or after Jan. 1, 2025, would have 30 days to file their BOI reports. The stated aim of the proposed extension is to provide these new companies—which represent the first entities required to submit BOI reports—with additional time to understand their obligations under the CTA and to collect the necessary information. The NPRM is still within its comment period (**comments are due to FinCEN by Oct. 30, 2023**).

Proposed BOI Reporting Form

On Sept. 29, 2023, FinCEN published a **30-day notice** in the Federal Register seeking comments on the form that FinCEN intends to use for Reporting Companies to file BOI reports (the **BOIR Form**). This proposal represents a revision to the initial draft of the BOIR Form, which received significant public criticism. The initial BOIR Form included checkboxes that would allow a Reporting Company to indicate if certain information about a beneficial owner or company applicant was “unknown.”

FinCEN is now pursuing a revised approach that will not contain these “unknown” checkboxes. This approach will consist of an initial implementation approach starting Jan. 1, 2024, and a potential alternative approach, which may be adopted a later date following feedback from filers, law enforcement

agencies, and other key stakeholders. In the first approach, FinCEN would require every field of the BOIR Form to be completed (i.e., have responses entered in text boxes), and the BOIR Form could only be submitted once each required field had been filled out. Any field left blank, whether intentionally or accidentally, would prevent the filer from submitting their BOIR Form.

FinCEN's proposed alternative approach would be to provide a drop-down option in the Beneficial Owner(s) section of the BOIR Form that would allow filers to specify one of a few reasons why they were temporarily unable to provide a piece of information about a beneficial owner. FinCEN is considering several drop-down options, including:

- Cannot Contact BO;
- BO Unresponsive;
- BO Refused to Provide; and
- Third Party Refused to Provide.

Drop-down options will not be included in the other sections of the form (i.e., Reporting Company Section and Company Applicant(s) Section).

BOIR Forms that select one of these drop-down options will be accepted into the filing system but will still be considered *incomplete and non-compliant filings*. BOIR Forms will only be considered complete and compliant once the missing information is added.

Written comments on the BOIR Form are due to FinCEN on or before Oct. 30, 2023.

U.S. Treasury's 30-Day Notice for the FinCEN Identifier Application

Similarly, on Sept. 29, 2023, FinCEN published a **30-day notice** in the Federal Register seeking comments on the form application that FinCEN intends to require beneficial owners and company applicants to use to obtain a FinCEN Identifier, a unique identifier that individuals and companies may request from FinCEN to streamline the submission of BOI Reports (the **FinCEN ID Form**). According to FinCEN, the primary reasons for individual beneficial owners to apply for a FinCEN Identifier include data security, where an individual may see less risk in submitting personal identifiable information to FinCEN directly (compared with doing so indirectly through one or more reporting companies), and administrative efficiency (where an individual is likely to be identified as a beneficial owner of numerous reporting companies).

The information required from applicants on the FinCEN ID Form is similar to the information required on the proposed BOIR Form.

Written comments on the FinCEN ID Form are due to FinCEN on or before Oct. 30, 2023.

FinCEN's Compliance Guide and Additional Guidance

On Sept. 18, 2023, FinCEN published a **Small Entity Compliance Guide (Compliance Guide)** in an effort to assist small businesses in complying with BOI reporting requirements. The Compliance Guide addresses, among other things, (i) which entities are "reporting companies" and must file BOI reports (and which are exempt); (ii) who is a "beneficial owner" (and who is not a beneficial owner); (iii) who is a "company applicant"; (iv) what information must be reported; (v) what to do if there are changes or

inaccuracies in any BOI reported information; and (vi) when and how must reporting companies file their initial BOI report.

On Sept. 29, 2023, FinCEN also updated its [FAQs \(BOI FAQs\)](#) with additional guidance on the scope of the reporting requirements. The BOI FAQs were initially published March 24, 2023, to address frequently asked questions on the reporting requirements.

Possibility of Implementation Delays for the Final Rule

Since the enactment of the CTA and FinCEN's promulgation of rules to implement the CTA, both industry groups and legislators have raised concerns and criticism. Most recently, the Chairman of the House Financial Services Committee, Rep. Patrick McHenry (R-NC), introduced legislation to delay implementation of FinCEN's Final Rule. A companion bill was introduced in the Senate by Sen. Mike Rounds (R-SD), a member of the Senate Banking, Housing & Urban Affairs Committee.

The Protecting Small Business Information Act of 2023 (H. R. 4035 / S. 2623) seeks to delay the effective date of the Final Rule, which is currently Jan. 1, 2024, until the Secretary of the Treasury certifies to Congress, and makes such certification available to the public, that all final rules required under the CTA (including the amendments made by such Act) have been issued by the Secretary of the Treasury; and all such final rules will take effect on the same date.

The Final Rule is one of three rulemakings planned to implement the CTA. FinCEN is engaged 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;³ and (2) revise FinCEN's Customer Due Diligence rule to bring it into conformance with the CTA.

H. R. 4035 was introduced to the House of Representatives on June 12, 2023, and S. 2623 was introduced to the Senate on July 27, 2023.

Conclusion

With the CTA's Jan. 1, 2024, effective date approaching, FinCEN will likely continue to issue guidance on its expectations for implementation of, and compliance with, the new requirements. Entities that may qualify as Reporting Companies under the Final Rule should prepare their stakeholders, including boards of directors, foreign affiliates, and Bank Secrecy Act/Anti-Money Laundering 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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³ On Dec. 15, 2022, FinCEN issued a Notice of Proposed Rulemaking implementing the provisions of the CTA that govern access to BOI that FinCEN collects and maintains. That proposed rule is covered in detail in this [GT Alert](#).

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