

Thomson Reuters Institute

US Beneficial Ownership Rules

Reporting, compliance & access



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Executive Summary

Recent news has highlighted how geopolitical factors like tax evasion and political unrest can impact society and cause governments to take action. Economic pressure can be a powerful tool to protect citizens, but it is hard to ensure that all the right parties are being targeted.

To do so requires a vigilant know-your-customer (KYC) process that digs into direct and indirect owners of business entities. Additionally, the U.S. government, like many other governments, is concerned with properly taxing individuals and businesses. That requires proper investigation of the proper ownership of investments and business holdings, and that means government entities need access to ownership details.

Prior to Jan. 1, however, there was not one place that collected all the information that would allow proper investigation, placing an incredible burden on government agencies that need such information for enforcement.

Implementation of the new beneficial ownership program requires that corporate, tax and accounting, and legal professionals have a proper understanding of what will be required under the new beneficial ownership rules. Additional procedures will be required before interested parties can complete the task of opening a new business entity.

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Identifying beneficial owners

Beneficial owners and *controlling* parties are the individuals who exercise substantial control over the reporting company or own or control at least 25% of it. An individual “exercising substantial control” includes: *i*) senior officers; *ii*) people who can appoint and remove senior officers, including the board of directors or similar body; and *iii*) anyone who directs, determines, or has substantial influence over important decisions made by the company.

If a business is profiting from illicit actions, then the beneficial owners and controlling parties are the ones responsible for those actions and need to be held accountable. Knowing the beneficial owner of a company can help investigators identify and prosecute crimes ranging from money laundering to tax evasion and much more.

The United States is seeking to close a loophole that has long been exploited by money launderers and bad actors. The option of hiding money in corporations with no ownership information made known to the government or investigators is now under severe scrutiny. Within the next 12 to 18 months, the Financial Crimes Enforcement Network (FinCEN), a division of the U.S. Treasury Department, wants to see a seismic shift. That shift is the new beneficial ownership database and required filing for the approximately 32.6 million entities doing business in the United States.

On Jan. 1, the beneficial ownership database began accepting filings. In the first week, Treasury Secretary Janet Yellen announced that more than 100,000 small businesses¹ have already registered, lagging behind initial projections for filings. This lag means that it will be difficult to reach the Jan. 1, 2025, deadline for filing. It is possible that with increased outreach and education the filings could increase exponentially, bringing the database closer to its target filing.

The goal of all this beneficial ownership rulemaking is to move companies toward a level of transparency that will greatly aid law enforcement's battle against illicit finance.

This report is based on the insight of several subject matter experts discussing the U.S. Corporate Transparency Act (CTA)² that was enacted by Congress as part of the Anti-Money Laundering Act of 2020 (AMLA 2020).³ The report also discusses the overall impact the CTA has in the landscape of beneficial ownership and puts this in the context of global beneficial ownership reporting statutes.

¹ https://home.treasury.gov/news/press-releases/jy2017?utm_campaign=Illicit%20Edge%20Daily&utm_medium=email&_hs_mi=289314723&_hsenc=p2ANqtz-87wj_RzNgWCryVBrbcjXuD1Xgbu0iqcgEsgNn2DPEDu1dUFJaC0iHzZRuTC0qs5qt8qVffBvm3TrSsAdvoPdzjOZng04UwSuVoS7GwU0_RlsF8c4w&utm_content=289314723&utm_source=hs_email

² <https://home.treasury.gov/news/press-releases/jy1974>

³ <https://www.fincen.gov/anti-money-laundering-act-2020>

Global beneficial ownership standards

Nations around the world have implemented or are in the process of implementing beneficial ownership collection requirements as part of their efforts to enhance transparency, combat money laundering and prevent other financial crimes. These initiatives are often aligned with international standards set by organizations such as the Financial Action Task Force (FATF), an intergovernmental organization. Here are a few examples of what is happening around beneficial ownership requirements around the world:

- The United Kingdom has a public register of beneficial ownership, which was established as part of its commitment to combating money laundering and improving corporate transparency. Companies are required to disclose information about their beneficial owners and this information is accessible to the public.
- Canada has introduced measures to enhance transparency in corporate ownership. Companies are required to maintain a register of individuals with significant control, which includes beneficial ownership information. The information is provided to the relevant authorities, but it is not made public.
- Australia has implemented a beneficial ownership regime, requiring certain entities to provide information about their beneficial owners. The information is stored in a centralized register maintained by the Australian Securities and Investments Commission.
- France has established a register of beneficial ownership information for certain legal entities. The information is collected and maintained by the commercial court registry.
- The Netherlands has implemented measures to collect and maintain information on ultimate beneficial owners of legal entities. This information is registered with the country's Chamber of Commerce.
- Singapore has implemented measures to enhance transparency in corporate ownership. Certain companies are required to maintain a register of controllers, including beneficial owners, and provide this information to the nation's Accounting and Corporate Regulatory Authority.
- South Africa has introduced beneficial ownership disclosure requirements for certain types of legal entities. The information is maintained by the Companies and Intellectual Property Commission.

- The European Union has implemented its Fourth and Fifth Anti-Money Laundering Directives (4AMLD and 5AMLD) related to the identification and disclosure of beneficial owners of corporations. Of the countries with AML procedures, the EU seems to be the most developed and closer to the model that the United States is trying to create. The 4AMLD, implemented in 2015, required EU member states to establish central registers of beneficial ownership information for corporate entities. Building upon the 4AMLD, the 5AMLD was adopted in 2018 and introduced additional measures to strengthen the EU's framework for preventing money laundering and terrorist financing. One significant change was the extension of beneficial ownership disclosure requirements to cover a broader range of legal entities, including trusts and certain types of legal arrangements.
- EU member states are required to ensure that certain entities, such as competent authorities, financial intelligence units and professionals subject to anti-money laundering (AML) regulations, have access to the beneficial ownership information in the central registers. The beneficial ownership requirements apply to various corporate entities, including companies and other legal entities incorporated within the EU. The obligations extend to entities that engage in business activities, such as trading or holding assets.

Other countries are actively working on or have already implemented beneficial ownership disclosure requirements. The specific regulations and mechanisms for collecting and maintaining this information can vary from country to country.

US compliance in context

In January 2021, the CTA was enacted in the United States as part of the National Defense Authorization Act for Fiscal Year 2021. The CTA aims to address issues related to money laundering, terrorism financing and other illicit activities by requiring companies to disclose their beneficial ownership information to FinCEN.

FinCEN issued a final rule outlining beneficial ownership information (BOI)⁴ reporting requirements in September 2022. The rule is expected to affect tens of millions of public entities, many of them small businesses. Existing businesses will have less than a year, until Jan. 1, 2025, to report their BOI to FinCEN.

To many proponents of fuller corporate transparency, this rule is extremely valuable. "According to Congress, bad actors, people who are engaged in money laundering and other illicit activities, don't do it in their own name. They do it through LLCs, corporations and other similar entities," says Sandra Feldman, Publications Attorney at Wolters Kluwer CT Corp. "Right now, when these types of companies are created in the US, or when they're created in foreign countries and register to do business in the US, they aren't required to provide the names of the individuals who ultimately own or control the entity. And that means law enforcement has trouble finding out who the individuals are behind these entities. That's why Congress says that the BOI will help protect national interests."

⁴ <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>

Beneficial ownership reporting

The CTA requires certain US companies to report information about their beneficial owners to FinCEN. The process to start a corporation first begins when individuals file with the Secretary of State of the state in which they are incorporating the business and get a unique identifier. The next step, which is new, under the BOI rule, requires them to file information on the company and its beneficial owners with FinCEN in its Beneficial Ownership Information & Images (BOII) database.



The CTA applies to a broad range of entities, including corporations, limited liability companies (LLCs) and other similar entities. Further, there are 23 types of entities that are exempt from the beneficial ownership information reporting requirements, including publicly traded companies that meet specified requirements, many nonprofits and certain large operating companies.

Exempt from being considered a “reporting entity” is the following:

1. Securities reporting issuer
2. Governmental authority
3. Bank
4. Credit union
5. Depository institution holding company
6. Money services business
7. Broker or dealer in securities
8. Securities exchange or clearing agency
9. Other Exchange Act registered entity
10. Investment company or investment adviser
11. Venture capital fund adviser
12. Insurance company
13. State-licensed insurance producer
14. Commodity Exchange Act registered entity
15. Accounting firm
16. Public utility
17. Financial market utility
18. Pooled investment vehicle
19. Tax-exempt entity
20. Entity assisting a tax-exempt entity
21. Large operating company
22. Subsidiary of certain exempt entities
23. Inactive entity

Many of the entities exempted from BOI legislation are already subject to substantial reporting requirements from other regulators, such as publicly traded companies and investment companies. The thresholds for reporting are determined based on ownership percentages and control.

The beneficial ownership information collected by FinCEN is not made public. It is stored in a confidential database accessible only in line with the access rules set on a staggered basis. The aim is to provide these agencies with tools to investigate and prevent financial crimes.

The CTA imposes penalties for non-compliance, including civil and criminal penalties. Companies that fail to report accurate and up-to-date beneficial ownership information may face fines and other legal consequences.

On Jan. 1, FinCEN opened the BOII Database⁵ for widespread filing. This means that any entity created after that date but before Jan. 1, 2025, will have 90 days to file beneficial ownership information in the database. Entities created prior to that date have until Jan. 1, 2025, to file beneficial ownership information. After Jan. 1, 2025, all new entities will have 30 days to file.

Up until the deadline, major questions arose about whether the database would be functional and secure as there was minimal information available. There were also questions surrounding the rules about which entities had access to the information put into the database. This was perhaps of more concern as the information is personal and warnings of scams occurred prior to the go-live date.



Alert: FinCEN has been notified of recent fraudulent attempts to solicit information from individuals and entities who may be subject to reporting requirements under the Corporate Transparency Act.⁶

The fraudulent correspondence may be titled "Important Compliance Notice" and asks the recipient to click on a URL or to scan a QR code. Those e-mails or letters are fraudulent. FinCEN does not send unsolicited requests. Please do not respond to these fraudulent messages, or click on any links or scan any QR codes within them.

⁵ <https://boiefiling.fincen.gov/fileboir>

⁶ <https://www.fincen.gov/boi>

Once the actual BOII database was up and running, however, it seemed to be user-friendly. There is an option for online submission and one for creating a downloadable form. The process was intuitive, but there are some pitfalls in the online submission without the downloaded form. While there were minor errors and technical difficulties, the database was overall received well, and the information is now flowing. While this is a good sign, the overall effectiveness of the BOII database has yet to be seen. The system has also not been taxed at capacity and it will take some time to see if small businesses catch on to its use.

Final access rule

In December, FinCEN made public a much-anticipated final rule outlining which entities will have access to a secure database housing all the information on the beneficial ownership of legal entities. Notably, the final rule on access, which will come into force in February, expands the ways financial institutions will be able to use the data, permitting them to employ it for a broad range of AML purposes beyond customer due diligence (CDD). Interestingly, FinCEN's previous proposed rule⁷ on access, issued in December 2022, would have limited financial institutions' use of data solely to CDD purposes.

However, in response to concerns expressed in 80 comment letters submitted by members of Congress, the financial industry, trade associations, corporate transparency advocacy groups and others, FinCEN opted to broaden acceptable uses of the information, a senior Treasury official said when announcing the expanded-access final rule.⁸

To increase the "practicality and usefulness" of the BOI, the final rule includes a broader interpretation of the phrase "customer due diligence requirements under applicable law," the Treasury official said. "This change will allow financial institutions to use [BOI] for purposes beyond compliance with FinCEN's Customer Due Diligence Rule to include maintaining their anti-money laundering program, sanctions screening, [and] in meeting suspicious activity reporting and enhanced due diligence requirements," the official said.

Still, it will be some time before financial institutions will be able to access the database, the official added.

⁷ <https://www.federalregister.gov/documents/2023/12/22/2023-27973/beneficial-ownership-information-access-and-safeguards>
⁸ <https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/beneficial-ownership-registry-final-rule/>

Database access will come in phases

FinCEN will allow access to the database “in phases,” beginning with a pilot program granting access to “a handful of key federal agency users” starting “in 2024,” Andrea Gacki, FinCEN director, said during an online media event.

The subsequent stage will extend access to a limited number of Treasury offices and certain other law enforcement and national security agencies. Access for a wider range of law enforcement and intelligence officials, including state, local and tribal law enforcement, and intermediaries that handle foreign government requests, will follow.

Financial institutions and their regulators will be the last group granted access. When asked when financial institutions’ access is expected, the Treasury official said there is “more to come” on the timing of phases, adding Treasury has not affixed set timelines.

Further, the access rule does not *require* financial institutions to make use of the BOI database as part of their AML obligations, the Treasury official said, adding that FinCEN will issue documents that make this clear and address the “interplay of beneficial ownership information and the access rule” with a final CTA rule that Treasury has yet to issue.

That final rule implementing the CTA will address how the BOI database and the CTA’s other implementing rules will affect FinCEN’s existing CDD Rule for financial institutions.⁹ By law, FinCEN must issue that rule by January 1, 2025.

⁹ <https://www.gpo.gov/fdsys/pkg/FR-2016-05-11/pdf/2016-10567.pdf>

On the horizon

US financial Institutions are required to assist U.S. government agencies in detecting and preventing money laundering in the Bank Secrecy Act (BSA). The CDD Rule¹⁰, which became effective in May 2018, amends the BSA and has four core requirements. It requires covered financial institutions to establish and maintain written policies and procedures that are reasonably designed to: *i*) identify and verify the identity of customers; *ii*) identify and verify the identity of the beneficial owners of companies opening accounts; *iii*) understand the nature and purpose of customer relationships to develop customer risk profiles; and *iv*) conduct continued monitoring to identify and report suspicious transactions and, on a risk basis, maintain and update customer information. The requirements under the CDD rule are inconsistent with the requirements under the CTA.

For the time being, officers with responsibilities under the BSA "should continue to focus on compliance with the beneficial ownership requirements of the existing CDD Rule," says Dan Stipano, a financial regulatory expert who spent more than 30 years at the U.S. Office of the Comptroller of the Currency in senior legal and enforcement roles and now a partner with Davis Polk in Washington, D.C. "Those requirements will remain applicable until the revised CDD Rule has been finalized and is effective, and that could take a long time. FinCEN has not even begun the rulemaking to make conforming changes to the Rule, and the proposed rule will surely generate a large number of comments from the industry that will have to be reviewed and analyzed."

It is unclear what the actual timing is for the rule that will reconcile CDD Standards and the requirements of the BOII database. Jim Richards, founder of RegTech Consulting, explains that the "CDD Reconciliation Rule should be published within one year of the implementation of the system — so, at earliest, Jan. 1, 2025. FinCEN's Fall 2023 regulatory agenda indicated it would have a *proposed* CDD Reconciliation Rule by June 2024."

As the CDD reconciliation process unfolds, there are concerns that financial institutions will have to file a Suspicious Activity Report (SAR) for each time the account opening information

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- Dan Stipano, Partner at Davis Polk

¹⁰ <https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule#:~:text=The%20CDD%20Rule%20has%20four,owners%20of%20companies%20opening%20accounts>

and BOII database information are inconsistent. The SARs filings are of concern because they can shift some burden onto the financial institutions.

"We can expect lots of 'defensive' SARs, based on the imperfect reconciliation, particularly if FinCEN doesn't publish clear guidance that is also picked up by the prudential regulators," says Richards. Also, it will be important that FinCEN provides a lot of clarity on how financial institutions reconcile the information that they collect in accordance with CDD standards to the information that was provided to FinCEN in the BOII database.

In a quest to limit the ill-gotten gains generated by bad actors, one major step is piercing the corporate veil. The steps that were taken with the BSA continue with the CTA, and the BOII database moves further in the right direction — but there is still work to be done in clarifying what information is collected and who can access and use it.

Credits

Thomson Reuters Institute

Editors: Rabihah Butler in Charlotte, NC
Gregg Wirth in Bloomsburg, PA

Thomson Reuters Regulatory Intelligence

Editor: Alexander Robson in London

*Special acknowledgment to the Subject Matter Experts
who lent their time and expertise:*

Todd Ehret
Sarah Beth Felix
Daniel Robinson
Jim Richards
Dan Stipano
Brett Wolf

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