

# Florida Business Entities

## What's Important to Know for Real Estate Transactions



# LLC Beneficial Attributes

- Apparent Authority
- Foreigners can be members or managers
- Flexible management structure
- Flexibility for 1031 exchange transactions

# More LLC Attributes

- Can elect tax treatment
- Statement of Authority and Statement of Denial
- Non-member veto power
- Can back-date by up to 5 days

# A Few Distinctions

- Operating agreement superior to articles of organization
- Operating agreement may be implied
- Protection from reverse piercing for multi-member LLC

# Brief History

- As early as 1982, but seldom used
- FL had imposed a corporate tax on LLCs
- In 1998 corporate tax eliminated
- Soon thereafter, became entity of choice

*Have option to "check the box"  
for tax election*

# Brief History

- New Statute, F.S. Chapter 605
- Became fully effective January 1, 2015
- Minor amendments thereafter

An LLC is a

***HYBRID***

between a corporation and a  
partnership

# Comparisons to Corporations

ITEM	CORPORATION	LIMITED LIABILITY COMPANY
<b>Document to Form Entity</b>	Articles of Incorporation	Articles of Organization
<b>Governing Documents</b>	Bylaws/ Shareholders Agreement	Operating Agreement
<b>Owners (Ownership)</b>	Shareholder(s) (shares, capital, stock)	Member(s) (participation interest)
<b>Authorized Parties- (Apparent Authority)</b>	Director(s); President, VP, Treasurer, Secretary, Chief Executive Officer, Chief Financial Officer; (or any other party duly authorized)	Member(s) or Manager(s) but not both; (or any other party duly authorized)



# Statement of Authority



## STATEMENT OF AUTHORITY

Pursuant to section 605.0302(1), Florida Statutes, this limited liability company submits the following statement of authority:

**FIRST:** The name of the limited liability company is: \_\_\_\_\_  
\_\_\_\_\_

**SECOND:** The Florida Document Number of the limited liability company is: \_\_\_\_\_

**THIRD:** The street address of the limited liability company's principal office is:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The mailing address of the limited liability company's principal office is:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**FOURTH:** This statement of authority grants or sets limitations of authority on all persons having the status or position of a person in a company, whether as a member, transferee, manager, officer or otherwise or to a specific person on the following:

1. May execute an instrument transferring real property held in the name of the company.
  - a. Granted to: \_\_\_\_\_  
\_\_\_\_\_
  - b. No authority granted to: \_\_\_\_\_  
\_\_\_\_\_
2. May enter into other transactions on behalf of, or otherwise act for or bind, the company.
  - a. Granted to : \_\_\_\_\_  
\_\_\_\_\_
  - b. No authority granted to: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Signature of authorized representative

\_\_\_\_\_  
Typed or printed name of signature

**Filing Fee: \$25.00**  
**Certified Copy: \$30.00 (optional)**

# Proper Terminology

Manager Managed  
or  
Member Managed

**NOT** – Managing Member-  
Confusing and eliminated in the  
Revised Act.

# Manager Managed v Member Managed

- A Member of a Manager Managed LLC has **NO** authority to act for a Manager Managed LLC.
- Similarly, the revised LLC Act does **NOT** empower a Manager with any powers to act for a Member Managed LLC.

Terms are **NOT**  
interchangeable



# Statute of Frauds

- Real Estate Contract = **Yes**
- LLC Operating Agreement = **See Next Slide for Answer**



# LLC Operating Agreement



- Statute of Frauds does not apply.
- The Operating Agreement does not need to be identified as an “Operating Agreement.”
- May be “oral, implied, in a record, or any combination thereof.”
- “Record” includes emails, course of dealing, usage of trade, or implied terms.
- The most important part of an LLC –

Should be as clear and comprehensive as possible.

# INTERGRATION CLAUSE

## Entire Agreement

This Agreement together with all exhibits hereto contains the entire agreement and supersedes all prior agreements, oral or written, with respect to the subject matter hereof. This Agreement may be changed only by an agreement in writing signed by the party against whom any waiver, change, amendment, modification, or discharge is sought.



# EXAMPLE OF SINGLE MEMBER LLCs



FL LLC

PROPERTY

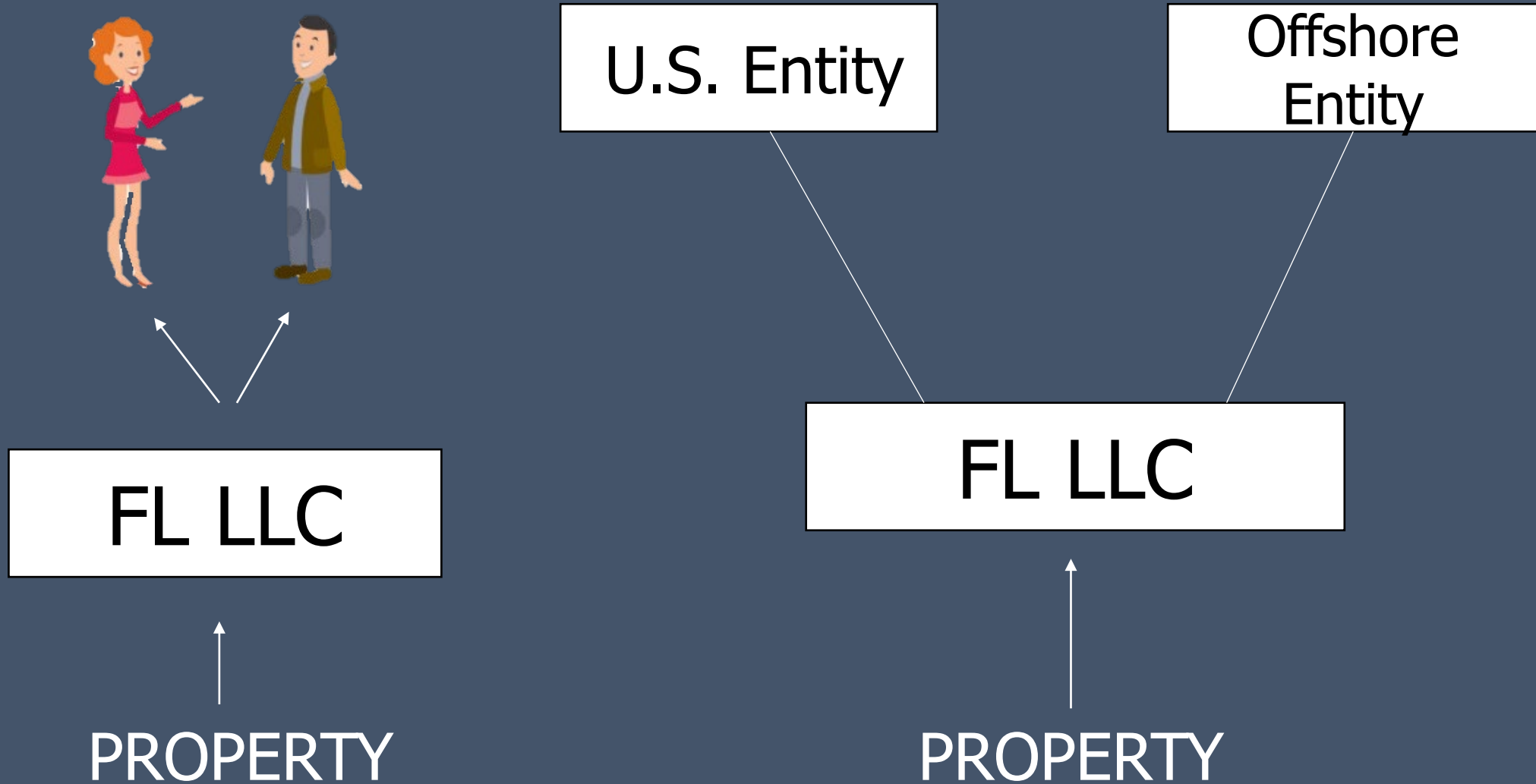
TRUST

British Virgin Islands  
Corporation

FL LLC

PROPERTY

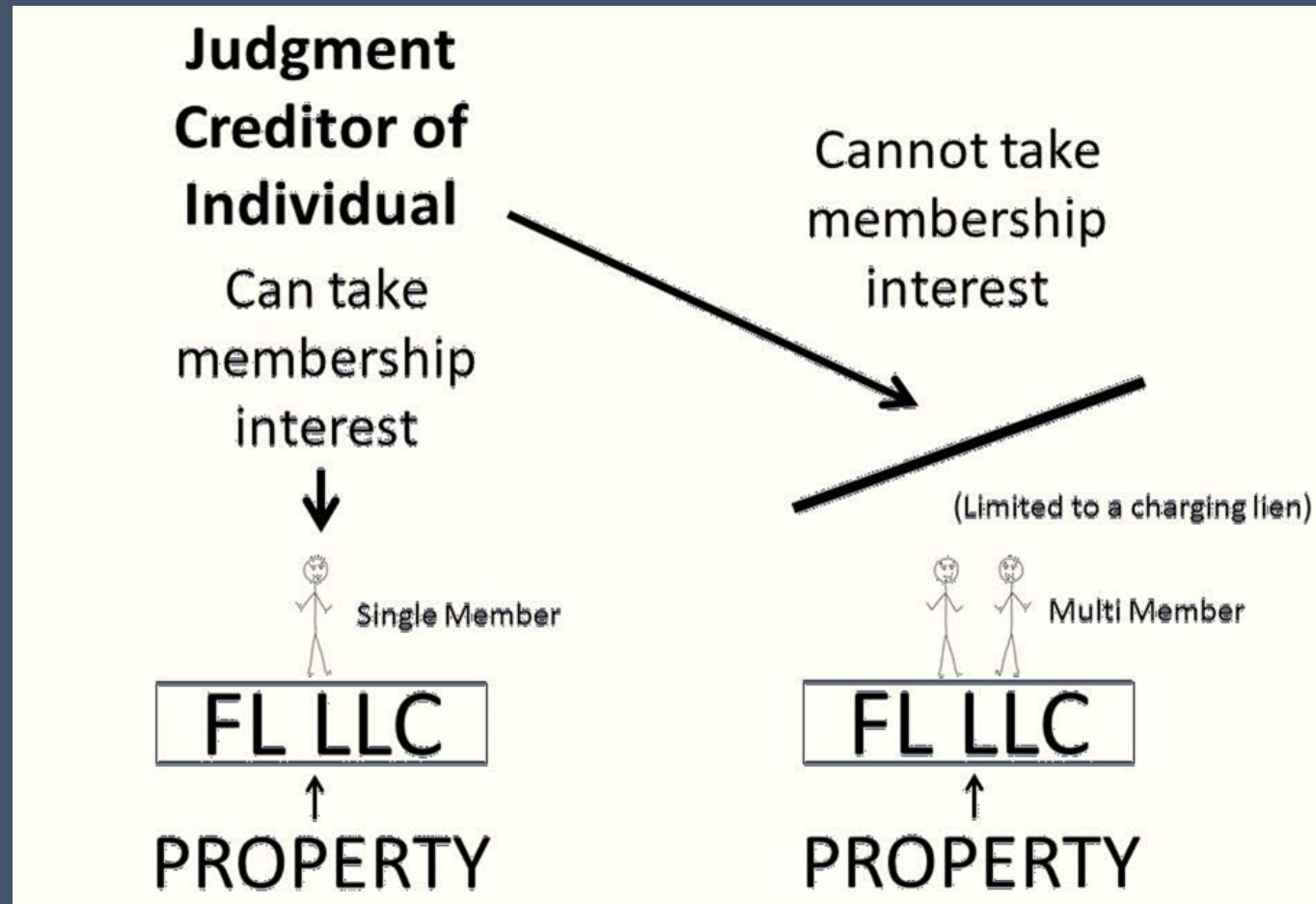
# Examples of Multi-Member LLCs





# “CHARGING ORDERS”

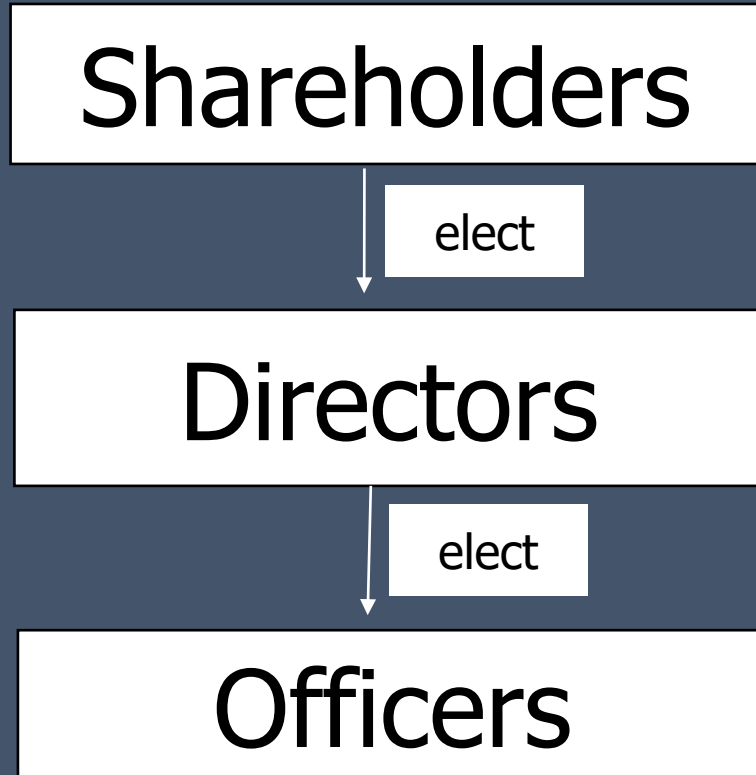
## Asset Protection Considerations / Difference between Single Member & Multi Member LLC in the Case of a “Reverse Piercing”



# How are LLCs taxed

- Default classifications for single member and multi member
- Can elect different tax treatment
- IRS Form 8832 “check the box”

# Corporations



Articles of Incorporation control for any conflict with By-Laws or the resolutions.

Articles + By Laws + Shareholders Agreement in the aggregate is comparable to Operating Agreement

# Authority

- Transaction in the Ordinary Course of Business
  - Review Bylaws – Usually Corporate Officers
  - If unsure whether ordinary course, treat as outside the ordinary course
- Outside Ordinary Course of Business
  - Governing Body = Board of Directors
  - Owners = Shareholders

# 2023 Florida Statutes

- 607.1201 Disposition of assets not requiring shareholder approval.— Unless the articles of incorporation otherwise provide, no approval by shareholders is required to:(1) Sell, lease, exchange, or otherwise dispose of any or all of the corporation's assets in the usual and regular course of business;
- (2) Mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), create a security interest in, or otherwise encumber any or all of the corporation's assets, regardless of whether in the usual and regular course of business;
- (3) Transfer any or all of the corporation's assets to one or more domestic or foreign corporations or other entities all of the shares or interests of which are owned by the corporation; or
- (4) Distribute assets pro rata to the holders of one or more classes or series of the corporation's shares, except to the extent that the distribution is part of a dissolution of the corporation under ss. [607.1401-607.14401](#).
- History.—s. 116, ch. 89-154; s. 159, ch. 2019-90.

# 2023 Florida Statutes

- 607.1202 Shareholder approval of certain dispositions.—
- (1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property (with or without good will), otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, but only if the board of directors proposes and its shareholders approve the proposed transaction.
- (2)(a) To obtain the approval of the shareholders under subsection (1), the board of directors must first adopt a resolution approving the disposition, and thereafter, the disposition must also be approved by the corporation's shareholders.
- (b) In submitting the disposition to the shareholders for approval, the board of directors must recommend the proposed transaction to the shareholders of record unless:
  - 1. The board of directors makes a determination that because of conflict of interest or other special circumstances it should not make such a recommendation; or
  - 2. Section 607.0826 applies.
- (c) If either subparagraph (b)1. or subparagraph (b)2. applies, the board of directors shall inform the shareholders of the basis for its so proceeding without such recommendation.
- (3) The board of directors may set conditions for approval of the disposition or the effectiveness of the disposition.

# 2023 Florida Statutes

- (4) If the disposition is required to be approved by the shareholders under subsection (1) and if the approval is to be given at the meeting, the corporation shall notify each shareholder, regardless of whether entitled to vote, of the meeting of shareholders at which the disposition is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the disposition and shall contain a description of the disposition and the consideration to be received by the corporation. Furthermore, the notice shall contain a clear and concise statement that, if the transaction is effected, shareholders dissenting therefrom are or may be entitled, if they comply with the provisions of this chapter regarding appraisal rights, to be paid the fair value of their shares and such notice must be accompanied by a copy of ss. 607.1301-607.1340.
- (5) Unless this chapter, the articles of incorporation, or the board of directors acting pursuant to subsection (3) requires a greater vote or a greater quorum, the approval of the disposition shall require the approval of the shareholders at a meeting at which a quorum exists consisting of a majority of all the votes entitled to be cast on the disposition.
- (6) After a disposition has been approved by the shareholders under this chapter, and at any time before the disposition has been consummated, it may be abandoned by the corporation without action by the shareholders, subject to any contractual rights of other parties to the disposition.
- (7) A disposition of assets in the course of dissolution is governed by ss. 607.1401-607.14401 and not by this section.
- (8) For purposes of this section, the assets of a direct or indirect consolidated subsidiary shall be deemed to be the assets of the parent corporation.
- (9) For purposes of this section, the term “shareholder” includes a beneficial shareholder and a voting trust beneficial owner.
- History.—s. 117, ch. 89-154; s. 153, ch. 90-179; s. 20, ch. 2003-283; s. 160, ch. 2019-90; s. 40, ch. 2020-32.

# 2023 Florida Statutes

## 692.01 Conveyances executed by corporations.

Any corporation may execute instruments conveying, mortgaging, or affecting any interest in lands by instruments sealed with the common or corporate seal and signed in its name by its president or any vice president or chief executive officer. Assignments, satisfactions, or partial releases of mortgages and acquittances for debts may be similarly executed by any corporate officer. No corporate resolution need be recorded to evidence the authority of the person executing the deed, mortgage, or other instrument for the corporation, and an instrument so executed is valid whether or not the officer signing for the corporation was authorized to do so by the board of directors, in the absence of fraud in the transaction by the person receiving it. In cases of fraud, subsequent transactions with good faith purchasers for value and without notice of the fraud shall be valid and binding on the corporation.

History.—RS 1955; GS 2459; s. 1, ch. 6183, 1911; RGS 3799; CGL 5672; s. 1, ch. 71-10; s. 1, ch. 79-290; s. 3, ch. 2008-35.



# 2023 Florida Statutes

692.02 Validation of conveyances.

Conveyances by corporations of lands in this state, heretofore executed, which have been sealed with the common or corporate seal of such corporation and signed in its name by a vice president or the chief executive officer thereof, shall be as valid and effective and shall bear the same presumptions as if signed in the name of such corporation by its president.

History.—s. 2, ch. 6183, 1911; RGS 3800; CGL 5673.

# Partnerships - Authority

- Transactions in the Ordinary Course of Business
  - Look to Partnership Agreement
  - Generally, any individual Partner (but preference for all)
- Outside Ordinary Course of Business
  - All Partners
- Affecting the Entity Existence
  - All Partners

# General Partnerships- Apparent Authority

- **620.8301 Partner agent of partnership.—**

Subject to the effect of a statement of partnership authority under s. 620.8303:

- (1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course of partnership business or business of the kind carried on by the partnership, in the geographic area in which the partnership operates, binds the partnership unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.
- (2) An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by all of the other partners or is authorized by the terms of a written partnership agreement.

History.—s. 13, ch. 95-242.

# Limited Partnerships- Apparent Authority

## **620.1402 General partner agent of limited partnership.—**

- Each general partner is an agent of the limited partnership for the purposes of its activities. An act of a general partner, including the signing of a record in the partnership's name, for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership, unless the general partner did not have authority to act for the limited partnership in the particular matter and the person with which the general partner was dealing knew, had received a notification, or had notice under s. 620.1103(4) that the general partner lacked authority.
- (2) An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership binds the limited partnership only if the act was approved by the other partners as provided in s. 620.1406.

History.—s. 17, ch. 2005-267.

# FinCEN Reporting for Entities

- New Geographic Targeting Order (GTO) is effective **October 19, 2023 and expires April 18, 2024.**
- Requirements apply to title insurers and title agents for residential purchases of \$300,000.00 or more without obtaining an institutional mortgage in the Florida counties of Miami-Dade, Broward, Palm Beach, Hillsborough, Pasco, Pinellas, Manatee, Sarasota, Charlotte, Lee, or Collier.
- The GTP requires title issuing agents to collect and report information about the persons involved in certain residential real estate transactions (“Covered Transactions”)
- “Covered Transactions” means a transaction in which:
  - i. Residential real property is purchased by a Legal Entity;
  - ii. The purchase price of the residential real property is in the amount of \$300,000 or more;
  - iii. Such purchase is made without a bank loan or other similar form of external financing;
  - iv. Such purchase is made, at least in part, using currency or a cashier’s check, a certified check, a traveler’s check, a personal check, a business check, a money order in any form, a funds transfer, or virtual currency.

# FinCEN Reporting for Entities

- Note: The definition of “Legal Entity” :

“Legal Entity” means a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state, or the United States, or a foreign jurisdiction, other than a business whose common stock or analogous equity interests are listed on a securities exchange regulated by the Securities Exchange Commission (“SEC”) or a self-regulatory organization registered with the SEC, or an entity solely owned by such a business.

# CORPORATE TRANSPARENCY ACT (CTA) SUMMARY

- Beginning Jan. 1, 2024, the Corporate Transparency Act (CTA) requires certain U.S. and foreign entities defined as "reporting companies" to report certain identifying information about themselves, their beneficial owners, and company applicants to FinCEN (the U.S. Dept. of the Treasury's Financial Crimes Enforcement Network) within a certain prescribed time period.
- Failure to comply with the new reporting requirements will result in serious civil and criminal penalties. Adopted as Title 64 of the 2021 National Defense Authorization Act.
- Mandates creation of a national database for the "beneficial ownership" information (BOI) of many businesses.
- Purpose of the disclosures is to prevent usage of anonymously owned entities for illegal purposes.
- Financial Crime Enforcement Network of the US Treasury (FinCEN) must establish database and filing procedure before filings commence; Database will not open until January 1, 2024.

# CORPORATE TRANSPARENCY ACT (CTA) SUMMARY

## Filing Deadlines:

- New businesses formed after January 1, 2024 must file BO reports within 30 days of filing (pending proposed extension to 90 days).
- All other existing businesses (other than inactive and exempt companies) must file by January 1, 2025.



# CTA – REPORTING COMPANY

- Reporting Companies: Corporations, LLCs, any other entity created by the filing of a document with Secretary of State or similar office, and any foreign entity registered to do business in any State.
- May not include: General partnerships, LLPs (because not “created” by filing), Trusts not created by a state office filing, other “associations” that do not make a filing, and any foreign entity that doesn’t register to do business.
- Exempt Entities, Section 5336(a)(11)(B): Primarily regulated companies: Public companies, certain large companies, financial institutions, registered money transmitting businesses, broker dealers, registered investment advisors, investment companies, venture capital fund advisors, insurance companies, public utilities, certain charitable organizations, and certain political organizations.
- Inactive Entity Exemption: Applies to certain businesses formed prior to January 1, 2020 that are not engaged in an active business, and do not hold any kind of assets, including ownership in any entity. Within past 12 months cannot (1) have had a change in ownership, or (2) sent or received funds in an amount greater than \$1,000 (either directly or through an affiliate).
- This exemption does NOT apply to any entity owned by a foreign person, directly or indirectly, wholly or partially.

# CTA – FILING REQUIREMENTS

- FinCEN will publish instructions and guidance to complete the Beneficial Owner (BOI) report form. Can be filed electronically, and will be available at: [www.fincen.gov/boi](http://www.fincen.gov/boi)
- Requirements will include:
  - Personal identifying information for every reportable “beneficial owner” (and for new companies will need to include for every “applicant”),
  - Includes name, address, current passport, or drivers license number, and an image of the identification document. (For individuals that are likely to have multiple filings they will have the option to file and obtain a “FinCEN identifier” under certain circumstances and requires a separate application. Any changes to the FinCEN identifier information must be filed within 30 days therefrom, and this is a requirement of the FinCEN identifier not the reporting company.
  - Company will be required to have a taxpayer identification number (EIN) at the time of filing.
  - Company must report all its trade or “dba” names.
  - Updates must be filed within 30 days after any change to the information.

# CTA – BENEFICIAL OWNER

- Reporting companies must disclose every individual who DIRECTLY OR INDIRECTLY, either:
  - Exercised “Substantial Control” over the reporting company, or
  - Owns or controls at least 25% of the ownership interest of the reporting company.

Substantial Control, As Defined in 31.C.F.R. 1010-380, includes and person who:

- Is a “senior officer” of the reporting company (not necessarily directors),
- Exercises authority over the appointment or removal of any senior officer or Manager of an LLC, majority of the board of a corporation, or similar body in another entity, or
- Directs, determines, or has “substantial influence” over, important matters made by the reporting company (list of examples is available; though not exclusive)(does not apply to negative covenants in loan agreements).

# CTA – BENEFICIAL OWNER

- Direct or indirect control includes: Manager of a manager managed LLC, member of a member managed LLC, board representation for corporations (depending on the circumstances), ownership or control of a majority of voting shares, rights associated with any financing arrangement, control over intermediary entities that exercise substantial control over the entity, arrangements with entities or individuals acting as nominees, any could be through any other contract, arrangement, understanding or relationship depending on the circumstances (ie, joint ownership, nominee, intermediary, custodian or agent agreements).
- For any trust with an ownership interest: Reporting must include (a) trustee of the trust or other individual with authority to dispose of trust assets, and (b) beneficiary who receives all income and principal from the trust or has the right to the assets of the trust. Also includes grantor or settlor who has the right to revoke the trust or the right to the distribution or assets, and any individual who through ownership or control of intermediary entities that owns or controls ownership interests in the reporting company.

# CTA – PENALTIES AND OTHER CONSIDERATIONS

- Penalties apply to any individual, reporting company or other entity who willfully provides, or attempts to provide, false or fraudulent BOI, and can include (a) civil fine of up to \$10,000 (accruing \$500 for each day a report is outstanding), up to two years in prison, and additional penalties for unauthorized disclosure or unauthorized use of the BOI.
- Practice suggestions: Need to review operating agreements and shareholders agreements and many other client documents (including estate documents). Consider limitation of confidentiality clauses in operational agreements, and revising agreements to (a) impose express obligations for managers, members, officers and shareholders to provide necessary information for the BOIs, and (b) designate person(s) responsible for filing. Consider use of client intake information sheets. Revise covenants and closing conditions. Consider limitations on legal opinions.

Thank you!

Feel free to contact me with any questions:

James (Jamie) Marx

Marx Rosenthal PLLC

Miami, Florida

[james@marxrosenthal.com](mailto:james@marxrosenthal.com)

(305) 577-0276