



FinCEN Announces Proposed Solution to Disclosure Dilemma in the Corporate Transparency Act

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The Corporate Transparency Act (CTA) may be the most consequential federal law in recent memory. To no surprise, it is raising a host of complicated issues, and fundamental questions remain about how affected businesses are to comply. The Financial Crimes Enforcement Network (FinCEN), which is tasked with promulgating the CTA's implementing regulations, issued a [Notice of Proposed Rulemaking](#) (NPRM) on September 29, 2023, tackling one of the CTA's most controversial aspects: How does a "reporting company" disclose information about its "beneficial owners" when that information is unknown even to the business itself?

The CTA requires that any legal entity subject to the CTA, called a "reporting company," timely report information about itself, its beneficial owners and, and for reporting companies formed after January 1, 2024, its company applicants. Those reporting duties are backed up by criminal and financial penalties. FinCEN will receive the required disclosures via e-filing on the (to be created) Beneficial Ownership Secured System (BOSS), aka Beneficial Ownership Information System (BOIS). It is a feature proposed for BOSS that a reporting company's disclosure filing cannot be accepted unless and until all the required fields were fully completed. The required Beneficial Ownership Information (BOI) "can only be submitted once each required field has been filled out. Any field left blank, whether intentionally or accidentally, will prevent the filer from submitting their BOIR [Beneficial Ownership Information Report] Form."

The Unknown Checkboxes

In FinCEN's earliest rulemaking notice, BOSS would permit filers to disclose "unknown" for situations when all the statutorily mandated BOI was unavailable. For example, even after a reporting company's best efforts, difficulties may exist in timely collecting information

from individuals or certain individuals may simply refuse to cooperate. And because deadlines are imposed in the CTA for reporting, having the “unknown” option would allow filers to fully complete the BOSS form, marking “unknown” as appropriate.

Needless to say, FinCEN’s original approach did not sit well with many.

Notably, commenters were uniformly critical of the checkboxes that would allow a reporting company to indicate if certain information about a beneficial owner or company applicant is “unknown,” or if the reporting company is unable to identify information about a beneficial owner or company applicant. Commenters referred to these checkboxes as the “unknown checkboxes.” A significant number of these comments expressed concern that the checkboxes would incorrectly suggest to filers that it is optional to report required information, and that reporting companies need not conduct a diligent inquiry to comply with their reporting obligations. These commenters requested that FinCEN remove all such checkboxes.

The Proposed Alternative

FinCEN’s latest NPRM presents new guidance. First, the BOSS template as proposed would be modified to eliminate the option of checking “unknown” for a reporting company’s beneficial owners, which FinCEN refers to as the BOIR. Second, it is proposed that regulations keep in place FinCEN’s rule that the BOIR Form must be fully complete in all fields before it can be accepted on BOSS.

Even with these changes, the statutory versus reality dilemma remains. The CTA requires disclosures that must be both timely submitted and complete. But reporting companies face the real possibility that the required information, in whole or in part, is simply not known or unavailable. According to the NPRM:

FinCEN is cognizant that reporting companies could face difficulties in obtaining information promptly. To better understand this potential concern, FinCEN consulted with behavioral scientists at the General Services Administration,

technology experts at the Department of the Treasury, and various others throughout the U.S. Government (USG) who have expertise around these issues. The consultations highlighted potential, though not inevitable, pitfalls in not providing an explanatory mechanism in the BOIR Form when a filer is unable to obtain certain required information. This might inadvertently discourage reporting companies from filing in a timely manner (or filing at all) because they do not have sufficient information. It may also incentivize reporting companies to file meaningless or untruthful information in certain fields to make a deadline. These difficulties also have the potential to significantly increase the volume of inquiries to FinCEN's Contact Center] from reporting companies that seek clarification of the filing requirements when they are unable to obtain BOI.

Therefore, FinCEN's NPRM advances a work-around. The proposal is to add to BOSS a drop-down box with a menu of preselected responses for filers to choose as appropriate, in the event a reporting company does not have the BOI. The menu options may include, "(but not limited to), "Cannot Contact BO"; "BO Unresponsive"; "BO Refused to Provide"; and "Third Party Refused to Provide."

In this fashion, FinCEN's believes reporting companies can timely and fully complete filings, i.e., it perceives a filing will be functionally complete even if all the BOI information is not complete. FinCEN recommends this solution in its NPRM, in part, because the future responses it receives will provide a more complete picture of the difficulties reporting companies are experiencing in collecting BOI. FinCEN offered this by way of explanation:

The benefit of this implementation would be to: (1) provide a mechanism for the collection of some beneficial ownership information that would be of immediate use to law enforcement agencies and other authorized users of BOI; (2) provide insight into any common difficulties that might arise so that FinCEN can potentially provide guidance, frequently asked questions (FAQs), or follow-up with reporting companies or beneficial owners; and (3) provide notice for

FinCEN that an incomplete report has been submitted and facilitate appropriate related follow-up. Further, in both implementations, FinCEN intends to make clear on the BOIR Form that reporting companies must provide all required information to satisfy their reporting obligations.

Please note FinCEN's emphasis that "[d]rop-down options will not be included in the other sections of the form (e.g., Reporting Company Section and Company Applicant(s) Section)." As such, reporting companies and company applicants will be expected to provide complete information.

Written comments to the NPRM are due no later than October 30, 2023.

Frost Brown Todd's Corporate Transparency Act Team is closely monitoring FinCEN's efforts to complete the CTA's implementing regulations and issue other guidance. Please contact the authors if you have any questions about how the CTA may affect you or your business. You can also find more CTA-related resources and analysis [here](#).

Frost Brown Todd's [Corporate Transparency Act Team](#) is staying up to date on the important rule changes that will likely have significant impacts on your business operations. Click below to read the latest information about the Corporate Transparency Act.

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- [**Corporate Transparency Act: Who Can Exert Substantial Influence on My Company? Part II**](#)
- [**Reporting Under the Corporate Transparency Act – Is My Company Exempt?**](#)
- [**FinCEN Announces Proposed Solution to Disclosure Dilemma in the Corporate Transparency Act**](#)
- [**Portfolio Company Reporting Under the Corporate Transparency Act**](#)
- [**The Corporate Transparency Act: Considerations for Effectively Using the FinCEN Identifier**](#)

- [***The Corporate Transparency Act's Impact on the Real Estate Industry: What You Need to Know to Comply***](#)
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