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Businesses and Rentals Existing on Jan. 1 Trigger FinCEN Filings

Do you use an LLC to own a rental property or operate a business?

If so, you likely face the new filing requirement by the Department of the Treasury's financial intelligence unit, Financial Crimes Enforcement Network (FinCEN), including big penalties and possible prison time for failure to file. More on this later.

Here's the broader question posed by the new law: Are you the owner (or one of the owners) of a corporation, limited liability company, limited partnership, or other business entity? If so, you need to get ready for the coming of the Corporate Transparency Act (CTA).¹

After years of delay, the CTA is scheduled to go into effect for small businesses that exist on January 1, 2024. Reporting for such businesses must be completed before January 1, 2025.²

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For what's required for new business entities that don't exist today but that will be formed during 2024, see [Beware: New 2024 Businesses and Rentals Trigger FinCEN Filings](#).

Businesses that have to report and that are in existence on January 1, 2024, must file, on or before December 31, 2024, a beneficial owner information (BOI) report with FinCEN.

Penalties for Non-Compliance

To make sure you are paying attention, the government has put in place severe penalties for non-compliance:³

- Civil penalties of up to \$500 for each day that a violation continues, capped at \$10,000
- Potential criminal penalties, including imprisonment for up to two years for any person who willfully (a) provides, or attempts to provide, false or fraudulent beneficial ownership information, or (b) fails to report complete or updated beneficial ownership information to FinCEN

Automatic forgiveness. The government gives you 90 calendar days to correct inaccurate or incomplete information in your BOI report. If you get this fixed in that 90-day calendar period, you escape civil and criminal liability.⁴

How Many Must File?

How many existing businesses (and rental property owners) will be affected by this new federal filing requirement? About 32 million!

What's the Corporate Transparency Act?

Congress enacted the Corporate Transparency Act in 2021 to help prevent the use of anonymous shell companies for money laundering, tax evasion, and other illegal purposes. Currently, most states allow corporations, LLCs, and other business entities to be established without revealing the identities of the true owners.

The CTA puts an end to those hidden identities.

The CTA requires businesses to file a BOI report with FinCEN, listing the names and contact information of the human beings who actually own or control the company. This information will be placed in a FinCEN database for use by federal, state, and foreign law enforcement; the IRS; national security agencies; and financial institutions (in order to meet their due diligence requirements, but only with the consent of the company

involved).

This database will not be available to the public. For example, private creditors can't access it to collect debts against the owners of LLCs and corporations. And it will contain no financial information.

Is Your Business or Rental Property Subject to the CTA?

Many businesses are exempt from the CTA.

The CTA primarily applies to smaller businesses that are not already heavily regulated by the government.

The basic rule is that the CTA applies to businesses that are formed by filing a document such as articles of incorporation or organization with a state Secretary of State office or similar official.⁵ This includes

- limited liability companies (LLCs),
- corporations,
- limited partnerships (in most states), and
- limited liability partnerships.

The CTA does not apply to sole proprietors because no document need be filed to legally establish a sole proprietorship. You simply start a business you own yourself.

But the CTA does apply to single-member LLCs even though they are taxed as sole proprietors (“disregarded entities”). The reason: if you form a single-member LLC, you file a document (usually called “articles of organization”) with your state’s Secretary of State.

The CTA also does not apply to general partnerships except in a few states such as Delaware, where general partnerships must make a state filing to come into existence. Such a filing is optional for California general partnerships—but if one is filed, a BOI report must also be filed.

The CTA also applies to foreign corporations, LLCs, and other entities that register to do business in the U.S.⁶ The foreign business entity filing is ordinarily done by filing a document with the state Secretary of State.

Businesses Exempt from the CTA

Many types of businesses are exempt from the CTA. If your business falls within one of these categories, you can forget about the CTA.

Larger businesses. The broadest exemption is for “large operating companies.” These are businesses with⁷

- more than 20 full-time employees (i.e., those who work more than 30 hours per week),
- \$5 million in domestic gross receipts or sales on their prior year tax return, and
- a physical presence in the U.S.

Inactive businesses. You don’t need to file a BOI report for a business entity you formed before 2020 that is now inactive. An inactive business is defined as one that⁸

- was in existence on or before January 1, 2020;
- is not engaged in active business;
- is not owned by a foreign person, whether directly or indirectly, wholly or partially;
- has not experienced any change in ownership in the prior 12 months;
- has not sent or received more than \$1,000, either directly or through any financial account, in the preceding 12 months; and
- does not otherwise hold any assets in the United States or abroad, including any ownership interest in any corporation, limited liability company, or similar entity.

Heavily regulated businesses. The CTA also does not apply to publicly traded corporations and other businesses that issue securities registered with the U.S. Securities and Exchange Commission, investment funds, investment advisors, registered broker-dealers, banks, registered money transmitting businesses, credit unions, insurance companies, registered public accounting firms, and venture capital fund advisors.⁹

Nor does the CTA apply to tax-exempt nonprofits, including Section 501(c)(3) corporations and Section 527 political organizations.¹⁰

Filing a BOI Report with FinCEN

If your business is subject to the CTA, it is called a “reporting company,” and it must file a beneficial owner information report with FinCEN on or before December 31, 2024.

Your BOI report must contain all the following information for each “beneficial owner”:¹¹

- Full legal name
- Date of birth
- Complete current *residential* street address
- A unique identifying number from either a current U.S. passport, state or local ID document, or driver's license or, if the individual has none of those, a foreign passport
- An image of the document from which the unique identifying number was obtained

For closely held companies, especially those owned by family members, obtaining the personal data should not be difficult.

But for companies not owned by family members, some beneficial owners might not be willing to provide their personal data to the company. In this event, they can register with FinCEN and obtain a unique identifying number (a FinCEN identifier) by submitting their personal information to FinCEN. The reporting company can report the FinCEN identifier number instead of the individual's personal information.

Your BOI report must also contain the following information about your company:¹²

- Legal name (and any trade name or dba)
- Address of principal place of business (this can't be a P.O. box or the office of the entity's registered agent)
- State or jurisdiction of formation
- IRS taxpayer identification number

You'll file the BOI report online at a new FinCEN database called BOSS (Beneficial Ownership Secure System). Filings can't be made until January 1, 2024, at the earliest. There is no filing fee.

Who Are Your Business's Beneficial Owners?

Obviously, to file a BOI report, you need to identify the beneficial owners of your business. For most businesses, this is simple. But for businesses with complex ownership or governance structures, it can get very complicated.

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The beneficial owners are the human beings who actually own and/or control a reporting company. A beneficial owner can't be a business entity such as an LLC or corporation. If a reporting company is owned by a business entity, the human owners of that entity—and not the entity itself—must be listed as the beneficial owners.

There are two different types of beneficial owners:¹³

- The humans who own or control at least 25 percent of the ownership interests in the company
- The humans who exercise “substantial control” over the company

“Ownership interests” means, for example, an LLC’s membership interests or a corporation’s shares of stock. For example, a three-member LLC in which each member has a one-third ownership interest has three beneficial owners. The same goes for a four-shareholder corporation in which each shareholder owns 25 percent of the corporate stock.

For reporting companies with complex ownership structures, identifying the 25 percent or more owners can be more difficult. All types of ownership interest must be compared with all outstanding ownership interests. For LLCs or limited partnerships, the 25 percent owners are determined by comparing an individual’s capital or profits interest against the entity’s total outstanding capital and profit interests.

But there is a default rule: any individual who owns or controls 25 percent or more of any class or type of ownership interest of a reporting company is deemed to be a beneficial owner.

Things can get even more complicated if there are individuals who don’t own a 25 percent or more interest but who exercise substantial control over the company. For example, if an LLC has a manager who owns less than 25 percent of the LLC, that person would still be a beneficial owner because the LLC’s manager exercises substantial control over the entity.

Substantial control. The definition of “substantial control” is breathtakingly broad. It includes¹⁴

- senior officers—a corporation’s president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer who performs a similar function (typically not secretary or treasurer);
- individuals who have authority over appointment or removal of the senior officers or directors of a corporation or the managers and members of an LLC;
- individuals who direct, determine, or have substantial influence over important decisions—for example, entering into new lines of business; reorganizing, dissolving, or merging the company; selling principal assets; incurring substantial debt; determining compensation for senior officers; and amending any governance documents; and

any other person who has substantial control (direct or indirect) over the company.

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For companies with complex ownership or governance structures, it may be necessary to review the governing documents to identify all the individuals with “substantial control.” These documents may include corporate bylaws, LLC operating agreements, and any other documents that grant special voting rights such as shareholder agreements. And even this may not be enough, because in the absence of a formal written document, substantial control may be exercised through informal understandings or relationships.

Exemptions. Individuals who would otherwise qualify as beneficial owners may be omitted from the BOI report if they are¹⁵

- minor children (provided their parent or legal guardian is listed);
- individuals acting as a nominee, intermediary, custodian, or agent on behalf of another individual (provided the individual for whom the agent or nominee acts is listed);
- employees other than senior officers;
- heirs of company owners; and
- creditors of a reporting company, unless the creditor is a beneficial owner based on substantial control or on ownership or control of 25 percent or more of the ownership interests.

A good rule of thumb: if you’re not sure whether a person exercises substantial control, but the person might do so, list the person in the BOI report.

Ongoing Duty to Keep Your BOI Report Up to Date

Your company’s BOI report never expires and never has to be renewed. But you do need to update it within 30 days if any of the information it contains changes.¹⁶

For example, you have to update your BOI report if your residence address changes or a new beneficial owner comes on board. If a beneficial owner dies, the change must be reported within 30 days after the estate is settled.

One advantage of having the beneficial owners obtain a FinCEN identifier and listing it on the BOI report is that the owner (not the reporting company) is then responsible for keeping the information on file with FinCEN up to date. Thus, for example, the beneficial owner (not the company) would have to report his or her own address change to FinCEN. Such changes must be reported within 30 days.

If your reporting company meets the criteria for any exemption after the filing of your initial BOI report, you must file an updated report stating that your company is no longer a reporting company.

For example, you need to file an updated report if, after you filed your initial BOI report, your company qualified as a large operating company with 20 or more employees and \$5 million in annual income.

The CTA does not require companies to file an updated BOI report after their termination or dissolution.

Amending Governing Documents

If you're the owner of a one-member LLC or a one-shareholder corporation, you and only you are personally responsible for complying with the CTA. It's not really necessary to amend your LLC or corporate governing documents to require CTA compliance.

The CTA does not legally require individual beneficial owners to supply the information needed to complete and keep up to date a reporting company's BOI report. Thus, for multi-owner businesses with many beneficial owners, it is advisable that the governing documents mandate that all the beneficial owners comply with the CTA's requirements. These may include

- LLC operating agreements,
- corporate bylaws,
- corporate shareholder agreements, or
- limited partnership agreements.

Such an agreement should include

- a representation by each shareholder, member, or partner that it will comply with the CTA or is exempt;
- a covenant (promise) by each shareholder, member, or partner, requiring continued compliance with the CTA (or evidence of exemption);
- an indemnification by each shareholder, member, or partner to the company and its other shareholders, members, or partners for its failure to comply with the CTA or for providing false information; and
- consent by each disclosing party for the company to disclose identifying information to FinCEN, as required by the CTA.

Here's an example of a very simple clause to add to an LLC operating agreement (it can also be modified for a shareholder agreement):

Corporate Transparency Act Compliance: *The members of the LLC acknowledge and agree that the LLC is subject to the reporting requirements of the Corporate Transparency Act (CTA; 31 U.S.C. Section 5336) and its implementing regulations (31 C.F.R. Section 1010.380). The members shall provide all necessary information and documentation to the LLC to enable it to comply with its reporting obligations under the CTA. The members shall promptly notify the LLC of any changes in their beneficial ownership information or any other information required to be reported under the CTA. The members shall indemnify and hold harmless the LLC and its managers, officers, and agents from any liability, loss, or damage arising from any failure by a member to comply with this provision.*

In addition, someone at the company should be appointed to be in charge of gathering the company beneficial owner information, filing the initial BOI report, and updating the BOI report when necessary.

Takeaways

Here are five takeaways from this article.

1. The Corporate Transparency Act goes into effect on January 1, 2024. Non-exempt companies formed in 2023 and earlier must file a beneficial owner information report with FinCEN—the Treasury Department's financial intelligence unit. The BOI report must be filed between January 1, 2024 and December 31, 2024.
2. Companies subject to the CTA include corporations, limited liability companies, limited partnerships, and other business entities formed by filing a document with a state Secretary of State. Foreign companies that register to do business in the U.S. must also comply.
3. Certain types of businesses are exempt from the CTA, including those with 20 or more employees and \$5 million in annual income. Specific types of heavily regulated businesses such as publicly traded companies are also exempt.
4. The BOI report must disclose the identities and contact information of all of the entity's "beneficial owners": the humans who either (a) control 25 percent of the ownership interests in the entity or (b) exercise substantial control over the entity.
5. Companies have an ongoing duty to keep the BOI report up to date. They must report any changes to FinCEN within 30 days.

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- 1 31 U.S.C. Section 5336.
- 2 31 CFR Section 1010.380(c)(2)(xxiii).
- 3 31 U.S.C. Section 5336(h).
- 4 31 CFR Section 1010.380(a)(3).
- 5 31 C.F.R. Section 1010.380(c)(1).
- 6 31 CFR Section 1010.380(c)(1)(ii).
- 7 31 CFR Section 1010.380(c)(2)(xxi).
- 8 31 CFR Section 1010.380(c)(2)(xxiii).
- 9 31 CFR Section 1010.380(c)(2).
- 10 31 CFR Section 1010.380(c)(2)(xix).
- 11 31 CFR Section 1010.380(b)(1)(ii).
- 12 31 CFR Section 1010.380(b)(1)(i).
- 13 31 CFR Section 1010.380(d).
- 14 31 CFR Section 1010.380(d)(1).
- 15 31 CFR Section 1010.380(d)(3).
- 16 31 CFR Section 1010.380(a)(2).

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