



# The Corporate Transparency Act

**2024 NTCHBA Conference  
Pittsburgh, Pennsylvania**

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# Introduction – Corp Transparency Act & FinCEN Final Rule

- The United States does not currently have a centralized repository of data about who owns and operates legal entities within its borders. In an effort to curtail illicit activities and financial crimes through the use of shell companies, Congress enacted the **Corporate Transparency Act** on January 1, 2021
- The CTA requires reporting of **beneficial ownership** of certain **domestic and foreign entities** to the U.S. Treasury Department's Financial Crimes Enforcement Network or "FinCEN"
- On September 30, 2022, FinCEN published its final regulations implementing the **beneficial ownership reporting requirements** of the CTA (the "Final Rule")
- Stated goals of the Final Rule include helping **protect U.S. national security**, providing critical information to law enforcement, and **promoting financial transparency and security** by preventing illicit actors from hiding money in closely held entities

# Beneficial Ownership Information (BOI) Rules under the CTA

## ▪ **BOI Reporting Rule**

- Final Rule Published 9/30/2022, **Effective 1/1/2024**
- Obligates Non-Exempt Reporting Companies to report BOI in Tech System (BOIT) known as Beneficial Ownership Secure System (BOSS)

## ▪ **BOI Access Rule**

- Final Rule Published 12/21/2023, effective 2/20/2024 (via pilot for Federal Agencies to access BOSS) to be expanded to for Banking Institutions at a yet TBD Date
- Establishes framework for access to BOI in Boss by Gov't Agencies and Banking Institutions
  - BOSS access does not apply to Non-Bank Financial Institutions (broker dealers/mutual funds/futures and commodities brokers)
  - Existing Due Diligence Applies

## ▪ **BOI Due Diligence Rule**

- No Final Rule Yet
- Will revise current customer due diligence to confirm to Anti-Money Laundering Act of 2020

# Overview of FinCEN Final BOI Reporting Rule

- The Final Rule became effective **January 1, 2024**
- Domestic and foreign entities will be required to file **reports with FinCEN** that set forth the **beneficial owners** of the company, the **company applicants**, and must file **updates** to report material changes in beneficial ownership in BOIT BOSS System
  - 23 Reporting Company Exceptions

# Overview of FinCEN Final BOI Reporting Rule

## Today's Agenda:

- Who is required to file
- What information must be reported
- When to file - timelines for submitting reports
- Where – FinCEN online registration system
- Why - civil and criminal penalties for non-compliance
- What should Corporate Fiduciaries be considering

# Reporting Companies: Who must Report

- **Domestic and Foreign** entities who register with a **Secretary of State** to do business and who are **not exempt** from reporting:
  - Corporations
  - LLCs
  - LPs
  - LLPs
  - Business Trusts
- Requires a filing with a state (e.g. not a GP or trust) and not otherwise exempt

# Reporting: Who Is Exempt from BOI Reporting Requirement

- The CTA exempts **23 types of entities** from the BOI reporting requirement
- These include:
  - Banks and Credit Unions
  - Public and SEC registered companies
  - Certain accounting firms
  - Tax-exempt entities
  - Certain subsidiaries of exempt companies
  - **Large operating companies** with at least:
    - **20 full-time employees,**
    - more than **\$5,000,000 in gross receipts or sales, and**
    - an operating presence at a **physical office within the United States**

## Who Must File Report:

- The **Reporting Company itself** has the duty and obligation to file requisite reports to FinCEN disclosing BOI, company applicant (if newly formed), company information, and requisite updates



# Reporting Deadlines

- **Initial Reports:** Beginning January 1, 2024 -
  - **Existing Companies:** On or before **January 1, 2025**
  - **New Companies:** within **90 days during 2024, 30 days thereafter**
- **Updates:** **30 days** after change occurs (entity information or BOI)
- **Corrections:** **30 days** after prior reporting error discovered

# Reporting Company Information Disclosure

- A **Reporting Company** must report:
  - Its **legal name**;
  - Any trade names or “**doing business as**” (d/b/a) names;
  - The **current street address of its principal place of business** if that address is in the United States or, for reporting companies whose principal place of business is outside the United States, the current address from which the company conducts business in the United States;
  - Its **jurisdiction of formation** or registration; and
  - Its **Taxpayer Identification Number**

# Beneficial Ownership Information: 2 Types

- In general, a “**Beneficial Owner**” is any individual who:
  - (1) directly or indirectly exercises “**substantial control**” over the reporting company, or
  - (2) who directly or indirectly **owns or controls 25 percent or more** of the “ownership interests” of the reporting company

# Substantial Control (Regardless of Ownership)

- Whether an individual has “**substantial control**” over a reporting company depends on the power they may exercise over a reporting company.
  - an individual will have **substantial control** of a reporting company if they **direct, determine, or exercise substantial influence** over important decisions the reporting company makes
    - A Director, 1% General Partner, an LLC Manager, a Trustee
- Any “**senior officer**” is deemed to have substantial control over a reporting company
  - holding the position or exercising the authority of a **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

# Ownership

- **What constitutes "ownership" of a Reporting Company?**
  - Equity, capital and profits interest in partnerships, convertible instruments, and options; **direct or indirect**
  - **Indirect:** JTWRORS, TbE, custodian, as agent, nominee, guardian?
- **How is 25% ownership of a Reporting Company determined?**
  - on a fully diluted basis - all options are treated as exercised; 25% of voting powers of all classes of stock or value of all classes of stock; 25% of total outstanding capital and profits interests of partnership; and if ownership unclear, anyone who owns or controls 25% of any class or type of ownership interest

# What about Trust Ownership? Estates?

- **Trusts:** When the trust holds a sufficient interest in a Reporting Company, a trustee must gather information on those of the following:
  - **Trustees** who have the power to dispose of the trust estate;
  - **Beneficiaries** who (A) are the sole income and principal beneficiaries or (B) have the right to withdraw or demand the distribution of substantially all of the trust estate;
  - **Grantors** (A) of revocable trusts and (B) who have the right to withdraw assets from the trust; and/or perhaps
  - Others who have the power to dispose of trust assets.
- **Estates:**
  - The CTA requires the reporting of a deceased beneficial owner's interest within 30 days of the **settlement the decedent's estate** under applicable state law.

# FinCEN Example

- *Example 3: The reporting company is a corporation owned by four individuals who each own 25 percent 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 hold any of the company's ownership interests.*
- In this example, there are **eight beneficial owners**. All four of the individuals who each own 25 percent 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. 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, even though they own no shares.
- What if one owner transfers all shares into trust?

# Company Applicant(s) –Applies to Reporting Companies formed after January 1, 2024

- There can be up to **two individuals** who qualify as company applicants —
  - the individual who **directly files the document** that creates, or first registers, the reporting company; and
  - the individual that is **primarily responsible for directing the filing** of the relevant document
- No reporting company will have more than two company applicants
- Only reporting companies formed or registered **on or after January 1, 2024** will have to report their company applicant(s)
- Critically, existing companies created or registered **before January 1, 2024** do not have to report their company applicants
- Relevance to Law Firms, CPA Firms, Vendors & Family Offices



# Company Applicant Example

- *Example 2: Individual A is engaged to create a company. Individual A prepares the necessary documents to create the company and directs Individual P to file the documents with the relevant department of state. Individual P then directly files the documents online that create the company.*
- **Individuals A and P are both company applicants**—Individual P directly filed the documents, and Individual A was primarily responsible for directing or controlling the filing. Individual P could, for example, be Individual A's spouse, business partner, attorney, or accountant; in all cases, Individuals A and P are both company applicants in this scenario.

# Company Applicant: Information Required for Report

- For each company applicant, a reporting company will have to report:
  - full name;
  - date of birth;
  - address; and
  - A unique identifying number from an acceptable identification document (DL or passport) with image of document and jurisdiction that issued the identification document or FinCEN Identifier Number
- Address: the reporting company must report the individual's **residential street address**, unless he or she files the formation or registration document in the course of business, then the reporting company must report the current street address of the company applicant's business. **For example, if the company applicant is a paralegal or attorney who filed the document while working at a law firm, the reporting company must report the business address of the law firm where the paralegal worked when filing the document.**

# Reporting Deadlines

- **Initial Reports:** Beginning January 1, 2024 -
  - **Existing Companies:** On or before **January 1, 2025**
  - **New Companies:** within **90 days\*** for 2024- **30 days** in years 2025 forward
- **Updates:** **30 days** after change occurs (entity information or BOI)
- **Corrections:** **30 days** after reporting error discovered

# BOI Reporting - Mechanics

- FinCEN developed a BOSS reporting system for electronic filings
- Online filing system – [www.fincen.gov/boi](http://www.fincen.gov/boi)

# BOI Access Rule – Who Can Access BOSS?

- Records are not to be searchable by or available to the general public or press
- **FinCEN can disclose BOI under 5 circumstances:**
  - (1) U.S. Federal, state, local, and tribal agencies requesting BOI for national security, intelligence, or law enforcement purposes (access to database with and without court approval);
  - (2) Foreign law enforcement agencies, judges, prosecutors, central authorities, and competent authorities (foreign requesters), through treaty or via federal agencies, etc.;
  - (3) Financial Institutions (FIs) using BOI to facilitate compliance with customer due diligence (CDD) requirements under applicable law;
  - (4) Federal functional regulators and other appropriate regulatory agencies acting in a supervisory capacity assessing FIs for compliance with CDD requirements; and
  - (5) the U.S. Department of the Treasury itself for tax purposes (audit, enforcement, etc.)

# BOI Reports – Penalties for Non-Compliance

## ▪ Civil and Criminal Penalties Authorized

- “Willful” violations for providing false or fraudulent information, or for failure to report complete or updated BOI with FinCEN
- **Entity vs. Individual Duty? Who responsible?**
  - Applies to “individual who causes the failure...or is a senior officer”
  - **A BO or Company Applicant who willfully provides false or fraudulent info may be liable for the entity’s failure to provide accurate information**
- Civil Penalties - \$500 per day; Maximum fine of \$10,000
- Criminal penalties - Imprisonment up to 2 years

# Best Practices for Corporate Fiduciaries holding closely held business interests?

## 1) Identify Risk Tolerance

- Does bank trust company accept closely held business interests
- What is the onboarding process
- Who manages, i.e. delegation, directed trusteeship

## 2) Create a Committee/Assign Task Person & Train

## 3) Screen Fiduciary Assets to Identify Closely Held Business Interest

## Best Practices Continued...

### 4) Determine if the Business Interests are governed by the CTA

- Was it created by or registered via a filing with a State or Tribe?
- Is it exempt?

### 5) If governed by the CTA:

- How much does the Trust own?
  - 25% or more (aggregation)
  - If less than 25% ask
- Is the Trust the manager or otherwise have control?
  - If Trust is manager different duties



## Best Practices Continued...

- 6) Determine who is responsible for reporting
- 7) Identify information to be reported
  - How to determine which Trust parties are the Beneficial Owners
- 8) Report or document process via written analysis/notice in file
- 9) Best practice for non-exempt Beneficial Owners is to get a FinCEN ID
  - Why that is
  - Where to go and how to get

# Conclusion

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