

# NAVIGATING THE CORPORATE TRANSPARENCY ACT AND BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS

By Ricardo A. Arce  
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## NAVIGATING THE CORPORATE TRANSPARENCY ACT AND BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS

### INTRODUCTION

The Corporate Transparency Act (“CTA”) was enacted on January 1, 2021 as part of the Anti-Money Laundering Act of 2020 in the National Defense Authorization Act for Fiscal Year 2021.<sup>1</sup> The principal mandate of the CTA is to require certain business entities to:

- 1) Report certain beneficial ownership information (“BOI”) to the US Department of the Treasury's Financial Crimes Enforcement Network (“FinCEN”) and to promptly report any subsequent change in BOI; and
- 2) disclose information about who created the entity or registered it to do business in the United States.

On September 30, 2022, FinCEN issued a final rule (87 Fed. Reg. 59,498 (Sept. 30, 2022)) (the “Final Rule”) implementing the CTA's BOI reporting requirements which take effect on **January 1, 2024** (the “Effective Date”).<sup>2</sup> The stated purpose for the BOI reporting requirements is to “help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on entities doing business in the United States.”<sup>3</sup> “For too long, it has been far too easy for criminals, Russian oligarchs, and other bad actors to fund their illicit activity by hiding and moving money through anonymous shell companies and other corporate structures right here in the United States,” said Acting FinCEN Director Himamauli Das.<sup>4</sup> “This final rule is a significant step forward in our efforts to support national security, intelligence, and law enforcement agencies in their work to curb illicit activities. The final rule will also play an important role in protecting American taxpayers and businesses who play by the rules, but are repeatedly hurt by criminals that use companies for illegal reasons.”<sup>5</sup>

### WHICH ENTITIES MUST REPORT

All domestic and foreign entities that are within the meaning of the defined terms “reporting company” and do not otherwise fall into an enumerated exception must report. The reporting companies include:

**Domestic reporting companies:** Corporations, limited liability companies, limited partnerships or other entities created by the filing of a document with a secretary of state or similar office under the law of any State in the U.S., the District of Columbia, or any other commonwealth, territory, or possession of the U.S., or an Indian tribe. Sole-proprietorships which are not otherwise LLCs, general partnerships, certain types of trusts, do not fall under the scope of the definition because such entity classifications are not created by the filing of any document with a secretary of state or similar office.

**Foreign reporting companies.** Non-US entities that are 1) corporations, LLCs, or other entities; 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.

## Exempt Entities:

- *Large operating companies.* Any entity that has 1) more than more than 20 full-time employees in the U.S. A full-time employee is generally anyone employed an average of at least 30 service hours per week or 130 service hours per month, with adaptations for non-hourly employees (26 C.F.R. § 54.4980H-1(a)). The exempt entity must be the employer and it may not included employees of affiliated or consolidated entities (see 31 C.F.R. § 1010.380(c)(2)(xxi)(A); 26 C.F.R. § 54.4980H-1(a)); 2) an operating presence at a physical office within the US which may be owned or leased but may not be shared other than with the reporting company's affiliates (as defined at 31 C.F.R. § 1010.380(f)(6)); and 3) reported more than \$5 million in gross receipts or sales (net of returns and allowances) on its filed prior year federal tax return, excluding gross receipts or sales from sources outside the US, as determined under federal income tax principles. An entity that is part of an affiliated group of corporations (within the meaning of 26 U.S.C. § 1504) that filed a consolidated return must use the amount reported on the consolidated return for the group. See 31 C.F.R. § 1010.380(c)(2)(xxi).
- *Public companies.* This exemption applies to any issuer of securities that is: 1) an issuer of a class of securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (Exchange Act) (15 U.S.C. 78l); or 2) required to file supplementary and periodic information under Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)).<sup>6</sup>
- *Inactive entities.* This exemption applies to any entity that: 1) was in existence on or before January 1, 2020; 2) is not engaged in active business; 3) is not wholly or partially owned, directly or indirectly, by a non-US person; 4) has not experienced a change in ownership in the prior 12-month period; 5) has not sent or received any funds in an amount greater than \$1,000 (including all funds sent to or received from any source through a financial account or accounts in which the entity or an affiliate of the entity maintains an interest) in the prior 12-month period; and 6) does not otherwise hold any kind or type of assets, whether inside or outside the US, including an ownership interest in any corporation, LLC, or other similar entity.<sup>7</sup>
- *Investment companies or investment advisers.* This exemption applies to any entity that is: 1) an investment company (as defined in Section 3 of the Investment Company Act of 1940, as amended (Investment Company Act) (15 U.S.C. § 80a-3)) or an investment adviser (as defined in Section 202 of the Investment Advisers Act of 1940 (Advisers Act) (15 U.S.C. § 80b-2)); and 2) registered with the Securities and Exchange Commission (SEC) under the Investment Company Act or the Advisers Act.<sup>8</sup>
- *Venture capital fund advisers.* This exemption applies to any investment adviser that: 1) is described in Section 203(l) of the Advisers Act (15 U.S.C. § 80b-3(l)); and 2) has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the SEC.<sup>9</sup>
- *Pooled investment vehicles.* This exemption applies to certain pooled investment vehicles (as defined at 31 C.F.R. § 1010.380(f)(7)) that are operated or advised by certain other exempt entities (generally by a bank, credit union, broker or dealer in securities, federally registered investment adviser, or a venture capital fund adviser).<sup>10</sup> A foreign legal entity formed under the laws of a foreign country and registered to do business in a state or tribal jurisdiction that would be a reporting company but for the pooled investment vehicle exemption described above is only required to report to FinCEN the BOI of an individual who exercises substantial control over the entity (see Beneficial Owners and Company Applicants). If more than one individual exercises

substantial control over the foreign pooled investment vehicle entity, it must report information regarding the individual holding the greatest authority over the strategic management of the entity.<sup>11</sup>

- *Insurance companies and insurance producers.* These exemptions cover: 1) insurance companies as defined in Section 2 of the Investment Company Act (15 U.S.C. § 80a-2) (31 C.F.R. § 1010.380(c)(2)(xii)); and 2) state-licensed insurance producers that have an operating presence at a physical office in the U.S.<sup>12</sup>
- *Certain other highly regulated entities.* These other exempted entities include certain of the following: 1) banks (as defined in Section 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1813), Section 2(a) of the Investment Company Act (15 U.S.C. § 80a-2(a)), or Section 202(a) of the Advisers Act (15 U.S.C. § 80b-2(a))) (31 C.F.R. § 1010.380(c)(2)(iii)); 2) federal and state credit unions, as those terms are defined in Section 101 of the Federal Credit Union Act (12 U.S.C. § 1752) (31 C.F.R. § 1010.380(c)(2)(iv)); 3) bank holding companies (as defined in Section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. § 1841)) or any savings and loan holding company (as defined in Section 10(a) of the Home Owners' Loan Act (12 U.S.C. § 1467a(a))) (31 C.F.R. § 1010.380(c)(2)(v)); 3) money transmitting businesses registered with FinCEN under 31 U.S.C. § 5330 and money services businesses registered with FinCEN under 31 C.F.R. § 1022.380 (31 C.F.R. § 1010.380(c)(2)(vi)); 4) securities brokers or dealers (as those terms are defined in Section 3 of the Exchange Act (15 U.S.C. § 78c)) that are registered under Section 15 of the Exchange Act (15 U.S.C. § 78o) (31 C.F.R. § 1010.380(c)(2)(vii)); 5) exchange or clearing agencies (as those terms are defined in Section 3 of the Exchange Act (15 U.S.C. § 78o)) that are registered under Section 6 or 17A of the Exchange Act (15 U.S.C. §§ 78f, 78q-1) (31 C.F.R. § 1010.380(c)(2)(viii)); 6) other entities not described above that are registered with the SEC under the Exchange Act (31 C.F.R. § 1010.380(c)(2)(ix)); 7) certain entities that are registered under the Commodity Exchange Act (31 C.F.R. § 1010.380(c)(2)(xiv)); 8) regulated public utilities (as defined in 26 U.S.C. § 7701(a)(33)(A)) that provide telecommunications services, electrical power, natural gas, or water and sewer services within the US (31 C.F.R. § 1010.380(c)(2)(xvi)); and 9) financial market utilities designated by the Financial Stability Oversight Council under Section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. § 5463) (31 C.F.R. § 1010.380(c)(2)(xvii)).
- *Public accounting firms.* This exemption applies to public accounting firms registered under Section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7212) (31 C.F.R. § 1010.380(c)(2)(xv)).
- *Tax-exempt entities.* This exemption applies to an entity that is any one of the following: 1) an organization described in Section 501(c) of the Internal Revenue Code (IRC) (determined without regard to IRC Section 508(a)) and exempt from tax under IRC Section 501(a); 2) an organization described in IRC Section 501(c) that was exempt from tax under IRC Section 501(a), but that lost its tax-exempt status less than 180 days ago. This exemption applies during the 180-day period beginning on the date of loss of tax-exempt status; 3) a political organization (as defined in IRC Section 527(e)(1)) that is exempt from tax under IRC Section 527(a); or 4) a trust described in paragraph (1) or (2) of IRC Section 4947(a).<sup>13</sup>
- *Entities assisting tax-exempt entities.* This exemption applies to any entity that: 1) operates exclusively to provide financial assistance to or hold governance rights over any of the tax-exempt entities (described above) that are excluded entities; 2) is a US person; 3) is beneficially owned or controlled exclusively by one or more US persons that are US citizens or lawfully admitted for

permanent residence; and 4) derives at least a majority of its funding or revenue from one or more U.S. persons that are US citizens or lawfully admitted for permanent residence.<sup>14</sup>

- *Governmental authorities.* This exemption applies to an entity: 1) established under the laws of the US, an Indian tribe, a state, or a political subdivision of a state, or under an interstate compact between two or more states; and 2) that exercises governmental authority on behalf of the US or any such Indian tribe, state, or political subdivision.<sup>15</sup>
- *Subsidiaries of certain exempt entities.* Entities the ownership interests of which are controlled or wholly owned, directly or indirectly, by one or more exempt entities described above (other than by a pooled investment vehicle, a money transmitting or money services business, an entity that operates exclusively to provide financial assistance to or hold governance rights over tax-exempt entities, or an inactive entity) are also exempt.<sup>16</sup>

An exempt entity that ceases to qualify for an exemption must file a BOI report within 30 days after the date that it no longer meets the criteria for any exemption.<sup>17</sup>

#### **WHEN THE REPORT MUST BE FILED**

*Initial Report.* The CTA imposes different filing deadlines depending on when the domestic or foreign reporting company came into existence, or was registered to do business in a state or tribal jurisdiction.

- Any **domestic reporting company** created on or after **January 1, 2024, and before January 1, 2025**, shall file a report **within 90 calendar days** of the earlier of the date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the domestic reporting company has been created.<sup>18</sup>
- Any domestic reporting company created **on or after January 1, 2025**, shall file a report within **30 calendar days** of the earlier of the date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the domestic reporting company has been created.<sup>19</sup>
- Any entity that becomes a **foreign reporting company on or after January 1, 2024, and before January 1, 2025**, shall file a report **within 90 calendar days** of the earlier of the date on which it receives actual notice that it has been registered to do business or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business.<sup>20</sup>
- Any entity that becomes a **foreign reporting company on or after January 1, 2025**, shall file a report **within 30 calendar days** of the earlier of the date on which it receives actual notice that it has been registered to do business or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business.<sup>21</sup>
- Any **domestic reporting company** created before **January 1, 2024** and any entity that became a **foreign reporting company** before **January 1, 2024** shall file a report not later than **January 1, 2025**.<sup>22</sup>
- Any entity that no longer meets the criteria for any exemption under the definition of “reporting company” shall file a report within 30 calendar days after the date that it no longer meets the criteria for any exemption.<sup>23</sup>

Reports are to be submitted electronically through the secure filing system that will be available through FinCEN's website but not before the Effective Date.

### **THE INFORMATION THAT MUST BE DISCLOSED TO FINCEN**

The CTA requires that a reporting company's BOI report identify the reporting company's:

- Beneficial owners;<sup>24</sup>
- In the case of a reporting company that is created or becomes a foreign reporting company on or after the Effective Date, company applicant or applicants.<sup>25</sup>

### **Beneficial Owners**

The term "beneficial owner" means, with respect to a reporting company, any individual who, directly or indirectly, either exercises *substantial control* over such reporting company or owns or controls *at least 25 percent of the ownership interests* of such reporting company.<sup>26</sup>

*Substantial Control.* Under the CTA, an individual exercises "substantial control" over a reporting company if the individual:

- Serves as a senior officer of the reporting company. The term senior officer means:
  - the president;
  - the chief financial officer;
  - the general counsel;
  - the chief executive officer;
  - the chief operating officer; or
  - any other officer, regardless of title, performing a similar function.<sup>27</sup>
- Has authority over the appointment or removal of:
  - any senior officer; or
  - a majority of the reporting company's board of directors (or similar body).
- Directs, determines, or has substantial influence over important decisions made by the reporting company, such as:
  - The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
  - The reorganization, dissolution, or merger of the reporting company;
  - Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;
  - The selection or termination of business lines or ventures, or geographic focus, of the reporting company;
  - Compensation schemes and incentive programs for senior officers;
  - The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts; or
  - Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures.
- Has any other form of substantial control over the reporting company.<sup>28</sup>

An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through:

- Board representation;
- Ownership or control of a majority of the voting power or voting rights of the reporting company;
- Rights associated with any financing arrangement or interest in a company;
- Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
- Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- any other contract, arrangement, understanding, relationship, or otherwise.<sup>29</sup>

A reporting company must identify any individuals who, directly or indirectly, have substantial control over the reporting company in its BOI report.<sup>30</sup> While all persons with substantial control must be reported, FinCEN indicated in the Final Rule that it “[e]xpects that a reporting company will always identify at least one beneficial owner” under the “substantial control” component...<sup>31</sup>

*25% Ownership Interest in Reporting Company.* The term “ownership interest” means:

- Any equity, stock, or similar instrument; preorganization certificate or subscription; or transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights;
- Any capital or profit interest in an entity;
- Any instrument convertible, with or without consideration, into any share or instrument described above, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described above, regardless of whether characterized as debt<sup>32</sup>;
- Any put, call, straddle, or other option or privilege of buying or selling any of the items described above, without being bound to do so, except to the extent that such option or privilege is created and held by a third party or third parties without the knowledge or involvement of the reporting company; or
- Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.<sup>33</sup>

*Ownership or Control of Ownership Interest.* An individual may directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding, relationship, or otherwise, including:

- Joint ownership with one or more other persons of an undivided interest in such ownership interest;
- Through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual;
- With regard to a trust or similar arrangement that holds such ownership interest:

- As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;
- As a beneficiary who:
  - Is the sole permissible recipient of income and principal from the trust; or
  - Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or
- As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or
- Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company.<sup>34</sup>

*Calculation of Total Ownership Interests.* In determining whether an individual owns or controls at least 25 percent of the ownership interests of a reporting company, the total ownership interests that an individual owns or controls, directly or indirectly, shall be calculated as a percentage of the total outstanding ownership interests of the reporting company as follows:

- Ownership interests of the individual shall be calculated at the present time, and any options or similar interests of the individual shall be treated as exercised;
- For reporting companies that issue capital or profit interests (including entities treated as partnerships for federal income tax purposes), the individual's ownership interests are the individual's capital and profit interests in the entity, calculated as a percentage of the total outstanding capital and profit interests of the entity;
- For corporations, entities treated as corporations for federal income tax purposes, and other reporting companies that issue shares of stock, the applicable percentage shall be the greater of:
  - the total combined voting power of all classes of ownership interests of the individual as a percentage of total outstanding voting power of all classes of ownership interests entitled to vote, or
  - the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests; and
- If the facts and circumstances do not permit reporting companies that either issue capital or profits interests, or corporations or other reporting companies that issue shares of stock, as provided above, to be performed with reasonable certainty, any individual who owns or controls 25 percent or more of any class or type of ownership interest of a reporting company shall be deemed to own or control 25 percent or more of the ownership interests of the reporting company.<sup>35</sup>

In September 2023, FinCen issued a Small Entity Compliance Guide to help small businesses comply with the requirements of CTA, containing various examples of how to calculate ownership interests, including is cases whereby ownership is held through one or more holding companies.<sup>36</sup>

*Exempt Individuals.* The CTA exempts five categories<sup>37</sup> of individuals from the definition of beneficial owner, to include the following:

- A minor child, as defined in the State or Indian tribe in which a domestic reporting company is created or a foreign reporting company is first registered. However, if the reporting company

uses this exemption for a minor, the reporting company must report the required personal information of a parent or legal guardian of the minor and indicate on its BOI report that the information relates to the parent or guardian.<sup>38</sup> A minor child must report once the child attains the age of majority, provided the child meets the requires criteria to be a beneficial owner.<sup>39</sup>

- An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual. However, the reporting company must still report required personal information of the individual on behalf of whom the nominee, intermediate, custodian, or agent is acting.
- an individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person;<sup>40</sup>
- an individual whose only interest in a corporation, limited liability company, or other similar entity is through a right of inheritance (once the individual inherits the interest, this exemption no longer applies); or
- a creditor of a corporation, limited liability company, or other similar entity, unless the creditor also meets the criteria for a beneficial owner. A creditor is an individual who solely has 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.<sup>41</sup>

### **Company Applicants**

The term “applicant” means any individual who--

- files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or
- registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe.<sup>42</sup>

This term also includes any individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document, whether for a domestic or a foreign reporting company.<sup>43</sup>

A reporting company that was created or registered before the Effective Date does not need to report information regarding its company applicants nor does it need to report any change to required information regarding its company applicants, assuming that the information regarding the company applicants was correct when first reported.<sup>44</sup>

In the Final Report, FinCEN noted certain circumstances and examples specifically involving law firms, companies that provide business formation services, State employees and self-filing. Specifically with respect to law firms, FinCEN utilized an example where there is an attorney primarily responsible for overseeing the preparation and filing of incorporation documents and a paralegal who directly files them with a state office to create the reporting company. In this example, this reporting company would report two company applicants—the attorney and the paralegal—but additional individuals who may be indirectly involved in the filing would not need to be reported.<sup>45</sup> Equally for companies that provide business formation services, the individuals who supervise and direct the filing of formation documents

are company applicants. However, FinCEN does provide that where business formation services provide software, online tools, or generally applicable written guidance, their employees are not company applicants.

In other cases, a person who controls a reporting company may create the reporting company and file its formation documents without the assistance of a business formation service, law firm, or similar service. For example, an individual may prepare and self-file documents to create the individual's own reporting company. In this case, this reporting company would report one company applicant—the individual—who would also be reported as a beneficial owner. In another example, without the assistance of a business formation service, an individual may prepare formation documents for the individual's own reporting company, and a family member, agent, or other individual may directly file the documents with the state office. In this example, this reporting company would report two company applicants—the individual who prepares the documents and the individual who directly files them.

State filing office employees who process formation documents in the ordinary course of their state employment are not the filers of the documents they process, and therefore do not need to be reported.

### **Information to Be Reported**

The Reporting company must disclose information pertaining about its beneficial owners and company applicants and itself:

*For Beneficial Owners and Company Applicants.* For every individual who is a beneficial owner of such reporting company, and every individual who is a company applicant with respect to such reporting company:

- The full legal name of the individual;
- The date of birth of the individual;
- A complete current address consisting of:
  - In the case of a company applicant who forms or registers an entity in the course of such company applicant's business, the street address of such business; or
  - In any other case, the individual's residential street address;
- A unique identifying number and the issuing jurisdiction from one of the following documents:
  - A non-expired passport issued to the individual by the United States government;
  - A non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual;
  - A non-expired driver's license issued to the individual by a State; or
  - A non-expired passport issued by a foreign government to the individual, if the individual does not possess any of the documents above; and
- An image of the document from which the unique identifying number described above was obtained.<sup>46</sup>

If one or more exempt entities has or will have a direct or indirect ownership interest in a reporting company and an individual is a beneficial owner of the reporting company exclusively by virtue of the individual's ownership interest in such exempt entities, the report may include the names of the exempt entities in lieu of the information otherwise required with respect to such beneficial owner.<sup>47</sup> However, if the beneficial owner holds ownership interests in the reporting company through both exempt and non-

exempt entities or if the beneficial owner has substantial control over the reporting company, the beneficial owner must disclose.

*FinCEN Identifier.*

- An individual may obtain a FinCEN identifier by submitting to FinCEN an application containing the information about the individual beneficial owner.
- A reporting company may obtain a FinCEN identifier by submitting to FinCEN an application at or after the time that the entity submits an initial report.

Each FinCEN identifier shall be specific to each such individual or reporting company, and each such individual or reporting company (including any successor reporting company) may obtain only one FinCEN identifier.

*Use of the FinCEN identifier.*

If an individual has obtained a FinCEN identifier and provided such FinCEN identifier to a reporting company, the reporting company may include such FinCEN identifier in its report in lieu of the information otherwise required with respect to such individual. A reporting company may report another entity's FinCEN identifier and full legal name in lieu of the information otherwise required with respect to the beneficial owners of the reporting company only if:

- The other entity has obtained a FinCEN identifier and provided that FinCEN identifier to the reporting company;
- An individual is or may be a beneficial owner of the reporting company by virtue of an interest in the reporting company that the individual holds through an ownership interest in the other entity; and
- The beneficial owners of the other entity and of the reporting company are the same individuals.<sup>48</sup>

Use of a FinCEN Identifier may be useful for individuals who would rather disclose their personal information directly to FinCEN rather than providing it to the reporting company or is a beneficial owner or company applicant of multiple reporting companies.

*For Reporting Company.* The initial report of a reporting company shall include the following information:

- The full legal name of the reporting company;
- Any trade name or “doing business as” name of the reporting company;
- A complete current address consisting of:
  - In the case of a reporting company with a principal place of business in the United States, the street address of such principal place of business; and
  - In all other cases, the street address of the primary location in the United States where the reporting company conducts business;
- The State, Tribal, or foreign jurisdiction of formation of the reporting company;
- For a foreign reporting company, the State or Tribal jurisdiction where such company first registers; and
- The Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the reporting company, or where a foreign reporting company

has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.<sup>49</sup>

#### *Corrections and Updates.*

Any individual that has obtained a FinCEN identifier shall update or correct any information previously submitted to FinCEN in an application for such FinCEN identifier. The individual shall file an updated application reflecting such change within 30 calendar days after the date on which such change occurs. If any such application was inaccurate when filed and remains inaccurate, the individual shall file a corrected application correcting all inaccuracies within 30 calendar days after the date on which the individual becomes aware or has reason to know of the inaccuracy. If filed within 90 calendar days after the date on which the inaccurate application was submitted, the corrected application shall be deemed within a safe harbor provision of the Final Rule avoiding penalties.<sup>50</sup> Any reporting company that has obtained a FinCEN identifier shall file an updated or corrected report to update or correct any information previously submitted to FinCEN. Such updated or corrected report shall be filed at the same time and in the same manner as updated or corrected reports are filed.<sup>51</sup>

Any change to information regarding the reporting company or its beneficial owners that was accurate when reported must be updated, such as:

- If there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner, the reporting company shall file an updated report within 30 calendar days after the date on which such change occurs.
- If a reporting company meets the criteria for any exemption under the definition of “reporting company” subsequent to the filing of an initial report.
- If an individual is a beneficial owner of a reporting company by virtue of property interests or other rights subject to transfer upon death, and such individual dies. The updated report shall be filed within 30 days after the deceased beneficial owner's estate is settled either through intestacy or a testamentary disposition. The updated report must, to the extent applicable, identify any new beneficial owners.
- If a reporting company has reported information with respect to a parent or legal guardian of a minor child and such minor child attains the age of majority.
- If the name, date of birth, address, or unique identifying number with respect to an image of an identifying document reported to FinCEN has changed.<sup>52</sup>

In the Final Rule, FinCEN has provided that it does not expect a reporting company to file an updated report upon its termination or dissolution, but does expect a reporting company to report changes to any required BOI report information. Because of this reporting obligation, reporting companies should implement compliance processes to monitor and report any changes in their reported information in a timely manner to safeguard against noncompliance and the potential imposition of penalties and fines.

#### **Scope of Disclosure of Reported Information by FinCEN**

FinCEN may disclose beneficial ownership information reported pursuant to this section only upon receipt of--

- a request, through appropriate protocols--
  - from a Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity; or
  - from a State, local, or Tribal law enforcement agency, if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation;
- a request from a Federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation), under an international treaty, agreement, convention, or official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries when no treaty, agreement, or convention is available—
  - issued in response to a request for assistance in an investigation or prosecution by such foreign country; and
  - that—
    - requires compliance with the disclosure and use provisions of the treaty, agreement, or convention, publicly disclosing any beneficial ownership information received; or
    - limits the use of the information for any purpose other than the authorized investigation or national security or intelligence activity;
    - a request made by a financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law; or
    - a request made by a Federal functional regulator or other appropriate regulatory agency consistent with the requirements of above.<sup>53</sup>

## **PENALTIES FOR VIOLATION; LIMITED SAFE HARBOR**

### **Criminal and Civil Penalties**

Any person that willfully provides, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document or willfully fails to report complete or updated beneficial ownership information to FinCEN, shall be liable to the United States for a civil penalty of:

- not more than \$500 for each day that the violation continues or has not been remedied; and
- may be fined not more than \$10,000, imprisoned for not more than 2 years, or both.<sup>54</sup>

Any person that knowingly discloses or knowingly uses the beneficial ownership information obtained by the person through a report submitted to FinCEN or a disclosure made by FinCEN under appropriate protocols, shall be liable to the United States for a civil penalty of:

- not more than \$500 for each day that the violation continues or has not been remedied; and
- shall be fined not more than \$250,000, or imprisoned for not more than 5 years, or both; or
  - while violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period, shall be fined not more than \$500,000, imprisoned for not more than 10 years, or both.<sup>55</sup>

Penalties may also apply to reporting companies, individuals such as senior officers, any other entities who cause a reporting company not to report.<sup>56</sup>

### Limited Safe Harbor

The CTA provides a penalties safe harbor if a reporting company that has reason to believe that a submitted BOI report contains inaccurate information files a corrected report within 30 days after becoming aware or having reason to know of the inaccuracy. However, this safe harbor does not extend to inaccuracies that:

- Are corrected more than 90 days after the filing of an inaccurate BOI report, even if a reporting company files a correction promptly after becoming aware of an inaccuracy.<sup>57</sup>
- Were made for the purpose of evading the reporting requirements.
- Were known to the person submitting the report at the time it was submitted.<sup>58</sup>

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<sup>1</sup> 31 U.S.C. § 5336

<sup>2</sup> Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg 59,498-01, September 30, 2022.

<sup>3</sup> Id.

<sup>4</sup> Press Release, FinCEN Issues Final Rule for Beneficial Ownership Reporting to Support Law Enforcement Efforts, Counter Illicit Finance, and Increase Transparency (Sept. 29, 2022). Available at: <https://www.fincen.gov/news/news-releases/fincen-issues-final-rule-beneficial-ownership-reporting-support-law-enforcement>.

<sup>5</sup> Id.

<sup>6</sup> 31 C.F.R. § 1010.380(c)(2)(i)

<sup>7</sup> 31 C.F.R. § 1010.380(c)(2)(xxiii)

<sup>8</sup> 31 C.F.R. § 1010.380(c)(2)(x)

<sup>9</sup> 31 C.F.R. § 1010.380(c)(2)(xi)

<sup>10</sup> 31 C.F.R. § 1010.380(c)(2)(xviii)

<sup>11</sup> 31 U.S.C. § 5336(b)(2)(C); 31 C.F.R. § 1010.380(b)(2)(iii)

<sup>12</sup> 31 C.F.R. § 1010.380(c)(2)(xiii)

<sup>13</sup> 31 C.F.R. § 1010.380(c)(2)(xix)

<sup>14</sup> 31 C.F.R. § 1010.380(c)(2)(xx)

<sup>15</sup> 31 C.F.R. § 1010.380(c)(2)(ii)

<sup>16</sup> 31 C.F.R. § 1010.380(c)(2)(xxii)

<sup>17</sup> 31 C.F.R. § 1010.380(a)(1)(iv)

<sup>18</sup> 31 C.F.R. § 1010.380(a)(1)(i)(A)

<sup>19</sup> 31 C.F.R. § 1010.380(a)(1)(i)(B)

<sup>20</sup> 31 C.F.R. § 1010.380(a)(1)(ii)(A)

<sup>21</sup> 31 C.F.R. § 1010.380(a)(1)(ii)(B)

<sup>22</sup> 31 C.F.R. § 1010.380(a)(1)(iii)

<sup>23</sup> 31 C.F.R. § 1010.380(a)(1)(iv)

<sup>24</sup> 31 U.S.C. § 5336(b)(2)(A), which requires (i) full legal name; (ii) date of birth; (iii) current, as of the date on which the report is delivered, residential or business street address; and (iv)(I) unique identifying number from an acceptable identification document; or (II) FinCEN identifier in accordance with requirements in 31 U.S.C. § 5336(b)(3).

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<sup>25</sup> 31 C.F.R. § 1010.380(b)(1)(ii); 31 C.F.R. § 1010.380(b)(2)(iv)

<sup>26</sup> 31 C.F.R. § 1010.380

<sup>27</sup> 31 C.F.R. § 1010.380(f)(8)

<sup>28</sup> 31 C.F.R. § 1010.380(d)(1)(i)

<sup>29</sup> 31 C.F.R. § 1010.380(d)(1)(ii)

<sup>30</sup> 31 C.F.R. § 1010.380(d)

<sup>31</sup> See n. 2. supra.

<sup>32</sup> “Debt instruments would be included if they enable the holder to exercise the same rights as one of the specified types of equity or other interests, including if they enable the holder to convert the instrument into one of the specified types of equity or other interests.” 87 Fed. Reg. 59498-01, n. 2, supra.

<sup>33</sup> 31 C.F.R. § 1010.380(d)(2)(i)

<sup>34</sup> 31 C.F.R. § 1010.380(d)(2)(ii)(C)

<sup>35</sup> 31 C.F.R. § 1010.380(d)(2)(iii)

<sup>36</sup> “Individual B indirectly owns 35 percent of the reporting company’s stock through Company Y, which owns 50 percent of the reporting company’s stock. (Individual B owns 70 percent of Company Y’s stock (50% × 70% = 35%). Individual B does not exercise substantial control. Individual B is a beneficial owner by owning or controlling 25 percent or more of the reporting company’s ownership interests.” Beneficial Ownership Information Reporting Requirement, Small Entity Compliance Guide, September 2023 - Version 1.0, available at:

[https://www.fincen.gov/sites/default/files/shared/BOI\\_Small\\_Compliance\\_Guide\\_FINAL\\_Sept\\_508C.pdf](https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide_FINAL_Sept_508C.pdf).

<sup>37</sup> 31 U.S.C. § 5336(a)(3)(B); 31 C.F.R. § 1010.380(d)(3)

<sup>38</sup> 31 C.F.R. § 1010.380(b)(2)(ii), 31 C.F.R. § 1010.380(d)(3)(i)

<sup>39</sup> 31 C.F.R. § 1010.380(a)(2)(iv)

<sup>40</sup> “The individual is an employee of the reporting company, when applying the meaning of “employee” provided in 26 CFR 54.4980H-1(a)(15). In general, the term employee means that an individual, not a “senior officer,” that is subject to the will and control of the employer in what and how to do work, and that the employer may discharge the individual from work. 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. The individual is not a senior officer of the reporting company. The term “senior officer” means any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, or chief operating officer, or any other officer, regardless of official title, who performs a similar function.’ See FinCEN’s Small Entity Compliance Guide, n. 26, supra, p. 30.

<sup>41</sup> 31 C.F.R. § 1010.380(d)(3)(v).

<sup>42</sup> 31 U.S.C. § 5336(a)(2)

<sup>43</sup> 31 C.F.R. § 1010.380(e)

<sup>44</sup> 31 C.F.R. § 1010.380(b)(2)(iv); 31 C.F.R. § 1010.380(b)(3)(i)

<sup>45</sup> Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498-01, n. 2., supra.

<sup>46</sup> 31 C.F.R. § 1010.380(b)(1)(ii)

<sup>47</sup> 31 C.F.R. § 1010.380(b)(2)(i)

<sup>48</sup> 31 C.F.R. § 1010.380(b)(4)(ii)

<sup>49</sup> 31 C.F.R. § 1010.380(b)(1)(i)

<sup>50</sup> 31 U.S.C. § 5336(h)(1)(3)(C)(i)(I)(bb) (“[a] person shall not be subject to civil or criminal penalty under subparagraph (A) if the person--(aa) has reason to believe that any report submitted by the person in accordance with subsection (b) contains inaccurate information; and (bb) in accordance with regulations issued by the Secretary, voluntarily and promptly, and in no case later than 90 days after the date on which the person submitted the report, submits a report containing corrected information.”)

<sup>51</sup> 31 C.F.R. § 1010.380(b)(4)(iii)

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<sup>52</sup> 31 C.F.R. § 1010.380(a)(2)

<sup>53</sup> 31 U.S.C.A. § 5336 (c)(2)(B)

<sup>54</sup> 31 U.S.C.A. § 5336(h)(1) and (3)

<sup>55</sup> 31 U.S.C.A. § 5336(h)(2) and (3)

<sup>56</sup> 31 C.F.R. § 1010.380(g)

<sup>57</sup> 31 C.F.R. § 1010.380(a)(3)

<sup>58</sup> 31 U.S.C. § 5336(h)(3)(C)(i)