

# **FINCEN Publishes Final Rule on Beneficial Ownership Requirements - A Critical Step Towards Heightened Transparency in U.S. Financial System**

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On January 1, 2021, Congress passed the Corporate Transparency Act (“CTA” or the “Act”) to “better enable critical national security, intelligence and law enforcement efforts to counter money laundering, financing of terrorism, and other illicit activity.” The Act is a critical step in the decades-long effort to address criticism of the United States’ notoriously opaque financial system and its vulnerability to illicit activity, including money laundering and terrorism financing. The key component of the CTA is a national registry of beneficial ownership information (“BOI”) for “reporting companies” (as defined in the Act). This central repository is referred to below as the “BOSS” or the “Beneficial Ownership Secure System.”

In layman’s terms, the CTA aims to pull back the veil on privately owned corporations, limited liability companies, and other similar entities to ensure that these business associations are not funneling resources to individuals or entities under sanction of the U.S. government—a concern all the more salient in the wake of Russia’s invasion of Ukraine and the subsequent wave of sanctions. The Financial Crimes Enforcement Network—a bureau of the U.S. Treasury Department charged with monitoring the U.S. financial system for various types of illicit activity (“FinCEN”)—is responsible for enforcement of the CTA and, ultimately for maintaining and serving as the gatekeeper for the BOSS. While the Act passed Congress nearly two years ago, its impact will not be fully felt until all of FinCEN’s final rules are effective.

FinCEN began the slow, arduous process towards a final set of regulations in April of 2021 with an Advanced Notice of Proposed Rulemaking (“ANPR”). [In the ANPR, FinCEN sought comment from the public on a variety of issues raised during the rulemaking process including the definition of a “reporting company” and “beneficial ownership,” the actual mechanics of reporting BOI to FinCEN and, perhaps most importantly, who would ultimately have access or be able to gain access to the BOSS.](#) Now, nearly eighteen months after the initial ANPR, FinCEN has published the first of three expected final rules. The first rule, published on September 30, 2022, deals with beneficial ownership reporting requirements and provides clarity regarding which entities must report BOI and what constitutes beneficial ownership (the “Final Rule”).

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The Final Rule largely adheres to [the version proposed by FinCEN in December 2021](#) (“Noticed of Proposed Rulemaking” or “NPRM”) but does provide several key amendments and some additional clarification. For example, the Final Rule maintains verbatim the CTA’s broad definition of “reporting company” but provides guidance clarifying that, in most situations, domestic sole proprietorships, trusts and general partnerships are likely to be excluded. Additionally, the new rule confirms that foreign public companies registered to do business in the U.S. are not exempted under their own enumerated exception but—depending on the size of their U.S. operations—may be exempted under the “larger operating company” exemption. Further, the Final Rule largely keeps the expansive definition of “beneficial owner,” but pares down the universe of individuals who can qualify as a beneficial owner by eliminating control over a “dominant minority of the board” as an indication of substantial control and removing corporate secretary and corporate treasurer from enumerated list of senior officers. The Final Rule also provides more detailed instructions for calculating ownership interests for limited liability companies and analogous business associations, as well as entities taxed as corporations. Lastly, the Final Rule extends the window from 14 to 30 days that entities formed after January 1, 2024 (the “Effective Date”) have to file their initial BOI report but maintains the deadline of January 1, 2025 for entities in existence prior to the Effective Date.

While the full version of the Final Rule can be found on [FederalRegister.gov](#), we further discuss these points and some additional components below.

## **WHO IS A REPORTING COMPANY?**

The CTA provides definitions for both a (1) domestic reporting company and (2) foreign reporting company.

### ***Domestic Reporting Company***

As expected from the earlier versions promulgated by FinCEN, the Final Rule adopted the broad definition of a domestic reporting company found directly in the CTA, which includes any domestic corporation, limited liability company, or “other similar entity” that “is created by the filing a document with a secretary of state or any similar office under the law of a state or Indian tribe.” Because the CTA does not specifically define corporation or limited liability company, the Final Rule defers to the governing law of the jurisdiction of formation for interpretation. Similarly, the Final Rule does not define “other similar entity” via an enumerated list—as many commenters had requested—but instead imposes a principles-based interpretation from the CTA that asks: Is the entity created by filing of a document with a secretary of state or other similar office? FinCEN further notes that it believes, in most cases, “sole proprietorships, certain types of trusts, and general partnerships” are not formed by the filing of a document with a jurisdiction’s secretary of state or analogous authority and thus would likely be exempted from reporting BOI. FinCEN further notes that filing for a permit or license would not trigger any reporting obligations as these are not acts of formation.

### ***Foreign Reporting Company***

The Final Rule similarly adopts the broad definition from the CTA for a foreign reporting company, which includes any corporation, limited liability company or other similar entity formed in a foreign country and registered to do business in the United States.

### ***Exemptions***

Although the CTA grants FinCEN the authority to exempt additional entities where the collection of

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BOI “would neither serve the public interest nor be highly useful in national security, intelligence, and law enforcement agency efforts,” FinCEN declined to expand the list of exempted entities beyond the twenty-three specifically enumerated in the CTA. The CTA explains that these twenty-three types of entities are already subject to significant government oversight and/or required to report BOI to a government authority.

Among the exempted entities in the CTA and Final Rule are depository institution holding companies, insurance companies, tax exempt entities, public companies, pooled investment vehicles, investment advisers, large operating companies and subsidiaries owned and controlled by exempted entities.

Pooled investment vehicles are an enumerated exception in both the CTA and the Final Rule. In addition to any “investment company” within the meaning of the Investment Company Act of 1940 (the “1940 Act”), as amended, the definition of pooled investment vehicles also includes any entity excluded from the investment company definition under section 3(c)(1) or 3(c)(7) of the 1940 Act so long as such excluded entities are referenced by name in the relevant investment adviser’s Form ADV. In the Final Rule, FinCEN modified the part of the pool investment vehicle definition addressing excluded investment companies by conforming the timing of Form ADV inclusion with the timing in the SEC’s regulations. Foreign pooled investment vehicles are not exempted and are instead subject to a special rule requiring such entities to disclose the BOI of the individual who exercises substantial control over the vehicle.

To qualify for the large operating company exemption, an entity must (1) employ more than 20 employees in the U.S. on a full-time basis, (2) have filed an income tax return in the previous year showing either \$5,000,000 in gross receipts or aggregated sales from U.S. operations, and (3) have an operating presence at a physical office in the United States. For the purposes of employee count, calculations should be made on an entity-by-entity basis and should not aggregate the headcounts of affiliates. However, in regards to gross receipts and aggregated sales, entities are permitted to include the totals from entities owned by the entity in question.

Foreign public companies are not an enumerated exemption but may still qualify as large operating companies if they meet the three-pronged test above.

Entities that are exempt at the time of the Effective Date but subsequently lose their exempted status have the longer of (1) the remaining days left in the one-year filing period or (2) the remaining days in the 30 calendar day period to file an initial report, as further explained below.

## **WHAT MUST BE REPORTED AND HOW MUST IT BE REPORTED?**

### ***Information on Reporting Company***

The Final Rule requires the following information to be reported on the reporting companies:

1. Name – the full legal name of the reporting company used to establish the entity and all trade or d/b/a names, regardless of whether they are registered.
2. Address – (i) for reporting companies with a principal place of business in the United States, the street address of that principal place of business; and (ii) for reporting companies with a principal place of business outside of the United States, the street address of the primary location in the United States. This requirement is not satisfied by reporting a P.O. box or the address of a company formation agent or other third party.

3. Jurisdiction of Formation and Registration – (i) for domestic reporting companies, the State or Tribal jurisdiction of formation; and (ii) for foreign reporting companies, the foreign jurisdiction of formation and the State or Tribal jurisdiction where it first registers.
4. Company Identification Numbers – reporting companies are required to provide a TIN. A DUNS or LEI is not allowed in lieu of a TIN. Foreign reporting companies without a TIN will be required to provide a foreign tax identification number and the name of the relevant jurisdiction as an alternative.

### ***Information on Beneficial Owners and Company Applicants***

The Final Rule requires the following information to be reported on beneficial owners and company applicants:

1. Name, DOB and Address – reporting companies are required to identify each beneficial owner of the reporting company and each company applicant by full legal name, date of birth and current residential or business street address. A business address is required for company applicants who create or register companies in the course of their business while a residential address is required for all other individuals, including beneficial owners. Residential street address does not need to be the address an individual uses for tax residency purposes but cannot be P.O. boxes, private mailboxes and addresses of business agents or corporate agents.
2. Unique Identification Number and Image from Identification Document – the unique identifying number must be reported from one of four types of acceptable identification documents: (i) a nonexpired U.S. passport; (ii) a nonexpired state, local, or Tribal identification document; (iii) a nonexpired State-issued driver's license; or (iv) if an individual lacks one of those other documents, a nonexpired foreign passport. Additionally, reporting companies must provide an image of the identification document from which the unique identifying number was obtained.

### ***Certification***

The Final Rule requires each person filing a report with FinCEN to certify that the report is “true, correct, and complete.” FinCEN follows the structure of the CTA and places the responsibility for reporting the information on the reporting company itself. FinCEN recognizes that while an individual may file a report on behalf of a reporting company, the reporting company is ultimately responsible for the filing and is expected to verify the information they receive from their beneficial owners and applicants before they report such information to FinCEN.

### ***Security and Access***

FinCEN recognized the privacy concerns associated with disclosure and retention of identity information and stated that it will ensure that BOI will be used only for statutorily authorized purposes and will be subject to stringent use and security protocols. FinCEN is required to promulgate appropriate protocols such as “require requesting agencies to establish and maintain secure systems for storing BOI, provide a report on the procedures that will be used to ensure the confidentiality of the information, impose limits on who may access the information and training requirements for those authorized people, maintain a permanent system of standardized records and an auditable trail of

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each request, conduct an annual audit, and follow other necessary or appropriate safeguards.”

## **WHEN MUST A REPORTING COMPANY PROVIDE BOI?**

### ***Reporting Companies Formed After the Effective Date of January 1, 2024***

Foreign and domestic reporting companies formed after the Effective Date must file their BOI reports within 30 days of formation.

### ***Reporting Companies Formed Before the Effective Date of January 1, 2024***

Foreign and domestic reporting companies formed before the Effective Date must file their BOI reports “in a timely manner” but no later than January 1, 2025.

### ***Obligation to Update or Correct***

Foreign and domestic reporting companies who experience a change in beneficial ownership must report the change within 30 days. A duty to update is triggered by “any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners.”

Foreign and domestic corporations must update previously reported incorrect BOI within the 30 days of the reporting company having “knowledge” or “reason to know” that correction is necessary. However, the Final Rule provides a safe harbor to anyone that files a report with reason to believe it contains inaccurate information and voluntarily submits a corrected report within 90 days of the initially submitted inaccurate report. The safe harbor is only available to those who file the correction within the 90-day window and does not extend to those who file a correction outside of the 90-day window, even if such corrected report is filed promptly after becoming aware of the need for the correction.

Lastly, the Final Rule does not provide a good faith safe harbor for reporting companies and instead confirms that the onus is the reporting company to report information accurately.

## **WHAT CONSTITUTES BENEFICIAL OWNERSHIP?**

The CTA defines beneficial owner as any individual who, directly or indirectly, either (1) exercises substantial control or (2) owns or controls at least 25 percent of the ownership interests of the reporting company.

### ***Substantial Control***

The Final Rule sets forth three indicia of substantial control:

1. Service as a senior officer of the reporting company;
2. Authority over the appointment or removal of any senior officer or a majority of the board or analogous body; and
3. Direction, determination, or decision of, or substantial influence over, important matters affecting the reporting company

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The Final Rule also includes a catchall provision for individuals that exercise “any other form of substantial control over the reporting company.”

### ***25 Percent Ownership Interest***

The Final Rule adopts a broad definition of ownership interest that includes equity, as well as other types of interests such as profit interests, convertible instruments and options. Such instruments are to be treated as exercised for the purposes of calculating an individual’s beneficial ownership. Debt instruments are included if they allow the holder to exercise the same rights as one of the other enumerated types of interests. In addition to the expansive list of included ownership interests, the Final Rule also includes a catchall provision for “any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.”

The Final Rule also provides clarification regarding the calculation of total ownership interests.

- For reporting companies that issue capital or profit interests (such as limited liability companies), an individual’s ownership interests are the individual’s capital and profit interests, calculated as a percentage of the entity’s total outstanding capital and profit interests of the entity.
- For entities treated as corporations for federal income tax purposes, as well as other entities that issues shares of stock, the applicable percentage is the greater of (1) the total combined voting power of all of classes of ownership interests of the individual as a percentage of total outstanding voting power of all classes of ownership interests entitled to vote and (2) the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests.

The Final Rule further clarifies that when circumstances do not permit reliable calculations—as is often the case with early-stage companies—any individual who owns or controls 25% or more of any class or type of ownership interests shall be deemed to meet the requisite 25% ownership.

### ***Exceptions***

For purposes of determining whether an individual is a beneficial owner, (1) minors (as defined by the jurisdiction of formation), (2) individuals acting as nominees, intermediaries, custodians or agents on behalf of another, and (3) employees who are not senior officers and whose substantial control or economic benefits are derived solely from their status as an employee, are all excluded.

## **WHO IS A COMPANY APPLICANT?**

The Final Rule specifies that a company applicant is the individual who directly files the document to create or register the reporting company and the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing.

## **NEXT STEPS**

The next two FinCEN rules are expected to be published at some point in the coming years, but no specific timetable has been announced. These additional rules will address (1) access to the BOSS

and (2) revisions to FinCEN's 2016 Customer Due Diligence Rule, which requires covered financial institutional to collect a legal entity's BOI when they open an account (the "2016 CDD Rule"). While the 2016 CDD Rule significantly increased transparency in both the U.S. and global financial systems, it did not impose any BOI disclosure requirement at the time of a legal entity's creation, a gap that the CTA and the new wave of FinCEN regulations will seek to fill. Regardless of when the next rules are published by FinCen, entities should use the next fourteen months to analyze whether they will qualify for any of the aforementioned exemptions. If, after consultation with counsel, companies do not believe any exemptions will be available to them or that they could potentially lose exempted status at some point in the near future, companies should then start the process of assessing who is a beneficial owner and gathering the requisite information on such individuals, especially if the universe of beneficial owners includes individuals who will rely on foreign documentation.

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