

Corporate Transparency Act: Filing Requirements Reinstated – Practical Panel Discussion On What To Do Now?

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Corporate Transparency Act: Filing Requirements Reinstated – Practical Panel Discussion On What To Do Now?

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CTA

A Quickie Refresher

**You Know All This
but Just To Set the
Stage**



A Bit of Background

- Background to the CTA including its purposes, how it has been implemented and its current rules.
- The law is imposed on entities, not individuals and that there is no mechanism in the law forcing individuals to comply. Yet, individuals who thwart the law (and possibly the regulations--cf. Loper Bright) can be fined or incarcerated.
- Reporting companies include closely held business entities whether they be limited partnerships (LPs), limited liability companies (LLCs), S corporations, other corporations unless they are specifically exempt. FinCEN has made the requirements broad and complex and even includes entities that might be inactive or terminated.
- Beneficial Owners include anyone who owns 25% or more of a reporting company or who has “substantial control” over an entity. The definition of “substantial control” is both broad and vague so that many people who are officers, directors, managers, key employees, etc. of a reporting company may have to provide information to the reporting company to report them as a BO. If a trust owns or controls interests in a reporting company, the filing requirements become exponentially more complicated and many or all people named in fiduciary and other capacities in the trust may have to provide BOI information to the reporting company.

Court Cases and FinCEN

**Where are We At
(Approximately)**



National Small Business United v. Yellen

- On March 1, 2024, the U.S. District Court for the Northern District of Alabama held that the Corporate Transparency Act (CTA) was unconstitutional. National Small Business United et al. v. Yellen et al., No. 5:22-cv-01448 (N.D. Ala. 2024)
- The court concluded that the CTA exceeded the limits of Congress's power and could not be justified as an exercise of Congress's enumerated powers. The court's decision was based on the argument that the CTA's disclosure requirements exceeded Congress's authority under Article I of the Constitution.
- The court's ruling specifically enjoined the federal government from enforcing the CTA against the plaintiffs in the case, which included the National Small Business Association (NSBA) and Isaac Winkles. However, the judgment left the CTA intact against other parties and was highly likely to be appealed.

Texas Top Cop Shop

- On December 3, 2024, the U.S. District Court for the Eastern District of Texas, Sherman Division, issued an order granting a nationwide preliminary injunction against the CTA.
- Texas Top Cop Shop, Inc., et al. v. Garland, et al., No. 4:24-cv-00478 (E.D. Tex.).
- The court's decision was based on the argument that the CTA regulates corporate formation, which is governed by state law, rather than interstate commerce. The court emphasized that the Constitution must stand firm and that modern problems do not grant Congress a license to legislate outside the boundaries of the Constitution. The court granted the plaintiffs' motion for a preliminary injunction, enjoining the government from enforcing the CTA.

5th Circuit

- Texas Top Cop Shop, Inc., et al. v. Garland, et al., No. 4:24-cv-00478 (E.D. Tex.)
- The Fifth Circuit Court of Appeals granted the government's motion to stay the preliminary injunction issued by the Eastern District of Texas, which had enjoined the enforcement of the CTA. The court's decision effectively reinstated the CTA's requirements while the appeal is pending.

FinCEN Announcement - 1

- FinCEN issued a press release about the recent court developments:
- In light of a December 23, 2024, federal Court of Appeals decision, reporting companies, except as indicated below, are once again required to file beneficial ownership information with FinCEN. However, because the Department of the Treasury recognizes that reporting companies may need additional time to comply given the period when the preliminary injunction had been in effect, we have extended the reporting deadline as follows:
 - Reporting companies that were created or registered prior to January 1, 2024 have until January 13, 2025 to file their initial beneficial ownership information reports with FinCEN. (These companies would otherwise have been required to report by January 1, 2025.)
 - Reporting companies created or registered in the United States on or after September 4, 2024 that had a filing deadline between December 3, 2024 and December 23, 2024 have until January 13, 2025 to file their initial beneficial ownership information reports with FinCEN.

FinCEN Announcement - 2

- FinCEN issued a press release....
 - Reporting companies created or registered in the United States on or after December 3, 2024 and on or before December 23, 2024 have an additional 21 days from their original filing deadline to file their initial beneficial ownership information reports with FinCEN.
 - Reporting companies that qualify for disaster relief may have extended deadlines that fall beyond January 13, 2025. These companies should abide by whichever deadline falls later.
 - Reporting companies that are created or registered in the United States on or after January 1, 2025 have 30 days to file their initial beneficial ownership information reports with FinCEN after receiving actual or public notice that their creation or registration is effective.
- Plaintiffs in *National Small Business United v. Yellen*, No. 5:22-cv-01448 (N.D. Ala.)—namely, Isaac Winkles, reporting companies for which Isaac Winkles is the beneficial owner or applicant, the National Small Business Association, and members of the National Small Business Association (as of March 1, 2024)—are not required to report their beneficial ownership information to FinCEN at this time.

FinCEN Announcement - 3

- On Tuesday, December 3, 2024, in the case of Texas Top Cop Shop, Inc., et al. v. Garland, et al., No. 4:24-cv-00478 (E.D. Tex.), the U.S. District Court for the Eastern District of Texas, Sherman Division, issued an order granting a nationwide preliminary injunction. On December 23, 2024, the U.S. Court of Appeals for the Fifth Circuit granted a stay of the district court's preliminary injunction enjoining the Corporate Transparency Act (CTA) entered in the case of Texas Top Cop Shop, Inc. v. Garland, pending the outcome of the Department of the Treasury's ongoing appeal of the district court's order. Texas Top Cop Shop is only one of several cases that have challenged the CTA pending before courts around the country. Several district courts have denied requests to enjoin the CTA, ruling in favor of the Department of the Treasury. The government continues to believe—consistent with the conclusions of the U.S. District Courts for the Eastern District of Virginia and the District of Oregon—that the CTA is constitutional. For that reason, the Department of Justice, on behalf of the Department of the Treasury, filed a Notice of Appeal on December 5, 2024 and separately sought of stay of the injunction pending that appeal with the district court and the U.S. Court of Appeals for the Fifth Circuit.

Latest Update

- Plaintiffs challenging the beneficial ownership reporting requirements of the Corporate Transparency Act petitioned the Fifth Circuit for rehearing en banc after a panel granted a stay of a preliminary injunction order to prevent enforcement of the act, arguing that the panel decision conflicts with Supreme Court precedent and improperly weighed the equities in favor of the government.

What To Tell Clients Now

File!

File!

- Simply put FinCEN is not backing down and wants filings made. Because there was a brief period of time when those required to report may have reasonably understood that the reporting might not be required. FinCEN has provided a brief extension of the filing deadline for most reporting companies from January 1, 2025 to January 13, 2025. That is not going to be much reprieve for those required to file that have not even began the process of evaluating their filing requirements and collecting the relevant information to complete a filing. What this also seems to suggest is that FinCEN is “sticking to its guns” and insisting on filing pretty much in accordance with the rules that existed before the court cases may have raised hopes that the CTA might disappear. So, as noted above, it really seems that anyone who has not yet filed that may have to, should do so.

Practical Tips on Filing

**But You Have to
Get it Done!**



To Tell the Truth!

- How many incredibly bright nationally known advisers have, in utter frustration, called people on this panel asking for help with the CTA???

Many Clients Will Not Have the Ability to File or Access Online Info

- Company filings must be via the internet. What if someone does not have access to the internet? There are hundreds of thousands of people who do not have internet access. Over one million are over 90. According to data from the Pew Research Center and other sources, roughly 40% of Americans aged 80 and above do not have internet access, which would include
- A significant portion of those over 90 years old
- This means a substantial number (probably well over a million) of older Americans in this age group lack access to the internet.

Some Tips to Tell Clients

- Practitioners should request that clients who file on their own send in copies of their self-filed BOIRs.
- The most common is missing the Line 16 Existing Reporting Company tiny box that must be checked for entities existing at 12/31/2023. The box is just above the Company Applicant section. Clients with entities created 20-years ago have erroneously reported Company Applicant info, requiring a corrected BOIR.
- Foreign BO's having uploaded something other than a foreign passport. Several German BOs thought they could use their official German National Identity Card, which can be used throughout the EU for travel. The ID has to be a German passport.
- Instead of self-filing at the FinCEN Website, some clients use commercial third-party providers that opened in the past year just to submit BOIRs to FinCEN. Can you vet these new companies in time for cybersecurity, accuracy, or integrity? Clients may not realize that even if they use a filing service they still have to obtain the information.

What To Do If You Cannot Get All The Info on a Beneficial Owner?

- There is no mechanism to provide that the information is not available. So, do you put in "false" information so most of the information is sent to FinCEN or do you just not file at all? Should you send an email/letter/telephone message to FinCEN explaining that you tried but you could not complete the form? How can you do any of these?
- The online web portal won't let you file with less than complete information.
- You might insert guesstimates or you cannot file.
- Consider filing in paper and attaching a statement, perhaps like: "We have not been able to obtain information from or about Jane Smith who we believe to be a beneficial owner for the Reporting Company other than what has been reported."

The System is Down or Anything Else Goes Wrong

- Paper file with an explanation attached similar to what was suggested above.
- Take screen shots of the issues you encounter to prove what happened.
- The forms have little "forgiveness" where there is a lack of information.

Some Additional Thoughts on Problems

- Unlike other countries (e.g., UK), where compliance is on certain groups (e.g., banks), the CTA applies to virtually everyone including trust beneficiaries who do not even know they may be regarded as beneficial owners.
- It is unconstitutional to use selective prosecution. With millions involved, how will the government determine who will be prosecuted?

Step by Step Suggestions

**Maybe This Will
Help Some Clients**



Step by Step – Step 1 Template

- Step 1: Set up a template or “cheat sheet” to record all the information you will need for filings. In this way, when you actually begin to complete the filings for each Reporting Company it will be much easier and more efficient. You’ll also have a record of information to know if in the future you have to amend a report.
- If you are going to assist other Beneficial Owner’s you will need their full legal name, Social Security Number, home address, birthdate, identification, etc.
- For each Reporting Company you should obtain a copy of the legal document (certificate) that was used to form the entity. That should be a copy of the document accepted for filing by the state so that you have the correct date of formation, etc. You will also need the Tax Identification Number for the entity, physical business address, etc.
- If you collect all the necessary information before you start to file the filing process will be much easier and quicker. Don’t start to file to then collect the necessary information.

Step by Step – Step 1 Organize Your Laptop

- Also, set up a file folder on your computer to store your memo and key legal documents you'll need. That way you have everything accessible before you begin actual filings. Save the various receipts you receive from filing with FinCEN. Be certain that the laptop is backed up, encrypted, and that you have all appropriate cybersecurity protections, especially if you are holding confidential information for other Beneficial Owners.

Step by Step – Step 2

- Step 2: Identify each Reporting Company for which you are legally or practically responsible to assure that the CTA filing is made. For each Reporting Company identify every Beneficial Owner that will be required to provide Beneficial Owner Information (BOI). These decisions are often not simple or obvious but are not the subject of this article. The FinCEN Small Entity Compliance Guide and the FAQs posted by FinCEN to its website. Unfortunately, that information is voluminous and to get the decisions made, information gathered, and filings completed by January 13 it may be best to hire a professional familiar with rules if you cannot reach conclusions on filings quickly.

Step by Step – Step 3

- Step 3: Consider the approach of every Reporting Company obtaining a FinCEN Identifier Number for every Beneficial Owner whose information they have to report. That approach simplifies the process for Reporting Companies as the only information they will generally need to input is the entity's basic information and the FinCEN Identifier number for each Beneficial Owner. The Reporting Company can avoid having to have a copy of the Beneficial Owner's driver's license, home address, and other confidential information. That will make it safer as then that data is not in the Reporting Company's possession to risk hacking or other loss. The Beneficial Owner will often be more comfortable not submitting that information to the Reporting Company. Also, and this is quite important, if any Beneficial Owner's information changes (e.g., new driver's license, move to a new home address, etc.) the onus of updating that information is on the Beneficial Owner, not on the Reporting Company. If you take this approach contact each Beneficial Owner and have each obtain their own FinCEN Identifier Number and provide it to the Reporting Company. On the FinCEN website it says: "A FinCEN ID is a unique identifying number issued to an individual by FinCEN. Although there is no requirement to obtain a FinCEN ID, doing so can simplify the reporting process."

Step by Step – Step 4

- Step 4: Have every Beneficial Owner obtain a FinCEN Identifier Number. Before getting started be sure to have a PDF of your driver's license and if you don't have a driver's license a passport or sufficient state identification card. If you don't have a PDF you might be able to take a photograph with your smart phone and convert that .jpg file to a PDF. To convert a .jpg photograph to a PDF you may have an app on the phone you can use or you can purchase a third-party app that will make the conversion. Search online for the phone you have as to how to do this.
- If you don't already have a login.gov account set one up. Go to https://secure.login.gov/sign_up/enter_email. You can also access this on the FinCEN website: <https://fincenid.fincen.gov/landing>.
- Enter your email address. You will get an email from login.gov to confirm your email address. Do that. Then set up a password. Be sure to save it someplace secure. This password should not be given to the Reporting Company you have to provide information to. Set up multi-factor authentication (MFA).

Step by Step – Step 4

- Step 4 continued: The FinCEN website says: “To obtain a FinCEN ID for yourself, click the Create Account button to create an account and begin the application for a FinCEN ID. If you already have an account, login in to enter your identifying information on the FinCEN ID application.”
- Once your login.gov account is set up, and you have the PDF of your identification, go to <https://fincen.gov/boi>. On right side of screen click on “Create Fin Cen ID.” Apply to get your FinCEN Identifier Number.
- Do the above for each of Beneficial Owner.
- Once you have a FinCEN identifier for each Beneficial Owner, now you can file for each Reporting Company entity.

Step by Step – Step 5

- Step 5: Identify each entity you have to file for if you have not already done that, and collect the information you need for each entity. You'll need:
- Obtain a copy of the certificate filed to create the entity before you begin, the Tax Identification Number, and the physical address of the entity.
- Name of entity. This should be the exact legal name from the documentation forming the entity.
- Alternative names the entity might use or operate under.
- Tax identification number.
- Upload the certificate creating the entity where indicated. Although this seems to be required the FinCEN system does not seem to prompt for it. Emails to FinCEN have gone unanswered.
- <https://boiefiling.fincen.gov/fileboir>
- Click the button as to type of report for Item 1.
- For each you need to get the certificate forming the entity to upload and Tax identification number.

Step by Step – Step 6

- Step 6: When you complete the filing, copy and paste the confirmation of filing including the BOIR number into the template you created above. In that way you have one document with all relevant CTA filing information.
- Before leaving the page that confirms your filing was complete download and save in a CTA file folder on your computer the PDF of the filing confirmation be sure to add the name of the entity involved to the name you use to save it because the confirmation does not indicate anywhere which entity it is for (another example of the difficulty and lack of practicality of the FinCEN website and handling of the CTA). You should receive an email confirming the filing was complete. Save that as well and again be certain to add the reporting company name to the file name so it is clear which entity it is for.

Conclusion and Additional Information

Sub-Title



Conclusion

- File!
- When in doubt file!
- Remember the Nike commercial: “Just Do It!”
- If you cannot get the system to take your filing consider downloading the PDF of the forms, completing them, and filing that way with attached statements.

Additional information

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