

FinCEN Establishes Beneficial Ownership Reporting Requirements to Implement Corporate Transparency Act

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FINCEN ESTABLISHES BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS TO IMPLEMENT CORPORATE TRANSPARENCY ACT

On September 30, the US Treasury's Financial Crimes Enforcement Network (FinCEN) published, in the *Federal Register*, a [final rule](#) (Final Rule) that establishes beneficial ownership information (BOI) reporting requirements pursuant to the Corporate Transparency Act (CTA).¹ The Final Rule is codified at 31 CFR §1010.380. As discussed in greater detail below, the Final Rule requires most entities created or registered to do business in the United States to file beneficial ownership information (BOI) reports with FinCEN that identify two categories of individuals: (1) the beneficial owners of the entity and (2) the company applicants of the entity.

As discussed in a prior [LawFlash](#), Congress enacted the CTA on January 1, 2021, establishing a reporting regime for the beneficial owners of corporations and limited liability companies in an effort to make BOI available to law enforcement and, in some circumstances, financial institutions for use in combating money laundering.

FinCEN's [press release](#) accompanying the Final Rule states that it is "[d]esigned to protect U.S. national security and strengthen the integrity and transparency of the U.S. financial system," and "will help to stop criminal actors, including oligarchs, kleptocrats, drug traffickers, human traffickers, and those who would use anonymous shell companies to hide their illicit proceeds."

The Final Rule is in many respects an extension of the Customer Due Diligence Rule (CDD Rule) requirements² that FinCEN adopted in 2016 that require covered financial institutions to collect and verify BOI of certain legal entity customers. Unlike the CDD Rule, which requires certain financial institutions to collect BOI information, the Final Rule imposes a requirement on the legal entities themselves to report BOI information directly with FinCEN. While the **effective date for the Final Rule is January 1, 2024**, it is but one of three rulemakings that FinCEN must finalize to fully implement the BOI requirements of the CTA.³ In addition, FinCEN still needs to develop the infrastructure to administer the Rule's reporting requirements in accordance with the CTA's strict security and confidentiality requirements, including the information technology system—the Beneficial Ownership Secure System (BOSS)—that will be used to store beneficial ownership information.

BACKGROUND

The Final Rule is the culmination of long-standing efforts to address US deficiencies in beneficial ownership transparency as noted by the Financial Action Task Force (FATF), Congress, law enforcement, and others. Most recently in 2016, the United States was subject to a [mutual evaluation](#) by FATF where the United States was rated as non-compliant with Recommendation 24—Transparency and beneficial ownership of legal persons. The Final Rule helps bring the United States closer to satisfying FATF standards.

¹ The CTA was enacted into law as part of the National Defense Authorization Act for fiscal year 2021.

² 31 C.F.R. § 1010.230.

³ FinCEN needs to engage in additional rulemakings to (1) establish rules for who may access BOI, for what purposes, and what safeguards will be required to ensure that the information is secured and protected; and (2) revise FinCEN's CDD Rule following the promulgation of the Final Rule.

WHO HAS TO REPORT?

The Final Rule applies to “**reporting companies**” which are bifurcated between domestic reporting companies and foreign reporting companies.

A **domestic reporting company** is defined as any entity that is:

- A corporation
- A limited liability company (LLC), or
- Created by the filing of a document with a secretary of state or any similar office under the law of a state or American Indian tribe.

A **foreign reporting company** is defined as any entity that is:

- A corporation, LLC, or other entity;
- Formed under the law of a foreign country; and
- Registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a state or American Indian tribe.

Concurrently with the release of the Final Rule, FinCEN published a [Fact Sheet](#) in which it notes that it expects these definitions of reporting companies to include limited liability partnerships (LLP), limited liability limited partnerships, business trusts, and most limited partnerships, in addition to corporations and LLCs, as they are typically established by a filing with a secretary of state or similar office. However, to the extent an entity is not created by the filing of a document with a secretary of state or similar office, such as certain types of trusts, it is not subject to the Final Rule.

In addition, the Final Rule explicitly provides over 20 exemptions from the definition of reporting company. The list of exempted entities under the Final Rule is identical to those set out in the CTA (FinCEN did not add additional exempt entities) and similar to the list of exempted entities under the CDD Rule. These exempted entities include public companies, public utility companies, large operating companies, and subsidiaries of certain exempt entities. A full list of excluded entities is included as an Appendix to this report.

DISCLOSURE OF BENEFICIAL OWNERS AND COMPANY APPLICANTS

The Final Rule requires reporting companies to disclose their “beneficial owners” and “company applicants” to FinCEN.

BENEFICIAL OWNERS

As compared to FinCEN’s CDD Rule, the Final Rule imposes a broader definition of “beneficial owner” to include *any* individuals who exercise “substantial control” over the reporting company or who own *or control* a 25% “ownership interest” in the reporting company. By contrast, the CDD Rule defines beneficial ownership to include (i) any individuals who own 25% of the legal entity and (ii) a single individual with significant responsibility to control, manage, or direct the legal entity. In short, while the number of beneficial owners under the CDD Rule is capped at five, there is no limit to the number of individuals who qualify as beneficial owners under the Final Rule.

Furthermore, the Final Rule:

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- defines “substantial control” broadly and includes a catchall term encompassing “any other form of substantial control”;
- defines “ownership interest” broadly to encompass not just an equity interest (such as the CDD Rule) but other forms of ownership interest as well; and
- expands the definition of beneficial ownership of a trust to include trustees, grantors, settlors, beneficiaries, etc., whereas the CDD Rule defines beneficial ownership of a trust exclusively as the trustee.

In FinCEN’s [Fact Sheet](#), it explains that its approach to substantial control under the Final Rule is “designed to close loopholes that allow corporate structuring that obscures owners or decision-makers,” and that “[t]his is crucial to unmasking anonymous shell companies.”

COMPANY APPLICANTS

In addition to beneficial owners, the Final Rule requires reporting companies to disclose their “company applicant(s).” The Final Rule defines a company applicant as the individual who directly files the document that creates the domestic reporting company or registers the foreign 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 of the document. However, companies should note that the Final Rule does not require reporting companies already existing or registered as of the effective date of the Final Rule to report their company applicants.

DATA THAT MUST BE DISCLOSED

A reporting company’s initial report under the Final Rule must include:

- For the reporting company:
 - Full legal name;
 - Any trade name or “doing business as” (DBA) name;
 - Complete current address of its principal place of business or primary location in the United States where it conducts business;
 - Jurisdiction of formation;
 - Jurisdiction of first registration, for foreign reporting companies;
 - US Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) or tax identification number issued by a foreign jurisdiction and the name of such jurisdiction;
- For every individual who is a beneficial owner of the reporting company and every individual who is a company applicant of the reporting company:
 - Full legal name;
 - Date of birth;
 - Complete current address (business or residential as applicable);
 - Unique identifying number and the issuing jurisdiction from either a non-expired (1) passport issued by the US government, (2) identification document issued by a state or local government or Indian tribe, (3) driver’s license issued by a state,

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or (4) if the individual does not possess one of items 1 through 3, a passport issued by a foreign government; and

- Image of the document from which the unique identifying number was obtained.

If an individual beneficial owner or company applicant submits this data to FinCEN directly, the individual may obtain a “FinCEN identifier,” or unique identifying number assigned by FinCEN to the individual, which the reporting company may provide to FinCEN in its initial report in lieu of the data listed above pertaining to beneficial owners and company applicants.

SPECIAL RULES

The Final Rule contains special rules for the information required to be reported regarding ownership interests held by exempt entities, minor children, and foreign pooled investment vehicles.

REPORTING COMPANY OWNED BY EXEMPT ENTITY

If a reporting company is owned by an entity that is excluded from the definition of a reporting company (see Appendix), and an individual is a beneficial owner of the reporting company exclusively by virtue of the individual’s ownership interest in the exempt entity, the reporting company may provide only the name of the exempt entity to FinCEN in lieu of the information reporting companies are otherwise required to report pursuant to the Final Rule.

MINOR CHILDREN

Under the Final Rule, the term “beneficial owner” does not include a minor child, provided that the reporting company reports the required information of the minor child’s parent or legal guardian. A reporting company, however, would need to indicate when the information provided relates to a parent or legal guardian. In addition, a reporting company must submit an updated report when a minor child reaches the age of majority.

POOLED INVESTMENT VEHICLES

Under the Final Rule, a pooled investment vehicle is excluded from the definition of a reporting company if it is operated or advised by a bank, credit union, broker-dealer, investment company, investment adviser, or venture capital fund adviser. The Final Rule defines a pooled investment vehicle to mean:

- Any investment company, as defined in Section 3(a) of the Investment Company Act of 1940; or
- Any company that: (a) would be an investment company under that Section but for the exclusion provided from that definition by paragraph (1) or (7) of Section 3(c) of that Act; and (b) is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the Securities and Exchange Commission or will be so identified in the next annual updating amendment to Form ADV required to be filed by the applicable investment adviser pursuant to Rule 204–1 under the Investment Advisers Act of 1940.

However, if the pooled investment vehicle is foreign (i.e., would come within the meaning of a foreign reporting company), it will still have to report information about an individual who exercises substantial control over the entity. If more than one individual exercises substantial control over the entity, the entity shall report information with respect to the individual who has the greatest authority over the strategic management of the entity.

EFFECTIVE DATE, REPORTING DATES, AMENDMENTS AND CORRECTIONS

The Final Rule is effective January 1, 2024; however, filing requirements will differ based on when the reporting company was registered or created.

Reporting companies (whether foreign or domestic) created on or registered before January 1, 2024, must file their initial reports by January 1, 2025.

Domestic reporting companies created on or after January 1, 2024, must file their initial reports within 30 calendar days of the earlier of the date on which it receives actual notice that its creation has become effective, or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the domestic reporting company has been created.

Foreign reporting companies created on or after January 1, 2024, must file a report within 30 calendar days of the earlier of the date on which it receives actual notice that it has been registered to do business, or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business.

An entity that loses the ability to rely on an exemption from reporting company status have to file a report within 30 calendar days after the date that it no longer meets the criteria for any exemption.

Reporting companies must report any **changes or correct inaccurate information** previously reported within 30 days of when the company becomes aware of the change or inaccuracy.

IMPLICATIONS

The Final Rule will have significant implications going forward for any persons creating new entities or registering entities to do business within the United States. Unless subject to an exemption, every new LLC, LLP, corporation, or other business entity will have a filing obligation with FinCEN. This will capture the vast majority of small and medium businesses in the United States, and it will be incumbent on persons to track their various business organizations and ensure that reports are filed with FinCEN timely.

It is important to note that the Final Rule does not provide an exemption for certain private investment vehicles owned by US citizens that are already subject to AML reporting requirements. There will likely be a number of interpretive questions concerning the scope of the exceptions to the reporting obligations, and FinCEN acknowledged in the [Fact Sheet](#) that it intends to develop compliance and guidance documents to assist reporting companies in complying with the Final Rule.

In addition, as small and emerging companies grow, and expand their business lines, they will need to be mindful to update FinCEN with any changes, including new owners, new investors, and any new business lines operating under a different trade or DBA name. Notably, in the Final Rule, FinCEN made clear that responsibility for the accuracy of the information rests with the reporting company itself.

Under the Final Rule, federal agencies and state and local law enforcement agencies will have greater access to BOI and will be able to share such information with international agencies in an effort to combat money laundering and other illicit activities.

In addition, FinCEN is required to make certain conforming changes to the CDD Rule that requires certain financial institutions to collect BOI information from certain legal entity customers. Given the breadth of information that FinCEN will now be collecting directly from reporting companies, financial institutions can hopefully expect that FinCEN will alleviate some requirements under the CDD Rule, although that remains

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unclear. At a minimum, however, it is expected that FinCEN will harmonize the definitions and exclusions under each rule so as to not have a disconnect between the BOI that is collected by FinCEN under the Final Rule and financial institutions under the CDD Rule. As mentioned above, the Final Rule adopts a broader definition of “beneficial owner” than the definition under the CDD Rule. However, until FinCEN revises the CDD Rule as required, the Final Rule will have little effect on financial institutions’ current customer due diligence obligations.

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APPENDIX

Entities Exempt from Reporting Company Status

1. **Securities reporting issuers:** Any issuer of securities that is (a) an issuer of a class of securities registered under Section 12 of the Securities Exchange Act of 1934; or (b) Required to file supplementary and periodic information under Section 15(d) of the Securities Exchange Act of 1934.
2. **Governmental authorities:** Any entity that (a) is established under the laws of the United States, an American Indian tribe, a state, or a political subdivision of a state, or under an interstate compact between two or more states; and (b) exercises governmental authority on behalf of the United States or any such American Indian tribe, state, or political subdivision.
3. **Banks:** Any bank, as defined in (a) Section 3 of the Federal Deposit Insurance Act; (b) Section 2(a) of the Investment Company Act of 1940; or (c) Section 202(a) of the Investment Advisers Act of 1940.
4. **Credit unions:** Any federal credit union or state credit union, as those terms are defined in Section 101 of the Federal Credit Union Act.
5. **Depository institution holding companies:** Any bank holding company as defined in Section 2 of the Bank Holding Company Act of 1956, or any savings and loan holding company as defined in Section 10(a) of the Home Owners' Loan Act.
6. **Money services businesses:** Any money transmitting business registered with FinCEN under 31 USC 5330, and any money services business registered with FinCEN under 31 CFR 1022.380.
7. **Brokers or dealers in securities:** Any broker or dealer, as those terms are defined in Section 3 of the Securities Exchange Act of 1934, that is registered under Section 15 of that act.
8. **Securities exchanges or clearing agencies:** Any exchange or clearing agency, as those terms are defined in Section 3 of the Securities Exchange Act of 1934, that is registered under Sections 6 or 17A of that act.
9. **Other Exchange Act registered entities:** Any other entity not described in items 1, 7, or 8 above that is registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.
10. **Investment companies or investment advisers:** Any entity that is (a) An investment company as defined in Section 3 of the Investment Company Act of 1940, or is an investment adviser as defined in Section 202 of the Investment Advisers Act of 1940; and (b) Registered with the Securities and Exchange Commission under the Investment Company Act of 1940 or the Investment Advisers Act of 1940.
11. **Venture capital fund advisers:** Any investment adviser that (a) is described in Section 203(l) of the Investment Advisers Act of 1940; and (b) Has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the Securities and Exchange Commission.
12. **Insurance companies:** Any insurance company as defined in Section 2 of the Investment Company Act of 1940.
13. **State-licensed insurance producers:** Any entity that (a) is an insurance producer that is authorized by a state and subject to supervision by the insurance commissioner or a similar official or agency of a state; and (b) has an operating presence at a physical office within the United States.
14. **Commodity Exchange Act registered entities:** Any entity that (a) is a registered entity as defined in Section 1a of the Commodity Exchange Act; or (b) is (1) a futures commission merchant,

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introducing broker, swap dealer, major swap participant, commodity pool operator, or commodity trading advisor, each as defined in Section 1a of the Commodity Exchange Act, or a retail foreign exchange dealer as described in Section 2(c)(2)(B) of the Commodity Exchange Act; and (2) Registered with the Commodity Futures Trading Commission under the Commodity Exchange Act.

15. **Accounting firms:** Any public accounting firm registered in accordance with Section 102 of the Sarbanes-Oxley Act of 2002.
16. **Public utilities:** Any entity that is a regulated public utility as defined in 26 USC 7701(a)(33)(A) that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States.
17. **Financial market utilities:** Any financial market utility designated by the Financial Stability Oversight Council under Section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010 (12 USC 5463).
18. **Pooled investment vehicles:** Any pooled investment vehicle that is operated or advised by a person described in items 3, 4, 7, 10, or 11 above.
19. **Tax-exempt entities:** Any entity that is (a) an organization that is described in Section 501(c) of the Internal Revenue Code of 1986 (Code) (determined without regard to Section 508(a) of the Code) and exempt from tax under Section 501(a) of the Code, except that in the case of any such organization that ceases to be described in Section 501(c) and exempt from tax under Section 501(a), such organization shall be considered to continue to be described in this item 19(a) for the 180-day period beginning on the date of the loss of such tax-exempt status; (b) a political organization, as defined in Section 527(e)(1) of the Code, that is exempt from tax under Section 527(a) of the Code; or (c) a trust described in paragraph (1) or (2) of Section 4947(a) of the Code.
20. **Entities assisting a tax-exempt entity:** Any entity that (a) operates exclusively to provide financial assistance to, or hold governance rights over, any entity described in item 19 of this section; (b) is a United States person; (c) is beneficially owned or controlled exclusively by one or more US persons that are US citizens or lawfully admitted for permanent residence; and (d) derives at least a majority of its funding or revenue from one or more US persons that are US citizens or lawfully admitted for permanent residence.
21. **Large operating companies:** Any entity that (a) employs more than 20 full-time employees in the United States, with "full-time employee in the United States" having the meaning provided in 26 CFR 54.4980H-1(a) and 54.4980H-3, except that the term "United States" as used in 26 CFR 54.4980H-1(a) and 54.4980H-3 has the meaning provided in § 1010.100(hhh); (b) has an operating presence at a physical office within the United States; and (c) 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, as reported 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, excluding gross receipts or sales from sources outside the United States, as determined under federal income tax principles. For an entity that is part of an affiliated group of corporations within the meaning of 26 USC 1504 that filed a consolidated return, the applicable amount shall be the amount reported on the consolidated return for such group.
22. **Subsidiaries of certain exempt entities:** Any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more entities described in items 1 through 5, 7 through 17, 19, and 21 above.
23. **Inactive entities:** Any entity that (a) was in existence on or before January 1, 2020; (b) is not engaged in active business; (c) is not owned by a foreign person, whether directly or indirectly, wholly or partially; (d) has not experienced any change in ownership in the preceding 12-month period; (e) has not sent or received any funds in an amount greater than \$1,000, either directly or

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through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding 12-month period; and (f) does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.