

FinCEN Issues Final Rule Implementing Beneficial Owner Reporting Under Corporate Transparency Act

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What You Need to Know

- The U.S. Treasury Department's FinCEN has issued its final Beneficial Ownership Information Reporting Rule pursuant to the Corporate Transparency Act.
- Most business entities will be required to report to FinCEN under the final rule, however numerous exemptions should be considered prior to filing an initial report.
- Compliance and guidance documents, including forms for required reporting, will be forthcoming from FinCEN well in advance of the final rule's January 1, 2024 effective date.

On September 29, 2022, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued its final rule regarding the reporting of beneficial ownership information under the Corporate Transparency Act (CTA). Enacted on January 1, 2021, the CTA is an effort to combat money-laundering schemes by illicit actors whose identities have been or may be obfuscated by the use of shell and front companies. Following the CTA's enactment, FinCEN proposed rules for the implementation of the CTA's beneficial ownership information reporting requirements. The proposed rules were submitted for and subject to broad commentary over the past (almost) two years.

The final Beneficial Ownership Information Reporting Rule provides that entities deemed "reporting companies" must identify and report to FinCEN certain "beneficial owners" and company applicants within a period of time of the entities' formation, with a requirement to update this

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reporting when the beneficial owner information changes. Essential information regarding the terms of the rule follows.

Reporting Companies

Most business entities will be required to report to FinCEN, including:

- Domestic corporations, limited liability companies, or any other entity created by filing a document with a state secretary or similar state official or Indian tribal official – this could include limited liability partnerships, limited partnerships, business trusts, and other similar entities formed by filing documents with a state agency; and
- Foreign corporations, limited liability companies, or other such entities that are registered to do business in any state or tribal jurisdiction.

Despite the multitude of companies with reporting requirements under these definitions, there are 23 types of entities that are exempt from reporting. Among many others, these include banks, companies subject to Securities Exchange Commission (SEC) oversight, and large operational companies, as defined within the Beneficial Ownership Information Reporting Rule. These exemptions are not addressed at length in this Alert however they should be considered prior to filing the initial report, as such filing may not be necessary.

Information for Initial Reporting

The initial report to FinCEN is required to include the following information:

- Full legal name of the reporting company;
- Any trade names or DBAs of the reporting company;
- Complete current address of the reporting company, including the street address of the principal place of business in the United States and the street address of the primary location in the United States in which the reporting company conducts business;
- The state, tribal, or foreign jurisdiction of the reporting company or same with regard to the registration to do business of a foreign reporting company;
- The IRS taxpayer identification number (TIN), including EIN of the company, or, if a foreign entity without a TIN, any tax identification number issued by a foreign jurisdiction and the name of said jurisdiction;
- The “beneficial owners” of the reporting company, including:
 - The full legal name and date of birth of the individual;
 - The individual’s residential street address;
 - A unique identifying number for the individual, and the issuing jurisdiction of same, including possibly a non-expired US passport number; a non-expired identification document issued by a

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state, local, or tribal government; a non-expired driver's license; or a non-expired passport issued by a foreign government – each such document requiring an image to be produced to FinCEN;

- For reporting a company applicant that formed or registered the reporting company as part of the company applicant's business, the street address of the company applicant's business; and
- Names of exempt entities or individuals that are beneficial owners of the reporting company.

Beneficial Owners

With respect to a reporting company, "beneficial owner" is defined as any individual who:

- Directly or indirectly exercises substantial control over the reporting company, *or*
- Owns or controls at least 25% of the ownership interests of the reporting company.

The rule includes five exceptions to these two categories, which generally include minor children; agents on behalf of other individuals; employees that are not senior officers; individuals holding future interests through inheritance rights; and creditors.

"Substantial control" for the purposes of the regulation means that the individual:

- Serves as a senior officer of the reporting company;
- Has authority over the appointment or removal of any senior officer or the majority of the board of directors or similar body;
- Directs, determines, or has substantial influence over important decisions made by the reporting company, including but not limited to decisions regarding company assets, debt, reorganization, dissolution, investments, budgets, business lines, compensation schemes, contracts, and governance; *or*
- Has any other form of substantial control over the reporting company.

The exercise of "substantial control" can be direct or indirect, including as a trustee of a business trust, or, for example, through board representation, ownership or control of majority voting power, rights associated with financial interests in the company, control over an intermediary entity that has substantial control over the reporting company, formal or informal arrangements/relationships whereby the individual acts as a nominee, or "any other contract, arrangement, understanding, relationship, or otherwise."

"Ownership interest" is also broadly defined to include the widest variety of ways in which an individual can "own" a reporting company, including but in no way limited to, through stock or equity; voting trust certificates; capital or profit interests; instruments convertible into shares or other rights to purchase, sell, or subscribe; any put/call or other option of buying or selling (except to the extent that the option is in a third party without their knowledge or involvement in the company); or any other contract, instrument, understanding or other mechanism used to establish ownership.

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“Control of ownership interest” is also a broadly defined term meant to encapsulate as many of, if not all, possible arrangements by which an individual owns or controls ownership interest in a company through any “contract, arrangement, understanding, relationship, or otherwise.”

The rule likewise contains a detailed explanation of the calculation of the 25% ownership interest, to clarify at what point in time and which factors must be considered in the calculus. This should be examined closely prior to disclosure of the beneficial owners.

It should be noted that in addition to beneficial owners, the reporting company’s “company applicant” must also be reported. The company applicant is the individual who directly files the document that created the domestic company or who first registers the foreign entity in the United States. It also includes the individual primarily responsible for directing or controlling that filing.

Timeline for Initial Reporting

- The effective date for this rule is January 1, 2024.
- A domestic reporting company formed on or *after* January 1, 2024 shall report within 30 calendar days of its actual notice that its creation has become effective;
- A domestic reporting company formed *before* January 1, 2024 shall file not later than January 1, 2025;
- A foreign entity that becomes a foreign reporting company on or *after* January 1, 2024 shall report within 30 calendar days of its actual notice that it has been registered to do business in any state or tribal jurisdiction in the United States;
- A foreign entity that became a foreign reporting company *before* January 1, 2024 shall file not later than January 1, 2025;
- Any exempt entity that no longer qualifies as exempt under the regulation shall file a report within 30 calendar days of the date it no longer meets the exemption criteria.

Updating Reports

- *Updating reports* must occur within 30 calendar days of any change with respect to beneficial ownership or information regarding a beneficial owner, or if a previously reporting entity becomes exempt under the regulation;
- *Correcting reports* must occur within 30 calendar days after the reporting company becomes aware of an inaccuracy in its previous reporting.

Once a reporting company submits beneficial owner information to FinCEN, it will receive a unique FinCEN identifier/identifying number to demonstrate the company’s compliance and facilitate future reporting.

Next Steps

Forms for reporting are not yet available, and FinCEN will submit same for public comment prior to their publication, and for use well in advance of the effective date of the reporting rule.

While this Alert outlines the immediately important aspects of FinCEN's final rule, it is not comprehensive as to all nuances of the various beneficial owner reporting requirements and reporting exemptions. For questions related to your company's beneficial ownership, necessary reporting or exemptions thereto, please contact the author of this Alert.

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