

## Beneficial Ownership Information Reporting Rule update: FinCEN issues new rule on FinCEN identifiers

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The reporting requirements under FinCEN's Beneficial Ownership Information Reporting Rule will go into effect on January 1, 2024. As the effective date approaches, FinCEN has issued a new rule that specifies the circumstances in which a reporting company may report an entity's FinCEN identifier in lieu of information about an individual beneficial owner.

In a little over one month's time, on January 1, 2024, the Financial Crimes Enforcement Network's (FinCEN's) Beneficial Ownership Information Reporting Requirements Rule (the [BOI Reporting Rule](#)) is scheduled to go into effect. Once effective, reporting companies created on or after that date must report information on their beneficial ownership (BOI) and company applicants within 30 days of their formation,<sup>1</sup> while companies formed or registered prior to January 1, 2024, will have until January 1, 2025, to file their initial reports. Companies that regularly create subsidiaries or other new entities need to consider how they will address the BOI Reporting Rule. Equally, many companies will need to begin inventorying the entities that have been created in the past, determining which are subject to the Rule, and creating a process to have those reports prepared.

On November 8, 2023, FinCEN issued a final rule that amends the BOI Reporting Rule to specify when and how reporting companies may use a FinCEN identifier to report the BOI of certain related entities (the [FinCEN Identifier Rule](#)). The FinCEN Identifier Rule will be effective January 1, 2024, which aligns with the effective date of the BOI Reporting Rule. As the effective date of the BOI Reporting Rule approaches, however, many other questions remain unanswered, both as to the application of the rule and the mechanics of reporting.

### FinCEN Identifier Rule: Key takeaways

Pursuant to the BOI Reporting Rule, which will be effective on January 1, 2024, non-exempt corporations, limited liability companies and other similar entities (collectively, reporting companies) will be required to report certain identifying information about the beneficial owners who own or control the reporting company and the company applicants who form or register them.

For more information on the BOI Reporting Rule, please review our [client update](#) on the rule.

The BOI Reporting Rule also allows individuals and entities to obtain and update a FinCEN identifier, which is a unique number that FinCEN will issue upon request after receiving certain required information. In certain circumstances, the BOI Reporting Rule permits a reporting company to provide the FinCEN identifier in lieu of identifying information of either an individual or entity that is one of the reporting company's beneficial owners. Although there is no obligation for an individual or entity to obtain a FinCEN identifier, doing so allows individuals and entities to provide the required personal and business identifying information directly to FinCEN instead of to a reporting company.

The BOI Reporting Rule provides that a reporting company is permitted to provide an *individual's* FinCEN identifier in lieu of the individual's identifying information, but it did not address the circumstances under which a reporting company may

use an *entity's* FinCEN identifier, choosing instead to solicit further public comment on that question. The FinCEN Identifier Rule fills in this gap, and amends the BOI Reporting Rule to establish that a reporting company may report another entity's FinCEN identifier only if:

1. The other entity has obtained a FinCEN identifier and provided that FinCEN identifier to the reporting company;
2. An individual is or may be a beneficial owner of the reporting company by virtue of an interest in the reporting company that the individual holds through an ownership interest in the other entity; and
3. The beneficial owners of the other entity and of the reporting company are the same individuals.

The FinCEN Identifier Rule will, in effect, allow a reporting company to report an intermediate parent entity's FinCEN identifier in lieu of reporting the BOI of the reporting company's beneficial owners, but only if the reporting company and intermediate parent in fact have the same beneficial owners. It is important to note that a reporting company will be required to update its beneficial ownership report if the beneficial owners of the intermediate parent entity whose entity FinCEN identifier the reporting company has previously reported cease to be the same as the beneficial owners of the reporting company.

## Looking ahead

Although FinCEN seems committed to the January 1, 2024, effective date, there is some question as to whether the effective date will be extended: with just over two months remaining until reporting requirements go into effect, FinCEN has yet to finalize the [proposed rule](#) governing access to the registry (described in our December 2022 [client update](#)), nor has the agency clarified the technical process through which companies must submit their BOI Reports. Whether or not the deadline is extended, however, reporting companies and other stakeholders, including certain government agencies and financial institutions that will have access to the national beneficial ownership registry, still face numerous uncertainties with respect to the new BOI reporting regime—both as to the application of the BOI Reporting Rule and the mechanics of reporting BOI to FinCEN. It is also unclear what percentage of the estimated 32.6 million reporting companies<sup>2</sup> are currently aware of the BOI Reporting Rule (a figure that is almost certainly higher than the percentage of reporting companies that understand it).

Additionally, fundamental uncertainties remain around the BOI Reporting Rule's application, owing to the broad (and often ambiguous) language in the rule. Since the BOI Reporting Rule was finalized, FinCEN has attempted to clarify the Rule's requirements through [FAQs](#)<sup>3</sup> and a [Small Entity Compliance Guide](#).<sup>4</sup> While this guidance is useful in understanding some of the basic aspects of the Rule's requirements, FinCEN has yet to clarify many of the ambiguities inherent in the BOI Reporting Rule's definitions, which can make compliance a challenge for corporate entities that maintain complex organizational structures or that otherwise engage in complicated investment and transactional activities involving reporting companies. For example, under the BOI Reporting Rule, a "beneficial owner" includes any individual who exercises "substantial control" over a reporting company, which is defined to include, among other things, any individual who is an "important decision-maker," or who "has any other form of substantial control." FinCEN has not yet released explicit guidance on how to interpret this catch-all language or how broadly "substantial control" should be read when important decision-making authority is diffused across numerous individuals, both within and outside of a reporting company (e.g., the management of a parent company).

FinCEN has made clear, however, that the process of identifying a reporting company's beneficial owners is ultimately a fact-sensitive inquiry. In the absence of further guidance, reporting companies are encouraged to use their reasonable judgment in applying the Rule, based on the plain language of the regulations and the facts and circumstances around the company's ownership and control. Reporting companies are also advised to continue to monitor developments from FinCEN in the coming months.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

**Kendall Howell**

+1 202 962 7068  
kendall.howell@davispolk.com

**Paul Marquardt**

+1 202 962 7156  
paul.marquardt@davispolk.com

**Will Schisa**

+1 202 962 7129  
will.schisa@davispolk.com

**Daniel P. Stipano**

+1 202 962 7012  
dan.stipano@davispolk.com

**Charles Marshall Wilson**

+1 202 962 7130  
charles.wilson@davispolk.com

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- <sup>1</sup> Note that while FinCEN released a [proposed rule](#) in September of this year that would extend the filing deadline for companies formed or registered in 2024 to 90 days from date of formation, that rule has yet to be finalized. See FinCEN, Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024, 88 Fed. Reg. 66730 (September 28, 2023).
- <sup>2</sup> FinCEN estimates that there will be approximately 32.6 million reporting companies in Year 1, and 5 million additional reporting companies each year in Years 2–10. FinCEN, Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59549 (September 30, 2022).
- <sup>3</sup> FinCEN, Beneficial Ownership Information Reporting: Frequently Asked Questions, <https://www.fincen.gov/boi-faqs>.
- <sup>4</sup> FinCEN, Small Entity Compliance Guide: Beneficial Ownership Information Reporting Requirements (September 2023), [https://www.fincen.gov/sites/default/files/shared/BOI\\_Small\\_Compliance\\_Guide\\_FINAL\\_Sept\\_508C.pdf](https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide_FINAL_Sept_508C.pdf).