

ALERTS

The Corporate Transparency Act: Key Considerations in Estate Planning

January 31, 2024

As part of your estate planning or for other purposes (e.g., for privacy reasons regarding ownership of a residence), you may have created one or more limited liability companies, limited partnerships or other entities that may now be subject to important new federal information reporting requirements imposed by the Corporate Transparency Act (“CTA”).

[1] Below, we provide a brief overview of the first rule implementing the CTA (“BOI Rule”), discuss the types of entities subject to the BOI Rule and the information that must be included on a beneficial ownership information (“BOI”) report filed by those entities. In addition, we highlight certain implications of this law on individuals and entities involved in estate planning.

I. Jan. 1, 2024 Implementation of the BOI Rule.

On Jan. 1, 2024, the BOI Rule went into effect, which requires certain legal entities that are formed or registered to do business in the US by filing a document with the secretary of state or similar office (each, a “Reporting Company”) to file a BOI report with the US Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”).[2] This new reporting obligation is significant and is expected to have a broad impact on clients that have formed or will form legal entities to do business in the US for estate planning, privacy and family investment purposes, as many of these legal entities will not be exempt. In addition, although trusts typically used for estate planning purposes are not Reporting Companies (as such trusts are not formed by filing a document with a secretary of state), a trustee, grantor, and, in some cases, a beneficiary of such trusts, may be

included on a Reporting Company's BOI report if such individual has a certain ownership interest in or control over a Reporting Company.

II. Overview of the BOI Rule.

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 is not intended to become public, but FinCEN is authorized to share the information with certain government agencies, such as law enforcement agencies and financial regulators, and financial institutions with a Reporting Company's consent.[3]

On Jan. 1, 2024, FinCEN began accepting BOI reports, which are required to be filed electronically through FinCEN's BOI E-Filing System.[4] It is the responsibility of each Reporting Company to submit a completed BOI report to FinCEN on a timely basis. Failure to do so may result in civil or criminal penalties (or both) for the Reporting Company.[5]

Key Filing Dates:

- *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 90 days from receiving confirmation of formation or registration to submit a BOI report to FinCEN.
- *Updates/Corrections:* Reporting Companies must submit updated/corrected BOI reports within 30 days after (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.[6]

III. Which Legal Entities are Required to File a BOI Report?

Each Reporting Company is required to file a BOI Report with FinCEN. A "Reporting Company" is any legal entity that is formed or registered to do business in the US by filing a document (such as, in the case of a formation, Articles of Incorporation or a Certificate of Formation), with the secretary of state or similar office. The types of legal entities that are

formed for estate planning purposes most commonly include limited liability companies (“LLCs”) and limited partnerships. A trust used for estate planning purposes will not typically be considered to be a Reporting Company because it does not file documents with a secretary of state or similar office.

The BOI Rule exempts from the definition of Reporting Company twenty-three types of entities, although most of these exemptions are not likely to apply to Reporting Companies formed for estate planning or similar purposes. The exemptions that are potentially most likely to be relevant for estate planning purposes are as follows:

1. *Tax Exempt Entity* – 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.
2. *Entity Assisting a Tax Exempt Entity* – Any entity that (a) operates exclusively to provide financial assistance to, or hold governance rights over, any tax-exempt entity (described above); (b) is a US 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 US persons that are US citizens or lawfully admitted for permanent residence.
3. *Large Operating Company* – Any entity that meets all of the following requirements: (i) has more than 20 full-time employees in the US; (ii) has more than \$5 million in gross receipts or sales on its prior year’s federal income tax return; and (iii) has an operating presence at a physical location in the US.
4. *Inactive Entity* – Any entity that (a) was in existence before Jan. 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 months; (e) has not sent or received any funds greater than \$1,000, either directly or through any financial account in which the entity or an affiliate had an interest, in the preceding 12 months; and (f) does not hold any assets in the US or abroad, including any ownership interests in any corporation, limited liability company or other similar entity.

5. *Subsidiary of Certain Exempt Entities* – Any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by any exempt entity, except entities assisting a tax-exempt entity or inactive entities.

FinCEN did not create an express exemption for statutory or business trusts or family offices, although such trusts and family offices may be able to meet one of the exemptions to the definition of Reporting Company (e.g., charitable trusts that qualify for the tax-exempt status exemption and family offices that qualify for the large operating company exemption)

IV. Which Individuals are Required to be Identified on a BOI Report?

A Reporting Company must disclose its own identifying information and the personally identifying information of each of its Beneficial Owners and, in certain circumstances, its Company Applicants, as defined below.

Beneficial Owner. A “Beneficial Owner” is 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. The definitions of “substantial control” and “ownership interest” in the BOI Rule are quite broad, and have the potential to capture many individuals. For example, the senior officers of an LLC, such as the president, chief financial officer, general counsel, chief executive officer and chief operating officer, and any members with the right to appoint or remove a senior officer, will likely be deemed to exercise substantial control over the LLC. Although this example references specific titles, any individual who performs similar functions or has substantial influence over the business, financial or structural decisions of the Reporting Company may be deemed a Beneficial Owner. In addition, there are five ownership interest types that can be used to calculate an individual’s 25 percent ownership interest, such as (i) equity, stock or voting rights, (ii) capital or profit interests, (iii) convertible instruments, (iv) options or (v) any other instruments, contract, arrangement, understanding, relationship or mechanism used to establish ownership.

The BOI Rule contains five exceptions to the definition of 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 Applicant. Reporting Companies formed or registered to do business in the US on or after Jan. 1, 2024, must include on their BOI report information regarding the individual who 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. This may be an employee of a corporate formation service. In addition, if there is another individual that is primarily responsible for directing or controlling the filing of the formation document or first registration document, the identifying information of this individual must also be reported. No more than two individuals may be reported as Company Applicants.

V. Are Trusts Beneficial Owners?

Although trusts used for estate planning purposes are not typically Reporting Companies, as noted above, the BOI Rule requires a Reporting Company to identify any individual that, directly or indirectly, has substantial control over or owns or controls 25 percent or more of the ownership interest in a Reporting Company, which may include trust beneficiaries and other parties who participate in the creation and administration of a trust. Accordingly, the Reporting Company may require identifying information from the trust's trustee, grantor and, in certain cases, beneficiaries, for purposes of identifying such persons as Beneficial Owners on the Reporting Company's BOI report. Specifically, where a trust owns or controls a Reporting Company, the individuals listed below must be reported as Beneficial Owners:

1. Any trustee of the trust or other individual (such as trust protector, distribution trustee or trust committee member) with the authority to dispose of trust assets;
2. Any beneficiary who is the sole current 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^[7]; or
3. Any grantor who has the right to revoke or otherwise withdraw trust assets.

It is necessary to evaluate whether any individuals have substantial control over, or own or control a 25 percent or more ownership interest in, a Reporting Company through a trust arrangement, as such individuals would be considered Beneficial Owners of the Reporting Company. More than one individual in a trust arrangement (e.g., trustee and beneficiary) may be considered a Beneficial Owner of a Reporting Company. In addition, it is necessary to conduct this analysis while considering the facts of a particular trust arrangement, including whether any minor children or non-vested beneficiaries are involved, as these individuals may be excepted from the definition of Beneficial Owner.

VI. What Identifying Information Must be Included on a BOI Report?

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

Beneficial Owners and Company Applicants. The Reporting Company must report the following information about each Beneficial Owner and Company Applicant: (1) full legal name; (2) date of birth; (3) residential street address; (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.

FinCEN Identifier. Beneficial Owners and Company Applicants may register for a unique number (a “FinCEN Identifier”) by submitting an application to FinCEN that includes the identifying information that would otherwise have been included on a BOI report.[8] Once obtained, a FinCEN Identifier can be used on a BOI report instead of providing the required information listed above. This may be preferable to limit the disclosure of personal information that a Beneficial Owner or Company Applicant would have to give to the Reporting Company.

VII. Key Takeaways.

If you have formed one or more LLCs or other entities in connection with your estate planning (or home ownership, or other personal reason), such entities may be Reporting Companies and be required to submit a BOI report to FinCEN in 2024. Each entity will need to be analyzed to determine if it is a Reporting Company and, if so, what information must be included on a BOI report. It may take time to collect the necessary information, so it is important to begin the process of evaluating the reporting obligations of your entities with your financial advisors, accountants and attorneys. If you are planning to create a new legal entity for estate planning purposes in 2024, please be aware that the initial BOI report must be submitted to FinCEN within 90 days after formation.

Given the complexity of the BOI Rule, and because FinCEN is continuing to issue guidance and, most recently, a Small Business Compliance Guide^[9] to aid the public in complying with the BOI Rule, clients should carefully evaluate the appropriate filing requirements. FinCEN has indicated that it is intending to issue guidance specific to trust arrangements, which could differ from or add nuance to the information discussed above. The information provided herein should be considered in conjunction with any applicable guidance that FinCEN may issue.

Please contact your Schulte attorney if you have any questions about whether the reporting requirements imposed by the BOI Rule will apply to you, or if you wish to discuss other estate planning opportunities as they relate to your specific financial and personal situation.

[1] In addition to the new federal reporting requirements, on Dec. 22, 2023, the New York LLC Transparency Act was signed into law, which will require New York LLCs to disclose their beneficial owners to the New York Department of State, unless an exemption applies. New York LLCs will be permitted to file a BOI report filed with FinCEN with the New York Department of State. This information will only be accessible to federal, state and local government agencies and law enforcement in New York and is not intended to be publicly available.

[2] 31 C.F.R. § 1010.380; Final Rule, Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022). For more information on the BOI reporting obligation please see our prior *Alerts*: (1)

“FinCEN Issues Final Rule Requiring Reporting of Beneficial Ownership Information,” available here; (2) “The Corporate Transparency Act: Key Considerations for Compliance With the Beneficial Ownership Reporting Rule,” available here and (3) “The Corporate Transparency Act: The Private Funds Guide to Compliance With the Beneficial Ownership Reporting Rule,” available here.

[3] For more information regarding the extent to which BOI information reported to FinCEN will be shared and secured, please see our prior *Alert* “Final Rule on Access to Beneficial Ownership Information”

[4] For more information regarding how to file a BOI report and FinCEN Identifier application, please see our prior *Alert* “Corporate Transparency Act Update: Beneficial Ownership Reporting Rule Now Effective and FinCEN Is Accepting Reports.”

[5] Any individual, Reporting Company or other entity that willfully provides, or attempts to provide, false or fraudulent beneficial ownership information to FinCEN, or willfully fails to report complete or updated beneficial ownership information to FinCEN may be liable for civil or criminal penalties.

[6] 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.

[7] A Reporting Company will not be required to report current beneficiaries who are sprinkle beneficiaries of a trust as Beneficial Owners, unless a sprinkle beneficiary has substantial control over the Reporting Company.

[8] Reporting Companies can also obtain a FinCEN Identifier by checking a box on their BOI report.

[9] FinCEN, Small Entity Compliance Guide, Beneficial Ownership Information Reporting Requirements (Version 1.1, December 2023), available here.

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