

Corporate Transparency Act: Reporting Is Back On

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Agenda

Corporate Transparency Act

Status of CTA -- CTA Reporting Is Back On

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Status of CTA
Reporting is Back On

Reporting Is Back On

As a result of the decision (Feb. 17, 2025) by the U.S. District Court for the Eastern District of Texas in *Smith, et al. v. U.S. Department of the Treasury, et al.*, 6:24-cv-00336 (E.D. Tex.), beneficial ownership information (BOI) reporting requirements under the Corporate Transparency Act (CTA) are once again back in effect

How We Got Here?

BOI Reporting Saga (Short Version)

- **Dec. 3, 2024.** Off (*Texas Top Cop Shop Case*)
- **Dec. 23, 2024.** On (*Texas Top Cop Shop Case*)
- **Dec. 26, 2024.** Off (*Texas Top Cop Shop Case*)
- **Jan 7, 2025.** Off (*Smith Case*)
- **Jan. 23, 2025.** Supreme Court stays nationwide injunction under *Texas Top Cop Shop Case*, but *Smith Case* controls
- **Feb. 19, 2025.** On. District Court in *Smith Case* stays nationwide injunction

Chronology of Events

- **Dec. 3, 2024.** In the ***Texas Top Cop Shop Case (TTCS)*** the Eastern District of Texas issued an order granting a nationwide preliminary injunction that enjoins enforcement of the CTA, including the implementing regulations concerning BOI reporting requirements and reporting deadlines
- **Dec. 5, 2024. TTCS.** Amended Order by the U.S. District Court
- **Dec. 5, 2024. TTCS.** The DOJ filed a Notice of Appeal of the Amended Order
- **Dec. 6, 2024.** FinCEN issued a statement saying BOI reporting is suspended and filings are voluntary
- **Dec. 6, 2024. TTCS.** DOJ filed motion to stay injunction with the District Court
- **Dec. 13, 2024. TTCS.** DOJ filed Emergency Motion for Stay Pending Appeal with Fifth Circuit
- **Dec. 17, 2024. TTCS.** The District Court denied the motion and the DOJ appealed to the Fifth Circuit
- **Dec. 23, 2024. TTCS.** Motions panel for the Fifth Circuit granted the DOJ's emergency motion for a stay pending appeal and FinCEN issued a statement requiring filing of BOI reports with extended deadlines
- **Dec. 26, 2024. TTCS.** A Fifth Circuit merits panel vacates its own stay, once again enjoining enforcement of the CTA and BOI reporting

Chronology of Events

- **Dec. 27, 2024.** FinCEN issues a statement suspending BOI Reporting and making it voluntary
- **Dec. 31, 2024. TTCS.** DOJ filed an emergency application with the U.S. Supreme Court to stay the nationwide preliminary injunction
- **Jan. 3, 2025. TTCS.** Justice Samuel Alito requested respondents-plaintiffs submit their response to the DOJ application for a stay by Jan. 10, 2025
- **Jan. 7, 2025. **The *Smith* case ordered a nationwide suspension of BOI Reporting****
- **Jan. 23, 2025. TTCS.** The U.S. Supreme Court stayed the preliminary injunction, but as the *Smith* enjoinder of nationwide reporting was not before Supreme Court, it controlled
- **Jan. 24, 2025.** FinCEN suspended BOI reporting, because of the *Smith* case
- **Feb. 5, 2025.** DOJ filed a notice of appeal of District Court's order in the *Smith* case, and, in parallel, requested a stay of the order (nationwide injunction) during the appeal
- **Feb. 19, 2025.** District Court in *Smith* case granted DOJ's motion to stay (lift) the order granting preliminary relief pending the disposition of the appeal before Fifth Circuit

Chronology of Events

- **Feb. 19, 2025.** FinCEN announced lifting of nationwide injunction and reinstatement of BOI reporting within 30 days
- **March 21, 2025.** BOI reporting reinstated for vast majority of reporting companies

Reporting Deadlines

Reporting Deadline Extension

- FinCEN is generally extending the deadline 30 calendar days from February 19, 2025, for most companies
- **Rationale.** Because the Department of the Treasury (Treasury) recognizes that reporting companies may need additional time to comply with their BOI reporting obligations

Reporting Deadlines

General Rule

- **General Rule.** FinCEN is generally extending the deadline 30 calendar days from February 19, 2025, for most companies -- to **March 21, 2025**
- **Why an Extension?** The Treasury recognizes that reporting companies may need additional time to comply with their BOI reporting obligations
- **March 21, 2025.** This deadline will apply to the vast majority of reporting companies to file an initial, updated, and/or corrected beneficial ownership information (BOI) report
 - Example. Reporting Companies formed on or before Feb. 19, 2025, and reporting companies formed prior to Jan. 1 2024 will have until March 21, 2025, to file their BOI report.,
 - FinCEN will provide an update before then of any further modification of this deadline, recognizing that reporting companies may need additional time to comply with their BOI reporting obligations once this update is provided

Reporting Deadline

Some Reporting Companies Will Have Later Deadline

- **Applicable To:** Reporting companies that were previously given a reporting deadline later than the March 21, 2025, deadline must file their initial BOI report by that later deadline
 - For example:
 - Reporting companies formed *after* Feb. 19, 2025, will have 30 days from their formation/registration to file their BOI reports, unless they otherwise qualify for a later deadline, such as disaster relief extension, see below
 - if a company's reporting deadline is in April 2025 because it qualifies for certain disaster relief extensions, it should follow the April deadline, not the March deadline

Reporting Deadline

National Small Business United v. Yellen

- Plaintiffs in *National Small Business United v. Yellen*, No. 5:22-cv01448 (N.D. Ala.)—namely, Isaac Winkles, reporting companies for which Isaac Winkles is the beneficial owner or applicant, the National Small Business Association, and members of the National Small Business Association (as of March 1, 2024)—are not currently required to report their beneficial ownership information to FinCEN at this time

Reduction in Regulatory Burden

- In keeping with Treasury's commitment to reducing regulatory burden on businesses
 - *During this 30-day period* FinCEN will assess its options to further modify **deadlines**, while prioritizing reporting for those entities that pose the most significant national security risks
 - FinCEN also intends to initiate a process this year to revise the BOI reporting rule to **reduce burden** for lower-risk entities, including many U.S. small businesses

Case Scorecard

Wins/Losses

- Plaintiffs **successful** in arguing CTA unconstitutional in *National Small Business United*. Case now before 11th Circuit, awaiting decision
- Plaintiffs **unsuccessful** in constitutional arguments in:
 - *Community Associates Institute*, Case now before 4th Circuit
 - *Firestone*. Case now before 9th Circuit
 - *Small Business Association of Michigan*
 - *Boyle*
- Plaintiffs successful in obtaining nationwide injunction:
 - *Texas Top Cop Shop*
 - At District Court level and at Appeal to District Court
 - Fifth Circuit stayed nationwide injunction
 - Fifth Circuit Merits Panel Reinstated Nationwide Injunction
 - Supreme Court stayed nationwide injunction
 - *Smith*
 - At District Court level but on Appeal to District Court stayed on basis of Supreme Court decision in Texas Top Cop Shop case

Partial Wins

- *Trustees of the Lewis Wharf Condominium Trust*
 - Acknowledgment that trust was not a reporting entity
- *Community Associates Institute*
 - Acknowledgement that unincorporated community associates are out of scope of CTA
- *Boyle*
 - Penalties

Court Cases on Appeal

CTA Court Cases On Appeal

- ***National Small Business United (Alabama)***

- District Court found CTA unconstitutional – Congress lacked authority to enact such a law and granted summary judgment
- Case appealed to 11th Circuit and oral argument was held on Sept. 27, 2024
- Awaiting decision of 11th Circuit
- On Feb. 21, 2024, DOJ wrote Clerk of the 11th Circuit:

After the last remaining nationwide order was stayed, the Department of the Treasury extended the reporting deadline for most companies for 30 days, until March 21, 2025. See FinCEN, FinCEN Extends Beneficial Ownership Information Reporting Deadline by 30 Days; Announces Intention to Revise Reporting Rule, Notice No. FIN-2025-CTA (Feb. 18, 2025), <https://perma.cc/27HD-86J5>. The Department indicated that during the 30-day period, it would “assess its options to further modify deadlines, while prioritizing reporting for those entities that pose the most significant national security risks.”

The only currently effective judicial order that constrains the enforcement of the reporting requirements is the one in this case. The government respectfully urges this Court to reverse the district court’s judgment and to do so promptly.

CTA Cases On Appeal

- ***National Small Business United (Alabama)***

- On Feb. 24, 2024, the Plaintiffs responded to the DOJ's letter:
[Citing FinCEN's Notice dated Feb. 18, 2025,, the Plaintiffs wrote:

...revising or further delaying the reporting rule cannot solve the CTA's constitutional infirmities...

The CTA is unconstitutional on both enumerated-powers and Fourth Amendment grounds. This Court should uphold the judgment here and protect those within this Circuit from this unprecedented infringement

CTA Court Cases On Appeal

- **Texas Top Cop Shop (Texas)**

- District Court ruled in favor of the plaintiffs and against the government, issuing a nationwide preliminary injunction against the government’s enforcement of the CTA while leaving the CTA itself in place
- [intervening court activities omitted]
- The Fifth Circuit Merits Panel issued a briefing schedule under which briefing before the Fifth Circuit Court of Appeals is to be completed by February 28, 2025, now extended until March 7, 2025 and initially scheduled oral argument for March 25, 2025, now rescheduled to April 1, 2025

- Supreme Court Order:

The December 5, 2024 amended order of the United States District Court for the Eastern District of Texas, case No. 4:24–cv–478, is stayed pending the disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought. Should certiorari be denied, this stay shall terminate automatically. In the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

CTA Court Cases On Appeal

- ***Firestone (Oregon)***
 - District Court rejected challenges to constitutionality of the CTA and denied a preliminary injunction on the basis that plaintiffs failed to demonstrate a likelihood of success on the merits, irreparable injury, or that the balance of hardships tipped in their favor
 - Case appealed to Ninth Circuit
 - Briefs exchanged
- ***Community Associates Institute (E.D. Virginia)***
 - Litigation specific to community associations
 - District Court determined CTA was within scope of federal government's ability to regulate commerce and denied a preliminary injunction
 - Case appealed to Fourth Circuit
 - Briefs Exchanged

Court Cases

Hotze (No. 2:24-CV-00210-Z)

Northern District of Texas, Amarillo Division

- New injunction?
- In a joint status report filed Feb. 24, 2025, the Court was informed that Plaintiffs intend to file a new motion for a preliminary injunction prior to the new reporting deadline, which the defendants will oppose
- The briefing schedule is as follows:
 - Plaintiffs to file their motion on or before Feb. 24, 2025
 - Defendants to file any opposition on or before March 12, 2025; and
 - Plaintiffs to file any reply on or before March 14, 2025
 - The parties further agree that Defendants' deadline to answer or otherwise respond to the complaint shall remain stayed pending the resolution of the forthcoming motion and any ensuing appeal

Case	Initial Filing Date	Status
National Small Business United v. Yellen, No. 5:22-cv-1448-LCB (N.D. Ala. 3/1/24).	Nov. 15, 2022	<ul style="list-style-type: none"> District court found CTA to be unconstitutional for specific parties Appeal filed in the Eleventh Circuit on March 11, 2024 Oral argument held Sept. 27, 2024
Robert J. Gargasz Co., L.P.A. et al v. Secretary of the Treasury et al, 1:23-cv-02468 (N.D. Ohio)	Dec. 29, 2023	<ul style="list-style-type: none"> Case stayed pending outcome of Eleventh Circuit appeals
Boyle v. Yellen et al, 2:24-cv-00081(D. Me)	March 15, 2024	<ul style="list-style-type: none"> Oral argument held regarding cross motion for summary judgment Motion to dismiss for failure to state a claim Motion for summary judgment granted to government on Jan. 3, 2025
Small Business Association of Michigan et al v. Yellen et al, 1:24-cv-00314 (W.D. Mich)	March 26, 2024	<ul style="list-style-type: none"> Motion hearing for summary judgment filed by plaintiffs Cross motion for summary judgment filed by defendants on Dec. 16, 2024 Motion for summary judgement denied
Texas Top Cop Shop, Inc., et al v. Pamela Bondi, et al, 4:24-cv-00478 (E.D. Tex)	May 28, 2024	<ul style="list-style-type: none"> On Dec. 26, 2024, the Fifth Circuit Court of Appeals issued an order that vacated (effectively reversing) the same court's order from Dec. 23, 2024, and reinstated a lower court's nationwide injunction against enforcement of the CTA On Jan. 23, 2025, the Supreme Court stayed (i.e., suspended the effect of) the nationwide preliminary injunction against enforcement of the CTA
Black Economic Council of Massachusetts, Inc. et al v. Yellen et al, 1:24-cv-11411 (D. Mass)	May 29, 2024	<ul style="list-style-type: none"> Motion to dismiss for lack of jurisdiction as to organizational plaintiffs Cross motion for summary judgment and opposition to plaintiffs' motion for summary judgment filed by defendant on Dec. 19, 2024 Plaintiffs replied on Jan. 27, 2025
Firestone et al v. Yellen et al, 3:24-cv-01034 (D. Or)		<ul style="list-style-type: none"> The court denied plaintiffs' motion for preliminary injunction The court denies plaintiffs' motion for injunction pending appeal to the Ninth Circuit on Dec. 18, 2024

Trustees of the Lewis Wharf Condominium Trust v. Yellen et al, 1:24-cv-11679 (D. Mass)	June 27, 2024	<ul style="list-style-type: none"> On Nov. 22, 2024, the U.S. District Court for the District of Massachusetts ruled in the matter of Trustees of the Lewis Wharf Condominium Trust v. Janet Yellen, et. al. dismissed the case, but found that the CTA does not apply to unincorporated condominium associations
Taylor et al v. Yellen et al, 2:24-cv-00527 (D.Utah)	July 29, 2024	<ul style="list-style-type: none"> Motion to dismiss for failure to state a claim denied Motion to dismiss for lack of jurisdiction denied Motion for preliminary injunction denied on Dec. 19, 2024
Washington et al v. United States Treasury Department, 6:2024cv01483 (M.D. FL)	Aug. 13, 2024	<ul style="list-style-type: none"> Motion for sanctions and permanent injunction denied on Nov. 15, 2024 Notice of interlocutory appeal as to motion for reconsideration/clarification by plaintiff on Dec. 16, 2024
Community Associations Institute et al v. U.S. Department of the Treasury et al, 1:24-cv-01597 (E.D.Va.)	Sept. 10, 2024	<ul style="list-style-type: none"> Memorandum opinion and order denying plaintiffs' motion for preliminary injunction on Oct. 24, 2024 Appeal on the preliminary injunction filed Nov. 4, 2024 Appeal to the U.S. Court of Appeals for the Fourth Circuit
Smith et al v. United States Department of The Treasury et al, 6:24-cv-00336 (E.D. Tex)	Sept. 12, 2024	<ul style="list-style-type: none"> Memorandum opinion and order granting motion for preliminary injunction and relief granted under 5 U.S.C. § 705 on Jan. 7, 2025 Notice of appeal on Feb. 5, 2025
Hotze et al v. United States Department of the Treasury et al, 2:24-cv-00210 (N.D.Tex)	Sept. 26, 2024	<ul style="list-style-type: none"> Memorandum opinion and order denying as moot motion for injunction, filed by Michael B Wallis, Association of American Physicians & Surgeons, Daniel Rogers, Steven F Hotze M.D., Russell Ramsland. (Ordered by Judge Matthew J. Kacsmaryk on Dec. 30, 2024) Order granting motion to stay for 30 days on Jan. 31, 2025 The parties were on Jan. 31, 2025 to submit a joint status report no later than one week prior to expiration of the stay and update the court of any changes regarding the status of the Smith order

Midwest Association of Housing Cooperatives v. United States Department of Treasury, Secretary of et al, 4:24-cv-12949 (E.D. Mich)	Nov. 5, 2024	<ul style="list-style-type: none"> Order held regarding plaintiffs' emergency motion for declaratory relief or, alternatively, preliminary injunctive relief pending the outcome of National Small Business United v. U.S. Dept. of the Treasury, Eleventh Circuit on Nov. 26, 2024
Spizzirri Law, LLC et al v. Yellen et al, 1:25-cv-97 (N.D.Ga)	Jan. 9, 2025	<ul style="list-style-type: none"> Complaint filed

Constitutional Arguments

Arguments (Some) Raised by Opponents of the CTA

- **Constitutional Authority** -- CTA exceeds Congress's legislative authority
 - *Commerce Clause*:
 - DOJ argues that CTA is authorized by Commerce Clause because statute regulates the anonymous operation of business entities
 - Petitioners argue that CTA regulates the existence of entities formed under state law, not their operation, and that the regulation of inactivity based on mere existence is contrary to Congressional Commerce Clause powers
 - *Necessary and Proper Clause*: CTA is not a necessary and proper measure to implement Congressional powers related to:
 - Taxing rights
 - Foreign affairs, and
 - Foreign commerce
 - If the regulation is prohibited by the Constitution or otherwise inconsistent with its letter and spirit

Arguments (Some) Raised by Opponents of the CTA

- **First Amendment** -- Violation by compelling speech and interfering with associational freedoms
- **Fourth Amendment** – CTA is an unreasonable search and seizure
- **Fifth Amendment** –
 - Violation of privilege against self-incrimination
 - CTA unconstitutionally vague by failing to provide clear guidance on compliance
- **Eighth Amendment** – CTA penalties excessive and constituted cruel and unusual punishment
- **Ninth Amendment** – infringes privacy rights under the Ninth Amendment
- **Tenth Amendment** – Violates states' rights & state's authority to regulate domestic corporations

What is Going on in
Executive Branch?

What Is Going On in the Executive Branch?

- Prior to the Trump Administration coming into power on Jan. 20, 2025, it was not entirely clear how President Trump and the Administration felt about the CTA.
- Recollect that the President Trump vetoed the National Defense Authorization Act (NDAA), which contained the CTA in December of 2020, although the veto was not directed at the CTA
- Further, then Senator Marco Rubio, the current Secretary of State, was a strong proponent of the CTA
- The new Treasury Secretary, Scott Bessent, at his confirmation hearing, in response to a question relating to the importance of the CTA, responded as follows:

Beneficial ownership information can be a valuable tool to assist law enforcement efforts. We also must ensure that regulatory requirements are consistent with U.S. laws and appropriately tailored to provide such useful information to law enforcement while not creating unnecessary and substantial burdens or disproportionate legal consequences on law-abiding U.S. individuals and small businesses. If confirmed, I will work to ensure that Treasury's efforts to combat illicit finance are focused on detecting, disrupting, and deterring malign actors while not creating unnecessary regulatory requirements that are inconsistent with U.S. law and harmful to law-abiding U.S. individuals and businesses.

What Is Going On in the Executive Branch?

- Note, FinCEN is a unit of the Department of Treasury
- To date, the Biden Administration's FinCEN Director continues as the Director, reporting the Under Secretary for Terrorism and Financial Intelligence
- The Trump Administration has made clear its intention to eliminate regulatory burdens, which could include the CTA
- Note, it took nearly a month for a decision to be made to appeal the *Smith* case and ask for a stay of the nationwide injunction
- The appeal of the *Smith* case, motion for a stay of the nationwide injunction, as well as the briefs vigorously supporting the constitutionality of the CTA filed by the DOJ in the 5th Circuit in *Texas Top Cop Shop* as well as in the 4th and Ninth Circuits, in the *Community Associates Institute Inc.* and *Firestone* cases, all evidence strong support the CTA
- Notwithstanding the foregoing, as the DOJ said in its motion to stay the nationwide injunction in *Smith* and FinCEN more expansively in its announcement related to the resumption of reporting, there is a recognition of the burden of the CTA on small businesses and there will be a review both of reporting deadlines and reporting requirements.
- Another issue is the concern of the Treasury Department with the upcoming Financial Action Task Force (FATF) review in 2025 review and onsite evaluation of the United States' anti-money laundering and counter-terrorism financing (AML/CFT) regime; the prior Administration was most concerned about this review
- So, at this time, the Executive Branch seems on board with the CTA, subject to some modifications to lessen the burden on lower-risk entities, while targeting higher-risk entities

Project 2025?

Congress should repeal the Corporate Transparency Act, and FinCEN should withdraw its poorly written and overbroad beneficial ownership reporting rule

Both are targeted at the smallest businesses in the U.S. (those with 20 or fewer employees) and will do nothing material to impede criminal finance

The FinCEN beneficial ownership reporting rule will impose costs exceeding \$1 billion annually and is exceedingly poorly drafted

FinCEN itself estimates that more than 33 million businesses will be affected and that costs will be \$547 million to \$8.1 billion annually

Project 2025, pp. 707-708

What is Going on in
Congress?

Protect Small Businesses from Excessive Paperwork Act of 2025

- **Jan. 24, 2025.** Rep. Zach Nunn (R-Iowa) on Jan. 25, 2025, reintroduced the Nunn Bill (H.R. 736), which would delay the deadline for filing of initial BOI reports, but only for reporting companies formed prior to Jan. 1, 2024, until not later than Jan. 1, 2026.
 - The House acted quickly on the Nunn Bill and unanimously passed the legislation on Feb. 10, 2025.
- **Feb. 12, 2025.** A companion bill (S. 505) was introduced on the Senate side by Sen. Scott (R-S.C.).
 - The bill has 10 co-sponsors and has been referred to the Senate Banking, Housing, and Urban Affairs Committee

Repealing Big Brother Overreach Act

- Recently, Sens. Rand Paul (R-Ky.) and Tommy Tuberville (R-Ala.) reintroduced the **Repealing Big Brother Overreach Act**, a bill that aims to repeal the CTA with a stated goal of protecting small-business owners
- The bill so far has received support from about 21 Republican senators, but no Democrats have yet signed on
- In the House of Representatives, Rep. Warren Davidson (R-Ohio) reintroduced companion legislation, which has 66 Republican co-sponsors

Penalties and the Boyle Case?

Boyle Case (2:24-cv-00081-SDN)

- **Penalty case dealing with failure to report or complete or update BOI information**
- **Framing of Issue:** The CTA makes it unlawful for “any person to . . . willfully fail to report” beneficial ownership information. Willfully’ means the voluntary, intentional violation of a known legal duty. There is a legal duty on every “reporting company” to a report to FinCEN. There is not definition of “persons.” The term “reporting company” is narrowly defined and does not include individual persons. Thus, although the CTA attempts to impose civil and criminal penalties on any “person” who intentionally violates a duty , the penalty provision itself imposes a duty to report only on reporting *companies*, not individuals (or “persons”)
- **Argument:**
 - Notice of Proposed Rule Making (NPRM) initially clarified “that a person ‘fails to report’ complete or updated beneficial ownership information to FinCEN, if such person directs or controls another person with respect to any such failure to report, *or is in substantial control of a reporting company when it fails to report*”
 - Final Rule omits “substantial control” provision of NPRM and provides that a person fails to report BOI if the reporting company fails to make a required report, and such person either causes the failure or is a senior officer of the entity at the time of failure
 - The definition of “senior officer” seems to sweep in those who exercise substantial control over a reporting company—precisely the category of people the Final Rule sought to eliminate from its officer. Senior officers definitionally “exercise substantial control.” Therefore, an individual exercising substantial control exercises the same authority as a senior officer, and the Final Rule seems to treat such individuals as senior officers for purposes of the CTA’s penalty provision
- **Court’s view.** The Court entertains serious doubt as to whether it may rely on the Final Rule to interpret the sweep of the CTA’s penalties

CTA Technical Topics to be Discussed

Technical Topics to be Discussed

Entities Out of Scope

- Are LLPs out of scope?
- Common-law trusts, business trusts compared to statutory trusts
- Unincorporated associations

Exemptions

- Large Operating Company
 - DREs
 - Employee issues
 - US presence
 - Gross receipts issues
- Private Equity Issues
- Subsidiary Exemption Issues
- Non-US Entities
- Tax Exemption Issues

How to Determine Beneficial Owner When Tiers of Entities or Trusts?

- Appointment and removal authority
- Significant decision maker
- No power, but “calls the shots”

Trusts

- Beneficial Owners
- Corporate Trustees
- Directed Trusts

Community Property

- Look to state law

FinCEN identifiers

- Individual
 - Why use
 - Deactivation issues
- Entity
 - Use of limited rule

Special Rule

- Intermediate ownership by individual through exempt entity

Special Filing Situations

- Continuations
 - Inc. to LLC
 - Different states
 - Dissolved Entity
 - Exempt Entities

Updating Obligations

- Not one and done
- When required?
- Policies & Procedures to gather information
- Contractual Provisions Supplemental Agreements with beneficial owners (Certifications)
- Use of FinCEN Identifiers

Technical Topics to be Discussed

Reporting Deadlines

- NLT than Jan 1. 2025
- Shorter time frame if use outside vendor
- Companies formed in 4Q – 90 days
- Companies formed in 2025 & thereafter – 30 days
- Updates & Corrections – 30 days

Other

True, Accurate and Complete Attestation

Compliance with Privacy Laws

Who has access to Information?

Penalties & Enforcement Actions

Reference Materials

CTA

Why Was It Enacted?

THE PROBLEM

- The lack of US beneficial ownership information ("BOI") reporting requirements made the United States the jurisdiction of choice to establish shell companies to hide ultimate beneficial owners
 - BOI is Identifying information about the individuals who directly or indirectly own or control a company
- This weakened US efforts to combat the flow of illicit money into the US

THE GOAL

To combat the proliferation of anonymous shell companies that facilitated the flow and sheltering of illicit money into the US

THE REMEDY

Mandate reporting of BOI to the federal government to counter money laundering, terrorist financing, corruption, tax fraud and other illicit activity to protect national security, intelligence and law enforcement interests

CTA

In a "Nutshell"

- **Federal legislation:**
 - **First ever national BOI legislation**
 - Applicable to states | territories | possessions
 - Note, US defined as broader than continental US
- **Who Reports:** Reporting Company
- **What is Reported:** Information about Reporting Company, Beneficial Owners & Company Applicants
- **To Whom:** Financial Crimes Enforcement Network ("FinCen"), unit of Department of Treasury
 - FinCEN will maintain centralized, secure, data base
- **Disclosure:** Non-public
 - Only to selected government agencies (domestic and foreign) & financial institutions ("FI") for customer due diligence ("CDD") and FI regulators (Final Regulations published Dec. 2023)
- **Penalties:** Civil & criminal
- **Reporting Company:**
 - Pre 2024 companies
 - Newly-formed in 2024 and forward
 - Domestic
 - Foreign (that register w/state to do business)
- **Reporting Company Exclusions and Exemptions:**
 - Out of scope arrangements/entities
 - 23 Entity Exemptions
- **Beneficial Owners**
 - Domestic and Foreign Individuals
 - Five Exclusions

Reporting Guidance described herein promulgated by FinCEN in Final Regulations published in September 2022, supplemented by subsequent FINCEN administrative guidance

Rule Effective January 1, 2024



Beneficial Ownership Information Reporting



CTA

What It Requires?

The Corporate Transparency Act requires “Reporting Companies” -- domestic entities created by the filing of a document with a secretary of state and non-US entities that have registered to do business in the United States -- to report identifying information about the individuals who directly or indirectly own or control the company, unless the entity is exempt from reporting

CTA

Overview of Initial Report



Reporting Company created or registered before January 1, 2024

Provide information about:

- Itself
- Beneficial owners
- **But not Company Applicants**



Reporting Company created or registered on or after January 1, 2024

Provide information about:

- Itself
- Beneficial Owners
- Company Applicants

CTA Is a Big Deal

**Commencing in 2024,
FinCEN estimates**

**About 32.6 million
pre-existing entities
(pre-2024) will be
required to report**

**About 5 million new
companies will be
created in 2024 and
each year thereafter
over a decade and
required to report**

Defining a Reporting Company

Reporting Company. A corporation, LLC or other similar entity

Reporting Company Can be Domestic or Foreign

- **Domestic.** A corporation, LLC and any other entity created by the filing of a document with a secretary of state (e.g., statutory trust) or a similar office under the law of a state or Indian Tribe
- **Foreign.** An entity (including a corporation and LLC) formed under the law of a foreign country that has registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a state or Indian Tribe
- **Broad Definition of State.** Any state of the US | the District of Columbia | the Commonwealth of Puerto Rico | the Commonwealth of the Northern Mariana Islands | American Samoa | Guam | the U.S. Virgin Island | any other commonwealth | territory | or possession of the US

Targets bad actors seeking to use shell companies or other opaque structures for illicit purposes in the United States

Reporting Company: Entities Out of Scope



Sole proprietorship (not an entity)



General partnership



Unincorporated association



Wealth planning trust (but not a statutory trust, such as a DE statutory trust)

Why? Because no document filed with a secretary of state/Indian Tribe



Foreign entity **not registered to do business** in a state or with an Indian Tribe

Reporting Company: 23 Exemptions

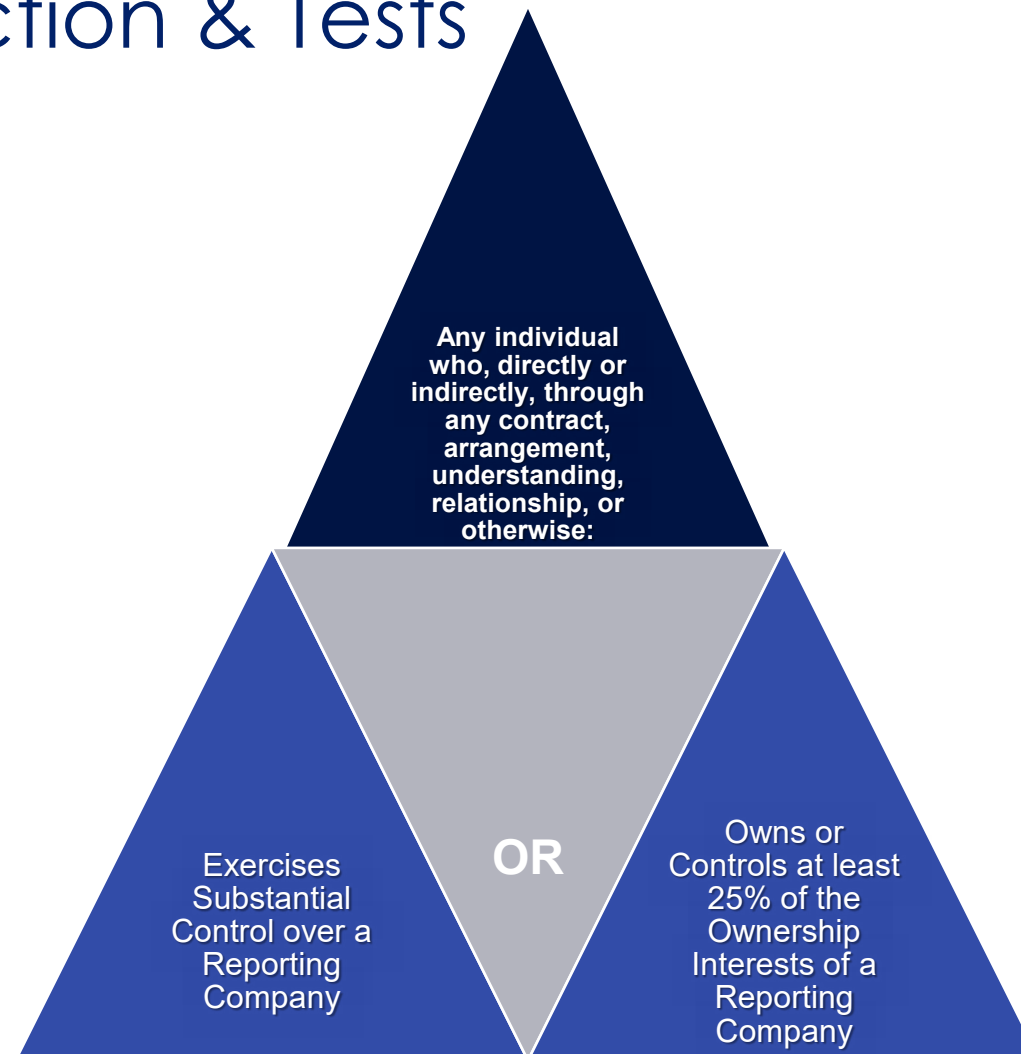
- Securities reporting issuer
- Governmental Authority
- Bank
- Credit union
- Depository institution holding company
- Money service business
- Broker or dealer in securities
- Securities exchange or clearing agency
- Other Exchange Act registered entity
- Investment company or investment advisor
- Venture capital fund advisor
- Insurance company
- State-licensed insurance producer
- Commodity Exchange Act registered entity
- Accounting firm registered with Sarbanes-Oxley Act
- Public utility
- Financial market utility
- Pooled investment vehicle*
- Tax-exempt entity
- Entity assisting tax-exempt entity
- Large operating companies in US | > 20 full-time employees | > \$5M gross receipts reported to IRS in tax return | physical office in US
- Subsidiary of certain exempt entities
- Inactive entity

** If an entity is a pooled investment vehicle and is formed under the laws of a foreign country (a "foreign pooled investment vehicle"), the entity is subject to a separate reporting requirement, provided it is registered to do business in a state*

Each exemption has detailed requirements, so read carefully
FinCEN has authority to add (but has not added) additional entities

Beneficial Owner: Introduction & Tests

- The Beneficial Owner concept is intended to identify the individuals who control or own a Reporting Company
- An individual can be a Beneficial Owner through the Substantial Control Test, the 25% Ownership Test, or both
- A Reporting Company may have multiple Beneficial Owners



Substantial Control (1/3)

Four Indicators

Senior Officer (nominal or *de jure* authority)

- Senior officer includes a President, CEO, COO, CFO, GC or any other officer, regardless of official title, who performs a similar function

Appointment/Removal Authority (*de facto* authority)

- Authority over appointment/removal of a Senior Officer or majority of Board of Directors (or similar body)

Important Decision Maker (*de facto* authority)

- Directs/determines or has substantial influence over important decisions made by the Reporting Company (such as business/finance/structure)

Any Other Form of Control. Any other form of Substantial Control over a Reporting Company

- Example. Individual who may not have "power" to direct or determine important decisions, but plays a significant role in decision-making process

Substantial Control (2/3)

Direct/Indirect – Broad & Encompassing

- **General Rule.** An individual may *directly* or *indirectly* (including as a trustee of a trust) exercise Substantial Control over a Reporting Company through any other contract, arrangement, understanding, relationship or otherwise
 - Direct Control: Through (i) Board of Directors representation, (ii) ownership or control of a majority of the voting power or voting rights of a Reporting Company, ((iii) rights associated with any financing arrangement or interest in a Reporting Company
 - Indirect Control: Through (i) controlling one or more intermediate entities that separately or collectively exercise Substantial Control over a Reporting Company or (ii) arrangements or financial or business relationships with other individuals or entities acting as nominees

Substantial Control (3/3)

Takeaways

- **Substantial Control**
 - Does not require ownership in an entity
 - Relates solely to authority to direct, determine or have substantial influence over important decisions
 - Includes an individual that exercises substantial control over Reporting Company through an unaffiliated company
- **FinCEN**
 - **Expects:** A Reporting Company to identify at least one Beneficial Owner under Substantial Control test
 - **Requires:** All persons in Substantial Control must be reported
- **FinCEN's Expansive Approach**
 - Supports basic goal of CTA. To require Reporting Company to identify individuals who stand behind the Reporting Company and direct its actions
 - Purpose. To foreclose corporate structuring to obscure owners or decision-makers, essential to unmasking shell companies
- **Directors**
 - FinCEN has provided that whether a Director is a Beneficial Owner is a facts and circumstances determination
 - An individual who directly or indirectly exercises substantial control over a Reporting Company or who owns or controls at least 25% of the ownership interests of a Reporting Company

Multi-tier company/trust structures
Difficult to identify all individuals in Substantial Control

25% Ownership Interest Test (1/4)

Three Parts to Determining Test

Definition of an
Ownership Interest

Direct or Indirect
Ownership or
Control of
Ownership Interest

Calculation of
Percentage
Ownership Interest

25% Ownership Interest Test(2/4)

Definition of an Ownership Interest

Equity, Stock, or Voting Right

- Any interest classified as stock or anything similar, regardless whether it confers voting power or voting rights, and even if the interest is transferable

Capital or Profit Interest

- Any interest in the assets or profits of an LLC

Convertible Instrument

- Any instrument convertible into equity, stock, or voting rights or a capital or profit interest

Option or Privilege

- Any put, call, straddle or other option or privilege of buying or selling equity, stock or joint rights, capital or profit interest or convertible instrument (unless option or privilege created and held by others without knowledge or involvement of Reporting Company)

Catch-All

- Any other instrument, contract arrangement, understanding, relationship, or other mechanism used to establish ownership

Ownership Interest (3/4)

Ownership & Control

- **General Rule.** An Individual may directly or indirectly own or control an ownership interest in a Reporting Company through any contract, arrangement, understanding, relationship, or otherwise, including:
 - Direct Ownership Interest: (i) Ownership by individual, (ii) Joint Ownership, (iii) Debt instrument it enables the holder to exercise the same rights as one of the specified types of equity interests, including a conversion right to an equity interest
 - Indirect Ownership Interest: Through (i) another individual acting as nominee, intermediary, custodian, agent of an individual or (ii) owning or controlling one or more intermediary entities, or the ownership interests of any intermediate entities that separately or collectively own or control ownership an ownership interest of a Reporting Company
 - Trust or similar arrangement that holds ownership interest: Ownership interests may be held by the trustee, a beneficiary, a grantor and multiple persons may hold an ownership interest

Ownership Interest (4/4)

Three Part Test

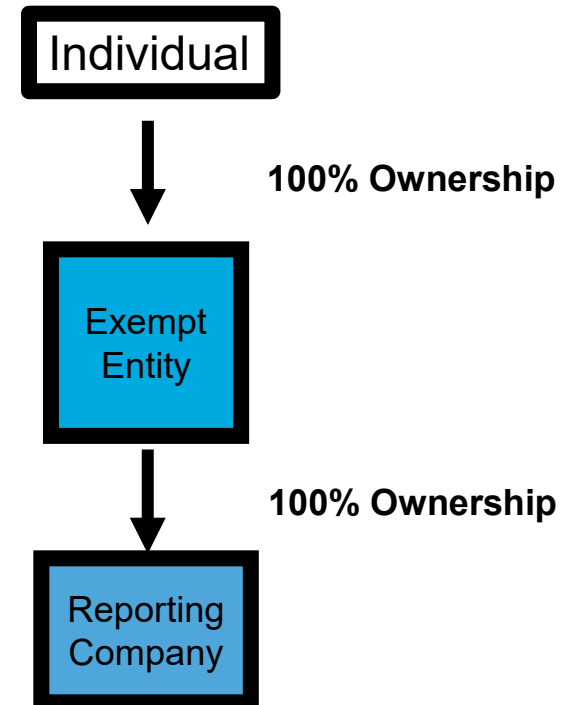
- **Calculation to determine whether individual owns | controls 25% of Ownership Interests in Reporting Company.**
 - ***Individual's total ownership interests*** determined at time of computation, treating options and similar interests as exercised, and calculated as a % of total outstanding ownership interests in Reporting Company
 - ***Reporting Companies that issue capital and profits interests*** (including entities taxed as a partnership) and calculated as a % of the total outstanding capital and profits interests in the entity
 - ***Corporations that issue shares of stock***, individual's % is equal to vote/value to total outstanding vote/value of all classes entitled to vote, or of ownership interests, as the case may be
 - **"Catch-all rule."** If above calculations cannot be performed with certainty, an individual is deemed to hold 25% or more of the total ownership interests, provided the individual owns or controls 25% or more of any class of ownership interests

Persons Excepted from Beneficial Owner Status?

- **Minor children** (provided Reporting Company reports required information of a parent/guardian)
- **Nominees, intermediaries, custodians, or agents** (in these relationships, reporting of principal required)
- **Employee** of a Reporting Company, acting solely as an employee, provided individual is not a Senior Officer and substantial control/economic benefits from Reporting Company derived solely from employment status
- **Inheritor** Individual whose only interest in a Reporting Company is a future interest through a right of inheritance
- **Creditor** of Reporting Company who only has a right to be paid a predetermined sum of money who meet the definition of a beneficial owner solely through a loan covenant (or similar right) intended to secure their right to receive repayment

Entity Reporting: Individual Owning Reporting Company through Exempt Entity

- **Special Rule.** If one or more exempt entities has or will have a direct or indirect ownership interest in a Reporting Company, and an individual is a Beneficial Owner of the Reporting Company exclusively by virtue of the individual's ownership interest in such exempt entities, the Report **may include** the names of the exempt entities in lieu of the PII with respect to the individual Beneficial Owner
 - *Reporting Company has option to ID BO, rather than identify exempt entity*
- Note, this special rule applies only if there is **ownership** by the individual, but not if individual is in substantial control of the Reporting Company through the exempt entity



Entity Reporting FinCEN Identifier Numbers

Rule. A Reporting Company may report another entity's FinCEN Identifier and full legal name in lieu of the PII required with respect to a Beneficial Owner only if:

Other entity has a FinCEN ID & provides it to the Reporting Company

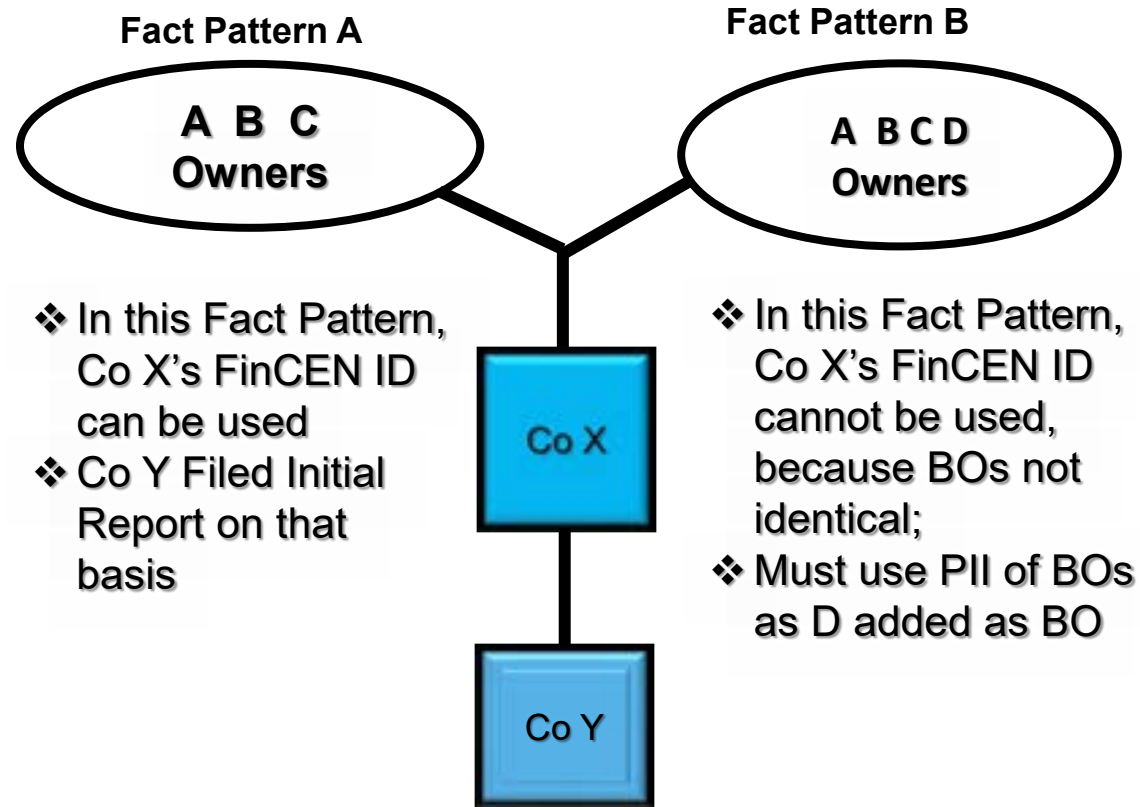
An individual is a BO of Reporting Company *through holding an ownership interest in that entity*

BO(s) of other entity and Reporting Company are identical



This rule enables the use of a FinCEN Identifier rather than the PII of individual(s) where the Reporting Company is a subsidiary of one or more parent companies with identical Beneficial Ownership

Illustration of Rule



Updated Report required if changes

Beneficial Owner: Application to Trusts

Trustees of trusts are contemplated as potentially being the “beneficial owners” of a Reporting Company:

The trustee of a trust or similar arrangement can exercise substantial control over a reporting company through the types of relationships outlined in the paragraph. Depending on the particular facts and circumstances, trusts may serve as a mechanism for the exercise of substantial control. Furthermore, “trusts or similar arrangements” can take a wide range of forms. Accordingly, FinCEN finds it appropriate—and directly responsive to comments that requested clarification on this point—to specify that a trustee of a trust can, in fact, exercise substantial control over a reporting company through the exercise of his or her powers as a trustee over the corpus of the trust, for example, by exercising control rights associated with shares held in trust

Recent FinCEN FAQs on Trusts

- **Can a Beneficial Owner own or control a reporting company through a trust?** Yes, either by exercising substantial control over a reporting company through a trust arrangement or by owning or controlling the ownership interests of a reporting company that are held in a trust
- **Who are the reporting company's Beneficial Owners when individuals own or control the company through a trust?** The individuals 1) who either exercise substantial control over a reporting company or 2) who own or control at least 25 percent of a reporting company's ownership interests. Substantial control or controlling ownership interests may be direct or indirect through any contract, arrangement, understanding, relationship or otherwise

Recent FinCEN FAQs on Trusts

- **Comment.** The FAQ clarifies the conditions as to when an individual owns or controls ownership interests in a reporting company through a trust, as follows:
 - **First**, a trustee, as well as any other individual, who *owns* or *controls* ownership interests and has the authority to dispose of trust assets is a beneficial owner
 - Prior to this FAQ, it was not clear whether any person who was designated a trustee was a beneficial owner merely because of that status. Now, that issue has been clarified that not all trustees are beneficial owners
 - For example, in a directed trust, if an administrative trustee does not have the authority to dispose of trust assets, the trustee will not be a beneficial owner.
 - **Second**, a beneficiary is a beneficial owner if he or she 1) is the *sole* permissible recipient of income and principal from the trust or 2) has a right to demand a distribution of, or withdraw, substantially all the assets from the trust
 - With FinCEN stating that there may be other situations where individuals associated with a trust are beneficial owners (see below), it is not entirely clear when the beneficiaries of a trust with multiple beneficiaries might be reportable, particularly where a trust has separate shares for beneficiaries or multiple mandatory beneficiaries
 - **Third**, a grantor or settlor is a beneficial owner if such individual has the right to revoke the trust or otherwise withdraw the assets of the trust

FinCEN notes that the forgoing criteria may not limit when an individual owns or controls ownership interests in a reporting company through a trust, adding that there may be other arrangements under which individuals associated with a trust may be beneficial owners of a reporting company in which the trust holds interests

Recent FinCEN FAQs on Trusts

- **How does a reporting company report a corporate trustee as a beneficial owner?** FinCEN has provided a response to this often-asked question, as follows:
 - The reporting company should determine whether any of the corporate trustee's individual beneficial owners indirectly own or control at least 25 percent of the ownership interests of the reporting company through their ownership interests in the corporate trustee. For example, if an individual were to own 60 percent of the corporate trustee of a trust, and that trust holds 50 percent of a reporting company's ownership interests, then the individual would own or control 30 percent ($60 \text{ percent} \times 50 \text{ percent} = 30 \text{ percent}$) of the reporting company's ownership interests and therefore would be a beneficial owner of the reporting company
- The FAQ further explains that the reporting company may, but is not required to, report the name of the corporate trustee in lieu of information about an individual beneficial owner *only* if each of the following three conditions are met: 1) the corporate trustee is exempt from reporting requirements, 2) the individual beneficial owner owns or controls at least 25 percent of the ownership interests in the reporting company *only* by virtue of ownership interests in the corporate trustee and 3) the individual beneficial owner does not exercise substantial control over the reporting company.
- The FAQ stresses that the owners or individuals employed or engaged by the corporate trustee may exercise substantial control over the reporting company and may have to be reported

[Additional comments on next slide]

Recent FinCEN FAQs on Trusts

- **Comment.** The initial, simple pass-through analysis articulated by FinCEN seems to oversimplify the ownership analysis. In the case of a trustee with fiduciary duties, mere ownership of the corporate trustee's equity should not, in and of itself, translate to a ratable ownership of the reporting company's equity interests because the trustee is acting in a fiduciary capacity with respect to the trust. Corporate trustees are likely to have far more complex governance controls as to their actions as trustee that would make the simple multiplication exercise inappropriate
- FinCEN emphasizes that trust company personnel could be in substantial control. The statute and regulations are not particularly helpful on that point, and it was hoped that FinCEN would clarify this issue. FinCEN, however, did not specify any distinction between a nonexempt trustee and an exempt "bank" trust company's employees having substantial control. This implies that a trust officer or trust committee member at an exempt bank could be in substantial control, and the reporting company would be required to report such persons as beneficial owners and file update reports if the personnel involved at the exempt bank were to change
- Further, FinCEN has not provided any direct clarification on whether an entity wholly owned by a bank, as trustee, qualifies under the Subsidiary Exemption. That said, the way that FinCEN essentially treats the corporate trustee as the actual owner (by looking through to the corporate trustee's owners as discussed above) could lead to the conclusion that a subsidiary entity held in a fiduciary capacity by an exempt corporate trustee should qualify for the Subsidiary Exemption. Assuming that is correct, it remains unclear whether reporting would be required if the reporting entity owned by the exempt corporate trustee also were to have beneficiaries who could be considered beneficial owners, as discussed above

Company Applicant Operating Rules

- **Company Applicants** (at most two individuals):
 - Company Applicant 1: The person who directly files the document with a secretary of state or similar office, and
 - Company Applicant 2: If more than one person is involved in the filing of the document, the individual primarily responsible for directing or controlling the filing
- **Comments.**
 - For purposes of determining who is a Company Applicant, the individual who signs the creation or registration document is not relevant, e.g., as an incorporator
 - Company Applicant 2 is determined by reference to the individual primarily responsible for directing or controlling the filing of the document; in that regard, consider the individual who is responsible for making the decisions about the filing of the document, such as how the filing is managed, what content the document includes, and when and where the filing occurs

FinCEN Identifier

What Is It and Why Get One?

What Is It?

- A unique numeric ID assigned by FinCEN to an individual (Beneficial Owner or Company Applicant) to be submitted to a Reporting Company to be used in the Report in lieu of an individual's PII
- Reporting Company can also obtain a FinCEN Identifier for use on a Report

Why Would An Individual Get One?

- For Data Security. To protect individual's PII -- individual submits PII to FinCEN and submits FinCEN Identifier to Reporting Company, so individual's PII not given to Reporting Company
- For Administrative Efficiency. If individual, either Beneficial Owner or Company Applicant, required to file numerous Reports

Should a Reporting Company Require its Beneficial Owners to Obtain a FinCEN Identifier?

- Generally, yes
- Why? No responsibility to keep track of changes in individual's PII or file an Updated Report
- So, lessen amount of information to keep track of

FinCEN Identifier Updated/Corrected Information/Deactivation

How to Obtain FinCEN Identifier?

- Individual. (i) By completing an electronic web form at <https://fincenid.fincen.gov>, (ii) by providing full legal name, date of birth, address, unique identifying number and issuing jurisdiction from an acceptable identification document, and an image of the identification document, and (iii) certifying application is true, correct and complete
- Reporting Company. Can request a FinCEN Identifier at, or after the time, that Reporting Company submits an Initial Report (by checking a box), or, if after submitting its Initial Report, by submitting an Updated BOIR, requesting a FinCEN Identifier, even if company does not need to update information

Change in Information

- Individual. Required to inform FinCEN within 30 days of change in PII
- Reporting Company. File an Updated Report within 30 days of change
- **Correct Inaccurate Information**
- Individual. File corrected information with FinCEN within 30 days after date on which individual became aware or has reason to know of inaccuracy
- Reporting Company. Same rule, but files a Corrected Report

Deactivation

- Currently no way to deactivate a FinCEN Identifier to eliminate requirement to update FinCEN for changes
- FinCEN assessing options to remedy this issue

Report: Information Disclosed

1. Reporting Company Information

- Complete Legal Name
- Tradename, "doing business as (dba, or trading as (t/a) names
- Business address:
 - For Reporting Company with a principal place of business in US
 - For a Reporting Company with a principal place of business outside US -- provide street address of *primary* location in US where company conducts business
- Domestic Company. State/Tribal jurisdiction of formation
- Foreign Company. Jurisdiction of Registration
 - Also, State/Tribal jurisdiction where company is first registered
- IRS TIN (including EIN)

2. Company Applicant PII (if applicable)

3. Beneficial Owner PII

Personal Identifiable Information ("PII")

- Full legal name
- Date of Birth
- Current Residential Address*
- Unique ID number and issuing jurisdiction from acceptable ID document (non-expired: (i) passport, (ii) state or local ID document, (iii) driver's license)
 - If individual has none of the foregoing, a non-expired foreign passport
- Image of document from which the unique ID number was obtained

* If Company Applicant is in business of corporate formation (e.g., an attorney), use business address rather than residential address

Initial Report Due Dates

Pre-2024 Reporting Companies

(Formed | Registered prior to January 1, 2024):

NLT January 1, 2025

Reporting Company Formed or Registered in 2024 must file Report within **90** days of the earlier of :

- Date on which Reporting Company received actual notice that its creation/ registration became effective or
- Date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that Reporting Company has been created (domestic) or registered (foreign)

Reporting Company Formed | Registered in 2025 or Thereafter must file Report within **30** days of the earlier of :

- Date on which Reporting Company received actual notice that its creation/ registration became effective or
- Date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that Reporting Company has been created (domestic) or registered (foreign)

FinCEN: Report only should include Beneficial Owners as of time of the filing, and not historical Beneficial Owners

Initial Report Due Dates

What about entities existing on 1/1/2024 that dissolve before 1/1/2025?

FAQ C.13:

“...If a reporting company (see Question C.1) continued to exist as a legal entity for any period of time on or after January 1, 2024 (i.e., did not entirely complete the process of formally and irrevocably dissolving before January 1, 2024), then it is required to report its beneficial ownership information to FinCEN, even if the company had wound up its affairs and ceased conducting business before January 1, 2024.”

What about entities that are formed after 1/1/2024, and then merge or dissolve out of existence before the initial report is due (i.e. 90 or 30 days as applicable)?

FAQ C. 14. If a reporting company created or registered in 2024 or later winds up its affairs and ceases to exist before its initial BOI report is due to FinCEN, is the company still required to submit that initial report?

“Yes. Reporting companies created or registered in 2024, no matter how quickly they cease to exist thereafter, must report their beneficial ownership information to FinCEN within 90 days of receiving actual or public notice of creation or registration. Reporting companies created or registered in 2025 or later, no matter how quickly they cease to exist thereafter, must report their beneficial ownership information to FinCEN within 30 days of receiving actual or public notice of creation or registration. These obligations remain applicable to reporting companies that cease to exist as legal entities—meaning wound up their affairs, ceased conducting business, and entirely completed the process of formally and irrevocably dissolving—before the expiration of the 30- or 90-day period reporting companies have to report their beneficial ownership information to FinCEN.... [Updated September 10, 2024]”

Updated | Corrected Due Date

Updated Report:

- Within **30** days of a change in the required information previously submitted to FinCEN relating to Reporting Company or its Beneficial Owners
- Company Applicant changes do not require Updated Report, assuming information reported was correct, but a Corrected Report required if information was not correct
- **But** a FinCEN Identifier requires that individual file Updated FinCEN Application

Corrected Report:

- Errors in Reports filed remedied by filing a corrected report within **30** days of becoming aware or having a reason to know of, inaccuracies in an earlier Report
 - Unclear whose knowledge triggers 30 day start period

Updated Report General Rule



Updated Report required only where Reporting Company information **or** individual's PII previously submitted on Report changes



PII changes include name, address or unique ID number previously provided to FinCEN

Updated Report not required upon change in personal characteristics on ID document

Updated Report Examples

Reporting Company was exempt but no longer meets exemption criteria

- Updated Report within 30 calendar days after date that exemption criteria is not met

Reporting Company meets exemption criteria subsequent to filing of an Initial Report

- Updated Report within 30 days of change of status + indicate on BOIR that company no longer is a Reporting Company

Deceased Beneficial Owner

- Updated filing arises because the deceased individual was a Beneficial Owner by virtue of property interests or other right subject to transfer upon death and not only because of 25 percent ownership or control
- Updated Report must identify new Beneficial Owners within 30 days of the settlement of the estate of the deceased Beneficial Owner

Report Overview & Attestation

Beneficial Owner Information Report (BOIR)

- All fields on BOIR must be completed for Report to be accepted
- Parent company cannot file a single Report on behalf of group of companies
- There is no fee associated with reporting a BOIR
- An entity that always has been eligible for an exemption does not have to file a Report
 - There are special rules if a non-exempt entity becomes exempt or an exempt entity becomes non-exempt
- **Filings of Report will be filed electronically**
 - Foreign companies that are not subject to US corporate income tax may report a foreign ID and the name of the relevant jurisdiction instead of an EIN

Report Attestation

- The Reporting Company is required to certify that its report or application is "true, correct, and complete"

Is a Reporting Company Responsible for Ensuring the Accuracy of Information that it Reports

- Yes. FinCEN expects that Reporting Companies will take care to verify the information they receive from their Beneficial Owners and Company Applicants before reporting it to FinCEN
- ## **Third-Party Service Providers**
- Reporting Companies may use third-party service providers to submit BOIRs

Penalties

- **Overview of Reporting Violations**
 - Failure to Report
 - Failure to Update BOI
 - Failure to Correct Inaccurate BOI
- **Rule.** *It shall be unlawful for any person to **willfully** provide, or attempt to provide, false or fraudulent **beneficial ownership information**, including a false or fraudulent identifying photograph or document, to FinCEN, in accordance with this section, or to **willfully** fail to report complete or updated **beneficial ownership information** to FinCEN in accordance with this section*
- **Penalties.**
 - *Civil Penalty.* \$500 per day in civil monetary penalties (inflation adjusted, now \$606)
 - *Criminal Penalty.* \$10,000 fine, imprisonment of no more than 2 years, or both
 - Safe Harbor (for liability from penalties).
 - **No penalties for filing an inaccurate report provided report corrected within 90 calendar days of when it was filed.**



Penalties: Takeaways

Assessment of potential violations will depend on all the facts and circumstances

As stated in the Preamble to the Final Regulations:

- *“As a general matter, FinCEN does not expect that an inadvertent mistake by a reporting company acting in good faith after diligent inquiry would constitute a willfully false or fraudulent violation”*

Although it is the Reporting Company that is obligated to file the report with FinCEN, penalties may apply to:

- The Reporting Company
- An entity or an individual who causes a Reporting Company not to report
- Individuals who are Senior Officers of a Reporting Company at the time a Reporting Company fails to accurately and completely report or update/correct its report

Reporting violations were extended to include individuals because individuals are the persons who primarily will provide information about themselves to Reporting Companies in order for the Reporting Company to comply with its CTA reporting obligations

Further, absent individual liability, illicit actors who form entities and fail to report may not be deterred if liability were applicable only to entities

Compliance Plan Overview of Steps



Privacy Planning & Protection

- The CTA will require the collection, maintenance, securing, processing, updating and sharing of data, particularly PII, with FinCEN
- A Reporting Company will need to consider its potential exposure, both in the US and abroad, with respect to PII and its CTA obligations
- In many jurisdictions, there may be no restriction whatsoever on the disclosure of PII to a regulator
- A Reporting Company, as a matter of good business practice, should consider entering into an agreement with its Beneficial Owner whereby:
 - The Beneficial Owners agrees to provide and timely and correctly update their PII
 - The Reporting Company notifies the Beneficial Owners that PII may be disclosed where required by law
 - In some jurisdictions, it may be advisable to obtain explicit consent by the Beneficial Owners
 - The agreement also should deal with other issues, such as maintaining and securing PII, non-disclosure of the Beneficial Owner's PII to other than FinCEN, specific performance (an equitable remedy) if a Beneficial Owner PII refuses to provide his/her PII to the Reporting Company, and indemnification for costs and penalties if a Beneficial Owner does not furnish his/her PII to the Reporting Company
- If Beneficial Owners are from abroad, particular attention must be paid to the transmission, collection and forwarding of data from non-US persons to the Reporting Company, and, in turn, to FinCEN, as non-US laws may apply to Reporting Companies
 - Important to check the laws of applicable jurisdictions

If a Reporting Company is foreign or collecting PII from foreign Beneficial Owners, obtain advice from a privacy professional relating to foreign jurisdiction privacy aspects

Exemption Planning Securities Reporting Issuer

Requirements: An entity qualifies for this exemption if either of the following two criteria apply:

- The entity is an issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l)
- The entity is required to file supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))



Exemption Planning SEC/Regulated Entities & SEC Registered Individuals



Investment company registered with the SEC



Investment advisor registered with the SEC



Venture capital fund advisor filing with the SEC



Certain pooled investment vehicles advised by other exempt entities (*i.e.*, bank, credit union (federal or state), broker or dealer in securities, federally registered investment advisor, or venture capital fund advisor)

Exemption Planning Large Operating Company

Three Requirements

- Employs more than 20 full-time employees in the United States
- Has an operating presence at a physical office within the United States
- Has filed a federal income tax or information return in the United States for the previous year demonstrating more than \$5 million in gross receipts or sales from US sources



Exemption Planning

Large Operating Company: Requirements

More Than 20 Full-Time Employee

- Must be in tested entity – cannot consolidate employee headcount across affiliated entities
- Are employees' common-law employees of tested entity?
 - What about employees of a professional services organization (PEO)?
 - In a PEO, there is a co-employment arrangement, the POE is the employer of record for tax purposes, but client business maintains full authority over workforce
 - Excluded: leased employees, sole proprietors, partner in partnership, 2% S Corp. shareholders
- Employee must work average of 30 hours of service a week or 130 hours of service a month, with adaptations for non-hourly workers
- An hour of service is any hour for which an employee is paid or entitled to payment for vacation, illness, leave or absence

Operating Presence in U.S.

- Operating presence must be in tested entity and not in another member of the group
- Entity regularly conducts its business at a physical location in the US that entity owns or leases (no shared workspaces or home offices)

More Than \$5 Million Gross Receipts

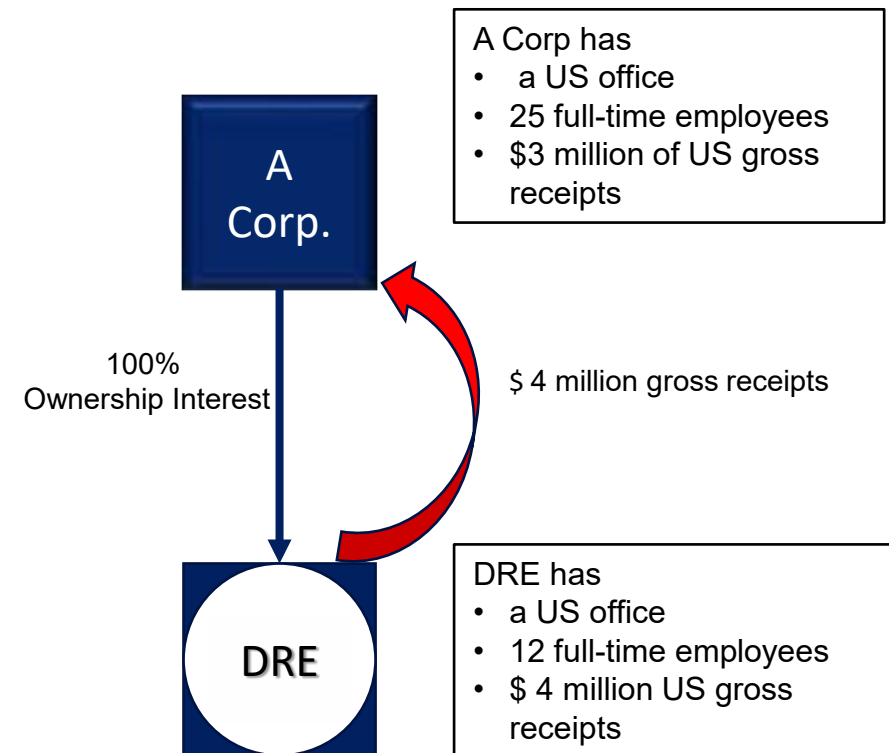
- Gross receipts or sales can be aggregated and includes income of consolidated return filings
- Must be exclusively from US sources
- Revenue must be reported on a US income tax return

Exemption Planning

Large Operating Company: DREs

How Does Exemption Apply to a Disregarded Entity (DRE)?

- A DRE is a business entity that (i) has a single owner, (ii) is not organized as a corporation, and (iii) has not elected to be taxed as a separate entity for federal tax purposes.
- The owner of a disregarded entity reports the income of the disregarded entity on the owner's return.
- The most common DRE is a single member LLC that reports its income on its owner's income tax return
- A DRE can not avail itself of the large operating company exemption since it does not file a federal income tax return
- An entity (but not an individual) owner of a DRE, such as a corporation or partnership, may avail itself of the Large Operating Company Exemption, *provided* the owning entity itself employs more than 20 full-time employees, has a US-based physical office and has more than \$5 million of gross receipts from US sources, including the gross receipts of the DRE
- *In the example, the DRE's \$4 million of gross receipts would be taken into account by A Corp. to enable A Corp. to qualify for the Exemption; the DRE also should qualify for the Subsidiary Exemption, discussed infra*



Exemption Planning

Large Operating Exemption: Takeaways

- The Exemption likely will be the most useful for unregulated private profit-making entities,
 - However, the Exemption has detailed requirements that will require careful consideration
- For example:
 - With respect to the Employee Headcount, FinCEN in the Final Rule has provided that one determines the employee Headcount, as follows:

In terms of assessing whether an entity has the requisite number of employees to qualify for the exemption, FinCEN expects that companies will regularly evaluate whether they qualify (or no longer qualify) for the exemption. FinCEN believes that such evaluations should be as simple as possible, and as consistent as possible from reporting

Query, how will that work? How frequently would an entity have to make this determination?
 - With respect to the Gross Receipts Requirement, note “start ups” cannot qualify since they would not have filed a tax return in the first year?
 - So too, query whether gross receipts should be limited to what a taxpayer reports on Line 1 of a tax return as gross receipts and income?

Exemption Planning

Tax Exempt Entities

- **Nonprofit organizations exempt from tax (IRC § 501(c) & (a))**
 - This includes the most common group, Section 501(c)(3) organizations, such as charitable, educational, religious organizations, as well as social welfare organizations, certain types of homeowners' associations (HOAs), business leagues, and social clubs
 - HOAs.
 - HOAs exempt from taxation under Section 501(c)(4) (social organizations **are exempt**)
 - HOAs (including condominium management associations, residential real estate management associations and timeshare associations exempt under Section 528 **are not exempt** from Beneficial Ownership Information Reporting)
- **Certain political organizations** qualify (IRC § 527(e)(1) & (a))
- **Certain trusts** described in IRC § 4947(a) (1) or (2) qualify
 - This includes charitable lead and remainder trusts
- **Organizations That Have Had Their Section 501(c) Exemption Revoked.** If an organization has its tax-exempt status revoked by the IRS, it has 180 days from the date of revocation to comply with the CTA
 - If the organization's tax-exempt status is not reinstated within that 180-day period (which is often the case), then it will need to comply with the CTA's reporting requirements
- **Caveat.** Note, if an entity is simply incorporated as a nonprofit, or has a nonprofit as a co-owner, that does not automatically qualify the organization for the Tax-Exempt Exemption

Exemption Planning

Subsidiary Exemption

- **Requirement in Final Rule.** An entity whose ownership interests are **controlled** or **wholly owned**, directly or indirectly, by one or more exempt entities (other than those listed below) is not a Reporting Company
 - The Subsidiary Exemption does not apply if subsidiary is owned by:
 - a money transmitting or money services business,
 - a pooled investment vehicle,
 - an entity assisting a tax-exempt entity, *or*
 - an inactive entity
 - FinCEN has clarified that Subsidiary Exemption only applies if the Subsidiary is fully -- 100% owned **or** 100% controlled -- by one or more exempt entities and has defined the term “control of ownership interests,” as follows
 - The exempt entity or entities entirely control all of the ownership interests in the Reporting Company, in the same way that an exempt entity or entities must wholly own all of a subsidiary’s ownership interests for the exemptions to apply

Common Estate Planning Vehicles that Are Reporting Companies?

Likely a Reporting Company:

- ✓ Family Limited Partnership
- ✓ Asset Holding Company
- ✓ Family Co-Investment Vehicle
- ✓ Any LLC, limited partnership or corporation used for estate planning purposes

Possible Exemption from Reporting (Limited Circumstances):

- ✓ Family Office
- ✓ Private Trust Company
- ✓ Certain Subsidiaries

Likely Not a Reporting Company or Exempt From Reporting:

- ✓ Revocable Trust
- ✓ Irrevocable Trust
- ✓ Wholly Charitable Trust
- ✓ Charitable Split-Interest Trust
- ✓ Private Foundation

Reporting Company Exemptions & Common Private Wealth Entities

Whether a private wealth entity may qualify for one of the 23 Reporting Company exemptions depends on the particular characteristics of the entity. The most relevant CTA Reporting Company Exemptions include:

- **Large Operating Company:** May apply to such as family offices, provided such offices (i) have more than 20 full-time employees in the U.S.; (2) maintain a physical office in U.S. and (3) have more than \$5 million of receipts/sales inside U.S. in past year (as reflected on tax/information return)
- **Investment Adviser:** May apply to multi-family offices, provided that such entities are registered in the U.S. Securities and Exchange Commission (the “**SEC**”) pursuant to the Investment Advisers Act of 1940
 - Family offices may occasionally qualify for the Reporting Company exemptions for **venture capital fund advisers** or Commodity Exchange Act registered entities (e.g., **commodity pool operators** or **commodity trading advisor**), where such offices meet the necessary criteria
- **Bank:** Registered private trust companies may qualify for the bank exemption (including, in part, “banks” as defined by the Investment Company Act of 1940) if they provide fiduciary services for family trusts and are state supervised and examined
- **Tax-Exempt Entity:** May apply to private foundations and qualified charitable lead/charitable remainder trusts

Exemption Planning Inactive Entity

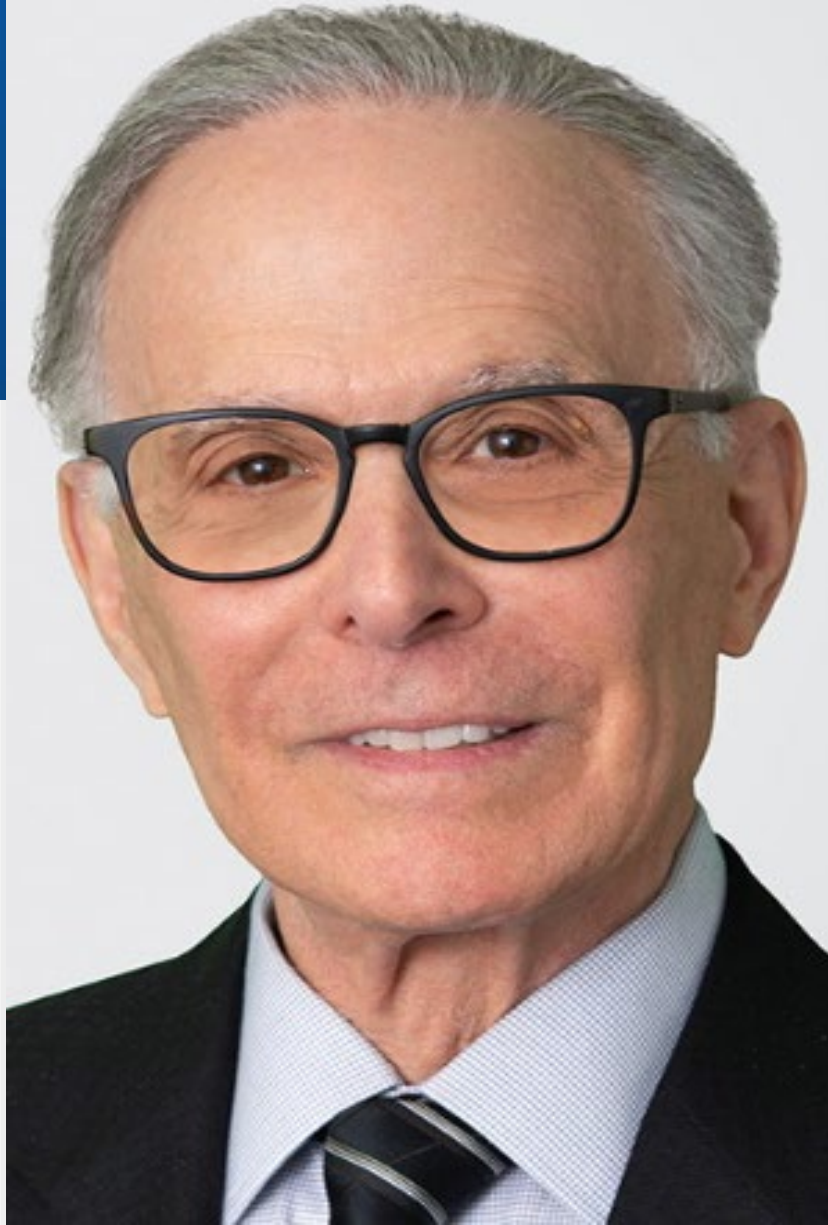
- This exemption applies to an entity that meets the following conditions:
 - **Was in existence on or before January 1, 2020** (date of CTA enactment)
 - The entity is not engaged in active business
 - The entity is not owned by a non-US person, whether directly or indirectly, wholly or partially
 - The entity has not experienced any change in ownership in the preceding twelve-month period
 - The entity has not sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity maintains an interest, in the preceding 12-month period, and
 - The entity does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, LLC, or other similar entity

Resources

FinCEN Web Page

- **FinCEN's BOI Webpage** (<https://www.fincen.gov/boi>)
- **Filing BOIRs** – on the Webpage go to **BOI-E Filing System**
 - There are help and resources instructions and guides
- **Obtaining FinCEN Identifiers** – to create an account and then obtain FinCEN Identifier
- **CTA Reference Materials**. Statute and regulations
- **Small Entity Compliance Guide**. To assist potential filers in complying with the beneficial ownership information (BOI) reporting rule
- **FAQs**. Guidance about BOI Reporting Requirements (In English and other languages)
- **Facility to Ask FinCEN Questions**
- **FinCEN Contact Center** FinCEN has launched a hotline and chatbot to help answer questions about the beneficial owner information requirement

Panelists



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- Also focuses on cybersecurity issues, including breach preparedness and responses.
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Disclaimer



This power point was prepared as of February 25, 2025, and is subject to change as further CTA guidance develops.



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