

Corporate Transparency Act Redux

Brandon K. Jones
Carruthers & Roth, P.A.
Phone: (336) 478-1160
E-mail: bkj@crlaw.com



Corporate Transparency Act (“CTA”)

- Enacted by Congress in 2021
 - Part of 2021 National Defense Authorization Act
- Went into effect 1/1/2024
- Overseen by FinCEN

Compliance and Enforcement

- FinCEN expected about 32 million reports in 2024
 - Reports filed (as of Nov. 2024): 6.5 million
- Enforcement?
 - Criminal and civil penalties

Filing Logistics

- Two ways to file:
 - Downloadable/fillable PDF
 - Savable, can use for future updated reports
 - Web form
 - Can't save work
- Third-party service providers

Filing Logistics

File the Beneficial Ownership Information Report (BOIR)

Select the filing method that works best for you:



File PDF BOIR

- Adobe Reader is required
- Prepare report offline at your own pace, save as you go
- Reuse PDF BOIR when filing updates/corrections
- Download BOIR transcript upon submission

Prepare BOIR

Submit BOIR



File Online BOIR

- Adobe Reader NOT required
- Prepare report online and submit now
- Prepare new Online BOIR when filing updates/corrections
- Download BOIR transcript upon submission

Prepare & Submit BOIR

Filing Logistics

Beneficial Ownership Information Report

Home Reporting Company Company Applicant(s) Beneficial Owner(s)



Beneficial Ownership Information Report

OMB No. 1506-0076

Version Number: 1.0
Release Date: 05-29-2024

Report Preparation & Submission Instructions:

- | | |
|---------------|---|
| Instructions | 1. Complete the report in its entirety with all required information. Click Instructions for help. |
| Validate | 2. Click Validate to ensure all entered data is properly formatted and that all required fields are completed. |
| Finalize | 3. Click Finalize to lock the entries in the report and prepare it for submission. Click Edit Report to unlock and re-edit. |
| Save | 4. Click Save to retain a local copy of the report (this can be done at any time during report preparation). |
| Print | 5. (Optional) Click Print to print a hard copy of your completed report. |
| Ready To File | 6. Select Ready to File (activated after the report is finalized and saved locally) to begin the submission process. |

Filing Information

1. *Type of filing:

- a. Initial report ☐
- b. Correct prior report ☐
- c. Update prior report ☐
- d. Newly exempt entity ☐

Reporting Company information associated with most recent report, if any:

- e. Legal name
- f. Tax Identification type
- g. Tax Identification number
- h. Country/Jurisdiction (if foreign tax ID only)
2. Date prepared (auto-filled when form is finalized)

PRIVACY ACT AND PAPERWORK REDUCTION ACT NOTICE

This notice is given under the Privacy Act of 1974 (Privacy Act) and the Paperwork Reduction Act of 1996 (Paperwork Reduction Act). The Privacy Act and Paperwork Reduction Act require that FinCEN inform persons of the following when requesting and collecting information in connection with this collection of information. This collection of information is authorized under 31 U.S.C. 5336 and 31 C.F.R. 1010.380. The principal purpose of this collection of information is to generate a database of information that is highly useful in facilitating national security, intelligence, and law enforcement activities, as well as compliance with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law. Pursuant to 31 U.S.C. 5336 and 31 C.F.R. 1010.380, reporting companies and certain other persons must provide specified information. The omission of that information is mandatory and failure to provide that information may

Beneficial Ownership Information Report

Home

Reporting Company

Company Applicant(s)

Beneficial Owner(s)

Part I. Reporting Company Information

3. Request to receive FinCEN Identifier (FinCEN ID) ☐
4. Foreign pooled investment vehicle ☐

Full legal name and alternate name(s):

5. * Reporting Company legal name
6. Alternate name (e.g. trade name, DBA)

Form of identification:

7. * Tax Identification type
8. * Tax Identification number
9. Country/Jurisdiction (if foreign tax ID only)

Jurisdiction of formation or first registration:

10. * a. Country/Jurisdiction of formation

Domestic Reporting Company:

- b. State of formation
- c. Tribal jurisdiction of formation
- d. Name of the other Tribe

Foreign Reporting Company:

- e. State of first registration
- f. Tribal jurisdiction of first registration
- g. Name of the other Tribe

Current U.S. Address:

11. * Address (number, street, and apt. or suite no.)
12. * City
13. * U.S. or U.S. Territory
14. * State
15. * ZIP Code

Filing Logistics

Beneficial Ownership Information Report (BOIR)

OMB No. 1506-0076

Complete the report in its entirety with all required information. Fields marked with an asterisk (*) symbol are the fields that, *at a minimum*, must be completed by all companies to file the report. Reporting companies, however, must include all information 31 CFR 1010.380(b) requires them to provide, regardless of whether a field is marked with an asterisk (*) symbol. These information requirements are summarized above under HELP.

Filing Information

Reporting Company

Company Applicant(s)

Beneficial Owner(s)

Submit

Part I. Reporting Company Information

② Need help?



☐ 3. Request to receive FinCEN ID

☐ 4. Foreign pooled investment vehicle

Legal name and alternate name(s)

② Need help?



*5. Reporting Company legal name

Previous

Next


Filing Logistics

- What if Reporting Company doesn't have all of the information on time?
 - No EIN
 - Uncooperative Beneficial Owners

Scams and Fraud


- FinCEN warns to look out for:
 - Form 4022 – not a real FinCEN form
 - Form 5102 – not a real FinCEN form
 - C.P.S. Form – not a real FinCEN form
 - Correspondence from “US Business Regulations Dept.” – no such department
 - Requests for payment – there is no filing fee
 - Unless using a legit third-party service

Scams and Fraud

Form 4022 (Rev. December 2023) United States Business Regulations Department	Mandatory Beneficial Ownership Reporting ▶ Read Instructions Below Carefully and Return Completed Form	<div style="text-align: right;">  </div> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 30%;">Notice ID</td> <td>9568352</td> </tr> <tr> <td>Respond By</td> <td>2/29/2024</td> </tr> <tr> <td>Filing Fee</td> <td>\$117</td> </tr> </table>	Notice ID	9568352	Respond By	2/29/2024	Filing Fee	\$117
Notice ID	9568352							
Respond By	2/29/2024							
Filing Fee	\$117							

COMPLETE THE FORM BELOW AND RETURN
 Make CHECK or MONEY ORDER payable to:
US Business Regulations Dept.

Reporting Entity



FAKE

T#000013

PURSUANT TO THE UNITED STATES CORPORATE TRANSPARENCY ACT, ENACTED BY CONGRESS. US Businesses are required to report their beneficial ownership information. A reporting company is any corporation, limited liability company, or any other entities created by the filing of a document with a secretary of state or any similar office in the United States.

A beneficial owner is an individual who either directly or indirectly: (1) exercises substantial control over the reporting company (President, CEO, COO, CFO, etc.), or (2) owns or controls at least 25% of the reporting company's ownership interests.

EXEMPT ENTITIES: Inactive Entity, Dissolved Entity, 501(c)3 Non Profit.

PENALTIES FOR NON COMPLIANCE:
 Companies who willfully provide false information or neglect to report by the filing deadline can face a civil penalties of up to **\$500 for each day** that the violation continues or has not been remedied. In addition, they can be **fined up to \$10,000 and/or face up to 2 years of imprisonment.**

Type or Print	Reporting Entity		Employment Identification Number (EIN)	
	Submitter Full Name		Title (Select One) <input type="checkbox"/> Owner <input type="checkbox"/> Officer <input type="checkbox"/> Paid Preparer	
	Submitter Phone Number	Submitter Email		

Part I Beneficial Owners		
Beneficial Owner Number 1 - First Name	Middle Initial	Last Name



Scams and Fraud

<p>Form 5102 (Rev. December 2023)</p> <p>Annual Records Service 121549</p>	<p>Mandatory Beneficial Ownership Reporting</p> <p>► Read Instructions Below Carefully and Return Completed Form</p>	<p>5799870 </p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">Notice ID</td> </tr> <tr> <td style="padding: 2px;">Respond By <div style="text-align: right;">8/21/2024</div></td> </tr> <tr> <td style="padding: 2px;">Filing Fee <div style="text-align: right;">\$119</div></td> </tr> </table>	Notice ID	Respond By <div style="text-align: right;">8/21/2024</div>	Filing Fee <div style="text-align: right;">\$119</div>
Notice ID					
Respond By <div style="text-align: right;">8/21/2024</div>					
Filing Fee <div style="text-align: right;">\$119</div>					

COMPLETE THE FORM BELOW AND RETURN

Make CHECK or MONEY ORDER payable to:

Annual Records Service.

Reporting Entity

PURSUANT TO THE UNITED STATES CORPORATE TRANSPARENCY ACT, ENACTED BY CONGRESS: US Businesses are required to report their beneficial ownership information. A reporting company is any corporation, limited liability company, or any other entities created by the filing of a document with a secretary of state or any similar office in the United States.

A beneficial owner is an individual who either directly or indirectly: (1) exercises substantial control over the reporting company (President, CEO, COO, CFO, etc.), or (2) owns or controls at least 25% of the reporting company's ownership interests.

EXEMPT ENTITIES: Inactive Entity, Dissolved Entity, 501(c)(3) Non Profit.



PENALTIES FOR NON COMPLIANCE:
Companies who willfully provide false information or neglect to report by the filing deadline can face a civil penalties of up to **\$500 for each day** that the violation continues or has not been remedied. In addition, they can be **fined up to \$10,000** and/or face up to **2 years of imprisonment**.

Type or Print	Reporting Entity		Employment Identification Number (EIN)	
	Submitter Full Name		Title (Select One)	
	Submitter Phone Number		<input type="checkbox"/> Owner <input type="checkbox"/> Officer <input type="checkbox"/> Paid Preparer	
		Submitter Email		

Part I Beneficial Owners				
Beneficial Owner Number 1 - First Name		Middle Initial	Last Name	
Address			Unit, Suite, Room, Etc.	
City		State	Zip Code	
Beneficial Owner Number 2 - First Name (If None Leave Blank)		Middle Initial	Last Name	
Address			Unit, Suite, Room, Etc.	

Scams and Fraud

MANDATORY FINCEN FILING

Notice Date: 4/10/2024
Reply By: 5/21/2024

**MUST FILE BY 5/21/2024
\$500.00 PENALTY PER DAY AFTER
5/21/2024**

FINCEN ALLIANCE

The Financial Crimes Enforcement Network (Fincen) is responsible for collecting ownership information. A beneficial owner is any individual who exercises substantial control **OR** owns at least 25% of the reporting company. Entities created after January 1, 2024 must file within 90 days.

was created on 2/21/2024 and must file by 5/21/2024

Penalties as specified in the Corporate Transparency Act, a person who willfully violates the BOI reporting requirements may be subject to civil penalties of up to \$500 for each day that the violation continues. That person may also be subject to criminal penalties of up to two years imprisonment and a fine of up to \$10,000.

We urge all business to file immediately - Scan the QR code or visit www.fincenalliance.com.

For More Information Visit:
<https://www.congress.gov/bill/116th-congress/house-bill/2513>

Scams and Fraud

- No enforcement from FinCEN yet
 - And FinCEN will not contact you by email or phone about actual penalties – like IRS

Legal Action and Court Challenges

- National Small Business United v. Yellen (Alabama)
 - Challenge by small business assoc. with 65k members
 - Trial Court found CTA was unconstitutional/exceeded Congress's authority:
 - Not allowed under foreign policy powers, Commerce Clause, or taxing power
 - Trial Court order only in effect for NSBU members
 - Appeal to 11th Circuit
 - Decision expected before year-end

Legal Action and Court Challenges

- Firestone v. Yellen (Oregon)
 - Plaintiffs' preliminary injunction denied
- Robert J. Gargasz Co. LPA v. Yellen (Ohio)
 - Plaintiffs' preliminary injunction denied
- Community Associatsion Institute v. Yellen (Virginia)
 - Stayed pending NSBU 11th Circuit decision
- Several others pending

Legislative Action?

- H.R. 4035 – “Protecting Small Business Information Act”
 - Delay effective date of CTA until all final rules/regs issued
- H.R. 5119 / S. 3625 – “Protect Small Business and Prevent Illicit Financial Activity Act”
 - Extends filing deadlines for pre-existing and new companies
- H.R. 8147 / S. 4297 – “Repealing Big Brother Overreach Act”
 - Repeals CTA

Legislative Action?

- H.R. 9278
 - Extends filing deadline for pre-existing “small businesses” by one year

- H.R. 7963
 - Requires FinCEN to submit quarterly reports to Congress on filings

Statutes, Regulations, Information

- CTA is codified at 31 USC § 5336, et seq.
- Treasury has produced one set of final regulations at 31 CFR 1010.380, et seq.
 - But still not regulations on government access to BOI info
- Various guides and FAQs on FinCEN's website
 - <https://www.fincen.gov/boi/small-business-resources>

Filing Deadlines

- For Reporting Companies formed before January 1, 2024:
 - Initial report must be filed on or before January 1, 2025
- For Reporting Companies formed on or after January 1, 2024 but before January 1, 2025:
 - Initial report must be filed within 90 calendar days after formation
- For Reporting Companies formed on or after January 1, 2025:
 - Initial report must be filed within 30 calendar days after formation

Extensions – Hurricane Relief

- FinCEN has granted 6-month filing extension for businesses affected by hurricanes
 - Beryl, Debby, Francine, Helene, and Milton
- Specific date ranges for each hurricane
- PPOB located in disaster area designated by both FEMA and IRS

Definitions

- **Reporting Company**
 - A company that is required to report under the CTA
- **Beneficial Owner**
 - Individual who owns 25% of Reporting Company, or has “substantial control”
- **“BOI” = Beneficial Ownership Information**
- **Company Applicant**
 - Individual responsible for forming a Reporting Company

Initial Filing Deadlines (cont'd)

- For an entity that loses its exempt status, within 30 days after that status is lost
- For a Reporting Entity that subsequently gains an exempt status, it must also file an updated report telling FinCEN of the exempt status – no deadline

Updated Filing Deadlines

- If there is any change with respect to the information that a Reporting Company previously reported, updated report must be filed within 30 days of the change
- NOTE: Not within 30 days of the date that the Reporting Company learns of the change, but within 30 days of the change itself

Updated Filing Deadlines (cont'd)

- Changes that must be reported include:
 - Changes with respect to the Reporting Company itself (including changes to legal name, trade names, and business address)
 - Changes with respect to who is a Beneficial Owner – i.e., ownership changes, including by reason of death (clock starts when estate of decedent is “settled”)
 - Changes with respect to any Beneficial Owner’s previously reported information (including changes of residential address, new driver’s license)
 - Unless a FinCEN ID for the Beneficial Owner was used

What is a Reporting Company?

- Domestic Reporting Companies:
 1. Corporations
 2. Limited Liability Companies
 3. Any other entity that is formed by filing a document with a secretary of state

- Does not include: sole proprietorships, trusts, general partnerships
 - Limited Liability Partnerships

What About Dissolved Companies?

- If company “ceased to exist as a legal entity” before January 1, 2024, no filing requirement
 - Fully dissolved/wound up – state law determination
 - Administrative dissolution?
- Companies that form after 1/1/24 but dissolve before their initial BOI report is due?
 - Still have to report

Conversions

- Conversion from one entity form to another (i.e., corporation to LLC) may trigger new filing requirement
 - Depends on state law – is new entity “created”?
 - Regardless, be careful of name change – updated report requirement
 - “Company, Inc.” to “Company, LLC”

Out-of-State Registrations

- Company registering to do business in another state does not trigger filing requirement
- BUT, change of state of incorporation means updated BOI report must be filed

Other Non-Triggering Events

- The following do not trigger reporting requirements:
 - Registering a trust with a court to establish jurisdiction
 - Fictitious name filings (for sole proprietors – but could require updated report for incorporated entities)
 - Filing for a state/professional license

Reporting Company Exemptions

- 23 enumerated types of entities that may otherwise be Reporting Companies, but are specifically exempted

Reporting Company Exemptions

- Heavily regulated industries, including:
 - Securities issuers that are registered under the Securities Exchange Act
 - Banks/Credit Unions
 - Registered Broker Dealers
 - Registered Investment Companies/Investment Advisors
 - Insurance Companies
 - Public Utilities
 - Accounting Firms registered with the PCAOB
 - Others

Reporting Company Exemptions

- Tax-Exempt Entities
 - Have to be a 501(c)
 - Without regard to 508(a) – determination letter not required?
 - Churches
 - HOAs

Reporting Company Exemptions

- Large Operating Companies:
 1. Has more than 20 full time employees in the US;
 - Borrows ACA definitions, but NO aggregation
 2. Has an operating presence at a physical office in the US; AND
 3. Filed a Federal tax return for the previous year showing more than \$5,000,000 of gross receipts or sales
 - Affiliated groups: amount shown on consolidated return
 - Newly formed companies can never fall under exemption until tax return filed

Reporting Company Exemptions

- Large Operating Company – possible trap
 - Parent S-corp with single-member LLC subsidiary
 - All employees (more than 20) are employed by single-member LLC
 - S-corp files tax return that reports revenue in excess of \$5 mil
 - NEITHER is exempt from reporting because neither, analyzed on its own, meets the requirements

Reporting Company Exemptions

- Subsidiaries of other exempt entities:
 - An entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more other exempt entities
 - A subsidiary that is only partially owned by another exempt entity does NOT qualify

What Information Must Be Reported

- For all Reporting Companies:
 - Company Information
 - Full legal name
 - All trade names and DBA's
 - The US street address of the principal place of business
 - Jurisdiction
 - TIN or EIN
 - Single-Member LLC's?

What Information Must Be Reported

- For all Reporting Companies:
 - **Beneficial Owner Information** – for each of the company's Beneficial Owners (individuals):
 - Full legal name
 - Date of birth
 - Residential street address
 - A unique ID number from a non-expired passport, state ID, drivers license
 - A scan/copy of the ID document

What Information Must Be Reported

- For Reporting Companies formed on or after January 1, 2024, report must also include the following information for the **Company Applicant**:

- Full legal name
- Date of birth
- Business street address
- A unique ID number from a non-expired passport, state ID, drivers license
- A scan/copy of the ID document

Who is a Company Applicant?

- Information on Company Applicants is only required to be reported for new companies formed after January 1, 2024
- Company Applicant is always an individual

Who is a Company Applicant?

- Two potential Company Applicants:
 1. The person who directly files the document that creates a domestic reporting company (or that first registers a foreign reporting company in a US state); AND
 2. The person who is “primarily responsible for directing or controlling such filing”
- The person who signs the filing document (i.e., the incorporator or organizer) is not necessarily the Company Applicant

Who is a Company Applicant?

- Examples:
 - Attorney prepares the formation document, it is signed by the client as incorporator, and the attorney directs his or her assistant or paralegal to file it with Secretary of State
 - Attorney and assistant/paralegal = Company Applicants
 - Client \neq Company Applicant
 - Attorney prepares the document and directs his or her client to sign it and file it directly,
 - Attorney and client = Company Applicants

Who is a Company Applicant?

- If business founder uses a third-party formation service (like LegalZoom), some employee of that service will be a Company Applicant
- Couriers who merely deliver company formation documents to Secretary of State are ordinarily not company applicants
 - Exception – unless courier works for the company applicant (e.g., law firm “runner”)

Who is a Beneficial Owner?

- Always an individual
 - And each reporting company will always have at least one Beneficial Owner
- Vague and broad definition
 - In some cases, it will be relatively straightforward and clear-cut to determine Beneficial Owners; not so much with larger entities with complex structures
- Disputed ownership?

Who is a Beneficial Owner?

- Two broad categories of “Beneficial Owners”:
 1. Individual who, directly or indirectly, owns at least 25% of the “ownership interests” in the Reporting Company; OR
 2. Individual who, directly or indirectly, exercises “substantial control” over the Reporting Company

Beneficial Owner: “25% ownership” test

- “Ownership Interests” include:
 - Equity, stock or voting rights
 - Stock in a corporation
 - Capital or profits interests
 - Membership interests in an LLC
 - Convertible instruments
 - Includes warrants or rights to purchase/sell/subscribe to a share or interest in equity or stock, even if not characterized as a debt
 - Options or privileges for any of the above
 - Put, call, straddle rights
 - Catchall - “any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership”

Beneficial Owner: “25% ownership” test

- How is the 25% threshold determined?
- “Simple” equation (ownership interest of the individual divided by the total outstanding ownership interests) with some specific rules

Beneficial Owner: “25% ownership” test

- How is the 25% threshold determined?
- When options and similar interests have been issued to an individual, they are treated as having been exercised
 - On an individual-by-individual basis

Beneficial Owner: “25% ownership” test

- How is the 25% threshold determined?
- For entities that issue capital/profits interests (e.g., LLC’s taxed as partnerships), an individual’s capital/profits interests as a percentage of total outstanding capital/profits interests

Beneficial Owner: “25% ownership” test

- How is the 25% threshold determined?
- For stock in a corporation (and entities treated as corporations for fed. tax purposes)
 - the greater of:
 - Voting power of the stockholder as a percentage of total voting power outstanding (among all classes); OR
 - Value - combined value of the interests owned by the individual as a percentage of the value of all outstanding interests

Beneficial Owner: “25% ownership” test

- How is the 25% threshold determined?
- Catchall - If ownership percentage cannot be calculated with reasonable certainty with the preceding special rules, any individual who owns or controls 25% or more of any class or type of ownership interest in the Reporting Company is a Beneficial Owner

Beneficial Owner: “25% ownership” test

- Who is the owner of the ownership interest?
 - Direct ownership of interest in Reporting Company
 - Indirect ownership

Beneficial Owner: “25% ownership” test

- Who is the owner of the ownership interest?
Indirect ownership:
 - Joint ownership with an undivided interest
 - Ownership by married couple in community property states
 - Through third party who is holding the interest as a nominee/intermediary/custodian/agent
 - Person for whom the interest is being held is the Beneficiary Owner

Beneficial Owner: “25% ownership” test

- Who is the owner of the ownership interest? Indirect ownership:
- Trusts - multiple individuals involved with a trust can be a Beneficial Owner:
 - Trustee or “other individual” with the authority to dispose of trust assets
 - Corporate trustees?
 - Beneficiary - who meets either of the following criteria:
 - Is the sole income/principal beneficiary; or
 - Has the right to withdraw all or substantially all of the trust assets
 - Grantor who has the right to revoke the trust or “otherwise withdraw assets”

Beneficial Owner: “25% ownership” test

- Who is the owner of the ownership interest?
Indirect ownership:
 - Through ownership of intermediary entities
 - Ownership at each level of a parent-subsidary group needs to be examined and analyzed

Beneficial Owner: Substantial Control Test

- Broad definitions and tests of what constitutes direct or indirect “substantial control” of a Reporting Company
- “Either/or” with 25% ownership test

Beneficial Owner: Substantial Control Test

- An individual exercises “substantial control” if he or she:
 - Serves as a “senior officer” of the entity
 - President, CFO, general counsel, CEO, COO, or any other similar officer regardless of title

Beneficial Owner: Substantial Control Test

- An individual exercises “substantial control” if he or she:
 - Has authority over the appointment or removal of a “senior officer” or of a majority of the board of directors (or similar body)
- Is an incorporator who appoints the initial board of directors a Beneficial Owner?

Beneficial Owner: Substantial Control Test

- An individual exercises “substantial control” if he or she:
 - Directs, determines, or has substantial influence over important decisions made by the entity, including the following decisions regarding:
 - Nature/scope/attributes of the entity’s business, including the sale, lease, mortgage, etc. of the entity’s principal assets
 - Reorganization/dissolution/merger of the entity
 - Major expenditures/investments, issuance of equity, incurrence of significant debt, approval of operating budget
 - Selection/termination of business lines/ventures/geographic focus
 - Compensation of senior officers
 - Entry into/termination/performance of significant contracts
 - Amendments of governance documents

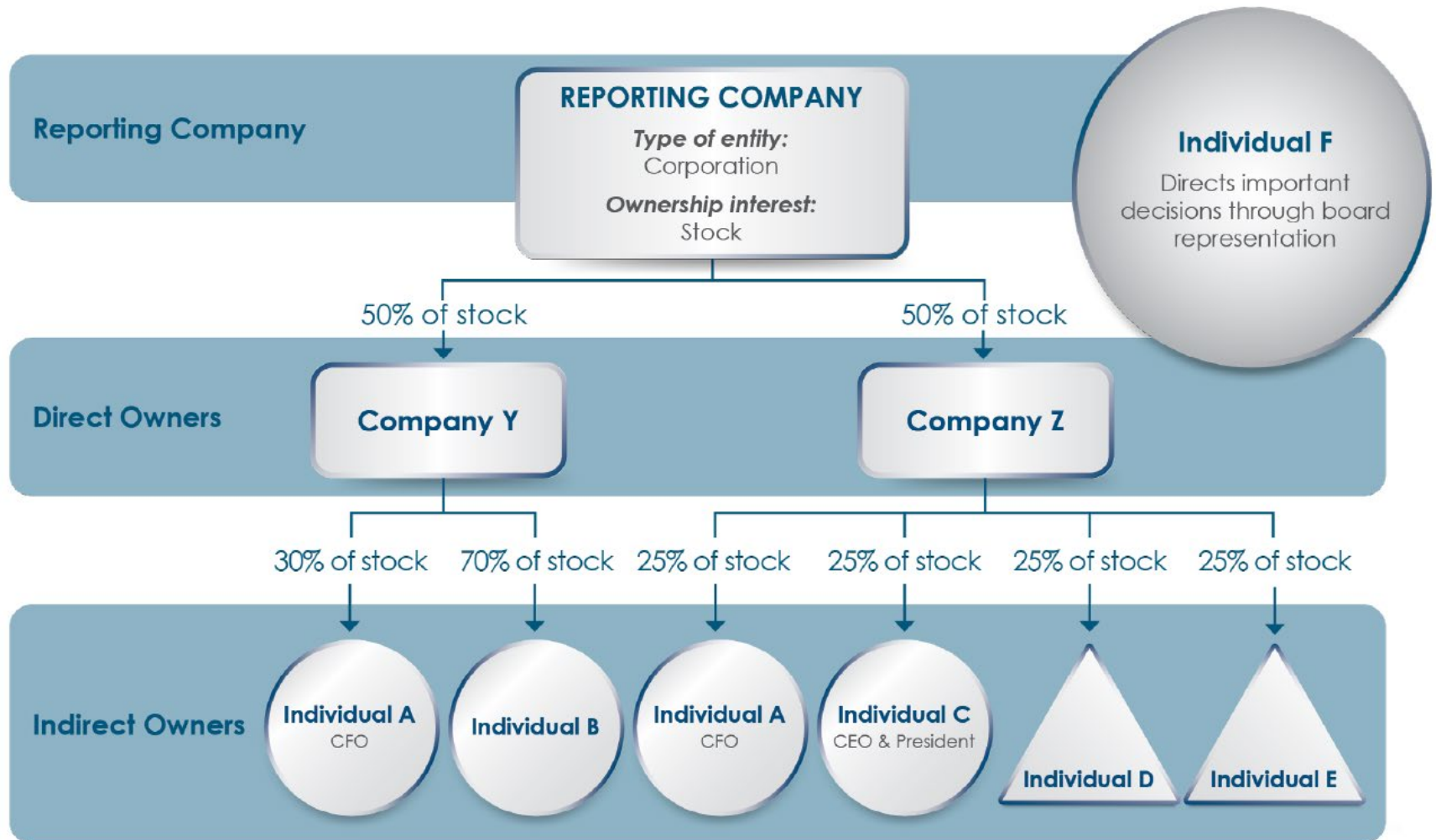
Beneficial Owner: Substantial Control Test

- An individual exercises “substantial control” if he or she:
 - Catchall - “has any other form of substantial control over the reporting company”

Beneficial Owner: Substantial Control Test

- How can an individual wield “substantial control?”
- Through any of the following (including as trustee of a trust):
 - Board representation
 - BUT – Board members are not automatically “beneficial owners”
 - Requires case-by-case analysis
 - Ownership/control of a majority of voting power/voting rights
 - Rights associated with a financing arrangement/instrument
 - Control over intermediary entities
 - Arrangements or financial/business relationships with other individuals/entities - whether formal or informal
 - **Catchall** - “any other contract, arrangement, understanding, relationship, or otherwise”

Beneficial Ownership Determination



Beneficial Owner: Exceptions

- Express exceptions to Beneficial Owner status:
 - Minor child - so long as the parent/guardian's information is reported by the Reporting Company
 - An individual acting as nominee/intermediary/custodian/agent for another
 - Pure employees - someone whose control over or economic benefits from the Reporting Company arise solely as a result of an employment relationship (but expressly excluding “senior officers”)
 - An individual whose sole interest is a future interest by inheritance
 - Creditors of the Reporting Company

FinCEN Identifier

- To receive a FinCEN ID, an individual provides requisite information (name, address, birthday, DL number, etc.) directly to FinCEN once
 - FinCEN will then issue the individual unique ID number

FinCEN Identifier

- Each Reporting Company can then report the ID number for the individual in lieu of all the other information normally required
- If any information about the individual changes, it is up to him or her to take steps to update with FinCEN
 - Shifts responsibility - any reporting company that has previously submitted the FinCEN ID of a beneficial owner whose information changes shouldn't have to do anything

FinCEN Identifier

- If an individual or entity receives a FinCEN identifier, any changes to such recipient's information must be reported to FinCEN within 30 days

Noncompliance and Consequences – Reporting Violations

- Unlawful for a person to:
 - Willfully provide, or attempt to provide, false or fraudulent beneficial ownership information; OR
 - Willfully fail to report complete or updated beneficial ownership information to FinCEN

- Willfully = “voluntary, intentional violation of a known legal duty”
 - But beware “ignorance of the law” excuse

Noncompliance and Consequences – Reporting Violations

- Safe harbor if person corrects a deficient report promptly (and in no case later than 90 days after the original deficient report was submitted)
 - But does not apply if person intentionally evaded reporting requirements, or had actual knowledge that information submitted was false

Noncompliance and Consequences – Reporting Violations

- Civil penalty of up to \$500 per day for each day violation continues
- Criminal fine of up to \$10,000, and imprisonment up to 2 years

Noncompliance and Consequences – Reporting Violations

- Who may run afoul of the law?
 - Reporting Company is ultimately responsible for filing reports
 - Senior officers may be held responsible on behalf of the company
 - Failure to timely file is an obvious violation, but so would submitting false information that the senior official knew (or possibly had reason to know) was incorrect
 - Reporting Company should undertake diligent inquiry to report and update all required information

Noncompliance and Consequences – Reporting Violations

- Who may run afoul of the law?
 - A beneficial owner who willfully provides false information to the reporting company is also clearly in violation
 - A BO willfully refusing to provide the requisite information to the reporting company - thereby causing the company to have to file an incomplete report - may also be in violation

Noncompliance and Consequences – Reporting Violations

- Regulations and FinCEN FAQs make clear that third-parties who file on behalf of a reporting company are certifying, on behalf of the reporting company, that the information is true, correct, and complete
 - Raises liability concerns

Use of Reporting Company Information

- Who will have (legal) access to all this information that is being reported?
 1. Federal agencies engaged in law enforcement, national security, or intelligence
 2. State law enforcement with a court order
 3. Federal agencies on behalf of foreign governments if certain requirements are met
 4. Financial institutions for KYC purposes, only with the Reporting Company's permission
 5. Federal regulators in connection with financial institution KYC requirements

Use of Reporting Company Information

- Regulations on government access are not final yet
- Significant privacy concerns
 - Vast amounts of personally identifiable information on millions of Americans will be stored in one or more databases by Treasury
- BOI information reported to FinCEN not subject to FOIA requests

Corporate Transparency Act Redux

Brandon K. Jones
Carruthers & Roth, P.A.
Phone: (336) 478-1160
E-mail: bkj@crlaw.com

