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FinCEN Publishes New Guidance on Beneficial Ownership Information Reporting Rule

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On September 18, 2023, the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) published its Small Entity Compliance Guide – the agency's most comprehensive guidance to date on compliance obligations under the beneficial ownership information (BOI) reporting rule. It provides a useful resource in addition to FinCEN's collection of information regarding BOI reporting for companies seeking a better understanding of their obligations under the new rule.

What's the BOI reporting rule?

The BOI reporting rule was finalized by FinCEN in September 2022 to implement Section 6403 of the Corporate Transparency Act (CTA). The stated goal of the CTA is to improve transparency of corporate structures and discourage the use of shell corporations to disguise and move illicit funds. The reporting rule is intended to address this goal by requiring certain companies to report information about their beneficial owners to FinCEN.

Barring an applicable exemption, 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. The compliance guide summarizes the specific information reporting companies are required to report. As also explained in the compliance guide, the BOI reporting rule requires covered entities in existence on December 31, 2023, to file a report no later than January 1, 2025. However, reporting companies that are formed or (if a foreign company) registered on or after January 1, 2024, must file a report within 30 days of the date on which the formation or registration becomes effective under applicable law.

What's in the compliance guide?

The guide does not create any new requirements. Rather, it provides an accessible and detailed summary of how the BOI reporting rule works, particularly with respect to:

- Which types of companies are subject to the reporting rule and how the 23 categories of exemptions operate to narrow the scope of covered entities.
- How to identify beneficial owners of a reporting company.

In turn, the guide addresses what reporting companies and their individual beneficial owners must do to comply, across six chapters:

1. Does my company have to report its beneficial owners?
2. Who is a beneficial owner of my company?
3. Does my company have to report its company applicants?
4. What specific information does my company need to report?

5. When and how should my company file its initial BOI report?
6. What if there are changes to or inaccuracies in reported information?

How should companies approach the reporting rule?

The first key step for any company is to determine if it is a reporting company or meets one of the available exemptions. Exempt entities include those subject to certain preexisting registration requirements or regulatory regimes, such as securities issuers (i.e., public companies), money services businesses and other types of financial institutions, investment companies and investment advisers, venture capital fund advisers, and pooled investment vehicles. Each type of exemption has specific criteria that must be met, so any potentially covered entity should carefully evaluate whether a relevant exemption is applicable.

The BOI reporting rule also includes a general exemption for a "large operating company," which is generally any entity that employs more than 20 full-time employees in the US, has more than 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. Again, there are very specific criteria for meeting the large operating company exemption, so any company that believes this exemption may apply should closely evaluate the applicable criteria. Finally, an entity that is controlled or wholly owned, directly or indirectly, by most (but not all) categories of exempt entities is exempt. For example, a wholly owned subsidiary of a public company is exempt, but a wholly owned subsidiary of a money services business is not (unless another exemption applies, such as the money transmitter being a public company or a large operating company).

The second key step for any non-exempt entity that is therefore a reporting company is to determine whom its beneficial owners and company applicants are. 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 compliance guide explains that "an individual might be a beneficial owner through substantial control, ownership interests, or both," and states that "FinCEN expects that every reporting company will be substantially controlled by one or more individuals, and therefore that every reporting company will be able to identify and report at least one beneficial owner to FinCEN."

The compliance guide elaborates on what constitutes "substantial control" by describing four categories:

1. The individual is a senior officer.
2. The individual has authority to appoint or remove certain officers or a majority of directors of the reporting company.
3. The individual is an important decision-maker.
4. The individual has any other form of substantial control over the reporting company.

The compliance guide includes checklist-type questions to help a company identify persons with substantial control, such as whether any individual has the ability to appoint or remove a majority of the company's board of directors (or similar body), or otherwise appoint or remove a senior officer such as president, chief executive officer, or chief financial officer.

Similarly, the compliance guide covers how to identify and calculate the various types of ownership interests that can trigger reporting based on the 25% threshold:

- Equity, stock, or voting rights.
- A capital or profit interest.
- Convertible instruments.
- Options or other nonbinding privileges to buy or sell any of the foregoing.
- Any other instrument, contract, or other mechanism used to establish ownership.

The guide provides a checklist to identifying each of the types of ownership interests, then how to calculate relevant percentages based on each of these types of interests.

The compliance guide also outlines the process of identifying company applicants, which should generally be more straightforward than the process of identifying beneficial owners. As an initial matter, reporting companies created or registered on or before December 31, 2023, do not have to report company applicants (such companies do not need to report anything before January 1, 2025, in any event). However, reporting companies created on or after January 1, 2024, will need to report company applicants. All such reporting companies must have at least one, but no more than two, company applicants, and company applicants must be natural persons. The first category of company applicant is the individual who directly filed the document that created a domestic reporting company or first registered a foreign reporting company. The compliance guide clarifies that this individual “would have actually physically or electronically filed the document with the secretary of state or similar office.” This “direct filer” must be identified by all reporting companies that have a company applicant reporting requirement (i.e., all reporting companies created or registered on or after January 1, 2024). The second category is the individual who was primarily responsible for directing or controlling the filing of the creation or first registration document. The compliance guide notes that not all reporting companies will necessarily have a person that falls into this second category.

Finally, the compliance guide walks through the information that needs to be filed with FinCEN by a reporting company, including details about each beneficial owner and company applicant (if applicable), as well as the requirements for updating and correcting BOI reports. Company information includes full legal name (and any trade names), address, jurisdiction of formation, and taxpayer identification number (or equivalent issued by a foreign jurisdiction). Information about beneficial owners includes their full legal name, date of birth, address, and the unique identifying number **and image** of their US passport, state driver’s license, or other eligible identification document.

Information generally must be updated within 30 days after a change in information occurs or after the date the company became aware of an inaccuracy or had reason to know of it. **Note:** A reporting company is responsible for maintaining current and accurate information not only about the company itself, but also about its beneficial owners and (to the extent applicable) company applicants. Reports – and updates – are required to be filed through a filing system that FinCEN is still in the process of developing. The compliance guide states that FinCEN will publish separate instructions and other technical guidance on how to complete the reports.

What are the next steps?

Companies currently in existence have time to determine if the BOI reporting 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 consider whether it is appropriate to develop processes to determine whether the reporting rule applies and to address whether newly created entities (e.g., subsidiaries, special purpose vehicles) are subject to the reporting 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, law firms, and corporate services firms – also may need to develop processes to address BOI reporting rule requirements, including approaches to updating previously reported information.

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