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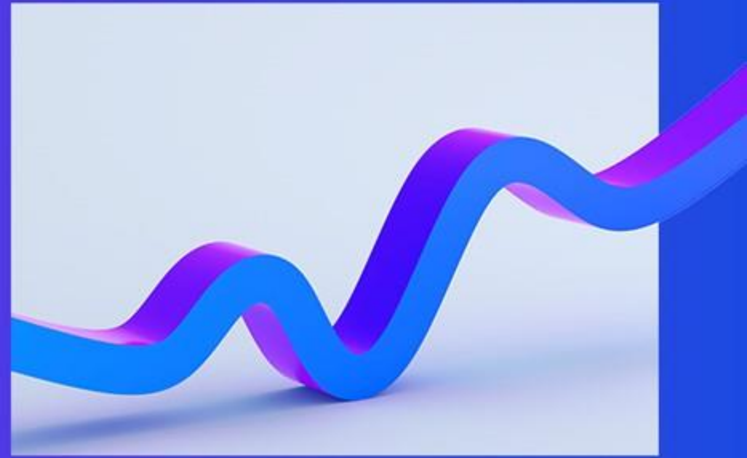

Oh, BOI! New FinCEN Beneficial Ownership Information Reporting is Here…Maybe

By Martin L. Mueller Jr., and Ted Jahn

> On January 1, 2024, the new beneficial ownership information (BOI) reporting rules went into effect, meaning that many companies will need to identify and begin submitting information about their beneficial owners. Thanks to a late extension of the requirements, new entities will not need to report until April, at the earliest, but that's just around the corner and many companies are still confused by the new rules, or possibly unaware of the requirements altogether. Complicating matters further, a recent ruling held that the reporting rules represented Congressional overreach and are unconstitutional. In this article, we discuss the origin of the new BOI reporting rule, as well as the new due diligence requirements for companies going forward.

Background

In 1998, the United Nations issued a report on financial havens and banking secrecy, detailing the money laundering process and how legal institutions were being used to further illicit activities. Interestingly, the report noted "the principal forms of abuse of secrecy appear to have shifted, as controls have been developed, from individual bank accounts to corporate bank accounts and bureau de change operations and then on to trust and other corporate forms that can be purchased readily without even the modest initial and

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ongoing due diligence that is exercised in the banking sector."[1] In 2004, the Financial Crimes Enforcement Network (FinCEN) highlighted the increased use of U.S. based shell corporations as conduits for moving money through foreign shell banks by Eastern Europeans. FinCEN analyzed suspicious activity reports (SARs) filings from April 1996 (when financial institutions were first required to file SARs) through January 2004, and found there had been 397 SARs tied to shell companies and Eastern European countries, amounting to nearly $4 billion, many of which had correspondent banking relationships established with financial institutions in the U.S.[2]

An interagency Task Force (comprised of the Department of the Treasury, the Department of Justice (DOJ) (including the FBI and DEA), the Department of Homeland Security (including ICE and CBP), and the U.S. Postal Service) was established to better understand and combat money laundering in the U.S. The group's first report, the 2005 U.S. Money Laundering Threat Assessment (2005 MLTA),[3] pointed out numerous vulnerabilities that money launders used to exploit structures devised for otherwise legitimate purposes. Specifically, it noted that domestic cloaking features (e.g., bearer shares, nominee shareholders and directors, and trusts) offered routes to corporate anonymity that rivaled those offered offshore. Notably, registrants (domestic and foreign) could use an intermediary firm, a nominee incorporation service (NIS), to establish an entity on their behalf. Though abiding by all laws, such intermediaries could exploit state secrecy rules to ensure that no beneficial ownership information was revealed for company formation, registration, or banking purposes.

A decade later, the Task Force issued a follow up report, the 2015 National Money Laundering Risk Assessment (2015 NMLRA),[4] estimating that $300 billion was generated annually in illicit proceeds, primarily through fraud and drug trafficking. The Task Force noted that vulnerabilities remained largely the same as those found in the 2005 MLTA, and once again detailed the role that shell companies (including front and shelf companies) played in facilitating such schemes. The report pointed out that there is no requirement in any state to provide beneficial ownership information when a legal entity is registered, and noted that banks are only required to identify the beneficial owner of an account in limited circumstances. The report went on to provide numerous examples discovered since the 2005 MLTA that illustrated how money launderers used nominees to create shell entities and shield the identities of criminals that ultimately owned and controlled the funds. Despite strict compliance with due diligence policies and procedures, the report highlighted that it is difficult to identify suspicious activity when it is unclear who owns or controls an account.

A year later, the Financial Action Task Force (FATF) issued a report[5] condemning the U.S. for its money laundering efforts. Although the U.S. had "attained a significant level of understanding of its ML/TF [money laundering and terrorist financing] threats which it develops through comprehensive and ongoing risk assessment processes…" the FATF stated that mitigation of the identified vulnerabilities is less well developed. Per the FATF, this is in part due to a regulatory framework that "has a number of exemptions, gaps and thresholds which do not appear to be justified or in line with the vulnerabilities identified through the risk assessment process…" specifically pointing out that there is no requirement to collect beneficial ownership information in all cases. In its key findings, FATF stated that "lack of timely access to adequate, accurate and current beneficial ownership information remains one of the fundamental gaps in the U.S. context." The FATF recommended that the U.S. prioritize taking action to ensure that beneficial ownership

[1] The United Nations Office for Drug Control and Crime Prevention study, *Financial Havens, Banking Secrecy and Money Laundering,* can be found at https://gfintegrity.org/wp-content/uploads/2022/06/UN-FINANCIAL-HAVENS-laundering.pdf.
[2] The FinCEN Bank Secrecy Act Advisory Group, *The SAR Activity Review*, August 2004, Issue 7, can be found at https://www.fincen.gov/sites/default/files/shared/sar_tti_07.pdf.
[3] The 2005 U.S. Money Laundering Threat Assessment can be found at https://home.treasury.gov/system/files/246/mlta.pdf.
[4] The 2015 National Money Laundering Risk Assessment can be found at https://home.treasury.gov/system/files/246/National-Money-Laundering-Risk-Assessment-06-12-2015.pdf.
[5] The 2016 FATF *Anti-money laundering and counter-terrorist financing measures*, *United States Mutual Evaluation Report*, can be found at https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/MER-United-States-2016.pdf.

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information is available to competent authorities in a timely manner by requiring that such information is obtained at the federal level.

FinCEN finalized new beneficial ownership information reporting rules under the Bank Secrecy Act, which had been proposed roughly around the time that FATF was conducting its research. It was very apparent that FinCEN took recommendations from FATF seriously, as the foreword discussed the reputational impact that prior reports from FATF, and other agencies, had on the U.S. In the Regulatory Analysis, FinCEN noted that the U.S. is generally considered a global leader in combating money laundering and terrorist financing, but its failure to meet a core standard that financial institutions identify and verify the identity of beneficial owners undermines U.S. leadership on illicit finance issues.[6] To this end, FinCEN noted that implementing the newly finalized rule, the Customer Due Diligence Requirements for Financial Institutions (2016 CDD Rule), would enable the U.S. to demonstrate progress with FATF, and other international bodies, and encourage other jurisdictions to comply with FATF standards. The 2016 CDD Rule became applicable in May 2018, and generally required financial institutions to identify and verify the identities of most legal entity customers at account opening. However, as noted in the 2024 National Money Laundering Risk Assessment (2024 NMLRA), "the lack of timely access to high-quality BOI and BOI disclosure requirements at the time of a legal entity's creation or registration has continued to hamper law enforcement investigations…"[7]

Momentum continued to build for a new reporting framework to require beneficial ownership information reporting at the time of entity creation, rather than merely at account opening. In 2019, similar bills, both titled the Corporate Transparency Act of 2019, were introduced by the House[8] and Senate.[9] Finally, in 2021, the Corporate Transparency Act (CTA) was enacted as part of the Anti-Money Laundering Act of 2020 (AMLA), under the National Defense Authorization Act for Fiscal Year 2021.[10] In September 2022, FinCEN issued final rules, effective beginning January 1, 2024.

CTA Ruled Unconstitutional

On March 1, 2024, the U.S. District Court for the Northern District of Alabama Northeastern Division ruled that the CTA was unconstitutional because it "exceeds the Constitution's limits on the legislative branch and lacks a sufficient nexus to an enumerated power to be a necessary or proper means of achieving Congress' policy goal…"[11] In this instance, the plaintiffs, National Small Business Association (NSBA) and an NSBA member, sued the Treasury Department after FinCEN issued the final rule, alleging that the mandatory disclosure requirements exceed Congress' authority under Article I of the Constitution and violate the First, Fourth, Fifth, Ninth, and Tenth Amendments. In its conclusion, the Court noted that it was unnecessary to decide whether the CTA violates the First, Fourth, and Fifth Amendments, but pointed out how the CTA and 2016 CDD Rule provide FinCEN with nearly identical information, stating "but the CDD rule does so in a constitutionally acceptable manner." Per the Court: "Even at the outer limits of the Necessary and Proper Clause, the practical similarities between these two regulations make it hard to justify a conclusion that 'failure to regulate' corporate entities upon formation would 'leave a gaping hole' in Congress' fight against illicit corporate activity and money laundering."

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[6] The Regulatory Analysis of the final rules on Customer Due Diligence Requirements for Financial Institutions can be found in the Federal Register at https://www.federalregister.gov/documents/2016/05/11/2016-10567/customer-due-diligence-requirements-for-financial-institutions.

[7] The 2024 National Money Laundering Risk Assessment can be found at https://home.treasury.gov/system/files/136/2024-National-Money-Laundering-Risk-Assessment.pdf.

[8] H.R. 2513, *Corporate Transparency Act of 2019*, can be found at https://www.congress.gov/bill/116th-congress/house-bill/2513.

[9] S.1978, *Corporate Transparency Act of 2019*, can be found at https://www.congress.gov/bill/116th-congress/senate-bill/1978/text.

[10] HR.6396, *William M. Thornberry National Defense Authorization Act for Fiscal Year 2021*, can be found at https://www.congress.gov/bill/116th-congress/house-bill/6395/actions.

[11] For full details, see *National Small Business United v. Yellen*, No. 5:22-cv-01448 (N.D. Ala.) at https://www.govinfo.gov/app/details/USCOURTS-alnd-5_22-cv-01448/summary.

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On March 4, 2024, FinCEN issued a notice[12] addressing the declaratory judgment, stating that the government is not currently enforcing the CTA against the plaintiffs involved in the case. Specifically, FinCEN will not require the NSBA or members of the NSBA as of March 1, 2024, to provide BOI information "at this time." On March 11, Treasury filed a Notice of Appeal,[13] confirming that FinCEN is not content with the limited enforcement currently in place. While the appeal is being determined in the Eleventh Circuit, it is likely that additional cases will be brought forth in other jurisdictions for broader claimant groups. Given that the reporting rule is currently effective, and the clock is running for those companies established after January 1, 2024, impacted individuals will need to keep close watch of this area for any updates.

Reporting Beneficial Ownership Information

As noted above, the 2016 CDD Rule helped mitigate U.S. exposure to certain criminal activity by instituting the identification and verification of BOI by certain financial institutions at account opening, but limitations under the rules hindered investigations and legal enforcement. The CTA expanded the reporting requirements by requiring the disclosure of BOI by U.S. and foreign companies (i.e., not just account information). In turn, FinCEN was tasked with building a database to house this information, which would then be made available, subject to applicable safeguards, to authorized governmental authorities and financial institutions. FinCEN issued final rules in 2022 (BOI Reporting Rule),[14] describing the entities subject to reporting, the information required to be reported, and how to report. The BOI Reporting Rule became effective on January 1, 2024, meaning that FinCEN is now collecting information. As discussed below, reporting was implemented in a phased in approach, requiring legacy entities to file by the end of 2024 and new entities to file within 90 calendar days of creation (for entities created in 2024, the reporting timeline is reduced in subsequent years).

Reporting Companies

The BOI Reporting Rule stipulates that certain "reporting companies" that are not subject to an exemption may be required to report BOI. A reporting company is broadly defined as either a "domestic reporting company" or a "foreign reporting company."[15] Broadly speaking, a domestic reporting company is a corporation, LLC, or other entity created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe. Conversely, a foreign reporting company is defined as an entity that is 1) a corporation, LLC, or other entity, 2) formed under the law of a foreign country, and 3) registered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe.

Exemptions

The BOI Reporting Rule lists 23 entity categories[16] that will not be deemed to be a "reporting company," meaning they are exempt from the BOI reporting requirements. A detailed review of each entity category is outside the scope of this article; however, the full list has been provided below. Note that the BOI Reporting Rule provides specific criteria that an entity must meet under each entity type in order to claim the exemption. In addition, there are special rules where an exemption may apply, but reporting is still required (e.g., foreign pooled investment vehicles).[17] Thus, a thorough analysis of the entity claiming an exemption should be reviewed against the criteria provided by FinCEN.

1. Securities reporting issuer

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[12] For further information, see *Notice Regarding National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.)* on the FinCEN website at https://www.fincen.gov/news/news-releases/notice-regarding-national-small-business-united-v-yellen-no-522-cv-01448-nd-ala.
[13] The Notice of Appeal can be found on the FinCEN website at https://fincen.gov/sites/default/files/shared/54_Notice_of_Appeal.pdf.
[14] 31 CFR Part 1010, *Beneficial Ownership Information Requirements*, can be found at https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf.
[15] See § 1010.380(c).
[16] See § 1010.380(c)(2).
[17] See § 1010.380(b)(2).

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2. Governmental authority
3. Bank
4. Credit union
5. Depository institution holding company
6. Money services business
7. Broker or dealer in securities
8. Securities exchange or clearing agency
9. Other Exchange Act registered entity
10. Investment company or investment adviser
11. Venture capital fund adviser
12. Insurance company
13. State-licensed insurance producer
14. Commodity Exchange Act registered entity
15. Accounting firm
16. Public utility
17. Financial market utility
18. Pooled investment vehicle
19. Tax-exempt entity
20. Entity assisting a tax-exempt entity
21. Large operating company
22. Subsidiary of certain exempt entities
23. Inactive entity

Beneficial Owners and Company Applicants

To the extent that an entity meets the definition of a reporting company, and no exemption is applicable, then the company must identify its beneficial owners. The BOI Reporting Rule defines a beneficial owner as an individual that, directly or indirectly, exercises substantial control over the reporting company or owns or controls at least 25% of the ownership interests of the reporting company.[18] It is important to note that there is no limit to the number of beneficial owners that may be subject to the reporting requirement. However, minor children, nominees or other intermediaries, employees, inheritors, and creditors are generally exempted from this definition, subject to certain conditions.[19]

Substantial Control

The BOI Reporting Rule provides a non-exhaustive list of examples indicating that an individual has substantial control over a company, including an individual that: 1) serves as a senior officer, 2) has appointment or removal authority over any senior officer or a majority of the board of directors, or 3) is deemed to be an important decision-maker. Examples of such decision making influence include: 1) the sale, lease, mortgage, or other transfer of any principal assets of the company; 2) the reorganization, dissolution, or merger of the company; 3) major expenditures or investments, issuances of equity, incurrence of debt, or approval of the operating budget; 4) the selection or termination of business lines or ventures, or geographic focus, of the company; 5) compensation schemes and incentive programs for senior officers; 6) the entry into or termination, or the fulfillment or non-fulfillment, of significant contracts; and 7) amendments of any substantial governance documents. Emphasizing that this list is non-exhaustive, the BOI Reporting Rule also includes a catch all category, including individuals that have “any other form of substantial control.”[20]

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[18] See § 1010.380(d).
[19] See § 1010.380(d)(3).
[20] See § 1010.380(d)(1)(i).

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As substantial control may exist directly or indirectly, the BOI Reporting Rule provides a non-exhaustive list of examples, including: 1) board representation, 2) ownership or control of a majority of the voting power or voting rights, 3) rights associated with any financing arrangement or interest in a company, 4) control over one or more intermediary entities that separately or collectively exercise substantial control, 5) arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees, or 6) any other contract, arrangement, understanding, relationship, or otherwise.[21] The broad language, particularly the last category, indicates that the analysis was intended to cast a wide net in determining whether an individual should be deemed to exercise substantial control.

Ownership Interests

As discussed above, reporting companies are required to report individuals that own or control 25% or more of the "ownership interests" of the company, which is defined broadly. Summarized, the following non-exhaustive interests must be considered when determining whether the 25% threshold has been met: 1) equity, stock, or voting rights; 2) capital or profit interests; 3) convertible instruments; 4) option or privilege; and 5) any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.[22] In addition, companies need to review for such interests held directly or indirectly, including interests held: 1) through joint ownership; 2) through nominees, intermediaries, or custodians; 3) through trust or similar arrangements; and 4) through tiered ownership or control of intermediary entities that separately or collectively own or control ownership interests of the company.[23] Note that the lists above are paraphrased. In addition, the BOI Reporting Rule provides calculations[24] to be used when determining the ownership amount. Thus, taxpayers should examine the rules closely when determining whether an individual's interest in a company amounts to the requisite ownership threshold.

Company Applicants

The BOI Reporting Rule also requires new entities to report certain "company applicants." This rule does not apply to reporting companies that were created or registered before January 1, 2024. In addition, unlike beneficial owners, only two individuals may qualify as company applicants. For domestic reporting companies, company applicants include the individual that directly files the document that creates the entity and the individual primarily responsible for directing or controlling the filing. For foreign reporting companies, company applicants include the individual that directly files the document that first registers the foreign reporting company and the individual primarily responsible for directing or controlling the filing.[25] In both cases, the second category is only applicable to the extent that more than one individual is involved in the filing of the document.

Reporting Requirements

Timing

Reporting for pre-existing entities (i.e., those created or registered before January 1, 2024) has been consistent – reporting companies are required to file their initial reports by January 1, 2025. There have been a couple of changes for new entities (i.e., those created or registered on or after January 1, 2024) since the rule was first proposed and again after it was finalized in 2022. Under the proposed rule, reporting was required within 14 days of creation or registration for all new entities. FinCEN addressed feedback to this proposal, noting that some commenters pushed for alignment with standard reporting deadlines, and ultimately finalized the rule with a delayed timeframe of 30 days following creation or registration. FinCEN

[21] See § 1010.380(d)(1)(ii).
[22] See § 1010.380(d)(2)(i).
[23] See § 1010.380(d)(2)(ii).
[24] See § 1010.380(d)(2)(iii)
[25] See § 1010.380(e).

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subsequently received extensive feedback from industry participants and concluded that additional time was necessary for entities to understand and comply with the rule, obtain necessary information, and resolve any questions arising during the initial reports. On November 29, 2023, FinCEN issued a final rule, extending the time of reporting for entities created or registered in 2024 to 90 days.[26] However, the original 30-day timeframe continues to apply to entities created or registered on or after January 1, 2025.

To the extent that an initial report contained inaccurate information when filed, the company is required to submit a corrected report within 30 days.[27] In addition, companies are required to submit updated reports within 30 days after any changes to information required for either the reporting company or the beneficial owners (e.g., a reporting company subsequently meets the criteria for an exemption,[28] a minor child previously exempted reaches the age of majority, etc.).[29] The requirement to submit an updated report does not apply for changes to personal information for a company applicant.

Reporting Format

Reporting companies can now go to the FinCEN BOI Report (BOIR) website[30] to submit initial, corrected, and updated reports. Reports can be submitted online, or a fillable pdf template can be downloaded. Reporting companies must provide the full legal name, trade name (if applicable), the current U.S. address (or the primary location in the U.S. where the company conducts business), the state, Tribal, or foreign jurisdiction of formation (and state or Tribal jurisdiction of first registration for foreign companies), and the U.S. TIN (or foreign TIN if the foreign company has not been issued a U.S. TIN). For each beneficial owner and company applicant, the reporting company must submit the full legal name, date of birth, complete current address, and the number, jurisdiction, and image of either a U.S. passport, state driver's license, or other governmental issued ID (or foreign passport if the individual does not have any of the other forms of ID).

FinCEN Identifier

Understandably, the transmission of personal information through tiered structures is a concern for many individuals. To address this, FinCEN has created a unique identifying number, a FinCEN identifier. Individuals may, but are not required to, electronically apply for a FinCEN identifier by providing the same personal information and image that reporting companies are required to submit in BOI reports. Upon successful application, the individual will receive the FinCEN identifier, which can then be used as a replacement for certain required information for beneficial owners and company applications in BOI reports. Likewise, a reporting company may also request a FinCEN identifier by checking a box on the BOI report.

Beneficial Ownership Reporting – 2024 and Beyond

Thanks to a late FinCEN extension, new reporting companies are not required to submit initial reports until 90 calendar days after initial creation or registration. Unfortunately, for those entities created shortly after January 1, 2024, that means the clock is ticking on the time that companies have to fully understand the new rules and collect requisite information. Pre-existing entities are granted far more time, as the initial report is not required until the end of the year, but tracking beneficial owners in more complicated legacy structures may prove far more burdensome. Complicating the picture, of course, is the recent court ruling (discussed above) that held the CTA to be unconstitutional, forcing FinCEN to put a (temporary?) hold on reporting for

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[26] The FinCEN final rule, *Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024*, can be found at https://public-inspection.federalregister.gov/2023-26399.pdf.
[27] See § 1010.380(a)(3).
[28] For example, a company that was previously required to report but later qualifies for an exemption should submit an updated report identifying itself and checking a box to note its newly exempt status. For further information, see the FinCEN BOI FAQs at https://www.fincen.gov/boi-faqs#L_5.
[29] See § 1010.380(a)(2).
[30] The FinCEN BOIR website can be found at https://boiefiling.fincen.gov/fileboir.

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the NSBA and members of the NSBA as of March 1, 2024. As indicated, it is likely there will be additional challenges to the CTA, along with subsequent responses and appeals by the Government.

Finally, it is important to note that reporting is expanding at the state level, at least for New York, which has already implemented its own BOI reporting rules specific to LLCs formed under New York law. The New York version largely piggybacks off of the federal version, and even permits filers to use the federal form for state purposes. However, unlike the federal version, companies that qualify for an exemption are required to affirmatively certify a statement identifying the entity and exemption. Other states will likely be keeping close watch on the initial rollout of the federal and New York reporting programs, and may institute similar requirements in the future. Needless to say, companies will need to familiarize themselves with the reporting requirements quickly, to ensure compliance in 2024, and monitor for updates as the reporting regime evolves.

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