

# Fintech Focus: What Fintechs Need to Know About FinCEN's New Beneficial Ownership Reporting Rule

## Publications

January 4, 2024

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With the start of the new year, FinCEN's Beneficial Ownership Reporting Rule (BOI Reporting Rule) came into effect, implementing specific transparency requirements relating to corporate ownership. The BOI Reporting Rule arises from the Corporate Transparency Act, a component of the Anti-Money Laundering Act (AMLA) of 2020, which was aimed at making it more difficult for bad actors to hide or benefit from illicit proceeds by using shell companies or other structures to mask their interest. Effective January 1, 2024, certain "reporting companies" subject to the BOI Reporting Rule will be required to affirmatively report information to FinCEN about the individuals who ultimately own or control them.

While some fintech companies—including those registered as money transmitter businesses—may be spared from these requirements by virtue of the many exemptions included in the new rule, others will be required to comply, and the industry should be aware of BOI Reporting Rule requirements and potential implications.

## What does the BOI Reporting Rule require?

The BOI Reporting Rule requires an initial report of certain information about the company itself and its beneficial owner(s), and that reporting companies subsequently report on certain changes in information (e.g., changes in beneficial owner(s) or their information, registering a new DBA). In addition, reporting companies created or formed on or after January 1, 2024, must also report information about their "company applicant(s)."

**Reporting companies** include: (1) domestic companies, including corporations, limited liability companies, or companies otherwise formed in the United States "by filing a document with a secretary of state or any similar office under the law of a state or Indian tribe"; or (2) foreign companies "registered to do business in any U.S. state or Indian tribe by such a filing."

However, because the BOI Reporting Rule is focused on obtaining beneficial ownership information that regulators and government agencies do not already possess through other processes, the rule

identifies 23 types of entities that are exempted from reporting if they meet certain applicable criteria. Among others, the rule exempts securities reporting issuers, governmental authorities, banks, credit unions, depository institution holding companies, money service businesses, brokers or dealers in securities, large operating companies (defined as companies with a physical presence, more than 20 US-based full-time employees, and more than \$5 million annually in gross receipts or sales as reflected in US tax returns), subsidiaries of certain exempt entities, and inactive entities.

Broker dealers and money service businesses, for example, are exempt from reporting in that they are already obligated to report their ownership structure to regulators such as state licensing authorities, FinCEN, and the SEC. The reporting company exemptions limit duplication of efforts where information is already available, making the ownership chain already transparent. With this in mind, fintech companies should review the criteria for each of these exemptions to determine if they will be obligated to comply with the BOI Reporting Rule.

### **Who qualifies as a Beneficial Owner that must be reported?**

**Beneficial Owners** are individuals who either directly or indirectly “exercise substantial control over the reporting company” or “own or control at least 25 percent of the ownership interest of a reporting company” as defined below, unless otherwise exempt.

Substantial Control is defined using four specific categories. Satisfaction of any one of these categories would establish control:

- “Senior officers” (i.e., President, CEO, CFO, COO, General Counsel, or other similar titles/positions);
- Individuals with authority to remove or appoint a majority of the board of directors (or similar governing body) or any senior officer;
- Individuals with authority to direct company decisions relating to its business, finances, and structure; and
- Any other individual with any substantial control over the reporting company, which is a broad catch-all without an explicit definition.

Ownership Interest can take any form including equity, voting rights, capital or profit interest, convertible interest, or any other form or arrangement that would establish ownership.

However, the Rule exempts five categories from the definition of a Beneficial Owner including, meaning interests of these parties are not required to be reported:

- Minor children, provided the reporting company instead reports the information of the parent or the guardian and the child’s information is reported once they reach the age of majority;

- Nominees, intermediaries, custodians, or agents acting on behalf of the actual beneficial owner (and the beneficial owner’s information is in fact reported);
- Employees, as defined at 26 CFR 54.4980H-1(a)(15), who are not senior officers and whose control or economic interest is derived solely from their status as an employee;
- Inheritors (e.g., someone who holds a future interest in the reporting company via a will); and
- Creditors whose ownership interest in the reporting company is derived from a loan, debt, or similar obligation incurred by the reporting company.

In addition, where a Beneficial owner indirectly owns a reporting company through an Exempt Entity, the reporting company can just report the name of the Exempt Entity rather than the individual Beneficial Owner(s). Finally, Company Applicants and Beneficial Owners of foreign pooled investment vehicles that satisfy the pooled investment vehicle exemption in the rule are exempt from reporting their Beneficial Owner(s) provided the reporting company reports one individual with substantial control over the reporting company—the individual with the greatest authority must be reported in the event of multiple individuals with control.

### **Who are Company Applicants that must be reported?**

**Company Applicants** include: (1) those who file the documents to create the domestic entity or to register the foreign entity, and (2) those who are “primarily responsible for the filing of the...creation or ...first registration document[s].” The rule requires the reporting of at least one individual (i.e., cannot be an entity) Company Applicant, but cannot exceed two total. Entities created and/or registered to do business in the US before January 1, 2024, are not required to report Company Applicants, and reporting companies are not required to report changes in information relating to company applicants.

### **What must be reported?**

The BOI Reporting Rule requires companies to report certain information relating to the **reporting company** including its name, DBA, address, jurisdiction of formation or registration (for foreign entities), and tax identification number or EIN when applicable. Similarly, reporting companies must also report information relating to their **Beneficial Owners** and **Company Applicants** including their name, date of birth, address, and a copy of a non-expired identification document bearing an identification number given by the issuing jurisdiction. In lieu of reporting these pieces of information to FinCEN about a Beneficial Owner, if an individual or entity that is a beneficial owner has already established its own FinCEN ID account directly with FinCEN, the reporting company can submit only the FinCEN ID to identify those individuals or entities.

### **When are the BOI reports due?**

- Reporting companies formed prior to January 1, 2024, have until January 1, 2025, to submit their reports to FinCEN.
- Reporting companies formed on or after January 1, 2024, but before January 1, 2025, have 90 calendar days from their formation date.
- Reporting companies formed on or after January 1, 2025, have 30 calendar days from their formation date.
- Within 30 days of a change in reportable information about a reporting company, beneficial owners, or information submitted to obtain a FinCEN identifier.

### **What are the ramifications for failure to report?**

Willful failure to file complete and accurate information within the time periods required by the rule can subject both the reporting company and its senior officers to civil liability of up to \$500 each day, and criminal penalties of up to two years in prison and/or a fine of up to \$10,000. Individuals subject to reporting requirements (e.g., Beneficial Owners or Company Applicants) may also be subject to civil and/or criminal penalties for willfully causing a company to either not to file a required BOI report or to report incomplete or false information.

### **Who will have access to the reportable information?**

On December 31, 2023, FinCEN issued the final rule implementing the “access and safeguard provisions of the Corporate Transparency Act” (Access Rule). The Access Rule, which goes into effect on February 20, 2024, compliments the BOI Reporting Rule by prescribing the system under which FinCEN may share BOI and sets the expectations under which the information must be protected by the receiving entity. Specifically, the Access Rule permits FinCEN to share BOI with federal, state, local, and tribal law enforcement authorities or intelligence/security agencies; foreign law enforcement agencies, judges, prosecutors, and other authorities that meet specific criteria; and US Department of the Treasury officers and employees. Additionally, FinCEN may disclose BOI to financial institutions engaged in required customer due diligence, provided the relevant reporting company has consented to this disclosure. Commercial use of BOI is not permitted.

The final rule anticipates concerns about access and use of BOI by malicious actors, and answers those concerns by imposing civil and criminal penalties for the unauthorized disclosure or use of BOI—civil penalties of \$500 each day a violation occurs without remedy, and criminal penalties of up to \$250,000 in fines and/or imprisonment for up to five years. Agencies with access to BOI also must work with FinCEN to ensure that they meet the rule’s security and confidentiality requirements.

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