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Beneficial Ownership Information Reporting: Navigating New Guidance and Risks

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Goal for Today's Session

- Bring you up to date with guidance and developments that took place during and after tax season
- Also review the requirements to remind you of them or, if you've not looked at them before, have access to detailed guidance on the same

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Changes Since January

- Alabama US District Court found the law unconstitutional – but only issued an order for a relatively small group – so no real change for most entities and owners right now
- FinCEN issues new Q&As on the BOI on April 18, 2024
 - A number clarify reporting – we will look at most of them briefly
 - Will not spend time on ones clarifying the limits on the users of the information
- Filings have now begun using various methods covered in the following slides

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Changes Since January

- New Jersey Committee on the Unauthorized Practice of Law releases guidance on what CPAs and EAs can and cannot do related to unauthorized practice of law issues

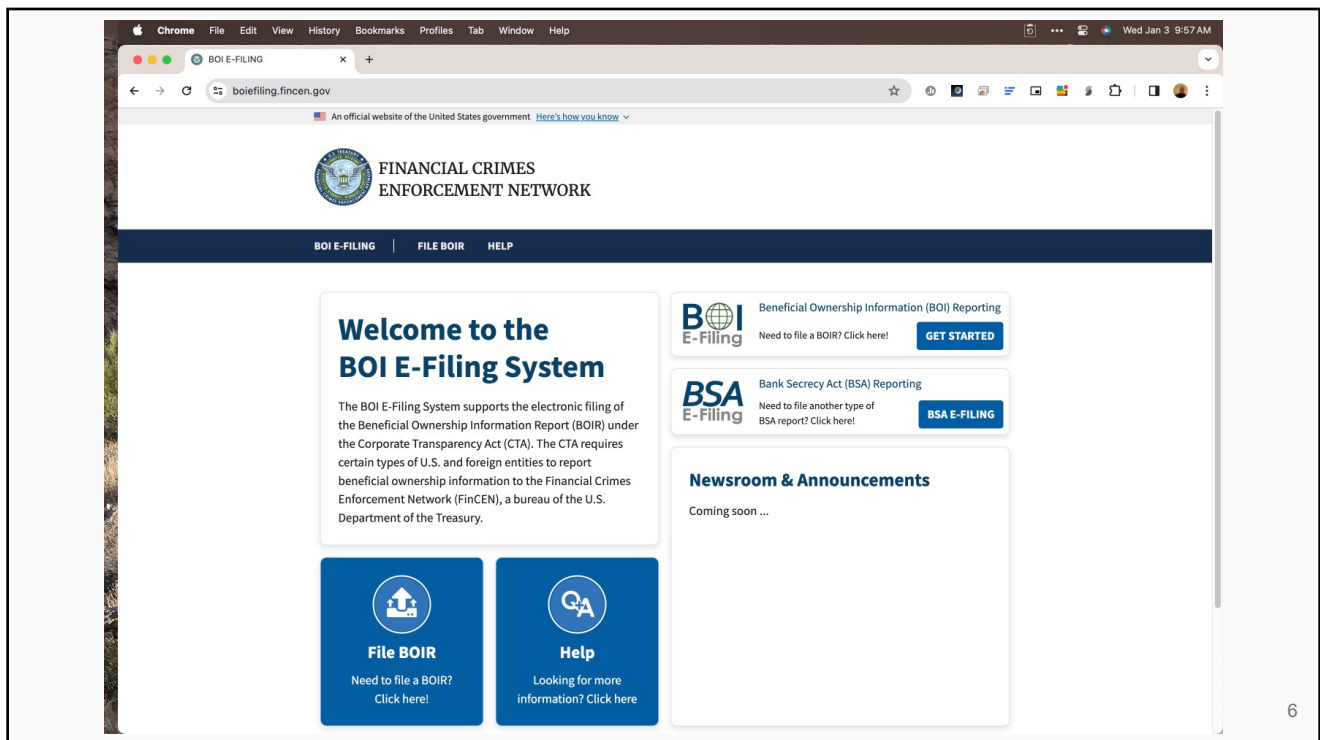
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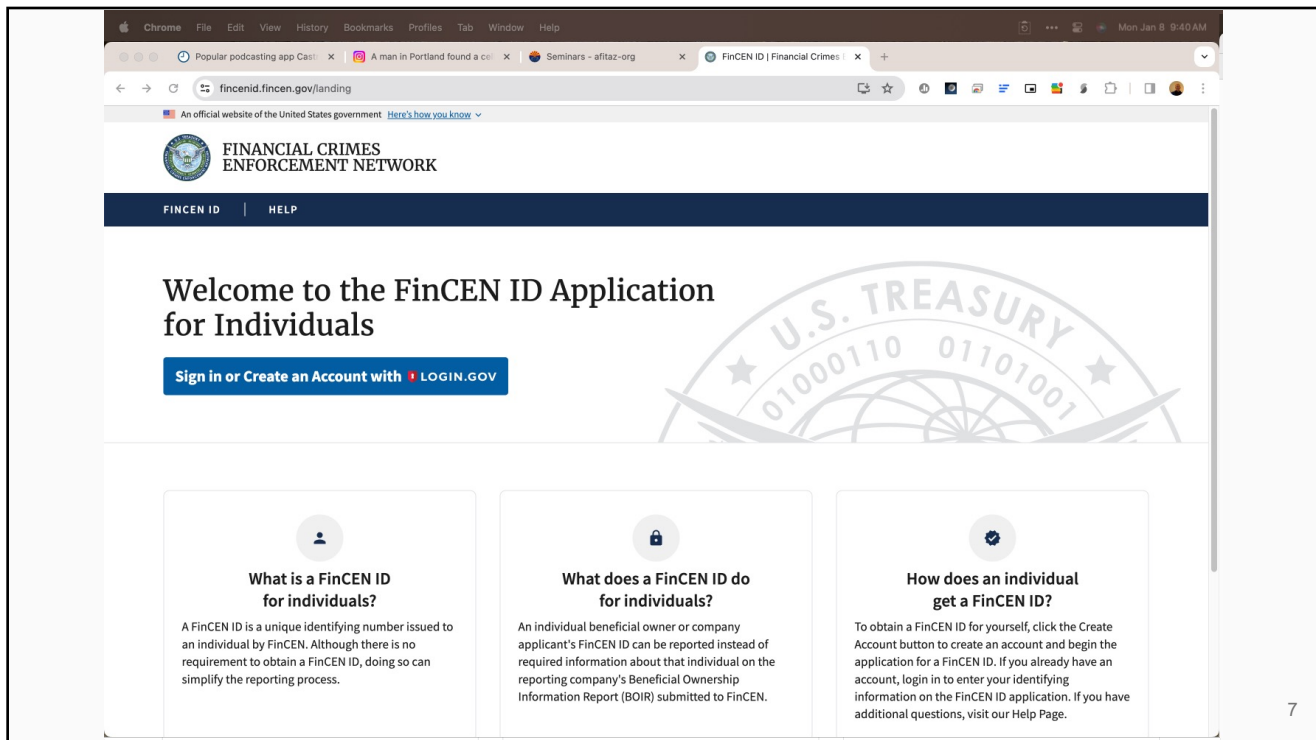
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Alabama District Court Case

- National Small Business United v. Yellen, USDC N.E. D Ala., March 1, 2024
 - National Small Business Association filed suit on the CTA claiming
 - Congress exceeded its powers in enacting the CTA
 - The law violates the First, Fourth, Fifth, Ninth & Tenth Amendments and
 - Is impermissibly vague in its term
 - Court released its 52-page opinion late on a Friday afternoon

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Alabama District Court Case

- National Small Business United v. Yellen, USDC N.E. D Ala., March 1, 2024
 - Court found that Congress failed to show this fit within its enumerated powers, taking into account the necessary and proper clause
 - Foreign affairs power
 - Commerce (interstate and international)
 - Taxing power
 - Did indicate there were ways it could be drafted to pass muster (limit applicability to entities engaged in interstate and/or international commerce)

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Alabama District Court Case

- National Small Business United v. Yellen, USDC N.E. D Ala., March 1, 2024
 - As the Court had found the law in its entirety was void, decided no point in looking further at issues with First, Fourth and Fifth Amendments
 - Relief for now is only for plaintiffs in the suit, which likely includes members of the the NSBA (possibly even new ones)

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FinCEN Announces Position and Appeal

- “Notice Regarding National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.),” FinCEN News Release, March 4, 2024
 - Case found that the Corporate Transparency Act was unconstitutional
 - Relief was granted, per the Court order, to the named plaintiffs
 - FinCEN announces will apply the decision only to members of the NASB as of March 1, 2024
 - Actions for those impacted?
 - FinCEN's announcement means they see no change for most impacted individuals
 - Even for those who have gotten relief, there is a risk of reversal on appeal
 - Most seem to be counseling continuing to plan to comply with the law

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FinCEN Announces Position and Appeal

- Notice of Appeal, National Small Business United, et al v. Yellen, et al, USDC ND Alabama, March 11, 2024
 - As expected, FinCEN filed formal notice that the agency will appeal the case
 - Appeal will be heard by the Eleventh Circuit Court of Appeals

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Practice of Law Issue

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- Letter issued to NJCPA by the New Jersey Committee on the Unauthorized Practice of Law
- Asked whether CPAs could prepare and file BOI reports under the CTA for clients
- While it only directly applies to New Jersey, the concepts are likely to be considered in other states if the matter comes up

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- The letter outlines two factors that must be considered when determining if any type BOI work is/is not the unauthorized practice of law in New Jersey
 - Is the preparation and/or filing of BOI reports the practice of law as New Jersey law defines the term and
 - Is it in the public interest to permit non-attorneys to prepare and/or file the forms, considering whether the public needs to be protected from the activity
- Merely being the practice of law does not mean undertaking the task would be the unauthorized practice of law in the view of New Jersey

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- The committee determines that preparing and/or filing BOI reports is the practice of law in New Jersey - involves “applying the terms of a dense statute to a set of potentially complicated facts.”
- But that is not the end of inquiry - should all such preparations and/or filing be restricted to attorneys to protect the public?
 - The question is approached from the view of the public’s interest solely
 - Certain parties may be allowed to perform services that meet the definition of the practice of law if, weighs the facts and circumstances, it is in the public’s interest to permit it

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- Case law and rulings considered
 - New Jersey Supreme Court determined in 1986 that CPAs (and later EAs) were allowed to prepare and file NJ Inheritance Tax Returns
 - In re Application of New Jersey Society of CPAs, 102 N.J. 231, 241-42 (1986) decided CPAs could prepare those returns (and later the Committee expanded that to include EAs)
 - CPAs and EAs do have to tell clients that a review of the return by an attorney would be advisable (under the protection of the public concept)

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- Case law and rulings considered
 - New Jersey Supreme Court determined in 1986 that CPAs (and later EAs) were allowed to prepare and file NJ Inheritance Tax Returns
 - The Court noted that any limitation on the practice of law must deal with the overlap of professional disciplines
 - Although not stated, arguably a number of BOI exemption rules involve the practice of accounting (e.g. gross income for large entities, counting full time employees under ACA regulations from payroll records)
 - Could end up with no one being able to give advice absent a consideration for the overlap (likely with considering the need to bring in an additional professional or refer the engagement out)

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- Case law and rulings considered
 - Letter also refers to the Committee's opinion granting non-attorneys a limited right to draft corporate documents (UPL Opinion 47, 2011). In that letter they considered
 - Is there any demonstrable harm from allowing a non-attorney to perform the service?
 - What would be the cost savings accruing to the public by allowing non-attorneys to perform the service?
 - Recognize the voluntary nature of the client deciding not to use an attorney and
 - Consider if the client truly understands the potential risks of not having the service performed by an attorney
 - Again required non-attorneys to advise clients on advisability of legal counsel

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- Now to apply these to the preparation and/or filing of BOI reports with FinCEN
 - The Committee concluded that the public needs some protection due to
 - The complexity of some matters under the CTA – the law is new and in many situations how it applies may not be crystal clear per the statute's language
 - Not properly complying with the law can lead to significant criminal and civil penalties
 - In a case of a complex filing, a lawyer's "judgment, training and expertise" is required to make the determination on things such as who are the beneficial owners

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- But the Committee goes on to note that most BOI reporting situation are not complex
 - It is clear who has ownership and controls of most entities (for instance, a single-member LLC formed to hold a piece of real estate)
 - In such cases the knowledge, training and skills of an attorney is not required to complete the form
 - In such cases, which are the norm, there would be a significant cost savings to the public in not having to have an attorney prepare and file the form should they wish to seek assistance

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- Does the public sufficiently understand the risks of using someone other than an attorney to handle the preparation or filing of the returns?
 - While the Committee has concluded that there are cases where an attorney is not needed and others where the attorney is need, the question becomes whether the public understand the risks enough to decide which category their filing falls in?
 - The Committee concludes that, because of the newness of the law, there is not yet sufficient information to make this call at this time
 - Issues like how FinCEN decides when to enforce pieces of this law and how they determine the amount of the fines (remember it's "up to \$591 per day") will be key information to determine the risks that a party is taking

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- The Committee effectively decided that CPAs and EAs, through their experience, training and professional standards can be the party to recognize the risks and advise the client accordingly
 - A New Jersey licensed CPA (or EA) can engage in this conduct if the CPA (or EA) notifies the client it may be advisable to consult with a lawyer in each engagement
 - The Committee relies on the professionalism of CPA (or EA) to recognize when a filing is complex (thus requiring an attorney's expertise) and it is in the client's interest for an attorney to be retained (note the subtle difference in wording from the first requirement)

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- The Committee's admonition to the CPA to recognize when an attorney is needed is in line with the AICPA Code of Conduct and the New Jersey Accountancy regulations that apply to New Jersey CPAs
 - A CPA must constantly evaluate if he/she, as well as his/her firm, possesses the professional competence to complete the engagement
 - If not, the CPA must make a referral to a professional that does possess the competence to handle the engagement or obtain a consultation on the matter (either refer to an attorney or have the client obtain an attorney to jointly handle the BOI issues)
 - AICPA Code of Professional Conduct ET §0.300.060.04

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

ET §0.300.060.04

.04 Competence represents the attainment and maintenance of a level of understanding and knowledge that enables a member to render services with facility and acumen. It also establishes the limitations of a member's capabilities by dictating that consultation or referral may be required when a professional engagement exceeds the personal competence of a member or a member's firm. Each member is responsible for assessing his or her own competence of evaluating whether education, experience, and judgment are adequate for the responsibility to be assumed. (emphasis added)

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- The Committee's admonition to the CPA to recognize when an attorney is needed is in line with the AICPA Code of Conduct and the New Jersey Accountancy regulations that apply to New Jersey CPAs
 - New Jersey's regulations for CPAs applies a very similar rule (N.J.A.C. 13.29-3.3)
 - As well, another regulations provides a general rule that New Jersey CPAs must comply with the AICPA Code of Conduct (N.J.A.C. 13:29-3.19)

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

NJAC 13:29-3.3 – Competence

A licensee or the licensee's firm shall not undertake any engagement for the performance of professional services which the licensee cannot reasonably expect to complete with due professional competence, including compliance, where applicable, with 13:29-3.5 and 3.6.

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- CPAs are protected from UPL state law complaints under 5 USC 500(c) when dealing solely with tax law matters (that is, Title 26 USC)
- Under an extreme view of the UPL definition, filling in any form for the government would be UPL (that includes annual corporate reports reports, financial aid applications, etc.)
- Reality is that courts haven't been willing to go to the extreme but 31 USC §5663 is new ground
- Insurance carriers have slowly been toning down UPL warnings

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- AICPA/AON Risk Alert on BOI

<https://www.cpai.com/Education-Resources/my-firm/Tax-Services/What-accounting-firms-need-to-know-about-CTA>

- Clients could claim CPAs should have educated them on this matter (so can't ignore it)
- Engagement letters for tax matters should make clear annual engagements don't cover BOI reporting (since that's not annual)
- CPA should consider consulting with counsel to see when actions under BOI could constitute practice of law in various jurisdictions (though most will have nothing like the letter from New Jersey's Committee on the Unauthorized Practice of Law)

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- AICPA/AON Risk Alert on BOI

<https://www.cpai.com/Education-Resources/my-firm/Tax-Services/What-accounting-firms-need-to-know-about-CTA>

- Also consider checking with your insurance carrier to see how they view this situation
- If do take on a BOI engagement, get a separate engagement letter drafted
- If decide not to handle BOI engagements, do not give "off the cuff" or "informal advice" as that opens up all of the issues you likely thought you were avoiding.

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- FinCEN throws its own view into the mix (intentionally or not)
 - FAQ Q&A B.8. indicates that companies should turn to attorneys and accountants for assistance
 - " Reporting companies that need help meeting their reporting obligations can consult with professional service providers such as lawyers or **accountants**." [November 16, 2023 revision]
 - Note that the Committee's letter specifically quotes this provision of the FinCEN FAQ document

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- Recently insurance carriers have backed off absolutes on UPL
 - CAMICO has indicated it expects to defend CPAs unless a state has clearly indicated that the BOI is UPL and released engagement letters
 - AON has similarly released multiple engagement letters
- Regardless, CPAs need to take care
 - Merely filling in the form based solely on a client's statements is unlikely to face problems in simple fact patterns
 - However, if ownership is via, say, a complex trust document or the like, then we get into the interpretation of legal documents and how a court would view them—and that takes legal skills

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Does Providing BOI Services Represent the Unauthorized Practice of Law?

- Applying tests derived fully from the IRC also is likely fine (and attorneys may very well ask the CPA to provide that information)
 - Not for profit organization claiming exemption under sections mentioned in the final rule
 - Taxpayer meets the mechanical tests for the large entity exemption based on income tax and employment tax filings
- However, if a client is seeking advice on avoiding reporting in less clear situations (including believing the Alabama decision will become the law of the land), you would appear to be opening yourself up, at least for civil damages, to a claim you were engaged in a form of UPL

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Referrals

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What if I Simply Refer Clients to Others to Handle the Report?

- Some CPAs have concluded that they are simply going to suggest clients go to others for assistance with this report
- But those clients are likely to ask the CPA for advice on where to turn
 - Normally the CPA should first suggest the client contact his/her attorney
 - But if the attorney also declines to provide the service (and many are) or the client is looking for another option, can the CPA refer them to one of many services providing BOI filing services?

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What if I Simply Refer Clients to Others to Handle the Report?

- A CPA must consider their responsibilities when making a referral – it's far from a no-risk option
 - Article discussing general issues of referrals: Sarah Beckett Ference, CPA, "Unintended Consequences of Professional Referrals", Journal of Accountancy website, November 1, 2020, <https://www.journalofaccountancy.com/issues/2020/nov/cpa-referrals-unintended-consequences.html>
 - A referral is reasonably seen by a client as an endorsement of the individual's or organization's capabilities by the CPA, as well as an assurance they will take care of all issues

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What if I Simply Refer Clients to Others to Handle the Report?

- Suggest that a CPA, in making referrals
 - Perform a due diligence investigation of organizations the CPA is considering making referrals to
 - Preferably give a client an alphabetical list of options from which to choose (avoids suggesting a preferential endorsement of one individual/organization)
 - Give the referral in writing to document exactly what you said regarding the referral
 - Also issue a disclaimer that clarifies you are not responsible for the other party's work and will not be supervising that work
 - Remember the AICPA Code of Professional Conduct rules for commissions and referral fees found at ET §1.520.001 – when they can't be taken and, if they can, they must be disclosed to the client

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What if I Simply Refer Clients to Others to Handle the Report?

- Remember the unique exposure of the BOI report – how is the client going to be aware an updated or corrected report is required
 - The difficulty of insuring clients timely file updated or corrected reports is one of the major liability exposures for BOI reporting
 - The party doing report preparation almost certainly have terms that limit their responsibility solely to one report—the client would to contact them should an updated report be required
 - Is the client going to be properly educated on the updated report issue by the party you are referring them to?
 - Can you really escape some responsibility here—the client sees you far more often

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Filing Requirements

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FinCEN Documents

- Final rule on reporting issued in late 2022
- FAQ issued by FinCEN on March 24, 2023
- One page PDF of key reporting dates
- Second one page PDF on beneficial ownership reporting
- Proposed (and now final) rule pushed back initial report for entities formed in 2024
- 54 page guide issued for small entities
- Reporting site opened up on schedule on January 1, 2024

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Filing Requirements

- Reporting companies are required to file these reports 31 USC §5336(b)(1)
- What entity types are covered?
 - LLCs
 - Corporations
 - Other entities required to register with a state, tribe, etc. or created by filing a document with the same governments
 - However, may be exempt from filing

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Filing Requirements

- Clarification in Question C.9. of FAQ added April 18, 2024
 - What if a domestic corporation or LLC is not created by filing a document with the Secretary of State or equivalent office – is it a reporting company
 - No – but this is a very unusual circumstance

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When Are Initial Reports to Be Filed?

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Explanation of the Initial Report Filing Requirements

- Filing is now available – opened up on January 1, 2024
- When initial reports are required to be filed
 - A reporting company created or registered to do business before January 1, 2024 - January 1, 2025
 - A reporting company created or registered during 2024 - 90-day deadline runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier
 - For reporting companies created or registered in 2025, the deadline drops to 30 days

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Explanation of the Initial Report Filing Requirements

- Previously exempt entity becomes no longer exempt - file a report within 30 calendar days after the date that it no longer meets the criteria for any exemption

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Explanation of the Initial Report Filing Requirements

- Also, it appears that if an existing entity files early in 2024, they would immediately be subject to the update requirements we'll discuss later

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Explanation of the Initial Report Filing Requirements

- April 18, 2024, clarification (Question G.6.)
 - Company created before January 1, 2024, met an exemption on that date
 - Before January 1, 2025, loses its exempt status
 - When does it have to file? It is the later of
 - January 1, 2025, or
 - 30 days after the entity loses its exempt status

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Reporting Company

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Categories of Reporting Companies

Type	Definition
Domestic reporting company	Any entity that is: (A) a corporation; (B) a limited liability company; or (C) created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe. ¹⁶
Foreign reporting company	Any entity that is: (A) a corporation, limited liability company, or other entity; (B) formed under the law of a foreign country; and (C) registered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe. ¹⁷

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Definition and Characteristics of a Reporting Company

- Domestic reporting company -
 - a corporation,
 - a limited liability company, or
 - any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.

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Definition and Characteristics of a Reporting Company

- Foreign reporting company -
 - a corporation, limited liability company, or other entity formed under the law of a foreign country, and
 - registered to do business in any U.S. state or in any Tribal jurisdiction, by the filing of a document with a secretary of state or any similar office under the law of a U.S. state or Indian tribe.

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Definition and Characteristics of a Reporting Company

- A “state” means
 - any state of the United States,
 - the District of Columbia,
 - the Commonwealth of Puerto Rico,
 - the Commonwealth of the Northern Mariana Islands,
 - American Samoa,
 - Guam,
 - the U.S. Virgin Islands, and
 - any other commonwealth, territory, or possession of the United States.

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Definition and Characteristics of a Reporting Company

- Entities formed before enactment of the CTA (January 1, 2021) must file unless they ceased to exist (defined later) before January 1, 2024 (FinCEN FAQ C.12, July 8, 2024)
- Entities that ceased to exist before January 1, 2024, do not need to report.
 - Must be formally terminated with the process complete by that date.
 - Filing dissolution paperwork with creating agency
 - Receive written confirmation of dissolution
 - Paying required taxes or fees
 - Ceasing to conduct business & wind up affairs (liquidate) (FinCEN FAQ C.13, 7/8/24)

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Definition and Characteristics of a Reporting Company

- Entities that ceased to exist before January 1, 2024, do not need to report.
 - If used a shortcut administrative dissolution (possible in some states) the entity is not treated as ceasing to exist as a legal entity unless the dissolution or suspension becomes permanent
 - In some states that may never happen
 - In others most often it is a matter of years
 - The key question is whether the entity can be restored via a mechanism (quite often paying the old unpaid fees and penalties and filing missed reports)

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Definition and Characteristics of a Reporting Company

- Entities formed in 2024 or later which ceased to exist before their initial filing date still must file the initial report (FinCEN FAQ C.14, 7/8/24)
 - The mere existence after January 1, 2024 is what triggers the filing requirement, not still being around on the due date
 - The question also addresses an issue some had wondered about-there is no requirement (or even option from what I can see) to inform FinCEN that the entity has ceased to exist

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Homeowners' Associations

- Clarified filing status in April 18, 2024, FAQ update
- Follows the standard rules (Question C10)
 - If formed other than by filing a document with Secretary of State or equivalent office, then is not required to file
 - But if did file with Secretary of State or similar office must file unless the HOA qualifies for an exemption
 - If qualifies as an IRC §501(c)(4) social welfare organization does not need to file
 - However, if not, then it's likely it needs to file

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Homeowners' Associations

- Beneficial Owners (Question D.13.)
 - Likely won't have a 25% owner (though if it does, those must report)
 - Substantial control –
 - Senior officer of the HOA
 - Authority to appoint or remove officers of the HOA or a majority of the board of directors
 - The individual is an important decision maker or
 - The individual has any other form of substantial control over the HOA

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Exempt Entities

- The statute provides for 23 types of entities that are exempt from the requirements to file reports even though they otherwise would be a reporting company
- Important to note that there is no small business exemption from the filing requirements.
- The main concern is all about small, non-operating companies or companies with minimal operations that exist primarily to confuse the ownership chain

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Exempt Entities

- Certain types of securities reporting issuers.
- A U.S. governmental authority.
- Certain types of banks.
- Federal or state credit unions as defined in section 101 of the Federal Credit Union Act.
- Any bank holding company as defined in section 2 of the Bank Holding Company Act of 1956, or any savings and loan holding company as defined in section 10(a) of the Home Owners' Loan Act.

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Exempt Entities

- Certain types of money transmitting or money services businesses.
- Any broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934, that is registered under section 15 of that Act (15 U.S.C. 78o).
- Securities exchanges or clearing agencies as defined in section 3 of the Securities Exchange Act of 1934, and that is registered under sections 6 or 17A of that Act.
- Certain other types of entities registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

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Exempt Entities

- Certain types of investment companies as defined in section 3 of the Investment Company Act of 1940, or investment advisers as defined in section 202 of the Investment Advisers Act of 1940.
- Certain types of venture capital fund advisers.
- Insurance companies defined in section 2 of the Investment Company Act of 1940.

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Exempt Entities

- State-licensed insurance producers with an operating presence at a physical office within the United States, and authorized by a State, and subject to supervision by a State's insurance commissioner or a similar official or agency.
- Commodity Exchange Act registered entities.
- Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002.

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Exempt Entities

- Certain types of regulated public utilities.
- Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010.
- Certain pooled investment vehicles.
- Certain types of tax-exempt entities.
- Entities assisting a tax-exempt entity described in the prior bullet

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Exempt Entities

- Large operating companies with at least 20 full-time employees, more than \$5,000,000 in gross receipts or sales, and an operating presence at a physical office within the United States. (This the exception that has the broadest applicability.)
- The subsidiaries of certain exempt entities.
- Certain types of inactive entities that were in existence on or before January 1, 2020

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Exempt Entities

- Remember these exemptions are to be interpreted narrowly - so you must look at the details for any exemption you believe cover a particular organization
- These details are found in the Beneficial Ownership Information Reporting Regulations at 31 CFR § 1010.380(c)(2)
- We'll next consider some of the categories you are more likely to run into

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Large Operating Company

- Must meet all of the following requirements:
 - Employ more than 20 employees on a full time basis in the United States
 - Filed federal income tax returns in the previous year that reported more than \$5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of
 - other entities owned by the entity; and
 - other entities through which the entity operates
 - Has an operating presence at a physical office in the United States

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Large Operating Company

- Counting employees for this test
 - Borrows definitions found in the regulations for the applicable large employer (ALE) provisions of the Affordable Care Act (ACA) for full time employees (does not count full time equivalents)
 - These regulations are found at
 - Treasury Reg. §54.4980H-1(a) (which provides definitions of employees and full time employees) and
 - Treasury Reg. §54.4980H-3 (which determines full time employees under the ACA for the ALE rules)

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Large Operating Company

- Counting employees for this test
 - Employer ALE regulations allows aggregating certain group of related entities as a single employer
 - Full time employee
 - generally is an employee who is employed an average of at least 30 hours a week in a calendar month,
 - working 130 hours per month being treated as equivalent of being employed on average at least 30 hours a week in a calendar month

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Large Operating Company

- Counting employees for this test
 - Definition of “United States” is modified from the ACA one. For this purpose, the “United States” is made up of:
 - The States of the United States,
 - the District of Columbia,
 - the Indian lands (as that term is defined in the Indian Gaming Regulatory Act), and
 - the Territories and Insular Possessions of the United States.
 - The last two categories are not part of the United States for ACA purposes.

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Large Operating Company

- \$5,000,000 test
 - Filed a Federal income tax or information return in the United States for the previous year demonstrating more than \$5,000,000 in gross receipts or sales, as reported as gross receipts or sales (net of returns and allowances) on the entity's
 - Form 1120 (including consolidated returns)
 - Form 1120-S,
 - Form 1065 or
 - Other applicable form

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Large Operating Company

- \$5,000,000 test
 - Excludes gross receipts or sales from sources outside the United States, as determined under Federal income tax principles.
 - For corporations that file a consolidated return, the test will apply to the amount reported on the consolidated return for the group

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Subsidiary of Certain Exempt Entities

- Wholly-owned subsidiaries of most (but not all) exempt entities
- All ownership interests must be controlled or owned, directly or indirectly, by one of listed entities for this exception

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Subsidiary of Certain Exempt Entities

- Entities that, if exempt, exempt their wholly controlled subsidiaries:
 - Securities reporting issuer;
 - Governmental authority;
 - Bank;
 - Credit union;
 - Depository institution holding company
 - Money services business;
 - Broker or dealer in securities;
 - Securities exchange or clearing agency

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Subsidiary of Certain Exempt Entities

- Entities that, if exempt, exempt their wholly controlled subsidiaries:
 - Other Exchange Act registered entity;
 - Investment company or investment adviser;
 - Venture capital fund adviser;
 - Insurance company;
 - State-licensed insurance producer;
 - Commodity Exchange Act registered entity;
 - Accounting firm (registered under Section 102 of the Sarbanes-Oxley Act);
 - Public utility;
 - Financial market utility;

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Subsidiary of Certain Exempt Entities

- Entities that, if exempt, exempt their wholly controlled subsidiaries:
 - Tax-exempt entity; or
 - Large operating company

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Inactive Entity

- All of these had to have existed on January 1, 2020 (so over time we will have fewer of these)
- 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 preceding twelve month period;

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Inactive 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 had an interest, in the preceding twelve month period; and
- Does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.

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Beneficial Owner

Beneficial Ownership Information Reporting: Navigating New Guidance and Risks

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Definition of a Beneficial Owner

- If not otherwise excluded (see next major section), with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—
 - exercises substantial control over the entity; or
 - owns or controls not less than 25 percent of the ownership interests of the entity

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Substantial Control

- Note - don't need to have any ownership to be in this category.
- An individual exercises substantial control if the individual:
 - Serves as a senior officer of the reporting company;
 - Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);

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Substantial Control

- An individual exercises substantial control if the individual:
 - Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding (not an exclusive list):
 - The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
 - The reorganization, dissolution, or merger of the reporting company;
 - Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;
 - The selection or termination of business lines or ventures, or geographic focus, of the reporting company;

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Substantial Control

- An individual exercises substantial control if the individual:
 - Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding (not an exclusive list):
 - Compensation schemes and incentive programs for senior officers;
 - The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;
 - Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or

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Substantial Control

- An individual exercises substantial control if the individual:
 - Has any other form of substantial control over the reporting company. (Catch-all category based on facts and circumstances of the situation).

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Substantial Control

- Substantial control can be exercised (directly or indirectly) in any of the following manners:
 - Board representation;
 - Ownership or control of a majority of the voting power or voting rights of the reporting company;
 - Rights associated with any financing arrangement or interest in a company;
 - Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;

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Substantial Control

- Substantial control can be exercised (directly or indirectly) in any of the following manners:
 - Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
 - any other contract, arrangement, understanding, relationship, or otherwise.

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Senior Officers

- Holding the position or exercising the authority of a:
 - president,
 - chief financial officer,
 - general counsel,
 - chief executive officer,
 - chief operating officer,
 - or any other officer, regardless of official title, who performs a similar function.

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Ownership Interests

- Any equity, stock, or similar instrument; preorganization certificate or subscription; or transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights;
- Any capital or profit interest in an entity;

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Ownership Interests

- Any instrument convertible, with or without consideration, into any share or instrument described in the prior two bullets, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described in the prior two bullets, regardless of whether characterized as debt;

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Ownership Interests

- Any put, call, straddle, or other option or privilege of buying or selling any of the items described in the first three bullets without being bound to do so, except to the extent that such option or privilege is created and held by a third party or third parties without the knowledge or involvement of the reporting company; or
- Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.

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Ownership or Control of an Ownership Interest

- Direct or indirect through any contract, arrangement, understanding, relationship, or otherwise, including (again, not an exhaustive list):
 - Joint ownership with one or more other persons of an undivided interest in such ownership interest;
 - Through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual;

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Ownership or Control of an Ownership Interest

- Direct or indirect through any contract, arrangement, understanding, relationship, or otherwise, including (again, not an exhaustive list):
 - With regard to a trust or similar arrangement that holds such ownership interest:
 - As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;
 - As a beneficiary who:
 - Is the sole permissible recipient of income and principal from the trust; or
 - Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or

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Ownership or Control of an Ownership Interest

- Direct or indirect through any contract, arrangement, understanding, relationship, or otherwise, including (again, not an exhaustive list):
 - With regard to a trust or similar arrangement that holds such ownership interest:
 - As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or
 - Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company.

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Ownership or Control of an Ownership Interest

- For more information on trusts, see the following April 18, 2024 FAQ questions
 - D. 14. Can beneficial owners own or control reporting companies through trusts?
 - D. 15. Who are a reporting company's beneficial owners when individuals own or control the company through a trust?
 - D. 16. How does a reporting company report a corporate trustee as a beneficial owner? (More than 25% ownership of the trust company or exercising substantial control)

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Calculation of Total Ownership Interests

- Calculated as a percentage of the total outstanding ownership interests of the reporting company as follows:
 - Ownership interests of the individual shall be calculated at the present time, and any options or similar interests of the individual shall be treated as exercised;
 - For reporting companies that issue capital or profit interests (including entities treated as partnerships for federal income tax purposes), the individual's ownership interests are the individual's capital and profit interests in the entity, calculated as a percentage of the total outstanding capital and profit interests of the entity;

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Calculation of Total Ownership Interests

- Calculated as a percentage of the total outstanding ownership interests of the reporting company as follows:
 - For corporations, entities treated as corporations for federal income tax purposes, and other reporting companies that issue shares of stock, the applicable percentage shall be the greater of:
 - the total combined voting power of all classes of ownership interests of the individual as a percentage of total outstanding voting power of all classes of ownership interests entitled to vote, or
 - the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests; and

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Calculation of Total Ownership Interests

- Calculated as a percentage of the total outstanding ownership interests of the reporting company as follows:
 - If the facts and circumstances do not permit the calculations described the prior two bullets to be performed with reasonable certainty, any individual who owns or controls 25 percent or more of any class or type of ownership interest of a reporting company shall be deemed to own or control 25 percent or more of the ownership interests of the reporting company.

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FinCEN Example 1

EXAMPLE 1 – FAQ QUESTION 9

Example 1: The reporting company is a limited liability company (LLC). You are the sole owner and president of the company and make important decisions for the company. No one else owns or controls ownership interests in your company or exercises substantial control over your company.

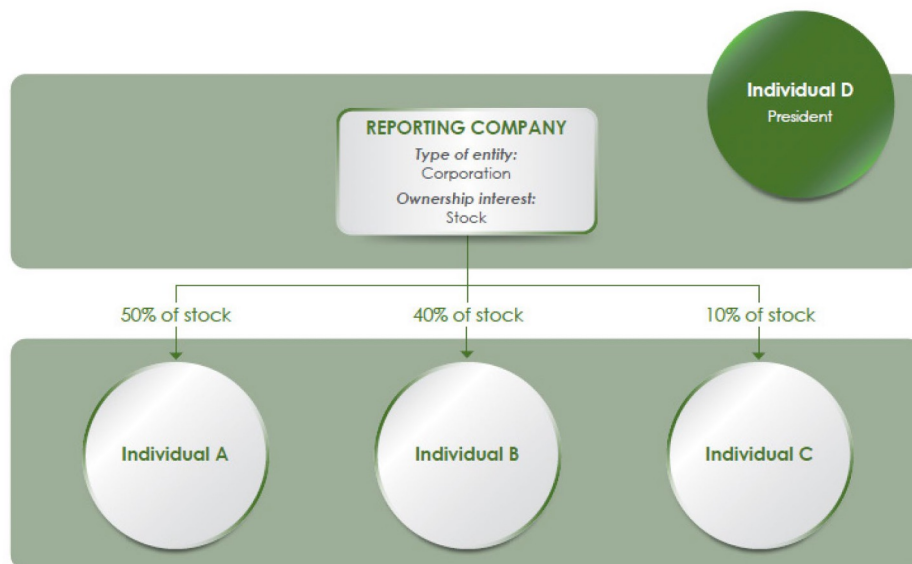
You are a beneficial owner of the reporting company in two different ways, assuming no other facts. First, you exercise substantial control over the company because you are a senior officer of the company (the president) and because you make important decisions for the company. Second, you are also a beneficial owner because you own 25 percent or more of the reporting company's ownership interests.

Because no one else owns or controls ownership interests in your LLC or exercises substantial control over it, and assuming there are no other facts to consider, you are the only beneficial owner of this reporting company, and your information must be reported to FinCEN.

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FinCEN Example 2



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FinCEN Example 2

EXAMPLE 2 – FAQ QUESTION 9

Example 2: The reporting company is a corporation. The company's total outstanding ownership interests are shares of stock. Three people (Individuals A, B, and C) own 50 percent, 40 percent, and 10 percent of the stock, respectively, and one other person (Individual D) acts as the President for the company, but does not own any stock.

Assuming there are no other facts, Individuals A, B, and D are all beneficial owners of the company and their information must be reported. Individual C is not a beneficial owner.

Individual A owns 50 percent of the company's stock and therefore is a beneficial owner because they own 25 percent or more of the company's ownership interests. Individual B owns 40 percent of the company's stock and therefore is a beneficial owner because they own 25 percent or more of the company's ownership interests.

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FinCEN Example 2

Individual C is not a company officer and does not directly or in directly exercise any substantial control over the company. Individual C also owns 10 percent of your company's stock, which is less than the 25 percent or greater interest needed to qualify as a beneficial owner by virtue of ownership interests. Individual C is therefore not a beneficial owner of the company.

Individual D is president of the company and is therefore a beneficial owner. As a senior officer of the company, Individual D exercises substantial control, regardless of whether the individual owns or controls 25 percent or more of the company's ownership interests.

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FinCEN Example 3

EXAMPLE 3 – FAQ QUESTION 9

Example 3: The reporting company is a corporation owned by four individuals who each own 25 percent of the company's ownership interests (e.g., shares of stock). Four other individuals serve as the reporting company's CEO, CFO, COO, and general counsel, respectively, none of whom hold any of the company's ownership interests.

In this example, there are eight beneficial owners. All four of the individuals who each own 25 percent of the company's ownership interests are beneficial owners of the company by virtue of their holdings in it, even if they exercise no substantial control over it. The CEO, CFO, COO, and general counsel are all senior officers and therefore exercise substantial control over the reporting company, making them beneficial owners as well.

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Individuals Not Treated as Beneficial Owners

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Excluded Individuals (Not a Beneficial Owner)

- A minor child, as defined in the State in which the entity is formed, if the information of the parent or guardian of the minor child is reported in accordance with this section;
- An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;

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Excluded Individuals (Not a Beneficial Owner)

- An individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person (does not cover senior officers);
- An individual whose only interest in a corporation, limited liability company, or other similar entity is through a right of inheritance (future interest only);
or

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Excluded Individuals (Not a Beneficial Owner)

- A creditor of a corporation, limited liability company, or other similar entity, unless the creditor meets the requirements of ownership discussed earlier (that is, simply being a creditor won't make someone a beneficial owner).

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Company Applicants

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Company Applicant

- Only required for entities created or registered on or after January 1, 2024
- Company applicant is:
 - For a domestic reporting company, the individual who directly files the document that creates the domestic reporting company;
 - For a foreign reporting company, the individual who directly files the document that first registers the foreign reporting company; and
 - Whether for a domestic or a foreign reporting company, the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document.

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No More than 2 Company Applicants

- The two would be:
 - the individual who directly files the document that creates, or first registers, the reporting company; and
 - the individual that is primarily responsible for directing or controlling the filing of the relevant document.
- If only one person was involved in filing the relevant document, then only that person should be reported as a company applicant.

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FinCEN Company Applicant Examples

EXAMPLE – FAQ QUESTION 11

Example 1: Individual A is creating a new company. Individual A prepares the necessary documents to create the company and files them with the relevant state or Tribal office, either in person or using a self-service online portal. No one else is involved in preparing, directing, or making the filing.

Individual A is a company applicant because Individual A directly filed the document that created the company. Because Individual A is the only person involved in the filing, Individual A is the only company applicant. State or Tribal employees who receive and process the company creation or formation documents should not be reported as company applicants.

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FinCEN Company Applicant Examples

EXAMPLE – FAQ QUESTION 11

Example 2: Individual A is creating a company. Individual A prepares the necessary documents to create the company and directs Individual B to file the documents with the relevant state or Tribal office. Individual B then directly files the documents that create the company.

Individuals A and B are both company applicants—Individual B directly filed the documents, and Individual A was primarily responsible for directing or controlling the filing. Individual B could, for example, be Individual A's spouse, business partner, attorney, or accountant; in all cases, Individuals A and B are both company applicants in this scenario.

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Information to Be Provided

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Information About the Entity

- The full legal name of the reporting company;
- Any trade name or “doing business as” name of the reporting company;
- A complete current address consisting of:
 - In the case of a reporting company with a principal place of business in the United States, the street address of such principal place of business; and
 - In all other cases, the street address of the primary location in the United States where the reporting company conducts business
- The State, Tribal, or foreign jurisdiction of formation of the reporting company

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Information About the Entity

- For a foreign reporting company, the State or Tribal jurisdiction where such company first registers; and
- The Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the reporting company, or where a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.

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Information About the Entity

- Entity must also indicate if is filing:
 - An initial report,
 - A correction of a prior report or
 - An update to a prior report

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Information to Be Provided for Beneficial Owners and Company Applicants

- The full legal name of the individual;
- The date of birth of the individual;
- A complete current address consisting of:
 - In the case of a company applicant who forms or registers an entity in the course of such company applicant's business, the street address of such business; or
 - In any other case, the individual's residential street address

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Information to Be Provided for Beneficial Owners and Company Applicants

- A unique identifying number and the issuing jurisdiction from one of the following documents:
 - A non-expired passport issued to the individual by the United States government;
 - A non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual;
 - A non-expired driver's license issued to the individual by a State; or
 - A non-expired passport issued by a foreign government to the individual, if the individual does not possess any of the prior three documents
- An image of the document from which the unique identifying number was obtained.

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Identification Documents

- A non-expired driver's license issued by a U.S. state. A "U.S. state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and any other commonwealth, territory, or possession of the United States.

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Identification Documents

- A non-expired identification document issued by a U.S. state or local government, or Indian Tribe that is issued for the purpose of identifying the individual. For example, a non-driver identification card issued by a state Department of Motor Vehicles would qualify because it is issued for identification purposes.

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Identification Documents

- A non-expired passport issued by the U.S. government; or
- If the individual does not have any of the three forms of identification document described above, the reporting company may provide the identifying number from a non-expired passport issued by a foreign government.

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Updated Reports

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General Rules for Update Reports

- If there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner, the reporting company shall file an updated report in the form and manner specified within 30 calendar days after the date on which such change occurs.

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General Rules for Update Reports

- An updated report required to be filed shall reflect any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners
- Newly exempt entities - An updated report required to be filed shall indicate that the filing entity is no longer a reporting company.

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General Rules for Update Reports

- Death of a beneficial owner - If an individual is a beneficial owner of a reporting company by virtue of property interests or other rights subject to transfer upon death, and such individual dies, a change with respect to required information will be deemed to occur when the estate of the deceased beneficial owner is settled, either through the operation of the intestacy laws of a jurisdiction within the United States or through a testamentary deposition. The updated report shall, to the extent appropriate, identify any new beneficial owners.

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General Rules for Update Reports

- Formerly a minor child - If a reporting company has reported information with respect to a parent or legal guardian of a minor child, a change with respect to required information will be deemed to occur when the minor child attains the age of majority.
- Changes to identifying document - With respect to an image of an identifying document required to be reported, a change with respect to required information will be deemed to occur when the name, date of birth, address, or unique identifying number on such document changes

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General Rules for Update Reports

- And everything else:
 - Address change
 - Gifting interests to another party
 - Sale of interest
 - Anything either
 - On report that is now different
 - Not on initial report but now should be there
 - On report that no longer should be there

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Corrected Reports

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Corrected Reports

- When an error is made in an initial or updated report, a corrected report is required
 - If any report under this section was inaccurate when filed and remains inaccurate, the reporting company shall file a corrected report within 30 calendar days after the date on which such reporting company becomes aware or has reason to know of the inaccuracy.
 - A corrected report filed within this 30-day period shall be deemed to satisfy the rules for a proper first report if filed within 90 calendar days after the date on which the inaccurate report was filed.
 - Note these are two different provisions - being outside either time limit can lead to penalties

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FinCEN Identifier

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FinCEN Identifier

- Allows getting a single FinCEN identifier for an individual that can be used for all filings
- Entity can apply for one that can be used in certain cases
- Appears to allow just updating the information once and have it apply to all entities the individual is a beneficial owner or company applicant for
- FinCEN has opened up the site that allows filing for a FinCEN identifier – requires an account with login.gov

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FinCEN Identifier

- Login.gov account setup requires
 - Email address to confirm application
 - Registration of 2 separate two factor authentication methods
 - Authentication application (Google Authenticator or compatible authenticator)
 - SMS text message
 - Backup code sheet of 10 codes
 - Security key (includes passcodes option under iOS and Android or physical keys such as YubiKey)
 - Government ID card

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FinCEN Identifier

- Can eliminate the need to provide personally identifiable information to the entity
- As well, eliminates the entity's need to protect that data as the entity can't lose data it doesn't possess

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Penalties for Reporting Violations

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Reporting Violation

- Subject to potential civil and/or criminal penalties - it is 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 these requirements or
 - willfully fail to report complete or updated beneficial ownership information to FinCEN

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Reporting Violation

- A person provides or attempts to provide beneficial ownership information to FinCEN if such person does so directly or indirectly, including by providing such information to another person for purposes of a report or application

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Civil Penalties

- The civil penalty is not more than \$500 for each day that the violation continues or has not been remedied – inflation adjusted upwards to \$591 for 2024 (see FAQ Question K.2. updated April 18, 2024)
- Note that there is no limit found in the statute for the amount of a civil penalty (you'll see some references to a \$10,000 cap, but that is only the criminal fine we'll talk about next)

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Criminal Penalties

- The criminal penalties are:
 - A fine of not more than \$10,000;
 - Imprisonment for not more than 2 years or
 - Both

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How Reports Will Be Filed

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Filing Reports

- Reports will be filed electronically through a secure filing system available via FinCEN's website as discussed at the beginning of the session (<https://boiefiling.fincen.gov/>)
 - PDF filing option (see copy of form in the manual)
 - Online filing (note must re-enter all data for any future corrected or update reports)
 - Third party software using System-to-System API
- Remember that FinCEN deadlines do not give special treatment to weekends or holidays – 30 days means 30 days!

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Filing Reports

- Party filing the report must give
 - Name
 - Email address or phone number
- Will be able to download a transcript of the BOI report which the business should retain
- Be sure to review the instructions for the report

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Entities with Access to Beneficial Ownership Information

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Who Can Access this Data?

- Is not data available to the general public
- Rather the data will only be available to six types of requesters

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Requesters Who Can Have Access to Beneficial Ownership Data

- U.S. Federal agencies engaged in national security, intelligence, and law enforcement activities;
- State, local, and Tribal law enforcement agencies with court authorization;
- The U.S. Department of the Treasury;
- Financial institutions using beneficial ownership information to conduct legally required customer due diligence, provided the financial institutions have their customer consent to retrieve the information;

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Requesters Who Can Have Access to Beneficial Ownership Data

- Federal and state regulators assessing financial institutions for compliance with legally required customer due diligence obligations; and
- Foreign law enforcement agencies and certain other foreign authorities who submit qualifying requests for the information through a U.S. Federal agency.

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Protection of Data

- The law imposes access requirements and safeguards on each group of requesters.
- FinCEN required under the law to:
 - implement protocols to safeguard beneficial ownership information;
 - build a secure IT system to store the information; and
 - establish processes and procedures to ensure that only authorized users can access beneficial ownership information for authorized purposes.

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Summary and Conclusion

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