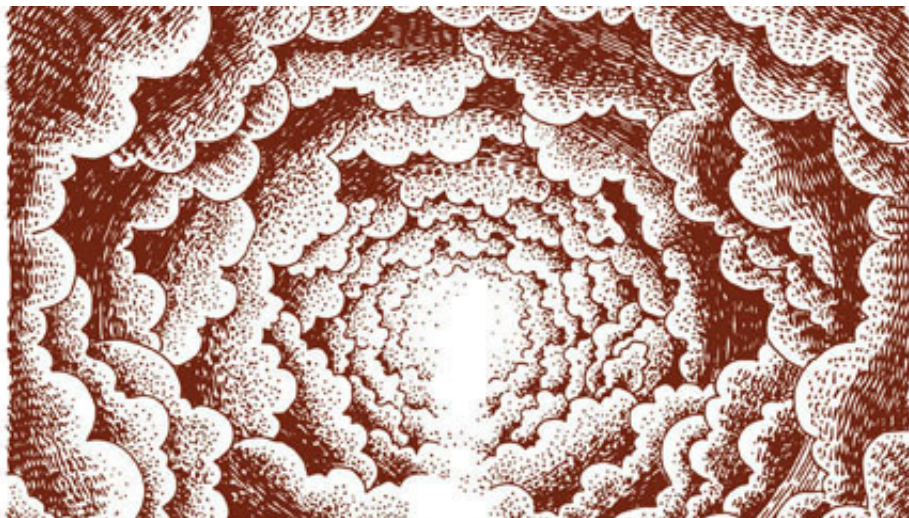


October 2024

Corporate Transparency Act: Thou Shalt Report NOW

The Corporate Transparency Act (“CTA”) ¹ is alive and kicking, despite challenges to its constitutionality. ² Not only is the CTA in effect, but FinCEN ³ estimates that of the 32.6 million businesses operating in the U.S. required to comply with the CTA, only a small number have already filed their Beneficial Ownership Information Reports (“BOIRs”). ⁴ Moreover, with new FinCEN guidance, companies that were in existence at the beginning of 2024 and subsequently dissolved during the year must file a BOIR unless they are otherwise exempt. ⁵

CYA From the CTA 2.0





Given there are steep civil and criminal penalties, reporting companies should act soon to meet the December 31, 2024, dropdead deadline to file their initial BOIR. ⁶

To recap, the CTA was enacted in 2021 to combat money-laundering and

terrorist activities by requiring previously unregulated businesses to report their human Beneficial Ownership Information (“BOI”) to FinCEN.⁷ The result will be a database of business ownership information that is readily available to law enforcement personnel who need that detail in real time.⁸ All information provided in a BOIR is confidential to the public, and access is severely restricted for law enforcement personnel.⁹

The CTA requires existing corporations, limited partnerships, limited liability companies and foreign entities registered to do business in the U.S. to disclose the identity and Personal Identifying Information (“PII”)¹⁰ of their human beneficial owners to FinCEN.¹¹ There are 23 exemptions to the CTA reporting requirements, but most relate to businesses that are already heavily regulated by the U.S. government.¹² In addition, new reporting companies formed in 2024 must file an initial BOIR within 90 days of their formation, and that BOIR must contain the PII of the Company Applicant(s), as well.¹³ A “Company Applicant” is the person (e.g., an attorney) directing the business entity formation or registration and/or the person (e.g., a paralegal) that is actually filing the formation/registration documents.¹⁴ If there are two Company Applicants, both must be reported on the BOIR.¹⁵

The CTA went live January 1, 2024. Since then, there have been changes to the penalties and additional guidance provided by FinCEN. Most notably, the civil penalties for violations of the CTA have increased, and dissolved businesses that existed on January 1, 2024 but no longer exist by December 31, 2024, must file a BOIR unless they are otherwise exempt.

Civil Fines Increased

The civil fines imposed for violation of the CTA are no joke, and they have increased. Pursuant to the Federal Civil Penalties Adjustment Act of 1990 (“Act”),¹⁶ civil monetary penalties readjust to account for inflation so that civil fines maintain, in theory, their deterrent effect. On January 25, 2024, the civil monetary penalties imposed for violations of the CTA increased from \$500/ day to \$591/day.¹⁷ The CTA code and regulations still state

\$500/day, but the civil fines are really \$591/day in accordance with the Act.

¹⁸ The criminal monetary penalties (which are separate from the civil monetary penalties and are not assessed daily) are still capped at a \$10,000 fine.

Civil and criminal penalties for any violation of the CTA may be imposed against reporting companies and their beneficial owners personally. In addition, business owners could face up to two years of imprisonment. ¹⁹ Violations of the CTA include failure to file an initial BOIR, keep it updated, or correct it when it is wrong. ²⁰ Law enforcement personnel who violate the strict protocols for disclosure of BOI are subject to the same daily civil fines as beneficial owners, as well as harsher criminal penalties. ²¹

Dissolved Entities

Reporting companies that were not completely, formally and irrevocably dissolved by January 1, 2024, must still file a BOIR unless they otherwise meet the criteria of a CTA reporting exemption. ²² At the onset, CTA practitioners advised business owners that there was no BOIR filing requirement if their reporting company was dissolved prior to the end of 2024. As of July 8, 2024, FinCEN has clarified this point to state the exact opposite of this advice. If a reporting company existed or could have reinstated its existence as of January 1, 2024, it is subject to the CTA and must file a BOIR unless it is otherwise exempt even if it is irrevocably and permanently dissolved by December 31, 2024.

FinCEN does not consider a reporting company permanently and irrevocably dissolved if it was only administratively dissolved, unless that administrative dissolution cannot be rescinded and the reporting company reinstated. ²³ In Arizona, corporations that have been administratively dissolved may be reinstated for up to six years, and Arizona LLCs have six months to reinstate their existence after administrative dissolution. ²⁴ However, many of these administratively dissolved entities may be exempt from filing a BOIR if they meet the six specific criteria of the inactive entity CTA exemption. ²⁵

Companies that are dissolved by the end of 2024 but still must file a BOIR are only required to do so once. ²⁶ These dissolved entities are not required to keep their BOIR updated or file any other amendment to the BOIR indicating that the entity is dissolved. ²⁷ If a reporting company was permanently and irrevocably dissolved prior to January 1, 2024, it has no reporting requirements under the CTA. ²⁸

EIN/TIN Not Required

FinCEN no longer requires a reporting company to report an Employer Identification Number (“EIN”) or Taxpayer Identification Number (“TIN”) on its BOIR if it does not already have one. If a domestic or foreign reporting company does not have an EIN, it does not have to obtain one merely to comply with the CTA. ²⁹ In short, FinCEN has aligned its reporting requirements with the IRS guidelines for disregarded entities. ³⁰



A disregarded entity must report BOI to FinCEN if it is a reporting company and not otherwise exempt. As part of its BOIR, a reporting company must provide either an EIN or TIN if it has one, or if not, under the new FinCEN guidance, the reporting company may use an owner’s Social Security Number (“SSN”) or an Individual Taxpayer Identification Number (“ITIN”). If a foreign reporting company has not been issued a TIN, it may provide a tax identification number issued by a foreign jurisdiction and the name of that

jurisdiction.

Initial Deadline Imminent

Reporting companies that are not otherwise exempt *must* file their BOIR with FinCEN by December 31, 2024.

However, the new ginormous elephant in the room is: Will the FinCEN BOI reporting platform crash? ³¹ Rumors are that there are approximately 30 million BOIRs left to be filed. If on October 1, 30 million BOIRs still need to be filed by December 31, roughly 326,000 BOIRs must be filed daily to meet the drop-dead CTA reporting deadline. This is significantly more than what the FinCEN BOI reporting platform has been managing to date. If the reporting platform crashes, who knows what will happen— but who wants to spend the December holidays worried about it?

If you, your clients, your friends or your family own a nonexempt domestic or foreign reporting company, thou shalt report to FinCEN. To quote Nike's famous slogan with urgency, Just Do It NOW or the fines, they may a-cometh.

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endnotes

1 31 USCA § 5336 and see 31 C.F.R. § 1010.380 (effective Jan. 1, 2024). To stay current on changes in CTA reporting, subscribe for updates by email at www.fincen.gov.

2. An Alabama District Court has issued a ruling stating that the CTA is unconstitutional, and it has been appealed to the 11th Circuit. *National Small Business United v. Yellen*, 5:22-cv-01448-LCB (Dist. Alabama March 1, 2024); and *National Small Business United v. U.S. Department of Treasury*, USCA11 Case: 24-

10736. The ruling stays the enforcement of the CTA reporting requirements as to the plaintiffs only. No other challenges to the CTA have received a ruling at the trial court level. FinCEN is advising that business owners still file their BOIRs by the December 31, 2024, deadline.

3. The Financial Crimes Enforcement Network (“FinCEN”) is a bureau of the U.S. Department of Treasury (like the IRS), and it collaborates with its counterparts in other countries to combat financial crimes and terrorism (www.fincen.gov/what-we-do).

4. William E H Quick, *The Corporate Transparency Act: Deniers Beware*, Bus. L. Today, July 10, 2023, <https://tinyurl.com/fxyhukj5>.

5. This new guidance likely increased the number of expected BOIR filings from original estimates.

6. To file a BOIR, go to <https://boiefiling.fincen.gov/>. All BOIR filings are electronic.

7. *Id.* The CTA is a bipartisan law passed by a two-thirds vote of Congress that overrode a presidential veto.

8. Think season 1, episode 1 of *Jack Ryan*. Also, the information required in a BOIR is information that the government provided to business owners in the first place (like driver’s licenses, passports and Employer Identification Numbers). It is available from the government agencies that issued it, but it is time-consuming to collect it from each independent government agency.

9. FinCEN is only authorized to disclose BOI to a statutorily defined group of government agencies to use in furtherance of national security, intelligence or law enforcement activities designed to thwart money laundering or terrorist activities. 31 USCA § 5336(c)(2)(B)(i) (I) and see also 31 USCA § 5336(c)(2) (B)(i)(II).

10. Personal Identifying Information (“PII”) is the beneficial owner’s legal name, date of birth, residential address and a copy of his or her unexpired driver’s license or passport.

11. 31 USCA § 5336(a)(5). The definition of “beneficial owner” includes persons with substantial control over the reporting company. 31 USCA § 5336(a)(3) (A)(i) and 31 C.F.R. § 1010.380(d)(1).

12. 31 USCA § 5336(a)(11)(B)(i)-(xxiv). If an entity is initially exempt from filing a BOIR and that entity’s status changes, the entity is required to report the change within 30 calendar days of its occurrence. 31 USCA § 5336(b)(2) (D).

13. www.fincen.gov/boi-faqs, July 8, 2024, FAQ E.1. Beginning January 1, 2025, newly formed reporting companies will have only 30 days from approval of their formation to file their BOIR with FinCEN. 31 USCA § 5336(b)(1) and 31 C.F.R. § 1010.380(a).

14. 31 C.F.R. § 1010.380(b)(1)(ii)(C) (1). Beginning January 1, 2025, newly formed reporting companies will have only 30 days from the date of their formation to file

their initial BOIR, and company applicants will still have to report their personal identifying information as part of the initial BOIR. 31 C.F.R. § 1010.380(a)(1)(i).



15. To avoid providing PII to the reporting company, Company Applicants may apply for a FinCEN Identifier, a unique identifying number provided by FinCEN after the PII for the applicant has been provided to FinCEN. 31 USCA § 5336(a)(6) and 31 C.F.R. § 1010.380(b)(4). Once a Company Applicant has a FinCEN Identifier, the Company Applicant only provides the identifier to the reporting company for use in the BOIR. To obtain a FinCEN identifier, go to <https://fincenid.fincen.gov/landing>.

16. Public Law 101 – 410, as amended in 2015 by section 701 of Public Law 114-74 and codified as a note to 28 U.S.C. § 2461; Federal Register, Vol. 89, No. 17, Pages 4820 – 4821 (Jan. 25, 2024).

17. *Id.*

18. 31 USCA § 5336(h)(3)(A).

19. *Id.*

20. Most third-party filing companies are not considering that some states, like Arizona, are community property states, which requires an analysis of marital community property to determine whether the spouse of a beneficial owner should be reported on a BOIR. As a result, many BOIRs filed for reporting companies in community property states may be wrong and the owners subject to fines.

21. 31 USCA § 5336(h)(3)(A). Law enforcement personnel are subject to up to \$25,000 in criminal fines and up to five years' imprisonment, or both. These fines and criminal penalties are enhanced if law enforcement personnel are found to have a pattern of conduct of violating the CTA or they violate the CTA while violating another law.

22. www.fincen.gov/boi-faqs, July 8, 2024, FAQs C.12. – C.14.

23. *Id.*, FAQ C.13.

24. A.R.S. §§ 10-1422 and 29-3709.

25. FinCEN Small Entity Compliance Guide, Version 1.1, Page 14 (December 2023) that may be found at www.fincen.gov/boi/small-entity-compliance-guide. Many business entities will not meet the inactive-entity exemption because they were not in existence prior to January 1, 2020.

26. www.fincen.gov/boi-faqs, July 8, 2024, FAQ C.14.

27. *Id.*

28. www.fincen.gov/boi-faqs, July 24, 2024, FAQ F.13.

29. *Id.*

30. A “disregarded entity” is not treated as an entity separate from its owner for U.S. tax purposes and does not file its own tax returns. Instead, the disregarded entity’s owner reports the entity’s income and deductions as part of the owner’s personal federal tax return. www.fincen.gov/boi-faqs, July 24, 2024, FAQ F.13.

31. The FinCEN BOI reporting platform is a secure, nonpublic electronic database that stores BOI. 31 USCA § 5336(c) (2)(B)(i)(I).

LISA C. THOMPSON focuses her practice on CTA compliance, general business law (setup, maintenance, compliance, dissolution, etc.) and consumer bankruptcy reorganizations She has filed her law firm’s BOIR and has been reporting to FinCEN as a Company Applicant using a FinCEN Identifier.