

Client Insight: Corporate Transparency Act and New Beneficial Ownership Reporting Information Requirements Coming January 1, 2024

Insights

December 5, 2023

The Corporate Transparency Act of 2021 (CTA) and its related Beneficial Ownership Information (BOI) rules require certain companies to submit a report containing their BOI to the Financial Crimes Enforcement Network (FinCEN). The law applies primarily to smaller entities, and over 32 million covered entities are expected to be required to make filings. It is important for founders, startups and other entities in the technology and life science ecosystems to understand the implications of the CTA and comply with the reporting requirements, unless they meet the criteria for an exemption (see below regarding exemptions).

The CTA requires reporting companies to disclose their beneficial ownership information to FinCEN via an online platform (as yet to be made available) to be provided by FinCEN. This information includes details about the reporting company itself, individuals who exercise substantial control over the reporting company and individuals who own or control at least 25% of its ownership interests. Each entity must assess whether it needs to file with FinCEN and file if required or face civil or criminal penalties. The CTA refers to entities that are obligated to file BOI reports with FinCEN as “reporting companies.”

Timing

No reports will be accepted prior to January 1, 2024, but actions can be taken beforehand to prepare. The deadlines vary depending on when the company was formed or registered in the United States (US), as summarized here:

Existing Reporting Companies

For reporting companies formed in the US, or registered as foreign corporations, the initial report must be filed by January 1, 2025. For the remainder of this alert, each of these entities are referred to as an Existing Reporting Company.

New Reporting Companies

For reporting companies formed in the US, or registered as foreign corporations on or after January 1, 2024 and before January 1, 2025, the initial report must be filed within 90 days of its formation or registration. For reporting companies formed or registered in the US on or after January 1, 2025, the initial report must be filed within 30 days of its formation or registration. For the remainder of this alert, each of these entities are referred to as a New Reporting Company.

The applicable date from which to measure such 30 or 90-day period is the date on which the company is formed or registered with the applicable secretary of state. The deadline for a New Reporting Company is measured from the earlier of (1) the date of receipt of actual notice of the entity's creation or registration, as applicable, and (2) the date such creation or registration is noticed publicly (publicly accessible registry). For a New Reporting Company that is not formed in the US, the applicable date is when the company is registered as a foreign corporation to do business with any US state.

Beneficial Ownership Information (BOI) Reporting

Each reporting company is responsible for filing the following information with FinCEN: (i) company specific information; (ii) beneficial owner information; and (iii) for entities formed or registered after January 1, 2024, company applicant information.

The company specific information to be reported (and maintained, as described more fully below) is as follows:

- Full legal name
- Any trade names or DBAs (whether registered or not)
- Street address of the principal place of business (if a domestic reporting company) or primary location in the US (if a foreign reporting company). PO Boxes, private

mailboxes and addresses of business agents or corporate agents will not fulfill this requirement.

- Jurisdiction of formation
- For foreign reporting companies, the state or tribal jurisdiction where the company first registers
- Taxpayer ID (if issued by a foreign jurisdiction, the name of such jurisdiction)

For each natural person beneficial owner of the reporting company, the beneficial owner information to be reported is as follows:

- FinCEN Identifier (more on this below) with this as the route suggested by Gunderson

OR

- Full legal name
- Date of birth
- Current residential street address
- Image of identification document
 - Can be US state driver's license, US passport, foreign passport, or other identification document issued by a state, local government or Indian tribe for the purpose of identifying the individual.
 - The form of identification must still be valid, as expired identification documents are not accepted.
- Identification number and issuing jurisdiction of identification document

In addition to providing the company specific information and BOI, New Reporting Companies also need to report up to two "Company Applicants." Company Applicants include the individual who directly files the document that creates the reporting company and, if more than one individual is involved in filing of the document, the individual who is primarily responsible for directing or controlling the filing. Third parties such as attorneys and paralegals may also be considered Company Applicants if they file corporate formation documents on behalf of clients. Talk to your Gunderson attorney about who would be the Company Applicants for any New Reporting Company.

For each natural person Company Applicant of the New Reporting Company, the Company Applicant information to be reported is as follows:

- FinCEN Identifier (more on this below) with this as the route suggested by Gunderson

OR

- Full legal name
- Date of birth
- Current residential street address (for Company Applicants that are in the business of creating entities, they need to provide the applicable business address).
- Image of identification document
 - Can be US state driver's license, US passport, foreign passport, or other identification document issued by a state, local government or Indian tribe for the purpose of identifying the individual.
 - The form of identification must still be valid, as expired identification documents are not accepted.
- Identification number and issuing jurisdiction of identification document

Gunderson attorneys and filing agents who are Company Applicants will be providing FinCEN Identifiers (as described below) to each New Reporting Company so that such information can be included in the New Reporting Company's filing with FinCEN.

There is no fee for submitting information to FinCEN.

Determining Beneficial Owners

Beneficial owners are individuals who directly or indirectly either (i) exercise substantial control over the reporting company or (ii) own or control at least 25% of the reporting company's ownership interests.

Substantial Control

An individual exercises “substantial control” over a reporting company if he or she:

- is a senior officer of the reporting company, which includes the company’s President, Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, General Counsel or any other officer who performs a similar function;
- has authority to appoint or remove any senior officer or a majority of the board (or similar body) of the reporting company;
- is an important decision-maker for the reporting company, which under the CTA means that such individual directs, determines or has substantial influence over decisions regarding a reporting company’s:
 - (x) business, such as:
 - (i) nature, scope and attributes of the business,
 - (ii) selection or termination of business lines or geographic focus, or
 - (iii) entry into, termination, fulfillment or non-fulfillment of significant contracts, or
 - (y) finances, such as:
 - (i) sale, lease, mortgage or other transfer of any principal assets,
 - (ii) major expenditures or investments, issuances of equity, incurrence of significant debt or approval of operating budget, or
 - (iii) compensation schemes and incentive programs for senior officers), or
 - (z) structure, such as:
 - (i) reorganization, dissolution or merger, or
 - (ii) amendments of governance documents; or
- has any other type of substantial control over the reporting company (i.e., a catch-all that captures anyone who can make important decisions on behalf of

the reporting company)

In addition, other indicia of control will be considered in determining whether an individual exercises “substantial control” over a reporting company, including board representation, ownership or control of a majority of voting power, or financial or contractual rights granted to such individual.

25% Ownership

To calculate 25% ownership, note that ownership interests include equity, stock or voting rights; a capital or profit interest; convertible instruments; options or other non-binding privileges to buy or sell any of the foregoing; and any other instrument, contract or other mechanism used to establish ownership. Special rules will likely apply to companies with more than one vote per share of stock or multiple classes of stock. We anticipate that FinCEN will provide additional guidance through “FAQs” in the near future.

In addition, special rules apply to trusts. Because the applicable standard is owning or controlling at least 25 percent of the ownership interests of a reporting company, each of the following individuals could be disclosed for a trust that is a stockholder of the reporting company: (i) trustee or other individual with authority to dispose of trust assets, (ii) a beneficiary who is the sole permissible recipient of trust income and principal or who has the right to demand a distribution or withdraw substantially all of the trust assets or (iii) a grantor/settlor who has the right to revoke or otherwise withdraw trust assets.

There are exemptions for certain beneficial owners, including for: (i) minor children; (ii) individuals who act on behalf of a beneficial owner nominee, intermediary, custodian or agent; (iii) employees of companies who have substantial control over, or economic benefits, solely due to their employment status at the reporting company but are not senior officers of such reporting company; (iv) an individual whose only interest in the reporting company is a future interest through a right of inheritance; or (v) if the individual is a “creditor” of the reporting company (*i.e.*, such individuals only meet the beneficial ownership threshold solely due to their rights to receive a predetermined sum of money, such as a debt or loan covenant).

Board members of venture-backed companies do not necessarily have substantial control over their portfolio companies. The determination as to whether to include such board members in a BOI filing will depend on specific facts and circumstances. Please contact your Gunderson attorney to help with this analysis.

Updates to Reporting Companies

If any of the information from the initial filing (or most recent filing) has changed, or an inaccuracy has been discovered, the reporting company needs to update the information with FinCEN within 30 days of such change or discovery. If there was an inaccuracy in the filing, the reporting company must correct it no later than 30 days after the date that the reporting company became aware of the inaccuracy or had reason to know about it. This includes any of the company information or BOI but not Company Applicant information. As an example, the expiration of a beneficial owner's driver's license or change in residential address would need to be updated with FinCEN if that information had been directly submitted by the reporting company, but the expiration of a Company Applicant's driver's license would not need to be updated by the reporting company. Note that if the reporting company submits only a FinCEN Identifier for a beneficial owner, it is the beneficial owner's responsibility (not the reporting company's) to update his or her information (e.g., driver's license expiration date or residential address) associated with his or her FinCen Identifier.

Use of FinCEN Identifiers

A "FinCEN Identifier" is a unique identifying number that FinCEN will issue to an individual or reporting company upon request after the individual or reporting company provides certain information to FinCEN. For an individual, this information is essentially the same as would be necessary to provide for such individual as part of a reporting company BOI filing. An individual or reporting company may only receive one FinCEN Identifier. Because no reports can be filed prior to January 1, 2024, individuals and reporting companies need to wait until then to obtain a FinCEN Identifier. We understand that a FinCEN number will be provided at the conclusion of the data entry portal session, in other words, there is no review process or waiting period for FinCEN to issue the Identifier.

The use of FinCEN Identifiers is highly encouraged because it: (1) provides that the user of the FinCEN Identifier does not have to provide all of the personally identifiable information to the reporting company; (2) relies on the user of the FinCEN Identifier to keep their own information up to date (as noted in the "Updates to Reporting Companies" subsection above) instead of the reporting company having to continuously update the information on behalf of such user; and (3) allows the users of such FinCEN Identifiers to only have to update one filing with FinCEN rather than needing to provide new personally identifiable information to each reporting company which has such individual listed as a beneficial owner.

Exemptions

There are 23 types of entities that are exempt from filing BOI reports with FinCEN as reporting companies. The exemptions that are most likely applicable for venture-backed companies are listed below. Other exemptions may be available to a particular group but more likely on a limited basis.

Companies

The most likely exemptions applicable to active operating companies are (1) the exemption that applies to public companies (securities reporting issuer) or (2) the “large operating company” exemption, which requires that the company has (i) at least 20 full-time employees in the US, (ii) an operating presence at a physical office in the US and (iii) more than \$5,000,000 in gross receipts/sales for the prior year (as provided in its federal income tax return), excluding gross receipts or sales from sources outside the US. Note that the prior year gross receipts requires a prior year of operating history, so having a current run rate over \$5,000,000 with no prior year operating history does not qualify for the exemption.

While there is an exemption for “inactive entities,” these really only apply to dormant companies because each such entity needs to meet ALL of the following criteria:

- was formed prior to January 1, 2020;
- is not engaged in active business;
- not wholly/partially owned, directly or indirectly, by a foreign person;
- has not experienced a change in ownership in the last 12 months;
- has not sent or received any funds in an amount greater than \$1,000 in the prior 12 month period; and
- does not otherwise hold any kind or type of assets, including an ownership interest in any other entity.

There is also an exemption for certain tax-exempt entities, such as non-profits registered under 501(c) of the Internal Revenue Code of 1986.

Merger Subsidiaries and Other subsidiaries

If the parent of a merger subsidiary or other subsidiary is a public company or a “large operating company” that qualifies for an exemption, then a wholly owned

subsidiary of such non-reporting company is exempt. However, if no exemption applies to the parent company, the merger subsidiary would be a reporting company.

Penalties for Non-Compliance

It is crucial to ensure accurate and timely reporting to FinCEN. Failure to file the required BOI reports or providing incomplete or false information may result in civil or criminal penalties. Additionally, a person may be subject to civil or criminal penalties for willfully providing false or fraudulent information or for willfully causing a company not to file a required BOI report or to report incomplete or false beneficial ownership information to FinCEN.

The willful failure to report complete or updated beneficial ownership information to FinCEN, or the willful provision of or attempt to provide false or fraudulent beneficial ownership information, may result in civil penalties of up to \$500 for each day that the violation continues, or criminal penalties including imprisonment for up to two years and/or a fine of up to \$10,000. Senior officers of an entity that fails to file a required BOI report may be held accountable for that failure.

Providing false or fraudulent beneficial ownership information could include providing false identifying information about an individual identified in a BOI report, such as by providing a copy of a fraudulent identifying document.

If a person has reason to believe that a report filed with FinCEN contains inaccurate information and voluntarily submits a report correcting the information within 90 days of the deadline for the original report, then the CTA creates a safe harbor from penalty. However, should a person willfully fail to report complete or updated beneficial ownership information to FinCEN as required under the CTA, FinCEN will determine the appropriate enforcement response in consideration of its published enforcement factors.

Next Steps

To comply with the CTA and BOI reporting requirements, we recommend the following steps, noting that Existing Reporting Companies have time to act given that their applicable deadline is January 1, 2025:

1. Assess whether any of your company's entities qualify as a reporting company and determine if any exemptions apply.
2. Familiarize yourself with the online portal that FinCEN will provide for filing. FinCEN will announce the specific URL no later than January 1, 2024.

3. Determine who the beneficial owners are for any non-exempt reporting companies and, when available, ask each of them to obtain a FinCEN Identifier or obtain the information necessary to file for a FinCEN Identifier on their behalf.
4. Review any forthcoming guidance from Gunderson as this is an evolving regulatory regime.
5. Consider accelerating any planned entity formations to occur before year end rather than after January 1, 2024 in order to avoid being among the first filers towards the end of March 2024 and instead have a due date of January 1, 2025.
6. Review with your personal financial advisors as to whether you have beneficial ownership of any trust (such as those used for tax or estate planning) or LLCs (such as ones formed to hold real estate) that may be covered by CTA reporting rules.

Gunderson's role in helping our clients with CTA compliance will entail providing guidance on the legal requirements of the regulation, including determining their reporting obligations, and identifying applicable beneficial owners. We expect there will be third-party service providers that will directly handle collection of the required information and facilitate filings with FinCEN. We will be able to introduce company clients to these providers as they become available.

If you have any further questions or need assistance, please do not hesitate to reach out to us. We are committed to helping you navigate the requirements of the Corporate Transparency Act and ensuring compliance.

Additional Resources

[FinCEN Beneficial Ownership Information Reporting Frequently Asked Questions](#)

[FinCEN Small Entity Compliance Guide](#)

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