

REPORTING “BENEFICIAL OWNERS” JUST LANDED ON THE MUST-DO LIST



By Leslie Bellwood

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As of January 1, 2024, many business entities will need to report their “beneficial owners” to the Financial Crimes Enforcement Network (FinCEN).¹ The term beneficial owner is much broader than many would assume. Not only is a beneficial owner someone who owns or controls at least 25 percent of a company, but also any individual who has substantial control over the company, even if they hold no ownership interest. This could be a senior officer such as a Chief Executive Officer, General Counsel, or any individual who has substantial influence over the important decisions of the company. For the purposes of beneficial ownership, substance over form is key.

Ownership interest, as defined by FinCEN, is also broader than traditional understandings of ownership interest such as ownership through convertible instruments that can be changed into equity, stock, voting rights, capital interest, or profit interest; or even option contracts that can give an individual

the option or privilege to buy or sell equity, stock, voting rights, capital interest, profit interest, or convertible instruments.

FinCEN issued this rule in September 2022 to implement the Corporate Transparency Act enacted in 2021. FinCEN determined that requiring beneficial owner information from business entities would strengthen the integrity of the U.S. financial system and national security by allowing FinCEN and other agencies to collect vital information to target illicit actors using companies as fronts for illegal activity.

These reports will be an additional tool for business litigation attorneys as well to utilize when representing clients in business ownership disputes and will become a standard document to request in books and records requests as evidence of reported business ownership.

Businesses entities formed before January 1, 2024 have the following year to make this report, which can be filed online on FinCEN’s BOI (Beneficial Ownership Information) E-Filing system, while entities formed after January 1, 2024 but before January 1, 2025 will have 90 days after formation to report their beneficial owners. Going forward, entities formed after January 1, 2025 will have 30 days to complete the beneficial ownership information report. For all reporting entities, updates or changes to a beneficial ownership information report must be made within 30 days after the change occurs.

FinCEN issued a Small Entity Compliance Guide to help guide small businesses in reporting their beneficial owners with considerations that extend beyond the discussion in this article.² Among other considerations, entities must determine whether they are required to report beneficial owners. There are exceptions to which entities must report their beneficial owners, such as brokers or dealers in securities, and who is considered a beneficial owner. The Guide and other FinCEN guidance should be reviewed by companies as they consider whether to file a report.

Businesses would be remiss not to take their reporting obligation seriously. FinCEN has developed serious penalties for failing to file a beneficial own-

ership report. Individuals, including senior officers of entities, may face civil and/or criminal penalties for willfully causing a company not to file a required beneficial ownership information report or to file a report falsely or fraudulently. Civil penalties may be up to \$500 per day as long as the violation remains unresolved. Possible criminal penalties include imprisonment of up to two years and/or fines of a maximum of \$10,000. This represents a potentially hefty penalty for the individuals in control of companies that must make these reports.

Some businesses may use this reporting requirement as an opportunity to become clear about the ownership and control of their small companies. For others, this reporting may trigger disagreements that could result in future litigation to determine ownership and control over businesses. Beneficial ownership information reporting may also have repercussions for asset reporting outside of the business context, such as for asset reporting in bankruptcies and divorces.

For business litigation attorneys in particular, these reports may become frequently used as evidence in ownership dispute cases, such as closely-held business divorce cases where reported and intended ownership may not align.

Business owners should make sure to complete all required reporting following FinCEN guidance. Attorneys on the other hand, should watch this space to evaluate how beneficial ownership information reports can and will be used in their practice.

¹ <https://boiefiling.fincen.gov/>

² <https://www.fincen.gov/boi/small-entity-compliance-guide>

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