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Financial Crimes Enforcement Network Issues Guidance on the “Who, What, When” of Beneficial Ownership Information Reporting Requirements

*By Caroline Brown, Carlton Greene, Anand Sithian, Nicole Sayegh Succar, and Kelsey Clinton**

In this article, the authors discuss public guidance materials released by the Financial Crimes Enforcement Network regarding its new beneficial ownership information reporting requirements.

The Financial Crimes Enforcement Network (FinCEN) has released much-anticipated public guidance materials¹ regarding its new beneficial ownership information reporting requirements, which will take effect January 1, 2024, pursuant to a final rule² promulgated by FinCEN on September 30, 2022 (the BOI Final Rule).³ The BOI Final Rule requires certain U.S. companies and foreign companies registered to do business in the U.S. to file reports with FinCEN that identify the entity’s beneficial owners and the persons who applied to create or register the entity. The BOI Final Rule implements the beneficial ownership information (BOI) reporting provisions of the Corporate Transparency Act (CTA), enacted by Congress as part of the Anti-Money Laundering Act of 2020 in the National Defense Authorization Act for Fiscal Year 2021.

FinCEN’s guidance includes Frequently Asked Questions (FAQs),⁴ which address the questions of who should report, what information must be reported, and when, and sets forth FinCEN’s reasons for collecting this information.

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¹ <https://www.fincen.gov/boi>.

² <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>.

³ 87 Fed. Reg. 59,498.

⁴ <https://www.fincen.gov/boi-faqs>.

WHO IS REQUIRED TO REPORT BENEFICIAL OWNERSHIP INFORMATION TO FINCEN?

FinCEN FAQ #7 explains that “reporting companies,” including a “domestic reporting company” or a “foreign reporting company” are required to report their beneficial ownership information to FinCEN. A “domestic reporting company” is defined as a corporation, limited liability company, or any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe. A “foreign reporting company” is defined as a corporation, limited liability company, or other entity formed under the law of a foreign country, that is also registered to do business in any U.S. state or in any Tribal jurisdiction.

As explained in FAQ #8, the CTA exempts 23 types of entities from the reporting requirements, including, among others (a) “large operating companies” – entities with (1) at least 20 full time employees in the United States, (2) more than \$5,000,000 in annual gross receipts or sales as reported on their prior year’s tax return filed with the Internal Revenue Service, excluding non-U.S. gross receipts or sales, and (3) an operating presence at a physical office within the United States – and their subsidiaries, (b) certain types of: (1) publicly traded companies, (2) banks, (3) money transmitting businesses, (4) insurance companies, and (5) pooled investment vehicles; (c) broker-dealers registered with the SEC, and (d) certain investment companies.

WHAT INFORMATION SHOULD BE IN THE REPORTS SUBMITTED TO FINCEN?

Reporting companies registered before January 1, 2024 must submit:

- Their legal name, any trade names, their address, their jurisdiction of formation, and their Taxpayer Identification Number (TIN); and
- Their “beneficial ownership information,” which FinCEN defines as identifying information (including name, date of birth, address, and a unique identifying number from an identification document, such as a driver’s license or passport) about the individuals who directly or indirectly own or control a company (i.e., the “beneficial owners,” defined further below).

These reporting companies do not need to report similar identifying information on their company applicants.

However, reporting companies registered on or after January 1, 2024, also must report similar identifying information for the persons who applied to create the entity (for domestic entities) or to register it to do business in the U.S. (for foreign entities), or who directed these activities (i.e., the “company applicants,” defined further below).

WHEN MUST REPORTING COMPANIES SUBMIT INFORMATION TO FINCEN?

As part of its guidance, FinCEN also released a timeline⁵ detailing key dates for reporting beneficial ownership information. Reporting companies that are registered to do business in the United States before January 1, 2024 are not required to file their reports until January 1, 2025. Reporting companies created or registered on or after January 1, 2024, must file their reports within 30 calendar days of receiving notice that the company's creation or registration is effective. FinCEN will not accept reports before January 1, 2024.⁶

Additionally, all reporting companies are required to update reports within 30 days if there are any changes to or any inaccuracies found in the information that the companies previously reported.⁷

WHY DOES FINCEN WANT THIS INFORMATION?

In FAQ #2, FinCEN explains that:

Very few U.S. states or territories require companies to disclose information about their beneficial owners – the individuals who own or control companies. This lack of transparency allows criminals, corrupt officials, and other bad actors to hide their identities and launder illicit funds through the United States using shell and front companies. . . . By collecting beneficial ownership information and sharing it with law enforcement, financial institutions, and other authorized users, FinCEN is making it harder for bad actors to hide or benefit from their ill-gotten gains. Companies that report beneficial ownership information will contribute to this important goal.

DEFINITIONS AND OTHER IMPORTANT INFORMATION

The FAQs reprise other key definitions from the BOI Final Rule, including:

- *Beneficial Owner*: as to a reporting company, any individual who (1) directly or indirectly exercises “substantial control” over the reporting company, or (2) directly or indirectly owns or controls 25 percent or more of the “ownership interests” of the reporting company.⁸
- *Substantial Control*: Under the FinCEN BOI rule, a reporting company

⁵ https://www.fincen.gov/sites/default/files/shared/BOI_Reporting_Filing_Dates-Published03.24.23_508C.pdf.

⁶ See FinCEN, FAQ #5.

⁷ BOI Final Rule at 87 Fed. Reg. 59,592.

⁸ BOI Final Rule at 87 Fed. Reg. 59,594.

must identify all individuals with “substantial control” over the reporting company. FinCEN says that an individual will have substantial control of a reporting company if the individual directs, determines, or exercises substantial influence over important decisions the reporting company makes, and also that “any senior officer is deemed to have substantial control over a reporting company.”⁹ This includes a president, chief financial officer, general counsel, chief executive officer, and chief operating officer.

- *Company Applicant*: any individual who (1) (a) directly files the document that creates, or first registers, the reporting company (for a “domestic reporting company”) or (b) directly files the document that first registers the reporting company to do business in the United States (for a “foreign reporting company”), or (2) is primarily responsible for directing or controlling the filing of the relevant document if more than one individual is involved in the filing of the document (for both foreign and domestic reporting companies).¹⁰

FinCEN’s FAQs also clarify that the BOI reported to FinCEN will be stored in a secure IT system – to be built by FinCEN – and only accessible by the following six types of requesters:

- U.S. federal agencies engaged in national security, intelligence, and law enforcement activities;
- State, local, and Tribal law enforcement agencies with court authorization;
- The U.S. Department of the Treasury;
- Financial institutions using beneficial ownership information to conduct legally required customer due diligence, provided the financial institutions have their customer consent to retrieve the information;
- Federal and state regulators assessing financial institutions for compliance with legally required customer due diligence obligations; and
- Foreign law enforcement agencies and certain other foreign authorities who submit qualifying requests for the information through a U.S. federal agency.¹¹

⁹ See FinCEN FAQ #9.

¹⁰ BOI Final Rule at 87 Fed. Reg. 59,596.

¹¹ See FinCEN FAQs #15-16.

Persons with access to FinCEN's Beneficial Ownership Secure System (BOSS)¹² will be subject to strict access requirements and safeguards.

PRACTICAL CONSIDERATIONS AND KEY TAKEAWAYS

Financial institutions and companies in the United States should closely review FinCEN's latest guidance to understand the scope of FinCEN's BOI Final Rule, and consider consulting with counsel regarding its application and exemptions. Other points for financial institutions or companies to consider include:

- With the consent of a reporting company customer, financial institutions may access FinCEN's BOSS system to review beneficial ownership information to meet the financial institution's requirement to conduct customer due diligence. Banks and other financial institutions subject to customer due diligence requirements should plan whether and how they might use this information. For example, such information may provide additional relevant insight about customer risk that regulators may expect financial institutions to utilize either as part of customer onboarding or ongoing customer monitoring.
 - FinCEN has not yet clarified if access to such beneficial ownership information will relieve financial institutions from other traditional diligence activities, consistent with their risk-based anti-money laundering (AML) obligations.
- Financial institutions who plan to access FinCEN's BOSS system should also plan for how they will ensure such information is kept secure and safeguarded from unauthorized access and dissemination. The BOI Final Rule requires substantial security measures to safeguard such information, with potential penalties for failing to maintain appropriate standards.
- Companies should determine whether they are subject to FinCEN's reporting requirements or whether they fit within one of the exemptions. In particular, companies may wish to assess and discuss with counsel whether the following types of associated companies are exempt from reporting under the BOI Final Rule, depending on applicable facts:
 - Affiliates (as opposed to subsidiaries);
 - Associated foreign entities, such as joint ventures; and
 - Single purpose entities (SPEs) or special purpose vehicles (SPVs).

¹² <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

- Companies, particularly those with many subsidiaries or affiliates, may wish to establish a plan to manage the process of identifying which of their associated entities are required to report, whether any exemptions to reporting apply, what information must be gathered, on whom, when and how this will be done in order to meet the required reporting deadlines, and how the enterprise will manage the identification and required reporting of changes to reported information.