



# BENEFICIAL OWNERSHIP INFORMATION REPORTING- AN UPDATE

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**BIO**

Blaise C. Bender is President and Managing Shareholder of Blaise C. Bender, PC a law firm that concentrates on tax matters and tax planning for individuals, businesses, partnerships and LLCs,. He also provides representation on tax issues and controversies impacting individuals and businesses, assists in business and non-profit development, mergers and acquisitions, contractual and transactional analysis, general counsel assistance and business and estate succession planning. He has also provided expertise to various members of Congress on legislative matters impacting taxpayers.

Formerly a full-time college professor for over twenty years. He received his B.B.A in Accounting Degree and a Master's of Science in Finance from Texas A& M University. He also received an MPA in Taxation from UTSA and his Juris Doctor in Law from St. Mary's University.

Blaise is a member of the State Bar of Texas, and is a licensed CPA. He possesses over six years of experience in public accounting working for Arthur Andersen & Co., Deloitte Touche, and Ernest and Young. Blaise also served as a CFO and Controller in the private sector.

Blaise currently serves as Chairperson of Credit Human, FCU a \$4 billion asset financial institution serving over 40 states. He also serves on the board of USIO, Inc. a publicly traded company engaged in automated payment acceptance and disbursement processing. Blaise chairs the audit committee of USIO, Inc. He is a member of the Texas Society of CPAs. He previously served as chairperson of the San Antonio Chapter of CPAs and Providence High School. Blaise serves as an advisor to various Congressional Representatives at the federal level in both the House and Senate on proposed tax legislation.

Blaise has conducted over 1,100 seminars and workshops throughout Texas and the United States and has numerous publications in tax and accounting. His seminars include an Annual Federal Tax Updates, Individual Tax Updates. Business Tax Updates, Merger and Acquisitions, Cryptocurrency Issues, Hobby Loss Issues, Real Estate Taxation, Pass-Throughs including Partnerships and S Corporations, Investment Diversification. Agricultural Tax Matters and Succession Planning to name a few. He also has numerous publications on tax matters, succession planning and governance. He has received numerous awards for his service in education and continuing education including the TXCPA Recognition for Meritorious Service to the Public Accounting and the Fellow Award in 2019 from the San Antonio Chapter of CPAs.

A native of San Antonio, Blaise graduated from Churchill High School and resides in San Antonio with his wife Dr. Julie S. Bender, a local veterinarian, along with there two four legged children, Daphne and Cookie.

# Beneficial Ownership Information Reporting – An Update

By

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## I. Overview

### A. General

1. The Corporate Transparency Act was enacted in 2021 to enhance transparency in entity structures and ownerships to combat money laundering, tax fraud, and other illegal activities. The Corporate Transparency Act (CTA) establishes uniform beneficial ownership information reporting requirements for certain types of corporations, limited liability companies, and other similar entities created in or registered to do business in the U.S. The CTA authorizes FinCEN to collect that information and disclose it to authorized government authorities and financial institutions, subject to certain safeguards and controls.

a. According to FINCEN, the idea behind the reporting requirements are to make *it harder for bad actors hide or benefit from their ill-gotten gains through shell companies or other opaque ownership structures.*

2. Beneficial ownership information refers to identifying information about the individuals who directly or indirectly own or control a company.

3. According to FinCEN and as stated in the reporting the benefits of the Reporting is that it *would significantly aid efforts to protect the U.S. financial system from illicit use. It would impede illicit actors' ability to use legal entities to conceal proceeds from criminal acts that undermine U.S. national security and foreign policy interests, such as corruption, human smuggling, drug and arms trafficking, and terrorist financing. For example, BOI can add critical data to financial analyses in law enforcement and tax investigations. It can also provide essential information to the intelligence and national security professionals who work to prevent terrorists, proliferators, and those who seek to undermine our democratic institutions or threaten other core U.S. interests from raising, hiding, or moving money in the United States through anonymous shell or front companies.*

## II. Reporting Process

### A. Timeline for Reporting

1. FinCEN opened up its reporting requirement on January 1, 2024. The filing is an electronic filing through <https://boifiling.fincen.gov> and then select 'File BIOR'

2. Currently, a reporting company created or registered to do business before January 1, 2024, will have until January 1, 2025, to file its initial BOI report.

3. A reporting company created or registered in 2024 will have 90 calendar days to file after receiving actual or public notice that its creation or registration is effective.

a. This 90-calendar day deadline runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier.

4. A reporting company created or registered on or after January 1, 2025, will have 30 calendar days to file after receiving actual or public notice that its creation or registration is effective.

5. Presently, there is no fee for submitting the report.

## **B. Who Can File A BOI Report**

1. The company that files the report is known as the Reporting Company.

2. Anyone whom the Reporting Company authorized to act on its behalf may file the report. This can include an officer, director, owner, employee, third party service provider. The filer must provide basic contact information including name, email address and phone number.

3. Attorneys and CPAs may assist in the reporting but there is no mandate or requirement that an attorney or CPA submit.

**4. Note:** It is imperative that CPA and CPA firms ascertain from their malpractice carrier as to whether they will be covered under the field of accounting in terms of filing the form. Many CPAs and CPA firms have been advised by their liability carriers that they will not be covered for filing the report. As such, a CPA with a liability policy should not assume that they are covered.

## **C. Preparing for Beneficial Ownership Reporting**

1. Organizations should take proactive steps to prepare themselves to meet beneficial ownership reporting requirements.

2. **Internal Review:** Conduct an internal review of your company's structure and ownership hierarchy to identify all potential beneficial owners.

3. **Documentation Gathering:** Collect the necessary documentation and information for each beneficial owner and company applicant, such as identification documents, proof of address, and relevant corporate records. The corporate records would include bylaws, buy sell agreements, minutes, policies and procedures, employment agreements, restrictive transfer agreements at a minimum.

4. **Centralized Record-Keeping:** Establish a centralized system or database to record and maintain accurate beneficial ownership information.

5. **Regular Updates:** Ensure your records are up-to-date by periodically reviewing and verifying the provided information. This is particularly the case regarding minutes as they would be examined in determining beneficial ownership reporting..

6. **Documentation for Exemption from Reporting.** Only a newly exempt entity is required to do a submission. For those that are exempt going into the reporting process internal documentation is necessary. It is strongly recommended that you download the Small Entity Compliance Guide and fill out the questions associated with your exempt entity. These are listed under Section 1.2 of the guide.

**7. Documentation of Substantial Control.** It is strongly recommended that you download the Small Entity Compliance Guide and examine the questions regarding Substantial control listed on page 20. The above referenced documents should also be centralized for this process.

### **III. Reporting Company**

#### **A. Reporting Companies**

1. The entity that is required report is known as a Reporting Company.

2. Companies, businesses or entities are required to report only if they meet the reporting company definition of a Reporting Company and do not qualify for an exception.

3. Generally, there are 2 types of reporting companies:

- Domestic reporting company: a corporation, limited liability company, or other entity created by the filing of documents with the secretary of state (or similar office) within the United States.
- Foreign reporting company: a corporation, limited liability, or other entity formed under the law of a foreign jurisdiction and registered to do business in the United States.

a. If the company is neither of these two types of reporting companies then it is not required to have a report filing.

**4. Domestic Reporting Companies.** A domestic reporting company is entity that is formed under the laws of United States or Indian tribes as the case may be. A Domestic Reporting Company can include a corporation, LLC or other entity in which the Corporation, LLC or other entity was created by the filing of a document with a Secretary of State or similar office under the laws of a state or Indian tribe.

a. States refers to any state of the United States, the District of Columbia, Puerto Rico, Northern Marina Islands, American Samoa, Guam, the US Virgin Islands in any other, wealth, territory or possession of the United States.

b. Indian tribe refers to any Indian or Alaska native tribe, band, nation, Pueblo, village or community that the Secretary of the Interior acknowledges exist as an Indian tribe. ( See 25 USC 5130)

c. In the state of Texas, the following entities generally must file or register to conduct business in the state:

- A domestic for-profit corporation.
- A domestic nonprofit corporation
- A domestic limited liability company (LLC)
- A domestic limited partnership (LP)
- A domestic limited liability partnership (LLP)
- A domestic professional corporation (PC)
- A domestic professional association (PA)

**Note:** For incorporation purposes, a domestic for-profit corporation can be a regular Corporation or an S corporation. Under Texas law, there is no distinction at the time of registering with the Secretary State as to whether an entity is a regular Corporation or S corporation. The LP, LLP, PC, PA are referred to in the Corporate Transparency Act as other entities created by filing a document with the Secretary of State.

d. In Texas the reference to domestic refers to an organization that was originally incorporated in Texas. Texas also allows businesses incorporated in other states to register to do business in the state. Those that are formed in another state and register here are known as foreign in nature and would include the following:

- A foreign for-profit corporation
- A foreign nonprofit corporation
- A foreign limited liability company (LLC)
- A foreign limited partnership (LP)
- A foreign limited liability partnership (LLP)
- A foreign professional corporation (PC)
- A foreign professional association (PA)

**Note:** For purposes of the beneficial ownership information reporting, the timeframe to report the registration of entities would be in the state of original origin not in Texas.

### **Example**

ABC Inc. incorporated in Delaware on January 1, 2023. The business registered as a foreign corporation in Texas January, 1, 2024. ABC, Inc. would have until the end of 2024 to register because of the original incorporation in Delaware. They would not have 90 days from January 1, 2024 to register. The original incorporation again was in Delaware.

**5. Foreign Reporting Companies.** A foreign reporting company is either a corporation, LLC or other entity that was formed outside of the United States but is registered to do business in state or tribal jurisdiction within the United States. This will be evidenced by the filing of a document with the Secretary of State or similar office of the state or tribe.

### **B. Exceptions from the Reporting Requirements**

1. The reporting rules do provide 23 specific types of entities that are exempt from the reporting period and that qualifies for any of these exemptions is not required to submit a report to FinCEN.

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

3. If a company filed a report and letter qualifies for exemption, the company should file the updated report indicating that it is a newly exempt entity from the reporting requirements. For purposes of this the updated report for a newly exempt entity what only required that the unity identified itself and check the box that it's a newly exempt entity.

4. The reporting company exceptions include the following:

- Securities reporting issuer
- Governmental authority
- Bank
- Credit union
- Depository institution holding company
- Money services business
- Broker or dealer in securities

- Securities exchange or clearing agency
- Other Exchange Act registered entity
- Investment company or investment adviser
- Venture capital fund adviser
- Insurance company
- State-licensed insurance producer
- Commodity Exchange Act registered entity
- Accounting firm
- Public utility
- Financial market utility
- Pooled investment vehicle
- Tax-exempt entity
- Entity assisting a tax-exempt entity
- Large operating company
- Subsidiary of certain exempt entities
- Inactive entity

5. In ascertaining whether a reporting company is exempt from reporting each one of the above requires one to two questions to be answered as documenting the exception. For example, in order for an investment company or investment adviser to be exempt the company must fit within section 3 of the Investment Company Act of 1940 and be registered with the SEC.

**6. Broker or Dealer in Securities.** An entity that is a broker-dealer would be exempt if they follow the definition under Section 3 of the Securities Exchange Act of 1934 and is registered under Section 15 of the Securities Exchange Act of 1934.

**7. Public Accounting Firms.** Under FinCEN, a public accounting firm qualifies for an exception if the entity is registered in accordance with Section 102 of the Sarbanes Oxley Act of 2002. (See 15 USC 7212)

**8. Large Operating Company.** There are generally six requirements or criteria that must be met in order for a large operating company to be exempt from the reporting. The six criteria include the following:

a. The entity employs more than 20 full-time employees. Full-time employees fostered the definition of a calendar month where the employee is employed an average of 30 hours per week with the employer. (See 26 CFR 54.4980 H – 1 (a) and 54.4980 H – 3)

b. More than 20 full-time employees of the entity are employed in the United States.

c. The entity has an operating presence at a physical office within the United States. This means that the entity rightly conducts his business in a physical location in the United States that the entity owns or leases and that is physically distant from the place of business of any other unaffiliated entity.

d. The entity filed a federal income tax return or information return in the United States for the previous year demonstrating more than \$5 million in gross receipts for sales. If the entity is part of an affiliated group of corporations that would include a consolidated return to meet the exception.

e. The entity reported this greater than \$5 million amount as gross receipts or sales (net of returns and allowances )on Form 1120, a consolidated Form 1120, Form 1120 – S, Form 1065 or any other applicable IRS form.

f. When gross receipts or sales from sources outside the United States, as determined under Federal income tax principle, are excluded from the entity's amount of gross receipts or sales, the amount remains greater than \$5,000,000.

g. It should also be noted that an engaging solely in passive activities like holding rental property or an entity that is deemed unprofitable is not exempt from the reporting requirements. (See FAQ C .5)

h. If the size of the Reporting Company fluctuates above or below one of the thresholds for the large operating company exception, the reporting company will need to file a report if it meets the definition of a reporting company and does not meet the criteria for the large operating company exception or any other exception.

i. If the company files a report and then becomes exempt as a large operating company the company should file a newly exempt entity report noting that they are now exempt.

j. If at a later date, the company no longer meets the criteria for the large operating company exception, the reporting company should file an updated report. Updated reports are filed in 30 days.

k. The Corporate Transparency Act (CTA) specifies that a company may qualify for the large operating company exemption based on a Federal income tax or information return filed "in" the previous year, while FinCEN's regulations refer to tax or information returns filed "for" the previous year.

(i) To the extent a tax or information return for the previous year was not filed in the previous year (e.g., because a company has not filed its return for the previous year at the time beneficial ownership information is required to be reported, or because the return filed in the previous year was for a prior year), a company should use the return filed in the previous year for purposes of determining its qualification for the exemption.

(ii) If a company relying on this exemption subsequently files a tax return demonstrating less than \$5 million in gross sales or receipts, and it no longer qualifies for the large operating company exemption or any other exemption, it has 30 days from the date of the tax return to file an initial BOI report.

(iii) The Federal income tax or information return must demonstrate 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.

**9. Tax Exempt Entity.** A tax-exempt entity qualifies for exception **if any** of the following four criteria apply:

a. The entity is an organization that is described in section 501(c) of the Internal Revenue Code of 1986 (determined without regard to section 508(a) of the Code) and exempt from tax under section 501(a) of the Code.

b. The entity is an organization that is described in section 501(c) of the Code, and was exempt from tax under section 501(a) of the Code, but lost its tax-exempt status less than 180 days ago.

c. The entity is a political organization, as defined in section 527(e)(1) of the Code, that is exempt from tax under section 527(a) of the Code.



d. The entity is a trust described in paragraph (1) or (2) of section 4947(a) of the Code.

**10. Entity Assisting a Tax Exempt Entity.** An entity qualifies for this exception if **all four** of the following apply:

a. The entity operates exclusively to provide financial assistance to, or hold governance rights over, any tax-exempt entity described under the Tax Exempt Entity Provision above.

b. The entity is a United States person as defined in section 7701(a)(30) of the Internal Revenue Code of 1986

c. The entity is beneficially owned or controlled exclusively by one or more United States persons that are United States citizens or lawfully admitted for permanent residence. “Lawfully admitted for permanent residence” is defined in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)).

d. The entity derives at least a majority of its funding or revenue from one or more United States persons that are United States citizens or lawfully admitted for permanent residence.

### **C. Statutory Trusts, Business Trusts Foundations**

1. Whether or not statutory trusts, business trust or foundations are Reporting companies depends on the formation. For example, a statutory trust, business trust or foundation would be a reporting company if it was created by the filing of a document with a Secretary of State. Similarly, a foreign entity is a reporting company only if it filed a document with the Secretary of State for summer office to register to do business in the United States.

a. Obviously, state laws vary on whether trusts are required to have the filing of a document with the Secretary of State for similar office to be created or registered. If a trust is created in the US jurisdiction that requires the state filing that is a reporting company unless one of the prior exemptions applied.

2. It should be noted the registration of a trust with a court of law merely to establish the course jurisdiction over any disputes involving the trust does not make the trust a reporting company.

### **3. FinCEN Rule for Nonfinancial Purchases of Residential Real Estate and Gratuitous Transfers**

a. In August 2024, FinCEN announced a final rule that is designed to combat and deter money laundering by increasing transparency in the U.S. residential real estate sector. The rule requires, on a nationwide basis, certain persons involved in real estate closings and settlements to report information to FinCEN about specified transfers of residential real estate that are a high risk for illicit finance.

**NOTE.** The final rule will take effect on December 1, 2025,

b. Transfers made directly to an individual are not covered by this rule.

c. The final rule requires “reporting persons” performing specified closing or settlement functions in certain reportable transfers of residential real property to report specified information to FinCEN about the transfer.

d. Transfers are reportable when they meet the following criteria:

- (1) the property is residential real property;
- (2) the transfer is non-financed;
- (3) the property is transferred to a legal entity or trust, and (4) an exemption does not apply.

e. Transfers meeting the rule's requirements must be reported regardless of purchase price or the value of the property. Gift transfers are thus subject to the rule.

f. Transfers made directly to an individual are not covered by this rule.

g. The rule applies only to residential real property located in the United States.

h. Reportable property includes the following:

- Single-family houses
- Townhouses
- Condominiums, and cooperatives, including condominiums and cooperatives in large buildings containing many such units,
- Entire apartment buildings designed for occupancy by one to four families
- Transfers of land, such as vacant or unimproved land, on which the transferee intends to build a structure designed for occupancy by one to four families
- Mixed use, such as a single-family residence that is located above a commercial enterprise

i. For a transfer to be reportable, it must be non-financed, meaning that it does not involve an extension of credit to all transferees that is both secured by the transferred property and extended by a financial institution subject to an AML program and Suspicious Activity Report (SAR) obligations. Transfers that are financed only by a lender without an obligation to maintain an AML program and file SARs, such as a non-bank private lender, are treated as non-financed transfers that potentially must be reported.

j. A transfer of residential real property must be reported if at least one of the new owners of residential real property is a "transferee entity" or "transferee trust." These categories include legal vehicles commonly used to own property, such as limited liability companies, corporations, partnerships, and trusts. Both domestic and foreign entities and trusts are covered by the reporting requirement.

k. A reportable transfer does not include:

- a transfer of an easement;
- a transfer resulting from the death of an individual, whether pursuant to the terms of a decedent's will or the terms of a trust, the operation of law, or by contractual provision;
- a transfer incident to divorce or dissolution of a marriage or civil union;
- a transfer to a bankruptcy estate;
- a transfer supervised by a court in the United States;
- a transfer made for no consideration by an individual, either alone or with their spouse, to a trust of which that individual, their spouse, or both of them, are the settlor or grantor;
- a transfer to a qualified intermediary for purposes of a like-kind exchange under Section 1031 of the Internal Revenue Code; and
- a transfer for which there is no reporting person

l. FinCEN expects that the obligation to file reports will generally rest with settlement agents, title insurance agents, escrow agents, and attorneys. There is only one reporting person for any given reportable transfer.

m. The reporting person is determined by one of the following ways:

**(i) Reporting cascade:** The reporting cascade consists of a list of seven different functions that a real estate professional may perform in a transfer of residential real property, with the reporting obligation for any such transfer applying to the professional that performed a function that appears highest on the list. For example, the first function on the list is the professional listed as the agent on the closing or settlement statement. If no such professional is involved in the transfer, then the reporting obligation applies to any professional that performed the second function on the list (i.e., the professional that prepared the closing or settlement statement), and so on down the list.

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**(ii) Real estate professionals decide:** Designed to provide flexibility to the industry and reduce potential burden, the real estate professionals that perform the functions described in the cascading list may enter into a written agreement with each other to designate the professional that will file the report for the transfer.

n. The final rule requires that a reporting person provide information about the transfer of residential real property identifying the following:

- The reporting person;
- The legal entity (transferee entity) or trust (transferee trust) receiving ownership of the property;
- The beneficial owners of the transferee entity or transferee trust;
- Certain individuals signing documents on behalf of the transferee entity or transferee trust during the reportable transfer;
- The transferor (e.g., the seller);
- The residential real property being transferred; and
- Total consideration and certain information about any payments made.

o. The beneficial owner of a transferee trust is any individual who is a trustee or otherwise has authority to dispose of transferee trust assets; is a beneficiary who is the sole permissible recipient of income and principal from the transferee trust or who has the right to demand a distribution of, or to withdraw, substantially all of the assets of the transferee trust; is a grantor or settlor of a revocable trust; or is the beneficial owner of an entity or trust that holds one of these aforementioned positions in the trust.

p. When determining whether a transfer is reportable and when collecting required information, reporting persons may rely on information provided by any other person, but only if the reporting person does not have knowledge of facts that would reasonably call into question the reliability of the information.

q. With regard to the beneficial ownership information of transferee entities or transferee trusts, this reasonable reliance standard is slightly more limited. In these situations, the reasonable reliance standard applies only to information provided by the transferee or the transferee's representative and only if the person providing the information certifies the accuracy of the information in writing to the best of their knowledge.

r. A report must be filed by the later date of either the final day of the month following the month in which the reportable transfer occurred; or 30 calendar days after the date of closing.

## **D. Sole Proprietorships and General Partnerships**

1. Unless the sole proprietorship was created in the United States by filing a document with the Secretary of State for similar office is there is no reporting requirement.

2. Filing a document with a government agency to obtain either:

- a IRS employer identification number,
- a fictitious business name, or
- a professional or occupational license does not create a new entity, and therefore does not make a sole proprietorship filing such a document a reporting company.

a. Disregarded entities that would file a Schedule C may have a reporting requirement. This is particularly the case if the disregarded entity is incorporated in the state through the office of the Secretary of State.

## **3. General Partnerships**

a. Under the Texas Business Organization Code, a general partnership is not required to register with the Texas Secretary of State. The federal legislation under the Corporate Transparency Act is silent on this. It thus appears that general partnerships formed in the state are not required to submit a filing of a beneficial ownership information report.

## **4. Assumed Names**

a. The Beneficial Ownership Information report does have an inquiry as to whether an entity has an assumed name. Under Texas law, an assumed name can be registered with the Texas Secretary of State.

b. The Assumed Name Registered with the Texas Secretary of State can be done for all counties or specific counties.

c. If it is a business entity that is registered previously with the Texas Secretary of State, the assumed name would be reported along with the business entity under the beneficial ownership information reporting rules specified in the Corporate Transparency Act.

d. If the assumed name is associated with a sole proprietorship, it cannot be registered with the Texas Secretary of State and as such does not create a reporting requirement to FinCEN. This also appears to be the case with a general partnership.

## **5. Disregarded Entities**

a. Recently FinCEN issued a revised FAQ on disregarded entities. They indicated that these entities must still report if they meet the definition of a reporting company.

b. Disregarded entities may report using different types of tax identification numbers such as EIN, Social Security or an Individual Tax Identification Number.

c. FinCEN used this FAQ to strongly indicate that all reporting companies must have a tax identification number in order to submit the report.

## **E. S Corporations**

1. A corporation treated as a pass-through entity under Subchapter S of the Internal Revenue Code (an “S Corporation” or “S-Corp”) that qualifies as a reporting company—i.e., that is created or registered to do business by the filing of a document with a secretary of state or similar office, and does not qualify for any of the exemptions to the reporting requirements—must comply with the reporting requirements.
2. The S-Corp’s pass-through structure for tax purposes does not affect its BOI reporting obligations. In particular, pass-through treatment under Subchapter S does not qualify an S-Corp as a “tax-exempt entity” under FinCEN BOI reporting regulations.

## **F. Homeowners Associations (HOA)**

1. These entities may be a Reporting Company. The determination is based on how the HOA was formed.
2. If an HOA was not created by the filing of a document with a secretary of state or similar office, then it is not a domestic reporting company.
3. An incorporated HOA or other HOA that was created by such a filing also may qualify for an exemption from the reporting requirements. For example, HOAs recognized by the IRS as section 501(c)(4) social welfare organizations may qualify for the tax-exempt entity exemption.
4. An incorporated HOA that is *not* a section 501(c)(4) organization, however, may fall within the reporting company definition and therefore be required to report BOI to FinCEN.

## **IV. Beneficial Owner of Company**

### **A. General**

1. If your company or your client’s company is reporting company, the next thing that must be determined is to identify the beneficial owners.
2. Beneficial owners are any individual who, directly or indirectly:
  - Exercise substantial control over a reporting company; or
  - Owns or controls at least 25% of the ownership interest of a reporting company.
3. Beneficial owners must be individuals (i.e., natural persons).
  - a. Trusts, corporations, or other legal entities are not considered to be beneficial owners. However, in specific circumstances, information about an entity may be reported in lieu of information about a beneficial owner.
4. A reporting company can have multiple beneficial owners. There is no maximum number of beneficial owners who must be reported.

### Example

ABC Company is a Reporting Company that has one beneficial owner who exercises substantial control over the company and five other beneficial owners who all own or control 25% of the ownership interest of the reporting company.

a. According to FinCEN, it expects that every reporting company will be substantially controlled by one or more individuals, and therefore every reporting company will be able to identify and report at least one beneficial owner to FinCEN. (FAQ D .1)

### B. Exceptions from Determination of Beneficial Owner

1. There are five exceptions associated with not be deemed a beneficial owner. If the party falls within these five exceptions the reporting company does not have to report the individual as a beneficial owner to FinCEN. The exceptions are as follows:

**a. A Minor Child.** This involves an individual defined under the laws of the state in which the best the company is created or the foreign company is first registered.

(i) However, the minor child may be exempt but the parent or legal guardian of the minor child may become the beneficial owner and required to be reported. Under FinCEN, the minor child exception only applies to the parent or legal guardians information is reported in lieu of the minor child.

(ii) Under Texas Family Code Section 3.103, except as provided, during the marriage of the parents of an unemancipated minor for home and managing conservator has not been imported, the earnings of the minor are subject to the joint management, control and disposition of the parents of the minor, unless otherwise provided by agreement of the parents or by judicial order. Judicial order could include a guardian. As such, the Texas statutory provision would require the parent or the guardian to be the reporting beneficial owner.

(iii) When the minor child reaches the age of majority as defined by state law or Indian tribe in which the reporting company was created the exception no longer applies. At that time, the individual is a beneficial owner and the reporting company must file an updated report.

**b. Nominee, Intermediary, Custodian or Agent.** Individual qualifies for this exception if the individual is merely acting on behalf of an actual beneficial owner as the beneficial owners nominee, intermediary, custodian or agent.

### Example

John, performs advisory or contractual services as a tax professional to Bubba. John is not a beneficial owner and no reporting is required. However, Bubba is the beneficial owner and must report.

**(i) Partnership Representative or Tax Matters Partner.** Whether or not the partner representative or tax matters partner Form 1065 is a beneficial owner is a fact and circumstance examination. 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. (See FAQ D .10)

**c. An Employee.** An employee of Reporting Company may be exempt if the following three criteria apply:

(i) The individual is an employee of the reporting company, when applying the meaning of “employee” provided in 26 CFR 54.4980H-1(a)(15). In general, the term employee means that an individual is subject to the will and control of the employer in what and how to do work, and that the employer may discharge the individual from work.

(ii). The individual’s substantial control over, or economic benefits from, the reporting company are derived solely from the employment status of the individual as an employee.

(iii). The individual is not a senior officer of the reporting company. The term “senior officer” means any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, or chief operating officer, or any other officer, regardless of official title, who performs a similar function.

**d. An Inheritor.** This pertains to individual whose only interest in reporting company is a future interest through our right of inheritance, through a will that would provide a future interest in the company. Once the individual inherits the interest, this exception no longer applies, and the individual may qualify as a beneficial owner.

**e. A Creditor.** The individual is a creditor of the reporting company. The term “creditor” means an individual who would meet the definition of a beneficial owner of the reporting company solely through rights or interests for the payment of a predetermined sum of money, such as a debt incurred by the reporting company, or a loan covenant or other similar right associated with such right to receive payment that is intended to secure the right to receive payment or enhance the likelihood of repayment.

### **Example**

Bubba has lent ABC Company, a reporting company \$10,000 and has executed an appropriate security interest and promissory note. Bubba is exempt from reporting. Now assume Bubba loans ABC Company \$ 10,000 in his capacity as a shareholder ( loan from shareholder). Bunna is not exempt from reporting as a beneficial owner because he has equity in the company.

**2. CPAs or Attorneys.** CPAs and attorneys generally do not qualify as beneficial owners. However, that may be depending upon the type of work being performed. CPAs and attorneys 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 in substantial control. An attorney or CPA who is designated as an agent of the reporting company may qualify for the nominee, intermediary, custodian or agent exception from the beneficial ownership definition.

**a. Note:** 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.

### **C. Substantial Control Defined**

1. Reporting Companies are required to identify all individuals who exercise substantial control over the company. There is no limit to the number of individuals who can be reported for exercising substantial control.

2. An individual exercises substantial control over a Reported Company if any of the following four criteria:

- the individual is a senior officer;
- the individual has authority to appoint or remove certain officers or a majority of directors of the reporting company;
- the individual is an important decision-maker; or
- the individual has any other form of substantial control over the reporting company.

**3. Senior Officer Defined.** This is an individual holding the position exercising authority as President, Chief Financial Officer, General Counsel, Chief Executive officer, Chief Operating officer or any other officer, regardless of official time to, who performs a similar function as these officers.

**4. Appointment for Removal Authority.** This pertains to an individual with the ability to appoint or remove any senior officer or majority of the board or similar body.

**5. Definition of Important Decision – Maker.** This is an individual who directs, determines or substantial influence over important decisions made by the reporting company including decisions regarding the following:

**Business Operations.** This includes, but is not limited, to:

- Nature, scope and attributes the business.
- The selection or termination of a business lighter ventures or geographic focus.
- The entry into our termination or fulfillment are nonfulfillment of significant contracts.

**Financial Operations.** This includes, but is not limited, to:

- Sales, leases, mortgages or other transactions 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.

**Structural Operations.** This includes, but is not limited, to:

- Reorganizations, dissolutions, mergers and acquisitions.
- *Amendments of any substantial governance documents of the reporting company, included the articles of incorporation or similar formation documents, bylaws or certificate policies or procedures.*

**6. Other Forms of Substantial Control Exercise.** This would involve the exercises substantial control in a new or unique way that would be deemed substantial.

7. The determination of substantial control is done on both of direct and indirect basis. An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through:

- Board representation;
- Ownership or control of a majority of the voting power or voting rights of the reporting company;
- Rights associated with any financing arrangement or interest in a company;



- Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
- Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- any other contract, arrangement, understanding, relationship, or otherwise.

### **Examples of Substantial Control on a Direct Basis**

Substantial Control on a direct basis can be determined by ascertaining if an individual exercises such through contracts, arrangements, understandings, relationships or otherwise. This could include board representation of the Reporting company.

A board member is not always a beneficial owner of a reporting company unless they own or control at least 25% of the ownership interest of the reporting company. (FAQ D .9)

### **Examples of Substantial Control on Indirect Basis**

Substantial Control on indirect basis over a reporting company could be determined by examining control of one or more intermediaries entities that separately or collectively exercise substantial control over the reporting entity. Intercompany loans, shareholder loans would also fall within the category. Likewise, a trustee of a trust may exercise substantial control over reporting entity in the trust and the trustee would have a required reporting requirement.

## **8. Director of a Board**

a. Under FAQ D .9, a board member is not always a beneficial owner of a reporting company unless they own or control at least 25% of the ownership interest of the reporting company.

b. Nonetheless, a board member may still be a beneficial owner if they exercise substantial control. The determination of this would likely be based on governance documents such as the bylaws.

c. Specifically, the determination would have to be made as to whether the board of directors has one or more individuals possessing the power ability to remove a majority of the board or body. Questions to look at would include the following:

- *Does your company have a Board of Directors or similar body and do they have an individual with the ability to appoint or remove a majority of the board or body?*
- *Does any individual have the ability to appoint or remove a senior officer of your Company?*
- *Does any individual direct, determine or have substantial influence over important decisions made by your company including decisions regarding the company's business, finances or structure?*
- *Other individuals who have substantial control of your company in ways other than those identified above?(See Small Entity Compliance Guide, December 2023 – Version 1.1)*

d. It is conceivable that one or more members of a Board of Directors would be a beneficial owner because of the ability to assert substantial control. The questions above infers not just a current power or duty but a potential power or duty.

e. It is conceivable that you may have a board member that is a beneficial owner with no ownership of stock but has the ability to assert substantial control through policies, procedures and governance documents. The facts of decision-making may be government collective basis does not appear to matter in terms of reporting to FinCEN.

#### **D. Ownership Interest Defined**

1. An ownership interest is generally an arrangement that establishes ownership rights in the reporting company. Examples of ownership interests include shares of equity, stock, voting rights, or any other mechanism used to establish ownership.

2. Reporting companies are required to identify all individuals who own or control at least 25 percent of the ownership interests of the company.

3. The following may be viewed as ownership interest being on a direct or indirect basis:

**a. Equity Stock or Voting Rights.** This pertains to any interest classified as stock or anything similar regardless of whether it confers voting power or voting rights even if the interest is transferable. This appears to into three broad categories

- Equity, stock or similar interest
- Pre-organization certificate or subscription
- Transferable share of, or voting trust certificate or certificate of deposit for an equity security interest in a joint venture or certificate of interest in a business trust

**b. Capital or Profit Interest.** This would include any interest in the assets or profits of the company organized as an LLC which is similar to stock in a corporation is sometimes referred to as units. It appears there were also include the capital account associated with a limited partnership.

**c. Convertible Instruments.** This would include instruments that are convertible to equity, stock, voting rights or capital or profit interest whether or not anything would need to be paid to exercise the conversion. This could also include the following:

- Ownership interest associated with any future on any convertible instrument.
- Any warrants or right to purchase, sell or subscribe to a share or interest in equity, stock, voting rights or capital or profit even if the warrant or right is a debt instrument. (Conversions of debt-to-equity)

**d. Options are Non-binding Privileges to Buy or Sell.** This refers to puts, calls, straddles or other option or privilege of buying or selling equity, stocks, voting rights, capital interest, profit interest or convertible instruments. However, this would not include an option or privilege created and held by others without the knowledge or involvement of the Reporting Company.

**e. Other Instruments, contracts or Mechanisms Used to Establish Ownership.** Restricted stock units would fall in this category.

**4. Direct Ownership.** This could *include joint ownership* with one or more persons of an undivided interest.

a. 31 CFR 1010.380 (d) (ii) (A) states that an individual may directly or indirectly own or control and ownership interest of a reporting company through any contract, arrangement, understanding, relationship or otherwise *including joint ownership with one or more persons of an undivided interest in such interest*

**b. Community Property.** The rules are silent on joint ownership associated with community property. The Corporate Transparency Act did not provide a definition of joint ownership but did include the phrase joint ownership in terms of ascertaining direct ownership. Under the laws of the state of Texas, Texas Family Code 3.002 identifies community property as:

*consisting of the property, other than separate property acquired by either spouse during the marriage.*

(i) Likewise, Texas Family Code Section 3.003 states that *property possessed by either spouse during the marriage that exists on the dissolution of marriage is presumed to be community property.*

(ii) Under Texas Family Code Section 3.101, *each spouse has the sole management, control and disposition of that spouse's separate property.* However, under Texas Family Code Section 3.102, *during marriage, each spouse is the sole management, control and disposition of the community property that the spouse would have owned if single including personal earnings, revenue from separate property, recovery for personal injuries and the increase in mutation, and the revenue from, all property subject to the spouse's sole management, control and disposition.*

(iii) Under Texas Family Code Section 3.102 (b), *if community property subject to the sole management, control and disposition of one spouse is mixed or combined with the community property subject to the sole management, control and disposition of the other spouse, then mixed or combined community property is subject to the joint management, control and disposition of the spouse's, list the spouses provide otherwise by power of attorney in writing or other agreement.*

(iv) Finally, under Texas Family Code Section 3.102 (e), community property is such a joint management, control and disposition of the spouses unless the spouses provide otherwise by power of attorney in writing or other agreement.

**(v) Note:** It appears based upon the community property rules of Texas that in ascertaining either substantial control or the 25% ownership interest test, reporting companies may have to include both spouses if either would be a beneficial owner and if that spouse is married and resides in a community property state such as Texas. It does not appear that the community property laws do not exclude the ownership interest from the community property of the marriage.

### **Examples**

Bubba and Bubbet are married and they live in Texas which is a community property state. Bubba is the CEO of ABC, Inc. his wife works for the same company but she is a secretary. The wife would not be reported as a beneficial owner but Bubba would be because he is a senior officer.

Bubba and Bubbet are married and they live in Texas which is a community property state. Bubba is the CEO of ABC, Inc. a C Corporation he formed during the marriage. Bubbet is not a stockholder nor is an officer in the company. Bubba owns 100% of the stock. Bubbet is not exercising substantial control. However, from a committee property perspective she may be a beneficial owner on an indirect basis because of the committee property rights to at least 50%. Are we having fun yet?

Bubba and Bubbet are married and lived in Texas in a community property state. Bubba is a senior vice president of ABC, Inc. of which he owns 40%. He received the 40% during the marriage. He would be a beneficial owner because he's a senior vice president. If Bubbet has no affiliation with the company she is not a beneficial owner.

Assume Bubba owns 40% of ABC LLC. ABC LLC is a partnership in the 40% represents capital and profit ownership. Bubba is passive he is a member only. The LLC operates via managers. Bubba would not be exerting substantial control but arguably would have a reporting requirement because he's over the 25% ownership threshold.

Now assuming that he received the 40% during the marriage to Bubbet. Bubba has no affiliation with the LLC. The receipt is in a community property state such as Texas. Again, both do not exercise substantial control. The argument could be made that they are below the ownership threshold of 25% because it is community property.

**(vii) Planning.** With respect to the community property rule, it might be possible to avoid having to report the BOI of a spouse who is not involved in the business by having the two spouses enter into a separate property agreement through which one spouse might renounce or transfer to the other spouse that spouse's community property interest in shares. Also, Texas Family Code Section 3.001 does define a spouse's separate property as consisting of:

- The property owned or claimed by the spouse before marriage;
- The property acquired the spouse during the marriage by gift, devise or descent; and
- The recovery of personal injuries maintained spouse during the marriage, except any recovery for loss of earnings during marriage.

In addition, Texas Family Code Section 3.004 indicates a subscribed and valid schedule of a spouse's separate property may be recorded in the deed of records of the county in which the parties, or one of them, resides in the county or counties in which real property is located. As such a marital partition agreement or prenup agreement would be honored with respect to reporting to FinCEN.

**5. Indirect Ownership.** This can include owning or controlling one or more intermediaries entities or the ownership of interests of an intermediary entity that separately or collectively owns or controls ownership of the reporting entity.

a. Indirect ownership can also occur through an individual acting as a nominee, intermediary, custodian or agent. The actual nominee, intermediary, custodian or agent is not a beneficial owner because they are not asserting either substantial control or possess the ownership interest. (See Small Entity Compliance Guide, December 2023 – Version 1.1)

**b. IRS Regulation 1.414 (c) – 4; Rules for Determining Ownership.** Under the constructive ownership rules clients may also wish to look at 1.414 (c) – 4 (5) with respect to constructive ownership on spouses. This section states that *an individual shall be considered on an interest, directly or indirectly, by or for his or her spouse, other than a spouse was legally separate from the individual under a decree of divorce, whether in a laboratory or final or decree of separate maintenance.*

c. **Related Party Rules.** Under Section 267 (b) , related parties generally consist of:

- Brothers and sisters
- Spouses

- Ancestors and lineal descendants (father, son, grandfather)
- Entities that are more than 50 percent owned, directly or indirectly, by individuals, corporations, trusts, and/or partnerships.
- Controlled groups (any two entities that are both owned more than 50 percent by the same party)

**Note:** With the exception of a spouse in community property state, the Corporate Transparency Act does not factor in related parties in terms of the substantial control or ownership test on indirect basis.

### **Example**

John owns 80% of XYZ Company. XYZ Company owns 30% of ABC Company. John is treated as owning 24% of ABC (80% of XYZ x 30%) this is important in that John would not have a reporting requirement with respect to ABC because he is under the 25% ownership threshold but would have a reporting requirement because he directly owns 80% of XYZ Company.

**Note:** The other attribute would be an individual is considered owning stock that is owned via family members that are related as described herein.

### **Example**

Bob owns 30% in ABC, Inc. His wife owns 20%, his grandson owns 5% and his nephew owns 15%. Bob would be a beneficial owner based upon owning more than 25%. His wife, grandson and nephew, despite the constructive ownership rules would not have a beneficial ownership reporting requirement based solely upon the ownership test. It is conceivable that they might if there was an assertion or documentation showing they exerted substantial control.

**d. Individuals may also hold ownership in reporting entity through a trust.** A trustee with authority to dispose trust assets as well as a beneficiary who was the sole permissible recipient of income and principal from the trust or who has a right to demand a distribution of overdraw substantially all the assets of the trust would likely have a reporting requirement as a beneficial owner. Likewise, a grantor who have the right to revoke or withdraw trust assets would likely have a reporting requirement.

6. The determination is made on a direct or indirect basis in association with ownership. It is recommended that the first thing that be done is to identify those who exercise substantial control then determine ownership.

## **E. Dispute Over Ownership**

1. If ownership of a reporting company is the subject of active litigation and an initial BOI report has not been filed, a person authorized by the company to file its beneficial ownership information should comply with the requirements by reporting:

- all individuals who exercise substantial control over the company, and
- all individuals who own or control, or have a claim to ownership or control of, at least 25 percent ownership interests in the company.
- 

2. If an initial BOI report has been filed, and if the resolution of the litigation leads to the reporting company having different beneficial owners from those reported (for example, because some individuals' claims to ownership or control have been rejected), the reporting company must file an updated BOI report within 30 calendar days of resolution of the litigation. (See FAQ D .11)

3. Restrictive Transfer Agreements can trigger an ownership issue if they are in the event exercised. Often times the restriction is associated with an existing owner having to sell their interest back to the reporting company or existing owners.

a. The existing owners may have not been beneficial owners previously may become beneficial owners as a result of the exercise of the restriction. Such rights could include those that were previously discussed.

b. They can also include rights to maintain one's ownership interest whereby individual owners have the right to buy a pro rata portion of any future offerings by the company to purchase its ownership interest. The desire is to prevent the company from issuing additional interest in diluting the ownership interest or reducing the percentage interest of the owners.

## **V. Company Applicant**

### **A. Overview**

1. Only reporting companies created or registered **on or after** January 1, 2024, will need to report their company applicants. This applies to domestic reporting companies created on or after January 1, 2024 or foreign reporting companies that first registered to do business in the United States on or after January 1, 2024.

2. A company that must report its company applicants will have only up to two individuals who could qualify as company applicants.

3. A reporting company is not required to report a company applicant if it is either:

a. A domestic reporting company created **before January 1, 2024** or

b. A foreign reporting company first registers new business a United States before January 1, 2024.

### **B. What is a Company Applicant?**

1. All company applicants must be individuals. No legal entities can be company applicants. There can be no more than two company applicants per reporting company.

2. There are two categories of company applicants.

**a. Direct Filers.** The individual must be identified by all reporting companies that have a company applicant reporting requirement. This is an individual who directly file the document that created domestic reporting company or the individual who directly file the document that first registered a foreign reporting company. The individual will have actually physically or electronically filed the document with a Secretary of State or similar office.

**b. Directs or Controls the Filing Action.** This would involve an individual that is only required and is involved in the filing the document that created her first registered the company. To reiterate, this is an individual who was primarily responsible for directing or controlling the filing of the creation or first registration document. This individual is viewed as the company applicant even though they did not actually file the document with the Secretary of State or similar office.

3. In determining a company applicant, it is not relevant who signs the creation or registration of the documents as an incorporator.

4. To determine who is primarily responsible for directing or controlling the filing of the document, consider who is responsible for making the decisions about the filing of the document, such as how the filing is managed, what content the document includes, and when and where the filing occurs. The following three scenarios provide examples.

### **Examples**

John is an attorney who completes a company creation document using information provided by a client, and then sends the document to a corporate service provider for filing with a secretary of state. John is the company applicant who is primarily responsible for directing or controlling the filing because they prepared the creation document and directed the corporate service provider to file it. The individual at the corporate service provider is the company applicant who directly filed the document with the secretary of state. In other words both our company applicants.

John as an attorney instructs a paralegal to complete the preparation of Articles of Formation. John directs the paralegal and does not do it himself. Before directing the corporate service provider to file the document, the attorney is the individual at the corporate service provider who files the document our company applicants. The paralegal is not an applicant because the attorney played a greater role in the paralegal in making substantive decisions about the filing of the document.

If a client initiates a company creation directly by asking a corporate service provider to file the document. The company, the client is primarily responsible for directing or controlling the filing the client would be a company applicant along with the individual at the corporate service provider who files the document.

John has created a new company by preparing the necessary documents to correct the company and he filed articles of incorporation with the state of Texas. He either did it in person or used an online portal. No one else was involved in the filing process. John is a company applicant because he directly file the document that created the entity. The state of Texas and employees of the secretary of the state of Texas though they process the creation they are not viewed as company applicants.

John created a company. John prepared the articles of incorporation and he directed Betty to file the document with the secretary of the state of Texas. Betty filed the document directly through the online portal. Both John and Betty are company applicants. Betty did the filing directly. John was primarily responsible for directing and controlling the filing by Betty. Both are company applicants.

**Note:** Regarding Betty she may be a company applicant as well if she was John's spouse, business partner, attorney or Accountant.

### **5. CPAs and Attorneys**

a. A CPA or Attorney could be a company applicant, depending on their role in filing the document that creates or registers a reporting company. In many cases, company applicants may work for a business formation service or law firm.

b. A CPA or Attorney may be a company applicant if they directly filed the document that created or registered the reporting company. If more than one person is involved in the filing of the creation or registration document, an accountant or lawyer may be a company applicant if they are primarily responsible for directing or controlling the filing.

### Example

An attorney at a law firm that offers business formation services may be primarily responsible for overseeing preparation and filing of a reporting company's incorporation documents. A paralegal at the law firm may directly file the incorporation documents at the attorney's request. Under those circumstances, the attorney and the paralegal are both company applicants for the reporting company.

Under Texas Law, an entity can be formed through the Texas Secretary of State website. John Smith a CPA files articles of incorporation on behalf of a new client. The Texas Secretary of State views the online portal for filing as public domain. The CPA would not be in trouble for practicing law without a license. However, they would likely be a company applicant.

## 6. Use of Automated Incorporation Services

a. If a business formation service only provides software, online tools, or generally applicable written guidance that are used to file a creation or registration document for a reporting company, and employees of the business service are not directly involved in the filing of the document, the employees of such services are not company applicants. For example, an individual may prepare and self-file documents to create the individual's own reporting company through an automated incorporation service. In this case, this reporting company reports only that individual as a company applicant.

### C. Removal

1. 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.

2. 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.

## VI. Reporting Requirements

### A. Overview

1. The information that needs to be reported depends on when the company was created or registered.

2. To reiterate, if a reporting company **was created or registered before January 1, 2024**, the reporting company only needs **provide information about itself and beneficial owners**.

3. If the reporting company **was created or registered on or after January 1, 2024** reporting company must **provide information not only about itself as well as beneficial owners and company applicants**.

4. Reporting companies may complete BOIRs electronically by accessing the BOI E-Filing portal at <https://boiefiling.fincen.gov> (accessible beginning on January 1, 2024). The E-Filing portal permits a reporting company to choose one of the following filing methods to submit a BOIR:



- Upload finalized PDF version of BOIR and submit online.
- Fill out Web-based version of BOIR and submit online.

a. A reporting company may submit its BOIR through either of these methods, both of which require the filing to be done online as BOIRs cannot be mailed or faxed to FinCEN.

b. The person who submits a BOIR will need to provide their name and email address to FinCEN.

c. The person who submits a BOIR will receive confirmation of submission when a BOIR is accepted by FinCEN.

## **B. Filing Information**

**1. Type of Filing.** When the client or third party begins the process of filing they must indicate the type of filing. There are four (4) types of filing:

- Initial Report.
- Corrected Prior Report
- Update Prior Report
- Newly Exempt Report

2. If either of these the Reporting Company Information associated with one of these types of filings requires the legal name, tax identification type (SSN/ITIN, EIN, foreign), the tax identification number and Country and jurisdiction if there is a foreign tax ID number.

## **C. Information to Report – Information Provided on Reporting Company**

**1.** This is in Part I of the form. The information of the reporting company must provide includes the following:

- Its legal name;
- Any trade names, “doing business as” (d/b/a), or “trading as” (t/a) names;
- The current street address of its principal place of business if that address is in the United States (for example, a U.S. reporting company’s headquarters), or, for reporting companies whose principal place of business is outside the United States, the current address from which the company conducts business in the United States (for example, a foreign reporting company’s U.S. headquarters);
- Its jurisdiction of formation or registration; and
- Its Taxpayer Identification Number (or, if a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of the jurisdiction).

2. If the Reporting Company has both a legal name and an assumed name, both must be included.

3. A reporting company will also have to indicate whether it is filing an initial report, or a correction or an update of a prior report.

4. Note also there is no annual reporting requirement. Reporting companies generally file it initial report and then make update or correct as needed.

d. The reporting company must use the United States Street address and cannot use a PO Box.

- e. For a foreign reporting company, the country and jurisdiction of origin or registration must be included.
- f. There is also a box to check to indicate reporting company was create a register before January 1, 2024.

## **5. Address of Principal Place of Business of Reporting Company**

a. If a reporting company does not have a principal place of business in the United States, then the company must report to FinCEN as its address the primary location in the United States where it conducts business.

**Note:** How does this work for a virtual business that does not have a physical address?

What about a home-based business is conducted online? Likely the physical address would be the residential address of the home-based business.

b. If a reporting company has no principal place of business in the United States and conducts business at more than one location within the United States, then the reporting company may report as its primary location the address of any of those locations where the reporting company receives important correspondence.

c. If a reporting company has no principal place of business in the United States and does not conduct business functions at any location in the United States, then its primary location is the address in the United States of the person that the reporting company, under State or other applicable law, has designated to accept service of legal process on its behalf. In some jurisdictions, this person is referred to as the reporting company's registered agent, or the address is referred to as the registered office. Such a reporting company should report this address to FinCEN as its address.

## **6. FinCEN identifier (FinCEN ID) For Reporting Company**

a. A FinCEN identifier is a unique identifying number that FinCEN will issue to an individual or reporting company upon request after the individual or reporting company provides certain information to FinCEN.

b. An individual or reporting company mail received one FinCEN identifier.

c. An individual or reporting company is not required to obtain a FinCEN identifier. Hence, the request for the ID number is optional. For a reporting Company, the Company Applicant makes the request.

d. The Reporting Company may include FinCEN identifiers in its BOI report instead of certain required information about beneficial owners or company applicants.

e. In other words, the FinCEN identifier can be a number assigned to the Reporting company or a beneficial owner or both.

f. When a beneficial owner or company applicant has obtained a FinCEN identifier, reporting companies may report the FinCEN identifier of that individual in the place of that individual's otherwise required personal information on a beneficial ownership information report. The Company Applicant would use the ID number in the future.

g. A reporting company may report another entity's FinCEN identifier and full legal name in place of information about its beneficial owners when three conditions are met:

- The other entity obtains a FinCEN identifier and provides it to the reporting company;

- The beneficial owners hold interests in the reporting company through ownership interests in the other entity; and
- The beneficial owners of the reporting company and the other entity are the exact same individuals.

h. Reporting companies may request a FinCEN identifier by checking a box on the beneficial ownership information report upon submission. This would be Part I: Reporting Company Information. After the reporting company submits the report, the company will immediately receive a unique FinCEN identifier.

i. If a reporting company wishes to request a FinCEN identifier after submitting its initial beneficial ownership report, it may submit an updated beneficial ownership information report requesting a FinCEN identifier, even if the company does not otherwise need to update its information.

**7. Authorization to Request FinCEN identifier on behalf of an Individual.** Anyone authorized to act on behalf of an individual may request a FinCEN identifier on the individual's behalf on or after January 1, 2024.

a Reporting companies with a FinCEN identifier must update or correct the company's information by filing updated or corrected beneficial ownership information report as needed.

#### **D. Information to Report – Information Provided Regarding Company Applicant**

1. This is in Part II of the form.

2. The information reporting companies record provide regarding the company applicant includes the following:

- The individual's name;
- Date of birth;
- Address; and
- An identifying number from an acceptable identification document such as a passport or U.S. driver's license, and the name of the issuing state or jurisdiction of identification document .

a. The Address of the Company Applicant can either be a residential address or business address. If the company that works in corporate formation (i.e. an attorney or corporate formation agent) the reporting company must report the company applicant's business address. Otherwise, the reporting company must use the company applicants residential address.

b. The reporting company will also have to report an image of the identification document used to obtain the identifying number. The type of identification document that can be provided include the following:

- State Issued Driver's License
- State/Local Tribe Issued ID
- US Passport
- Foreign Passport

None of the above to be expired.

**Note:** The identifying number in association with the identifying documents must be provided.

c. The jurisdiction in which the identifying document provided was issued must be included this could include Country, Foreign Jurisdiction, State, Local/Tribunal, or other local/Tribunal Descriptions.

**4. FinCEN ID.** The Company Applicant has the option to apply for and include a FinCEN identifier also known as a FinCEN ID. This is a number associated with the Reporting Company or beneficial owner. The Company Applicant would check a box requesting to receive the FinCEN identifier.

**5. Authorization to Request FinCEN identifier on behalf of an Individual.** Anyone authorized to act on behalf of an individual may request a FinCEN identifier on the individual's behalf on or after January 1, 2024.

a Reporting companies with a FinCEN identifier must update or correct the company's information by filing updated or corrected beneficial ownership information report as needed.

### **E. Information to Report – Information Provided Regarding Beneficial Owners**

1. This is in Part III of the form.

2. The information the reporting company is required to provide regarding beneficial owners includes the following:

- The individual's name;
- Date of birth;
- Residential address; and
- An identifying number from an acceptable identification document such as a passport or U.S. driver's license, and the name of the issuing state or jurisdiction of identification document.

a. If the Beneficial owner is a parent or guardian of a minor child a box must be checked accordingly information regarding that parent or guardian of the minor child will be required to be submitted. This would include the information identified above.

b. If the beneficial owner is associated with an exempt entity a box would also have to be checked.

b. The reporting company will also have to report an image of the identification document used to obtain the identifying number.

c. The same form of identification as used for the Company Applicant would apply here as well.

### **3. Beneficial Owner Physical Address**

a. The residential address that is current at the time of filing should be reported to FinCEN.

b. An updated report should be submitted within **30 calendar days** if the address, or any other information previously reported, changes. (See FAQ F .11)

### **4. FinCEN identifier (FinCEN ID) For Beneficial Owner**

a. Individuals may request a FinCEN identifier starting January 1, 2024, by completing an electronic web form at <https://fincenid.fincen.gov>. Obtaining a FinCEN identifier for an individual requires the requesting party to create a Login.gov account, which is tied to the individual receiving the FinCEN identifier.

Individuals who receive a FinCEN identifier should ensure their login credentials, including email address and related multi-factor information associated with their Login.gov account, are saved for future reference.

b. Individuals will need to provide the following:

- Full legal name,
- Date of birth,
- Physical address,
- Unique identifying number and issuing jurisdiction from an acceptable identification document, and
- An image of the identification document.

After an individual submits this information, they will immediately receive a unique FinCEN identifier.

c. When a beneficial owner has obtained that ID number they may use that ID number in place of the individuals otherwise required personal information on a beneficial ownership information report.

d. Again, individuals must update or correct information through the FinCEN identifier application that is used to request the FinCEN identifier. Individuals must report any change to the information they submitted no later than 30 days after the date on which the change has occurred. Likewise, if there is an accuracy in the information, the individual must correct information no later than 30 days after the date the individual became aware of the accuracy or had reason to know of it.

e. Presently, there is no way to deactivate a beneficial owners FinCEN identifier if they are no longer associated with the Reporting Company. This would include the company applicant if the company applicant change.

## **F. Acceptable Forms of Identification**

1. To be clear under the Corporate Transparency Act it requires a unique identification number found in one of the following acceptable forms of identification regarding individuals:

- A non-expired U.S. driver's license (including any driver's license issued by a commonwealth, territory, or possession of the United States);
- A non-expired identification document issued by a U.S. state or local government, or Indian Tribe;
- A non-expired passport issued by the U.S. government; or
- A non-expired passport issued by a foreign government (permitted only when an individual does not have one of the other three forms of identification listed above).

2. These form of identification are directly associated with the Company Applicant and Beneficial Owner.

**3. Multiple Last Names.** If an individual's name consists of a first name and multiple last names (e.g., a father's last name and another's last name), the multiple last name elements would be entered in the last name field and the first name entered in the first name field.

### **Example**

The website has the following example: If an individual's name is Juan (first name) Vega (first last name) Santiago (second last name), "VEGA SANTIAGO" would be entered in the last name field and "JUAN"

would be entered in the first name field. This would be the case for a beneficial owner and company applicant.

If an individual's name typically is written with the family name first, that family name should be entered in the last name field.

a. Middle names if it is on the identification should be included.

**4. Exception to Identification.** If a beneficial owner or company applicant's identification document does not include a photograph for religious reasons, the reporting company may nonetheless submit an image of that identification document when submitting its report, as long as the identification document is one of the types of identification accepted by FinCEN, such as a non-expired State-issued identification document.

5. The filing through the FinCEN is a mandatory filing requirement. The fact that your client has a business entity and files the PIR or the OIR report with the Comptroller of Public accounts does not meet the filing requirement.

## **G. Addresses**

**1. US Territories.** When address is in the US territory, the territory code must be selected in the US or US territory field. The system will automatically fail the state field with the relevant code.

**2. Non-US Addresses.** When an address is not in the United States, enter the street address, city, country/jurisdiction, and foreign postal code. If a foreign address contains information that does not exactly match the BOIR address fields, provide the foreign address information in the existing BOIR address fields regardless of whether the field fully matches the address information. All foreign address information should be reflected somewhere in the BOIR address fields provide.

## **VII. Initial Report**

### **A. General**

1. If your company existed before January 1, 2024, it must file its initial beneficial ownership information report by January 1, 2025. The box indicating initial report would be checked on the filing information section of the form.

2. If your company was created or registered on or after January 1, 2024, and before January 1, 2025, then it must file its initial beneficial ownership information report within 90 calendar days after receiving actual or public notice that its creation or registration is effective.

a. This 90-calendar day deadline runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier.

3. If your company was created or registered on or after January 1, 2025, it must file its initial beneficial ownership information report within 30 calendar days after receiving actual or public notice that its creation or registration is effective.

## **B. Determination of Date Company Created or Registered**

1. For a company created or registered after January 1, 2024 date of determination of creation or registration is the earlier of the date on which:

- The reporting entity receives actual notice that its creation or registrations become effective or
- a Secretary of State or similar office first provides public notice, such as through a publicly accessible registry, that the domestic reported company has been created or that the foreign company has been registered.

2. Per FinCEN, they recognize that in some states, automated systems provide notice of creation or registration to newly created or registered companies. While in other states, no actual notice of creation or registration is provided, and newly created companies receive notice through the public posting of state records. FinCEN believes that individuals who create or register reporting companies will likely stay apprised of creation or registration notices or publications, given those individuals' interest in establishing an operating business or engaging in the activity for which the reporting company is created.

3. Likewise, it is important the taxpayer who may be a reporting entity that incorporated after January 1, 2024 have a federal taxpayer identification number. This could be an issue with foreign individuals who have a beneficial ownership reporting requirement as it takes 6 to 8 weeks to obtain that PIN number for foreign person the sooner the application for the TIN, the better result for the taxpayer.

## **C. Consolidated or Combined Reporting**

1. A parent company cannot file a single report on behalf of a group of companies. In other words there is no combined or consolidated reporting. Any company that meets the definition reporting company is not exact must file its own BOI report.

## **D. Inclusion of Historical Beneficial Owners**

1. The initial report should only include the beneficial owners as of the time of filing. There is no requirement to include historical beneficial owners in the file.

## **E. Exempt Entities that are no Longer Exempt**

1. Generally, an entity that loses its exempt status must file a BOI Report within 30 days after the date it is no longer able to meet the requirement or criteria or any exception.

2. A reporting company created or registered to do business before January 1, 2024 and loses their exempt status will still have until January 1, 2025 file its initial report.

3. Previously exempt entities that existed before 2024 and loses their exemption in 2024 will receive the benefit of a timeline that is the longer of either:

- The remaining days left in one year filing period for existing companies or
- The 30 calendar day. For companies that lose their exempt status.

## **Example**

ABC Company is no longer an exempt large operating company on February 1, 2024. ABC company will have until January 1, 2025 file its initial report as a reporting company.

Assume now that ABC company is no longer exempt large operating company on December 15, 2024. ABC company will have until January 14, 2025 to file its initial report. (30 days).

## **VIII. Updated Report**

### **A. General**

1. The Company Applicant would indicate that the report is an update report by checking the box on the Filing Information section which is the beginning of the report.

2. a. If there is **any change** to the required information about your company or its beneficial owners in a beneficial ownership information report that your company filed, your company must file an updated **report no later than 30 days after the date of the change**.

b. A reporting company is not required to file an updated report for any changes to previously reported information about a company applicant.

### **B. What would Constitute a Change?**

1. Any change to the information reported for the reporting company. These could include, but are not limited to the following:

- A registering a new business name or assumed business name.
- A change in beneficial owners, such as a new CEO, or a sale that changes who meets the ownership interest threshold of 25 percent.
- When the beneficial owner dies or a percentage change in ownership under the ownership test
- A Change in substantial control
- Any change to a beneficial owner's name, address, or unique identifying number previously provided to FinCEN.
- A beneficial owner obtaining a new driver's license or other identifying document that includes a changed name, address, or identifying number. The change would also require including an image of the new identifying document.

2. Any change to the reporting company's beneficial owners that should be done in a 30 day timeframe of when the deceased owner's estate is settled. If there any new beneficial owners they would be identified at that time.

3. There is no requirement to report a company's termination or dissolution.



## 4. Example of Updated Reporting

### Example

ABC, Inc. is a reporting entity and has decided to change its legal name to ABC, Co. Under this they would have to file an updated report. The update would not be limited to the new name. ABC would be required to file updated report to include not only the new name but also unchanged information about the company, beneficial owners and if applicable company applicant. In other words a change would require a complete report to be filed.

5. An updated report is not required when the type of ownership interest a beneficial owner has in a reporting company changes.

### Examples

ABC, Inc. is a reporting entity and previously reported preferred stock under ownership test. The company has elected to have a conversion of preferred stock to common stock. There is no requirement to file updated report. The type of ownership interest is not a requirement for reporting just the ownership test 25%.

ABC, Inc. is a reporting entity and previously reported under ownership test. The company has elected to convert preferred stock to common stock. Sean previously owned 30% of preferred stock but is now to receive 40% on it conversion. That change will have to be reported because it's a change in the percentage not the change in the type of ownership.

## C. Late Filing

1. An updated BOI report can be submitted to FinCEN at any time. However, the reporting company is responsible for ensuring that updates are filed within 30 days of a change occurring.

2. If a reporting company has engaged a third-party service provider to file BOI reports and updates on its behalf, then it should communicate any changes to its beneficial ownership information to the third-party service provider with enough time to meet the 30-day deadline.

## IX. Corrected Report

### A. Inaccuracies

1. If an inaccuracy is identified in a BOI report that your company filed, your company must correct it no later than 30 days after the date your company **became aware of the inaccuracy or had reason to know of it.**

2. This includes any inaccuracy in the required information provided about your company, its beneficial owners, or its company applicants.

3. The same 30-day timeline applies to inaccuracies in information submitted by an individual in order to obtain a FinCEN identifier.

4. The box titled Corrected Report would be checked on the Information Section of the form.

5. For both a corrected report updated report, A reporting company that filed its prior BOI report using the fillable PDF version may update its saved copy and resubmit to FinCEN. If a reporting company used

FinCEN's web-based application to submit the previous BOI report, it will need to submit a new report in its entirety by either accessing FinCEN's web-based application to complete and file the BOI report, or by using the PDF option to complete the BOI report and upload to the BOI e-Filing application.

## **X. Newly Exempt Entity**

### **A General**

1. This box would be checked on the filing information page of the form. A reporting company filed a beneficial ownership information report but then becomes exempt from filing the report, the company should file an updated report indicating that it is no longer a reporting company.

2. An updated BOI report for a newly exempt entity will only require that:

- the entity identify itself; and
- check a box noting its newly exempt status.

3. The client does not need report information about existing beneficial owners ownership interest in a reporting company if the ownership interest held through one or more of the exempt entities previously discussed. The client is required to report the name of the exempt entities instead of information about the individual who is the beneficial owner of the company.

### **Example**

ABC, Inc. is a Large Operating Company that owns 50% of the ownership interest in XYZ Company. XYZ Company is a reporting company. ABC, Inc. is exempt because they follow the definition of a large operating company. John owns 50% of the large operating company as an indirect ownership in XYZ Company of 25% ( $50\% \times 50\% = 25\%$ ) the reporting would name the large corporate company instead of John's personal information.

## **XI. Compliance and Enforcement**

### **A. Penalties**

1. Under the Corporate Transparency Act, a person who violates the reporting requirements may be subject to civil penalties up to \$500 for each day the violation continues. Civil penalties will be adjusted in late for inflation. Presently they are \$591 per day for a violation.

2. Likewise, a reporting entity, company applicant or beneficial owner may be subject to criminal penalties of up to two years imprisonment and a fine of up to \$10,000. Potential violations would include willful failing to file the information report, filing a false report or willfully failing to correct or update a report.

3. Criminal penalties of a fine of up to \$250,000 or imprisonment of up to five years (or both). (31 U.S.C. § 5336(h)(3)(B).)

4. If the unauthorized disclosure or use is part of a pattern of illegal activity involving more than \$100,000 in any 12-month period, the criminal penalty is increased to a fine of up to \$500,000 or imprisonment of up to ten years (or both) (31 U.S.C. § 5336(h)(3)(B)(ii)(II))

5. For 2024, since this is new to avoid the penalty an updated or corrected report can be made within 90 days of the deadline for the original report. (See FAQ K. 1)

## **B. Liability Issues**

1. Both individuals and corporate entities can be held liable for willful violations.
2. This includes not only an individual who actually files or attempts to file false information but also eating one who willfully provides the filer with false information to report.
3. Both individuals and corporate entities may be held liable for willfully failing to complete her update beneficial ownership information. Individuals can be held liable if outer cost of failure or senior officer at the company at the time of the failure.
4. An individual who willfully files a false or fraudulent beneficial ownership information report on a company's behalf may be subject to the same civil and criminal penalties as the reporting company and its senior officers.
5. Enforcement action can include those who willfully called a recorded company's failure to submit complete or updated information this can include the beneficial owner, company applicant and the reporting company itself.

## **C. Reporting Company Responsibility for Filing**

1. FinCEN makes it very clear that it is the responsibility of the reporting company to identify the beneficial owners and company applicants and report such accurately to FinCEN. (See FAQ K. 4)
2. At the time the filing is made, each reporting company is required to certify the report or application is true, correct and complete.

## **D. Conflict between Reporting Company and Beneficial Owner**

1. According to FinCEN on its website, reporting companies must put in place mechanisms to ensure beneficial owners will keep the reporting company apprised of changes that they must either update or correct. The reporting is a legal requirement subject to penalties. (See FAQ K. 5)

## **XII. Dissolving and FinCEN Reporting Requirements**

### **A. Overview**

1. FinCEN at present has not provided any specific guidance on liquidation and dissolution of a Reporting Entity.
2. A liquidated or dissolved business is not an exempt entity. It is not a newly exempt entity to be reported as such as an update or correction.
3. An argument could be made that a liquidated or dissolved business is inactive entity. Remember, an inactive entity is exempt from reporting. There are six criteria that must be met. These include the following:
  - The entity was in existence on or before January 1, 2020.
  - The entity is not engaged in active business.

- The entity is not owned by a foreign person whether directly or indirectly, wholly or partially.
- The entity has not experienced a change in ownership in the preceding 12 month period.
- The entity has not sent or received any funds in the amount greater than \$1,000 dollars, either directly or through any financial account in which the entity or affiliate of the entity had an interest, in the preceding 12 months.
- The entity does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in a corporation, LLC or similar entity.

### **Examples**

ABC Company was formed January 1, 2017. The business has been active for over a year. The total amount of assets is less than \$1,000. There has been no revenue from the business and no advertising for well over a year. The business is not owned by a foreign person but all the stock is owned by Bubba (100% stock ownership). Bubba wishes to dissolve ABC Company in 2024. He likely would not file with FinCEN as he meets the criteria.

Now ABC Company was formed January 1, 2017 but the business ceased activity in 2024. All the other criteria to be deemed an active entity exists. Bubba owns 100% of the stock and thus meets the criteria of being a beneficial owner. There is no timeline to determine whether a business is active or not under the Corporate Transparency Act. There is no dissolution exception. Bubba would likely file a report for 2024 at the end of the year. An argument could be made in 2025 that he is a newly exempt entity as an active entity. This will be erroring on the side of conservatorship and caution under the rules.

**Note:** In both examples above, A Certificate of Termination would have to be filed with the Secretary State as further evidence of the entity is now inactive entity.

4. Under the second illustration above, even if the business was formed in 2024 or 2025 and shut down within the year all reporting would likely be required.

5. Note that FinCEN has specifically required an updated report in the event an entity's reporting status changes. At a minimum, a report should be sent regarding a change in the reporting status of the company. In reality given the nature of the penalties that can be imposed on an individual personally, especially without any potential corporate shield, an initial report should probably be sent along with a report of a change in an entity's reporting status. The requirements for reporting a new exempt status is simply to identify the reporting company and indicate the new exempt status.

6. Caution must be taken regarding the dissolution or withdrawal because of the severity of the penalties being imposed.

### **B. Involuntary Termination of a Business Entity in Texas**

1. If the corporate privileges or right to transact business of a taxable entity are forfeited and the taxable entity doesn't pay the amounts necessary to revive its corporate privileges within 120 days, then the Comptroller is required to certify the name of the corporation to the Texas Attorney General and Secretary of State. (See Texas Tax Code Section 171.301, 171.3015 and 171.302)

2. Generally when the corporate privilege or right to transport business is forfeited, one of two things can occur:

a. The Attorney General may file a suit to forfeit the charter or certificate authority of the taxable entity or

b. The Secretary of state may forfeit the taxable entities charter, certificate of registration without a judicial proceeding.

3. Once a taxable entity's charter, certificate, or authority is forfeited, the entity becomes what's known as a "terminated entity." This means that the entity is prohibited from continuing its existence for the purpose of continuing its business or affairs unless the entity is reinstated.

4. The question becomes as to whether the involuntary terminated entity is a newly exempt entity for purposes of the reporting rules to FinCEN. If the entity fits the six criteria he considered an active entity then the argument can be made it is not a reporting requirement. However, if the entity is an active trade or business and did not comply with the filings under the franchise tax board the revived PIR all our reports, the involuntary termination by the Secretary of State only revokes the ability to conduct business in Texas. It is unlikely in the federal law to be deemed a termination or revocation of the charter or original filing. Remember, the beneficial ownership information report is based on the original chartering or original filing.

5. Under Texas law, involuntary termination is recorded at the Secretary of State's website but the initial incorporation or chartering remains on the site is not taken off. Therefore the federal government could make an argument that the reporting entity is still has a requirement even on a de facto basis. This uncertainty remains in play and could expose the company applicant, the beneficial owners to the penalties for not filing timely.

### **XIII. Constitutionality Beneficial Ownership Information Reporting Rule**

#### **A. National Small Business United v. Yellen, No. 5:22 –cv – 01448 – LCB (ND Ala.).**

##### **1. Basis of Lawsuit**

On November 15, 2022, the National Small Business Association (NSBA) and a small business owner by the name of Winkles brought a lawsuit in the US District Court for the Northern District of Alabama challenging the Beneficial Ownership Information Reporting Role of the Corporate Transparency Act. The plaintiffs challenge the constitutionality of the rule asserting that the Corporate Transparency Act in seeking to combat money laundering and other illegal activity requires law abiding Americans to provide highly personal information to a government agency to be stored in a database for criminal enforcement purposes violating privacy protections. In addition, the powers and duties granted are vague and unduly burdensome on small businesses and infringe on state powers to govern business. The plaintiff sought an immediate injunction against the implementation of the Beneficial Ownership Information Reporting Rules.

##### **2. Substantive Aspects of the Case**

The District Court determined that the specific issue in the case is as follows:

*Whether the Constitution gives Congress the power to regulate millions of entities and their stakeholders the moment they obtain a corporate status from a state?*

##### **3. Governments Argument**

**a. Standing Argument.** The federal government argued that the plaintiffs did not have standing to bring the suit and that they failed to show any specific injury to support their claim.

**b. Foreign Affairs and Nationals Security.** The government further argued that the Corporate Transparency Act mandate to require reporting companies to disclose beneficial ownership information is directly tied to Congress's power to conduct foreign affairs because such information is vital to US national security interests, assist national security, intelligence and law enforcement in countering money laundering, the financing of terrorism, other illicit acts and bring the US in line with international anti-money laundering and financing of terrorism standards known as AML/CFT standards.

**c. Commerce Clause.** The Government also indicated in the alternative that the Corporate Transparency Act was about exercise of Congresses power under the Commerce Clause because the Act regulates the channels of interstate and foreign commerce as well as activities that have a substantial effect on interstate and foreign commerce.

**d. Taxing Power and Necessary and Proper Clause.** The government also argued the collection of the information is necessary and proper near ensure taxable income is appropriate reported. To support the argument the Government know that Congress provided for access to the information for tax administration purposes.

## 2. Court Ruling

On March 1, 2024, the District Court determined that the Plaintiffs are entitled to summary judgment as a matter of law. The court granted the plaintiffs request for relief by entering a declaratory judgment that the Corporate Transparency Act is unconstitutional because it exceeds the Constitution's limits on Congress's power. The Court made no ruling as to the constitutionality of the act on any other grounds. The District Court indicated that the Defendant are permanently enjoined from enforcing the Corporate Transparency Act solely against the plaintiff's. Specifically, the District Court indicated that the beneficial ownership information reporting role was unconstitutional because the legislation cannot be justified as an exercise of congresses enumerated powers.

**a. Standing:** The Court disagreed and indicated that Mr. Winkles had standing because the beneficial ownership provisions compelled disclosure of personal information for law enforcement purposes which can be construed as a concrete emanate injury that is traceable to the government. In addition, since Mr. Winkles was a member of NSBA and had standing as an individual, the Association also had standing

**b. Foreign Policy.** The District Court indicated in its ruling that what Congress was doing was not conducting foreign policy or regulating foreign affairs but rather injecting itself into domestic policy where congressional powers were limited. The court went on to state that the act requiring disclosure of beneficial ownership information for entities that incorporate under a state law exceeds congressional authority meaning it exceeds the congresses enumerated powers. The court also indicated that the Act converts an astonishing amount of traditional local conduct into a matter for federal enforcement involves a substantial extension of federal police resources that the Act cannot justifies necessary and proper to carry out congresses foreign affairs powers.

**c. Commerce Clause.** The District Court indicated that the Corporate Transparency Act plain language does not regulate the channels and instrumentalities of commerce let alone commercial or economic activity. The District Court Judge said the Corporate Transparency Act failed to mention the word commerce in the statute all. The Court indicated that while some of the reporting companies would have to disclose beneficial ownership information and may indeed engage in commerce that is not sufficient to sustain the Act under the Commerce Clause because the Act applies to all domestic entities that are created by a document filed with the state or foreign entities that register to do business with the state. The Act neither regulates entities who engage in interstate commerce directly nor the channels for instrumentalities of commerce themselves.

**d. Taxing Power and Necessary and Proper Clause.** The District Court rejected the government argument as not enough further noting that it would be a substantial expansion of federal authority to permit Congress to bring his taxing power to bear just to collect useful data and allow tax enforcement officials to access that data.

### **3. Temporary Result of Decision**

The federal government cannot currently enforce the reporting rules against Mr. Winkles nor can they enforce it against the National Small Business Association and the members of that association as of March 1, 2024. The court's decision specifically stated that those parties are not required to report to FinCEN presently.

### **4. FinCEN and Treasury Response**

FinCEN responded by indicating it would comply with the District Court's Order as long as he remains in effect. Specifically, the government will not enforce the Corporate Transparency Act against the plaintiffs associate with the action. However, the government exerts continuing authority to enforce the law against nonparties and has continued to take that position. FinCEN further indicated that it will continue to implement the Corporate Transparency Act as required by Congress.

## **B. Appeal**

1. On March 11, 2024 the federal government filed an appeal with the 11<sup>th</sup> Circuit Court of Appeals.

2. The Treasury argues in appeal that the Corporate Transparency Act falls within the purview of congresses economic regulatory authority under the Commerce Clause and the Necessary and Proper Clause of Article I of the Constitution. The Treasury reiterates that the primary purpose of the Act is to combat financial crimes such as money laundering, terrorism financing and tax fraud which Congress has historically legislated against. The Treasury Department also disputes the District Court's findings that the Act regulates the mere act of incorporation or formation. The treasury argues that it regulates a class of entities which conduct commercial transactions in their own name not the name of the owners. And that the reporting requirement are triggered by the entity created by the filing of documents with a state because the enemies can enter into contracts, borrow money, incur liabilities and transfer property all of which can be the means by which the owners launder money or conduct illegal transactions. The Treasury argues that the mere act of incorporation or formation is not the regulation.

2. In the Appellate brief, the attorneys for NSBA initially state that the Corporate Transparency Act does not target commercial activities. The NSBA cites the Supreme Court decision in *National Federation of Independent Businesses v. Sebelius* noting that the court held it has never permitted Congress to anticipate economic activity in order to regulate individuals not currently engaged in commerce. Commerce clause is not a general license to regulate an individual from cradle to grave simply because he or she predictably engage in a transaction. They further argued that under state law corporate formation is a governmental and ministerial act not a commercial or economic activity. Further they argue that many individuals create shell companies for law for noncommercial reasons such as individuals forming LLCs to hold family homes for personal security reasons or to create nonprofit associations without tax-exempt status. The Corporate transparency Does not target commercial activities. Rather, it targets entities at their formation and no further activity not even commercial activity is required to bring such entities under review. As such, the Act regulates noneconomic noncommercial activities that do not substantially affect interstate commerce.

**3. Fourth Amendment Search and Seizure Argument.** The NSBA is now arguing that requiring businesses to submit beneficial ownership information for law enforcement purposes is a search and that the fourth amendment reflected the framers judgment that any claim government on the to make law enforcement easier cannot justify suspicionless searches of its citizens. The appellate brief indicated that collecting massive amounts of data from millions of law-abiding American small business owners is not a panacea to our law enforcement and national security threats and it's not constitutional either. The reason the District Court never discuss the fourth amendment is because they found that the Corporate Transparency Act did not fall within congresses enumerated powers.

**C. Gargasz LPA et al v. Yellen (Case 1:23 – CD – 02468 – CEF; US DC Northern District of Ohio)**

1. The plaintiffs challenge the enforcement of the Corporate Transparency Act on constitutional grounds similar in nature to National Small Business United v. Yellen. The District Court entered an order staying the proceedings pending the 11<sup>th</sup> Circuit Appeal case in the Alabama decision.

**D. William Boyle v. Yellen (Case 2:24 – CB – 00081)**

1. This is a recent lawsuit challenging the constitutionality of the Corporate Transparency Act as infringing upon state sovereignty. The lawsuit argues the primary authority to charter and govern corporate entities rests with the states. By imposing a federal standard for incorporation, the Corporate Transparency That allegedly oversteps congresses powers and contravenes the principles of federalism and state autonomy.

2. The regulation allegedly lies outside of Congresses enumerated powers, such as managing foreign affairs, regulate commerce or levy taxes. The lawsuit indicates the formation of reported company is described as a local act that bears no relation of foreign affairs or national security, noting that many companies may not partake in commerce across state lines with foreign nations or Indian Tribes.

**E. Small Business Association of Michigan v. Yellen , US District for W D Mich, March 26, 2024**

1. The Small Business Association of Michigan brought a suit challenging the Corporate Transparency Act on constitutional grounds. The lawsuit requests immediate relating to all compliance requirements the complaint requests the court declared the Act unconstitutional and grant preliminary injunctive relief against enforcement. The District Judge presiding denied immediate relief.

2. The Michigan suit argues that the Act provides warrantless and suspicionless searches of American citizens and companies and violates the US constitutional protections under the Fourth Amendment. The complaint further alleges is that the Act is unconstitutional and therefore void. The Complaint indicates that the definition of a beneficial owner *includes anyone who exercises substantial control over an entity whether directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise.* The lawsuit argues that the vagueness requires American citizens to guess how much control is substantial and what sorts of relationships or otherwise qualify as control sufficient to require all reporting for risk the imposition of penalties. The lawsuit further states that privacy matters are the concern because many state, federal and foreign agencies will be able to access the information furnished.



**F. Texas Top Chop Shop, Inc. v. Merrick Garland (Case No. 4:24 – CB – 00478 – ALM; US District Court, Eastern District of Texas)**

1. The Plaintiffs are challenging the enforcement of the Corporate Transparency Act on constitutional grounds seeking an injunction prohibiting the government from enforcing the Act and the reporting rules in a declaratory judgment invalidating the Act in its entirety and wholly unlawful in setting aside the reporting Rules. The relief sought in this case goes beyond the Plaintiffs but to all parties currently affected by the reporting requirements. On June 3, 2024 plaintiffs filed a motion for preliminary injunction prohibiting defendants from enforcing the Implementing any further regulations or proceedings. A court hearing has not been set on this matter.

**G. Black Economic Council of Massachusetts, Inc. v. Yellen (Case No. 1:24 – CB – 11411 – PBS)**

1. The plaintiffs seek to declare the Corporate Transparency Act unconstitutional and attain a permanent injunction enjoining defendants and any other federal agencies or employees acting on behalf of the Defendants reinforcing any provisions of the Act against any individual, applicant or entity. The request goes beyond plaintiffs in the case to all parties currently affected by the reporting requirements. This is a most recently filed case in Texas above.