ARE YOU READY FOR BENEFICIAL OWNERSHIP REPORTING?

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The Corporate Transparency Act[1] and the accompanying Beneficial Ownership Information Reporting Rule[2] adopted by the Department of Treasury, Financial Crimes Enforcement Network (FinCEN), require certain companies to report beneficial ownership information to FinCEN by January 1, 2025, for companies formed before January 1, 2024, or within thirty (30) days following formation of a new company on or after January 1, 2024. Once a company is ready to file, the reporting is relatively easy. However, determining whether your company is required to report, determining whose information must be reported, and gathering the information necessary to report, may take time, and companies formed before January 1, 2024, should begin preparing to file as soon as possible.

This article explores these questions and how to report the information if required. You may also wish to review the Small Entity Compliance Guide[3] issued by FinCEN, which contains various flow charts to help you analyze whether you are required to report and what you are required to report. This article is not intended to be used as legal advice. You should consult with your attorney to determine when and what you may be required to disclose to comply with the Corporate Transparency Act (the "Act").

Why Do I Have to Report?

The Act is intended to provide law enforcement with beneficial ownership information for the purpose of detecting, preventing and punishing terrorism, money laundering and other misconduct through business entities. Small business have not traditionally reported information about their ownership in a manner easily accessible to law enforcement, and the Act therefore imposes a new burden on small businesses to collect and report information about certain individual beneficial owners to assist law enforcement. Failure of reporting companies or their beneficial owners to comply can result in a civil penalty of up to $500 per day plus a fine of $10,000 or two years in prison, or both.[4]

Who Is Required to Report?

Almost all small businesses currently operating in the U.S. are or will be required to report. The reporting requirements apply to all domestic (U.S.) corporations, limited liability companies and other entities formed by the filing of a document with a Secretary of State or similar agency (for example, most limited partnerships) and foreign (non-U.S.) companies that have registered to do business in any U.S. state, unless they fall under one of the 23 express exemptions. Most of the exemptions relate to specific types of businesses that do not apply to most companies, for example

[1] 31 U.S.C. §5336.
[2] 31 CFR §1010.380.
[3] https://www.fincen.gov/boi/small-entity-compliance-guide
[4] 31 U.S.C. §5336(h)(3).

banks and securities brokers.[5] The primary exemptions are public companies reporting to the SEC under the Securities and Exchange Act of 1934, and "large operating companies."

A "large operating company" is an entity that meets all of the following requirements:

(1) Employs more than 20 *full-time* employees in the United States, as determined by federal law;
(2) Has an operating presence at a physical office within the United States; and
(3) Filed a Federal income tax or information return in the United States for the previous year demonstrating more than $5,000,000 in gross receipts or sales (net of returns and allowances) on the entity's IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120–S, IRS Form 1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined by Federal income tax principals.

Any entity whose ownership interests are wholly owned by certain exempt entities are excluded from the reporting requirement. However, if less than 100% of the ownership interests are owned by exempt entities, then the company must report but may name only the exempt entity in lieu of disclosing the beneficial owners of the exempt entity (discussed further below).

While "reporting companies" can be all types of entities, including certain partnerships, I refer to all of them in this article as "companies."

What Gets Reported?

Reporting companies are required to collect and report three types of information: (1) basic information about the reporting company, (2) information about the beneficial owners of the reporting company, and (3) information about "company applicants" of the reporting company, each of which is discussed below.

(1) *Information About the Reporting Company.*

Reporting companies disclose the following:

(a) Full legal name of the company,
(b) Any trade names or "doing business as" (DBA) names used
(c) Current U.S. address,
(d) Jurisdiction of formation (or for foreign companies, first state of registration), and
(e) IRS Taxpayer Identification Number (TIN) including any Employer Identification Number (EIN).

(2) *Information about Beneficial Owners*

Reporting companies gather and disclose the following information about their beneficial owners:

(a) Full legal name,

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[5] For a list of all 23 different types of companies that are exempt, *see* 31 U.S.C. §5336(a)(11)(B) and 31 CFR §1010.380(c)(2).

(b) Date of birth,
(c) Current address,
(d) Unique identifying number and image of one of the following types of identification:
- U.S. passport (or foreign passport if no U.S passport),
- State driver's license,
- I.d. issued by a state, local government or tribe

However, in order to protect the personal information of beneficial owners and to make it easier for beneficial owners of multiple companies, individuals may obtain a FinCEN ID, and then the reporting company is only required to provide the FinCEN ID number for the beneficial owner. Obtaining a FinCEN ID is free and relatively easy and will help protect the confidentiality of the foregoing information. An individual is required to notify all reporting companies of any updates to their information, and having a FinCEN ID will allow an individual to update information for all reporting companies by simply updating the FinCEN ID in one place. A FinCEN identifier may be obtained and updated at the following link: FinCEN ID.[6]

A reporting company must determine who its beneficial owners are and collect the foregoing information from them. All reporting companies have at least one and an unlimited number of beneficial owners. A "beneficial owner" is any individual who, directly or indirectly (a) exercises substantial control over a reporting company, or (b) owns or controls, directly or indirectly, at least 25 percent of the ownership interests of a reporting company.

Direct or indirect ownership or control of *either* the voting interest or the economic interest (or both) of the reporting company determines ownership. Joint owners who hold undivided interests in the company are each deemed to own the entire ownership interest.[7] For example, spouses in community property states like California own, by state law, undivided 50% interests in all community property. If one spouse owns 25% of the stock of a corporation in his or her name alone and the stock is community property, then both the record holder and his or her spouse are beneficial owners because they both are deemed to own 25% of the corporation.

A person may exercise substantial control over a company without having an ownership interest. For example, senior officers of a reporting company exercise substantial control over the company and are therefore "beneficial owners" even if they do not own any voting or economic interest in the company.[8] Directors of corporations may or may not exercise substantial control over a reporting company and therefore may not always be beneficial owners. Managers of manager-managed limited liability companies most likely exercise substantial control, and therefore individual beneficial owners of an entity acting as a manager of a reporting company are most likely "beneficial owners" of the reporting company regardless of the percentage interest owned in the company. The same is true for general partners of a limited partnership and their beneficial owners.

[6] https://fincenid.fincen.gov/landing
[7] 31 CFR §1010.380(d)(ii)(C).
[8] 31 CFR §1010.380(d)(1)(i)(A).

There are exemptions for certain beneficial owners, for example minors, certain employees who are not senior officers, and inheritors (beneficiaries with only a future interest arising upon death, for example beneficiaries under a revocable living trust, other than the trustor).[9]

Determining beneficial owners can be relatively straight-forward when only individuals have direct ownership of a company's stock or membership interest, without convertible debt instruments or employee options, profit participation or equity incentive plans. For companies with more complex equity structures or more complex organizational charts, this analysis is more difficult, and you should consult with an attorney to help you determine who are the beneficial owners. For example, ownership interests can arise from voting rights agreements, rights to profits, convertible instruments like convertible notes or warrants, and options or other contractual rights to acquire ownership interests. When these interests are held in a trust, then the trustee(s) *and* certain beneficiaries of the trust may be deemed "beneficial owners." Refer to Section 2.3 of the Small Entity Compliance Guide for a flow chart and illustrations of various types of beneficial owners.

If an individual is a beneficial owner of a reporting company exclusively by virtue of their ownership in an exempt entity, then a special rule applies allowing the reporting company to disclose only the name of the exempt entity in lieu of its beneficial owners.[10] However, a beneficial owner that holds part of its interest through an exempt entity and part directly or through a non-exempt entity, then for purposes of determining if the individual owns 25% or more of the reporting company, all of its ownership is included, including ownership through the exempt entity. For example, Mr. Smith owns 50% of company A and 10% of company B, and company A and company B each own 50% of reporting company C. Company A is an exempt entity but company B is not. Mr. Smith is deemed to own 20% of company C through its ownership of company A plus 5% of company C through its ownership in company B. Mr. Smith is a beneficial owner of company C because he owns a 25% interest in company C, even though the majority of his ownership is through an exempt entity, and because he does not own his interests in company C exclusively by virtue of his ownership interest in exempt entities, the special rule does not apply to him. All of Mr. Smith's information must be reported.

(4) Information about Company Applicants

Company applicants are individuals who control the filing of the formation documents of a company. All reporting companies have at least one but no more than two "company applicants." Companies formed prior to January 1, 2024, are not required to report information about the company applicant. Only companies formed on or after January 1, 2024, are required to gather and report information about company applicants. If a company applicant is required to be disclosed, then the same information is reported about the company applicant as is reported for beneficial owners (or the company applicant's FinCEN ID).

A "company applicant" is a person who either (a) actually files the formation document (or foreign registration) with the Secretary of State or similar agency, or (b) is primarily responsible for directing or controlling the filing of the formation document (or foreign registration). An individual

[9] *See*, 31 U.S.C. §5336(a)(3)(B), and 31 CFR §1010.380(d)(3).
[10] 31 CFR §1010.380(b)(2).

may be both a beneficial owner and a company applicant, in which event their information is disclosed under both sections of the report. An example of a company applicant is an attorney who files the Article of Information of a corporation or Certificate of Formation for a limited liability company. An attorney who directs the filing of a formation document filed by a corporate service provider, such as RASI or CT Corporation, is a company applicant, along with the individual at the corporate service provider who causes the filing to be made. It is the reporting company's responsibility to collect the information required to be reported about the company applicants, so it is important to obtain this information at the time a company is formed.

When Am I Required to Report?

Reporting companies formed *before* January 1, 2024, have until January 1, 2025, to file the report. Reporting companies formed *on or after* January 1, 2024, have thirty (30) days to file the report.[11]

Updates to any information reported must be filed within 30 days of the change.[12] If a company was previously exempt, the company must report within 30 days after failing to meet the criteria for the exemption.[13] If a reporting company later becomes exempt, this must be reported as an update to the report within 30 days of the change.[14]

What if an Individual Refuses to Provide Information or Provides False Information?

Reporting companies are liable for failing to collect and report the required information. Beneficial owners and company applicants are required to provide to the reporting companies the information upon request and are liable for refusing to provide information or providing false information to a reporting company.[15] Further, beneficial owners and company applicants must provide reporting companies updates when any of the previously provided information changes in order to permit a company to file updates within the 30-day period required (which can be accomplished by updating their FinCEN ID).[16]

How Do I Report?

Reports and updates are filed for free online at https://boiefiling.fincen.gov/fileboir. Once you have assembled all of the information required to be reported, the actual filing process is relatively easy. A copy of the form report is included at the back of this article for reference.

This article is for general information purposes only and is not intended as legal advice. You should consult with your attorney to determine when and what you may be required to disclose to comply with the Act. Information and links included in this article are based upon information available as

[11] The 30 days is determined from the earlier of (a) the date the company receives actual notice that its creation has become effective or (b) the date on which a secretary of state or similar office first provides public notice of its creation.
[12] 31 CFR §1010.380(a)(2)(i).
[13] 31 CFR §1010.380(a)(1)(iv).
[14] 31 CFR §1010.380(a)(2)(ii).
[15] 31 U.S.C. §5336(h); 31 CFR §1010.380(g).
[16] *Id.*

of the publication date set forth at the top of this article and may have been updated since this article was published.

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