

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

**IN RE:** ) **NO. 23-03665-5-PWM**  
**BOA NUTRITION, INC.** )  
**Debtor.** ) **CHAPTER 7**

**RESPONSE TO MOTION TO DETERMINE THAT THE CHAPTER 7  
TRUSTEE HAS NO DUTY TO REPORT THE DEBTOR'S BENEFICIAL  
OWNERSHIP INFORMATION TO THE U.S. DEPARTMENT OF THE  
TREASURY**

The United States of America, by and through the United States Attorney for Eastern District of North Carolina, on behalf of its agency, the Department of the Treasury (hereafter, "Treasury") and Treasury's bureau the Financial Crimes Enforcement Network ("FinCEN"), hereby responds to the motion [D.E. 25] (the "Motion") filed by the U.S. Bankruptcy Administrator (the "B.A.") for an order determining that John C. Bircher, III, the chapter 7 trustee (the "Trustee"), has no duty or obligation to report beneficial ownership information on behalf of BOA Nutrition, Inc. (the "Debtor") under the Corporate Transparency Act ("CTA").

**INTRODUCTION**

FinCEN does not oppose the request for a determination that the Trustee here does not have a duty to report the Debtor's beneficial ownership information to FinCEN. As explained below, a chapter 7 trustee is not typically responsible for fulfilling a debtor reporting company's duty to report beneficial ownership information to FinCEN. While there may be unusual circumstances in which a chapter 7 trustee could become liable for a reporting company's failure to file beneficial ownership information, FinCEN does not view such circumstances as likely

to commonly arise for the reasons explained below and is not aware of any such circumstances in this case.

FinCEN anticipates issuing official guidance consistent with this response to provide clarity for chapter 7 trustees more generally.

### **BACKGROUND**

1. On December 19, 2023, the Debtor filed a petition for relief under chapter 7 of the Bankruptcy Code. D.E. 1.

2. In its petition, the Debtor indicated that it is a corporation. Petition, D.E 1, at Q. 6.

3. The Trustee was appointed on December 20, 2023. D.E. 6.

4. On February 28, 2024, the B.A. filed the current Motion seeking an order determining that the Trustee has no duty to report beneficial ownership of the Debtor to FinCEN. D.E. 25.

5. On February 29, 2024, the Court entered an order stating as follows:

The BA requests that the court enter an order determining that the chapter 7 trustee (the Trustee) has no duty to report beneficial ownership information on the debtor's behalf under the Corporate Transparency Act (the CTA). Under the CTA, a "reporting company" is required to submit information about its beneficial ownership to the U.S. Department of the Treasury's Financial Crimes Enforcement Network. 31 U.S.C. § 5336(b)(1). The statute defines "reporting company" to include "a corporation, limited liability company, or other similar entity that is . . . created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe." 31 U.S.C. § 5336(a)(11). The BA concedes that, as a corporation, the debtor is a reporting company under the CTA. But the BA contends that as a representative of the bankruptcy estate, a chapter 7 bankruptcy trustee is not obligated to comply with the reporting requirements of the CTA.

D.E. 26. In its Order, the Court directed the Treasury to respond to the Motion within 14 days. *Id.*

6. The Court subsequently extended the deadline to respond to the Motion to May 13, 2024. D.E. 30.

7. The Court subsequently further extended the deadline to respond to the Motion to May 27, 2024. D.E. 43.

### **RESPONSE**

FinCEN does not oppose the request for a determination that the Trustee here has no duty to report beneficial ownership of the Debtor to FinCEN.

As the Court correctly observes in its Order [D.E. 26], the obligation to report beneficial ownership information to FinCEN under the CTA lies with reporting companies themselves. *See* 31 C.F.R. § 1010.380(a).<sup>1</sup> A reporting company must decide for itself which individual will submit a beneficial ownership information report to FinCEN on its behalf. *See* Beneficial Ownership Information Frequently Asked Question B.8<sup>2</sup> (“Anyone whom the reporting company authorizes to act on its behalf—such as an employee, owner, or third-party service provider—may file a [beneficial ownership information] report on the reporting company’s behalf”).

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<sup>1</sup> A bankruptcy estate is not a “reporting company” obligated to file beneficial ownership information with FinCEN. A domestic entity is a reporting company only if it was created by the filing of a document with a secretary of state or similar office. 31 C.F.R. § 1010.380(c)(1)(i). A bankruptcy estate is not created by such a filing. *See* 11 U.S.C. § 541(a) (“The commencement of a case under section 301, 302, or 303 of this title creates an estate”).

<sup>2</sup> FinCEN, *Beneficial Ownership Frequently Asked Questions*, FAQ B.8 (Dec. 12, 2023), available at [https://www.fincen.gov/boi-faqs#B\\_8](https://www.fincen.gov/boi-faqs#B_8).

Accordingly, a chapter 7 bankruptcy trustee is not typically responsible for fulfilling a debtor reporting company's duty to report beneficial ownership information to FinCEN: the responsibility is the reporting company's duty. That said, any person who "willfully fail[s] to report complete or updated beneficial ownership information to FinCEN" violates the CTA and its implementing regulations, potentially subjecting them to the CTA's penalties.<sup>3</sup> 31 C.F.R. § 1010.380(g); 31 U.S.C. § 5336(h)(1)(B), (3)(A). "A person fails to report complete or updated beneficial ownership information to FinCEN if . . . such person either causes the failure, or is a senior officer of the entity at the time of the failure." 31 C.F.R. § 1010.380(g)(4).

FinCEN expects that, in most circumstances, a chapter 7 trustee will not be in a position to commit such violations, even if a reporting company whose bankruptcy estate the trustee represents fails to submit a required beneficial ownership report to FinCEN. Simply becoming a chapter 7 trustee does not make an individual a "senior officer" of the reporting company, *i.e.*, "any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function." *Id.* § 1010.380(f)(8). And, without more, a chapter 7 trustee's mere failure to submit a reporting company's beneficial ownership report does not willfully cause that company to fail to file.

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<sup>3</sup> For purposes of the CTA, "willfully" means the voluntary, intentional violation of a known legal duty. 31 U.S.C. § 5336(h)(6).

Nonetheless, there may be unusual circumstances in which a chapter 7 trustee could become liable for a reporting company's failure to file beneficial ownership information. A chapter 7 trustee who, for example, falsely informed a debtor company that the trustee would file the required beneficial ownership information for the company but then willfully failed to do so, or who otherwise willfully prevented the debtor company from filing the required information may be liable under the CTA for willfully causing a debtor reporting company's failure to file. FinCEN does not view such circumstances as likely to commonly arise, however, particularly as reporting deadlines shorten over the next year, providing fewer instances in which debtor reporting companies will be required to file initial beneficial ownership information reports.<sup>4</sup>

To the best of FinCEN's knowledge, none of these unusual facts are present here, and FinCEN thus does not oppose the specific relief contained in the Motion. Additionally, FinCEN anticipates issuing official guidance consistent with this response to provide clarity for chapter 7 trustees more generally.

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<sup>4</sup> Reporting companies created or registered before January 1, 2024, have until January 1, 2025, to submit initial beneficial ownership information reports to FinCEN. 31 C.F.R. § 1010.380(a)(1)(iii). Reporting companies created or registered to do business in the United States in 2024 have 90 days after notice of their creation or registration to submit their reports, and reporting companies created or registered in 2025 and beyond have 30 days. *Id.* § 1010.380(a)(1)(i), (ii). FinCEN thus expects that the likelihood of a reporting company finding itself in bankruptcy before its initial beneficial ownership information report is due will decrease substantially after 2024.

**CONCLUSION**

For the reasons explained above, FinCEN does not oppose the limited relief sought in the Motion related to this case and anticipates issuing official guidance consistent with this response to provide clarity for chapter 7 trustees more generally.

Respectfully submitted this 21st day of May, 2024.

MICHAEL F. EASLEY, JR.  
United States Attorney

/s/ Benjamin J. Higgins  
BENJAMIN J. HIGGINS  
Attorney for the Treasury  
Assistant United States Attorney  
Civil Division  
150 Fayetteville Street, Suite 2100  
Raleigh, North Carolina 27601  
Telephone: (919) 856-4043  
Email: [benjamin.higgins2@usdoj.gov](mailto:benjamin.higgins2@usdoj.gov)  
Massachusetts Bar # 690969

**CERTIFICATE OF SERVICE**

I, Benjamin J. Higgins, here by certify that I have served the foregoing Motion upon the below listed parties by CM/ECF or by U.S. Mails on this 21st day of May, 2024.

Brian Behr  
Bankruptcy Administrator

John C. Bircher, III  
Chapter 7 Trustee

John Northern  
Attorney for the Debtor

/s/ Benjamin J. Higgins  
BENJAMIN J. HIGGINS  
Attorney for the Treasury  
Assistant United States Attorney  
Civil Division  
150 Fayetteville Street, Suite 2100  
Raleigh, North Carolina 27601  
Telephone: (919) 856-4043  
Email: [benjamin.higgins2@usdoj.gov](mailto:benjamin.higgins2@usdoj.gov)  
Massachusetts Bar # 690969