



Understanding the Corporate Transparency Act After National Small Business United

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On January 1, 2024, the [Corporate Transparency Act \(CTA\)](#) came into effect. The CTA represents a novel regulatory development in the United States that requires a broad class of legal entities (referred to as “reporting companies”) to identify and report beneficial ownership information (BOI) on a confidential basis to a federal, centralized data repository (the BOI Reporting Rule). The CTA is enforced by a bureau of the Department of Treasury, the Financial Crimes Enforcement Network (FinCEN), the primary anti-money laundering enforcement authority in the U.S. With the CTA, the U.S. joins an international trend of subjecting legal entity ownership to more transparency, in the name of preventing and combating money laundering, terrorist financing, corruption, tax fraud, and other illicit activity—in particular, the use of shell companies to purchase assets (including real property) and to store and move money. While shell companies may be created for a legitimate purpose, there are also concerns that the use of some of these companies can facilitate crimes.

On March 1, 2024, a federal judge in the Northern District of Alabama, Northeastern Division, in the case *National Small Business United, d/b/a the National Small Business Association, v. Yellen*, ruled that the CTA was unconstitutional, at least as it applied to the plaintiffs in that case, which has created questions as to the ongoing validity of the law more broadly. The decision has been appealed.

Below, we outline the key facets of the CTA to serve as an initial guide. While the judge’s ruling in *National Small Business United* has created questions as to the CTA’s enforceability, it is unclear whether that ruling will survive on appeal or whether the scope of that ruling will remain limited to the plaintiffs in that case. For now, it remains worth exploring how the CTA works, and we have assumed for these purposes that the CTA will remain in effect, consistent with FinCEN’s most recent guidance—more on this below. Please reach out to your Fenwick team if you have questions or want to learn more.

What You Need to Know

- **Deadlines for Compliance.** There are three major deadlines that companies should be aware of:
 - Companies formed before January 1, 2024, have until January 1, 2025, to comply with the CTA's BOI Reporting Rule.
 - Companies formed after January 1, 2024, have 90 days following the date of formation to submit their initial BOI report to FinCEN.
 - All companies that have a change of circumstance that triggers a reporting obligation or that discover an error in previously submitted information will have 30 days to file a BOI report regardless of the date of formation but for companies formed before January 1, 2024, this obligation to update their BOI report does not kick in until an initial BOI report is filed.

- **Information That Is Collected by FinCEN.**

Reporting companies will submit the names, dates of birth, addresses, and identification documents of individuals who have at least a 25% *ownership interest* in the reporting company, or exercise *substantial control* over the reporting company, to the new FinCEN BOI registry, called the Beneficial Ownership Secure System (BOSS), which can be accessed [here](#). Information stored on BOSS is intended to be kept confidential by FinCEN and shared with various governmental authorities for limited purposes only (as detailed below).

- **Which Legal Entities Need to Comply?**

Domestic reporting companies (i.e., corporations, LLCs, and other entities created by filing a document with a secretary of state or similar state office in the U.S.).

Foreign reporting companies (i.e., entities formed outside the U.S. that have registered to do business in the U.S. by filing a document with a secretary of state or similar state office).

- **Which Legal Entities Do Not Need to File BOI Reports?**

The CTA contains a list of 23 exempt legal entities that do not need to file BOI reports. Key exemptions are detailed below.

- **Additional Resources.**

FinCEN published its [first set of guidance](#) on BOI reporting requirements on March 24, 2023. FinCEN has also published an [FAQ guide](#), which is regularly updated, as well as a [separate guide for small business owners](#).

Below, we highlight various CTA provisions on which companies should begin concentrating. We also consider the practical implications that the CTA's compliance obligations impose around record keeping, privacy, and working with independent investors and other ownership interest holders to ensure company beneficial owners are accurate and up to date. Though the effective date of the BOI Reporting Rule has passed, many questions remain unanswered as to the novel regulatory elements of the CTA.

I. WHICH ENTITIES QUALIFY AS A REPORTING COMPANY?

In addition to corporations and LLCs, which are clearly reporting companies under the CTA, FinCEN has expressed its expectation that (subject to the 23 specific exemptions outlined in the CTA) limited liability partnerships, limited liability limited partnerships, business trusts, and most limited partnerships should be reporting companies because these entities are generally created by a filing with a secretary of state or similar state office. In contrast, FinCEN believes that sole proprietorships, certain types of non-business trusts, and general partnerships that are not created through the filing of a document with a secretary of state or any similar office are not within the scope of the definition (and therefore not reporting companies under the CTA), even if they register for a business license or similar permit that does not create the entity.

II. KEY FEATURES OF THE BOI REPORTS

If an entity meets the definition of either a domestic or foreign reporting company (see above) and does not qualify for an exemption, then the CTA requires that such entity file a BOI report with FinCEN containing three categories of information: (A) basic information about the reporting company; (B) information on the beneficial owners; and (C) for companies created or registered after January 1, 2024, information about “company applicants.”

A. Reporting Company Information

The reporting company will need to disclose:

- Its full legal name;
- Any trade names (sometimes also known as “dbas”);
- Current U.S. address at which is it principally operating (not a PO Box);
- Jurisdiction of formation; and
- TIN or EIN.

B. Beneficial Owners

FinCEN recognizes that among the new compliance elements imposed on companies doing business in the U.S., the BOI data may be the most challenging and potentially controversial to collect. Unlike certain beneficial ownership reporting obligations under the federal securities laws that impose reporting obligations on the beneficial owner, under the CTA, the reporting company itself is responsible for filing a BOI report and reporting any changes to previously reported BOI and is liable for any willful failure to do so (as further detailed below).

FinCEN's public commentary has consistently focused on education to date, which suggests that it will not likely direct its initial efforts toward enforcement.

Reporting companies will need to identify their beneficial owners and disclose the relevant information requested in the FinCEN BOI report with respect to each beneficial owner. A “beneficial owner” under the CTA is any individual (natural person) who, directly or indirectly, either: (i) exercises substantial control; or (ii) owns or controls 25% or more of the ownership interests of the reporting company.

Substantial Control

The term “substantial control” under the CTA is not analogous to control under other federal statutes, including the federal securities laws. Under the CTA, an individual exercises substantial control over a reporting company if the individual:

1. Serves as a senior officer of the reporting company (the term “senior officer” means the president, the chief financial officer, the general counsel, the chief executive officer, the chief operating officer, or any other officer, regardless of title, performing a similar function);
2. Has authority over the appointment or removal of any senior officer or a majority of the board of directors or similar body;
3. Directs, determines, or has substantial influence over important decisions made by the reporting company;
or
4. Has any other form of substantial control over the reporting company.

This is a broad list and does not differentiate between individuals with the power to exercise substantial control and those who do, in fact, exercise such power in the management of a reporting company. FinCEN [outlined](#) a broad representative list of “important decisions,” including any reorganization, dissolution, or merger of the reporting company (i.e., approving a sale of the reporting company). It remains unclear whether a stockholder having a veto right on these matters amounts to a “substantial influence.” What is clear is that the test for “substantial influence” appears to focus on core business decisions and not the employees who implement such decisions (unless those employees have one of the enumerated senior officer titles), nor does it focus on passive advisors who do not have direct and meaningful oversight into the operations of the reporting company. We encourage ongoing dialogue with your Fenwick team to ensure that the reporting company is listing all beneficial owners in the BOI Report.

Ownership Interest

Reporting companies will also need to determine which individuals, directly or indirectly, own or control 25% or more of the reporting company’s ownership interests. As with substantial control, the term “ownership interests” is defined broadly under [31 C.F.R. § 1010.380\(d\)\(2\)](#) and without regard to the specific type of entity in which the interest is held. Ownership interests include any of the following, regardless of whether the interest is transferable, classified as stock or anything similar, or confers voting power or voting rights:

- Any equity, stock, or similar instrument;
- Any preorganization certificate or subscription;
- Any transferable share of, or voting trust certificate or certificate of deposit for, an equity security;
- An interest in a joint venture;
- A certificate of interest in a business trust;
- Any capital or profits interest in an entity;
- Any instrument convertible, with or without consideration, into any share or instrument described above or any future on any such instrument, whether or not characterized as debt;
- Any warrant or right to purchase, sell, or subscribe to a share or other interest described above;
- Any put, call, straddle, or other option or privilege of buying or selling any of the above interests without being bound to do so, except to the extent that the option or privilege is held by a third party and not known to the reporting company; or
- Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

The CTA also sets forth specific calculation guidelines in [31 C.F.R. § 1010.380\(d\)\(2\)\(iii\)](#). [FinCEN's Small Entity Compliance Guide](#) provides step-by-step details on calculating ownership interests under specific scenarios. We encourage you to reach out to your Fenwick team for additional guidance on making such calculations and determinations where questions arise.

Of note, there is a limited exception for employees who hold 25% or greater ownership interest in a reporting company and do not otherwise act in a role of substantial control. Such individuals are not beneficial owners within the meaning of the CTA, and their information will not need to be submitted in the BOI report.

Required BOI Data

In its BOI report, a reporting company must disclose the following regarding each of its individual beneficial owners:

- i. Their full legal name;
- ii. Date of birth;
- iii. Current residential address; and
- iv. A copy of the individual's U.S. passport, state driver's license, or other identification document issued by a state, local government, or tribe.

Alternatively, the reporting company may submit the name and FinCEN identifier of each beneficial owner (more on this below).

C. Company Applicants

Company applicants must be identified in a company's initial BOI report only if the reporting company was created or registered on or after January 1, 2024.

A company applicant is someone who is either:

- i. The direct filer—the individual who directly filed the document that created the entity; or
- ii. The director/controller of the filing action—applicable only if a separate individual is primarily responsible for directing or controlling the filing of the creation or first registration document.

The CTA's definition of company applicants is intended to ensure that the reporting company provides information on individuals who are responsible for the filing to form a reporting company, but FinCEN stated in the [BOI Reporting Rule](#) that it intends for a reporting company to limit the number of its company applicants to two individuals.

Required BOI Data

In its BOI report, a reporting company created or registered on or after January 1, 2024, must disclose the following regarding each of its company applicants:

- i. Their full legal name;
- ii. Date of birth;
- iii. Current residential or business address; and
- iv. A copy of the individual's U.S. passport, state driver's license, or other identification document issued by a state, local government, or tribe.

Alternatively, the reporting company may disclose the name and FinCEN identifier of each company applicant.

III. EXEMPTIONS TO BOI REPORTS

Pursuant to [31 CFR § 1010.380\(c\)\(2\)](#), the BOI Reporting Rule expressly excludes from the definition of reporting company 23 categories of entities, such as larger entities with established U.S. operations, more highly regulated entities, and other entities that may be subject to different ownership reporting requirements.

Of note, specifically enumerated exempt entities include:

- **Large Operating Companies.** Any entity that has all of the following attributes:
 - More than 20 full-time employees in the U.S. (a full-time employee is generally employed an average of at least 30 service hours per week or 130 service hours per month, with adaptations for non-hourly employees; the exempt entity must be the employer; it may not consolidate employees across affiliated entities);
 - An operating presence at a physical office within the U.S. (this physical office may be owned or leased but may not be shared other than with the reporting company's affiliates); and

- Reported more than \$5 million in gross receipts or sales (net of returns and allowances) on its filed prior year federal tax return, excluding gross receipts or sales from sources outside the U.S., as determined under federal income tax principles (an entity that is part of an affiliated group of corporations, within the meaning of [26 U.S.C. § 1504](#), that filed a consolidated return must use the amount reported on the consolidated return for the group).
- **Public Companies.** This exemption applies to any issuer of securities that is:
 - An issuer of a class of securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the Exchange Act); or
 - Required to file supplementary and periodic information under Section 15(d) of the Exchange Act.
- **Additional Exempt Entities Include:**
 - SEC-registered investment companies or advisors;
 - Venture capital fund advisors;
 - Certain pooled investment vehicles; and
 - Subsidiaries that are wholly owned or controlled, directly or indirectly, by certain exempt entities.

FinCEN has signaled in its FAQs, policy webinars, and in the notice of rulemaking process that the exemptions identified above are not exhaustive, so updates may arrive during the first year of effectiveness.

Please be aware that any reporting company that stops qualifying for an exemption must file a BOI report with FinCEN within 30 calendar days after the date that it no longer meets the exemption criteria. Likewise, a reporting company that becomes an exempt entity must update its previously filed BOI report to show that it is no longer a reporting company within 30 calendar days of the date it meets the exemption criteria.

IV. REPORTING MECHANICS

A. FinCEN Identifier

An individual may obtain a FinCEN identifier (FinCEN ID) by providing to FinCEN the same information as the reporting company is required to provide regarding its beneficial owners or its company applicants, respectively, in its initial BOI report. The reporting company may then report the individual's name and FinCEN ID on its BOI report in lieu of listing the specific information and materials described above regarding the individual. However, if an individual obtains a FinCEN ID, the individual (and not the reporting company) must:

- File an updated application with FinCEN within 30 days after any change in their reported information; and
- Correct any inaccuracy in their previously reported information within 30 days of becoming aware of the inaccuracy.

Reporting companies can alert beneficial owners that they may elect to apply for a FinCEN ID for a variety of reasons, including if the beneficial owner prefers to file their personal information directly with FinCEN.

Further, some individuals may be identified as a beneficial owner or a company applicant of multiple reporting companies. In that case, it may be administratively easier for the individual to provide their name and FinCEN ID to those reporting companies in lieu of having to provide other personal information.

For reporting companies, use of FinCEN IDs for their beneficial owners should also reduce the ongoing compliance burden of maintaining updated information by shifting that burden to the holders of such FinCEN IDs.

The online application portal to apply for a FinCEN ID is located [here](#).

B. Updated and Corrected Reports

As noted above, and to reiterate the importance of maintaining accurate BOI reports, reporting companies must update their previously filed BOI reports if any required information regarding the reporting company or its beneficial owners (but not company applicants) changes and must correct any inaccuracies in previously filed reports. Specifically, a reporting company has 30 days to:

- **Report Changes.** Any change to information *regarding the reporting company or its beneficial owners* must be updated, such as:
 - A change to any information in the BOI report regarding the reporting company (for example, a change in the company's address or registering a new business name with a state authority);
 - A reporting company becoming an exempt entity (as noted above) (for example, a company that grows its number of employees or revenues or both such that it meets the criteria for the large operating company exemption must file an updated BOI report to check a box noting its newly exempt status); and
 - A change in the reporting company's beneficial ownership, including any change regarding who is a beneficial owner or in reported BOI regarding any particular beneficial owner (for example, a change in a beneficial owner's address) (note that using a FinCEN ID, as noted above, obviates the need for a reporting company to update information regarding a beneficial owner as long as such individual remains a beneficial owner).

FinCEN stated in the BOI Reporting Rule that there is no materiality threshold regarding a reporting company's obligation to report changes to any required BOI report information. The reporting company must report all changes to the required information rather than changes to information on an individual's identification document, including the expiration date, which do not require the submission of an updated image. However, FinCEN does not expect a reporting company to file an updated report upon its termination or dissolution.

- **Correct Inaccuracies.** If the reporting company becomes aware of or has reason to know that any information in its previously filed BOI report was inaccurate, it must file a corrected report within 30 days. The CTA provides for a safe harbor from liability for filing a false BOI report if the reporting company files a corrected report within 90 days of the submission of an incorrect report. Under the BOI Reporting Rule, the corrected report must be filed within 30 days of discovery of the inaccuracy and within 90 days of the initial filing in order to take advantage of the safe harbor.

Reporting companies should implement a compliance process to monitor and report any changes in their reported information in a timely manner.

C. Access to Reported Information

As noted above, FinCEN established the BOSS database to securely maintain BOI reports. FinCEN may disclose the reported BOI only on receipt of a request, made through appropriate protocols, by:

- U.S. federal agencies engaged in national security, intelligence, or law enforcement activities, for use in furtherance of those activities;
- A state, local, or tribal law enforcement agency, if a court of competent jurisdiction has authorized the law enforcement agency to seek the information in a criminal or civil investigation;
- A federal agency on behalf of non-U.S. law enforcement or a foreign prosecutor or judge;
- A financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the financial institution's compliance with customer due diligence requirements under applicable law; or
- Federal and state regulators assessing financial institutions for compliance with legally required customer due diligence obligations.

Officers and employees of the Treasury Department may also access BOI for tax administration purposes.

V. PENALTIES FOR VIOLATION

The CTA provides for civil and criminal penalties for violations, including a fine of up to \$10,000, imprisonment for up to two years, or both, for any person who willfully:

- Provides or attempts to provide false or fraudulent BOI; or
- Fails to report complete or updated BOI to FinCEN.

Penalties may also apply to reporting companies and individuals who:

- Cause a reporting company not to report; or
- Are senior officers of a reporting company at the time of its failure to fulfill its obligation to accurately report or update BOI.

The CTA also sets out civil and criminal penalties that may be imposed on any person knowingly disclosing or using BOI reported to FinCEN in an unauthorized manner.

VI. THE IMPACT OF THE *NATIONAL SMALL BUSINESS UNITED* CASE

As noted above, the federal district judge in *National Small Business United* permanently enjoined the U.S. government from enforcing the CTA against the plaintiffs in that case, including the thousands of members of the National Small Business Association. On March 4, 2024, FinCEN released a brief statement (available [here](#)) stating, among other things, that: "FinCEN will comply with the court's order for as long as it remains in effect. As a result, the government is not currently enforcing the Corporate Transparency Act against the plaintiffs in that action: Isaac Winkles, reporting companies for which Isaac Winkles is the beneficial owner or applicant, the National Small Business Association, and members of the National Small Business Association (as of March 1, 2024). Those individuals and entities are not required to report beneficial ownership information to FinCEN at this time." The U.S. Department of Justice, on behalf of the U.S. Department of Treasury, filed a Notice of Appeal for this ruling on March 11, 2024.

It is unclear whether the district judge's ruling will survive on appeal, but the final order from the court was seemingly clear that the injunction was limited to the plaintiffs in that case. Unless the scope of this ruling is clarified or expanded by the appeals court, then any business who was not a member of the National Small Business Association as of March 1, 2024 should continue to expect to comply with the CTA, absent further litigation on the CTA's constitutionality.

VII. KEY TAKEAWAYS: ACTIONS TO CONSIDER IN PREPARATION FOR CTA COMPLIANCE

- The CTA is here, and, for now, appears here to stay.
- For entities created or registered on or after January 1, 2024, you have 90 days after the date of formation to submit your initial BOI filing through [FinCEN's BOI E-Filing System](#). You'll be required to identify all of your beneficial owners and up to two company applicants to be listed in your BOI filing. Starting January 1, 2025, newly formed entities will have 30 days after formation to submit their initial BOI filing.
- For entities that existed before January 1, 2024, you have until January 1, 2025, to submit your initial BOI filing.
- The reporting regime is confidential and isn't expected to impose onerous requirements, but you'll need to create some new muscle memory as you acclimate to this new reporting regime.
- If you are a new company (i.e., formed on or after January 1, 2024), then you should ensure your filing is done in a timely manner. If you were formed before January 1, 2024, then you should assess whether you need to submit your initial BOI filing with all of your beneficial owner information or if you fall within one of the enumerated exclusions under the CTA before the end of 2024.
- Individuals who may believe they are company applicants or beneficial owners of a reporting company should consider applying for a FinCEN identifier (you can apply [here](#))—it only takes a few minutes to obtain a FinCEN ID.
- Reporting companies should consider other actions that may be sensible to facilitate CTA compliance, including:
 - Designating an officer or other person to be responsible for a reporting company's compliance with the CTA.
 - Ensuring that the reporting company's ownership and other entity records are complete and up to date.
 - Developing a communication strategy to advise beneficial owners of the company's BOI reporting obligations under the CTA.

The introduction of any new reporting regime is likely to cause questions, confusion, and stress as individuals and entities work to understand and adapt to its requirements. Your Fenwick team is available to assist you in that process and to answer any questions you may have.