



Defending America's Individually & Family Owned Businesses

Corporate Transparency Act

Compliance Challenges for Privately-Held Companies

December 12, 2023

Disclaimer

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Reference Materials

- [Beneficial Ownership Information Reporting | FinCEN.gov](https://www.fincen.gov/boi)
(www.fincen.gov/boi)
- Materials and information prepared by FinCEN include:
 - Small Entity Compliance Guide
 - Frequently Asked Questions
 - Quick Reference Guide
 - Final Rule – BOI information collection data fields
- Links to Statute, Proposed Rules and Final Rules
- Electronic reporting portal not yet available – opens January 1, 2024

Key Dates

New Entities
January 1, 2024

Entities formed **on or after January 1, 2024** must report beneficial owner and applicant information within 30 days* after formation.

*On November 29th, 2023, FinCEN issued final rule to increase the initial filing deadline from 30 days to 90 days for entities formed in calendar year 2024. Entities formed in calendar year 2025 and beyond have 30 days to file initial report.

Existing Entities
January 1, 2025

Entities in existence **prior to January 1, 2024** must report beneficial owner and applicant information by January 1, 2025.

What Must be Reported

New Entities

(i.e., formed on or after January 1, 2024)

Reporting Company

- Legal name
- Trade names
- Current address (principal place of business)
- Jurisdiction of formation
- TIN (this means SSN for disregarded entities!)

Beneficial Owners – **All**

- Individual name
- DOB
- Residential address
- ID # - DL, state ID or passport
- Copy of ID

Applicants – **Up to Two (2)**

- Direct Filer
- Directs or controls the filing action
- Info required same as BO except business address if works in company formation; residential address otherwise

Existing Entities

(i.e., formed prior to January 1, 2024)

Reporting Company

- Legal name
- Trade names
- Current address (principal place of business)
- Jurisdiction of formation
- TIN (this means SSN for disregarded entities!)

Beneficial Owners – **All**

- Individual name
- DOB
- Residential address
- ID # - DL, state ID or passport
- Copy of ID

Applicants – **None**

What Must be Reported (cont.)

New Entities

(i.e., formed on or after January 1, 2024)

Changes to Beneficial Owners –
within 30 days after change

Changes to Applicants – N/A

Corrections – 30 days after
discovery of error

Existing Entities

(i.e., formed prior to January 1, 2024)

Changes to Beneficial Owners –
within 30 days after change

Applicants – N/A

Corrections – 30 days after
discovery of error

Practical Tips to Consider Now

- If you will need New Entities in 2024, consider forming them now:
 - Provides opportunity to delay reporting obligation till end of 2024
 - “Shelf” entities can be capitalized later as needed; if not capitalized then report filed with “no beneficial owners” “N/A – dormant shelf entity”
 - Gives more time for additional guidance to come out prior to existing entity deadline
- Plan to file initial reports for Existing Entities in December 2024
 - As soon as you file a report for an Existing Entity, the 30-day change obligation commences.
 - Waiting to file until December 2024 means that your first change report won’t be due until 2025 or after.
 - Maximizes time for additional guidance to come out before filing
- Get FinCEN IDs – if you know if impending changes (e.g., someone moving residences in 2024; name changes) wait until after the change

Practical Tips to Consider Now (cont.)

FinCEN Identifiers

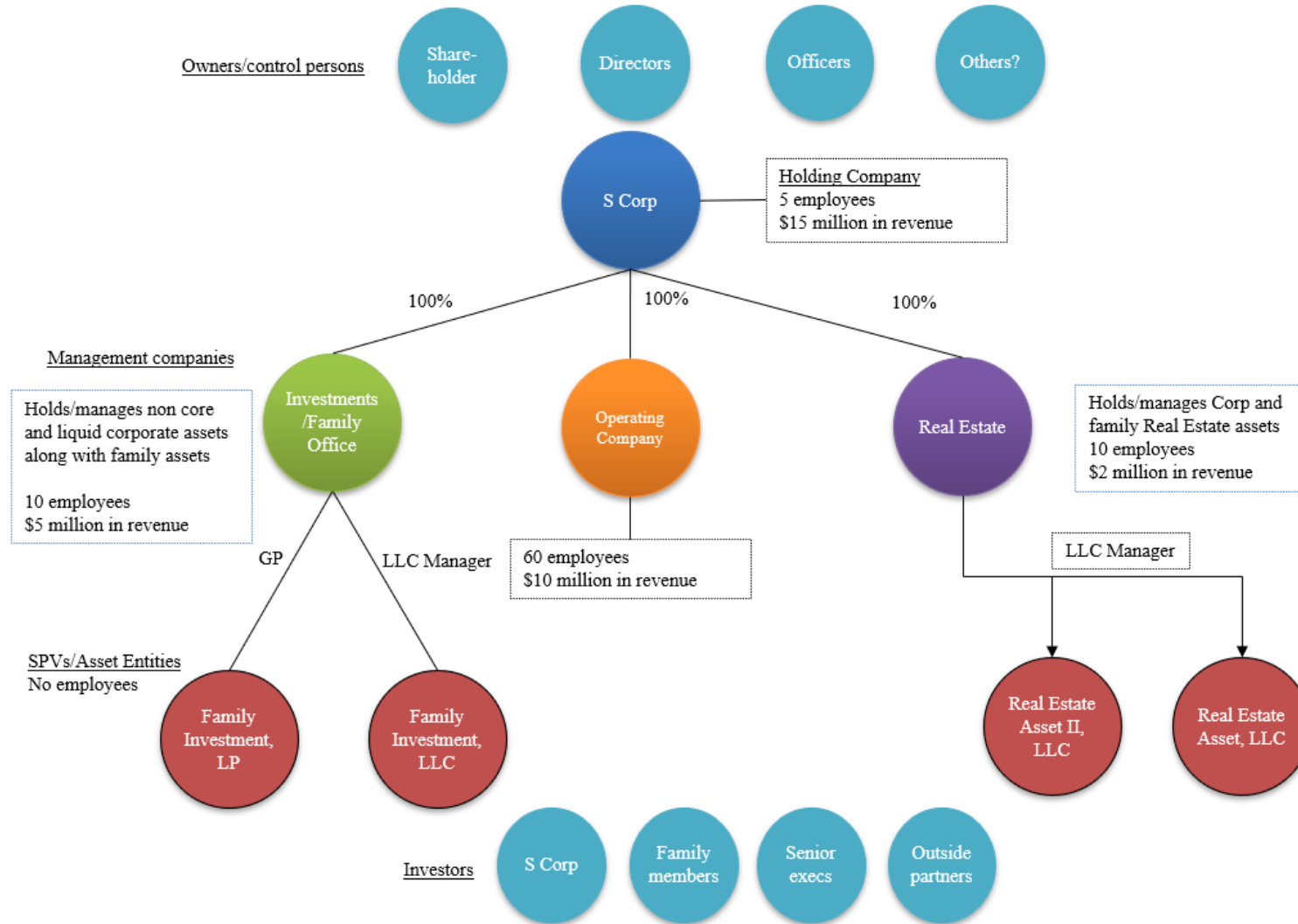
- Unique identifying number that FinCEN will issue to individuals or entities upon request. Same information required to obtain FinCEN identifier
- If you have to report, FinCEN identifiers will make it easier. If information reported to obtain FinCEN identifier changes (e.g., new home address), then change filing to the FinCEN identifier will need to be made, but no change filing needed with respect to reporting company filings for which the FinCEN identifier was submitted.
- Eliminates multiple reports containing personal information.

Key Exemptions

- Large Operating Company Exemption:
 - More than \$5,000,000 in annual gross receipts – filed income tax or information return in previous year demonstrating more than \$5,000,000 in gross receipts or sales
 - More than 20 full time employees (average of at least 30 hours per week)
 - Operating presence in the U.S. – physical office
- Subsidiary Exemption: “any entity whose *ownership interests* are controlled or wholly owned, directly or indirectly, by one or more” exempt entities
- Private Trust Company:
 - Any “bank” is exempt from CTA
 - Regulated PTC (as a bank – supervised and examined by state bank regulators) – exempt. Defined in Section 2(1) of Investment Company Act
 - Non-regulated PTC – not-exempt

Practical Tips to Consider Now (cont.)

Who are the beneficial owners?



Penalties

- Civil and/or criminal penalties may apply to:
 - Willful failure to report complete or updated beneficial ownership information
 - Willful provision of or attempt to provide false or fraudulent BOI
 - Willfully causing a company not to file a required BOI or to report incomplete BOI (e.g., a beneficial owner refuses to provide BOI to reporting company)
- Penalties:
 - Civil - \$500 for each day that violation continues
 - Criminal – a fine of up to \$10,000 and/or imprisonment for up to two years.

Senior officers of an entity that fails to file a required BOI report may be held accountable for that failure!

Who is a Beneficial Owner?

Statute:

“Beneficial Owner” means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement understanding, relationship, or otherwise –

- (i) Exercises substantial control over the entity; or
- (ii) Owns or controls not less than 25 percent of the ownership interests of the entity

[Does not include: minor child, nominee/intermediary, employee, heir or creditor (unless meets above requirements)]

Final Rule:

Substantial Control. An individual exercises substantial control over a reporting company if the individual:

- A. Serves as a senior officer of the reporting company;
- B. Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- C. Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding:
 - 1. 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;
 - 2. The reorganization, dissolution, or merger of the reporting company;
 - 3. Major expenditures or investments, issuances of any equity, incurrence of any debt, or approval of the operating budget of the reporting company;
 - 4. The selection or termination of business lines or ventures, or geographic focus, of the reporting company;
 - 5. Compensation schemes and incentive programs for senior officers;
 - 6. The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;
 - 7. 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
- D. Has any other form of substantial control over the reporting company

Who is a Beneficial Owner? (cont.)

Final Rule:

Direct or indirect exercise of substantial control.

An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through:

- A. Board representation
- B. Ownership or control of the voting power or voting rights of the reporting company
- C. Rights associated with any financing arrangement or interest in a company
- D. Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company
- E. Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees
- F. Any other contract, arrangement, understanding, relationship, or otherwise.

Final Rule Explanatory Comment:

The final rule also retains the “substantial influence” language in the third indicator, because FinCEN envisions situations in which individuals may not have the power to direct or determine important decisions made by the reporting company, but may play a significant role in the decision-making process and outcomes with respect to those important decisions.

CTA – Who is a Beneficial Owner? (cont.)

Under the statutory language, *clarified* by the Final Rule, Reporting Companies should

1. Review their governance documents and structure to identify directors, senior officers, shareholders and others with formal roles in the organizational structure
2. Review every “contract, arrangement, understanding, relationship or otherwise”
3. Determine each individual who has “substantial influence” over or plays a “significant role” in important decisions concerning the business.
4. Such individual may have “substantial influence” or play a “significant role” even if the individual does not have the power to direct or determine or benefit from those important decisions.

If you get it wrong, you might be a felon!

Examples

- A landlord – there is a contract (the lease) and the landlord “may not have the power to direct or determine important decisions but plays a significant role in the decision-making process and outcomes with respect to those important decisions” (e.g., negotiations over the lease, office layout, finishes, buildout schedule, cost). What if rent is or includes a % of sales/revenue? A derivative ownership interest?
- A third-party IT consultant who advises a small business (with no internal expertise). The IT consultant “may not have the power to direct or determine important decisions but plays a significant role in the decision-making process and outcomes with respect to those important decisions” (e.g., preparing budgets/estimates, briefing the owner/board, making recommendations, installing the systems, troubleshooting, recommending upgrades/improvements from time to time).
- A parent, who is sophisticated in business and finance, of a business owner with less experience who often provides guidance and advice to the business owner and the business owner often follows such advice. Is the parent a beneficial owner because the parent plays a “significant role” in the decision-making process of the business owner?
- A lawyer spouse (non-owner) who negotiates leases and other business documents for the business owning spouse and her business partner and the business owners rely on (e.g., do not review or fully review the documents) the lawyer spouse for these purposes. The non-lawyer spouse is not paid for these services. Is the non-owner lawyer spouse a beneficial owner?
- A mentor of a business owner who helps the owner work through important decisions about the business. Is the mentor a beneficial owner?
- An advisory Board...

Final Rule Explanatory Comment:

FinCEN does not envision that the performance of **ordinary, arms-length advisory or other third-party professional services** to a reporting company would provide an individual with the power to direct or determine, or have substantial influence over, important decisions of a reporting company.

[The above language included in context of tax and legal professionals only. There is no carveout for or discussion of non-professional contractors, consultants, etc. in Final Rule. The statutory definition suggests that contractors and consultants should be considered!]



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Thank You