

ALERTS

The Corporate Transparency Act: Key Considerations for Compliance With the Beneficial Ownership Reporting Rule

November 2, 2023

On Jan. 1, 2024, the first final rule (“BOI Rule”) implementing the Corporate Transparency Act (“CTA”)[1] will take effect requiring certain legal entities formed or registered to do business in the US (each, a “Reporting Company”) to file a beneficial ownership information (“BOI”) report with the US Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”).[2] Each Reporting Company will be required to disclose on its BOI report identifying information of the Reporting Company and each individual who directly or indirectly exercises substantial control or owns or controls 25 percent or more of the ownership interests of a Reporting Company (each, a “Beneficial Owner”), and, in certain cases, the individuals involved in the Reporting Company’s formation and/or registration to do business in the US (each, a “Company Applicant”). Any individual, Reporting Company or other entity that willfully provides, or attempts to provide, false or fraudulent BOI to FinCEN, or willfully fails to report complete or updated BOI to FinCEN, may be liable for civil or criminal penalties.

According to FinCEN, the BOI Rule is intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud and other illicit activity. The information in the BOI report will not become public, but FinCEN is authorized to share the information with certain government agencies, such as law enforcement agencies and financial regulators. It may also be shared with financial institutions with a Reporting Company’s consent.

In this *Alert*, we provide an overview of the BOI Rule, discuss key terms and compliance dates, and offer key considerations and takeaways.

I. Key Considerations and Takeaways

Key Dates:

- **Effective Date.** Jan. 1, 2024.
- **Existing Entities.** Reporting Companies formed or registered before Jan. 1, 2024 must file their initial BOI reports by Jan. 1, 2025.
- **New Entities.** Reporting Companies formed or registered on or after Jan. 1, 2024 will have a minimum of 30 days (and possibly as much as 90 days) from receiving confirmation of formation or registration to submit a BOI report to FinCEN.[3]
- **Updates/Corrections.** Reporting Companies must submit updated/corrected BOI reports within 30 days of (i) any change to the information previously reported in the BOI report regarding the Reporting Company or its beneficial owners; or (ii) becoming aware (or having reason to know) of an inaccuracy regarding the information previously reported in the BOI report.[4]

The BOI Rule will have significant implications for US and foreign entities. Determining the applicability of the BOI Rule, whether an entity has any reporting obligations or is eligible for an exemption is a fact-specific analysis, which should be determined on an entity-by-entity basis. Companies should begin evaluating which legal entities in their organizational structure are within the scope of the definition of Reporting Company (i.e., those legal entities formed or registered to do business in the US by the filing of a document with a secretary of state or similar office) and which of those entities may qualify for an exemption. Preparing an organizational structure chart which identifies each entity (depicting any up-stream entities that directly or indirectly own or control it, and any down-stream entities that it may directly or indirectly own or control), is necessary to have all the information needed to conduct this analysis, including to assess any changes to their existing structures that might be appropriate. After identifying which entities in their organizational structure will be Reporting Companies, companies should begin gathering information required to be reported on a BOI report for each Reporting Company.

In addition, companies should consider developing systems to keep track on an ongoing basis of ownership structures, and any information disclosed on a BOI report or any application to obtain a unique identifying number that FinCEN will issue to an individual upon request (“FinCEN Identifier”). Such systems are necessary to ensure that if there is any change to a Reporting Company’s Beneficial Owners or disclosed information (e.g., address change or passport expiration), that such change is identified and an updated or corrected report is timely filed.

II. Who is Impacted by the BOI Rule?

The BOI Rule identifies two types of Reporting Companies:[5]

1. A “*domestic reporting company*,” which includes a corporation, a limited liability company or other entity that is 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
2. A “*foreign reporting company*,” which is any entity that is a corporation, limited liability company or other entity that is formed under the law of a foreign country and that is registered to do business in the US by the filing of a document with a secretary of state or equivalent office under the law of a state or Indian tribe.

The applicability of the BOI Rule and the information included on a BOI report is determined on an entity-by-entity basis.

Exemptions. Entities must file a BOI report only if they meet the definition of Reporting Company and do not qualify for an exemption. The BOI Rule exempts 23 specific types of entities from the reporting requirements (each, an “Exempt Entity”), which are discussed in more detail below.

III. Whose Information Must Be Reported?

Reporting Company. An entity that meets the definition of *Reporting Company* and is not otherwise an Exempt Entity, must report information on itself and the personal information of each *Beneficial Owner* and, for new entities created or registered on or after Jan. 1, 2024, information regarding all individuals identified as “*Company Applicants*” to FinCEN.

Beneficial Owners. The BOI Rule defines a Beneficial Owner broadly as any individual, who directly or indirectly:

1. Exercises *substantial control* over the Reporting Company; or
2. Owns or controls 25 percent or more of the *ownership interests* of the Reporting Company.

Substantial Control. An individual exercises substantial control over a Reporting Company if the individual meets *any* of the following four general criteria:

- *Senior Officer* – Any individual holding the following positions at a Reporting Company: 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 or has such authority as these officers (each, a “Senior Officer”).[6]
- *Appointing or Removal Authority* – Any individual that has the authority to appoint or remove any Senior Officer or a majority of the board of directors (or similar body) of the Reporting Company.
- *Important Decision-Maker* – Any individual who directs, determines or has substantial influence over important decisions made by the Reporting Company, including decisions regarding the Reporting Company’s:
 - Business, such as: the nature, scope and attributes of the business; the selection or termination of business lines or ventures, or geographic focus; the entry into or termination, or the fulfillment or non-fulfillment, of significant contracts.
 - Finances, such as: sales, lease, mortgage or other transfer of any principal assets; major expenditures or investments, issuances of any equity, incurrence of any significant debt or approval of the operating budget; compensation schemes and incentive programs for senior officers.
 - Structure, such as: reorganization, dissolution or merger; amendments of any substantial governance document of the Reporting Company, including articles of incorporation or similar formation documents, bylaws and significant policies or procedures.
- *Catch-All* – An individual that has any other form of substantial control over the Reporting Company, such as through (i) board representation,[7] (ii) ownership or control of a majority of the voting

power, (iii) rights associated with any financing arrangement or interest in a company,[8] or (iv) voting rights and control over intermediary entities that exercise substantial control over the Reporting Company. [9]

Ownership Interests. In calculating an individual's 25 percent direct or indirect ownership interest in a Reporting Company, Reporting Companies should consider the following five ownership interest types, which notably include contingent interests:

- *Equity, Stock or Voting Rights* – Any interest classified as stock or anything similar, regardless of whether it confers voting power or voting rights, and even if the interest is transferable. Examples include: (i) equity, stock or similar instrument; (ii) preorganization certificate or subscription; (iii) transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture or certificate of interest in a business trust.
- *Capital or Profit Interest* – Any interest in the assets or profits of an entity organized as an limited liability company, which is similar to stock in a corporation and sometimes referred to as a “unit.”
- *Convertible Instruments* – Any instrument convertible into equity, stock or voting rights or capital or profit interest, whether or not anything needs to be paid to exercise the conversion. The following related items are also ownership interests: (i) any future on any convertible instrument; or (ii) any warrant or right to purchase, sell or subscribe to a share or interest in equity, stock or voting rights or capital or profit interest, even if such warrant or right is a debt.
- *Option or Other Non-Binding Privileges to Buy or Sell any of the Foregoing* – Any put, call, straddle, or other option or privilege of buying or selling equity, stock or voting rights, capital or profit interest, or convertible instruments, except if the option or privilege is created and held by others without the knowledge or involvement of the Reporting Company.
- *Catch-All* – Any other instruments, contract, arrangement, understanding, relationship or mechanism used to establish ownership, such as (i) joint ownership with one or more other persons of an undivided interest in an ownership interest; (ii) owning or controlling one or more intermediary entities, or the ownership interest of any

intermediary entities, that separately or collectively own or control ownership interest of a Reporting Company; (iii) another individual acting as a nominee, intermediary, custodian or agent; or (iv) a trust (including as a trustee, grantor/settlor who has the right to revoke the trust, or as a beneficiary of the trust).[10]

Exclusions to the Definition of Beneficial Owner. The BOI Rule contains five exceptions to the Beneficial Owner: (1) a minor child, provided that a parent's or guardian's information is reported; (2) an individual acting as nominee, intermediary, custodian or agent on behalf of another individual; (3) an individual acting solely as an employee of a Reporting Company in specified circumstances (provided that the employee is not a Senior Officer); (4) an individual whose only interest in a Reporting Company is a future interest through a right of inheritance; and (5) a creditor of a Reporting Company.

Company Applicants. The BOI Rule defines Company Applicant as the individual(s) who: (1) directly files the document (physically or electronically) with a secretary of state or similar office that forms or registers the entity to do business in the US; and (2) is primarily responsible for directing or controlling the filing of the formation document or first registration document. If more than one individual is involved in the filing of the document that created or first registered the entity, then two individuals (but no more) must be reported as Company Applicants.

IV. What Information Needs to be Included in the BOI Report filed with FinCEN?

A Reporting Company must report the following: (1) full legal name; (2) any trade name or "doing business as" name; (3) the street address of its principal place of business or the primary location in the US where the foreign Reporting Company does business; (4) the jurisdiction of formation; (5) for any foreign Reporting Company, the US state where the entity first registers to do business; and (6) taxpayer identification number and name of jurisdiction.

For certain Reporting Companies, there is a special rule which will provide some relief in identifying Beneficial Owners. This rule provides that where a Reporting Company is owned, directly or indirectly, by an Exempt Entity, and there is an individual that is a Beneficial Owner of the Reporting

Company exclusively by virtue of the individual's ownership interest in such Exempt Entity, the Reporting Company's BOI report will include the name of the Exempt Entity in lieu of the identifying information regarding that individual.[11]

Each *Beneficial Owner* and *Company Applicant* must report the following information:(1) full legal name; (2) date of birth; (3) residential street address;[12] (4) unique identifying number and issuing jurisdiction from their government-issued identification document (e.g., US driver's license or US or foreign passport); and (5) the image of the document that shows the unique identifying number.

To the extent that a Reporting Company's Beneficial Owners or Company Applicants choose to obtain a FinCEN Identifier, such individuals may provide their FinCEN Identifier in lieu of the identifying information required to be disclosed on the BOI report.

V. Which Entities are Exempt From the Definition of Reporting Company?

As noted above, the BOI Rule exempts from the definition of "Reporting Company" 23 specific types of entities, many of which are already subject to substantial federal and/or state regulation or already have to provide their BOI to a governmental authority, such as public companies, banks, securities brokers and dealers, SEC-registered investment companies and SEC-registered investment advisers. Examples include the following:

1. *Large Operating Companies* – Entities (i) with more than 20 full-time employees in the US; (ii) with more than \$5 million in gross receipts or sales in prior year; and (iii) that have an operating presence at a physical location in the US.
2. *SEC Reporting Issuers* – All SEC reporting issuers under Section 12 or 15(d) of the Securities Exchange Act of 1934 Act ("1934 Act").
3. *SEC Registered Investment Advisers* – Investment advisers registered with the SEC under the Investment Advisers Act of 1940 (the "Advisers Act").
4. *Venture Capital Fund Advisers* – Investment advisers that are exempt from registration under Section 203(l) of the Advisers Act because they

advise solely one or more “venture capital funds” (as defined in Rule 203(l)-1 of the Advisers Act) (“VC Advisers”).

5. *Investment Companies* – Investment companies registered with the SEC under the Investment Company Act of 1940 Act (e.g., mutual funds).
6. *Pooled Investment Vehicles* – Any “pooled investment vehicle” that is operated or advised by certain other exempted entities, namely, a bank, credit union, SEC-registered broker-dealer in securities, SEC-registered investment company, SEC-registered investment adviser, or venture capital fund adviser.[13]
7. *Registered Broker-Dealers* – Broker-dealers registered with the SEC under the 1934 Act.
8. *Money Services Businesses* – Any (a) money transmitting business registered with FinCEN under 31 U.S.C. § 5330 or (b) money services business registered with FinCEN under 31 C.F.R. § 1022.380.
9. *Tax Exempt Entities* – Any (a) organization defined in Section 501(c) and exempt from tax under Section 501(a) of the Internal Revenue Code, (b) political organization defined in Section 527(e)(1) and exempt from tax under Section 527(a) of the Internal Revenue Code, or (c) trust defined in paragraph (1) or (2) of Section 4947(a) of the Internal Revenue Code.
10. *Subsidiaries of Certain Exempt Entities* – Any entities whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more certain exempt entities.

Please see Schulte’s high-level summary of exempt entities on Appendix A of this *Alert*, which provides an overview of each of the 23 Exempt Entities.

VI. Key Takeaways

Given the complexity of the BOI Rule, and because FinCEN is continuing to issue guidance in the form of frequently-asked-questions[14] and, most recently, a Small Business Compliance Guide[15] to aid the public in complying with the BOI Rule, companies should carefully evaluate the appropriate filing requirements.[16] Schulte is continuing to monitor FinCEN guidance, which could differ or add nuance to the information

discussed above. The information in this *Alert* should be considered in conjunction with any applicable guidance that FinCEN may issue.

In addition, the CTA is being implemented in two additional rulemakings to (i) establish who is permitted to access BOI reports filed with FinCEN, for what purposes BOI reports can be accessed and what safeguards will be put into place to protect and secure BOI; and (ii) revise FinCEN's CDD rule to align with the BOI Rule.[17]

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] The CTA was enacted in January 2021 as part of the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”) (CTA §§ 6401–03), available here. For more information regarding the CTA and the Anti-Money Laundering Act of 2020, both enacted as part of the NDAA, please see our prior *Alert* “Passage of Anti-Money Laundering Act of 2020 Includes Comprehensive BSA/AML Reform Measures,” available here.

[2] 31 C.F.R. § 1010.380; Final Rule, Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022), available here (hereinafter, “BOI Rule”). For more information regarding the BOI Rule, please see our prior *Alert* “FinCEN Issues Final Rule Requiring Reporting of Beneficial Ownership Information,” available here.

[3] FinCEN has recently issued a proposed rule extending this 30 day deadline to 90 days for Reporting Companies formed or registered on or after Jan. 1, 2024 and before Jan. 1, 2025. Such proposed rule has not yet been adopted. Notice of Proposed Rulemaking, Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 Fed. Reg. 66730 (Sept. 28, 2023), available here.

[4] Reporting Companies are not required to update previously reported information about their Company Applicants, but are required to correct any inaccurate information previously reported about their Company Applicants.

[5] Other types of legal entities, including certain trusts, are excluded from the definitions to the extent that they are not created by the filing of a document with a secretary of state or similar office.

[6] This would exclude individuals performing ministerial functions like a corporate secretary or treasurer, unless such individual otherwise exercises substantial control under any of the other criteria.

[7] Not all board members may be viewed as having substantial control. See FinCEN, Beneficial Ownership Information Reporting, Frequently Asked Questions, FAQ D.9 (last updated September 2023) (“Whether a particular director meets [the definition of Beneficial Owner] is a question that the reporting company must consider on a director-by-director basis.”), available here.

[8] Creditors are excluded from the definition of Beneficial Owner.

[9] Note that the trustee of a trust or similar arrangement can be deemed to exercise substantial control.

[10] Where a Reporting Company is owned by a trust or similar arrangement, the following individuals may hold ownership interests in the Reporting Company: (i) a trustee of the trust or other individual (if any) with the authority to dispose of trust assets; (ii) a beneficiary who is the sole permissible recipient of trust income and principal from the trust, or who has the right to demand a distribution of or withdraw substantially all of the trust assets; or (iii) a grantor or settlor who has the right to revoke or otherwise withdraw trust assets.

[11] Unlike the exemption from the definition of Reporting Company for subsidiaries of certain Exempt Entities, this special rule applies to any Exempt Entity. A Reporting Company may choose whether to take advantage of this special rule by including the name of the Exempt Entity in lieu of the identifying information regarding that individual or may report the Beneficial Owner’s full information. Where a Beneficial Owner’s interest is held through multiple Exempt Entities, all such Exempt Entities may be reported in lieu of the identifying information regarding that individual.

[12] Company Applicants may disclose their business address instead of their residential street address.

[13] As used in this exemption, the term “pooled investment vehicle” means any (i) any investment company, as defined in section 3(a) of the Investment Company Act of 1940; or (ii) any company that: (A) would be an investment company under Section 3(a) but for the exclusion provided by Section 3(c)(1) or Section 3(c)(7); *and* (B) is identified by its legal name by the applicable investment adviser in its Form ADV filed with the SEC 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 Advisers Act.

[14] FinCEN, Beneficial Ownership Information Reporting, Frequently Asked Questions (last updated September 2023), available here.

[15] FinCEN, Small Entity Compliance Guide, Beneficial Ownership Information Reporting Requirements (Version 1.0, September 2023), available here.

[16] Such guidance is available on FinCEN's webpage dedicated to compliance with the BOI Rule, available here.

[17] FinCEN issued a notice of proposed rulemaking to address access to and safeguarding of BOI. *See* 87 Fed. Reg. 77,404 (Dec. 16, 2022), available here.

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