

Countdown to Implementation of U.S. Beneficial Ownership Reporting

What to Expect and How to Prepare

November 29, 2023

In just over one month, FinCEN’s beneficial ownership information reporting rule (the “BOI Rule”) will take effect on January 1, 2024. Many questions remain, however, regarding how the BOI Rule will be implemented and interpreted in practice. This alert highlights recent developments, open questions and areas to watch as the January 1 effective date approaches.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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Background on the CTA

The BOI Rule, summarized in our 2022 [alert memo](#), implements the Corporate Transparency Act’s (“CTA”) beneficial ownership reporting requirements. Under the CTA and BOI Rule, beginning January 1, 2024, certain legal entities newly formed in the United States, and foreign legal entities newly registered to do business in the United States, will be required to report personal information about their beneficial owners and company applicants to FinCEN. Preexisting legal entities formed or registered before 2024 must also file reports, but with an extended reporting deadline of January 1, 2025. A number of exemptions from reporting are available—many of the exemptions include technical criteria, however, that must be evaluated on an entity-by-entity basis. Willful failures to report, and willfully reporting false or incomplete information, can result in civil or criminal penalties.



Recent Developments

In the last few months, FinCEN has released several rulemakings and guidance documents clarifying how the BOI Rule should be applied in particular circumstances.

- FinCEN has established a [beneficial ownership information reporting website](#), which includes a detailed [Small Entity Compliance Guide](#) and periodically updated [FAQs](#) that provide step-by-step guides and answer some interpretive questions under the BOI Rule.
- On November 29, 2023, FinCEN finalized an [amendment](#) to the BOI Rule that extends the reporting deadline for newly created entities from 30 days to 90 days. The extended reporting window only applies during the first year of implementation (e.g., for entities created or registered on or after January 1, 2024, and before January 1, 2025), to give affected entities more time to understand the requirements of the BOI Rule, collect the necessary information, and resolve any questions that arise.
- On November 8, 2023, FinCEN [amended](#) the Final Rule to specify the circumstances in which a reporting company may report an entity's "FinCEN identifier" (a unique identifying number that can be provided in lieu of providing beneficial ownership information). The conditions on the use of entity FinCEN identifiers are likely to limit their utility. For example, it does not appear that a reporting company with a significant (> 25%) legal entity minority investor could report the investor's FinCEN identifier rather than looking through the legal entity investor to identify individual beneficial owners (unless the beneficial owners of both entities are the same individuals).
- On September 29, 2023, FinCEN published a [Notice of Information Collection](#) ("NOIC") and request for comments on the format of its proposed online reporting form. The NOIC follows an earlier [proposal](#) that was heavily criticized because it would have allowed the reporting company to indicate that information

about its beneficial owners was "unknown". The "unknown" option was eliminated in the latest NOIC, but FinCEN still appears to be considering how to address situations where a reporting company may not have access to all the required information about its beneficial owners.

Open Questions and Areas to Watch

- To date, FinCEN has held firm to a January 1 effective date, but unforeseen challenges could still lead to delays, particularly if they affect the rollout of FinCEN's online portal and secure database.
- Stakeholders should expect FinCEN to continue to release new or updated guidance, FAQs and interpretations after the effective date as it gains experience and collects feedback on the BOI Rule. Further to this process, FinCEN has announced plans to establish a call center before January 1, 2024 to help address questions that arise.
- FinCEN intends for reports to be filed electronically through a secure filing system accessible through FinCEN's website. But FinCEN has not yet released practical instructions or technical guidance on how to use the filing system or to complete reports. Among other things, FinCEN has not yet indicated whether the filing system on day 1 will require manual entry or will allow batch uploads, APIs and other time-saving features.
- Third-party vendors are developing products to assist in the collection, analysis and tracking of beneficial ownership information for reporting purposes (including for purposes of updating previously filed reports as information changes). The capabilities of these products may vary, and their ability to interface with the FinCEN filing system has not yet been tested.
- FinCEN has not yet finalized the "Access Rule", the second of three planned rulemakings under the CTA, which will govern access to beneficial ownership information held by FinCEN in its secure database. The [proposed rule](#) FinCEN

released on December 15, 2022, described in our [blog post](#), disappointed financial institutions hoping the CTA might facilitate compliance with existing know-your-customer and customer due diligence (“CDD”) obligations. This is because it proposed to limit access to a limited set of financial institutions, and for a single, narrow purpose—requesting beneficial ownership information for specific customers, with customer permission, in order to comply with FinCEN’s 2016 customer due diligence rule (the “2016 CDD Rule”).

- A third planned CTA rulemaking, which is due 1 year after the BOI Rule takes effect, is required to align the 2016 CDD Rule to the requirements of the BOI Rule and CTA.

How to Prepare

- By January 1, 2024, businesses that regularly create or register legal entities in the United States should have a process to ensure consistency in their approach to reporting new legal entities. A model process could include, for example, (i) identifying newly formed or registered legal entities that might be required to report, (ii) analyzing potential exemptions, (iii) maintaining consistency of approach in identifying beneficial owners and company applicants that must be reported, and (iv) internal certification and other quality assurance processes. Firms may wish to designate a specific set of employees responsible for filing formation papers with a secretary of state, for example, to reduce the number of employees who are required to be reported as company applicants.
- Both U.S. and non-U.S. individuals and businesses that regularly acquire or hold significant (e.g., 25% or greater) positions in legal entities that are organized or do business in the United States should consider how they will respond to requests from those legal entities for beneficial ownership information, in case reporting is required under the BOI Rule. In some cases, acquiring a FinCEN identifier could simplify responses and help

prevent unnecessary distribution of non-public personal information.

- Over the next year, businesses and investors—particularly those with complex legal structures—should conduct an inventory of their preexisting (pre-2024) legal entities and assess their legal structures to determine where reporting obligations may apply in order to meet the January 1, 2025 deadline for reporting preexisting entities. Final reporting decisions should be informed by any additional guidance released by FinCEN and practical experience gained by the industry over the course of 2024.
- For both reporting companies and investors, a system for tracking reported information and identifying changes that will require updated reports will also be critical.
- Where businesses encounter interpretive issues that are not addressed by FinCEN’s guidance, legal counsel may be able to provide helpful guidance. Certain exemptions from reporting raise nuanced interpretive issues, particularly for private equity firms and investors. But we expect the most challenging interpretive issues to arise in the context of analyzing complex ownership and governance structures, where the identification of individuals who are direct or indirect beneficial owners may be challenging.

Clients with questions should reach out to any of the listed authors or their regular contacts at Cleary Gottlieb.

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