

## Publication

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### FinCEN's Final Rule on Beneficial Ownership Information Reporting Requirements Defers Effective Date until January 1, 2024

FinCEN has published its Final Rule regarding the beneficial ownership reporting requirements under the Corporate Transparency Act of 2019 (the "CTA"). The Final Rule is the first in a series of three rulemakings aimed at preventing and combating money laundering, terrorist financing, corruption, tax fraud, and other illicit activity. The Final Rule has an effective date of January 1, 2024 (the "Effective Date"), however existing entities (those created or registered prior to the Effective Date) will have until January 1, 2025, to comply with the reporting requirements of the CTA and Final Rule.

#### Reporting Companies

Reporting companies must comply with the reporting requirements of the CTA and the Final Rule. A "reporting company" includes all (i) domestic corporations, limited liability companies, and similar entities created by filing a formation document with an individual state or Indian Tribe, or (ii) foreign entities registered to do business in the United States. However, the Final Rule exempts 23 types of entities from the definition of "reporting company," including SEC reporting issuers (*e.g.*, publicly traded companies), certain investment advisers, banks and credit unions, and insurance companies.

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## Company Applicant and Beneficial Owner

A “company applicant” is the individual who files or directs that another individual file the document to create or register a reporting company. Under this definition, a reporting company may have multiple company applicants (*e.g.*, both the corporate formation agency who files the reporting company’s formation documents and the attorney overseeing the filing may be deemed a company applicant).

The Final Rule defines “beneficial owner” as any individual who (i) exercises “substantial control” over the reporting company, or (ii) owns or controls 25% or more of the reporting company. However, this definition has five exemptions including minor children, employees, and certain creditors.

Under the Final Rule, an individual exerts substantial control over a reporting company where: (1) the individual is a “senior officer” of the reporting company; (2) the individual has the authority to appoint or remove senior officers or members of the board of directors (or equivalent governing body) of the reporting company; or (3) the individual has substantial influence over important decisions made by the reporting company. The Final Rule also includes a “catch-all” provision within the definition of substantial control to capture instances where individuals exert substantial control over an entity through novel or less conventional means such as a series of limited liability companies or decentralized autonomous organizations.

An individual may directly or indirectly own or control ownership interests in a reporting company. As such, the Final Rule specifies that an individual may exert such ownership or control through any contract, arrangement, understanding, relationship, or otherwise. “Ownership interest” includes “any . . . instrument, contract, arrangement, understanding, relationship, or other

mechanism used to establish ownership.” To determine whether an individual owns 25 percent or greater of a reporting company, FinCEN will look at the individual’s total ownership interests in the reporting company to include all classes and types of interest.

In the trust context, the Final Rule specifies that a trustee and others with the authority to control or dispose of trust assets are considered to own or control the ownership interests in a reporting company that are held in trust. For example, where a trust has 25 percent ownership interest in a reporting company, a grantor or settlor who has the right to revoke the trust or withdraw the trust assets is considered to own or control the ownership interests in the reporting company.

### **BOI and Company Applicant Reports**

The Final Rule requires reporting companies to report certain information about beneficial owners and company applicants. However, reporting companies created or registered prior to the Effective Date are not required to report information on their company applicants.

Reporting companies must submit Beneficial Ownership Information (“BOI”) reports to FinCEN, regardless of the date of formation or registration. These BOI reports must include the following information:

- The full legal name of the reporting company (*i.e.*, the legal name used to establish the entity),
- All alternative and “doing business as” names,
- The street address of the reporting company’s principal place of business,
- The state or tribal jurisdiction of formation (or registration, if the reporting company is a foreign entity), and

- The reporting company's Taxpayer Identification Number.

In addition, the Final Rule requires reporting companies to provide the following information for each beneficial owner (and in the case of reporting companies created or registered after the Effective Date, each company applicant):

- Full legal name,
- Date of birth,
- Current residential street address (or business address for company applicants who create or register companies in the course of their business),
- A unique identification number (UIN) from a non-expired government-issued document (*e.g.*, a U.S. Passport or State ID), and
- A copy of the non-expired government-issued document that includes a photograph and UIN for each "company applicant" and "beneficial owner."

Company applicants and beneficial owners also have the alternative of requesting a unique identifying number assigned by FinCEN ("FinCEN ID"), which reporting companies may then submit to FinCEN in lieu of providing the information described above.

## Reporting Requirements and Penalties

For existing reporting companies – those created or registered prior to the Effective Date – the Final Rule grants a one-year grace period from the Effective Date to file their initial BOI report with FinCEN, meaning that existing reporting companies will not have to comply with the Final Rule's reporting requirements until January 1, 2025. New entities (or those created or registered in the United States after January 1, 2024) meeting the definition of a reporting company must submit an initial report within 30 calendar days from the time that (i) the

entity receives actual notice that its creation or registration has become effective, or (ii) a secretary of state or similar office first provides public notice of the creation or registration of the entity. For instance, a new entity may receive public notice of its creation or registration where the secretary of state posts such notice in a publicly accessible registry. When a previously exempt entity no longer meets the exemption criteria, the previously exempt entity will receive the greater of (i) the remaining calendar days left in the one-year grace period mentioned above, or (ii) 30 calendar days from the date in which the entity no longer meets any exemption criteria.

The CTA imposes continuous reporting requirements on reporting companies. The Final Rule specifies that reporting companies will have 30 calendar days to report changes in beneficial ownership information or correct inaccurate information contained in a prior BOI report after the reporting company becomes aware of or should have known about the inaccurate information. A reporting company will have 90 calendar days to correct inaccurate information.

FinCEN will receive, store, and maintain beneficial ownership information in its Beneficial Ownership Secure System ("BOSS"). Federal regulators, as well as federal, state, local, and Tribal law enforcement authorities will have access to the information in BOSS.

Failure to comply with the reporting requirements of the CTA may result in civil and criminal penalties. For example, failure to report or willful submission of false or fraudulent beneficial ownership information can lead to a civil penalty of \$500 per calendar day, a fine of \$10,000, and up to two years imprisonment.

### **More Regulations to Come**



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FinCEN intends to issue additional sets of rulemakings to (i) establish the CTA's protocols for access to and disclosure of beneficial ownership information, and (ii) revise FinCEN's current regulations concerning customer due diligence requirements for financial institutions. While FinCEN has not provided an update on its first set of rulemakings regarding the establishment of CTA protocols for access to and disclosure of beneficial ownership information, the CTA requires FinCEN to revise its current regulations concerning customer due diligence requirements for financial institutions by January 1, 2025. NGE will endeavor to update clients on further proposed and final rulemakings from FinCEN relating to the implementation of the CTA.

For additional information, contact Robert Gerber, Wesley Nissen, John Koenigsknecht, Earl Melamed, Lawrence Richman, Peter Miles or your NGE attorney.

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