

TLA *Transportation Lawyers Association*

# CHICAGO

## Regional Seminar and Bootcamp

January 23–24, 2025

Radisson Blu Aqua Hotel ❁ Chicago, IL





## CORPORATE TRANSPARENCY ACT – LEGAL UPDATE

- John D. Wagner, Esq. – Cors & Bassett – Cincinnati, OH
- Richard A. Westley, Esq. – Blitch Westley Barrette – Madison, WI



## CORPORATE TRANSPARENCY ACT – WHAT IS IT?

- Congress passed the Corporate Transparency Act on January 1, 2021.
- Goal is to address the misuse of shell companies involved in terrorism, money laundering, and other misconduct.
- The Corporate Transparency Act consists of §§ 6401-6403 of the National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. No. 116-283 (H.R. 6395, 134 Stat.338, 116<sup>th</sup> Cong. 2d Sess. Section 6402 of the NDAA sets forth Congress' findings and objectives in passing the Corporate Transparency Act, and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.



## CORPORATE TRANSPARENCY ACT – WHAT IS IT?

- Represents a stark departure of beneficial ownership reporting – shifting burden from private institutions to government.
- Predicted impact in year one – 32 million small and medium-sized businesses required to file.
- Impact in year 2 through year 10 – 5 million additional companies required to file.





## CORPORATE TRANSPARENCY ACT – WHO MUST COMPLY?

The rule only applies to a “reporting company” – whether foreign or domestic.

- “*Reporting company*” means a corporation, limited liability company, or other similar entity that is (a) 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; or (b) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with the Secretary of State or a similar office under the law of a state or Indian Tribe.
  - A key factor is the filing of a document with the state’s Secretary of State or a similar office. At this time, further guidance is expected regarding what constitutes a “similar office,” which may include a court.
  - General partnerships will likely not be reporting companies, but limited partnerships, limited liability partnerships and limited liability limited partnerships likely will be.
  - Sole proprietorships are not usually created by a filing and likely would not be reporting companies



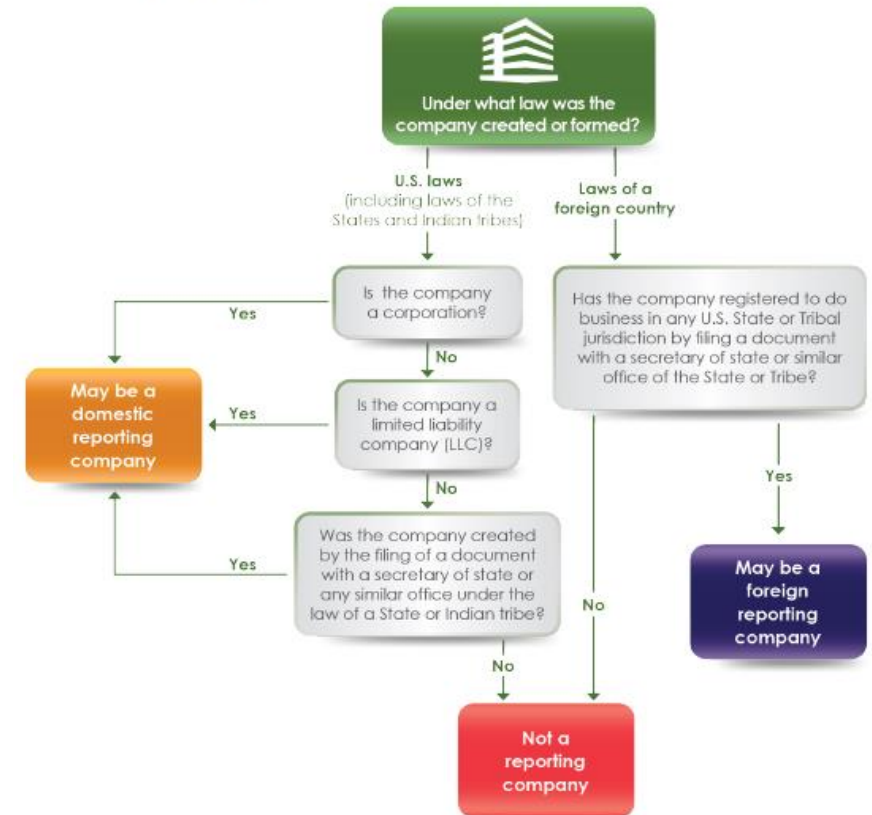
## CORPORATE TRANSPARENCY ACT – WHO MUST COMPLY?

FinCEN published a Small Entity Compliance Guide. The Guide provides small businesses (and their advisors) with various charts and examples to aid in the decision-making process for compliance.

[FinCEN Small Entity Compliance Guide - BOI Reporting Requirements](#)

**Takeaway:** LLCs and corporations created by the filing of a document with a secretary of state (or similar office) are reporting companies for purposes of the BOI Reporting Rule . . . unless an exemption applies.

Chart 1 – Reporting company definition





## CORPORATE TRANSPARENCY ACT – WHO IS EXEMPT?

- Twenty-three specific types of entities are exempt from the reporting requirements.
- The Guide contains a worksheet for companies to use when determining if they are exempt.

Chart 2 – Reporting company exemptions

| Exemption No. | Exemption Short Title                    |
|---------------|--|
| 1             | Securities reporting issuer              |
| 2             | Governmental authority                   |
| 3             | Bank                                     |
| 4             | Credit union                             |
| 5             | Depository institution holding company   |
| 6             | Money services business                  |
| 7             | Broker or dealer in securities           |
| 8             | Securities exchange or clearing agency   |
| 9             | Other Exchange Act registered entity     |
| 10            | Investment company or investment adviser |
| 11            | Venture capital fund adviser             |
| 12            | Insurance company                        |
| 13            | State-licensed insurance producer        |
| 14            | Commodity Exchange Act registered entity |
| 15            | Accounting firm                          |
| 16            | Public utility                           |
| 17            | Financial market utility                 |
| 18            | Pooled investment vehicle                |
| 19            | Tax-exempt entity                        |
| 20            | Entity assisting a tax-exempt entity     |
| 21            | Large operating company                  |
| 22            | Subsidiary of certain exempt entities    |
| 23            | Inactive entity                          |



## CORPORATE TRANSPARENCY ACT – EXEMPTIONS

### TWO OF THE MOST COMMON EXEMPTIONS INVOLVE SUBSIDIARIES AND LARGE OPERATING COMPANIES

#### **21. Large operating company**

Any entity that: (A) **employs more than 20 full time employees in the United States**, with “full time employee in the United States” having the meaning provided in 26 CFR 54.4980H-1(a) and 54.4980H-3, except that the term “United States” as used in those sections of the CFR have the meaning provided in 31 CFR 1010.100(hhh), (B) **has an operating presence at a physical office within the United States**, and (C) **filed a Federal income tax or information return in the United States for the previous year demonstrating more than \$5,000,000 in gross receipts or sales**, as reported as gross receipts or sales (net of returns and allowances) on the entity's IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120-S, IRS Form 1065, or other applicable IRS form, excluding gross receipts or sales from sources outside the United States, as determined under Federal income tax principles. For an entity that is part of an affiliated group of corporations within the meaning of 26 USC 1504 that filed a consolidated return, the applicable amount shall be the amount reported on the consolidated return for such group.

#### **22. Subsidiary of certain exempt entities**

Any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more entities described in exemptions 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, or 21 set forth above.





## CORPORATE TRANSPARENCY ACT – HOW TO COMPLY

- Compliance is achieved by filing a Beneficial Ownership Information Report (“BOIR”) online at the BOI E-Filing System located at [www.boiefiling.fincen.gov](http://www.boiefiling.fincen.gov)
- The System allows for online filing via the Web or by submission of an offline BOIR (pdf submission)
- In our experience, the time required to complete a BOIR online is typically between 10-15 minutes after all required information is gathered, with some exceptions.



## CORPORATE TRANSPARENCY ACT – HOW TO COMPLY - BOIR CONTENT

There are two categories of individuals whose information must be included in BOI Reports: Beneficial Owners and Company Applicants

- Beneficial Owners
  - A beneficial owner is any individual who, directly or indirectly:
    - Exercises substantial control over a reporting company; **OR**
    - Owns or controls at least 25 percent of the ownership interests of a reporting company.
  - Reporting companies are not required to report the reason an individual qualifies as a beneficial owner.
  - Many reporting companies will have multiple beneficial owners, largely due to the definition of substantial control.



## CORPORATE TRANSPARENCY ACT – HOW TO COMPLY

An individual exercises substantial control over a reporting company if they meet any of four general criteria:

- Senior Officer
- Authority to appoint or remove a senior officer or a majority of the Board of Directors
- Important decision-maker
- Catch-all – “other form of substantial control over the reporting company”

Chart 3 – Substantial control indicators



### SENIOR OFFICER

any individual holding the position or exercising the authority of a:

1. President
2. Chief financial officer (CFO)
3. General counsel (GC)
4. Chief executive officer (CEO)
5. Chief operating officer (COO)

or any other officer, regardless of official title, who performs a similar function as these officers



### APPOINTMENT OR REMOVAL AUTHORITY

any individual with the ability to appoint or remove any **SENIOR OFFICER** or a majority of the board of directors or similar body



### IMPORTANT DECISION-MAKER

any individual who directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding the reporting company's:

1. **Business**, such as:
  - Nature, scope, and attributes of the business
  - The selection or termination of business lines or ventures, or geographic focus
  - The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts
2. **Finances**, such as:
  - Sale, lease, mortgage, or other transfer of any principal assets
  - Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget
  - Compensation schemes and incentive programs for senior officers
3. **Structure**, such as:
  - Reorganization, dissolution, or merger
  - Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures



### CATCH-ALL

any other form of substantial control over the reporting company. Control exercised in new and unique ways can still be substantial. For example, flexible corporate structures may have different indicators of control than the indicators included here





## CORPORATE TRANSPARENCY ACT – HOW TO COMPLY

- All individuals who own or control at least **25 percent** of the ownership interests of the company must be identified.
- Includes: equity, stock, voting rights, capital or profit interest, convertible instruments, options or non-binding privileges to buy or sell equity, stock, etc.
- Catch-all = any other instrument, contract, arrangement, etc. used to establish ownership

Chart 4 – Ownership interests







## CORPORATE TRANSPARENCY ACT – HOW TO COMPLY - BOIR CONTENT

### WHAT IS A COMPANY APPLICANT?

- The individual who files the document that creates or registers a reporting company or who directs and controls the filing of such formation document.

A reporting company is only required to report its company applicants if it is: a domestic reporting company created on or after January 1, 2024;

**OR** a foreign reporting company first registered to do business in the United States on or after January 1, 2024.

- Company applicants are **not** required for companies created prior to January 1, 2024.



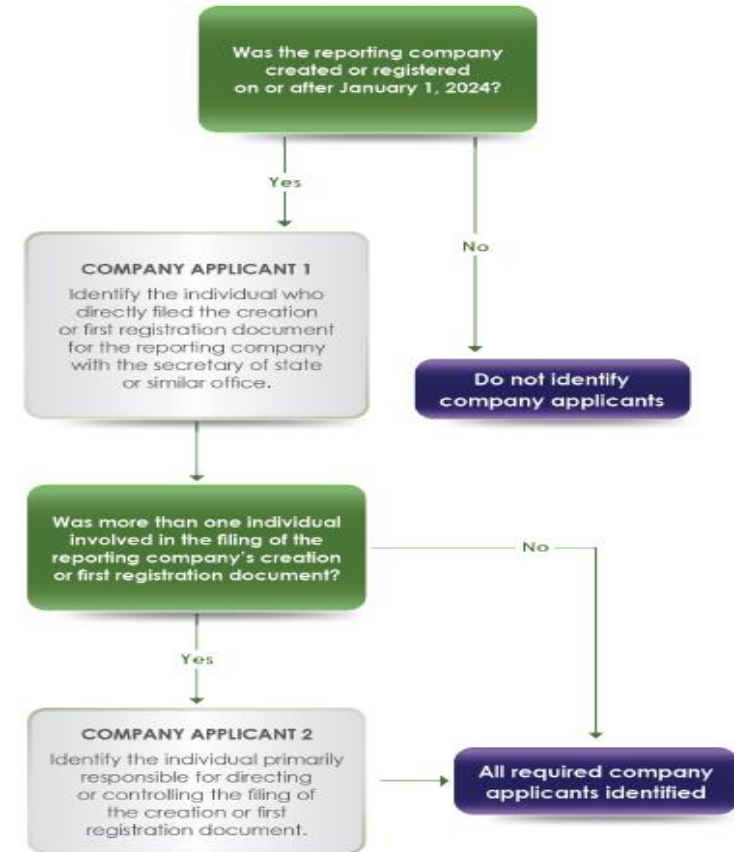
Chart 6 – Company application definition

### There are two categories of company applicants:

- Direct Filer- the individual who filed formation document with Secretary of State,

OR

- Individual primarily responsible for directing or controlling the filing.
- No reporting company will have more than 2 company applicants;
- Example – if you file on behalf of an entity, your law firm and your paralegal are likely the company applicants.





# CORPORATE TRANSPARENCY ACT – HOW TO COMPLY

- **REQUIRED INFORMATION FOR BOIR**

- Company Info

- Full legal name, Trade name, Address, Jurisdiction of formation, TIN

- Beneficial Owner(s)/Company Applicant(s) Info

- Full legal name, DOB, Address + Image and Information of one of the following:
  - U.S. Passport
  - State driver's license, or
  - State ID
  - Foreign passport is acceptable if the individual does not have a State ID/DL or passport.
- FinCEN ID – this is a unique ID that can be used by an individual each time they access or file on FinCen's BOIR System

Chart 7 – Required information checklists

**Reporting Company**

- ☐ Full legal name
- ☐ Any trade name or "doing business as" (DBA) name
  - » Report all trade names or DBAs.
- ☐ Complete current U.S. address
  - » Report the address of the principal place of business in United States, or, if the reporting company's principal place of business is not in the United States, the primary location in the United States where the company conducts business.
- ☐ State, Tribal, or foreign jurisdiction of formation
- ☐ For a foreign reporting company only, State or Tribal jurisdiction of first registration
- ☐ Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN))
  - » If a foreign reporting company has not been issued a TIN, report a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.

**Each Beneficial Owner and Company Applicant**

Not all reporting companies are required to report information about company applicants. See Chapter 3 for assistance in identifying whether your company is required to report company applicant information.

- ☐ Full legal name
- ☐ Date of birth
- ☐ Complete current address
  - » Report the individual's residential street address, except for company applicants who form or register a company in the course of their business, such as paralegals. For such individuals, report the business street address. The address is not required to be in the United States.
- ☐ Unique identifying number and issuing jurisdiction from, and image of, one of the following non-expired documents:
  - » U.S. passport
  - » State driver's license
  - » Identification document issued by a state, local government, or tribe
  - » If an individual does not have any of the previous documents, foreign passport



# CORPORATE TRANSPARENCY ACT – FILING DEADLINES ...

## FILING DEADLINES – AS OF DECEMBER 26, 2024, BOI REPORTING IS VOLUNTARY

### Original Deadlines:

- If reporting company created **prior** to January 1, 2024 → Initial report due January 1, 2025
- If reporting company created **after** January 1, 2024 → Reports due within 90 DAYS

### FinCen.gov/BOI Update re Voluntary Reporting

Legal Update: On Tuesday, December 3, 2024, in the case of *Texas Top Cop Shop, Inc., et al. v. Garland, et al.*, No. 4:24-cv-00478 (E.D. Tex.), the U.S. District Court for the Eastern District of Texas, Sherman Division, issued an order granting a nationwide preliminary injunction. *Texas Top Cop Shop* is only one of several cases that have challenged the Corporate Transparency Act (CTA) pending before courts around the country. Several district courts have denied requests to enjoin the CTA, ruling in favor of the Department of the Treasury. The government continues to believe—consistent with the conclusions of the U.S. District Courts for the Eastern District of Virginia and the District of Oregon—that the CTA is constitutional. For that reason, the Department of Justice, on behalf of the Department of the Treasury, filed a Notice of Appeal on December 5, 2024 and separately sought stay of the injunction pending that appeal.

On December 23, 2024, a panel of the U.S. Court of Appeals for the Fifth Circuit granted a stay of the district court’s preliminary injunction entered in the case of *Texas Top Cop Shop, Inc. v. Garland*, pending the outcome of the Department of the Treasury’s ongoing appeal of the district court’s order. FinCEN immediately issued an alert notifying the public of this ruling, and recognizing that reporting companies may have needed additional time to comply with beneficial ownership reporting requirements, FinCEN extended reporting deadlines. On December 26, 2024, however, a different panel of the U.S. Court of Appeals for the Fifth Circuit issued an order vacating the Court’s December 23, 2024 order granting a stay of the preliminary injunction. Accordingly, as of December 26, 2024, the injunction issued by the district court in *Texas Top Cop Shop, Inc. v. Garland* is in effect and reporting companies are not currently required to file beneficial ownership information with FinCEN.





# CORPORATE TRANSPARENCY ACT – PENALTIES FOR NONCOMPLIANCE

Safe harbor from penalty - 90 days of original report deadline to correct inaccurate information on a report  
Willful failure to report complete or updated BOI to FinCEN or willful provision of or attempt to provide false or fraudulent BOI may result in civil or criminal penalties up to:

**Civil Penalties** - Over \$500 each day the violation continues

**Criminal Penalties** - Imprisonment up to 2 years and/or a fine of up to \$10,000  
Applies to senior officers of an entity

Penalties for willfully causing a company not to file a BOI report or to report incomplete or false BOI to FinCEN



# **CORPORATE TRANSPARENCY ACT – LAW FIRM LIABILITY / BEST PRACTICES**

- Professional associations / law firms have responded to BOI Reporting and CTA compliance with varying approaches
  - Some law firms / some CPA firms = notify clients, but not offering to provide the service
  - Other law firms = notify clients of responsibility, offer to assist
    - My law firm has assisted in filing hundreds of BOIR
    - Letter sent to all clients with information re CTA as well as an Intake Form to allow our paralegal to file the BOIR
    - Many corporate transactions and Shareholder Agreements now include a CTA compliance clause, ensuring that individuals will provide necessary information to allow the entity to file/update a BOIR



# **CORPORATE TRANSPARENCY ACT – LAW FIRM LIABILITY / BEST PRACTICES**

- Tips to avoid liability
  - Do not facilitate non-compliance
  - Ensure deadlines are met
- Risk Mitigation – third party vendors (Wolters Kluwer and others) have created entity management software to assist with BOIR and CTA compliance.



# **CORPORATE TRANSPARENCY ACT / BOI REPORTING – QUESTIONS**