

# Beneficial Ownership Information Reporting

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### A. Corporate Transparency Act

1. The stated purpose of the Corporate Transparency Act (CTA) is to combat illegal activities made possible by corporate anonymity, such as money laundering, tax fraud, and terrorist funding. Passed in 2020 as part of the 2021 National Defense Authorization Act.
2. Based on a National Federation of Independent Business survey, 90% of respondents are unfamiliar with the reporting requirements of the Corporate Transparency Act (CTA).
3. The Corporate Transparency Act will enhance the ability of the Financial Crimes Enforcement Network (FinCEN) and other agencies to protect U.S. national security and the U.S. financial system from illicit use and provide essential information to national security, intelligence, and law enforcement agencies; state, local, and Tribal officials; and financial institutions to help prevent drug traffickers, fraudsters, corrupt actors such as oligarchs, and proliferators from laundering or hiding money and other assets in the United States.
4. A final rule implementing the beneficial ownership information reporting requirements of the Corporate Transparency Act (CTA) was issued in September 2022. These regulations go into effect on January 1, 2024. Beneficial ownership information will not be accepted prior to January 1, 2024.
5. The Beneficial Ownership Information Reports are to be submitted to FinCEN which is a branch of the Treasury Department. FinCEN is the same governmental unit responsible for enforcing the FBAR reporting requirement - Report of Foreign Bank and Financial Accounts. The reports are not a tax form and are not submitted to the Internal Revenue Service.
6. The definition of a "reporting company" under the Act is complex and may include many small businesses, middle-market businesses, and sole practitioners. There are several categories of exemptions, and most exemptions are for entities that are already subject to substantial federal or state regulation.
7. There is nothing in the regulations stating this directly, however, these rules only apply to small entities.

## B. Filing Deadlines

1. Reporting companies created or registered before January 1, 2024, will have one year (until January 1, 2025) to file their initial reports.
2. Reporting companies created or registered during 2024, will have 90 days after creation or registration to file their initial reports. Initially the regulations stated that firms created during 2024 had 30 days to file. Amended regulations changed the rule to 90 days.
3. Reporting companies created or registered after January 1, 2025, will have 30 days after creation or registration to file their initial reports.
4. Once the initial report has been filed, both existing and new reporting companies will have to file updates within 30 days of a change in their beneficial ownership information.
5. Because companies are required to file updates within 30 days, there is no reason why companies in existence before 2024 should file their initial report before the end of 2024. Filing early just requires the company to have to file any changes to the information throughout the year.
  - a. FinCEN did received over 100,000 reports within the first few days of the filing requirements going into effect.

## C. Professional Liability Risk

1. Given the nature of the CPA-client relationship, a client's first inclination may be to turn to their CPA for advice on the CTA rather than their attorney.
2. Even practitioners who decide not to provide services related to CTA may still face professional liability risk for a client's non-compliance in certain situations – failing to advise the client of CTA filing requirements and providing answers to “quick questions” about CTA compliance requirements. If a client incurs damages related to their noncompliance with the Act, they may blame the practitioner and such claims may be significant.
3. Engagement Letter
  - a. The slide and materials provide a sample provision to be included in an Engagement Letter to all clients. This sample engagement letter was taken from the AICPA's website.

- b. Unless specifically engaged to provide CTA assistance, for the avoidance of doubt, include a provision in all engagement letters, regardless of service, disclaiming a responsibility to do so. Including this provision helps defend against a client's "you didn't tell me" assertion.

#### 4. Possible Statement in Engagement Letter

- a. Assisting you with your compliance with the Corporate Transparency Act ("CTA"), including beneficial ownership information ("BOI") reporting, is not within the scope of this engagement.

You have sole responsibility for your compliance with the CTA, including its BOI reporting requirements and the collection of relevant ownership information.

We shall have no liability resulting from your failure to comply with CTA. Information regarding the BOI reporting requirements can be found at <https://www.fincen.gov/boi>.

Consider consulting with legal counsel if you have questions regarding the applicability of the CTA's reporting requirements and issues surrounding the collection of relevant ownership information.

#### 5. Is filling out the FinCEN report practicing law?

- a. Accountants have a limited grant to "interpret" tax law under Title 26 of the U.S. Code (Internal Revenue Code) via Treasury Circular 230 and state accountancy statutes. It is unclear whether interpretation of CTA statutes, which are under Title 31 of the U.S. Code (Money and Finance), is similarly permissible.
- b. Providing technical or interpretive advice on CTA may rise to the practice of law. The "practice of law" is defined by the states (not federally), and many have an express prohibition against Unauthorized Practice of Law (UPL). UPL is considered to be the practice of law by an individual who is either not licensed to practice law at all, or who is licensed to practice law but has not received permission to practice in the state where acts which equate to "practice" occur.
- c. Clients may ask a "quick question" about CTA and their filing obligations. However, providing ad hoc advice is fraught with risk. Answering one-off questions related to CTA not only may lead to bad or incomplete advice, but may also cross the line into the practice of law.

- d. Until states provide conclusive or actionable guidance on how or if a non-attorney may provide CTA services without violating UPL statutes, UPL will remain an important consideration.

## 6. Insurance Coverage

- a. Insurance coverage for any claim asserted arising from Corporate Transparency Act services will be evaluated based on the claim's underlying facts, the insured's policy language, and applicable state law at the time the claim is reported.
- b. But in general, an accountant professional liability policy covers errors and omissions arising from the delivery of professional services.
- c. "Professional services" is typically defined in policy language and generally includes services performed in the practice of public accountancy.
- d. The Corporate Transparency Act is new, and how CTA fits within the existing interpretation of the practice of public accountancy is unclear.

## 7. Bank Comfort Letter

- a. Other risks that may arise if the CPA provides CTA assistance to clients include: Bank scrutiny. As the Corporate Transparency Act is part of the Bank Secrecy Act, bank underwriters may ask practitioners to confirm a client's CTA compliance in the form of a "comfort letter" or other documentation. While CPAs should always scrutinize comfort letter requests, because CTA contains criminal as well as civil penalties, additional care should be taken.

## 8. Data Security

- a. Another risk is data security. CTA compliance may require gathering data which is not ordinarily requested or retained by the practitioner. This added data may be personally identifiable information, requiring protection under applicable laws and regulations. Data security is already a key concern for practitioners, and CTA may increase the amount of data requiring protection, thus increasing a practitioner's data security liability exposure.

#### D. Filing Reports

1. FinCEN estimates that over 32 million initial BOI reports will be filed in the first year of the Final Rule taking effect, and that approximately 5 million initial BOI reports and over 14 million updated reports will be filed in each subsequent year.
2. The form must be filed electronically.
3. FinCEN will store BOI reports in a centralized database and only share this information with authorized users for purposes specified by law. The centralized database is known as the Beneficial Ownership Secure System (BOSS).

#### E. Penalties

1. Failure to comply with the beneficial ownership filing requirement may result in penalties such as:
  - Civil penalties of \$500 per day.
  - Criminal penalties of up to 2 years in prison and/or a fine up to \$10,000.
  - a. Additionally, any person who, without authorization, knowingly discloses or uses BOI is liable for \$591 per day, up to \$250,000, and up to five years of imprisonment.
2. There will be no fee for submitting your beneficial ownership information report to FinCEN.
  - a. However, preparing the report may be a costly endeavor.

#### F. Domestic Entities Filing with a State

1. BOI reporting requirements apply to all domestic entities that are created by filing a document with a secretary of state or other similar office of a State or Indian tribe. FinCEN believes this will exclude many sole proprietorships, general partnerships, and trusts, subject to applicable State or tribal law.

2. Unless otherwise specified, States and Indian tribes have the following meanings.
  - States means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other commonwealth, territory, or possession of the United States.
  - Indian tribes means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe. (See section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5130)).

#### G. Foreign Companies

1. The reporting requirements also apply to foreign companies, including corporations, limited liability companies, and other entities formed in a foreign country that have registered to do business in any State or Indian tribal jurisdiction by filing a document with the appropriate office.

#### H. Exemptions from Filing

1. The following list summarizes the 23 exemptions. In each case the exemption from the filing requirement exists because the entity has provided the information to the Department of the Treasury in some other manner.
  - a. Securities reporting issuer
  - b. Governmental authority
  - c. Bank
  - d. Credit union
  - e. Depository institution holding company
  - f. Money services business
  - g. Broker or dealer in securities
  - h. Securities exchange or clearing agency
  - i. Other Exchange Act registered entity
  - j. Investment company or investment adviser
  - k. Venture capital fund adviser
  - l. Insurance company
  - m. State-licensed insurance producer
  - n. Commodity Exchange Act registered entity
  - o. Accounting firm
  - p. Public utility
  - q. Financial market utility
  - r. Pooled investment vehicle
  - s. Tax-exempt entity
  - t. Entity assisting a tax-exempt entity

- u. Large operating company
- v. Subsidiary of certain exempt entities
- w. Inactive entity

## 2. Public Accounting Firm

- a. The entity is a public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002. (15 U.S.C. 7212)
  - 1) This exemption applies to approximately 1,400 firms.
- b. There are currently more than 46,000 public accounting firms doing business in the U.S., according to the AICPA.
  - 1) According to the AICPA, roughly 80% of accounting firms doing business in the U.S. must comply with these new reporting requirements.

## 3. Large Operating Company

- a. An entity qualifies for this exemption if all six of the following criteria apply:
  - 1) The entity employs more than 20 full time employees, when applying the meaning of full-time employee provided in 26 CFR 54.4980H-1(a) and 54.4980H-3. In general, "full-time employee" means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer.
  - 2) More than 20 full-time employees of the entity are employed in the "United States," as that term is defined in 31 CFR 1010.100(hhh).
  - 3) The entity has an operating presence at a physical office within the United States. "Operating presence at a physical office within the United States" means that an entity regularly conducts its business at a physical location in the United States that the entity owns or leases and that is physically distinct from the place of business of any other unaffiliated entity.
  - 4) The entity filed a Federal income tax or information return in the United States for the previous year demonstrating more than \$5,000,000 in gross receipts or sales. If the entity is part of an affiliated group of corporations within the meaning of 26 U.S.C. 1504, refer to the consolidated return for such group.

- 5) The entity reported this greater-than-\$5,000,000 amount as gross receipts or sales (net of returns and allowances) on the entity's IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120-S, IRS Form 1065, or other applicable IRS form.
- 6) When gross receipts or sales from sources outside the United States, as determined under Federal income tax principle, are excluded from the entity's amount of gross receipts or sales, the amount remains greater than \$5,000,000.

#### I. Beneficial Owner

1. The final rule defines a "beneficial owner" as any individual who, directly or indirectly, own or controls at least 25% of the ownership interest of the reporting company, or who exercise "substantial control" over the company.
2. Ownership
  - a. Any of the following may be an ownership interest:
    - 1) Equity, stock, or voting rights;
    - 2) A capital or profit interest;
    - 3) Convertible instruments;
    - 4) Option or other non-binding privileges to buy or sell any of the forgoing; and
    - 5) Any other instrument, contract, or other mechanism used to establish ownership
  - b. If a company has issued any options, privileges, or convertible instruments, assume they have been exercised or converted in all calculations.
3. Substantial Control
  - a. An individual exercises substantial control over a reporting company if the individual meets any of four general criteria:
    - 1) The individual is a senior officer;
    - 2) The individual has authority to appoint or remove certain officers or a majority of directors of the reporting company;
    - 3) The individual is an important decision-maker; or

- 4) The individual has any other form of substantial control over the reporting company.
4. Reporting companies are not required to report the reason (i.e., substantial control or ownership interests) that an individual is a beneficial owner.
5. There is no maximum number of beneficial owners that must be reported.
6. FinCen expects that every reporting company will be substantially controlled by one or more individuals.
7. Accountants and lawyers who provide general accounting or legal services are not considered beneficial owners because ordinary, arms-length advisory or other third-party professional services to a reporting company are not considered to be "substantial control." In addition, a lawyer or accountant who is designated as an agent of the reporting company may qualify for the "nominee, intermediary, custodian, or agent" exception from the beneficial owner definition.

#### J. Company Applicant

1. Only reporting companies created or registered on or after January 1, 2024, will need to report their company applicants.
2. A company that must report its company applicants will have only up to two individuals who could qualify as company applicants:
  - The individual who directly files the document that creates or registers the company; and
  - If more than one person is involved in the filing, the individual who is primarily responsible for directing or controlling the filing.
3. All company applicants must be individuals. Companies or legal entities cannot be company applicants.
4. Reporting Company Applicants
  - a. Not all reporting companies have to report their company applicants to FinCEN.
    - 1) A reporting company must report its company applicants only if it is either a:
      - Domestic reporting company created in the United States on or after January 1, 2024; or

- Foreign reporting company first registered to do business in the United States on or after January 1, 2024.
- b. A reporting company does not have to report its company applicants if it is either a:
- Domestic reporting company created in the United States before January 1, 2024; or
  - Foreign reporting company first registered to do business in the United States before January 1, 2024.
- c. For companies created before 2024, the personal who created or registered the company may no longer be around.
5. An accountant or lawyer could be a company applicant, depending on their role in filing the document that creates or registers a reporting company. In many cases, company applicants may work for a business formation service or law firm. An accountant or lawyer may be a company applicant if they directly filed the document that created or registered the reporting company.
6. If more than one person is involved in the filing of the creation or registration document, an accountant or lawyer may be a company applicant if they are primarily responsible for directing or controlling the filing.
- a. For example, an attorney at a law firm that offers business formation services may be primarily responsible for overseeing preparation and filing of a reporting company's incorporation documents. A paralegal at the law firm may directly file the incorporation documents at the attorney's request. Under those circumstances, the attorney and the paralegal are both company applicants for the reporting company.

#### K. Beneficial Ownership Information Report

1. BOI reports require specific information about the company, its beneficial owners, and its company applicants.
  - a. Reporting Company
  - b. Full legal name
  - c. Any trade name
  - d. Complete current U.S. address
  - e. State, Tribal, or foreign jurisdiction

- f. For a foreign reporting company only – state or Tribal jurisdiction of first registration
- g. IRS Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN))
- h. If a foreign company has not been issued a TIN – report a tax identification number issued by a foreign jurisdiction and name of jurisdiction

2. Each Beneficial Owner and Company Applicant

- a. Full legal name
- b. Date of birth
- c. Complete current address
- d. Unique identifying number and issuing jurisdiction from, and image of one of the following non-expired documents:
  - 1) U.S. passport
  - 2) State driver's license
  - 3) Identification document issued by a state, local government, or tribe.
- e. If an individual does not have any of the three previous documents, foreign passport

3. The applicant details are identical to those of beneficial owners, except the address must be a business address, not a residential one.

L. FinCEN Identifier

- 1. A "FinCEN identifier" is a unique identifying number that FinCEN will issue to an individual or reporting company upon request after the individual or reporting company provides certain information to FinCEN.
- 2. An individual or reporting company may only receive one FinCEN identifier.
- 3. An individual or reporting company is not required to obtain a FinCen identifier.

4. Individuals may electronically apply for FinCEN identifiers.
  - a. In the application, an individual must provide their name, date of birth, address, unique identifying number and issuing jurisdiction from an acceptable identification document, and an image of the identification document – the same four pieces of personal information and image reporting companies submit about beneficial owners and company applicants in BOI reports.
5. A company may request a FinCEN identifier when it submits a BOI report by checking a box on the reporting form.
6. If an individual has obtained a FinCEN identifier and provided it to a reporting company; the reporting company may include such FinCEN identifier in its report instead of the information required about the individual.

#### M. Any Changes Must be Reported

1. For example, if a beneficial owner obtained a new driver's license or other identifying document that includes the change name, address, or identifying number, the reporting company also would have to file an updated beneficial ownership information report with FinCEN, including an image of the new identifying document.

#### N. End of a Company

1. There is no requirement to report a company's termination or dissolution.
2. However, the ending of a company involves a multitude of changes.

#### O. Amending Operating Agreement

1. An operating agreement helps govern your business's internal operations, and if you encounter internal contention over CTA compliance, you may have to update your operating agreement to avoid difficulties down the line.
2. The update should be an added provision that requires everyone who qualifies as a beneficial owner to comply with the CTA.
3. If any beneficial owner refuses to comply with the provision, they may be expelled and/or required to compensate your company for any associated losses. The provision should also apply to any third party, such as a lender, who could potentially acquire equity in the company or exercise a degree of control over it.

## P. Reporting Forms

1. FinCEN did not distribute the reporting form and the directions to the form until January 1, 2024.
2. The E-Filing portal permits a reporting company to choose one of the following filing method to submit a BOIR:
  - a. Upload a finalized PDF version of BOIR and submit online.
  - b. Fill out Web-based version of BOIR and submit online.
3. The person who submits a BOIR will need to provide their name and email address to FinCEN. The person who submits a BOIR will receive confirmation of submission when a BOIR is accepted by FinCEN.
4. FinCEN also offers system-to-system BOIR transmission via secure Application Programming Interface (API) for those third-part service providers, who are interested in automating the BOIR filing process.
5. BOIRS must be complete before they can be filed in FinCEN. FinCEN will not accept a BOIR if any items marked with a red Asterisk (\*) are blank.
6. If a previously submitted BOIR needs to be corrected or updated, complete a corrected or updated BOIR in is entirely, with the necessary correction or updates made to the information. Reporting companies must resubmit unchanged information along with the corrected or updated information.
7. All unique identifying numbers must be entered as a single text string without formatting or special characters such as hyphens or periods. An identifying number such as a Social Security number are entered without the dashes.

8. Certain words and phrases or variations of these words and phrases are not allowed in the text fields of the BOIR.

a. Do not use the following words or variation of these words in text fields of the BOIR:

AKA  
DBA  
NMN  
NONE  
NOT APPLICABLE  
OTHER  
SAME  
SAME AS ABOVE  
SEE ABOVE  
T/A  
UNKNOWN  
VARIOUS  
XX

9. Treasury's Financial Crimes Enforcement Network (FinCEN) estimates filings for entities with complex structures could take nearly 11 hours. The average burden of reporting BOI for reporting companies with simple beneficial ownership structures should be 90 minutes per response.

10. FinCEN assumes the economic impact on an individual small entity is significant if the total estimated impact in a given year is greater than 1 percent of the small entity's total receipts for that year.

Q. Small Business Cost is Significant

1. FinCEN assumes the economic impact on an individual small entity is significant if the total estimated impact in a given year is greater than 1 percent of the small entity's total receipts for that year.

2. FinCEN estimates the cost for small financial institutions to comply with the sections of the proposed rule addressing BOI access would be between approximately \$12,155 and \$17,644 in year 1, and approximately \$7,405 and \$9,094 annually in subsequent years.

## R. Potential Delay in Reporting

1. The House of Representatives recently passed in H.R. 5119, the Protect Small Business and Prevent Illicit Financial Activity Act.
2. This legislation will provide more time for businesses to prepare for this new requirement, and to give a full year to file for not only existing businesses but also those formed in 2024 and any businesses needing to update their filings due to changes in ownership, etc.

## S. Small Entity Compliance Guide

1. The Financial Crimes Enforcement Network has published a Small Entity Compliance Guide, which is 57 pages.
2. It can be found at the following link:

<https://www.fincen.gov/boi/small-entity-compliance-guide>

## T. Final Thoughts

1. The bottom line is that a small business should expect to have to pay for some professional to help with the filing. One or more individuals will have to spend significant time gathering the information for the initial filing and setting up a real-time system to monitor reportable items such as address changes, changes in organization responsibilities, directors, shareholders, and other reportable items.
2. Most small businesses struggle to timely meet other annual tax and registration filing requirements, so compliance is likely to be a major issue. Remember, this never goes away. Be prepared for the regulatory creep that will bring with it requests for more information and audit oversight.
3. This ends our webinar on the Beneficial Ownership Information Reporting Requirements under the Corporate Transparency Act.