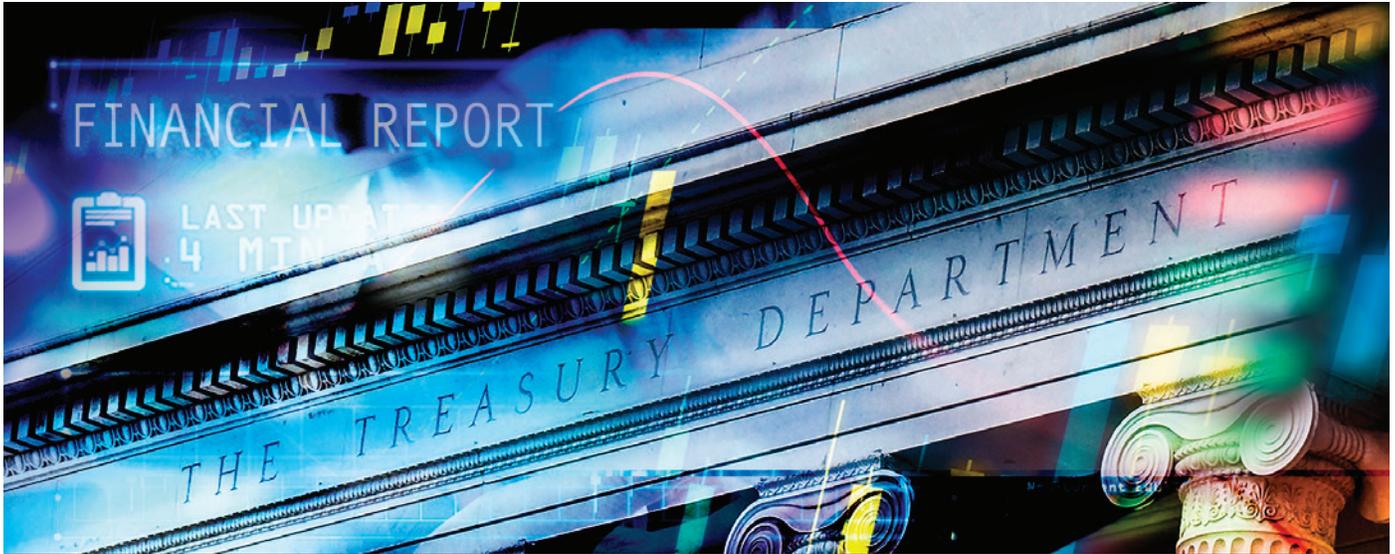




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WHITE PAPER

September 2023

Preparing for Major Changes in FinCEN Beneficial Ownership Reporting

An estimated 32.6 million domestic and foreign companies will soon be required to report information about their beneficial owners to the U.S. Treasury. This *White Paper* describes the new requirements and the steps companies need to consider taking prior to the first reporting deadlines to comply with the new requirements.

The reporting requirements take effect January 1, 2024. All non-exempt domestic reporting companies created on or after January 1, 2024, will have 30 days from notification of their formation to file an initial beneficial ownership report with the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). Foreign reporting companies formed on or after January 1, 2024, will have 30 days from their initial qualification to do business in a U.S. jurisdiction to file. Domestic or foreign reporting companies in existence prior to January 1, 2024, will have until January 1, 2025, to file an initial beneficial ownership report.

While FinCEN is expected to issue additional interpretative guidance on the reporting procedures, including the format of the reporting form and final rules on access to reported information, companies can take specific steps now to ensure they are ready to timely comply with the new requirements.

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INTRODUCTION

An estimated 32.6 million “reporting companies” will soon be required to report information about their “beneficial owners” to the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”).¹ Such reporting companies will include, unless exempted, all entities formed (in the case of domestic reporting companies) or qualified to do business (in the case of foreign reporting companies) by governmental filings; as such, they will include traditional corporations, limited liability companies, limited partnerships, certain trusts, and other forms of business organizations if formed or qualified to do business by the requisite filing with a secretary of state or similar official.

This reporting requirement is part of a sweeping Beneficial Ownership Information Rule (the “BOI Rule”) promulgated last year by FinCEN, which becomes effective on January 1, 2024. FinCEN will not accept any reports prior to that date.² The BOI Rule implements Section 6403 of the Corporate Transparency Act (“CTA”), which is designed to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activities. It marks a sea change in U.S. reporting and entity formation rules, as historically there has not been any generally applicable requirement in the United States to disclose the individuals who own or control corporate entities. Failure to comply with the new reporting obligations can lead to civil and criminal penalties, including a civil penalty of up to \$500 per day (capped at \$10,000), and imprisonment for up to two years.³

The CTA and the BOI Rule will impact “reporting companies” formed on or after January 1, 2024, as well as legacy reporting companies that exist today or come into existence before the end of 2023. In accordance with the BOI Rule, all reporting companies created on or after January 1, 2024, will have 30 days from notification of their creation (if a domestic company) or qualification to do business in a U.S. domestic jurisdiction (if a foreign company) has become effective, to file an initial report with FinCEN.⁴ The report must include information about the company, those forming or qualifying the company (i.e., its “company applicants”), and its “beneficial owners,” a concept that includes both anyone who, directly or indirectly, owns or controls at least 25% of the reporting company’s ownership interests, and anyone who exerts substantial control

(as defined in the BOI Rule) over the reporting company.⁵ Reporting companies in existence prior to January 1, 2024, will have until January 1, 2025, to file an initial report that identifies the companies’ beneficial owners.

FinCEN recently published several resources to help individuals and entities understand the new reporting obligations, including a “Frequently Asked Questions” page and a number of concrete examples.⁶ As the effective date of the BOI Rule approaches, we expect that FinCEN may issue additional information to assist potential filers. FinCEN also will finalize rules relating to the handling of, and access to, reported information, the form of the required reports, and revisions to the existing Customer Due Diligence Rule applicable to financial institutions.

This *White Paper* provides an introduction to the BOI Rule and identifies certain steps companies and other entities should take now to ensure timely compliance, including:

- Determining which entities are reporting companies and which entities qualify for one of the 23 enumerated exemptions;
- Identifying beneficial owners and company applicants;
- Identifying the information about beneficial owners and company applicants that must be reported, analyzing the four special rules that alter those requirements, and understanding the proposed mechanics for reporting information;
- Understanding deadlines for initial compliance, updates, and corrections to reports; and
- Understanding penalties for noncompliance.

This *White Paper* also includes a list of issues and questions that parties should consider in connection with evaluating the impact of the BOI Rule on both entities that already, as well as developing processes to ensure the ability to comply with the BOI Rule in connection with the formation of new entities that are reporting companies.

In many—if not most—cases, compliance with the BOI Rule will not present substantial difficulty provided that the relevant parties have access to the required information. In other instances, however, compliance may present challenges. Those challenges may prove particularly acute in the context of existing complex organizational structures, some of which may make tracing beneficial ownership interests difficult.

Challenges may also arise in the context of non-exempt entities that are dormant or not actively managed, as well as in the context of highly structured organizations or business models that lack an easily identifiable party with clear responsibility for ensuring compliance with the BOI Rule. For example, statutory trusts or limited liability companies are often governed by heavily negotiated complex agreements that may not squarely address who has responsibility for compliance with the BOI Rule. And there are many companies that are, in a practical sense, dormant in that they may lack a functioning board or active officers or managers to take on the responsibility of filing the required reports, yet do not meet the definition of an exempt “inactive” entity under the BOI Rule.

In these and other similar circumstances, a detailed analysis of the governing agreements, the relevant organizational statutes, and other applicable laws will likely be necessary to determine where the appropriate responsibility to file accurate reports lies, without much, if any, guidance from FinCEN.

To state the obvious, given the interpretive and informational difficulties that the BOI Rule presents, persons who may be responsible for compliance of existing entities should not wait to familiarize themselves with the BOI Rule nor delay developing and implementing a plan to identify the reporting companies for which they have responsibility and how they will comply with the BOI Rule and CTA. Likewise, if they have not done so already, those who create entities as part of structuring new businesses and organizations should familiarize themselves with the BOI Rule’s impact so that they can account for any applicable reporting obligations in connection with forming new entities. This may include reviewing processes to ensure timely compliance with the new reporting obligations, as well as modifying traditional structures and updating templates and forms of agreements that have otherwise withstood the test of time.

WHAT ENTITIES ARE REPORTING COMPANIES?

Domestic and Foreign Reporting Companies

The BOI Rule applies to both domestic and foreign reporting companies. A “domestic reporting company” is any entity that is a corporation, a limited liability company, or any other entity created by the filing of a document with a secretary of state or similar office.⁷ A “foreign reporting company” is a foreign corporation, limited liability company, or other entity formed under

the laws of a foreign country that is registered to do business in any state by the filing of a document with a secretary of state or similar office.⁸

Importantly, the BOI Rule does not apply to entities that were not formed by a filing with a secretary of state or similar office filing. This means that general partnerships, sole proprietorships, and common law trusts are not “reporting companies” under the laws of most jurisdictions. FinCEN has emphasized that the proper way to think about what is and is not a “reporting company” is whether, under the applicable state law, a filing creates the entity (and not the category of entity—i.e., trust, LLC, etc.—to which the entity may belong).⁹ Thus, a careful analysis of the relevant state statutory filing regime may be required to determine whether an entity is a “reporting company.”

Businesses or organizations with complex corporate structures should be especially careful to identify all entities within their structures (including entities that are not LLCs or corporations) and to assess whether those entities meet the “reporting company” definition. Businesses or organizations with structures that include foreign entities should carefully analyze whether any of those entities were registered to do business in the United States by a filing. Parties who may have filing obligations should be mindful that the BOI Rule captures entities that are disregarded for federal income tax purposes, such as single-member LLCs.

Exemptions

Many entities that fit the definition of a domestic or foreign reporting company will fall into one of the BOI Rule’s 23 enumerated exemptions. Exempt entities are generally larger, more heavily regulated entities that are already subject to other reporting requirements, including FinCEN’s Customer Due Diligence (“CDD”) Rule.¹⁰ Exempt entities include:

- Publicly traded companies with a class of shares registered under the Exchange Act;
- U.S. government entities;
- Banks;
- Credit unions;
- Depository institution holding companies;
- Money services businesses;
- Registered broker dealers;
- Securities exchanges or clearing agencies and other Exchange Act registered entities;

- Investment companies and investment advisors;
- Venture capital fund advisers;
- Insurance companies and state-licensed insurance producers;
- Commodity Exchange Act registered entities;
- Registered public accounting firms;
- Regulated public utilities and financial market utilities;
- Pooled investment vehicles operated or advised by certain other exempt entities, including registered investment advisors;
- Tax-exempt entities as defined under Section 501(c) of the Internal Revenue Code;¹¹
- “Large operating companies”;¹²
- Entities in which the ownership interests are controlled or wholly owned by certain other exempt entities; and
- Existing inactive entities.

The exemptions in the BOI Rule track those in the CTA. FinCEN expressly declined to elaborate on those exemptions in a manner that could expand them, noting that relying on “carefully circumscribed” exceptions ensures consistency with the CTA’s overall objective of enhancing financial transparency.¹³ The CTA does, however, include a provision to exclude additional entities as determined by the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security.¹⁴ Whether and how that authority might be exercised remains to be seen.

Businesses and organizations assessing an entity’s eligibility for the BOI Rule’s exemptions should carefully examine the definitions for these exempt entities, as those definitions carve out entities that may appear, on their face, to be exempt. Consider, for example, the definition of “inactive entities,” which does not include any entity that:

- Was created after January 1, 2020;
- Is “owned by a foreign person, whether directly or indirectly, wholly or partially”;
- Has experienced any change in ownership in the preceding 12 months;
- Has sent or received funds in any amount greater than \$1,000, either directly or through any financial account in which the entity or any of its affiliates had any interest, in the preceding 12-month period; or
- Holds “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.”¹⁵

Businesses and organizations also should carefully consider how the BOI Rule treats affiliated entities. For example, to qualify for the large operating company exemption, an entity must:

- Employ more than 20 full-time employees in the United States;
- Have an operating presence at a physical office within the United States; and
- File a federal income tax or information return in the United States for the previous year demonstrating more than \$5 million in gross receipts or sales.

FinCEN does not permit entities to consolidate employee headcounts across affiliated entities to satisfy subsection (i) of the large operating company exemption.¹⁶ However, if any entity is part of an affiliated group of corporations that filed a consolidated tax return, that entity may rely on the amount of gross receipts or sales reported by the affiliated group to satisfy subsection (iii) of the large operating company exemption.¹⁷

WHO ARE BENEFICIAL OWNERS AND COMPANY APPLICANTS?

The BOI Rule requires reporting companies created on or after January 1, 2024, to provide information about two sets of individuals: (i) their beneficial owners and (ii) their company applicants.¹⁸ Reporting companies in existence prior to January 1, 2024, will not have to provide information about their company applicants; they will be required to report only beneficial ownership information, and the deadline to do so is January 1, 2025.

Beneficial Owners

The term “beneficial owner” is something of a misnomer, as the BOI Rule defines it to include numerous individuals who may have no ownership interest in a reporting company. Under the BOI Rule, a “beneficial owner” is any individual who, directly or indirectly, either:

- Owns or controls at least 25% of the ownership interests of the reporting company (the “ownership prong”), or
- Exercises substantial control over the reporting company (the “substantial control prong”).

An individual exercises “substantial control” by:

- Serving as a senior officer of the reporting company, including as CEO, COO, or general counsel;¹⁹
- Having authority over the appointment or removal of senior officers or a majority of the board of directors;
- Directing, determining, or having substantial influence over important decisions made by the reporting company; or
- Holding any other form of substantial control over the reporting company.

The breadth of the catch-all provision underscores how fact-intensive this analysis will be for each reporting company. FinCEN has stated publicly that the BOI Rule is intended to capture individuals with both *de jure* and *de facto* authority, and it expects all reporting companies to identify at least one beneficial owner under the “substantial control” prong, even if all other individuals are subject to an exclusion or fail to satisfy the ownership interests component.²⁰ In other words, entities cannot avoid reporting beneficial ownership interests simply by structuring their ownership to ensure that no party owns more than 24.9% of the relevant reporting company. At least one individual person must be reported as exercising “substantial control.”

The BOI Rule broadly defines “ownership interests” to include not only traditional equity interests like shares of stock, but also ownership of options, convertible securities, and other instruments that entitle an individual to an equity, capital, or profit interest in the reporting company (or to acquire such an interest).²¹ The BOI Rule includes another catch-all provision that captures “any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.”²² The breadth of this catch-all means that each reporting company will need to carefully analyze its individual circumstances and cannot rely on the BOI Rule to provide an exhaustive list of instruments that indicate ownership. Further, reporting companies must be mindful that beneficial ownership (either through the ownership or substantial control prongs of the definition) can be indirect, and held through intermediaries, including other entities. Indirect ownership can also be exercised through other contracts, arrangements, or understandings.²³ Identifying indirect beneficial owners may complicate reporting for companies that are part of complex structures.

The size of an ownership interest is to be calculated based on securities owned or controlled directly or indirectly at the time of determination, treating options and convertible securities as already exercised or converted.²⁴ Importantly, while enhanced voting rights held by securities holders may not be material to analyzing the “ownership prong” of the beneficial owner analysis, they may be relevant to the “substantial control prong.” FinCEN has recognized that complex ownership structures will make the process of identifying beneficial owners difficult, particularly where securities are owned or controlled indirectly. While the final BOI Rule provides more detailed guidance than was included in the proposed rulemaking,²⁵ the BOI Rule’s instructions do not address all circumstances that one could imagine arising. Accordingly, existing organizations with particularly complex structures should begin their analysis well before the initial reporting deadline.

The BOI Rule provides a narrow set of exemptions for beneficial ownership, which includes employees other than senior officers and creditors of reporting companies.²⁶

Company Applicants

Reporting companies created on or after January 1, 2024, must submit information about their “company applicant(s)” as well as their beneficial owners. As with beneficial owners, company applicants must be individuals. The BOI Rule defines “company applicant” to mean:

- For a domestic reporting company, the individual who directly files the document that creates the domestic reporting company;
- For a foreign reporting company, the individual who directly files the document that first registers the foreign reporting company; *and*
- Whether for a domestic or a foreign reporting company, 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.

In other words, there may be either one or two company applicants. FinCEN expects that company applicants will often include an employee of a business formation service or law firm.²⁷

WHAT INFORMATION MUST BE REPORTED ABOUT THE REPORTING COMPANY, ITS BENEFICIAL OWNER(S), AND COMPANY APPLICANT(S)?

The BOI Rule requires reporting companies to provide the following information about the company, its beneficial owners, and the company applicants:

- **Information Identifying the Reporting Company:** The full name of the reporting company, any trade name it uses, its complete business address, and its IRS Taxpayer Identification Number, including an Employer Identification Number).²⁸
- **Information About Beneficial Owners:** For each beneficial owner, the reporting company must provide the following information: name, birthdate, residential street address, an acceptable identification document (a state-issued driver's license, a state/local/or tribal-issued ID document, a U.S. passport, or a foreign passport), the unique identifying number on such ID document, and an image of the ID document.²⁹
- **Information About Reporting Company Applicants:** Reporting companies created after January 1, 2024, must provide the same categories of information as are required for beneficial owners, except that company applicants who register companies in the regular course of their business will provide the business address for each newly registered company instead of their residential street address. Otherwise, the applicant must provide a residential street address.³⁰

Special Rules Regarding Information to Report

The BOI Rule provides four “special rules”³¹ that alter the information that must be provided in the following circumstances:

1. When a reporting company is owned by an exempt entity;
2. When a reporting company reports information for a parent or legal guardian rather than a minor child;³²
3. When an entity is a foreign pooled investment vehicle;³³ or
4. When a domestic reporting company is in existence or a foreign reporting company is registered before January 1, 2024.³⁴

Business organizations and corporate families should consider whether to invoke the special rule that applies to reporting companies owned by exempt entities, which provides:

If one or more exempt entities ... has or will have a direct or indirect ownership interest in a reporting company and an individual is a beneficial owner of the reporting company exclusively by virtue of the individual's ownership interest in such exempt entities, the report may include the names of the exempt entities in lieu of the information required under paragraph (b)(1) of this section with respect to such beneficial owner.³⁵

Entities that choose to invoke this special rule must be careful. This rule applies only where a beneficial owner's interest in a reporting company is held “exclusively” through the owner's interest in exempt entities, without any separate interest in the reporting company. The rule does not enable beneficial owners who hold ownership interests through both exempt and non-exempt entities to “obscure their standing as beneficial owners.”³⁶ In other words, the special rule does not permit “beneficial owners of a reporting company to avoid being reported by electing to hold even a small portion of their ownership interests through an exempt entity and keeping their ownership interests through non-exempt entities under 25 percent.”³⁷ Importantly, this special rule does not apply to reporting under the “substantial control” prong of the beneficial owner analysis.

Form of Report and Access to Reported Information

Reporting companies will file reports online via the Beneficial Ownership Secure System (“BOSS”), which is currently under development.³⁸ As of the publication of this *White Paper*, FinCEN has not finalized the form with which reporting companies will submit the required information via BOSS. However, on January 17, 2023, FinCEN published a proposed form for public review and comment.³⁹ That form included an option for reporting companies to indicate that they were unable to obtain certain pieces of information covered by the BOI Rule. On April 3, 2023, several members of Congress sent a letter to Secretary Yellen and Acting Director Das urging FinCEN to amend the form and remove that “escape hatch.”⁴⁰ It remains to be seen whether FinCEN will amend the form in response.

FinCEN has also proposed rules governing who has access to reported BOI information and how that access will be provided.⁴¹ The proposed rules restrict access to reported information to particular government agencies and financial

institutions for particular purposes.⁴² They do not provide for general public access to BOI information. Further, different degrees of access are contemplated for different purposes: i.e., in some cases those agencies with access may search the database for allowed purposes while in others, requested information about an entity will be provided but the requester will not have the right to search the database itself.

Reporting companies and financial institutions will want to watch for finalization of the access rules in order to understand who will have access to reported information, for what purposes, and subject to what conditions.

DEADLINES FOR INITIAL COMPLIANCE, UPDATES, AND CORRECTIONS TO REPORTS

As noted above, reporting companies created or registered on or after January 1, 2024, will be subject to the CTA and BOI Rule's reporting obligations. Such reporting companies will face tight deadlines for complying with their reporting obligations following the relevant entity's creation:

- Domestic reporting companies must file an initial report within 30 calendar days of the earlier of the date of receipt of actual notice that its creation has become effective or the date on which a secretary of state or a similar office first provides a public notice, such as through a publicly accessible registry, that the domestic reporting company has been created.
- Foreign reporting companies must file an initial 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 a similar office first provides a public notice, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business.

Legacy reporting companies that are created before January 1, 2024, will be required to file their initial reports on January 1, 2025.

All reporting companies—both those created before and after January 1, 2024—must update company and beneficial ownership information within 30 calendar days of any change to

that information. Accordingly, if a beneficial owner moves, a duty to update is triggered. The BOI Rule does not require updates to company applicant information. If a reporting company or applicant learns of an error, corrected reports must be filed within 30 calendar days after the reporting company becomes aware or has reason to know of an inaccuracy. The BOI Rule “provides a safe harbor to any person that has reason to believe that any report submitted by the person contains inaccurate information” and submits a corrected report within 90 days of the original submission.⁴³

ENFORCEMENT AND PENALTIES FOR NONCOMPLIANCE

It remains to be seen how FinCEN will handle enforcement of the CTA and BOI Rule. Given the sheer number of entities expected to report and FinCEN's limited resources, actively tracking potential reporting companies' compliance will be a daunting task. As a result, stand-alone CTA investigations and enforcement actions seem unlikely in the near term. Instead, reported data is likely to be used primarily to improve the efficiency and reach of existing criminal and regulatory investigations by providing ready access to beneficial ownership information relating to reporting companies or individuals already under investigation, particularly in areas such as tax, money laundering, and sanctions enforcement. CTA enforcement will most likely occur when such existing investigations incidentally uncover failures to file beneficial ownership information or the filing of false information. That said, reporting entities should remain attuned to the manner and extent to which law enforcement and financial regulators utilize the reported information and how this use evolves in the coming years.

As noted above, the BOI Rule makes it “unlawful for any person to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document ... or to willfully fail to report complete or updated beneficial ownership information to FinCEN.”⁴⁴ “Person” includes any individual, reporting company, or other entity.⁴⁵ Willful violations of the BOI Rule's reporting requirements can lead to civil and criminal penalties, including a maximum civil penalty of \$500 per day (up to \$10,000) and imprisonment for up to two years.⁴⁶

Each person filing a report under the BOI Rule must certify that the report is true, correct, and complete. FinCEN has clarified that, “[w]hile an individual may file a report on behalf of a reporting company, the reporting company is ultimately responsible for the filing. The same is true of the certification. The reporting company will be required to make the certification, and any individual who files the report as an agent of the reporting company will certify on the reporting company’s behalf.”⁴⁷ That the certification is ultimately made on behalf of the reporting company does not, of course, eliminate the filing individual’s liability if they willfully file false or fraudulent information as described above. FinCEN expects reporting companies to “verify” the information they receive from beneficial owners and applicants before reporting it to FinCEN.⁴⁸

The BOI Rule expressly does not apply a knowledge or due diligence standard to that certification, as was recommended by some commenters.⁴⁹ However, FinCEN has said that it “does not expect that an inadvertent mistake by a reporting company acting in good faith after diligent inquiry would constitute a willfully false or fraudulent violation.”⁵⁰

EXAMPLES

The two examples below are intended to show how the rules discussed above will work in practice. While these examples are relatively simple, they illustrate the many analytical steps each entity will need to undertake to determine whether it is a reporting company and, if it is, to identify its beneficial owners and company applicants. Businesses with complex corporate and ownership structures should not underestimate the time or resources required to complete this analysis and should consider consulting outside counsel as appropriate given the legal and regulatory complexities involved.

Identifying Reporting Companies

Entity A is a domestic limited liability company with 25 full-time employees and annual gross receipts of \$100 million. Entity B is a domestic trust that was formed without the filing of any document with a secretary of state, that has one full-time employee, and that has annual gross receipts of \$1 million. Entity C is a domestic limited liability company with 10 full-time employees and annual gross receipts of \$25 million. Entity A is the trustee of Entity B and fully owns Entity C.

Analysis: Assuming no other facts, Entity A meets the definition of a reporting company but is exempt because it is a large reporting company. Entity B does not meet the definition of a reporting company because it is not a corporation, LLC, or entity formed by a filing with a secretary of state. Entity C meets the definition of a reporting company but is exempt because it is the wholly owned subsidiary of a large reporting company.

Identifying Beneficial Owners

FinCEN recently provided three examples to help companies identify beneficial owners. While all of FinCEN’s examples are helpful, the following example is a particularly clear illustration that on many occasions, the number of individuals who “substantially control” a reporting company will equal (and could exceed) the number of individuals who hold ownership interests:

The reporting company is a corporation owned by four individuals who each own 25% of the company’s ownership interests (e.g., shares of stock). Four other individuals serve as the reporting company’s CEO, CFO, COO, and general counsel, respectively, none of whom holds any of the company’s ownership interests.

Analysis: In this example, there are eight beneficial owners. All four of the individuals who each own 25% of the company’s ownership interests are beneficial owners of the company by virtue of their holdings in it, even if they exercise no substantial control over it. In addition, the CEO, CFO, COO, and general counsel are all senior officers and therefore exercise substantial control over the reporting company, making them beneficial owners as well.

NEXT STEPS TO CONSIDER IN ORDER TO PREPARE TO COMPLY WITH THE BOI RULE

How best to interpret and apply the beneficial ownership reporting rules promises to be an iterative and evolving exercise. While FinCEN has published some clarifications (including FAQs and instructional videos), these do not answer all questions that will come up as business organizations assess whether and to what extent the BOI Rule applies to their particular situations. While we anticipate that FinCEN will issue further guidance in the coming months, there are a number of open questions—some of which are noted below—that

should prompt business organizations and corporate families to start their analysis sooner rather than later. This is particularly true with respect to businesses and organizations with large numbers of legacy entities that could be reporting companies. Time will be needed to gather the relevant facts and develop an understanding of the rules as they apply to each entity. It also will enable business organizations to raise legal issues with counsel.

To that end, companies, asset managers, transaction sponsors, funds, family offices, and corporate trustees should consider doing the following in the near term:

1. Immediately identify all entities within an existing organization, especially those involved in complex organizational structures, to determine which are reporting companies, and whether they can claim an applicable exemption from reporting. Business organizations should prepare for such an analysis to be time-consuming and fact-specific and require identifying where appropriate indirect as well as direct beneficial owners. Strong consideration should be given to involving legal counsel in connection with evaluating and documenting exemptions.
2. Determine, for each reporting entity, who is responsible for:
 - (i) determining whether an entity is a reporting company;
 - (ii) obtaining the necessary information about beneficial owners; and then
 - (iii) filing the report under the CTA and BOI Rule. While in most cases this will not be difficult, in many cases it may require close review of the reporting company's organizational documents, relevant contracts (e.g., management agreements), and the organizational statute under which it is formed. Where the relevant governing agreements or applicable law fails to clearly delineate who has responsibility for making the reporting company determination or filing the relevant reports, extra time will be needed as parties may seek amendments to existing agreements, additional compensation, or indemnification in connection with performing the duties contemplated by the BOI Rule.
3. For any existing reporting companies that are not exempt, begin to identify beneficial owners and the information to be reported about each, and implement a way to track changes to the relevant information. Business organizations also should consider any tension that may arise in

connection with efforts to determine beneficial ownership between the BOI Rule, on the one hand, and any other laws, including foreign laws.

4. Develop policies and procedures concerning the preparation of the relevant reports, including how to evaluate and document applicable exemptions, as well as the degree of diligence to be performed in connection with information provided by others. Although FinCEN has suggested that it expects companies to "verify" the information provided and that a "diligent inquiry" would show an absence of a willful violation, it has not otherwise explained what verification steps are required, or defined the parameters of a "diligent inquiry." Furthermore, since the CTA and BOI Rule include penalties only for willful violations of the reporting requirements, it is unclear what remedies FinCEN will have against reporting companies that make good-faith efforts at verification or inquiry that FinCEN later deems to have been insufficient.
5. Consider adopting procedures to track changes in management personnel and entity ownership within corporate families to allow for compliance with requirements to update certain information within 30 calendar days of any change to that information.
6. Designate and train personnel who will be responsible for "certifying" the information reported to FinCEN.
7. Consider whether altering the form of existing business organizations or ownership structures would be less burdensome than the BOI Rule's reporting obligations.
8. Understand how the new rules apply to the formation of new entities so that preparations can be made to make the requisite filings when new entities (reporting companies) are formed as part of transactions and structures on or after January 1, 2024.
9. Consider who might fairly be viewed as a "company applicant," especially when company personnel, outside law firms, and filing services may all be eligible for the designation given their respective involvement.
10. Consider the impact of the new rules on some common incorporation and registration practices, such as forming entities before anyone knows who the officers, directors, or

shareholders are. To avoid the need to update reports pursuant to the ongoing updating obligation, one might elect to form entities closer to the time when basic information about ownership and control are settled.

11. Financial institutions, despite being exempt from reporting ownership under the BOI Rule,⁵¹ should begin considering how they might adjust their CDD and Know Your Customer policies in the event that FinCEN adopts the proposed rule giving them access to the BOI database for the purposes of complying with their CDD obligations.⁵² The CTA requires FinCEN to revise its regulations governing CDD by financial institutions to adjust for the new BOI Rule regime, but regardless of the changes are ultimately adopted, financial institutions will need to consider how and when to use their access to the BOI database in their CDD process, and to secure the consent of reporting companies to obtain their BOI information from the database for those purposes. For example, financial institutions may consider comparing beneficial ownership information from the database to that gathered from financial institutions' own historical CDD practices, whether to help ensure the accuracy of the customer information previously obtained, identify any shortcomings in historical CDD policies and practices that resulted in gaps or errors, or identify potential bad actors who have provided false or incomplete information during the CDD process. Financial institutions may wish to consider conducting some comparative analysis early on to avoid later regulatory scrutiny over conflicting information that could suggest weaknesses in historical CDD or AML compliance programs.

In making these assessments, financial institutions should consider how their supervisory agencies may perceive the way they use—or fail to use—their access to BOI information to enhance their overall CDD practices.

12. Monitor FinCEN updates or guidance related to the BOI Rule to see if any material changes are made. For example, changes could be made to the proposed reporting form. FinCEN also may provide additional guidance regarding what parties should do if they cannot identify the required beneficial ownership information.

CONCLUSION

The analyses required under the BOI Rule are numerous, complex, and highly fact intensive. In addition to assessing what initial reports need to be made for existing reporting companies, companies should consider developing and implementing procedures that will address ongoing compliance issues. These might include policies governing the collection of information at the time of company formation and procedures to monitor material changes, such as those impacting ownership percentages or a company's eligibility for an exemption. Finally, companies should be on the lookout for updates from FinCEN, including after January 1, 2024, as issues exposed during the first wave of reporting may prompt rule changes or additional interpretive guidance. Outside counsel can guide companies through these processes and corresponding challenges as guidance continues to evolve.

BOI RULE AT A GLANCE

| | Domestic Reporting Companies | Foreign Reporting Companies |
|-------------------------|---|---|
| Who Must Report? | <ol style="list-style-type: none"> 1. A domestic reporting company means any entity that is: 2. A corporation; 3. A limited liability company; or 4. Any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe; and 5. Not entitled to an exemption. | <p>A foreign reporting company means any entity that is:</p> <ol style="list-style-type: none"> 1. A corporation, limited liability company, or other entity; 2. Formed under the law of a foreign country; and 3. 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 Indian tribe; and 4. Not entitled to an exemption. |

| | Companies Formed Before January 1, 2024 | Companies Formed On or After January 1, 2024 |
|---------------------------------------|--|---|
| What to Report? | <ol style="list-style-type: none"> 1. Information about the company; and 2. Information about all beneficial owners. | <ol style="list-style-type: none"> 1. Information about the company; 2. Information about all beneficial owners; and 3. Information about company applicants. |
| When to File the First Report? | Before January 1, 2025 | <p>Domestic Reporting Companies: Within 30 calendar days of the earlier of:</p> <ol style="list-style-type: none"> i. Receipt of actual notice that company formation is effective; or ii. Public notice that the company has been created. <p>Foreign Reporting Companies: Within 30 calendar days of the earlier of:</p> <ol style="list-style-type: none"> i. Receipt of actual notice of registration to do business; or ii. Public notice that the company is registered to do business. |
| When to Update? | 30 calendar days after any changes to previously reported information. | |

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ENDNOTES

- Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (September 30, 2022) at 59549.
- See “Beneficial Ownership Information Reporting Frequently Asked Questions.”
- See 31 U.S.C. § 5336(h)(3)(A).
- As of the date of publication of this *White Paper*, it appears that the Office of Information and Regulatory Affairs is reviewing a proposed further rulemaking from FinCEN titled “Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024.” This title suggests that some modification of the 30-day compliance period for reporting BOI for newly formed or registered companies might be forthcoming.
- Thus, a reporting company may have more than one beneficial owner.
- FinCEN’s [Beneficial Ownership Information Reporting page](#) collects all resources published by FinCEN about the BOI Rule. In addition to providing links to the final and proposed rules identified above, the page provides links to background information (including FAQs and informational videos) about the new rules.
- A statutory trust is an example of an entity that could meet the definition of “domestic reporting company.” See, e.g., 12 Del Code, § 3810 (requiring the filing of a certificate to form a statutory trust).
- Domestic or foreign companies that are qualified to do business by filings made with Indian Tribes are also covered by the BOI Rule. 31 C.F.R. § 1010.380(c)(1)(i)(C). The term “Indian Tribe” has the same meaning as in Section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. § 5130).
- See 87 Fed. Reg. 59537.
- 87 Fed. Reg. 59507; see 31 C.F.R. § 1010.230 (“Beneficial ownership requirements for legal entity customers”); FinCEN, *Customer Due Diligence Requirements for Financial Institutions*, 81 Fed. Reg. 29398 (May 11, 2016).
- Most if not all charitable organizations are required to file IRS Form 990, which are publicly available and disclose the entities’ officers, directors, and trustees.
- The BOI Rule defines a “large operating company” as one with 20 or more full-time employees, that filed a federal tax return in its last year showing at least \$5 million in gross receipts or sales, and that has an “operating presence” at a physical office within the United States. 31 C.F.R. § 1010.380(c)(2)(xxi). The BOI Rule defines an “operating presence at a physical office” to mean “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.” 31 C.F.R. § 1010.380(f)(6).
- See 87 Fed. Reg. 59539; 31 U.S.C. § 5336(a)(11)(A)(i)-(xxiii).
- See 87 Fed. Reg. 59508.
- 31 C.F.R. § 1010.380(c)(2)(xxiii).
- 87 Fed. Reg. 59543; 31 C.F.R. § 1010.380(c)(2)(xxi)(A).
- 31 C.F.R. § 1010.380(c)(2)(xxi)(C).
- 31 C.F.R. § 1010.380(b)(2)(iv). Companies in existence on January 1, 2024, will not be required to disclose their “company applicants.”
- 31 C.F.R. § 1010.380(f)(8).
- See 87 Fed. Reg. 59525.
- See 87 Fed. Reg. 59531.
- 31 C.F.R. § 1010.380(d)(2)(ii)(E). FinCEN has referred to this provision as a “catch-all” that is consistent with the statutory language in 31 U.S.C. § 5336(a)(3)(A). FinCEN has explained that this catch-all is “designed to ensure that any individual or entity that establishes an ownership interest in a reporting company through a contractual or other relationship not described” elsewhere in the statute “is subject to the beneficial owner reporting requirements.” See 87 Fed. Reg. 59531. Note, however, that FinCEN does not require reporting companies to take into account options and derivatives created by market makers without the reporting company’s involvement or knowledge. *Id.*
- 31 C.F.R. § 1010.380(d)(1)(ii) (examples of direct or indirect substantial control) and 31 C.F.R. § 1010.380(d)(2)(ii) (examples of direct or indirect ownership).
- See 87 Fed. Reg. 59532.

- 25 See 87 Fed. Regs. 59531-32.
- 26 31 C.F.R. § 1010.380(d)(3)(iii).
- 27 87 Fed. Reg. 59536. As an example, FinCEN noted that in a typical case where a lawyer supervises a paralegal in doing a filing (and the paralegal does the filing directly, rather than through a filing service), there would be two company applicants: the lawyer and the paralegal. It is interesting to note in the example that FinCEN did not consider the client as the party “overseeing the preparation and filing” of the incorporation documents, though in some or perhaps many cases that might be appropriate. Similarly, an attorney using a filing service may be considered to be “overseeing the preparation and filing” and the person at the service actually filing would be the filing person.
- 28 “[W]here a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.” 31 C.F.R. § 1010.380 (b)(1)(i)(F).
- 29 See 31 C.F.R. § 1010.380(b)(1)(ii)(C)(2).
- 30 See 31 C.F.R. § 1010.380(b)(1)(ii)(C)(1).
- 31 See 31 C.F.R. § 1010.380(b)(2) for the full list of special rules.
- 32 “If a reporting company reports the information required under paragraph (b)(1) of this section with respect to a parent or legal guardian of a minor child consistent with paragraph (d)(3)(i) of this section, then the report shall indicate that such information relates to a parent or legal guardian.” 31 C.F.R. § 1010.380(b)(2)(ii).
- 33 If an entity would be a reporting company but for the “pooled investment vehicle” exemption and it is formed under the laws of a foreign country, “such entity shall be deemed a reporting company for purposes of paragraphs (a) and (b) of this section, except the report shall include the information required under paragraph (b)(1) of this section solely with respect to 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.” 31 C.F.R. § 1010.380(b)(2)(iii).
- 34 As discussed throughout, these reporting companies are not required to report company applicant information. Instead, they must indicate that they were in existence prior to January 1, 2024. See 31 C.F.R. § 1010.380(b)(2)(iv).
- 35 31 C.F.R. § 1010.380(b)(2)(i).
- 36 87 Fed. Reg. 59521.
- 37 *Id.* For example, a reporting company could not invoke this rule to avoid reporting a beneficial owner with 5% ownership interest via an exempt entity and 20% ownership interest via a non-exempt entity.
- 38 Proposed rulemaking published on December 15, 2022, addresses how FinCEN will ensure the security of BOI kept on BOSS and how authorized individuals may access that information. See Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. 77494 (December 16, 2022).
- 39 Agency Information Collection Activities, Proposed Collection; Comment Request; Beneficial Ownership Information Reports, 88 Fed. Reg. 2760 (January 17, 2023).
- 40 [Letter to the Honorable Janet Yellen](#), April 3, 2023.
- 41 Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. 77404 (Dec. 16, 2022).
- 42 Under the proposed access rule, financial institutions will be able to request BOI information about particular entities if those entities have consented to the provision of such information to the financial institution. We would expect financial institutions will generally obtain such consent from customers as part of their customer due diligence process.
- 43 See 31 C.F.R. § 1010.380(a)(3).
- 44 31 C.F.R. § 1010.380(g).
- 45 *Id.*
- 46 See 31 U.S.C. § 5336(h)(3)(A).
- 47 87 Fed. Reg. 59514.
- 48 *Id.*
- 49 *Id.*
- 50 87 Fed. Reg. 59515.
- 51 See *supra* p. [4].
- 52 As noted earlier in this *White Paper*, financial institutions would be granted access under FinCEN's proposed rule on access to the BOI database for purposes of complying with CDD requirements under applicable law, though only with the consent of the relevant reporting company whose BOI is requested. 87 Fed. Reg. 77415.

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