

Startups: Beneficial Ownership Filings May Be Required After January 1, 2024

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Founders and operators, is your company prepared to report its Beneficial Ownership Information (BOI)? Unless an exemption applies, you may be required under the Corporate Transparency Act (CTA) to identify and report the company's BOI (discussed in further detail below) to the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) beginning January 1, 2024. This rule (the Final Rule) will also apply to foreign entities registered to do business in the U.S.

Startups, early-stage companies, and growth-stage companies should carefully evaluate the applicability of the CTA. In fact, all corporations, limited liability companies, limited liability partnerships, and any other corporate entities formed by a filing with the secretary of state or any other similar office under the laws of any state or Native American Indian tribe are subject to the CTA. This includes both domestic U.S. companies and foreign non-U.S. entities if such a foreign entity is registered to do business in any U.S. state pursuant to a state filing. A company subject to the CTA will be required to file its BOI with FinCEN unless one of the CTA's 23 exemptions to filing BOI applies. One possible exemption that could be relevant for some startups applies if the company has more than \$5 million in gross receipts or sales and more than 20 full-time U.S. employees.

All companies, even companies that believe they are exempt, should discuss next steps with counsel to ensure compliance with the CTA. A proper analysis will require a review of corporate records. Noncompliance may result in civil and criminal penalties—not only for the company but also for the corporate officers who caused the company's noncompliance.

Takeaway for your organization: Regardless of whether a company is exempt from CTA reporting, it will need to adequately document the process leading to that conclusion. Therefore, it is essential to discuss with your counsel soon (given the CTA's January 1, 2024, effective

date) to determine your exemption status and either (i) prepare to disclose the information required by FinCEN or (ii) properly document your exemption status in the event that your entity is required to justify its exemption.

What Information Must Be Reported?

The following information is required to be reported if the entity is determined to be a reporting company (Company Information):²

- Legal name of the entity
- Trade name or "doing business as" name of the entity
- Principal place of business in the U.S.
- Formation jurisdiction
- Tax number (employer identification number or taxpayer identification number)
- BOI for the beneficial owners of the entity

"Beneficial owners" are defined as "any individual who, directly or indirectly, either (1) exercises substantial control over a reporting company or (2) owns or controls at least 25 percent of the ownership interests of [the] reporting company."³ An individual exercises substantial control over a reporting company if they are empowered to act on the entity's behalf. For instance, a company's Chief Executive Officer (CEO), due to his or her decision-making authority, would qualify as a beneficial owner despite owning, if any, less than 25 percent of the reporting company. If a company's Chief Financial Officer (CFO) is a nominal position with little decision-making authority, the reporting company may opt not to report such CFO in favor of an individual with a different title but with increased actual authority. As highlighted by the foregoing, actual authority, not a title with perceived authority, is the prevailing consideration in the analysis of substantial control.⁴ "Ownership interest" is broadly defined to include, among other things, equity, stock, and any other "mechanism used to establish ownership."⁵ It is important to note that, unlike FinCEN's current Customer Due Diligence Rule, all

¹ Special thanks to **Anthony Santiago**, summer associate at Lowenstein Sandler, for his contributions to this alert.

² 31 CFR § 1010.380(b)(1)(i). (The reporting company itself must report its full legal name, address, jurisdiction of formation or registration, and taxpayer identification number).

³ Beneficial Ownership Information Reporting Rule Fact Sheet, <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

⁴ *Id.*

individuals who qualify as beneficial owners, either by control or by ownership, are required to be reported. As an example, both a CEO with substantial control and an individual with a 26 percent equity ownership stake would have to be reported. Despite the wide range of potential beneficial owners, the term does not include minors, agents, creditors, or future interest holders.⁵

Once a reporting company's beneficial owners are identified, the company must report the Company Information and BOI to FinCEN. BOI includes the beneficial owner's:

- Full legal name
- Date of birth
- Residential address
- Unique identifying number from a passport or accepted identification card

In addition, reporting companies created after January 1, 2024 must provide a scanned image of the document depicting the unique identifying number of the beneficial owner(s). Willful failure to report accurate BOI may result in civil and criminal penalties. Companies should implement controls to ensure reports are updated within regulatory timelines.

Next Steps

Reporting companies created or registered before January 1, 2024 will have until January 1, 2025 to file their initial BOI reports. Reporting companies created or registered after January 1, 2024 will have 30 calendar days from creation/registration to file their initial BOI reports. All reporting companies are required to file updated reports within 30 calendar days of any change to BOI or Company Information.

The Final Rule is the first of multiple anticipated rulemakings that will implement the CTA's reporting requirements. FinCEN is expected to issue guidance on (1) access to reporting companies' BOI and safeguards intended to maintain the highest levels of data protection and oversight and (2) amendments to its existing rules to better align with the Final Rule's requirements.

Who Can Access the Information?

The BOI and Company Information will be housed in FinCEN's Beneficial Ownership Secure System (BOSS). Current prevailing guidance indicates that the BOI will be confidential, and the information will not be accessible through Freedom of Information Act requests. Reporting companies should expect their BOI and Company Information to be accessed only via the BOSS, in limited circumstances, and by limited parties as follows:

- Federal agencies, only when furthering national security, intelligence, or law enforcement activities
- State, local, and tribal agencies, as part of criminal or civil investigations if authorized by a court of competent jurisdiction
- Foreign governments, only to the extent requests are made by a foreign law enforcement agency, prosecutor, or judge, and such request is approved by FinCEN

- Certain financial institutions seeking to comply with customer due diligence requirements if they have permission from the reporting company in question

The foregoing is subject to change as new final rules are issued.

How Can You Prepare Prior to January 1, 2024?

The deadline is fast approaching; therefore, we strongly recommend that companies discuss this with their counsel to implement a process for registration and reporting. Startups and growth companies in particular should consider taking the following steps:

- Create an action plan for registration and reporting. Companies incorporated prior to January 1, 2024, will have until January 1, 2025, to register and report.
- With an action plan in place, companies should consult with internal stakeholders and in-house/outside counsel regarding reporting obligations or applicable exemptions.
- Where exemptions are not available, companies must prepare the required BOI and Company Information for the FinCEN report. Ownership determination may require detailed analysis from multiple sources to establish ownership percentage, in addition to determining individuals with actual authority to substantially control the reporting company. Depending upon ownership complexity, the foregoing analysis may require significant time and resources.
- Once all owners/controllers are identified, their BOI will need to be collected for reporting purposes and maintained in a secure manner in accordance with relevant privacy and cybersecurity laws.
- Companies with multiple subsidiaries should analyze their organizational structure to identify each potential reporting company and begin the exemption analysis on an entity-by-entity basis.
- Companies should document the foregoing processes in their anti-money laundering programs and include protocols for filing with the BOSS and conducting periodic reexaminations of each entity's claimed exemptions or reporting obligations. If any entity in a company's structure ceases to qualify for an exemption and therefore becomes a reporting company, such entity is required to file a report with FinCEN within 30 days of this change. Failure to report such changes may result in civil and criminal penalties.

Conclusion

Lowenstein Sandler is available to assist our clients with determining the applicability of any exemptions to the definition of reporting company, identifying beneficial owners, and generally ensuring compliance with the CTA, including preparing reports and offering training to your compliance and operations teams. We encourage our clients to review the CTA and additional guidance, begin discussions to determine exemption status and/or prepare for reporting, and assess how FinCEN's Final Rule may otherwise impact your operations.

⁵ 31 CFR § 1010.380(d)(2)(i)(E).

⁶ *Id.* § 1010.380(d)(3).

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