

Corporate Transparency Act: Do's, Don'ts and Deadlines

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February 27th, 2024



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Background

31 CFR 1010.380*, regarding reporting beneficial ownership information, was propagated in support of the Corporate Transparency Act (31 USC 5336).

Government is concerned about shell companies:

- » Used for illegal purposes
- » Created or used by certain regimes (e.g. Russia, North Korea, Iran)
- » Used to circumvent sanctions (think newly-manufactured Texas Instruments hardware found in Russian cruise missile-wreckage in Ukraine)



Basics of Required Information - Companies

Initial Report

- » Full legal name of the reporting company
- » Trademark and DBA
- » Current address:
 - » Domestic: “principal place of business” in the U.S.
 - » Foreign: “the street address of the primary location in the United States where the reporting company conducts business”
- » State, Tribal, or foreign jurisdiction
 - » of formation (domestic) or
 - » of registration (foreign)
- » IRS TIN or foreign equivalent with issuing jurisdiction.
§ 1010.380(b)(1)(i).

*If an entity is formed or registered to do business by filing with a secretary of state or equivalent, they are a “reporting company” and thus need to report (e.g. LLCs, corporations, LLPs, LPs, etc.). § 1010.380(a)(1), (c)(1).



Basics of Required Information - Individuals

Initial Report

- » Full legal name
- » Date of birth
- » Complete current address:
 - » For Company Applicants: their place of business
 - » For all others: “the individual's residential street address”
- » A unique identifying number and the issuing jurisdiction:
 - » Passport
 - » Driver's license
 - » State, tribal, or local government issued ID
 - » Foreign passport
- » Image of the document showing the identifying number § 1010.380(b)(1)(ii).



Timelines For Compliance

Initial Report

- » Domestic reporting companies:
 - » Created after Dec. 31, 2023 but before Jan. 1, 2025, have **90 CALENDAR DAYS** (§ 1010.380(a)(1)(i)).
 - » Earlier of (i) notice received that creation is effective; and (ii) date secretary of state provides public notice.
 - » Created after Dec. 31, 2024 have **30 DAYS**
 - » Created before Jan. 1, 2024 have until Jan. 2025 (§ 1010.380(a)(1)(iii)).
- » Foreign reporting companies (§ 1010.380(a)(1)(ii), (iii)):
 - » Basically the same requirements and timelines, but requirements are triggered by registration to do business in a U.S. jurisdiction, rather than creation as in the case with domestic reporting companies.
- » Entities that are no longer exempt must file within **30 DAYS** (§ 1010.380(a)(1)(iv)).
 - » *Updated report required for entities that become exempt (§ 1010.380(a)(2)(ii)).
- » Substantive Note: Company Applicant information isn't required for entities created or registered before January 1, 2024 (§ 1010.380(b)(2)(iv)).



Timelines For Compliance

Updated Report

- » **30 DAYS** to update required information for a company or a beneficial owner after it changes (§ 1010.380(a)(2)).
 - » Requirement is quite broad in its application: “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[.]” § 1010.380(a)(2)(i).
 - » Address, name, etc.



Timelines For Compliance

Updated Report (continued)

- » If a beneficial owner dies and interests are transferred, the clock starts ticking upon the date their estate is settled (§ 1010.380(a)(2)(iii)).
- » Beneficial owners who are minors must have their information reported upon reaching majority, if their parent's or guardian's information was submitted instead (§ 1010.380(a)(2)(iv), (b)(2)(ii), (d)(3)(i)).
- » If a beneficial owner's or company applicant's identifying document changes (e.g. passport or driver's license), then the date when the document changes starts the clock (§ 1010.380(a)(2)(v)).
 - » Triggers are "when the name, date of birth, address, or unique identifying number on such document changes."
- » For an entity to obtain exempt status, you must file an updated report. You are required to file. § 1010.380(a)(2)(ii).



Timelines For Compliance

Corrected Report

- » File within **30 days** of finding, or having reason to know, of an inaccuracy. § 1010.380(a)(3).
- » If they file within **90 days** of the inaccurate report being filed, then likely avoid criminal and civil penalties for a reporting violation under 31 U.S.C. 5336(h)(3)(C)(i)(I) unless an exception applies. See 31 U.S.C. 5336(h)(3)(C)(i)(I); 31 CFR § 1010.380(a)(3).



Penalties For Noncompliance

- » Up to \$500 per day, capped at \$10,000, in civil penalties for willfully providing false or fraudulent information on a BOI report, or failing to report complete or updated information. See 31 USC 5336(h)(3)(A).
 - » Imprisonment up to 2 years also possible. *Id.*
- » Unauthorized use or disclosure of BOI information can lead to up to \$250,000 in fines or imprisonment for up to 5 years, or both. See 31 USC 5336(h)(3)(B).
 - » Penalties increased if another law of the U.S. is also broken or misuse is part of a broader pattern of criminal behavior. *Id.*



What Constitutes Beneficial Ownership Or Substantial Control?

Beneficial Ownership Generally

- » A “beneficial owner”, 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 (§ 1010.380(d)).
- » If you own a stake in a company solely through an exempt entity, then the reporting company only needs to include the exempt entity’s information for that beneficial owner. §1010.380(b)(2)(i).
- » Foreign Pooled Investment Vehicles must report, but have more lax reporting requirements for BOI, such that reports are due for those who exercise substantial control, but need only be filed for the individual who “has the greatest authority over the strategic management of the entity”. § 1010.380(b)(2)(iii).



What Constitutes Beneficial Ownership Or Substantial Control? (continued)

Substantial Control

Substantial control is defined very broadly. An individual exercises substantial control if any of the following apply (§ 1010.380(d)(1)):

1. Serving as a Senior Officer (think C-suite or similar) (§ 1010.380(d)(1)(i)(A), (f)(8)).
2. Authority over appointment or removal of (a) any senior officer or (b) majority of the board (§ 1010.380(d)(1)(i)(B)).
3. “Directs, determines, or has substantial influence over important decisions made by the reporting company” including seven enumerated types of decisions, e.g. M&A, major expenditures, etc. (§ 1010.380(d)(1)(i)(C)).
4. “Has any other form of substantial control over the reporting company.” (§ 1010.380(d)(1)(i)(D)).



What Constitutes Beneficial Ownership Or Substantial Control? (continued)

Substantial control may be exercised directly or indirectly, including as a trustee of a trust, through (§ 1010.380(d)(1)(ii)):

- » Board representation
- » Majority ownership or control of voting rights
- » “Rights associated with any financing arrangement or interest in a company” (§ 1010.380(d)(1)(ii)(C)).
- » Control via intermediary entities
- » “Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees” (§ 1010.380(d)(1)(ii)(E)).
- » “Any other contract, arrangement, understanding, relationship, or otherwise.” (§ 1010.380(d)(1)(ii)(F)).



What Constitutes Beneficial Ownership Or Substantial Control? (continued)

Ownership interests, and control thereof

- » Includes:
 - » equities such as stocks;
 - » certificates of interest in a business trust;
 - » JV interest;
- *does not require these be transferrable or come with voting rights (§ 1010.380(d)(2)(i)(A)).



What Constitutes Beneficial Ownership Or Substantial Control? (continued)

Ownership interests, and control thereof (continued)

- » Includes:
 - » Capital and Profits interests (§ 1010.380(d)(2)(i)(B));
 - » Convertible instruments, futures, warrants, or options for such (§ 1010.380(d)(2)(i)(C));
 - » Puts, calls, straddles, or other options or privileges of buying or selling the above interests (§ 1010.380(d)(2)(i)(D)).



What Constitutes Beneficial Ownership Or Substantial Control? (continued)

Ownership interests, and control thereof (continued)

- » Includes:
 - » The catch-all “Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.” (§ 1010.380(d)(2)(i)(E)).



What Constitutes Beneficial Ownership Or Substantial Control? (continued)

Ownership interests, and control thereof (continued)

- » Ownership or control of ownership interests can be exercised through (§ 1010.380(d)(2)(ii)):
 - » Joint ownership of an undivided interest
 - » Through a nominee, intermediary, custodian, or agent
 - » Through intermediary entities
 - » Through a trust or similar arrangement:
 - » As Trustee of a trust
 - » As a trust's sole Beneficiary; as a Beneficiary who may compel a distribution; or the settlor/grantor of a trust who retains a right to revoke the assets



What Constitutes Beneficial Ownership Or Substantial Control? (continued)

Ownership interests, and control thereof (continued)

- » Note that the FinCEN rule includes requirements for calculating the percentage of ownership interests for purposes of the 25%-Rule (§ 1010.380(d)(2)(iii)). Some highlights:
 - » Ownership interests are calculated presently, but any “options or similar interests”, e.g. convertible instruments, are treated as exercised.
 - » Capital and Profits interests both calculated
 - » Corporations: the greater of vote or value.
 - » Catch-all of § 1010.380(d)(2)(iii)(D).



Who Is Exempt From These Reporting Obligations?

Individual Exceptions (§ 1010.380(d)(3)).

Beneficial ownership does not include:

- » Minor children (but if not included, parent or guardian must be reported instead).
- » A nominee, intermediary, custodian, or agent
- » A mere employee of a reporting company who is not a senior officer
- » Rights of inheritance
- » Creditors



Who Is Exempt From These Reporting Obligations?

23 Entity Exemptions

Apply at the entity level (§ 1010.380(c)(2))*:

- » Securities reporting issuer ('33 Act § 12; '34 Act § 15(d)).
- » Governmental authorities in the U.S.
- » Banks
- » Credit unions
- » Depository institution holding company
- » Money services business
- » Broker or dealer in securities
- » Securities exchange or clearing agency
- » Certain other Exchange Act registered entities.
- » Investment companies & investment advisors
- » Venture capital fund advisers
- » Insurance companies
- » State-licensed insurance producers
- » Entities registered under the Commodity Exchange Act
- » Accounting firms
- » Public utilities
- » Financial market utilities
- » Pooled investment vehicles
- » Certain tax exempt entities
- » Certain entities which “exclusively to provide financial assistance to, or hold governance rights over” aforementioned tax exempt entities



Who Is Exempt From These Reporting Obligations?

23 Entity Exemptions (continued)

Apply at the entity level (§ 1010.380(c)(2)):

- » Large operating company
 - » More than 20 full-time employees in the U.S. (per entity-requirement)
 - » Has an “operating presence at a physical office within the United States”
 - » Filed U.S. Federal income tax return for prior year showing greater than \$5 million in U.S.-sourced gross receipts or sales reported on Form 1120, 1065, or similar.
 - » Consolidated returns aggregate the amount for the entities in the affiliated group.



Who Is Exempt From These Reporting Obligations

23 Entity Exemptions (continued)

Apply at the entity level (§ 1010.380(c)(2)):

- » Subsidiaries: Entities whose ownership interests are “controlled or wholly owned, directly or indirectly” by any of the previously mentioned exempt entity types, except for:
 - » Money Services Businesses,
 - » Pooled investment vehicles, and
 - » entities assisting tax exempt entities.



Who Is Exempt From These Reporting Obligations?

23 Entity Exemptions (continued)

Apply at the entity level (§ 1010.380(c)(2)):

- » Inactive entities, i.e. entities which meet all of the following requirements:
 - » Existed on or before Jan. 1, 2020
 - » Not engaged in active business
 - » Not owned by foreign person, directly or indirectly, wholly or partially
 - » No ownership changes in last 12 months
 - » “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 had an interest, in the preceding 12-month period”
 - » Does not hold any assets



Other Topics

Residential Address

- » The Rule requires that beneficial owners report their “residential street address.” § 1010.380(b)(1)(ii)(C)(2).
- » In the comments to the Rule on this point, FinCEN agreed to not require that this match the same address used for “tax residency purposes”.
- » FinCEN’s commentary to the Rule did draw attention to the fact that government identification, such as passports and driver’s licenses, also require a residential address when the application is filed.
- » If someone doesn’t have a permanent address, then it should be their current residential address.

Converted Entities

- » We are still waiting on guidance from FinCEN regarding how to treat converted entities.

Access to BOI

- » FinCEN released a final rule regarding access to BOI and safeguards around it on Dec. 22, 2023.



Contact Our Presenter

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