November 13 , 2024

Corporate Transparency Act What You Need to Know

Holland & Knight

Panelists

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THERE ARE 49 DAYS LEFT TO FILE

Topics to be Discussed During Webinar

Entities Out of Scope

- Are LLPs out of scope?
- Common-law trusts, business trusts compared to statutory trusts
- Unincorporated associations

Exemptions

- Large Operating Company
    - DREs
    - Employee issues
    - US presence
    - Gross receipts issues
- Private Equity Issues
- Subsidiary Exemption Issues
- Non-US Entities
- Tax Exemption Issues

How to Determine Beneficial Owner When Tiers of Entities or Trusts?

- Appointment and removal authority
- Significant decision maker
- No power, but "calls the shots"

Trusts

- Beneficial Owners
- Corporate Trustees
- Directed Trusts

Community Property

- Look to state law

FinCEN identifiers

- Individual
    - Why use
    - Deactivation issues
- Entity
    - Use of limited rule

Special Rule

- Intermediate ownership by individual through exempt entity

Special Filing Situations

- Continuations
    - Inc. to LLC
    - Different states
    - Dissolved Entity
    - Exempt Entities

Updating Obligations

- Not one and done
- When required?
- Policies & Procedures to gather information
- Contractual Provisions Supplemental Agreements with beneficial owners (Certifications)
- Use of FinCEN Identifiers

Topics to be Discussed During Webinar

Reporting Deadlines

- NLT than Jan 1. 2025
- Shorter time frame if use outside vendor
- Companies formed in 4Q – 90 days
- Companies formed in 2025 & thereafter – 30 days
- Updates & Corrections – 30 days

True, Accurate and Complete Attestation

Compliance with Privacy Laws

Who has access to Information?

Penalties & Enforcement Actions

Status of Court Cases

Status of Administrative & Congressional Relief

Project 2025 and the CTA

FOR REFERENCE

CTA
Why Was It Enacted?

THE PROBLEM

- The lack of US beneficial ownership information ("BOI") reporting requirements made the United States the jurisdiction of choice to establish shell companies to hide ultimate beneficial owners
  - BOI is Identifying information about the individuals who directly or indirectly own or control a company
- This weakened US efforts to combat the flow of illicit money into the US

THE GOAL

To combat the proliferation of anonymous shell companies that facilitated the flow and sheltering of illicit money into the US

THE REMEDY

Mandate reporting of BOI to the federal government to counter money laundering, terrorist financing, corruption, tax fraud and other illicit activity to protect national security, intelligence and law enforcement interests

CTA
In a "Nutshell"

- **Federal legislation**:
  - **First ever national BOI legislation**
  - Applicable to states | territories | possessions
    - Note, US defined as broader than continental US
- **Who Reports**: Reporting Company
- **What is Reported**: Information about Reporting Company, Beneficial Owners & Company Applicants
- **To Whom**: Financial Crimes Enforcement Network ("FinCen"), unit of Department of Treasury
  - FinCEN will maintain centralized, secure, data base
- **Disclosure**: Non-public
  - Only to selected government agencies (domestic and foreign) & financial institutions ("FI") for customer due diligence ("CDD") and FI regulators (Final Regulations published Dec. 2023)
- **Penalties**: Civil & criminal
- **Reporting Company**:
  - Pre 2024 companies
  - Newly-formed in 2024 and forward
  - Domestic
  - Foreign (that register w/state to do business)
- **Reporting Company Exclusions and Exemptions**:
  - Out of scope arrangements/entities
  - 23 Entity Exemptions
- **Beneficial Owners**
  - Domestic and Foreign Individuals
  - Five Exclusions

Reporting Guidance described herein promulgated by FinCEN in Final Regulations published in September 2022, supplemented by subsequent FINCEN administrative guidance

Rule Effective January 1, 2024

Beneficial Ownership Information Reporting

CTA
What It Requires?

The Corporate Transparency Act requires “Reporting Companies” -- domestic entities created by the filing of a document with a secretary of state and non-US entities that have registered to do business in the United States -- to report identifying information about the individuals who directly or indirectly own or control the company, unless the entity is exempt from reporting

CTA
Overview of Initial Report

Reporting Company created or registered before January 1, 2024

Provide information about:

- Itself
- Beneficial owners
- **But not Company Applicants**

Reporting Company created or registered on or after January 1, 2024

Provide information about:

- Itself
- Beneficial Owners
- Company Applicants

CTA
Is a Big Deal

Commencing in 2024, FinCEN estimates

About 32.6 million pre-existing entities (pre-2024) will be required to report

About 5 million new companies will be created in 2024 and each year thereafter over a decade and required to report

Defining a Reporting Company

Reporting Company. A corporation, LLC or other similar entity

Reporting Company Can be Domestic or Foreign

- ***Domestic**.* A corporation, LLC and any other entity created by the filing of a document with a secretary of state (e.g., statutory trust) or a similar office under the law of a state or Indian Tribe
- ***Foreign**.* An entity (including a corporation and LLC) formed under the law of a foreign country that has registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a state or Indian Tribe
- **Broad Definition of State**. Any state of the US | the District of Columbia | the Commonwealth of Puerto Rico | the Commonwealth of the Northern Mariana Islands | American Samoa | Guam | the U.S. Virgin Island | any other commonwealth | territory | or possession of the US

Targets bad actors seeking to use shell companies or other opaque structures for illicit purposes in the United States

Reporting Company: Entities Out of Scope

Sole proprietorship (not an entity)

General partnership

Unincorporated association

Wealth planning trust (but not a statutory trust, such as a DE statutory trust)

Why? Because no document filed with a secretary of state/Indian Tribe

Foreign entity **not registered to do business** in a state or with an Indian Tribe

Reporting Company: 23 Exemptions

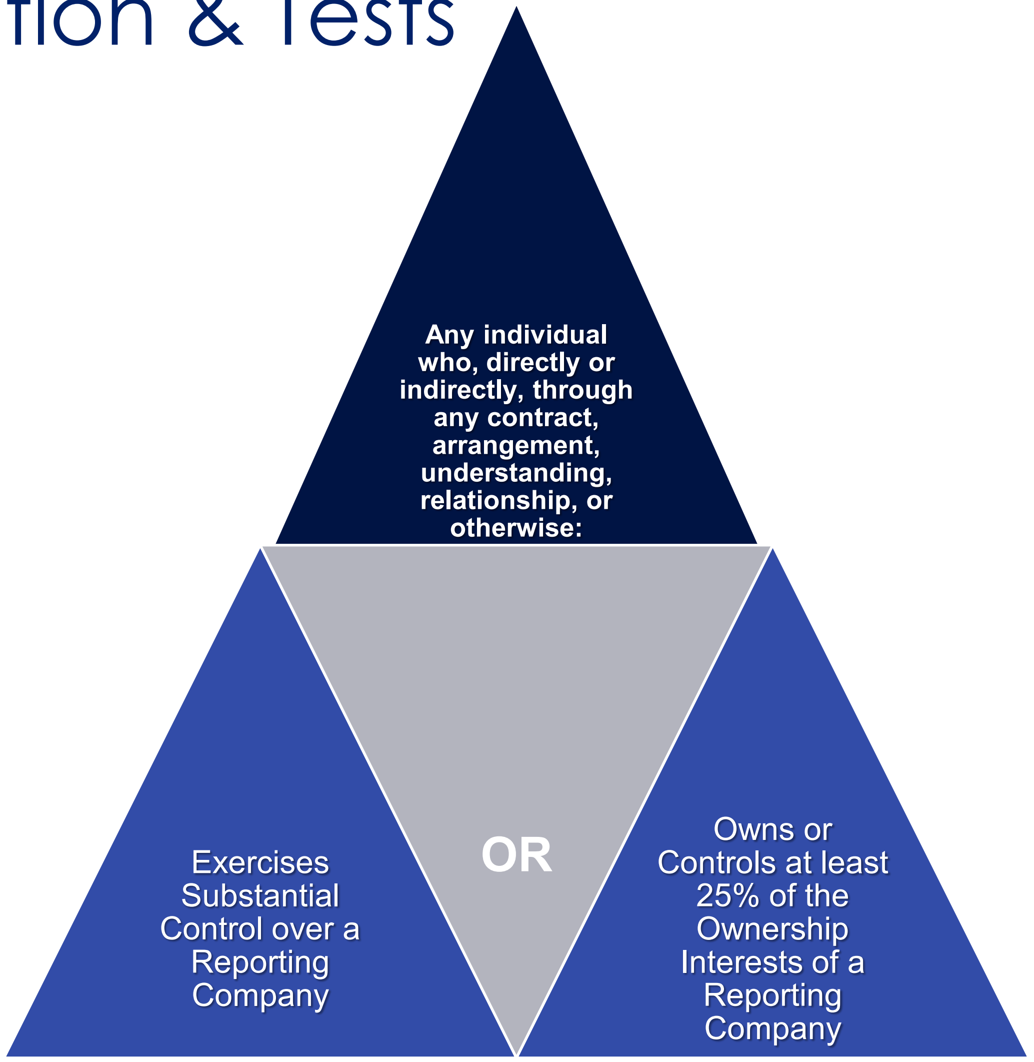
- Securities reporting issuer
- Governmental Authority
- Bank
- Credit union
- Depository institution holding company
- Money service business
- Broker or dealer in securities
- Securities exchange or clearing agency
- Other Exchange Act registered entity
- Investment company or investment advisor
- Venture capital fund advisor
- Insurance company
- State-licensed insurance producer
- Commodity Exchange Act registered entity
- Accounting firm registered with Sarbanes-Oxley Act
- Public utility
- Financial market utility
- Pooled investment vehicle*
- Tax-exempt entity
- Entity assisting tax-exempt entity
- Large operating companies in US | > 20 full-time employees | > $5M gross receipts reported to IRS in tax return | physical office in US
- Subsidiary of certain exempt entities
- Inactive entity

** If an entity is a pooled investment vehicle and is formed under the laws of a foreign country (a "foreign pooled investment vehicle"), the entity is subject to a separate reporting requirement, provided it is registered to do business in a state*

Each exemption has detailed requirements, so read carefully
FinCEN has authority to add (but has not added) additional entities

Beneficial Owner: Introduction & Tests

- The Beneficial Owner concept is intended to identify the individuals who control or own a Reporting Company
- An individual can be a Beneficial Owner through the Substantial Control Test, the 25% Ownership Test, or both
- A Reporting Company may have multiple Beneficial Owners



Substantial Control (1/3)
Four Indicators

Senior Officer (nominal or *de jure* authority)	• Senior officer includes a President, CEO, COO, CFO, GC *or* any other officer, regardless of official title, who performs a similar function
Appointment/Removal Authority (*de facto* authority)	• Authority over appointment/removal of a Senior Officer or majority of Board of Directors (or similar body)
Important Decision Maker (*de facto* authority)	• Directs/determines or has substantial influence over important decisions made by the Reporting Company (such as business/finance/structure)
Any Other Form of Control. Any other form of Substantial Control over a Reporting Company	• Example. Individual who may not have "power" to direct or determine important decisions, but plays a significant role in decision-making process

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Substantial Control (2/3)
Direct/Indirect – Broad & Encompassing

- **General Rule.** An individual may *directly* or *indirectly* (including as a trustee of a trust) exercise Substantial Control over a Reporting Company through any other contract, arrangement, understanding, relationship or otherwise
  - Direct Control: Through (i) Board of Directors representation, (ii) ownership or control of a majority of the voting power or voting rights of a Reporting Company, ((iii) rights associated with any financing arrangement or interest in a Reporting Company
  - Indirect Control: Through (i) controlling one or more intermediate entities that separately or collectively exercise Substantial Control over a Reporting Company or (ii) arrangements or financial or business relationships with other individuals or entities acting as nominees

Substantial Control (3/3)
Takeaways

- **Substantial Control**
  - Does not require ownership in an entity
  - Relates solely to authority to direct, determine or have substantial influence over important decisions
  - Includes an individual that exercises substantial control over Reporting Company though an unaffiliated company
- **FinCEN**
  - **Expects**: A Reporting Company to identify at least one Beneficial Owner under Substantial Control test
  - **Requires**: All persons in Substantial Control must be reported
- **FinCEN's Expansive Approach**
  - Supports basic goal of CTA. To require Reporting Company to identify individuals who stand behind the Reporting Company and direct its actions
  - Purpose. To foreclose corporate structuring to obscure owners or decision-makers, essential to unmasking shell companies
- **Directors**
  - FinCEN has provided that whether a Director is a Beneficial Owner is a facts and circumstances determination
  - An individual who directly or indirectly exercises substantial control over a Reporting Company or who owns or controls at least 25% of the ownership interests of a Reporting Company

Multi-tier company/trust structures

Difficult to identify all individuals in Substantial Control

25% Ownership Interest Test (1/4)
Three Parts to Determining Test

Definition of an Ownership Interest

Direct or Indirect Ownership or Control of Ownership Interest

Calculation of Percentage Ownership Interest

25% Ownership Interest Test (2/4) Definition of an Ownership Interest

Equity, Stock, or Voting Right	Capital or Profit Interest	Convertible Instrument	Option or Privilege	Catch-All
• Any interest classified as stock or anything similar, regardless whether it confers voting power or voting rights, and even if the interest is transferable	• Any interest in the assets or profits of an LLC	• Any instrument convertible into equity, stock, or voting rights or a capital or profit interest	• Any put, call, straddle or other option or privilege of buying or selling equity, stock or joint rights, capital or profit interest or convertible instrument (unless option or privilege created and held by others without knowledge or involvement of Reporting Company)	• Any other instrument, contract arrangement, understanding, relationship, or other mechanism used to establish ownership

Ownership Interest (3/4)
Ownership & Control

- **General Rule**. An Individual may directly or indirectly own or control an ownership interest in a Reporting Company through any contract, arrangement, understanding, relationship, or otherwise, including:
  - Direct Ownership Interest: (i) Ownership by individual, (ii) Joint Ownership, (iii) Debt instrument it enables the holder to exercise the same rights as one of the specified types of equity interests, including a conversion right to an equity interest
  - Indirect Ownership Interest: Through (i) another individual acting as nominee, intermediary, custodian, agent of an individual or (ii) owning or controlling one or more intermediary entities, or the ownership interests of any intermediate entities that separately or collectively own or control ownership an ownership interest of a Reporting Company
  - Trust or similar arrangement that holds ownership interest: Ownership interests may be held by the trustee, a beneficiary, a grantor and multiple persons may hold an ownership interest

Ownership Interest (4/4)
Three Part Test

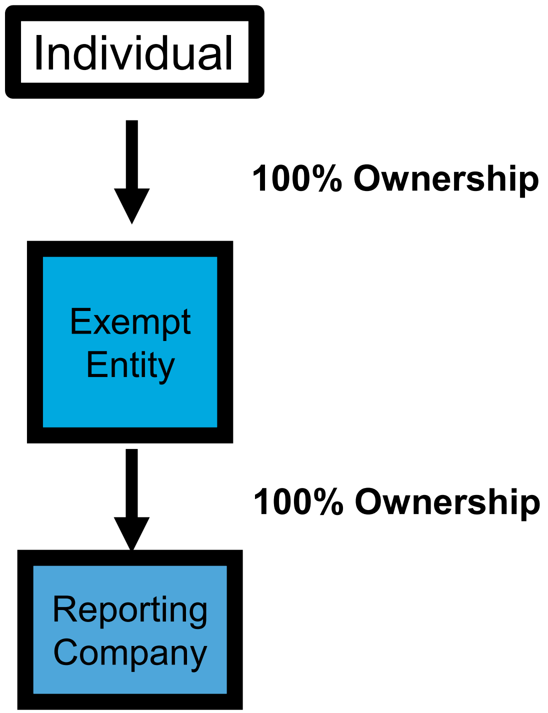
- **Calculation to determine whether individual owns | controls 25% of Ownership Interests in Reporting Company.**
  - ***Individual's total ownership interests*** determined at time of computation, treating options and similar interests as exercised, and calculated as a % of total outstanding ownership interests in Reporting Company
  - ***Reporting Companies that issue capital and profits interests*** (including entities taxed as a partnership) and calculated as a % of the total outstanding capital and profits interests in the entity
  - ***Corporations that issue shares of stock***, individual's % is equal to vote/value to total outstanding vote/value of all classes entitled to vote, or of ownership interests, as the case may be
  - "***Catch-all rule.***" If above calculations cannot be performed with certainty, an individual is deemed to hold 25% or more of the total ownership interests, provided the individual owns or controls 25% or more of any class of ownership interests

Persons Excepted from Beneficial Owner Status?

- **Minor children** (provided Reporting Company reports required information of a parent/guardian)
- **Nominees, intermediaries, custodians, or agents** (in these relationships, reporting of principal required)
- **Employee** of a Reporting Company, acting solely as an employee, provided individual is not a Senior Officer and substantial control/economic benefits from Reporting Company derived solely from employment status
- **Inheritor** Individual whose only interest in a Reporting Company is a future interest through a right of inheritance
- **Creditor** of Reporting Company who only has a right to be paid a predetermined sum of money who meet the definition of a beneficial owner solely through a loan covenant (or similar right) intended to secure their right to receive repayment

Entity Reporting: Individual Owning Reporting Company through Exempt Entity

- **Special Rule**. 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 PII with respect to the individual Beneficial Owner
  - ***Reporting Company has option to ID BO, rather than identify exempt entity***
- Note, this special rule applies only if there is **ownership** by the individual, but not if individual is in substantial control of the Reporting Company through the exempt entity



Entity Reporting
FinCEN Identifier Numbers

Rule. A Reporting Company may report another entity's FinCEN Identifier and full legal name in lieu of the PII required with respect to a Beneficial Owner only if:

Other entity has a FinCEN ID & provides it to the Reporting Company	An individual is a BO of Reporting Company *through holding an **ownership interest** in that entity*	BO(s) of other entity and Reporting Company are identical

This rule enables the use of a FinCEN Identifier rather than the PII of individual(s) where the Reporting Company is a subsidiary of one or more parent companies with identical Beneficial Ownership

Illustration of Rule

Fact Pattern A

A B C
Owners

- In this Fact Pattern, Co X's FinCEN ID can be used
- Co Y Filed Initial Report on that basis

Co X

Co Y

Fact Pattern B

A B C D
Owners

- In this Fact Pattern, Co X's FinCEN ID cannot be used, because BOs not identical;
- Must use PII of BOs as D added as BO

Updated Report required if changes

Beneficial Owner: Application to Trusts

Trustees of trusts are contemplated as potentially being the "beneficial owners" of a Reporting Company:

The trustee of a trust or similar arrangement can exercise substantial control over a reporting company through the types of relationships outlined in the paragraph. Depending on the particular facts and circumstances, trusts may serve as a mechanism for the exercise of substantial control. Furthermore, "trusts or similar arrangements" can take a wide range of forms. Accordingly, FinCEN finds it appropriate—and directly responsive to comments that requested clarification on this point—to specify that a trustee of a trust can, in fact, exercise substantial control over a reporting company through the exercise of his or her powers as a trustee over the corpus of the trust, for example, by exercising control rights associated with shares held in trust

Recent FinCEN FAQs on Trusts

- **Can a Beneficial Owner own or control a reporting company through a trust?** Yes, either by exercising substantial control over a reporting company through a trust arrangement or by owning or controlling the ownership interests of a reporting company that are held in a trust

- **Who are the reporting company's Beneficial Owners when individuals own or control the company through a trust?** The individuals 1) who either exercise substantial control over a reporting company or 2) who own or control at least 25 percent of a reporting company's ownership interests. Substantial control or controlling ownership interests may be direct or indirect through any contract, arrangement, understanding, relationship or otherwise

Recent FinCEN FAQs on Trusts

- **Comment**. The FAQ clarifies the conditions as to when an individual owns or controls ownership interests in a reporting company through a trust, as follows:
  - **First,** a trustee, as well as any other individual, who *owns* or *controls* ownership interests and has the authority to dispose of trust assets is a beneficial owner
    - Prior to this FAQ, it was not clear whether any person who was designated a trustee was a beneficial owner merely because of that status. Now, that issue has been clarified that not all trustees are beneficial owners
    - For example, in a directed trust, if an administrative trustee does not have the authority to dispose of trust assets, the trustee will not be a beneficial owner.
  - **Second**, a beneficiary is a beneficial owner if he or she 1) is the *sole* permissible recipient of income and principal from the trust or 2) has a right to demand a distribution of, or withdraw, substantially all the assets from the trust
    - With FinCEN stating that there may be other situations where individuals associated with a trust are beneficial owners (see below), it is not entirely clear when the beneficiaries of a trust with multiple beneficiaries might be reportable, particularly where a trust has separate shares for beneficiaries or multiple mandatory beneficiaries
  - **Third**, a grantor or settlor is a beneficial owner if such individual has the right to revoke the trust or otherwise withdraw the assets of the trust

FinCEN notes that the forgoing criteria may not limit when an individual owns or controls ownership interests in a reporting company through a trust, adding that there may be other arrangements under which individuals associated with a trust may be beneficial owners of a reporting company in which the trust holds interests

Recent FinCEN FAQs on Trusts

- **How does a reporting company report a corporate trustee as a beneficial owner?** FinCEN has provided a response to this often-asked question, as follows:
  - The reporting company should determine whether any of the corporate trustee's individual beneficial owners indirectly own or control at least 25 percent of the ownership interests of the reporting company through their ownership interests in the corporate trustee. For example, if an individual were to own 60 percent of the corporate trustee of a trust, and that trust holds 50 percent of a reporting company's ownership interests, then the individual would own or control 30 percent (60 percent × 50 percent = 30 percent) of the reporting company's ownership interests and therefore would be a beneficial owner of the reporting company
- The FAQ further explains that the reporting company may, but is not required to, report the name of the corporate trustee in lieu of information about an individual beneficial owner *only* if each of the following three conditions are met: 1) the corporate trustee is exempt from reporting requirements, 2) the individual beneficial owner owns or controls at least 25 percent of the ownership interests in the reporting company *only* by virtue of ownership interests in the corporate trustee and 3) the individual beneficial owner does not exercise substantial control over the reporting company.
- The FAQ stresses that the owners or individuals employed or engaged by the corporate trustee may exercise substantial control over the reporting company and may have to be reported

[Additional comments on next slide]

Recent FinCEN FAQs on Trusts

- **Comment.** The initial, simple pass-through analysis articulated by FinCEN seems to oversimplify the ownership analysis. In the case of a trustee with fiduciary duties, mere ownership of the corporate trustee's equity should not, in and of itself, translate to a ratable ownership of the reporting company's equity interests because the trustee is acting in a fiduciary capacity with respect to the trust. Corporate trustees are likely to have far more complex governance controls as to their actions as trustee that would make the simple multiplication exercise inappropriate
- FinCEN emphasizes that trust company personnel could be in substantial control. The statute and regulations are not particularly helpful on that point, and it was hoped that FinCEN would clarify this issue. FinCEN, however, did not specify any distinction between a nonexempt trustee and an exempt "bank" trust company's employees having substantial control. This implies that a trust officer or trust committee member at an exempt bank could be in substantial control, and the reporting company would be required to report such persons as beneficial owners and file update reports if the personnel involved at the exempt bank were to change

- Further, FinCEN has not provided any direct clarification on whether an entity wholly owned by a bank, as trustee, qualifies under the Subsidiary Exemption. That said, the way that FinCEN essentially treats the corporate trustee as the actual owner (by looking through to the corporate trustee's owners as discussed above) could lead to the conclusion that a subsidiary entity held in a fiduciary capacity by an exempt corporate trustee should qualify for the Subsidiary Exemption. Assuming that is correct, it remains unclear whether reporting would be required if the reporting entity owned by the exempt corporate trustee also were to have beneficiaries who could be considered beneficial owners, as discussed above

Company Applicant Operating Rules

- **Company Applicants** (at most two individuals):
  - Company Applicant 1**:** The person who directly files the document with a secretary of state or similar office, and
  - Company Applicant 2**:** If more than one person is involved in the filing of the document, the individual primarily responsible for directing or controlling the filing
- **Comments**.
  - For purposes of determining who is a Company Applicant, the individual who signs the creation or registration document is not relevant, e.g., as an incorporator
  - Company Applicant 2 is determined by reference to the individual primarily responsible for directing or controlling the filing of the document; in that regard, consider the individual who is responsible for making the decisions about the filing of the document, such as how the filing is managed, what content the document includes, and when and where the filing occurs

FinCEN Identifier
What Is It and Why Get One?

What Is It?

- A unique numeric ID assigned by FinCEN to an individual (Beneficial Owner or Company Applicant) to be submitted to a Reporting Company to be used in the Report in lieu of an individual's PII
- Reporting Company can also obtain a FinCEN Identifier for use on a Report

Why Would An Individual Get One?

- <u>For Data Security</u>. To protect individual' PII -- individual submits PII to FinCEN and submits FinCEN Identifier to Reporting Company, so individual's PII not given to Reporting Company
- <u>For Administrative Efficiency</u>. If individual, either Beneficial Owner or Company Applicant, required to file numerous Reports

Should a Reporting Company Require its Beneficial Owners to Obtain a FinCEN Identifier?

- Generally, yes
- Why? No responsibility to keep track of changes in individual's PII or file an Updated Report
- So, lessen amount of information to keep track of

FinCEN Identifier Updated/Corrected Information/Deactivation

How to Obtain FinCEN Identifier?

- Individual. (i) By completing an electronic web form at https://fincenid.fincen.gov, (ii) by providing full legal name, date of birth, address, unique identifying number and issuing jurisdiction from an acceptable identification document, and an image of the identification document, and (iii) certifying application is true, correct and complete
- Reporting Company. Can request a FinCEN Identifier at, or after the time, that Reporting Company submits an Initial Report (by checking a box), or, if after submitting its Initial Report, by submitting an Updated BOIR, requesting a FinCEN Identifier, even if company does not need to update information

Change in Information

- Individual. Required to inform FinCEN within 30 days of change in PII
- Reporting Company. File an Updated Report within 30 days of change
- **Correct Inaccurate Information**
- Individual. File corrected information with FinCEN within 30 days after date on which individual became aware or has reason to know of inaccuracy
- Reporting Company. Same rule, but files a Corrected Report

Deactivation

- Currently no way to deactivate a FinCEN Identifier to eliminate requirement to update FinCEN for changes
- FinCEN assessing options to remedy this issue

Report: Information Disclosed

1. Reporting Company Information

- Complete Legal Name
- Tradename, "doing business as (dba, or trading as (t/a) names
- Business address:
  - For Reporting Company with a principal place of business in US
  - For a Reporting Company with a principal place of business outside US -- provide street address of *primary* location in US where company conducts business
- Domestic Company. State/Tribal jurisdiction of formation
- Foreign Company. Jurisdiction of Registration
  - Also, State/Tribal jurisdiction where company is first registered
- IRS TIN (including EIN)

2. Company Applicant PII (if applicable)

3. Beneficial Owner PII

Personal Identifiable Information ("PII")

- Full legal name
- Date of Birth
- Current Residential Address*
- Unique ID number and issuing jurisdiction from acceptable ID document (non-expired: (i) passport, (ii) state or local ID document, (iii) driver's license)
  - If individual has none of the foregoing, a non-expired foreign passport
- Image of document from which the unique ID number was obtained

* If Company Applicant is in business of corporate formation (e.g., an attorney), use business address rather than residential address

Initial Report Due Dates

Pre-2024 Reporting Companies (Formed | Registered prior to January 1, 2024):

NLT January 1, 2025

Reporting Company **Formed or Registered in 2024** must file Report within **90** days of the earlier of :

- Date on which Reporting Company received actual notice that its creation/ registration became effective or
- Date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that Reporting Company has been created (domestic) or registered (foreign)

Reporting Company **Formed | Registered in 2025 or Thereafter** must file Report within **30** days of the earlier of :

- Date on which Reporting Company received actual notice that its creation/ registration became effective or
- Date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that Reporting Company has been created (domestic) or registered (foreign)

FinCEN: Report only should include Beneficial Owners as of time of the filing, and not historical Beneficial Owners

Initial Report Due Dates

What about entities existing on 1/1/2024 that dissolve before 1/1/2025?

FAQ C.13:

"…If a reporting company (see Question C.1) continued to exist as a legal entity for any period of time on or after January 1, 2024 (i.e., did not entirely complete the process of formally and irrevocably dissolving before January 1, 2024), then it is required to report its beneficial ownership information to FinCEN, even if the company had wound up its affairs and ceased conducting business before January 1, 2024."

What about entities that are formed after 1/1/2024, and then merge or dissolve out of existence before the initial report is due (i.e. 90 or 30 days as applicable)?

FAQ C. 14. If a reporting company created or registered in 2024 or later winds up its affairs and ceases to exist before its initial BOI report is due to FinCEN, is the company still required to submit that initial report?

"Yes. Reporting companies created or registered in 2024, no matter how quickly they cease to exist thereafter, must report their beneficial ownership information to FinCEN within 90 days of receiving actual or public notice of creation or registration. Reporting companies created or registered in 2025 or later, no matter how quickly they cease to exist thereafter, must report their beneficial ownership information to FinCEN within 30 days of receiving actual or public notice of creation or registration. These obligations remain applicable to reporting companies that cease to exist as legal entities—meaning wound up their affairs, ceased conducting business, and entirely completed the process of formally and irrevocably dissolving—before the expiration of the 30- or 90-day period reporting companies have to report their beneficial ownership information to FinCEN…. [Updated September 10, 2024]"

Updated | Corrected Due Date

Updated Report:

- Within **30** days of a change in the required information previously submitted to FinCEN relating to Reporting Company or its Beneficial Owners
- Company Applicant changes do not require Updated Report, assuming information reported was correct, but a Corrected Report required if information was not correct
- **But** a FinCEN Identifier requires that individual file Updated FinCEN Application

Corrected Report:

- Errors in Reports filed remedied by filing a corrected report within **30** days of becoming aware or having a reason to know of, inaccuracies in an earlier Report
  - Unclear whose knowledge triggers 30 day start period

Updated Report General Rule

Updated Report required only where Reporting Company information **or** individual's PII previously submitted on Report changes

PII changes include name, address or unique ID number previously provided to FinCEN

Updated Report not required upon change in personal characteristics on ID document

Updated Report Examples

Reporting Company was exempt but no longer meets exemption criteria

- Updated Report within 30 calendar days after date that exemption criteria is not met

Reporting Company meets exemption criteria subsequent to filing of an Initial Report

- Updated Report within 30 days of change of status + indicate on BOIR that company no longer is a Reporting Company

Deceased Beneficial Owner

- Updated filing arises because the deceased individual was a Beneficial Owner by virtue of property interests or other right subject to transfer upon death and not only because of 25 percent ownership or control
- Updated Report must identify new Beneficial Owners within 30 days of the settlement of the estate of the deceased Beneficial Owner

Report
Overview & Attestation

Beneficial Owner Information Report (BOIR)

- All fields on BOIR must be completed for Report to be accepted
- Parent company cannot file a single Report on behalf of group of companies
- There is no fee associated with reporting a BOIR
- An entity that always has been eligible for an exemption does not have to file a Report
  - There are special rules if a non-exempt entity becomes exempt or an exempt entity becomes non-exempt
- **Filings of Report will be filed electronically**
  - Foreign companies that are not subject to US corporate income tax may report a foreign ID and the name of the relevant jurisdiction instead of an EIN

Report Attestation

- The Reporting Company is required to certify that its report or application is "true, correct, and complete"

Is a Reporting Company Responsible for Ensuring the Accuracy of Information that it Reports

- Yes. FinCEN expects that Reporting Companies will take care to verify the information they receive from their Beneficial Owners and Company Applicants before reporting it to FinCEN

Third-Party Service Providers

- Reporting Companies may use third-party service providers to submit BOIRs

Penalties

- **Overview of Reporting Violations**
  - Failure to Report
  - Failure to Update BOI
  - Failure to Correct Inaccurate BOI
- **Rule**. *It shall be unlawful for any* **person** to ***willfully*** *provide, or attempt to provide, false or fraudulent* **beneficial ownership information**, *including a false or fraudulent identifying photograph or document, to FinCEN, in accordance with this section, or to* ***willfully*** *fail to report complete or updated* **beneficial ownership information** *to FinCEN in accordance with this section*
- **Penalties**.
  - *Civil Penalty*. $500 per day in civil monetary penalties (inflation adjusted, now $591)
  - *Criminal Penalty*. $10,000 fine, imprisonment of no more than 2 years, or both
    - Safe Harbor (for liability from penalties).
      - **No penalties for filing an inaccurate report provided report corrected within 90 calendar days of when it was filed.**

Penalties: Takeaways

Assessment of potential violations will depend on all the facts and circumstances

As stated in the Preamble to the Final Regulations:

- *"As a general matter, FinCEN does not expect that an inadvertent mistake by a reporting company acting in good faith after diligent inquiry would constitute a willfully false or fraudulent violation"*

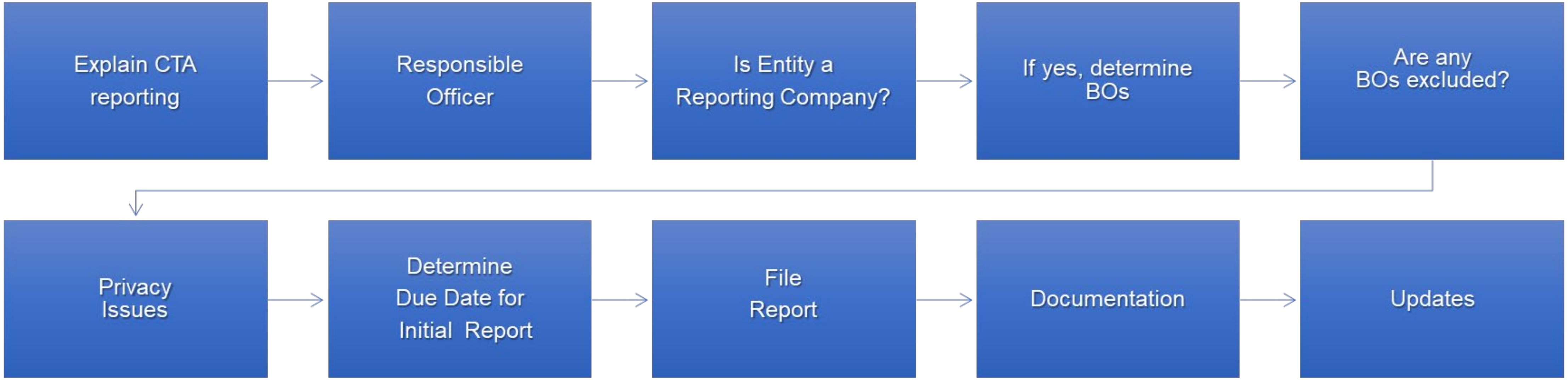
Although it is the Reporting Company that is obligated to file the report with FinCEN, penalties may apply to:

- The Reporting Company
- An entity or an individual who causes a Reporting Company not to report
- Individuals who are Senior Officers of a Reporting Company at the time a Reporting Company fails to accurately and completely report or update/correct its report

Reporting violations were extended to include individuals because individuals are the persons who primarily will provide information about themselves to Reporting Companies in order for the Reporting Company to comply with its CTA reporting obligations

Further, absent individual liability, illicit actors who form entities and fail to report may not be deterred if liability were applicable only to entities

Compliance Plan
Overview of Steps



Privacy Planning & Protection

- The CTA will require the collection, maintenance, securing, processing, updating and sharing of data, particularly PII, with FinCEN
- A Reporting Company will need to consider its potential exposure, both in the US and abroad, with respect to PII and its CTA obligations
- In many jurisdictions, there may be no restriction whatsoever on the disclosure of PII to a regulator
- A Reporting Company, as a matter of good business practice, should consider entering into an agreement with its Beneficial Owner whereby:
  - The Beneficial Owners agrees to provide and timely and correctly update their PII
  - The Reporting Company notifies the Beneficial Owners that PII may be disclosed where required by law
    - In some jurisdictions, it may be advisable to obtain explicit consent by the Beneficial Owners
    - The agreement also should deal with other issues, such as maintaining and securing PII, non-disclosure of the Beneficial Owner's PII to other than FinCEN, specific performance (an equitable remedy) if a Beneficial Owner PII refuses to provide his/her PII to the Reporting Company, and indemnification for costs and penalties if a Beneficial Owner does not furnish his/her PII to the Reporting Company
- If Beneficial Owners are from abroad, particular attention must be paid to the transmission, collection and forwarding of data from non-US persons to the Reporting Company, and, in turn, to FinCEN, as non-US laws may apply to Reporting Companies
  - Important to check the laws of applicable jurisdictions

If a Reporting Company is foreign or collecting PII from foreign Beneficial Owners, obtain advice from a privacy professional relating to foreign jurisdiction privacy aspects

Exemption Planning
Securities Reporting Issuer

Requirements: An entity qualifies for this exemption if either of the following two criteria apply:

- The entity is an issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l)
- The entity is required to file supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))

Exemption Planning
SEC/Regulated Entities & SEC Registered Individuals

Investment company registered with the SEC

Investment advisor registered with the SEC

Venture capital fund advisor filing with the SEC

Certain pooled investment vehicles advised by other exempt entities (*i.e.*, bank, credit union (federal or state), broker or dealer in securities, federally registered investment advisor, or venture capital fund advisor)

Exemption Planning
Large Operating Company

Three Requirements

- Employs more than 20 full-time employees in the United States
- Has an operating presence at a physical office within the United States
- Has filed a federal income tax or information return in the United States for the previous year demonstrating more than $5 million in gross receipts or sales from US sources

Exemption Planning
Large Operating Company: Requirements

Moe Than 20 Full-Time Employee

- Must be in tested entity – cannot consolidate employee headcount across affiliated entities
- Are employees' common-law employees of tested entity?
  - What about employees of a professional services organization (PEO)?
    - In a PEO, there is a co-employment arrangement, the POE is the employer of record for tax purposes, but client business maintains full authority over workforce
  - Excluded: leased employees, sole proprietors, partner in partnership, 2% S Corp. shareholders
- Employee must work average of 30 hours of service a week or 130 hours of service a month, with adaptions for non-hourly workers
- An hour of service is any hour for which an employee is paid or entitled to payment for vacation, illness, leave or absence

Operating Presence in U.S.

- Operating presence must be in tested entity and not in another member of the group
- Entity regularly conducts its business at a physical location in the US that entity owns or leases (no shared workspaces or home offices)

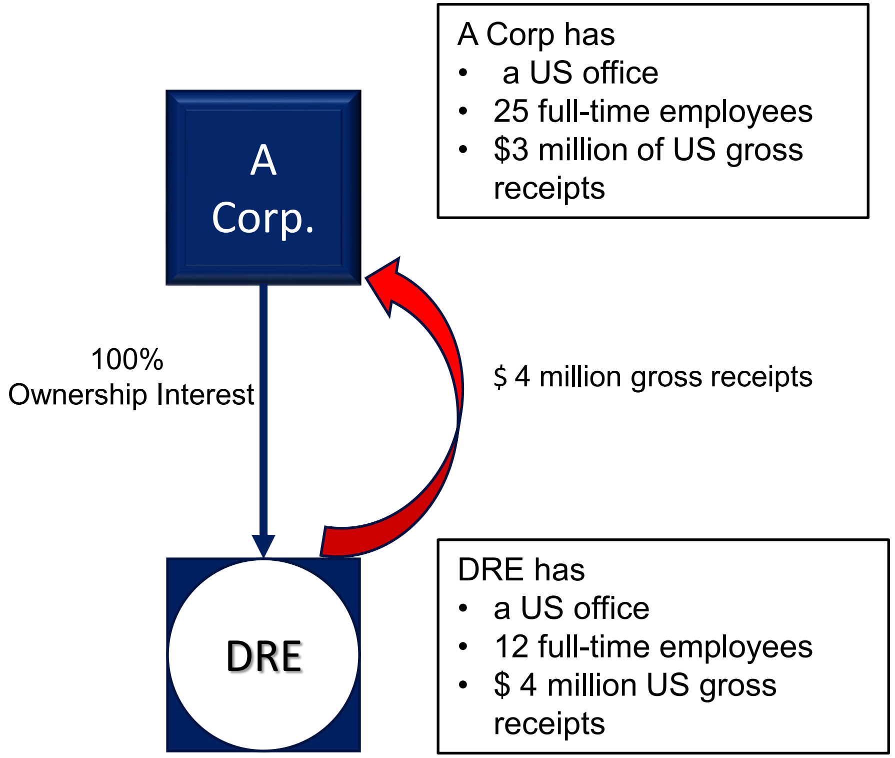
More Than $5 Million Gross Receipts

- Gross receipts or sales can be aggregated and includes income of consolidated return filings
- Must be exclusively from US sources
- Revenue must be reported on a US income tax return

Exemption Planning
Large Operating Company: DREs

How Does Exemption Apply to a Disregarded Entity (DRE)?

- A DRE is a business entity that (i) has a single owner, (ii) is not organized as a corporation, and (iii) has not elected to be taxed as a separate entity for federal tax purposes.
- The owner of a disregarded entity reports the income of the disregarded entity on the owner's return.
- The most common DRE is a single member LLC that reports its income on its owner’s income tax return
- A DRE can not avail itself of the large operating company exemption since it does not file a federal income tax return
- An entity (but not an individual) owner of a DRE, such as a corporation or partnership, may avail itself of the Large Operating Company Exemption, *provided* the owning entity itself employs more than 20 full-time employees, has a US-based physical office and has more than $5 million of gross receipts from US sources, including the gross receipts of the DRE
- *In the example, the DRE’s $4 million of gross receipts would be taken into account by A Corp. to enable A Corp. to qualify for the Exemption; the DRE also should qualify for the Subsidiary Exemption, discussed infra*



Exemption Planning
Large Operating Exemption: Takeaways

- The Exemption likely will be the most useful for unregulated private profit-making entities,
  - However, the Exemption has detailed requirements that will require careful consideration
- For example:
  - With respect to the Employee Headcount, FinCEN in the Final Rule has provided that one determines the employee Headcount, as follows:

    In terms of assessing whether an entity has the requisite number of employees to qualify for the exemption, FinCEN expects that companies will regularly evaluate whether they qualify (or no longer qualify) for the exemption. FinCEN believes that such evaluations should be as simple as possible, and as consistent as possible from reporting

    Query, how will that work? How frequently would an entity have to make this determination?
  - With respect to the Gross Receipts Requirement, note “start ups” cannot qualify since they would not have filed a tax return in the first year?
  - So too, query whether gross receipts should be limited to what a taxpayer reports on Line 1 of a tax return as gross receipts and income?

Exemption Planning
Tax Exempt Entities

- **Nonprofit organizations exempt from tax** (IRC § 501(c) & (a))
  - This includes the most common group, Section 501(c)(3) organizations, such as charitable, educational, religious organizations, as well as social welfare organizations, certain types of homeowners' associations (HOAs), business leagues, and social clubs
    - HOAs.
      - HOAs exempt form taxation under Section 501(c)(4) (social organizations ***are exempt***)
      - HOAs (including condominium management associations, residential real estate management associations and timeshare associations exempt under Section 528 ***are not exempt*** from Beneficial Ownership Information Reporting)
- **Certain political organizations** qualify (IRC § 527(e)(1) & (a))
- **Certain trusts** described in IRC § 4947(a) (1) or (2) qualify
  - This includes charitable lead and remainder trusts
- **Organizations That Have Had Their Section 501(c) Exemption Revoked.** If an organization has its tax-exempt status revoked by the IRS, it has 180 days from the date of revocation to comply with the CTA
  - If the organization's tax-exempt status is not reinstated within that 180-day period (which is often the case), then it will need to comply with the CTA's reporting requirements
- **Caveat**. Note, if an entity is simply incorporated as a nonprofit, or has a nonprofit as a co-owner, that does not automatically qualify the organization for the Tax-Exempt Exemption

Exemption Planning
Subsidiary Exemption

- **Requirement in Final Rule**. An entity whose ownership interests are **controlled** or **wholly owned**, directly or indirectly, by one or more exempt entities (other than those listed below) is not a Reporting Company
  - The Subsidiary Exemption does not apply if subsidiary is owned by:
    - a money transmitting or money services business,
    - a pooled investment vehicle,
    - an entity assisting a tax-exempt entity, *or*
    - an inactive entity
  - FinCEN has clarified that Subsidiary Exemption only applies if the Subsidiary is fully -- 100% owned **or** 100% controlled -- by one or more exempt entities and has defined the term “control of ownership interests,” as follows
    - The exempt entity or entities entirely control all of the ownership interests in the Reporting Company, in the same way that an exempt entity or entities must wholly own all of a subsidiary’s ownership interests for the exemptions to apply

Common Estate Planning Vehicles that Are Reporting Companies?

Likely a Reporting Company:

- ✓ Family Limited Partnership
- ✓ Asset Holding Company
- ✓ Family Co-Investment Vehicle
- ✓ Any LLC, limited partnership or corporation used for estate planning purposes

Possible Exemption from Reporting (Limited Circumstances):

- ✓ Family Office
- ✓ Private Trust Company
- ✓ Certain Subsidiaries

Likely <u>Not</u> a Reporting Company or Exempt From Reporting:

- ✓ Revocable Trust
- ✓ Irrevocable Trust
- ✓ Wholly Charitable Trust
- ✓ Charitable Split-Interest Trust
- ✓ Private Foundation

Reporting Company Exemptions & Common Private Wealth Entities

Whether a private wealth entity may qualify for one of the 23 Reporting Company exemptions depends on the particular characteristics of the entity. The most relevant CTA Reporting Company Exemptions include:

- **Large Operating Company**: May apply to such as family offices, provided such offices (i) have more than 20 full-time employees in the U.S.; (2) maintain a physical office in U.S. and (3) have more than $5 million of receipts/sales inside U.S. in past year (as reflected on tax/information return)
- **Investment Adviser**: May apply to multi-family offices, provided that such entities are registered in the U.S. Securities and Exchange Commission (the "**SEC**") pursuant to the Investment Advisers Act of 1940
  - Family offices may occasionally qualify for the Reporting Company exemptions for **venture capital fund advisers** or Commodity Exchange Act registered entities (e.g., **commodity pool operators or commodity trading advisor**), where such offices meet the necessary criteria
- **Bank**: Registered private trust companies may qualify for the bank exemption (including, in part, "banks" as defined by the Investment Company Act of 1940) if they provide fiduciary services for family trusts and are state supervised and examined
- **Tax-Exempt Entity**: May apply to private foundations and qualified charitable lead/charitable remainder trusts

Exemption Planning
Inactive Entity

- This exemption applies to an entity that meets the following conditions:
  - **Was in existence on or before January 1, 2020** (date of CTA enactment)
  - The entity is not engaged in active business
  - The entity Is not owned by a non-US person, whether directly or indirectly, wholly or partially
  - The entity has not experienced any change in ownership in the preceding twelve-month period
  - The entity has not sent or received any funds in an amount greater than $1,000, either directly or through any financial account in which the entity or any affiliate of the entity maintains an interest, in the preceding 12-month period, and
  - The entity does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, LLC, or other similar entity

Resources
FinCEN Web Page

- **FinCEN's BOI Webpage** (https://www.fincen.gov/boi)
- **Filing BOIRs – on the Webpage go to BOI-E Filing System**
  - **There are help and resources instructions and guides**
- **Obtaining FinCEN Identifiers – to create an account and then obtain FinCEN Identifier**
- **CTA Reference Materials**. Statute and regulations
- **Small Entity Compliance Guide**. To assist potential filers in complying with the beneficial ownership information (BOI) reporting rule
- **FAQs**. Guidance about BOI Reporting Requirements (In English and other languages)
- **Facility to Ask FinCEN Questions**
- **FinCEN Contact Center** FinCEN has launched a hotline and chatbot to help answer questions about the beneficial owner information requirement

Constitutional Challenges to the CTA

- ***National Small Business United Case***.
  - The Court found that the CTA is unconstitutional because it exceeds the Constitution's limits on Congress' powers, rejecting the arguments of the government that the BOIR Rule was constitutionally supported by Congress' broad powers to oversee foreign affairs and national security, regulate interstate commerce and impose taxes and related regulations.
  - The government appealed the decision to the 11^{th} Circuit.
  - On Sept. 27, 2024, the 11^{th} Circuit held oral argument
- **Firestone v. Yellen & Community Associations Institute v. Yellen**
  - Courts in these two cases denied request for preliminary injunctive relief, supporting constitutionality of the CTA
- **Complaints.**
  - There have been about a dozen complaints filed (apart from the *National Small Business United* case
  - Complaints have been filed in Fl, MA, MI, OH, OR, UT, VA, and TX
  - The cases are in the early procedural stages generally

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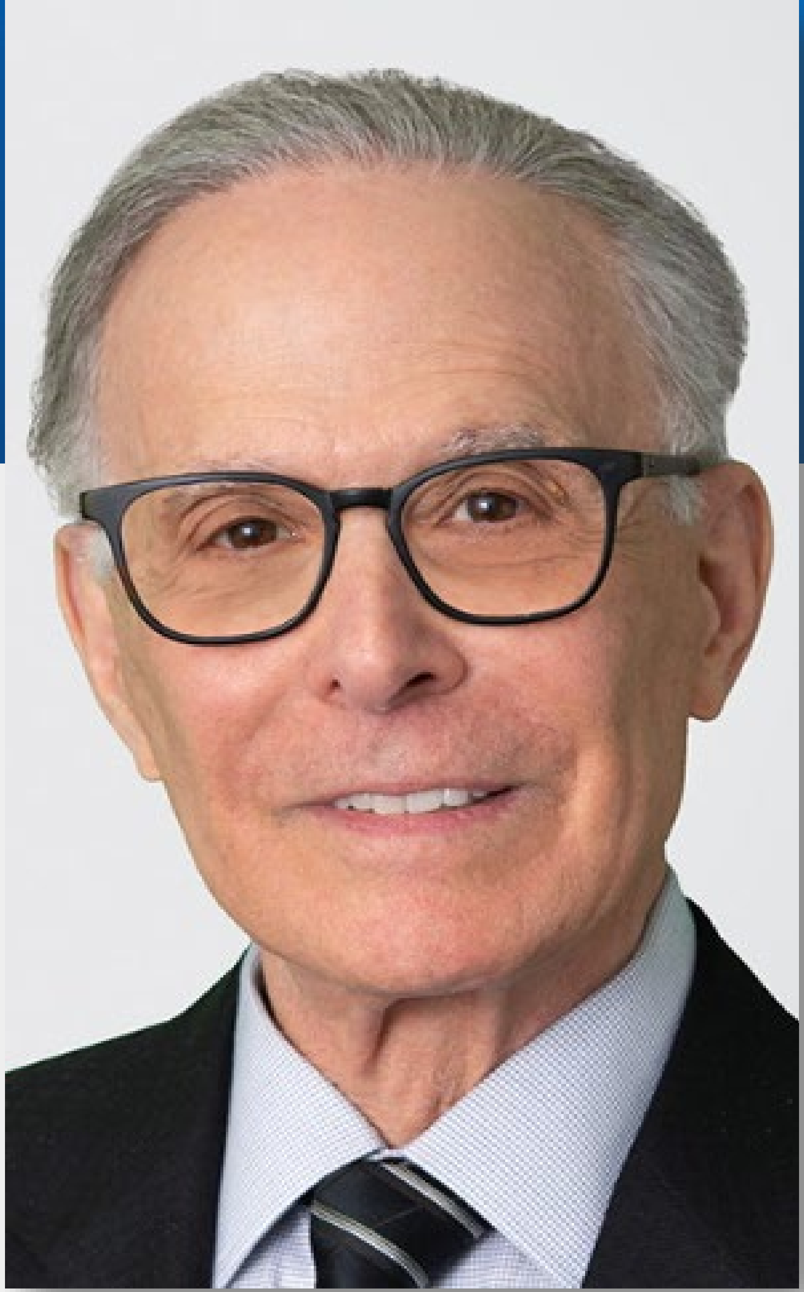
The CTA After the Election?

- Project 2025 states, at pp. 707-708:

- “Congress should repeal the Corporate Transparency Act, and FinCEN should withdraw its poorly written and overbroad beneficial ownership reporting rule. Both are targeted at the smallest businesses in the U.S. (those with 20 or fewer employees) and will do nothing material to impede criminal finance. The FinCEN beneficial ownership reporting rule will impose costs exceeding $1 billion annually and is exceedingly poorly drafted. FinCEN itself estimates that more than 33 million businesses will be affected and that costs will be $547 million to $8.1 billion annually.”

PANELISTS



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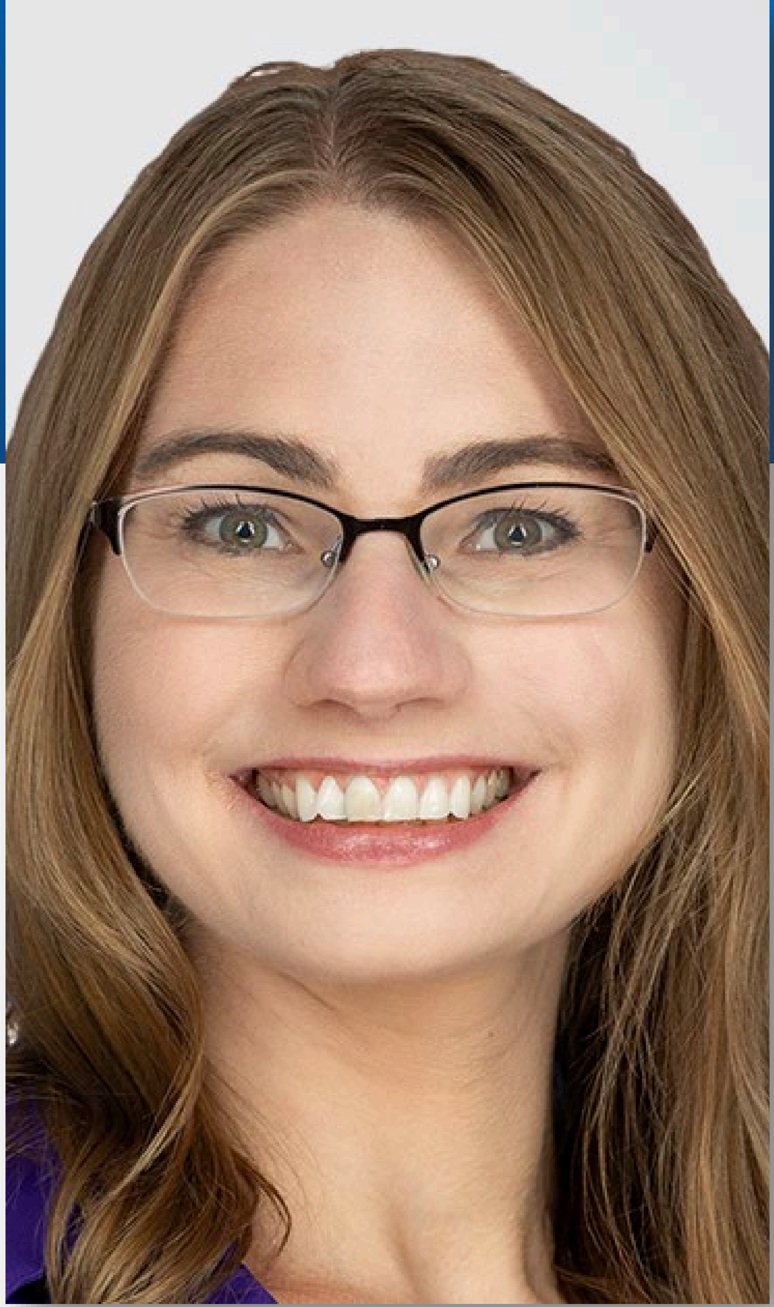

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- Focuses on proving support to clients with complex family estate plans and high maintenance asset structures to ensure proper administration.
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- Actively involved in assisting clients with complying with the CTA.

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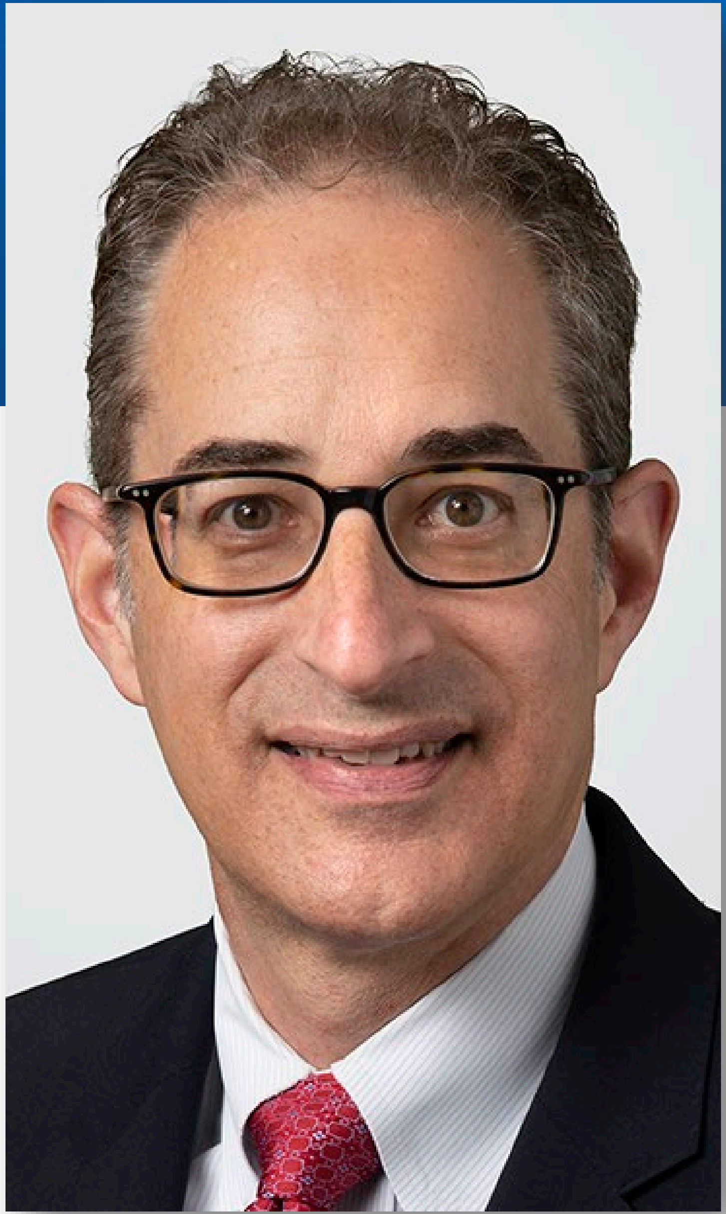

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