

Corporate Transparency Act Guidance

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In this article, the authors provide a basic overview of the new Corporate Transparency Act and its implementing regulations as they currently exist. They also raise various issues, questions, and nuances regarding the real world application of the statute in real estate, corporate, tax, private client, finance, and other transactional practices.

The Corporate Transparency Act (the CTA) is a new federal law that creates significant federal reporting requirements for most US companies, including corporations, partnerships, and LLCs. On January 1, 2021, Congress enacted the CTA as part of the Anti-Money Laundering Act of 2020.¹ On September 30, 2022, the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) finalized the reporting requirements to implement the CTA² and published guidance on the final regulations.³

The CTA and reporting requirements aim to combat money laundering, tax fraud, and other corrupt activity where corporate structures are used to obfuscate the perpetrators' identities.⁴ The rules will become effective on January 1, 2024 for new companies and January 1, 2025 for existing companies.

This article (1) provides a basic overview of the CTA and its implementing regulations as they exist today, and (2) raises various issues,

questions, and nuances regarding the real world application of the CTA in real estate, corporate, tax, private client, finance, and other transactional practices.

OVERVIEW OF CTA

Who Is Required to Report?

"Reporting companies" (i.e., any domestic entity created by, or any foreign entity registered to do business in any state by, the filing of a document with the secretary of state or similar office) are required to directly file reports with FinCEN reporting basic information detailed below,⁵ including information about their (1) "beneficial owners" (i.e., any individual who directly or indirectly (a) exercises substantial control of a reporting company or (b) owns or controls at least 25 percent of the ownership interest in a reporting company),⁶ and (2) "company applicants" (i.e., certain individuals who file or help to prepare the doc-

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ument that creates the reporting company or qualifies it to do business).⁷

What Information Is Required to be Reported?

A reporting company must report:

- (a) Its full legal name;
- (b) Any trade name;
- (c) Its current street address;
- (d) Its jurisdiction; and
- (e) Its IRS taxpayer identification number.⁸

In addition, reporting companies must report the following information about their beneficial owners and company applicants:

- (a) Their full legal name;
- (b) Date of birth;
- (c) Current residential address;⁹
- (d) A non-expired U.S. identification document or, if not available, a foreign passport; and
- (e) An image of the document used in (d).¹⁰

Are There Exemptions?

The rules identify quite a few¹¹ types of entities that are exempted from the reporting requirements, primarily entities that are already subject to regulation, including, for example, publicly traded companies that have certain other reporting requirements. Also exempted from reporting requirements are “large operating companies” that employ more than 20 employees on a full-time basis in the United States, have an operating presence at

a physical office in the US, and generate more than \$5 million in annual gross receipts or sales. While the list of exemptions is broad, it will capture a relatively small portion of U.S. companies, and most will be required to adhere to the CTA’s requirements.

When to File Initial Reports?

For reporting companies created on or after January 1, 2024, reports must be filed within 30 days of (i) receipt of notice that the entity is effective or registered to do business, or (ii) when the secretary of state or similar office provides public notice that the reporting company was created or registered to do business, whichever is earlier.¹² For reporting companies created before January 1, 2024, reports must be filed by January 1, 2025.¹³

When to Update Initial Reports?

Updates must be made within 30 days after (a) there is a change to previously reported information, or (b) a reporting company becomes aware that previously reported information is inaccurate.¹⁴

Who Is Liable for Willfully Providing False Beneficial Ownership Information or a Failure to Report?

Reporting companies, beneficial owners, and company applicants are all potentially liable for willfully providing false beneficial ownership information. The regulations include intentionally broad language that states “any person” who causes the reporting company to fail to report, or is a senior officer of the reporting company at the time of the failure to report, may be personally liable for reporting violations.¹⁴

What Are the Penalties for Failing to Report or Inaccurate Reporting?

Civil penalties include a fine of \$500 per day for each day a violation is outstanding, up to a maximum of \$10,000. Criminal penalties include a maximum of two years imprisonment.¹⁵

PRACTICE ISSUES AND QUESTIONS TO CONSIDER

Although the CTA and the applicable rules appear comprehensive, implementing the rules will require reporting companies to grapple with many currently unclear nuances under those rules as well as to implement procedures to insure proper compliance. The following are just a few of the questions and issues to consider:

- If a single purpose entity (an SPE) is directly or indirectly controlled or wholly owned by an exempt entity, such as a “large operating company,” will the SPE qualify as a “subsidiary” of an exempt entity and, as such, qualify for its own exemption from reporting requirements?
 - Does joint venture ownership change this analysis where only one of the upstream venturers is an exempt entity?
 - Does it matter if the analysis is done under a control vs. ownership test?
- In determining the identity of all beneficial owners, what is the impact of a preferred return or promote style economic waterfall? Similarly, what is the impact of other typical business structures such as (i) options to crystallize

promote; (ii) buy/sell rights; and/or (iii) rights of first refusal?

- What new provisions should joint venture agreements include so that the manager has sufficient information to comply with the CTA’s reporting requirements?
- Is there a hidden risk to the appointment of certain types of officers (such as a “president”) at lower-tier entities, given the potential liability of senior officers?
- Could atypical loan covenants or other lender conditions disqualify a mortgage lender or mezzanine lender from the “creditor” exemption and thus make such lender(s) a beneficial owner of their borrower for purposes of the CTA?
- Are limited partnerships and limited liability partnerships reporting companies if they are not “created” (but merely registered or recognized) by a filing with a state office?

PRIVACY, SECURITY, AND AUTHORIZED ACCESS TO REPORTED INFORMATION

FinCEN has acknowledged public concerns regarding access to and protection of disclosed beneficial owner information. FinCEN proposed regulations governing the storage of reported information in secure non-public databases maintained by FinCEN.¹⁶ The proposed regulations also address the accessibility of these databases by certain governmental authorities and authorized financial institutions.

NEXT STEPS

In preparation for the effectiveness of the CTA, companies should start now to (i) famil-

iarize themselves with the applicability and requirements of the CTA, and (ii) assess and establish internal protocols for determining the identity of beneficial owners and for regularly collecting and updating the required reporting information.

NOTES:

¹See 31 U.S.C.A. § 5336.

²See 31 C.F.R. § 1010.380 (2022).

³See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022).

⁴See Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498.

⁵See 31 C.F.R. § 1010.380(c)(1) (2022).

⁶See 31 C.F.R. § 1010.380(d).

⁷See 31 C.F.R. § 1010.380(e).

⁸See 31 C.F.R. § 1010.380(b)(1)(i).

⁹or, for a company applicant which “forms or registers an entity in the course of such company applicant’s business”, the business address of the company applicant’s employer.

¹⁰See 31 C.F.R. § 1010.380(b)(1)(ii).

¹¹Specifically, the CTA identifies 23 excluded entities that do not need to report to FinCEN, see id. 31 C.F.R. §§ 1010.380l(2)(i) to (xxiii).

¹²See 31 C.F.R. § 1010.380(a)(1).

¹³See 31 C.F.R. § 1010.380(a)(1)(iii).

¹⁴See 31 C.F.R. § 1010.380(a)(2).

¹⁴See 31 U.S.C.A. 5336(h)(1); see also 31 U.S.C.A. 5336(g)(4).

¹⁵See 31 U.S.C.A. 5336(h)(1).

¹⁶See Vol. 87, No. 241 of the Federal Register.