

## LANDMARK US BENEFICIAL OWNERSHIP DISCLOSURE RULES ARE NOW EFFECTIVE

On January 1, 2024, the [Corporate Transparency Act](#) (“CTA”) entered into force. The CTA, which was enacted in January 2021 as part of the Anti-Money Laundering Act of 2020, requires certain domestic and foreign entities doing business in the United States (**reporting companies**) to report beneficial ownership to the Financial Crimes Enforcement Network (“FinCEN”), which is part of the US Department of the Treasury. Implementation of the CTA is part of the Treasury’s broader effort to address illicit finance and national security threats posed by corruption, as set out in its [Strategy on Countering Corruption](#) (December 2021), in line with its [mission](#) of safeguarding the integrity of the US financial system.

The CTA is intended to provide law enforcement and others with data necessary to identify those that currently benefit from financial anonymity to shield corruption, drug trafficking, other criminal acts, and terrorism. That anonymity is based on malign actors doing business through shell companies. As Treasury Secretary Yellen noted, “Unmasking shell corporations is the single most significant thing we can do to make our financial system inhospitable to corrupt actors.”

In September 2022, FinCEN issued the final beneficial ownership information (“BOI”) reporting [rules](#), which set out who must file a BOI report, what information must be provided and when BOI reports are due. (See also the full [adopting release](#).) BOI reports are to cover both the relevant reporting company and its beneficial owners as well as, in the case of reporting companies formed or registered after January 1, 2024, **company applicants** (defined below) in respect of that reporting company.

### Relevant Links

Below are the most relevant links for any one subject, or who thinks they may be subject, to BOI reporting requirement for an entity in which they are beneficial owners. If you have filed, or someone has filed on behalf of any legal entity you have formed, an instrument with a state secretary of state or similar office in respect of that entity, you should consider whether you have a filing obligation. The reporting obligation applies to “sell companies,” but there is no legal definition of a shell company, so the coverage definition starts very broad and narrows by excluding regulated companies, operating companies and the like so as to get to the essence of shell companies.

To be clear, the reporting obligation is not based on intent (*e.g.*, a malign purpose) or the nature of the activities your entity may be engaged in – if your legal entity does not meet an exemption, it likely is subject to reporting.

- [BOI Reporting FAQ](#)
- [Filing Portal - via PDF or Online](#)
- [System-to-System API](#)
- [FinCEN ID](#) – note a FinCEN ID (identifier) is not necessary or required to submit a report

### Reporting Companies

Reporting companies are corporations, limited liability companies or entities otherwise created in the United States by filing an instrument (such as a certificate of incorporation)

with a secretary of state or any similar office under the law of a state or Indian tribe, as well as non-US companies registered to do business in any US state or tribal jurisdiction by any such similar instrument. This definition picks up every company organized in a state in the United States or the District of Columbia and any non-US company doing business in the United States. There are, however, 23 categories of entities that are excluded from the definition of reporting company, for purposes of beneficial ownership disclosure, in keeping with the focus of the CTA on shell companies.

Note that domestic entities such as statutory trusts, business trusts and foundations are treated as reporting companies only if they were created by the filing of an instrument with a secretary of state or similar office and an exemption does not apply (*e.g.*, foundations are likely to be tax-exempt. Sole proprietorships that have not filed an instrument with a secretary of state or similar office would not be reporting companies.

### **Exemptions**

The CTA and the BOI rules in effect cover *any* domestic company or *any* foreign company authorized to do business in any state of the United States or tribal jurisdiction that is not otherwise subject to US federal or state regulation or does not otherwise disclose beneficial ownership to a governmental authority, unless wholly owned or controlled by most such entities. To give effect to these exceptions, the entities listed below will not be deemed reporting companies (*see* the [BOI rules](#) for the full definitions). All but the last category on the list are important not only for purposes of excluding those included within the relevant category, but also because of the potential coverage of their subsidiaries by reason of the last category.

- SEC reporting companies (registered under Section 12 or 15(d) of the Securities Exchange Act) – note this does not cover foreign companies that are public only in their home jurisdiction;
- governmental authorities;
- banks, in effect, regulated in the United States – note this would not cover foreign banks that are not regulated in the United States;
- federal or state credit unions;
- depository institution holding companies;
- money services businesses;
- broker-dealers registered with the SEC;
- securities exchanges and clearing agencies;
- other entities registered with the SEC under the Securities Exchange Act;
- registered investment companies and registered investment advisers;
- venture capital fund advisers;
- insurance companies (as defined in Section 2 of the Investment Company Act) – which would exclude non-US insurance companies;
- state-licensed insurance producers;
- entities registered under the Commodity Exchange Act;
- accounting firms registered with the PCAOB;
- public utilities;
- financial market utilities;

- pooled investment vehicles operated and advised by a bank, credit union, broker-dealer, investment company, investment adviser or venture capital fund adviser;
- tax-exempt entities and entities assisting tax-exempt entities;
- large operating companies (with a physical presence in the United States, more than 20 full-time employees and more than \$5 million in gross receipts or sales from US sources for the prior year, as reflected in federal income tax filings) – note that (i) this will not cover newly formed reporting companies as they will not have filed a federal income tax return and (ii) consolidation across entities to reach 20 employees is not permitted;
- certain inactive entities; and
- entities whose ownership interests are **controlled or wholly owned** by exempt entities (this category (tilted the “subsidiary exemption”) excludes, however, control or ownership by money services businesses, pooled investment vehicles and entities assisting a tax-exempt entity).

As a practical matter the exemptions may only cover a small proportion of the entities routinely formed or registered to do business across the country. This arises due to an ambiguity in the subsidiary exemption (which was likely intended to be broader) arising from the fact that neither the CTA nor the BOI rules (in contrast, for example, to SEC rules) provide a definition of “control.” FinCEN has yet to issue guidance on this critical issue. While “wholly owned” is clear, for example in the context of consolidated subsidiaries, “control” is not.

### **Beneficial Ownership**

Beneficial ownership covers individuals, directly or indirectly, exercising **substantial control** over, or owning or controlling at least 25% of the **ownership interests** of, a reporting company. Substantial control includes individuals:

- serving as **senior officers** (*i.e.*, president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function);
- having authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors (or similar body);
- who direct, determine or have **substantial influence** over important decisions made by the reporting company (as enumerated); or
- have any other form of substantial control over a reporting company.

There are additional definitions of what it means to exercise direct or indirect substantial control or to exercise substantial influence.

The BOI rules also include a detailed definition of ownership interests, as well as certain specific exclusions from the definition of beneficial owner.

### **Reporting Deadlines**

Reports could only be filed beginning January 1, 2024 (*see* filing link [above](#)).

- If a non-exempt domestic or foreign reporting company was created or registered prior to January 1, 2024, it will have until January 1, 2025 to report BOI.

- If a non-exempt reporting company is created (in the case of a domestic company) or registered (in the case of a foreign company) on or after January 1, 2024 but before January 1, 2025, it must report BOI within 90 days of notice of creation or registration (based on an [extended deadline](#) announced by FinCEN on November 29).
- If a non-exempt reporting company is created (in the case of a domestic company) or registered (in the case of a foreign company) on or after January 1, 2025, it must report BOI within 30 days of notice of creation or registration.
- Any entity that no longer benefits from an exemption must report BOI within 30 calendar days after it no longer meets the criteria for any exemption.

The relevant threshold date is the date on which a reporting company receives actual notice that its creation/registration to do business has become effective or the date on which the secretary of state or other similar office first provides public notice of creation/registration to do business.

The BOI rules also require updates to report changes as well as updates to correct inaccuracies in filed information (within 30 calendar days).

E-filing of BOI reports (*see link [above](#)*) generate an acknowledgement of submission success or failure, as well as the ability to download a transcript of the report. There is no fee to submit a BOI report.

### **Company Applicants**

BOI reporting also requires, for reporting companies created or registered on or after January 1, 2024, information about **company applicants**, which term means for a domestic reporting company, the individual who directly files the document that creates the domestic reporting company or, for a foreign reporting company, the individual who directly files the document that first registers the foreign reporting company in the United States. Company applicants also include individuals responsible for directing or controlling filings if more than one individual is involved in the filing.

### **Required Information**

Essentially, reporting company information in an initial report will include full legal name, trade name or d/b/a, business address, information on relevant jurisdiction and an IRS taxpayer identification number. Beneficial owners and company applicants will need to provide legal name, date of birth, current address and an identification document with a unique identifying number, such as a passport or driver's license. Only beneficial owners at the time of filing a report need to be disclosed. Going forward, changes to beneficial owners will need to be reported through updated reports.

Beneficial owners will have the option of obtaining a FinCEN identifier, by providing the required information directly to FinCEN and updating to reflect any changes. This then obviates the need to provide reporting companies with sensitive personal information. Reporting companies also may obtain FinCEN identifiers.

### **Reporting Violations**

The CTA and the BOI rules provide that it shall be unlawful for any person to wilfully provide, or attempt to provide, false or fraudulent BOI or to wilfully fail to report complete or

updated BOI. The CTA calls for civil and criminal penalties for violations. There is a safe harbor 90-day grace period for submitting corrected information where a person has reason to believe inaccurate information was filed, unless that person sought to evade reporting requirements or had actual knowledge that information filed was inaccurate.

### **Additional Steps**

The BOI rules represent the first of three steps related to the CTA. The second relates to protocols for access to, disclosure of, and protection of, BOI, which will remain inaccessible to the general public. Yesterday, FinCEN issued a [final rule](#) regarding access to BOI reported to FinCEN. (See also [FinCEN Access Rule Fact Sheet](#).) The third relates to customer due diligence information for financial institutions. In effect, information submitted to FinCEN will be available to:

- US law enforcement, national security and intelligence officials;
- foreign law enforcement agencies, judges, prosecutors, central authorities and competent authorities;
- with customer consent, to financial institutions to meet customer due diligence (CDD) requirement under applicable law;
- functional regulators; and
- Treasury officers and employees.

### **Concluding Thoughts**

To date, beneficial ownership reporting requirements have been confined to regulated entities or SEC registrants, and often above set thresholds. The CTA will impact millions of small businesses across the United States as well as entities that may not even rise to the level of operating businesses, for example, LLCs formed by consultants or advisors. FinCEN estimates that approximately 32.6 million reporting companies will be subject to filing requirements in 2024. While the scope of the required information is limited, the penalties for failure to make the required filings are significant. There will be countless interpretive questions that will arise, and so in a sense this is an evolving set of requirements, but that said, the deadlines for newly formed/registered entities are tight and the penalties are meaningful.

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