

FCPA Update

A Global Anti-Corruption Newsletter



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Corporate Transparency Act Reporting Obligations Paused Again, Further Developments Expected

As this article goes to print, beneficial ownership reporting obligations under the Corporate Transparency Act and its implementing regulations (together, the “CTA”) are again on pause.

On the evening of December 26, 2024, the U.S. Court of Appeals for the Fifth Circuit issued an order in *Texas Top Cop Shop, Inc., et al. v. Merrick Garland, et al.* vacating a December 23, 2024, order of the court’s motions panel that had reinstated CTA reporting obligations.¹ This latest decision means the December 3, 2024, preliminary injunction issued by the U.S. District Court for the Eastern District of Texas that enjoined enforcement of the CTA is back in effect.

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1. *Texas Top Cop Shop, Inc., et al. v. Merrick Garland, et al.*, No. 24-40792, Document 160 (5th Cir. Dec. 26, 2024), available here.

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On December 27, 2024, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") updated its website to reflect this development and to indicate again that reporting companies are not obligated to (but may voluntarily) report beneficial ownership information while the preliminary injunction remains in effect.

The Fifth Circuit has scheduled oral argument on the government's appeal of the District Court order for March 25, 2025. The government could, in the meantime, seek *en banc* review of the December 26, 2024, order reinstating the District Court injunction or an emergency stay from the Supreme Court. With further developments in the litigation expected, companies that fall within the CTA's scope should continue to monitor closely.

We provide below a summary of the litigation based on a client update published before these latest developments.

December 23, 2024, Order and FinCEN Response

On December 23, 2024, the U.S. Court of Appeals for the Fifth Circuit reinstated beneficial ownership reporting obligations under the CTA.² These obligations had been stayed by a nationwide preliminary injunction issued December 3, 2024, by the U.S. District Court for the Eastern District of Texas.³

In response to the Fifth Circuit decision, FinCEN issued a statement extending beneficial ownership information reporting deadlines, as set out in detail below.⁴ In particular, FinCEN provided an extension to January 13, 2025, for entities within the CTA's scope that were created before January 1, 2024, and provided extensions for certain other reporting companies, depending on when they were created.

Background

The CTA generally requires FinCEN to implement a beneficial ownership reporting regime, with certain companies required to disclose information about their beneficial owners, senior officers and other control persons to the federal government.

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2. *Texas Top Cop Shop, Inc. v. Garland*, No. 24-40792, Document 140-2 (5th Cir. Dec. 23, 2024), *available* here.
 3. *Texas Top Cop Shop, Inc. v. Garland*, No. 4:24-cv-478, Document 30 (E.D. Tex. Dec. 3, 2024), *available* here.
 4. FinCEN, "Alert: Updates to Beneficial Ownership Information Reporting Deadlines – Beneficial Ownership Information Reporting Requirements Now in Effect, with Deadline Extensions," *available* here.

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FinCEN's first regulation implementing the CTA was published on September 30, 2022, and went into effect on January 1, 2024. It established that reporting companies created or registered to do business in the United States on or after January 1, 2024, must report beneficial ownership information within a specified period after their creation or first registration, and entities created and registered to do business before January 1, 2024, must file initial beneficial ownership information reports by January 1, 2025.

Texas Top Cop Shop Complaint

The plaintiffs in the Texas case filed suit in May 2024, claiming that Congress exceeded its authority in enacting the CTA and that the statute violates the First, Fourth, Ninth and Tenth Amendments of the U.S. Constitution.

“On December 27, 2024, [FinCEN] updated its website to reflect this development and to indicate again that reporting companies are not obligated to (but may voluntarily) report beneficial ownership information while the preliminary injunction remains in effect.”

December 3, 2024, District Court Decision

The District Court held in its December 3, 2024, ruling that the plaintiffs have a substantial likelihood of success because the CTA likely extends beyond Congress's powers.

The District Court accordingly granted the plaintiffs' motion for a preliminary injunction to enjoin enforcement of the CTA. Having determined that the plaintiffs satisfied the elements for a preliminary injunction, the District Court also determined that a stay of the January 1, 2025, reporting deadline was “necessary to prevent irreparable injury.”⁵

As a result of the District Court's ruling, the obligation to comply with beneficial ownership reporting requirements under the CTA was suspended.

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5. 5 U.S.C. § 705.

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Developments on Appeal

On December 5, 2024, the Biden administration filed a notice of appeal to the U.S. Court of Appeals for the Fifth Circuit and, on December 11, 2024, filed a motion with the District Court to stay the preliminary injunction pending the government's appeal. The District Court denied the motion to stay on December 17, 2024.

On December 13, 2024, the government also filed an emergency stay motion with the Fifth Circuit, requesting a ruling no later than December 27, 2024, given the January 1, 2025, reporting deadline.⁶ It was this motion that was granted on December 23, 2024. The Fifth Circuit held, among other things, that the government has made a strong showing that it is likely to succeed on the merits in defending the CTA's constitutionality and expedited the appeal to the next available oral argument panel.

FinCEN Response and Next Steps

Following the December 3, 2024, preliminary injunction, FinCEN issued a statement on its website acknowledging the District Court decision and the government's appeal, indicating that the court's decision paused the beneficial ownership reporting obligation and providing that reporting companies would not be subject to liability for failing to report while the preliminary injunction was in effect.

After the Fifth Circuit granted the government's emergency motion for a stay of the injunction on December 23, 2024, FinCEN updated this statement, reinstating the reporting obligation and extending the reporting deadlines for certain entities, as follows:

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6. Defendants-Appellants' Emergency Motion for Stay Pending Appeal, *Texas Top Cop Shop, Inc. v. Garland*, No. 24-40792, Document 21 (5th Cir. Dec. 13, 2024).

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Date of Creation or First Registration	Initial Reporting Deadline
Before Jan. 1, 2024	Jan. 13, 2025
Jan. 1, 2024 – Sept. 3, 2024	Within 90 days of notice of creation or registration
Sept. 4, 2024 – Sept. 24, 2024	Jan. 13, 2025
Sept. 25, 2024 – Dec. 2, 2024	Within 90 days of notice of creation or registration
Dec. 3, 2024 – Dec. 23, 2024	Additional 21 days from original filing deadline (i.e., within 111 days of notice of creation or registration)
Dec. 24, 2024 – Dec. 31, 2024	Within 90 days of notice of creation or registration
On or after Jan. 1, 2025	Within 30 days of notice of creation or registration

As noted at the outset, companies within the CTA’s scope should monitor developments closely and prepare to file beneficial ownership information reports with FinCEN as may be required.

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DOJ Reports Progress on Compensation Pilot Program

In March 2023, DOJ's Criminal Division introduced a three-year "Pilot Program Regarding Compensation Incentives and Clawbacks."¹ This Program encourages companies to promote ethical behavior and build compliance considerations into their compensation systems, including regarding bonuses and performance reviews. It aims to deter wrongdoing and shift the financial burden of penalties from shareholders, who often are not involved in the relevant misconduct, to individuals who are directly responsible. On November 22, 2024, DOJ provided a written update on the Program's progress.² The update highlighted both successes and areas for improvement based on how companies across various industries have incorporated compliance-focused criteria into their compensation systems.

Elements of the Compensation Pilot Program

The Program is built around two key elements:

1. **Mandatory Requirement:** Companies resolving cases with DOJ's Criminal Division must implement compliance-related criteria into their compensation systems. These criteria must include clear and measurable metrics to ensure transparency and prevent confusion, such as:
 - Prohibiting bonuses for employees who fail to meet compliance standards;
 - Imposing financial penalties on culpable employees and supervisors who were involved in or ignored misconduct; and
 - Rewarding employees for ethical behavior and adherence to compliance policies.
2. **Voluntary Fine Reduction for Clawbacks:** Companies that successfully withhold or claw back compensation from employees involved in wrongdoing may receive a reduction in fines. Specifically, they are eligible for:
 - A dollar-for-dollar reduction in fines for the amount of compensation recouped; and
 - Up to a 25% reduction in fines for good faith attempts to recoup compensation, even if unsuccessful.

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1. U.S. Dep't of Justice, *The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks* (Mar. 3, 2023), <https://www.justice.gov/criminal/criminal-fraud/file/1571941/dl>; Kara Brockmeyer, et al., "DOJ Issues Trio of Updates That Further Heighten Compliance Expectations," FCPA Update, Vol. 14, No. 8 (Mar. 2023), <https://www.debevoise.com/media/files/insights/publications/2023/03/fcpa-update-march-2023.pdf>.

2. U.S. Dep't of Justice, *U.S. Department of Justice Criminal Division Corporate Enforcement Note: Report on the Pilot Program Regarding Compensation Incentives and Clawbacks* (Nov. 22, 2024), <https://www.justice.gov/criminal/media/1378086/dl?inline>.

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DOJ Sees Meaningful Progress and Innovative Solutions by Companies

The Program reflects DOJ's commitment to fostering compliance and offers an additional opportunity for organizations to showcase their commitment to compliance, complementing the guidance provided by DOJ in its "Evaluation of Corporate Compliance Programs." The Program, developed with input from stakeholders and industry experts, has delivered notable results. To date, according to DOJ, "at least sixteen companies across industries—including technology, finance, cryptocurrency, manufacturing, and energy"—have successfully implemented its measures.

DOJ emphasized that in order for the Program to succeed, there must be flexibility in applying its criteria. As DOJ has recognized, each industry has distinct risks that require a tailored approach to compliance. For instance, one company incorporated compliance adherence and misconduct reporting into annual performance reviews. This initiative, paired with a company-wide compliance campaign, significantly increased internal reporting of potential issues. DOJ also observed that many companies now include compliance metrics in performance reviews for senior executives.

Some companies have gone beyond mandatory requirements, proactively adopting compliance-focused compensation practices before engaging with DOJ. In one case, a company replaced contract-winning metrics in its commercial team's bonus structure with incentives tied to ethics training and annual integrity reviews. DOJ views such sector-specific innovations as key to cultivating a culture of accountability and ethical conduct. But creating incentives and adopting practices alone are not sufficient. DOJ continues to urge companies to regularly assess the effectiveness of these strategies, share insights, and refine their compliance practices to ensure long-term success.

Fine Reduction Process Gains Momentum

The Program also provides financial incentives for companies that hold wrongdoers accountable by withholding, reducing, or clawing back compensation. Companies that already have recouped compensation receive an upfront fine reduction equal to the amount recouped. For anticipated clawbacks, companies pay a reduced fine based on predicted recoupments, with any remaining balance adjusted at the end of the term based on actual amounts recouped. Even unsuccessful clawback efforts can earn companies up to a 25% credit if they demonstrate a good-faith attempt. DOJ considers such efforts as part of its evaluation of a company's cooperation and remediation.

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While this fine reduction initiative has not yet seen as much activity as the compensation incentive aspects of the Program, it is starting to gain some traction. To date, three companies—two in FCPA cases and one in a Bank Secrecy Act case—have received fine reductions under the Program; one of these companies has deferred part of its fine while pursuing additional clawbacks.

The companies benefiting from the Program include:

- **Albemarle:** The company proactively froze future bonuses for those who were involved in or oversaw misconduct, avoiding the need to pursue clawbacks. It earned a fine reduction equal to withheld bonuses and received a 45% penalty reduction due to substantial cooperation and remediation, despite not qualifying for a declination due to delayed disclosure to DOJ.
- **SAP:** The company withheld compensation from culpable employees and defended its actions in litigation, receiving a fine reduction equal to withheld amounts and contributing to a 40% penalty reduction.
- **TD Bank:** The bank withheld future bonuses from employees at various levels, avoiding the need for clawbacks, and received a proportional fine reduction. It became the first company to defer part of its fine based on predicted future withholdings, with the potential for further reductions if successful.

“Proactively withholding benefits from wrongdoers, as part of the cooperation and remediation process, has resulted in substantial penalty reductions for companies, even in cases where delayed disclosure prevented them from qualifying for full declinations.”

As is evident from these cases, DOJ is acknowledging the practical advantages of withholding future compensation over seeking to claw back payments already made. Withholding simplifies enforcement, reduces litigation risks, and reinforces accountability, making it an effective strategy for fostering a culture of ethical behavior.

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Encouraged by these successes, DOJ announced that prosecutors will emphasize the Program and other compliance-related considerations early in investigations. This approach aims to give companies ample time to implement corrective measures and remediation strategies, reinforcing DOJ's broader goal of promoting accountability and compliance across industries.

DOJ has recognized the success of companies that adopt flexible and innovative approaches to incorporating compliance into their incentive systems. However, it is crucial for companies to establish clear and consistent standards and metrics in these systems to avoid employee confusion. Achieving this generally will require explicitly outlining compensation and other compliance incentive and disincentive policies to employees, including relevant provisions in employment agreements where applicable, clearly communicating and obtaining acknowledgment from employees, and developing an internal plan to address any appeals or challenges to such policies and provisions in order to remain compliant with employment laws.

Key Takeaways

- DOJ appears to consider the Program to be demonstrating early success, as companies are adopting innovative and creative compensation-related measures that have been positively received by the government.
- Proactively withholding benefits from wrongdoers, as part of the cooperation and remediation process, has resulted in substantial penalty reductions for companies, even in cases where delayed disclosure prevented them from qualifying for full declinations.
- Companies have significant flexibility in designing their own compliance-based compensation systems, with DOJ looking for measurable outcomes to assess efficacy. This flexibility, however, also makes it more difficult to discern clear standards for DOJ's assessment of companies' efforts.

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