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Corporate Transparency Act

Background



Beneficial Ownership Information Reporting

- As of January 1, 2024 “**reporting companies**” must report Beneficial Ownership and Company Applicant information to the U.S. Treasury’s Financial Crimes Enforcement Network (FinCEN)
- Reporting companies is broadly defined, and includes:
 - corporations, LLCs, or other entities created by filing documents with a U.S. state or Indian Tribe
 - Limited partnerships, limited liability partnerships and other types of partnerships created by filing documents with a U.S. state or Indian tribe (but not “general” partnerships where no state filing is made)
 - Business Statutory Trusts, as well as foreign entities (formed under law of a foreign country) but registered to do business in any state.

Beneficial Owners

Beneficial Owners are individuals owning/controlling 25% of the equity of an entity OR exercising “substantial control” (either a senior officer, have ability to appoint officers/majority of board, or have “substantial influence” over decisions)



5 Explicit Exceptions from Beneficial Owners

- Minor children
- Inheritors (i.e., people with a future interest in equity through a right of inheritance, like a will providing that the individual receives equity upon the death of the current beneficial owner)
- Employees as defined in 26 CFR 54.4980H-1(a)(15), but only if the employee's substantial control is established solely from their employment status and the individual is not a senior officer
- Nominees, intermediaries, custodian or agents
- Creditors

Beneficial Owners – *Traps for the unwary*

- Ownership interest can include not just actual present ownership of equity, but also voting rights, instruments convertible into equity in the future (e.g., a convertible note), warrants, puts and calls and stock options.
- The definition of senior officers is not limited to president, CEO and CFO...in fact, *it specifically includes General Counsel.*
- Determination of whether someone is a Beneficial Owner may be difficult under “substantial influence” criteria. Examples include rights to approve sale/ merger of business, large expenditures, and compensation and incentives for officers.

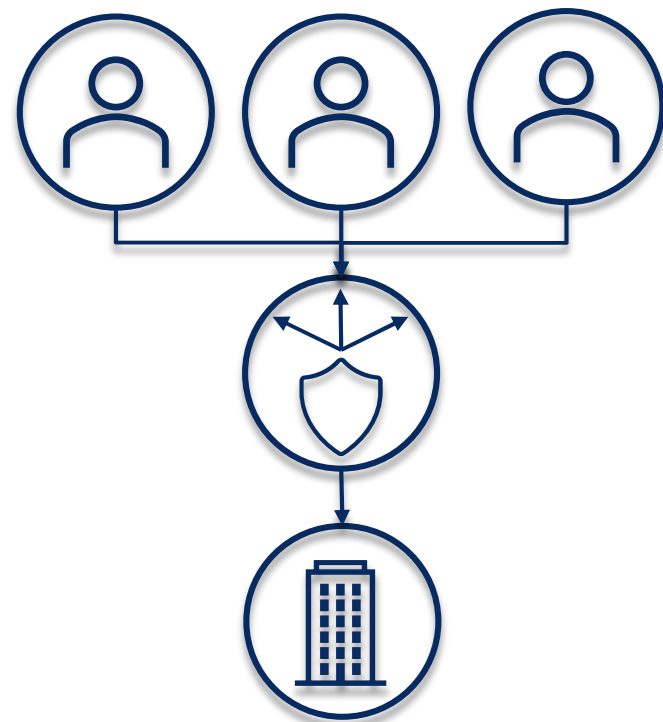


Other carve-outs from Beneficial Owners

- FinCEN's FAQs state that:
 - Lawyers and accountants providing general advice to the company are not Beneficial Owners (other than General Counsel)
 - Directors may not be Beneficial Owners, this is determined on a case-by-case basis consideration of whether or not a Director has "substantial control"
 - "Partnership Representatives" (or "Tax Matters Partners") may not be Beneficial Owners, again, this is determined on a case-by-case basis through consideration of whether or not the Partnership Representative has "substantial control"
- See: <https://fincen.gov/boi-faqs>

Beneficial Owners - Trust

- Trust as Reporting Company
- Beneficial Owners analysis: Trustees, beneficiaries, grantors, settlors, others
- Trust as owner of equity in Reporting Company



Company Applicants

- The individuals who form the entity (*i.e. lawyers and paralegals*). If more than one person was involved, the person who made the filing should be included, as should the person who ultimately supervised the filing.
- For example, the individuals at a registered agent service, business formation or incorporation service provider.
- A BOIR can list up to two Company Applicants.



Exemptions

- Certain entities are exempt, generally entities that are already heavily regulated and Beneficial Ownership information is already publicly available.
- These entities include banks, public companies, utilities and insurance companies.
- 501(c) organizations are exempt, including 501(c)(3), 501(c)(4) and 501(c)(6) entities - *but only if exempt status has been granted by the IRS- if it is not granted within 90 days of formation, a filing must be made, then “closed out” when status is granted.*
- Subsidiaries of an exempt entity (with some exceptions)



Exemption – Large Operating Companies

Office in the U.S. and filed
a U.S. tax return in
previous year.



>\$5 Million Annual
Gross Revenue



>20 Full-Time Employees



Caution – Re-evaluate Exemption Status

- A reporting company's exemption status determination is not "one and done."
- If a reporting company's status changes and it no longer meets an exemption criteria, it needs to file a Beneficial Ownership Report with FinCEN.
- *For example, if a corporation is exempt under the large entity exemption, but has under \$5,000,000 in gross annual revenue in a fiscal year, it is no longer exempt and must file. If the corporation then meets the criteria the next year, it may withdraw its filing.*

Filing Information

1. *Type of filing:

a. Initial report

b. Correct prior report

c. Update prior report

d. Newly exempt entity

Example: Development Company

- Client is a holding company based in Vermont. It files a federal tax return, has more than \$5,000,000 annual gross revenue, but fewer than 20 employees.
- Client has 20+ wholly-owned subsidiaries which are special purpose entities created to hold real estate projects.
- **Must Client file a BOI report for the holding company? What about the 20+ wholly-owned subsidiaries?**

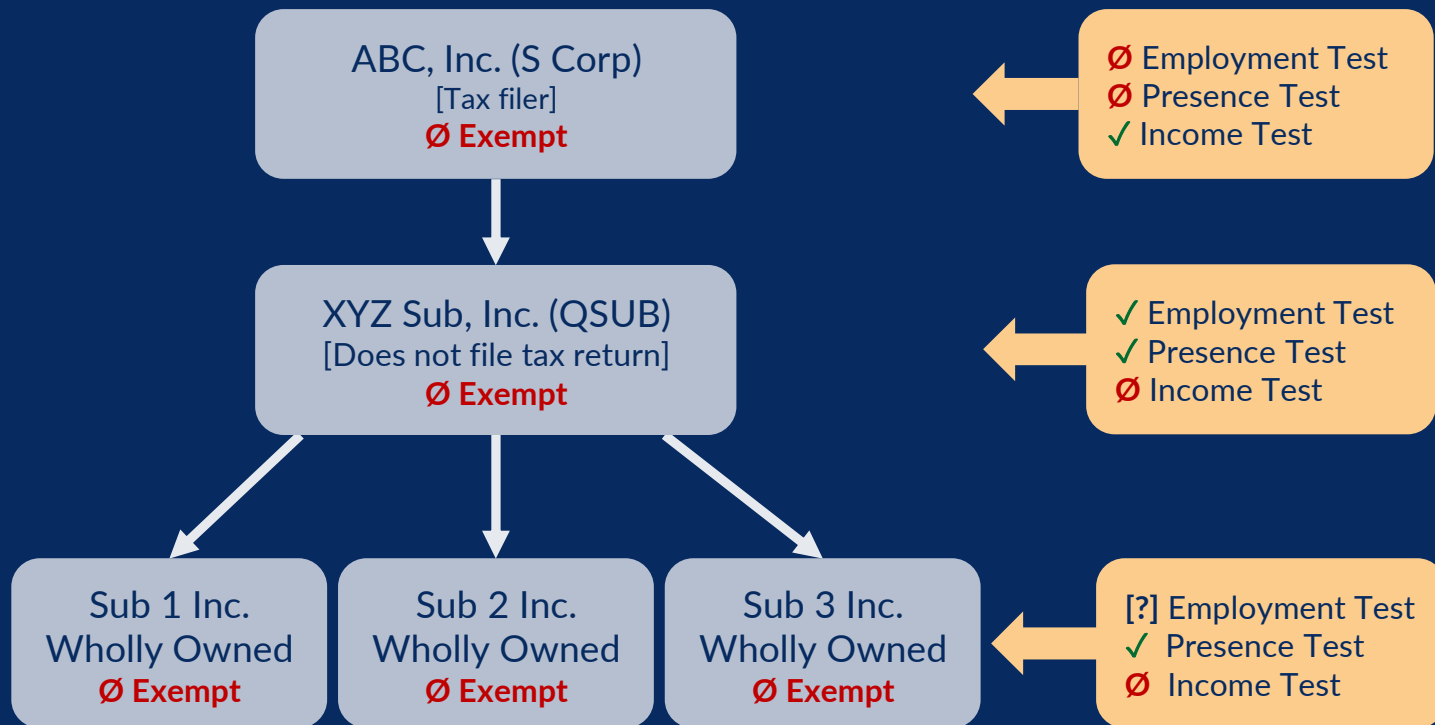


Example: Holding Company



- Holding company is Vermont corporation, taxed as S Corporation
- Operating company is a QSUB
- What information do we need?
 - ❑ Employs more than 20 full-time employees in the United States (“**Employment Test**”);
 - ❑ Has an operating presence at a physical office within the United States (entity regularly conducts its business at a physical location in the U.S. that the entity owns or leases and that is physically distinct from the place of business of any other unaffiliated entity) (“**Presence Test**”); and
 - ❑ Filed a Federal income tax or information return in the U.S. for the previous year demonstrating more than \$5MM in gross receipts or sales as reported on the entity’s tax return, excluding gross receipts or sales from sources outside the U.S. (“**Income Test**”).

Example: Wholly Owned Subsidiary



When to file?

- *An initial filing must be made by December 31, 2024 for all entities formed prior to January 1, 2024. Company Applicant information is not required to be included in these filings.*
- *For entities formed during 2024, a filing must be made within 90 days of evidence of formation being received (i.e., not the date of filing with SOS, but date of confirmation that entity exists).*
- *After December 31, 2024, all filings must be made within 30 days of evidence of formation.*



What information is provided?

- Legal Name of Entity
- Business Street Address (not a P.O. Box)
- Jurisdiction of Formation
- Tax ID
- Beneficial Ownership
- Company Applicant(s)



Personal Information

For Beneficial Owners and Company Applicants the following must be provided:

- Legal Name
- Date of Birth
- Residential Street Address (Company Applicants can use a business address)
- Passport or Driver's License information and image



IF YOU OBTAIN A FINCEN IDENTIFIER, YOU CAN PROVIDE THAT INSTEAD

FinCEN Identifier

You may obtain a FinCEN identifier by going to this website:

<https://fincenid.fincen.gov/landing>

This will redirect you to LOGIN.GOV.



You will need a photo or PDF of your driver's license or passport, date of birth and a residential address. You also need to provide a cell phone or another way to multi-factor authenticate. That's it.

Note that Company Applicants who form and register entities in the course of their business, such as attorneys and paralegals, should report the street address of such business. Otherwise, report a residential address.


FinCEN ID Application Instructions:

<https://fincenid.fincen.gov/assets/helpContent/FinCEN-ID-Step-By-Step-Instructions-20240104.pdf>

PDF BOI Report & BOIR E-Filing System

Beneficial Ownership Information Report

Home Reporting Company Company Applicant(s) Beneficial Owner(s)



 **Beneficial Ownership Information Report** Version Number: 1.0
OMB No. 1506-0076 Release Date: 04-05-2024

Report Preparation & Submission Instructions:

Instructions	1. Complete the report in its entirety with all required information. Click Instructions for help.
Validate	2. Click Validate to ensure all entered data is properly formatted and that all required fields are completed.
Finalize	3. Click Finalize to lock the entries in the report and prepare it for submission. Click Edit Report to unlock and re-edit.
Save	4. Click Save to retain a local copy of the report (this can be done at any time during report preparation).
Print	5. (Optional) Click Print to print a hard copy of your completed report.
Ready To File	6. Select Ready to File (activated after the report is finalized and saved locally) to begin the submission process.

Filing Information

The PDF form allows you to prepare the BOI Report at your own pace and reuse the form when filing updates.

The online BOIR filing method must be completed in its entirety, with no ability to save your progress.

 An official website of the United States government [Here's how you know](#) ▼



[BOI E-FILING](#) | [FILE BOIR](#) | [HELP](#)

Beneficial Ownership Information Report (BOIR)

OMB No. 1506-0076

Complete the report in its entirety with all required information. Fields marked with an asterisk (*) symbol are the fields that, *at a minimum*, must be completed by all companies to file the report. Reporting companies, however, must include all information 31 CFR 1010.380(b) requires them to provide, regardless of whether a field is marked with an asterisk (*) symbol. These information requirements are summarized above under HELP.

[Filing Information](#)

[Reporting Company](#)

[Company Applicant\(s\)](#)

[Beneficial Owner\(s\)](#)

[Submit](#)

Filing Information

Reminder – BOI Updates are Required

- **If Beneficial Ownership changes, an updated BOI report must be filed with FinCEN within 30 days of the change.**
- For example, an updated report is due if:
 - a senior officer leaves the entity
 - a new stockholder/member buys 25% or more of the equity in an entity
 - an existing stockholder/member sells equity, so their holdings decrease below 25%
 - a beneficial owner's legal name or reported address changes
 - a new DBA was registered for the entity
- Company Applicant information does not need to be updated if an entity changes law firms.



Reminder – FinCEN ID Updates are Required

- If an individual has a FinCEN ID, the individual must update any change to the information provided to obtain the FinCEN ID **within 30 days** of any change.
- Note that there is presently no way to inactivate a FinCEN ID so that the individual does not have to update their information if it changes. More to come on this.
- If a reporting company uses a FinCEN ID and information changes it needs to file an updated BOI Report.



Who can see BOI Reports?

- U.S. Department of Treasury (including as to tax administration)
- Federal Agencies engaged in law enforcement activities, national security and intelligence matters
- State, local or Tribal law enforcement agencies seeking information in criminal or civil investigations
- Foreign law enforcement (at the request of a U.S. Federal agency)
- Banks and other financial institution, **but only if reporting company consents** and financial institution meets certain requirements



Alabama Federal Court Rules CTA Unconstitutional

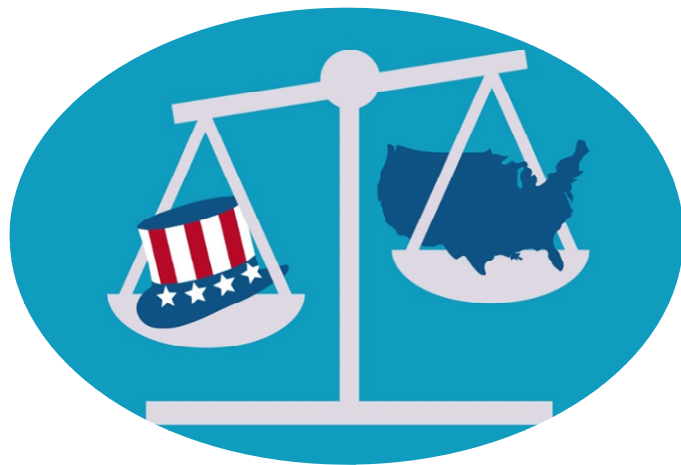


- The U.S. District Court for the Northern District of Alabama ruled that the CTA is unconstitutional on March 1, 2024, and enjoined the Department of Treasury from enforcing the CTA against the plaintiffs.
- They found it unconstitutional because the CTA “exceeds the Constitution’s limits on the legislative branch and lacks a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress’ policy goals.” *Nat’l Small Bus. United v. Yellen*, No. 5:22-cv-01448-LCB (N.D. Ala. 2022)
- Basically, they are saying this is a matter that should be left to states to decide as opposed to the Federal Government.
- On March 11, 2024, the Justice Department, on behalf of the Department of Treasury appealed the case to the U.S. Court of Appeals for the Eleventh Circuit.

Alabama Ruling – The Fallout

Only the plaintiffs in the case, Isaac Winkles (a small business owner) and the National Small Business Association (and its members) are protected by the injunction. I.e., everyone else in the U.S. still needs to file BOI Reports.

Why not wait to file? It is not clear that the matter will be resolved before January 1, 2025, which is the BOI filing deadline for entities formed prior to January 1, 2024.



“Mini CTAs”

- Individual states are beginning to adopt their own CTA-type acts.
- As of March 1, 2024, New York adopted the LLC Transparency Act (NY LLCTA), which will take effect in 2026. It only applies to LLCs.
- Other states, such as Maryland are considering similar legislation.
- At this time, neither Vermont or New Hampshire have any such legislation pending.



What's next?

- Expect to see CTA compliance representations in transaction documents – *remember*, if you have an exit plan in the next few years, you will need to be able to demonstrate compliance.
- You may see CTA compliance requirements in employment agreements (e.g., executive agrees to provide personal information when requested).
- Watch for enforcement – civil penalty \$500/day* not complying, plus criminal penalties up to 2 years in prison, \$10,000 fine.

**As of April 18, 2024, the civil penalty amount is \$591/day, adjusted for inflation.*

Watch out!

- Fraudsters are taking advantage of the CTA filing requirements.
- FinCEN has reported that there are bad actors trying to solicit confidential information from people and entities by sending official looking correspondence.
- *Be wary of correspondence you receive that asks you to click on a website link or scan a QR code, purports to be from FinCEN or a government agency. **FINCEN DOES NOT SEND UNSOLICITED REQUESTS.** The letters and emails are designed to look legitimate, create a sense of urgency and may threaten severe penalties.*
- How to be safe: Only file a report/click on a link after navigating to the FinCEN website yourself.



Resources

- FinCEN BOI website: <https://www.fincen.gov/boi>
- File an online BOIR or download the PDF form: <https://boiefiling.fincen.gov/fileboir>
- Small Entity Compliance Guide:
https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf
- PDF & Online BOIR Filing Step-by-Step Instructions and Quick Reference Guides:
<https://boiefiling.fincen.gov/help>
- Overview of BOI Reporting with Under Secretary Brian Nelson:
<https://www.youtube.com/watch?v=4qXv37hf4Dw>
- Sign up to receive e-mail **FinCEN Updates** newsletter:
<https://service.govdelivery.com/accounts/USFINCEN/subscriber/new>

DRM DOWNS
RACHLIN
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Questions?



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