

# Corporate Transparency Act practical considerations: board of directors or managers

Kozusko Harris Duncan

[View In Analytics](#)

USA | February 25 2025

## Introduction

The Corporate Transparency Act (CTA) requires US corporations, limited liability companies and statutory partnerships to file a beneficial ownership information (BOI) report with the US Financial Crimes Enforcement Network (FinCEN), unless an exemption applies. Whether a director or manager meets the criteria of a reportable “beneficial owner” as that term is defined in the CTA Final Regulations is a question the reporting company must consider on a director-by-director or manager-by-manager basis. A reporting company’s BOI report must be true, complete and correct or penalties apply.

For further details on the CTA please see the other articles in our CTA “practical considerations” series as well as “Corporate Transparency Act: beneficial ownership information reporting begins”, “Corporate Transparency Act: identifying individuals who own or control interests in reporting companies”, “Corporate Transparency Act: identification of individuals who exercise substantial control over reporting companies.”

## Reportable beneficial owner includes a company’s director or manager

The CTA establishes a reporting regime for U.S. and certain non-U.S. companies pursuant to which a reporting company must submit to FinCEN a report that, *inter alia*, identifies each beneficial owner of the reporting company. The term “beneficial owner” includes an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, exercises substantial control over the reporting company. This person does not need to “own” an interest in the company as that term is generally understood.

An individual is considered to exercise substantial control over a reporting company if the individual directs, determines, or has substantial influence over important decisions made by the reporting company. An individual is also considered to exercise substantial control over a reporting company if the individual serves as a senior officer, e.g. president, chief executive officer, general counsel, chief operating officer, or any other officer who performs a similar function. The Final Regulations specify that an individual may exercise substantial control over Reporting Company directly or indirectly such as through board representation.

It is important to note that the official title of the role is not determinative. The reporting company must consider all individuals who exercise substantial control as defined in the CTA Final Regulations.

## FinCEN FAQ D.9. regarding directors applies a facts and circumstances test

A corporation will often have a board of directors consisting of several individuals. A limited liability company many have a board or committee of managers. In most cases, those directors and managers act by majority vote. FinCEN FAQ D.9. addresses directors and is equally applicable to managers.

## **D. 9. Is a member of a reporting company’s board of directors always a beneficial owner of the reporting company?**

No. A beneficial owner of a company is any individual who, directly or indirectly, exercises substantial control over a reporting company, or who owns or controls at least 25 percent of the ownership interests of a reporting company.

Whether a particular director meets any of these criteria is a question that the reporting company must consider on a director-by-director basis.

As a result, the particular facts and circumstances of a reporting company’s board of directors or committee of managers must be considered. The FAQ then references Chapter 2 of FinCEN’s Small Entity Compliance Guide.

### **FinCEN’s Small Entity Compliance Guide example is helpful**

Chapter 2.1 of FinCEN’s Small Entity Compliance Guide entitled “What is substantial control?” includes examples of how beneficial owners are to be determined. In Example 4, the reporting company is a corporation with multiple indirect owners through two other companies. After noting that the CFO, CEO and president are reportable, without specifically noting whether they are also on the board of directors, the example addresses individual F who is a director but not an officer.

Individual F is on the company’s board of directors and makes important decisions on the reporting company’s behalf, thereby exercising substantial control over it. Individual F does not own or control any stock in the reporting company. The example concludes that individual F is therefore a beneficial owner by exercising substantial control over the reporting company, but not through holding ownership interests in it.

### **FinCEN Supplementary Information provides further insights**

The CTA Final Regulations include paragraph (d)(1)(i), entitled “Definition of Substantial Control,” which lists indicators that support the basic goal of requiring a reporting company to identify the key individuals who stand behind the reporting company and direct its actions.

As specifically noted in Supplementary Information, FinCEN envisions situations in which individuals may not have obvious power to direct or determine important decisions made by the reporting company but may nonetheless play a significant role in the decision-making process and outcomes with respect to those important decisions. FinCEN expressly notes that a reporting company may be “structured such that multiple individuals exercise essentially equal authority over the entity’s decisions—in which case each individual would likely be considered to have substantial influence over the decisions even though no single individual directs or determines them.” [Emphasis added.] This approach is also consistent with the “owns or controls 25% or more” prong of the beneficial owner definition, which requires reporting of individuals even though they hold less than majority ownership.

As part of the process of finalizing the Regulations, in addition to rejecting comments to the proposed Regulations that the language of the CTA limited collection of BOI to a single individual, FinCEN also rejected requests that a definition of substantial control comparable to the 2016 CDD (Customer Due Diligence) Rule, where BOI is provided for only a single individual, be adopted. In response to those requests, FinCEN indicated it believes that limiting reporting of individuals with substantial control to one person, or imposing any other numerical limit, would artificially restrict the reporting of beneficial owners who may nonetheless exercise substantial control over an entity, and any such artificial ceiling could become a means of evasion or circumvention.

In its Supplementary Information to the Final Regulations, FinCEN also considered comments asserting that the definition might be inconsistent with other U.S. federal statutes and regulations that contain “control” concepts. FinCEN noted that “‘Substantial control’ in the context of beneficial ownership is not necessarily identical to ‘control’ in other contexts.” It stated that the CTA clearly manifests an expectation of a broad reporting regime that accounts for a wide array of avenues of control and that its two-prong definition of “beneficial owner” is independent of other federal statutes and regulations.

### **Putting it all together - application of law and guidance**

Let’s say Reporting Company, an LLC, has three individuals who serve as its managers. Pursuant to the terms of Reporting Company’s operating agreement and state law, the managers, by majority vote, make decisions for Reporting Company.

All three managers have the authority to and in fact make decisions regarding the nature, scope, and attributes of the activities of Reporting Company, although no one manager can decide things unilaterally. Unless there are facts to support naming just one manager, all three individuals should be included on Reporting Company’s BOI report. The managers can determine Reporting Company’s expenditures and investments, approve its operating budget, and determine whether and what part, if any, of Reporting Company’s net profits should be distributed to the member or otherwise direct the use of such profits (or reserve the same). The managers can amend Reporting Company’s governance documents. Collectively, the three managers, acting by majority vote, exercise all the powers and take all the actions that may be undertaken by Reporting Company. As a result, all three individual directors must be disclosed on Reporting Company’s BOI report.

### **Comment**

When considering substantial control on a director-by-director or manager-by-manager basis, there is no support or guidance for taking the position that if multiple directors must act by majority vote, none of those directors are reportable. There is likewise no authority for failing to report one or more directors or managers when all have the same authority to exercise substantial influence over a reporting company’s decisions, even though no single individual directs or determines those decisions. Conversely, where facts and circumstances support a conclusion that one board or committee member is exercising control free from the influence of the other members, the individuals who do not in fact have such authority need not be reported. Those facts and circumstances should be documented and the BOI report updated if circumstances change. Regardless of the position held by a particular individual, if that individual is acting as a nominee, agent, or intermediary, that individual is not reportable but the individual or individuals who stand behind them, sometimes referred to as their principal, must be included on the BOI report.

*Please note that this article is general in nature and is not intended as legal advice. The authors are unable to provide legal advice to non-clients. Copyright in the original article resides with the named contributor.*