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The New FinCEN Small Entity Compliance Guide: Small Companies Will Have to Report Information About Owners and Beneficial Owners to FinCEN

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The Financial Crimes Enforcement Network (“FinCEN”) has published a new Small Entity Compliance Guide (“Guide”) for compliance with the Beneficial Ownership Information Reporting Rule (“Reporting Rule”), 31 CFR 1010.380. The Guide may be found [here](#).

The Impact on Small Businesses

With certain exceptions, the Reporting Rule applies to small businesses that employ 20 or fewer persons in the United States and reported gross receipts and sales of \$5 million or less on the previous year’s federal tax filings. For such small businesses, starting on January 1, 2024, reporting companies created or registered to do business before January 1, 2024, must file their initial BOI reports by January 1, 2025. Reporting companies created or registered on or after January 1, 2024, will have 30 days after receiving notice of their company’s creation or registration to file their initial BOI reports. Those BOI reports will contain information about the company, its beneficial owners, and its company applicants.¹ Failures to comply can result in serious penalties, discussed below.

Who Has to Report - Reporting Company Definitions

Domestic Companies

- a company must register if:
 - It is a corporation or an LLC
 - It was created by the filing of a document with a secretary of state or any similar office under the laws of a state or Indian tribe.
- If it does not meet these criteria, it does not have to register.
- Note that the exemption below for large companies establishes that the reporting requirements do not apply to companies that, among other things, employ more than 20 persons in the United States and reported gross receipts and sales of over \$5 million on the previous year’s federal tax filings.

¹ As is described in more detail below, a beneficial owner is an individual who owns or controls at least 25 percent of a company or has substantial control over the company, and a company applicant is an individual who directly files or is primarily responsible for the filing of the document that creates or registers the company.

Foreign Companies

- a company must register if:
 - It has registered to do business in any U.S. state or tribal jurisdiction by filing a document with a secretary of state or similar office of the state or tribe.
- If it does not meet this criterion, it does not have to register.

Exemptions to Reporting Company Definitions

The following types of companies are exempt - Note that the Guided has more detailed criteria that apply to each of these exemption categories to determine if an entity meets the definition of that exemption (found in the Guide):

- Securities reporting issuer
- Governmental authority
- Bank
- Credit union
- Depository institution holding company
- Money services business registered with FinCEN
- Broker or dealer in securities
- Securities exchange or clearing agency
- Other Exchange Act registered entity
- Investment company or investment adviser as defined in the Investment Company Act of 1940 or the Investment Advisers act of 1940, or is registered with the SEC under those Acts
- Venture capital fund adviser
- Insurance company
- State-licensed insurance producer²
- Commodity Exchange Act registered entity
- Public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002
- Public utility
- Financial market utility
- Pooled investment vehicle³
- Tax-exempt entity
- Entity assisting a tax-exempt entity
- Large operating company – the company must:
 - Employ more than 20 full time employees
 - More than 20- full time employees must be employed in the United States
 - The entity has an operating presence at a physical office within the United States. See footnote 1 for definition of “operating presence”.

² This includes entities that have an operating presence at a physical office within the United States. The term “operating presence at a physical office within the United States” means that an entity regularly conducts its business at a physical location in the United States that the entity owns or leases and that is physically distinct from the place of business of any other unaffiliated entity.

³ If an entity meets the criteria of Pooled investment vehicle and is formed under the laws of a foreign country, the entity is subject to a separate reporting requirement. These companies are referred to as “foreign pooled investment vehicles” and their reporting requirement is explained at 1010.380(b)(2)(iii).

- The entity filed an applicable 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 within the United States. If the entity is part of an affiliated group of corporations within the meaning of 26 U.S.C. 1504, refer to the consolidated return for such group
- Subsidiary of certain exempt entities
- Inactive entity – must meet the following criteria:
 - In existence on or before January 1, 2020
 - Not engaged in any active business
 - Not owned by a foreign person in whole or in part
 - Not had any change in ownership in the preceding 12 months
 - In the preceding 12 months, did not receive or send funds in an amount of \$1,000 directly or indirectly through a financial account in which the entity or an affiliate had an interest
 - Does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.

Information to be reported

Information about the company

- Full legal name
- Any trade name or “doing business as” (DBA) name
- Complete current U.S. address » Report the address of the principal place of business in United States, or, if the reporting company’s principal place of business is not in the United States, the primary location in the United States where the company conducts business.
- State, Tribal, or foreign jurisdiction of formation
- For a foreign reporting company only, State or Tribal jurisdiction of first registration
- Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) » If a foreign reporting company has not been issued a TIN, report a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.

Information about each beneficial owner and the company applicant

- Full legal name
- Date of birth
- Complete current address - Report the individual’s residential street address, except for company applicants who form or register a company in the course of their business, such as paralegals. For such individuals, report the business street address. The address is not required to be in the United States.
- Unique identifying number and issuing jurisdiction from, and image of, one of the following non-expired documents:
 - U.S. passport
 - State driver’s license
 - Identification document issued by a state, local government, or tribe
 - If an individual does not have any of the previous documents, foreign passport

Beneficial Owners

A beneficial owner is any individual who, directly or indirectly:

- Exercises substantial control over a reporting company; OR
- Owns or controls at least 25 percent of the ownership interests of a reporting company

An individual might be a beneficial owner through substantial control, ownership interests, or both.

Substantial Control

Reporting companies are required to identify all individuals who exercise substantial control over the company. An individual exercises substantial control over a reporting company if the individual meets any of four general criteria:

- The individual is a senior officer (including CEO, president, chief financial officer, general counsel, chief executive officer, or chief operating officer, or any other officers that perform similar functions;
- The individual has authority to appoint or remove certain officers or a majority of directors of the reporting company;
- The individual is an important decision-maker; OR
- The individual has any other form of substantial control over the reporting company

Ownership Interest

Reporting companies are required to identify all individuals who own or control at least 25 percent of the ownership interests of the company. Any of the following may be an ownership interest:

- Equity, stock, or voting rights;
- A capital or profit interest;
- Convertible instruments;
- Options or other non-binding privileges to buy or sell any of the foregoing; and
- Any other instrument, contract, or other mechanism used to establish ownership

Exceptions to Beneficial Ownership definition

There are several exceptions to the beneficial ownership definitions:

- Minor child, if a parent or legal guardian's information is reported in lieu of the minor child's information
- The individual merely acts on behalf of an actual beneficial owner as the beneficial owner's nominee, intermediary, custodian, OR agent.
- The individual is
 - An employee
 - The individual's substantial control over, or economic benefits from, the reporting company are derived solely from the employment status of the individual as an employee; and
 - The individual is not a senior officer.
- The individual's only interest in the reporting company is a future interest through a right of inheritance, such as through a will providing a future interest in a company

- The individual is a creditor of the reporting company.⁴

Company Applicants

A reporting company is required to report its company applicants only if it is either a

- Domestic reporting company created on or after January 1, 2024; or
- Foreign reporting company first registered to do business in the United States on or after January 1, 2024.

Each reporting company that is required to report company applicants will have to identify and report to FinCEN at least one company applicant, and at most two. *All company applicants must be individuals.*

Company Applicants – Direct Filers

A Direct Filer is the individual who directly filed the document that created a domestic reporting company, or the individual who directly filed the document that first registered a foreign reporting company. This individual would have actually physically or electronically filed the document with the secretary of state or similar office.

Company Applicants – Person Who Directs or Controls the Filing Action

The individual who was primarily responsible for directing or controlling the filing of the creation or first registration document is a company applicant even if he or she did not actually file the document with the secretary of state or similar office.

FinCEN identifier

A “FinCEN identifier” is a unique identifying number that FinCEN will issue to an individual or reporting company upon request after the individual or reporting company provides certain information to FinCEN.

- An individual or reporting company is not required to obtain a FinCEN identifier.
- An individual or reporting company may only receive one FinCEN identifier.
- A company may include FinCEN identifiers in its BOI report instead of certain required information about beneficial owners or company applicants.

BOI Initial Filing Dates; Filing Amendments Due to Information Changes

Initial reporting dates: The Reporting Rule is effective on January 1, 2024. FinCEN will begin accepting BOI reports electronically through its secure filing system on this date. BOI reports will not be accepted prior to January 1, 2024.

If the company already exists as of January 1, 2024, it must file its initial BOI report by January 1, 2025. If the company is created or registered to do business in the United States after January 1, 2024, then it must file its initial BOI report within 30 days after receiving actual or public notice that its creation or registration is effective.

⁴ The term “creditor” means an individual who would meet the definition of a beneficial owner of the reporting company solely through rights or interests for the payment of a predetermined sum of money, such as a debt incurred by the reporting company, or a loan covenant or other similar right associated with such right to receive payment that is intended to secure the right to receive payment or enhance the likelihood of repayment.

Expiration of exemption: If the company previously qualified for an exemption to the reporting company definition but no longer qualifies, it is required to file a BOI report within 30 calendar days of the date on which it stops qualifying for the exemption.

Change in information provided or discovery of error in information provided: If there is any change to the required information about the company or its beneficial owners in a BOI report that it filed, or the company learns of an error in a BOI, it must file an updated BOI report no later than 30 days after the date on which the change occurred or the error was discovered.

Penalties for Non-Compliance

The willful failure to report complete or updated beneficial ownership information to FinCEN, or the willful provision of or attempt to provide false or fraudulent beneficial ownership information may result in a civil or criminal penalties, including civil penalties of up to \$500 for each day that the violation continues, or criminal penalties including imprisonment for up to two years and/or a fine of up to \$10,000. Senior officers of an entity that fails to file a required BOI report may be held accountable for that failure.

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