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# FinCEN Beneficial Ownership Rule Effective January 1, 2024 – But With Reporting Deadline Extension

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The beneficial ownership information (BOI) reporting rule implementing Section 6403 of the Corporate Transparency Act (CTA) was finalized by the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) in September 2022. The BOI rule starts taking effect on January 1, 2024, and, as a general matter, sets a 30-day deadline for covered companies formed after January 1, 2024, to submit required reports. However, on November 30, 2023, FinCEN granted a partial reprieve by finalizing a rule that extends the time frame for submitting required reports from 30 days to 90 days. This extension, **which applies only to companies created in 2024,** means that a covered company created on or after January 1, 2024, must submit a report of its beneficial owners and related company information – a BOI report – within 90 days of receiving notice of the company's creation or registration.

Non-exempt companies in existence as of December 31, 2023 (i.e., the end of this year) still must submit a BOI report by January 1, 2025. A reporting company that is created on or after January 1, 2025, must submit a BOI report within 30 days after receiving notice of the company's creation or registration. Such companies should note, however, that the deadline reverts to 30 days on January 1, 2025, meaning that a company created late in 2024 can avail itself of the 90-day filing deadline extension only until the end of the year, then must complete the filing by the end of January (if the filing is not already due before then).

Even with the extension to the filing deadline for 2024, companies still should consider how the BOI rule may apply and what steps they need to take to meet its requirements. Below, we've provided an overview of some of the key elements of the BOI rule that can serve as a starting point for developing an action plan to address this new reporting regime.

## What makes a company a covered 'reporting company'?

A "reporting company" is any company formed in the US, or any foreign company that registers to do business in the US, by filing a document with a secretary of state or similar office, unless it comes within the scope of an exemption. There are 23 categories of exemptions from the BOI rule. Companies that qualify under any of these exemptions will not be "reporting companies" and will not need to file BOI reports (unless they later become non-exempt). Some of the exemptions likely to have broad relevance are noted below, and additional detail on each exemption, including the specific criteria, is provided by FinCEN in Section 1.2 of the Small Entity Compliance Guide. In spite of the breadth of the exemptions, however, many newly and recently formed privately held companies are not likely to qualify for an exemption, and thus will be subject to the BOI rule. Additionally, holding companies or other similar vehicles may in some cases not be within any of the categories of exemptions, though a detailed analysis may be required based on the specific facts and circumstances of a particular organization's structure.

Key exemptions likely to exclude many companies from the BOI rule's reporting requirements include exemptions for the following types of entities:

- **Large operating companies,** which the BOI rule defines to include any company that employs more than 20 full-time employees in the US, has more than $5,000,000 in gross receipts or sales in the US, and has an operating presence at a physical office within the US.
- **Public companies,** based on the BOI rule definition of a "securities reporting issuer."
- **Certain types of regulated entities,** such as insurance companies, banks and credit unions, brokers or dealers in securities, and money services businesses (MSBs).
- **Entities involved in private equity and venture capital** – specifically, investment companies, investment advisers, pooled

investment vehicles and venture capital fund advisers – subject to certain criteria.

- **Subsidiaries of certain exempt entities,** including larger operating companies, public companies, regulated entities such as banks (but not MSBs), and the exempt private equity and venture capital entities, are also exempt from BOI reporting, provided in each case that the subsidiary's ownership interests are controlled, or wholly owned, directly or indirectly, by the exempt entity.

# What do reporting companies need to do?

A reporting company must submit a BOI report to FinCEN that includes three types of information:

1. **Company information,** such as full legal name (and any trade names), address, jurisdiction of formation, and taxpayer identification number (or equivalent issued by a foreign jurisdiction).
2. **Beneficial owner information,** including the full legal name, date of birth, address, and the unique identifying number **and image** of a US passport, state driver's license, or other eligible identification document for each individual identified as a beneficial owner.
3. **Company applicant information,** for companies created or registered on or after January 1, 2024, which is the same information required to be provided for beneficial owners.

Companies must collect the required information and submit BOI reports through FinCEN's Beneficial Ownership Secure System (BOSS). The final form of the BOI report has not yet been made available as of the date of this alert, and FinCEN is not yet accepting BOI reports.

A reporting company must file an updated BOI report to communicate changes to company or beneficial owner information (including the beneficial owners' identities and previously submitted information for them) no later than 30 days after the date on which the change occurred. BOI report data also must be updated within 30 days after the date the company becomes aware of an inaccuracy in a previously filed BOI report or had reason to know of such inaccuracy. Company applicant information **does not** need to be updated on a reporting company's BOI report in the event the information changes (e.g., a change in address of a company applicant), but a reporting company **does** need to file an updated BOI report if there are inaccuracies in previously reported company applicant information.

Companies are not otherwise required to submit BOI reports on an annual or other periodic basis as a matter of course.

# What is a 'beneficial owner'?

Under the BOI rule, a "beneficial owner" is any **individual** who, directly or indirectly exercises **substantial control** over a reporting company **or** owns or controls at least **25% of the ownership interests** of a reporting company. The BOI rule describes four categories of "substantial control":

1. The individual is a senior officer (e.g., CEO, chief financial officer, general counsel).
2. The individual has authority to unilaterally appoint or remove any such senior officer or a majority of the board of directors of the reporting company.
3. The individual directs, determines or has substantial influence over important decisions made by the reporting company.
4. The individual has any other form of substantial control over the reporting company.

Ownership interests for purposes of the BOI rule can include equity, stock or voting rights; a capital or profit interest; convertible instruments; options or other nonbinding privileges to buy or sell any of the aforementioned types of interests; or any other instrument, contract or other mechanism used to establish ownership. To determine whether an individual owns or controls, directly or indirectly, at least 25% of the ownership interests of the company, a reporting company may need to first identify the types of ownership interests, then calculate whether any single individual's interests exceed 25%.

FinCEN's Small Entity Compliance Guide provides additional information, including checklists, for identifying individuals who are beneficial owners based on the substantial control and ownership interests prongs, but companies with more complex ownership and/or governance structures may need to conduct a more detailed and nuanced analysis to identify beneficial owners.

# What is a ‘company applicant’?

Reporting companies created after January 1, 2024, are required to identify and report company applicants. Each such reporting company will have at least one and a maximum of two company applicants. Under the BOI rule, a “company applicant” is defined as: (1) the individual who directly files the document that creates a domestic reporting company or first registers a foreign reporting company to do business in the US; and, if applicable, (2) the individual primarily responsible for directing or controlling the filing of the creation or registration document.

Reporting companies created or registered on or before December 31, 2023, **do not** have to report company applicants when they start reporting by January 1, 2025.

# What is a ‘FinCEN identifier’ and why does it matter?

A “FinCEN identifier” is a unique identifying number that FinCEN will issue to an individual upon request. An individual may directly apply for a FinCEN identifier by providing the same information that a reporting company would submit on behalf of the individual as a company applicant or beneficial owner. (In certain instances, a reporting company may wish to obtain a FinCEN identifier and can request the issuance when filing its BOI report.)

A reporting company may report an individual’s FinCEN identifier in place of the required four pieces of information about the individual in BOI reports. An individual who is either a beneficial owner or a company applicant of a reporting company will therefore not need to provide personal information directly to the reporting company if the individual has obtained a FinCEN identifier and provides it to the reporting company instead. An individual must keep the information provided to FinCEN to obtain a FinCEN identifier (e.g., address information) updated.

Similar to the BOI report, FinCEN has not yet made public the final form of the FinCEN identifier application, and FinCEN is not yet accepting FinCEN identifier requests.

# What are the penalties for noncompliance?

Any person who willfully provides, or attempts to provide, false or fraudulent BOI data to FinCEN – or willfully fails to report complete or updated BOI data to FinCEN – may be subject to civil or criminal penalties of up to $10,000 and up to two years in prison. A person fails to report complete or updated BOI data to FinCEN if, with respect to a reporting company, the person “causes the failure,” which could include an individual’s refusal to provide or submit required information for a reporting company’s BOI report.

# Next steps

Companies currently in existence have time to determine if the BOI rule applies, because it does not take effect until January 1, 2025, for companies created or registered on or before December 31, 2023. Nevertheless, such companies may wish to start developing processes to determine whether the BOI rule applies and to be able to evaluate whether newly created entities within the corporate family (e.g., subsidiaries, special purpose vehicles) are subject to the rule. Newly formed companies, and persons or entities that are involved in or create such companies – such as entrepreneurs, venture funds, and other investors and investment vehicles – will need to determine whether the BOI rule applies and, if so, how they will address reporting requirements. All covered companies should continue to monitor for updates from FinCEN regarding the reporting process generally, including the availability of the FinCEN reporting forms and access to the BOSS.

**Please join Cooley for a webinar focused on the CTA and the new BOI reporting rule requirements that start taking effect on January 1, 2024.**

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# Key Contacts


| | |
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| Adam Fleisher<br>Washington, DC | afleisher@cooley.com<br>+1 202 776 2027 |
| Jasmine A. Banks<br>Washington, DC | jbanks@cooley.com<br>+1 202 360 6565 |


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