



Current Federal Tax Developments

November 20, 2023

Kaplan Financial Education

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This Week We Look At:

IRS clarified FAQ on §139A and backpay for wrongfully incarcerated members of the armed services

FinCEN adds to the FAQ on beneficial ownership information reporting

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<https://www.currentfederaltaxdevelopments.com>



IRS clarified FAQ on §139A and backpay for wrongfully incarcerated members of the armed services

FinCEN adds to the FAQ on beneficial ownership information reporting



IRS Clarifies FAQ on §139A Wrongful Incarceration Exclusion



Photo by [Jim Hüfner](#) on [Unsplash](#)

- FS-2023-26, Nov. 2023
 - IRC §139F(a) provides “In the case of any wrongfully incarcerated individual, gross income shall not include any civil damages, restitution, or other monetary award (including compensatory or statutory damages and restitution imposed in a criminal matter) relating to the incarceration of such individual for the covered offense for which such individual was convicted.”

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<https://www.irs.gov/newsroom/irs-updates-frequently-asked-questions-related-to-wrongful-incarceration>



IRS Clarifies FAQ on §139A Wrongful Incarceration Exclusion



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- FS-2023-26, Nov. 2023
 - IRS has issued an FAQ that outlines the nature of this exclusion (who it applies to, what it excludes, etc.)
 - The IRS updated the FAQ to deal with a situation where a wrongfully incarcerated servicemember receives backpay - is that eligible for a §139F exclusion?

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<https://www.irs.gov/newsroom/irs-updates-frequently-asked-questions-related-to-wrongful-incarceration>



IRS Clarifies FAQ on §139A Wrongful Incarceration Exclusion

Q9. Can a wrongfully incarcerated United States military service member who receives back pay following the reversal of a court martial conviction exclude the payments from gross income under the wrongful incarceration exclusion? (updated Nov. 13, 2023)

A9. No. A United States military service member who is a wrongfully incarcerated individual and who receives back pay following the reversal of a court martial conviction may not exclude the payments under the wrongful incarceration exclusion if the payments are merely the restoration of pay and allowances to which the service member is entitled by statute. A wrongfully incarcerated individual, who in a prior year received back pay and excluded the payments from gross income, may file an amended federal income tax return (Form 1040-X) for that prior year to report the back pay as income

<https://www.irs.gov/newsroom/irs-updates-frequently-asked-questions-related-to-wrongful-incarceration>

FinCEN Adds Details to FAQ on Beneficial Ownership Reporting



- Beneficial Ownership Information Reporting, Frequently Asked Questions, Revised November 16, 2023
- FinCEN has updated its FAQ to add new questions and answers on various topics
- One of those indirectly impacts the question regarding the unauthorized practice of law issue, though is not dispositive

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FinCEN Adds Details to FAQ on Beneficial Ownership Reporting

B. 7. Is a reporting company required to use an attorney or a certified public accountant (CPA) to submit beneficial ownership information to FinCEN?

No. FinCEN expects that many, if not most, reporting companies will be able to submit their beneficial ownership information to FinCEN on their own using the guidance FinCEN has issued. [Reporting companies that need help meeting their reporting obligations can consult with professional service providers such as lawyers or accountants.](#)

[Issued November 16, 2023]

<https://www.fincen.gov/boi-faqs>

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C. 3. Are certain corporate entities, such as statutory trusts, business trusts, or foundations, reporting companies?

It depends. A domestic entity such as a statutory trust, business trust, or foundation is a reporting company only if it was created by the filing of a document with a secretary of state or similar office. Likewise, a foreign entity is a reporting company only if it filed a document with a secretary of state or a similar office to register to do business in the United States.

State laws vary on whether certain entity types, such as trusts, require the filing of a document with the secretary of state or similar office to be created or registered.

- If a trust is created in a U.S. jurisdiction that requires such filing, then it is a reporting company, unless an exemption applies.

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Similarly, not all states require foreign entities to register by filing a document with a secretary of state or a similar office to do business in the state.

- However, if a foreign entity has to file a document with a secretary of state or a similar office to register to do business in a state, and does so, it is a reporting company, unless an exemption applies.

Entities should also consider if any exemptions to the reporting requirements apply to them. For example, a foundation may not be required to report beneficial ownership information to FinCEN if the foundation qualifies for the tax-exempt entity exemption.

Chapter 1 of FinCEN's Small Entity Compliance Guide ("Does my company have to report its beneficial owners?") may assist companies in identifying whether they need to report.

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C. 4. Is a trust considered a reporting company if it registers with a court of law for the purpose of establishing the court's jurisdiction over any disputes involving the trust?

No. The registration of a trust with a court of law merely to establish the court's jurisdiction over any disputes involving the trust does not make the trust a reporting company.

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D. 6. Is my accountant or lawyer considered a beneficial owner?

Accountants and lawyers generally do not qualify as beneficial owners, but that may depend on the work being performed.

Accountants and lawyers who provide general accounting or legal services are not considered beneficial owners because ordinary, arms-length advisory or other third-party professional services to a reporting company are not considered to be “substantial control” (see Question D.2). In addition, a lawyer or accountant who is designated as an agent of the reporting company may qualify for the “nominee, intermediary, custodian, or agent” exception from the beneficial owner definition.

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However, an individual who holds the position of general counsel in a reporting company is a “senior officer” of that company and is therefore a beneficial owner. FinCEN’s Small Entity Compliance Guide includes a checklist to help determine whether an individual qualifies for an exception to the beneficial owner definition (see Chapter 2.4, “Who qualifies for an exception from the beneficial owner definition?”).

[Updated November 16, 2023]

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D. 10. Is a reporting company's designated "partnership representative" or "tax matters partner" a beneficial owner?

It depends. A reporting company's "partnership representative," as defined in 26 U.S.C. 6223, or "tax matters partner," as the term was previously defined in now-repealed 26 U.S.C. 6231(a)(7), is not automatically a beneficial owner of the reporting company. However, such an individual may qualify as a beneficial owner of the reporting company if the individual exercises substantial control over the reporting company, or owns or controls at least 25 percent of the company's ownership interests.

Chapter 2 of FinCEN's Small Entity Compliance Guide ("Who is a beneficial owner of my company?") has additional information on how to determine if an individual qualifies as a beneficial owner of a reporting company.

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Note that a “partnership representative” or “tax matters partner” serving in the role of a designated agent of the reporting company may qualify for the “nominee, intermediary, custodian, or agent” exception from the beneficial owner definition.

FinCEN's Small Entity Compliance Guide includes additional information on such exemptions in Chapter 2.4, “Who qualifies for an exception from the beneficial owner definition?”

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E. 4. Can a company applicant be removed from a BOI report if the company applicant no longer has a relationship with the reporting company?

No. A company applicant may not be removed from a BOI report even if the company applicant no longer has a relationship with the reporting company. A reporting company created on or after January 1, 2024, is required to report company applicant information in its initial BOI report, but is not required to file an updated BOI report if information about a company applicant changes.

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F. 6. Is there a requirement to annually report beneficial ownership information?

No. There is no annual reporting requirement. Reporting companies must file an initial BOI report and updated or corrected BOI reports as needed.

FinCEN's Small Entity Compliance Guide includes more information about when to file initial BOI reports in Chapter 5.1, "When should my company file its initial BOI report?" and when to file updated and corrected BOI reports in Chapter 6, "What if there are changes to or inaccuracies in reported information?"

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G. 3. How can I obtain a Taxpayer Identification Number (TIN) for a new company within 30 days so that I can file an initial beneficial ownership information report on time?

The Internal Revenue Service (IRS) offers a free online application for an Employer Identification Number (EIN), a type of TIN, which is provided immediately upon submission of the application. For more information on TINs, see "Taxpayer Identification Numbers (TIN)" on the IRS.gov website. For more information on Employer Identification Numbers and to access the EIN online application, see "Apply for an Employer Identification Number (EIN) Online" on the IRS.gov website.

A paper filing is required if a foreign person that does not have an Individual Taxpayer Identification Number (ITIN) applies for an EIN. According to the IRS, receiving an EIN through this process could take six to eight weeks. If you are a foreign person that may need to obtain an EIN for a reporting company, we recommend applying early for an ITIN. Foreign reporting companies that are not subject to U.S. corporate income tax may report a foreign tax identification number and the name of the relevant jurisdiction instead of an EIN or TIN.

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G. 4. Should an initial BOI report include historical beneficial owners of a reporting company, or only beneficial owners as of the time of filing?

An initial BOI report should only include the beneficial owners as of the time of the filing. Reporting companies should notify FinCEN of changes to beneficial owners and related BOI through updated reports.

FinCEN's Small Entity Compliance Guide includes more information about when to file updated or corrected BOI reports in Chapter 6, "What if there are changes to or inaccuracies in reported information?"

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L. 4. If I own a group of related companies, can I consolidate employees across those companies to meet the criteria of a large operating company exemption from the reporting company definition?

No. The large operating company exemption requires that the entity itself employ more than 20 full-time employees in the United States and does not permit consolidation of this employee count across multiple entities.

FinCEN's Small Entity Compliance Guide includes a checklist for this exemption (see exemption #21).

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L. 5. How does a company report to FinCEN that the company is exempt?

A company does not need to report to FinCEN that it is exempt from the BOI reporting requirements if it has always been exempt.

If a company filed a BOI report and later qualifies for an exemption, that company should file an updated BOI report to indicate that it is newly exempt from the reporting requirements. Updated BOI reports are filed electronically through the secure filing system. An updated BOI report for a newly exempt entity will only require that the entity: (1) identify itself; and (2) check a box noting its newly exempt status.

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