

Without any fanfare, the Financial Crimes Enforcement Network (FinCEN) updated the official Frequently Asked Questions (FAQs) regarding the Corporate Transparency Act (CTA). As reported in a previous Client Alert, which can be accessed [here](#), the CTA was enacted to require reporting companies to identify individuals possessing substantial control and ownership over such companies.

Unless at least one of 23 listed exemptions is applicable, US domestic companies that were formed by filing a document with a secretary of state or similar office, and non-US companies that registered to do business in the US by filing a document with a secretary of state or similar office, are required to report their beneficial ownership information (BOI) to FinCEN. Such reporting companies must update reports within 30 days after information therein has changed.

Although a federal court in Alabama held in March 2024 that the CTA was unconstitutional as to the specific plaintiff in the case, the Justice Department, on behalf of the Department of the Treasury, is appealing the court's judgment and reported that, while the litigation is ongoing, FinCEN will continue to implement the CTA while simultaneously complying with the Alabama court's order.<sup>1</sup> Other than the particular individuals and entities subject to the court's holding in that case, reporting companies are still required to comply with the CTA and file BOI reports.

A reporting company's BOI report must include information about the reporting company itself, its beneficial owners and, for reporting companies created or registered after January 1, 2024, its company applicants. Beneficial owners are individuals who, directly or indirectly, either (a) exercise "substantial control" over a reporting company, or (b) own or control at least 25% of the ownership interests of a reporting company. Company applicants are the individuals who (a) directly file the document creating or registering the reporting company or (b) are primarily responsible for directing or controlling such filing (if more than one individual is involved in the filing of the document).

## Large Operating Company Exemption

Although FinCEN has published a number of pieces providing guidance on the CTA, questions still abound due to the newness of the reporting requirements, ambiguities regarding certain requirements, and the lack of enforcement actions analyzing such requirements. One question many companies have had relates to their fluctuating numbers of sales or employee headcount and their ability to qualify under the "large operating company" (LOC) exemption.

Under the LOC exemption, a reporting company that satisfies the exemption's requirements will not be required to file a BOI report. The applicable regulations generally define a LOC as any entity that:

- Employs more than 20 full-time employees in the US;
- Has an operating presence at a physical office within the US; and
- Filed a US federal income tax or information return in the US for the previous year demonstrating more than US\$5,000,000 in gross receipts or sales, excluding gross receipts or sales from sources outside the US. Entities that are part of an affiliated group of corporations within the meaning of 26 U.S.C. § 1504 that filed a consolidated return may rely upon the applicable amount reported on consolidated return for the group.

Many companies have inquired as to whether and how the exemption applies to them when their gross receipts or sales or employee headcount fluctuate above and below the required thresholds. Initial guidance from FinCEN provided little clarity on this issue, but the updated guidance from FinCEN specifically address such situations.

Not surprisingly, FinCEN prefaced its guidance on this issue by stating that the company will need to file a BOI report if it otherwise meets the definition of a reporting company and does not meet the criteria for the LOC exemption (or any other exemption). If, after filing a BOI report, the company qualifies for the LOC exemption, the company should file an updated BOI report and note its newly exempt status. If, in the future, the company ceases to satisfy the criteria for the LOC exemption (or any other exemption), the reporting company will have to file an updated BOI report with FinCEN within 30 calendar days of failing to satisfy the criteria for the LOC exemption. Thus, a company could be subject to whipsawing filing obligations from time to time.

<sup>1</sup> [Notice Regarding National Small Business United v. Yellen, No. 5:22-cv-01448 \(N.D. Ala.\), FinCEN](#)

## Exempted Companies that Lose their Exemption

Similar confusion to that of the LOC exemption requirements has surrounded companies created or registered prior to January 1, 2024, that qualified for an exemption at the time the CTA went into effect but ceased to qualify for an exemption later in 2024. In such a situation, FinCEN has determined that such previously exempted companies will have until the later of (i) December 31, 2024 (the original deadline for filing by reporting companies that existed before 2024), and (ii) 30 days after the company loses its exempt status.

## Reporting Companies Without a Principal Place of Business in the US

With respect to a reporting company that lacks a principal place of business in the US, FinCEN advised that in such a situation, the company must report as its address the primary location in the US where the company conducts business. If the reporting company does not have a principal place of business in the US and conducts business at more than one location in the US, FinCEN advised the company may report as its primary location the address of any of those locations in the US where the company receives important correspondence. And if a reporting company has no principal place of business in the US and does not conduct business functions at any location in the US, FinCEN advised that the company should report as its primary location the address in the US of the person that the reporting company designated to accept service of legal process on its behalf (i.e., its registered agent for service of process).

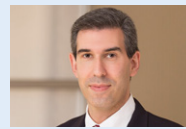
## Other Updates by FinCEN Regarding BOI

Among other updates to guidance, FinCEN confirmed that S corporations are subject to BOI reporting requirements, as are Homeowners Associations (HOAs) that were created by the filing of a document with a secretary of state or similar office. HOAs that were not created by the filing of such a document are not subject to BOI reporting requirements.

FinCEN also advised that beneficial owners can own or control a reporting company through trusts, by either exercising substantial control over a reporting company through a trust arrangement or by owning or controlling the ownership interests of a reporting company that are held in a trust. FinCEN also updated its guidance on determining who a reporting company's beneficial owners are when individuals own or control a reporting company through a trust.

FinCEN's updated guidance also addressed information regarding how BOI may be accessed by government employees and agencies, and confirmed certain penalties for violating BOI reporting requirements. Overall, a person who willfully violates the BOI reporting requirements may be subject to civil penalties of up to US\$500 for each day that the violation continues, adjusted annually for inflation (currently US\$591 per day), and subject to criminal penalties of up to two years' imprisonment and a fine of up to US\$10,000. With such serious consequences potentially resulting from the failure to comply with the CTA's BOI reporting requirements, it is important that companies and the officers and directors operating such companies be aware of the CTA's requirements and maintain compliance.

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