

FinCEN Reference Guide Clarifies Beneficial Ownership Reporting Requirements

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Holland & Knight Alert

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Highlights

- The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued a notice to customers of financial institutions (the Notice) containing a reference guide for reporting beneficial ownership information (BOI) under customer due diligence (CDD) and the Corporate Transparency Act (CTA).
- The Notice informs entities that BOI must be submitted to FinCEN under the CTA and financial institutions under CDD and compares 1) the types of information submitted about beneficial owners, 2) the types of information submitted about entities and 3) other information and certifications required by FinCEN and by financial institutions. The Notice also specifies the deadlines for reporting BOI to FinCEN under the CTA.
- This Holland & Knight alert highlights the key differences between the requirements for CTA and CDD reporting and makes certain observations related to the two BOI regimes.

The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) on July 26, 2024, [issued a notice](#) containing a reference guide for customers of financial institutions (the Reference Guide). The Reference Guide addresses key questions regarding two independent requirements: the obligation to provide beneficial ownership information (BOI) to financial institutions in accordance with federal customer due diligence (CDD) requirements and the requirement to report BOI to FinCEN under the Corporate Transparency Act (CTA). Financial institutions are encouraged to share this Reference Guide with customers who may be required to report BOI.

Background

Under the Customer Due Diligence Final Rule (CDD Rule) effective May 11, 2018, covered financial institutions are required to collect BOI in order to identify and verify the beneficial owners who own, control and profit from entities seeking to open an account. Beneficial ownership requirements under the CDD Rule are designed to help ensure that financial institutions have sufficient knowledge of their customers to prevent their institutions from being used to facilitate illicit activity.

The CTA, which entered into force on Jan. 1, 2024, requires certain entities (Reporting Companies) to report personally identifiable information (PII) about the individuals, called beneficial owners, who ultimately own or control them directly to FinCEN,¹ which stores this information on a national, secure, nonpublic database accessible to governmental authorities, certain financial institutions and financial regulators.² FinCEN may then share this data with authorized recipients to combat the proliferation of anonymous shell companies that facilitate the flow and sheltering of illicit money into the U.S.

With respect to these distinct regulatory requirements, the Reference Guide addresses the following questions:

Will Entities Need to Provide BOI to Both FinCEN and Financial Institutions?

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Yes. Both FinCEN and financial institutions collect BOI from entities but for different purposes and, in some cases, may collect different types of information. For instance, when an entity applies to open an account at a bank, the bank may be required to collect specific information about the entity's beneficial owner(s) before the account can be opened as part of the bank's federal CDD obligations. This information is gathered and retained by the bank and is not sent to FinCEN.

The same entity also might need to report BOI directly to FinCEN if it constitutes a "Reporting Company" under the CTA. A Reporting Company is any entity that meets the definition set forth by FinCEN and does not qualify for an exclusion³ or one of the 23 exemptions.⁴ There are two types of Reporting Companies:

- **Domestic Reporting Company:** a corporation, limited liability company (LLC) or other entity established by filing documents with a secretary of state or a similar office in the U.S.
- **Foreign Reporting Company:** an entity (including a corporation and LLC) formed under the laws of a foreign country registered to do business in the U.S. by filing documents with a secretary of state or a similar office

If an entity is required to report BOI to FinCEN, doing so does not fulfill the requirement to provide the same information to a financial institution and vice versa.

Also note, under the CTA, a Reporting Company has initial and ongoing reporting obligations, and the Reporting Company must monitor its status on an ongoing basis so as to determine whether it is a Reporting Company or exempt, which requires the filing of initial and updated and corrected reports.

Are FinCEN and Financial Institutions Collecting the Same BOI?

No. FinCEN and financial institutions collect different types of BOI.

For example, while both the CTA and CDD require a beneficial owner's name, address and date of birth, only financial institutions under the CDD must collect Social Security numbers (or comparable tax IDs for non-U.S. persons).

Conversely, the CTA requires that a beneficial owner provide to the Reporting Company one of four forms of identification, limited to one of the following acceptable forms of identification for individuals (and an image of the ID document):⁵

1. a nonexpired U.S. driver's license (including any driver's license issued by a commonwealth, territory or possession of the U.S.)
2. a nonexpired identification document issued by a U.S. state or local government or Indian tribe
3. a nonexpired passport issued by the U.S. government
4. a nonexpired passport issued by a foreign government (which is permitted only when an individual does not have one of the other three forms of identification listed above)

For CDD purposes, a financial institution *may* request to see a copy of the identification documents for each beneficial owner.

Additionally, the definition of a "beneficial owner" for FinCEN reporting purposes differs from that used for financial institution collection purposes.

- For FinCEN reporting under the CTA, a beneficial owner is any individual who directly or indirectly 1) exercises substantial control over a Reporting Company or 2) owns or controls at least 25 percent of the ownership interests of a Reporting Company.⁶ There is no maximum number of beneficial owners who must be reported to FinCEN.

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- For collection by a financial institution under the CDD Rule, a beneficial owner is 1) a *single* individual with significant responsibility to control, manage or direct a legal entity customer, including an executive officer or senior manager or any other individual who regularly performs similar functions, and 2) *each* individual, if any, who directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of a legal entity customer. Under the second prong, a financial institution may be required to collect information for up to four individuals.⁷
- Further, the identification of beneficial owners where a trust is involved differs between the two reporting regimes.

With respect to the information that the CDD and the CTA collect about entities, the information is generally the same, with minor variances.

The Reference Guide also contains a comparison of other information, which includes some differences between the CDD and the CTA. The CDD contains information about the individual opening the account, while the CTA includes information about company applicants.

More important is the certification. The certification by an individual opening an account under the CDD is, "to the best of [the individual's] knowledge, that the information provided ... is complete and correct," while the certification by an individual filing a report with FinCEN under the CTA is that "the [report] is true, correct, and complete." Note, under the CTA, there are civil and criminal penalties for the willful failure to report, update BOI and correct inaccurate BOI.

Deadlines for Reporting Beneficial Ownership Information to FinCEN

The Reference Guide also informed readers that FinCEN began accepting BOI reports pursuant to the CTA on Jan. 1, 2024, and summarizes the reporting due dates.

- A Reporting Company created or registered before Jan. 1, 2024, has until Jan. 1, 2025, to file its initial report.
- A Reporting Company created or registered in 2024 must file its initial report within 90 calendar days after receiving actual or public notice of its effective creation or registration, whichever is earlier.
- A Reporting Company created or registered on or after Jan. 1, 2025, must file its initial report within 30 calendar days after receiving actual or public notice of its effective creation or registration.
- Any updates or corrections to BOI previously filed with FinCEN must be submitted within 30 calendar days.

Takeaways

- The summary comparison of the BOI reporting contained in the CDD and CTA illustrates that, while both regimes are intended to collect BOI, the CDD regime is intended to clarify and strengthen CDD requirements for covered financial institutions. Meanwhile, the CTA is intended to implement, on a nationwide basis, the collection of BOI to counter money laundering, terrorist financing, corruption, tax fraud and other illicit activity to protect national security, intelligence and law enforcement interests
- The CDD Rule applies when a legal entity customer wants to open an account at a covered financial institution, unless the customer is otherwise excluded or the account is exempted, and then to monitor the customer's activities to identify any changes or red flags that may indicate an increased risk of illicit activity (and file a suspicious activity report). The CTA has a much broader scope that requires Reporting Companies (i.e., those entities that are not excluded or exempt) to initially report their information about their beneficial owners to FinCEN and then, on an ongoing basis, to file an updated or corrected report with FinCEN if information about the Reporting Company or its Beneficial Owners changes or is incorrect.
- The Reference Guide explicitly states that the information provided therein is accurate as of July 2024 and is subject

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to change in the future. That is because FinCEN is tasked with implementing regulations to revise its CDD requirements to conform with the CTA's BOI requirements. These regulations are anticipated to be released no later than Jan. 1, 2025.

- Notably, the Reference Guide did not address the sharing of BOI collected by financial institutions or FinCEN and what FinCEN's expectations are for customers and financial institutions alike when there are discrepancies in BOI reported to FinCEN and collected by financial institutions. Further guidance on these issues, particularly as it pertains to compliance with CDD requirements applicable to financial institutions, is expected as part of the issuance of a revised CDD Rule, described in the bullet point above.

For guidance on Beneficial Ownership Reporting Requirements and when to file BOI Reports, please contact the authors.

Notes

¹ 31 C.F.R. § 1010.380 (Corporate Transparency Act)

² The CTA also requires information about the Reporting Company and the Company Applicant(s); Company Applicant BOI is only required for Reporting Companies formed Jan. 1, 2024, and thereafter, and not for Company Applicant information for entities formed in pre-2024 years because of the difficulty in obtaining such information.

³ There are five exclusions: sole proprietorships, general partnerships, unincorporated associations, a common law trust and a foreign entity not registered to do business in a state or with an Indian tribe. Note, under the CDD, a general partnership is not excluded, and there is a different exclusion for foreign entities.

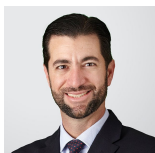
⁴ Note, under the CDD, although many of the federally regulated exemptions are the same, the CTA contains exemptions for large operating companies, tax-exempt entities, certain subsidiaries and inactive entities, which are not found in the CDD exemption list.

⁵ A beneficial owner and company applicant may provide a FinCEN Identifier in lieu of providing personal identifiable information. A FinCEN Identifier is a unique numeric ID assigned by FinCEN to an individual to be submitted to a Reporting Company to be used in a report in lieu of an individual's personal identifiable information. FinCEN Identifiers are used for data security and for administrative efficiency.

⁶ See 31 C.F.R. § 1010.380(d) for the definition of a "beneficial owner" with respect to a Reporting Company.

⁷ See 31 C.F.R. § 1010.230(d) for the definition of a "beneficial owner" for legal entity customers.

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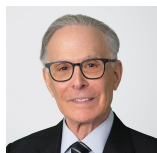


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