



## Corporate Transparency Act: FINCEN Adopts Beneficial Ownership Reporting Requirements

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On September 30, 2022, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued the final rule to implement the beneficial ownership reporting requirements of the Corporate Transparency Act (the "CTA," and such final rule, the "Final Rule").<sup>[1]</sup> The Final Rule, which becomes effective January 1, 2024, interprets the CTA broadly to address the following matters:

- Entities required to file reports (each, a "Reporting Company");
- Information required to be reported;
- Timeframe for filing reports; and
- Penalties for reporting violations.

In addition to providing further details on each of these matters, this article summarizes some of the more material differences between the Final Rule and the proposed rule FinCEN issued in December 2021.

### **BACKGROUND**

On December 8, 2021, FinCEN issued notice of Final Rulemaking on this same subject (the "Proposed Rule"),<sup>[2]</sup> and the Final Rule reflects comments received by it during the public comment period. The CTA, which was enacted into law on January 1, 2021 as part of the Anti-Money Laundering Act of 2020,<sup>[3]</sup> is designed to enhance beneficial ownership transparency in the U.S. in order to "protect the U.S. financial system from illicit use and impede malign actors from abusing legal entities, like shell companies, to conceal proceeds of corrupt and criminal acts."

Under the CTA, each "Reporting Company" is required to report certain identifying information regarding such company and its "Beneficial Owners" and "Company Applicants" (each term described

below) to FinCEN. Currently, companies do not generally need to report this information to federal or state governmental authorities, except under FinCEN's existing Customer Due Diligence Rule (the "CDD Rule"), which requires covered U.S. financial institutions to collect beneficial ownership information (BOI) from certain legal entity customers in connection with opening new accounts for those customers.

### **KEY CHANGES FROM THE PROPOSED RULE TO THE FINAL RULE**

The Final Rule includes a number of significant changes from the Proposed Rule, including with respect to the below.

The scope of who is intended to be a "Company Applicant" was narrowed. FinCEN stated in the Final Rule that it intends for a Reporting Company to limit the number of its Company Applicants to one or two individuals (depending on whether a second individual directs or controls the filing of the entity creation or registration document by the individual directly filing it)[4] In addition, a Reporting Company formed on or before January 1, 2024 does not need to report its Company Applicants[5] Finally, third party Company Applicants (like law firms or vendors who file articles of incorporation or articles of organization on behalf of a Reporting Company), are less likely to run afoul of the penalties for failing to update beneficial ownership changes because liability for failure to update when the obligation arises is limited to a person who "either causes the failure, or is a senior officer of the entity at the time of the failure." [6] Company Applicants (and others and any other individual involved in the filing) still have liability for initial reports that are inaccurate, however.

Reporting Companies formed after the effective date of the rule (January 1, 2024), have 30 days (instead of 14 days, as provided in the Proposed Rule) to report their beneficial ownership information[7] Reporting Companies that existed prior to the effective date of the Final Rule (January 1, 2024) have a grace period of one year following the effective date (i.e., through January 1, 2025) to comply with the beneficial ownership reporting requirements, and, once a Reporting Company has made its initial filing, it still has 30 days to update the filing in the case of any changes to its beneficial ownership.

The Final Rule clarifies that, where a minor was not previously reported as a Beneficial Owner because of the minor's age at the time of reporting (for example, a custodian was reported in lieu of the minor), that minor reaching the age of majority is a reportable event.[8] In addition, if a Beneficial Owner has a change in its, his or her BOI "for example, a change of name (legal name change or by marriage), a change of identifying number, or address" reflected on its, his or her identifying document, that is also a reportable event. [9]

Under the Final Rule, a Dun & Bradstreet or legal entity identifying number is no longer an acceptable identifying number for a Reporting Company. A U.S.-formed Reporting Company must obtain a taxpayer identification number (TIN). A foreign-formed Reporting Company without a TIN will be required to provide a foreign tax identification number.[10]

While the definition of "substantial control" in the Final Rule remains quite open-ended and subjective, the definition in the Proposed Rule was modestly narrowed to focus on the ability to affect a Reporting Company's decisions and to remove the concept of a "dominant minority."<sup>[11]</sup>

Also, the Final Rule specifically excludes the requirement to report individuals who exert substantial control exclusively through a company that is exempt from the beneficial ownership reporting requirements, because of the large operating company test or because it fits into one of the other 23 statutory exemptions (an "Exempt Company?"). Rather, the Reporting Company will just have to report the Exempt Company itself.<sup>[12]</sup>

Finally, the Final Rule attempts to provide some guidance on how to calculate a percentage interest for purposes of determining its Beneficial Owners where there may be more than one class of equity, or where options or partnership profits interests are outstanding. As described in further detail below, any individual who, directly or indirectly, (a) exercises substantial control over a Reporting Company or (b) owns or controls at least 25% of the ownership interests of a Reporting Company qualifies as a Beneficial Ownership of that Reporting Company. Under the Final Rule, if options or profits interests are outstanding, they are deemed to be exercised and "in the money" for purposes of determining whether the 25% ownership interest threshold has been met. If there is more than one class of equity interests outstanding, the 25% threshold is determined as a percentage of all outstanding interests, if possible, but failing that, more than 25% of any class of equity interests triggers the reporting requirement<sup>[13]</sup>

Be on the lookout for a subsequent alert from Williams Mullen that will cover key aspects of the final rule such as the entities required to file reports, exemptions, information required to be filed, definition of a "Beneficial Owner," what constitutes ownership interests and more.

This article contains general, condensed summaries of actual legal matters, regulations, and opinions for informational purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel. For more information, please visit our website at [www.williamsmullen.com](http://www.williamsmullen.com), or contact Larry Parker at 804.420.6467 or via email at [lparker@williamsmullen.com](mailto:lparker@williamsmullen.com) or Pat Tomlinson at 757.473.5305 or via email at [ptomlinson@williamsmullen.com](mailto:ptomlinson@williamsmullen.com).

[1] Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59,498 (September 30, 2022).  
<https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf>

[2] Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69,920 (Dec. 8, 2021).  
<https://www.govinfo.gov/content/pkg/FR-2021-12-08/pdf/2021-26548.pdf>

[3] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, 134 Stat. 3388 §§ 6001-6511

(2020).

[4] *Id.* at 59,536.

[5] 31 C.F.R., § 1010.380(b)(2)(iv).

[6] 31 C.F.R., § 1010.380(g)(4)(iii).

[7] 31 C.F.R., § 1010.380(a)(1)(i).

[8] 31 C.F.R., § 1010.380(a)(2)(iv).

[9] 31 C.F.R., § 1010.380(a)(1)(i).

[10] Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59,517.

[11] 31 C.F.R., § 1010.380(d).

[12] Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59,521.

[13] 31 C.F.R., § 1010.380(d)(2)(iii).

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