Are you Prepared for the Corporate Transparency Act

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Are you Prepared for the Corporate Transparency Act

What Practitioners Need to Do Now

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A KEY ESTATE PLANNING GUIDE

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Introduction to the CTA

Substantial Reach

Introduction

- The purpose of the CTA is to create a national database of companies in the U.S. that identifies the human beings behind the companies (both owners and those in control of the entities). The law is part of an increasing effort to combat money-laundering, terrorism, tax evasion, and other financial crimes. Congress intended to try to help law enforcement by creating this national database that would allow law enforcement to sift through so-called "shell companies" that are used for nefarious purposes. These rules are very different from any reporting that people have faced previously (e.g., annual reports to states where formed and income tax returns). Because the reporting requirements are quite different from income tax returns, clients' CPAs may not be able to, or perhaps may not be willing to, handle these filings.
- These rules and reports will be uncomfortable as well as burdensome. Those required to report may have to disclose their names and home addresses to comply with the rules, even if they do not actually own an interest in a company. Many will find these disclosures invasive and a further erosion of whatever limited privacy they believed they still have.

Introduction

- The Corporate Transparency Act (“CTA”) is a new federal law that will impact the owners, principles and other control persons involved in almost all limited liability companies (LLCs), corporations (both C and S corporations), limited partnerships (LPs), and other closely held entities.
- Congress enacted the CTA in 2021 as part of the National Defense Authorization Act for Fiscal Year 2021. The purpose of the CTA is aims to strip U.S. shell companies of anonymity that can hide illicit financial activity and for use in financing terrorist activities.
- But the reach will be very broad to accomplish this. There are exceptions to these filing requirements that are discussed below. However, most of the entities created as part of an investment plan (e.g., a holding company for securities or a small business, or owning rental real estate), an estate plan (e.g., an LLC designed to hold various investments to facilitate trust funding or administration), or asset protection planning (any entity created to insulate the assets it holds, or to insulate those who own the entity for claims arising from the assets the entity holds) likely will be subjected to the new reporting rules.

Introduction

- FinCen estimates that 32 million existing entities may face filing obligations. That will be increased by all new entities formed in the future. Thus, the CTA will impact a wide swath of Americans and their advisers as all try to grapple with this broad new requirement.
- Existing entities will have until January 1, 2025 to comply. But as discussed in more detail below, entities and owners/control persons should begin planning for the filings now. New entities formed after January 1, 2025 will have 30 days. FinCen has proposed increasing this to 90 days from formation to file for entities created or registered on or after Jan. 1, 2024, and before Jan. 1, 2025.
- Considering the severe penalties for non-compliance anyone who may even possibly be effected should proactively address the requirements.
- Most if not all small businesses will be subject to the new rules (other than proprietorships and general partnerships), including “business” entities that are formed as part of what most practitioners consider regular, everyday estate planning. The couple who purchases a weekend home but uses an LLC to insulate themselves from liability for anything occurring on the property, will be subject to these rules.

Introduction – Who Will File?

- A critical issue will be who will handle the filing.
- Corporate filing services that assist in the formation of entities and serve as registered agents may try to expand to meet the new CTA filings as yet another service they offer.
- CPAs may try to assist in the CTA reporting but may not have the information or expertise for all aspects of this.
- Wealth advisory firms might even endeavor to expand the scope of services they offer.
- However, attorneys will have the most relevant expertise and in addition to handling the filings may also be able to identify other legal matters that need to be tended to (e.g.,., an update of the entity governing documents).

What Companies Must Report?

32 Million Effected

What Companies Must Report?

- The CTA requires that "reporting companies" file certain "beneficial owner reports." Any entity that is created by filing paperwork with a Secretary of State (or tribal jurisdiction) is a "reporting company" unless the company meets one of the limited exceptions to avoid reporting.
- Common examples of reporting entities are LLCs, which are formed by filing articles of organization with a state, or corporations, which are formed by filing articles of incorporation with a state.
- These would include, for example, an LLC that holds rental real estate as part of an estate plan or asset protection plan; a professional corporation that holds a dental, medical, legal, or other professional practice; and a corporation that holds the family business (unless it meets the large company exception).
- Exceptions include charities, large companies (20 or more employees and $5 million or more in revenues), and certain types of other entities that already are subject to significant government regulation (e.g., banks).

Entities that are not subject to CTA reporting

i. Securities reporting issuer
ii. Governmental authority
iii. Bank
iv. Credit union
v. Depository institution holding company
vi. Money services business
vii. Broker or dealer in securities
viii. Securities exchange or clearing agency
ix. Other Exchange Act registered entity
x. Investment company or investment adviser
xi. Venture capital fund adviser
xii. Insurance company
xiii. State-licensed insurance producer
xiv. Commodity Exchange Act registered entity
xv. Accounting firm
xvi. Public utility
xvii. Financial market utility
xviii. Pooled investment vehicle
xix. Tax-exempt entity
xx. Entity assisting a tax-exempt entity
xxi. Large operating company
xxii. Subsidiary of certain exempt entities
xxiii. Inactive entity

Inactive Entity

- The inactive entity exception may be important to understand. The Guide provides:
- 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. “Foreign person” means a person who is not a United States person. A United States person is defined in section 7701(a)(30) of the Internal Revenue Code of 1986 as a citizen or resident of the United States, domestic partnership and corporation, and other estates and trusts.
- The entity has not experienced any change in ownership in the preceding twelve-month period.
- The entity has not sent or received any funds in an amount greater than $1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve- month period.
- The entity does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.

Inactive Entity

- The inactive entity exception is quite limited. A passive holding company will not qualify for exclusion. An entity that holds assets but which was dissolved under state law for failure to meet state law filing, tax or other requirements would also not appear to qualify.

What Must be Included in Company Filings

Details Not Easy to Obtain

What Reports Will Include

- Reporting companies will have to file reports that consist of information regarding the company and any individual who is a “beneficial owner.”
- The information that will have to be included in company reports includes:
  - Legal name and any trade names such as DBAs (doing business as).
  - Street address for company’s principal place of business (not a P.O. box or lawyer or other adviser’s address).
  - State of formation.
  - Tax Identification Number. A passthrough entity, like single member LLC that doesn’t have a tax identification number, may have to obtain and provide a unique identifying number.
  - An identifying document from an issuing jurisdiction (e.g., a certificate of incorporation) and the image of that document.

FinCen Identifier Number

An Approach Many Companies Might Mandate

FinCen Identifier Number

- There is an alternative approach that may lessen the information a reporting entity must disclose. A beneficial owner may obtain a special identification number and that number alone may be disclosed instead of disclosing all the information otherwise required. The 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.
- Individuals may electronically apply for FinCEN identifiers. In the application, an individual must provide their name, date of birth, address, unique identifying number and issuing jurisdiction from an acceptable identification document (e.g. a drivers license), and an image of the identification document. These are the same items of personal information and image reporting companies submit for beneficial owners.

FinCen Identifier Number

- Once a beneficial owner or company applicant has obtained a FinCEN identifier, reporting companies may report it in place of the otherwise required four pieces of personal information about the individual in BOI reports.
- The advantage of this appears to be that the individual is then responsible for keeping their personal information current with FinCen so that the reporting entity should not have an obligation, for example, to report a correction of filed information. If the beneficial owner's home address changes the reporting entity would have to identify that change and report it within a required time frame. If instead, that beneficial owner gave the reporting entity a FinCen identifier number the beneficial owner might be responsible instead. If this is correct then it may be advisable for all reporting entities to require that every beneficial owner obtain a FinCen identifier number.

Beneficial Owner Reporting

Personal Information

Beneficial Owner Reporting: What Will Have to Be Reported

- The CTA provides that reporting companies will also have to file reports for "beneficial owners." This is a term defined by the CTA that has broad, as and of yet, uncertain reach.
  - The information to be reported for each beneficial owner will consist of:
  - Full legal name. This requires the "full legal name" not initials.
  - Date of birth.
  - Home address (not a P.O. box or lawyer or other adviser's address).
  - PDF (photocopy) of the individual's U.S. passport or state driver's license.
- Advisers should understand that the above information for many entities will be more personal and invasive then the information that people have ever disclosed and many will be quite uncomfortable with these requirements.

When Reports Must be Filed

Deadlines Critical

When Reports Must be Filed

- FinCen has proposed increasing the 30-day period for filing for new entities created on or after January 1, 2024 be extended to 90 days for initial filings after formation and before January 1, 2025.
- For entities created on or after January 1, 2024, the initial reports are due within 30 days from the creation of the entity. That provides little time for practitioners to respond. Likely, attorneys creating entities will have to add the documentation to the templates they use for entity creation so that the filings are prepared as part of the process of forming the entity given the tight deadline. Practitioners are advised to begin the process of form revision now to be prepared for that eventuality.
- Every reporting company must file an initial report. For entities that already exist on January 1, 2024 , their initial reports are due by January 1, 2025. While that seems quite far off from today, the efforts that may be required for people to compile the relevant information in some cases will be significant, and practitioners may well want to begin the process now of creating documentation for communicating the necessary steps to clients now, so that they can inform people of the need for filings and the steps involved well in advance of that date.

When Reports Must be Filed - Changes

- Reporting companies must also report changes to any filing within 30 days of any change.
- A change with respect to required information will be deemed to occur when the name, date of birth, address, or unique identifying number on such document changes. This is a very burdensome and easy to miss requirement. If someone with ownership or control (see discussions below) moves to a new residence, or changes their name (e.g., gets married and takes on a new name), that change will have to be reported quickly.
- Business owners and others, as well as advisers assuming responsibility for reporting may have to ensure that all of those people know to inform them of such changes so that they can assure that the required filings are made on time.

Who Reports

Who Reports

- The reporting company is required to file the reports. The actual owners are not the ones required to file anything. This part of the rule places significant burdens on companies to keep track of all of the required information for anyone who constitutes a beneficial owner. At the moment there does not appear to be any "good faith" defense to failing to provide updated information; so, the burden is on the company to keep track of all of its beneficial owners.
- For this reason, if a person is involved in an entity that will be a reporting company, people should start thinking now about how they will gather and track all required information.
- A reporting company can have multiple beneficial owners. For example, a reporting company could have one beneficial owner who exercises substantial control over the reporting company, and a few other beneficial owners who own or control at least 25 percent of the ownership interests of the reporting company. A reporting company could have one beneficial owner who both exercises substantial control and owns or controls at least 25 percent of the ownership interests of the reporting company. There is no maximum number of beneficial owners who must be reported.

Entities and People Who May Be Subject to Reporting

- This new law will affect virtually all small family businesses, including LLCs and other entities designed only to hold real estate. Even if an entity has only one owner and is ignored for federal income tax purposes (like a single-member LLC), it will still have to file reports with FinCEN.
- Specifically, any person may be affected if they have an ownership interest or control position.
- Ownership is not as simple or obvious as it may sound. If the individual owns, directly or indirectly, at least 25% of an entity that will be a reporting company. But ownership is broader. "Ownership" is not limited to obvious ownership (e.g., the person owns membership interests in an LLC). It is broadly defined to include any type of equity interests. This could include a profits interests, convertible instruments, warrants, options, puts, calls, and other entity interests. Ownership interests can be owned or controlled through joint ownership, through a trust arrangement, or other indirect arrangements and may be subject to these rules. Determining who has an ownership interest may require the review of not only governing documents for an entity but ancillary documents and agreements as well.

Entities and People Who May Be Subject to Reporting

- The concept of a “beneficial owner” who will have to be disclosed in a report is complicated. In broad terms, a beneficial owner is anyone who owns at least 25% of the company, as noted above.

The Guide lists the following questions to provide guidance

i. Does your company issue equity, stock, or any similar instruments that confer voting power?
ii. Does your company issue any pre-organization certificates or subscriptions?
iii. Does your company issue any transferable shares of, or voting trust certificates or certificates of deposit for:
    1. an equity security,
    2. interest in a joint venture, or
    3. certificate of interest in a business trust?
iv. Do individuals hold capital or profit interests in your company (sometimes referred to
v. as "units")?
vi. Does your company issue any instruments convertible into any share, equity, stock, voting rights, or capital or profit interest? Note: It does not matter whether anything must be paid to exercise the conversion.
vii. Does your company issue any future on any convertible instrument?
viii. Does your company issue any warrant or right to purchase, sell, or subscribe to a share or interest in equity, stock, or voting rights, or capital or profit interests? Note: It does not matter if such warrant or right is a debt.
ix. Does your company issue any non-binding put, call, straddle, or other option or privilege of buying or selling equity, stock, or voting rights, capital or profit interest, or convertible instruments? Note: Options or privileges created by others without the knowledge or involvement of your company do not apply.
x. Does your company have any other instrument, contract, arrangement, understanding, relationship, or mechanism to establish ownership?

“Substantial Control” Persons

Complex Determinations

Who Has "Substantial Control"

- There is a second prong to the definition that reaches any person who has "substantial control" over the company.
  - A manager or officer of any entity that is a reporting company.
  - The director of an entity that will be a reporting company.
  - All officers are beneficial owners by default, even those who own no equity in the entity.
    - But these leaves many open issues. For example, is the CFO of an entity a control person? Will that depend on what an employment agreement provides? What if there is no formal written agreement? What about the head of a family office that manages family entities even though they are not a manager or an LLC or officer/director of a family corporation?
- A beneficial owner will also include an individual with authority over the appointment or removal of any senior officer or the majority of a corporation's board of directors. A similar body would be included.
- A person will be considered to have substantial control if they have authority for direction, determination, or decision of, or substantial influence over, important matters of a reporting company.
  - What are important matters of a company?

Guide provides the following questions to help identify those who may be subject to reporting:

- Does your company have a president, chief financial officer, general counsel, chief executive officer, or chief operating officer?
- Does your company have any other officers that perform functions similar to those of a President, chief financial officer, general counsel, chief executive officer, or chief operating officer? Note: One individual may perform one or more functions for a company, or a company may not have an individual who performs any of these functions.
- Does your company have a board of directors or similar body AND does any individual have the ability to appoint or remove a majority of that board or body?
- Does any individual have the ability to appoint or remove a senior officer of your company?
  - Note that in the context of trusts (see below) an investment director may hold the power to control decisions as to an entity interests held in a trust. That investment director (who may be labeled and investment trustee or investment advisor) would likely seem to be required to report.
  - Separately, if the entity is a corporation, some tax advisers carve out the ability to vote stock to avoid an estate inclusion issue. The right to vote such stock may be deliberately granted to another named person. That person would seem to be covered but the above question and hence be a reporting person.
- Does any individual direct, determine, or have substantial influence over important decisions made by your company, including decisions regarding your company's business, finances, or structure? Note: Certain employees who might fit this description are nevertheless exempt from the beneficial owner definition. See section 2.4 for more information.
- Are there any other individuals who have substantial control over your company in ways other than those identified above?

Minor's Do Not Report

- There is also an exception for a minor child. There is no requirement to report information about a beneficial owner of the reporting company who is a minor child, provided you have reported the required information about the minor child's parent or legal guardian.
- Note: If you report a parent or legal guardian's information instead of a minor child's information, then you must indicate in your BOI report that the information relates to a parent or legal guardian of the minor child.
- This exception will raise complex issues for many. What if the parents are divorced. If the husband is the legal guardian and the wife has a reporting entity, she will have to get information and report using her ex-husband's information.
- That seems inherently problematic. Will those getting divorced have to address CTA filings in their marital settlement agreements?

Professionals Handling Filings Must Report

- Initially advisors handling filings were going to have been subject to reporting. That could have included an attorney assisting in the formation of an entity, the paralegal and administrative assistant who completed documentation, etc.
- It appears that this will not be required for entities formed prior to the January 1, 2024 date, but it may apply after that date. If the latter is the case, some practitioners may opt not to assist with the formation of entities after January 1, 2024.
- Each reporting company that is required to report company applicants will have to identify and report to FinCEN at least one company applicant, and at most two. All company applicants must be individuals. Companies or legal entities cannot be company applicants.
- There are two categories of company applicants – the "direct filer" and the individual who "directs or controls the filing action." The direct filer is individual would have actually physically or electronically filed the document with the secretary of state or similar office. The other possible company applicant is the individual who was primarily responsible for directing or controlling the filing of the creation or first registration document. This individual is a company applicant even though the individual did not actually file the document with the secretary of state or similar office.
- Professionals may plan who will handle these filings so that fewer people will be subject to reporting requirements and that those who will be required to report will be agreeable to do so.

Inheritors and Trusts

Uncertainty, Complications and Issues

Inheritors

- A very limited exception is provided for who is referred to as an “Inheritor.” An individual qualifies for this exception the individual’s only interest in the reporting company is a future interest through a right of inheritance, such as through a will providing a future interest in a company. However, once the individual inherits the interest, this exception no longer applies, and the individual may qualify as a beneficial owner.
- That description is still too vague to provide sufficient guidance.
- If the testator died, is the ultimate beneficiary the inheritor or is the executor the control person until the interest is actually distributed?

Trustees and More

- What happens when trust owns a reporting company?
- Trusts, except for those that are formed under a specific state statute that requires a filing with the state to be formed, are themselves not reporting companies because a trust can be formed without any state law filing.
- A trust that is a beneficial owner of a company, however, will be included in a beneficial information report by virtue of being a beneficial owner. In that situation, who is identified as the beneficial owner? It seems certain that it is the trustee. What about the investment trustee or adviser of a trust that has fiduciary responsibility for whether the trust continues to hold that entity? What about a trust protector? And if a trust protector may be deemed a control person will that decision vary depending on the actual powers given to a particular trust protector? Each of these people may also be deemed control persons and hence one, some or all may be beneficial owners required to report.

The guide provides the following guidance as to trusts

i. A trustee of the trust or other individual with the authority to dispose of trust assets. Many modern trusts have several trustees each with different powers. Whether or not a particular trustee can dispose of trust assets may depend on the terms of the trust instrument, state law, and which asset is involved.
    1. For example, if a trust owns personal use property, the governing instrument may place the ownership or sale of that residential property in the purview of an investment trustee. Alternatively, in some trust documents that authority may be within the purview of the general or distributions trustee. If the same property is a rental property, or converted from personal use to rental, the responsible trustee may change. Parsing these powers may not be simple.
    2. The CTA appears to require that a trustee with authority to dispose of trust assets must be reported. There does not seem to be a requirement that there actually be that type of assets under that trustees purview in the trust. Thus, the practical approach may be to report for each trustee that could even theoretically dispose of an asset, even if the current circumstances don't permit that trustee to make such a decision. However, the individuals involved may wish to avoid reporting and may argue against that approach. Another practical issue is what knowledge and involvement do the individuals involved have of the trust?
    3. Many irrevocable trusts vest powers in fiduciaries and non-fiduciaries, such as trust protectors, to change trustees and replace them, to circumvent powers of a trustee, etc. Before filing it may be advisable to obtain an affidavit from all such persons as to any actions they may have taken that could affect the trust in terms of CTA reporting.
    4. The CTA appears to require reporting for any "other individual with the authority to dispose of trust assets." That might also include any person holding a power of appointment ("POA") over the trust. Since these powers can be so different from trust to trust, and peppered in various provisions throughout the trust document, it may require some care and effort to identify powers and then to analyze them to decide as to whether the powerholder must report.
    5. An individual may have created an irrevocable trust in 2012 naming various persons in different roles. Those individuals, even if they signed the trust document, may have had no communication or involvement in more than a decade. Now they will be asked for copies of a driver's license, home and address and other personally sensitive information for CTA reporting. That could cascade into a series of issues and problems that could be dramatic for a particular trust to address.

Beneficiaries

i. A beneficiary who is the sole permissible recipient of income and principal from the trust must report.
    1. Some simple trusts have only one person as an income and principal beneficiary. But many trusts have a class or number of persons who are beneficiaries. Would that avoid their having to report?
ii. A beneficiary, or any other person, who has the right to a distribution of or withdrawal of, substantially all of the assets from the trust.
    1. The above provision may include a special power of appointment trust where a powerholder has a special power of appointment to appoint assets to a particular person, e.g. the settlor. The CTA does not appear to require that the person be able to benefit themselves from the demand or withdrawal.
    2. Annual demand or Crummey powers used to qualify gifts to a trust as gifts of a present interest for gift tax purposes may subject those powerholders to reporting. It is not clear what "substantially all of the assets from the trust" means. If, when a trust is first formed, Crummey powerholders may be able to withdraw all trust assets. As the value of the trust assets increase, a lesser percentage of assets in the trust may be withdrawn. At what point does the power cease being "substantially all"?

Beneficiaries

1. A similar consideration is whether a person holding a power to loan assets to the settlor would be deemed to hold the power equivalent to the withdrawal from the trust for CTA reporting purposes.
2. It is not uncommon in estate planning for structures including trusts owning interests in entities, such as an LLC, to create separate or special voting interests to remove from the taxpayer's purview control over liquidation of, or distributions from an entity. These rights might be sold to a separate trust that would hold them to avoid the taxpayer engaging in estate planning controlling these rights. In these types of plans, those exercising control over the trust that owns these special voting rights would appear to be subject to BOI reporting. This would be in addition to the trustee and others in the primary trust that owns the "regular" interests in the entity. In short, the number of people required to report can grow rather significant in even a common estate plan for a wealthy taxpayer..

Settlors

- A settlor of a trust who has the right to revoke the trust, or otherwise withdraw the assets of the trust.
- Clearly a revocable trust would have the settlor who can revoke the trust, be required to report.
- But the provision also includes a settlor who has the right to withdraw assets from the trust. Does that cause the settlor who holds a power of withdrawal (substitution of assets) that would characterize that trust as a grantor trust for income tax purposes. This power, also known as a swap power, typically gives the settlor of the trust the right to swap assets of equivalent value with the trust. So, properly exercised this power, does not enable the settlor to benefit economically since equal value must be given to the trust in exchange for any trust assets withdrawn. Is that covered by this reporting requirement?

Updated Reports Required

A Minefield

When Filings Must be Updated

a. The following are some examples of changes that would require an updated BOI report:
   i. Any change to the information reported for the reporting company, such as registering a new DBA.
   ii. A change in beneficial owners, such as a new Chief Executive Officer, a sale that changes who meets the ownership interest threshold of 25 percent, or the death of a beneficial owner.
   iii. When a beneficial owner dies, resulting in changes to the reporting company's beneficial owners, report those changes within 30 days of when the deceased beneficial owner's estate is settled. The updated report should, to the extent appropriate, identify any new beneficial owners. It is unclear what this will actually mean in practice. If a beneficial owner dies and her interest passes to her estate perhaps that needs to be reported. If the estate funds a trust post-death then perhaps that transfer would constitute another reportable change.
   iv. Any change to a beneficial owner's name, address, or unique identifying number provided in a BOI report. If a beneficial owner obtained a new driver's license or other identifying document that includes the changed name, address, or identifying number, the reporting company also would have to file an updated beneficial ownership information report with FinCEN, including an image of the new identifying document. Consideration should be given to having every beneficial owner obtain a FinCen identifier number so that the changes can be reported by that person and not the reporting entity.
   v. When a beneficial owner that was a minor child reaches the age of majority, you must file an updated BOI report, identifying the individual as a beneficial owner and, if warranted, replacing their parent or legal guardian's information with their own. It is not clear that this modification can be avoided by the parents obtaining a FinCen identifier number while the beneficial owner is a minor.

Dates

Challenges to Address

Filing Dates

a. The rule for new entities is effective January 1, 2024.
b. While there is time to prepare, everyone who may be affected should begin that process now to avoid pressure as the deadline approaches. Entities formed on or after January 1, 2024 originally would have had only 30 days to file. There was some discussion of extending this time period to provide 90 days to file.
c. Existing entities will have until January 1, 2025 to file.

Penalties

Not To Be Ignored!

Penalties are Severe

a. There are severe penalties, including possible jail time, if someone fails to comply with these new rules. There are severe civil and criminal penalties for failing to file. This is not a risk that should be taken lightly. Civil penalties can be up to $500 per day and up to $10,000, and imprisonment of up to two years.
b. If a person has reason to believe that a report filed with FinCEN contains inaccurate information and voluntarily submits a report correcting the information within 30 days of the deadline for the original report, then the CTA creates a safe harbor from penalty. Given the complexity of the CTA and the newness of the reporting requirements that is not particularly lenient.
c. Should anyone willfully fail to report complete or updated beneficial ownership information to FinCEN as required under the Reporting Rule, FinCEN will determine the appropriate enforcement response in consideration of its published enforcement factors.
d. The willful failure to report complete or updated beneficial ownership information to FinCEN, or the willful provision of or attempt to provide false or fraudulent beneficial ownership information may result in a civil or criminal penalties, including civil penalties of up to $500 for each day that the violation continues.

Penalties are Severe

a. or criminal penalties including imprisonment for up to two years and/or a fine of up to $10,000. Senior officers of an entity that fails to file a required BOI report may be held accountable for that failure.
b. Providing false or fraudulent beneficial ownership information could include providing false identifying information about an individual identified in a BOI report, such as by providing a copy of a fraudulent identifying document.
c. Additionally, a person may be subject to civil and/or criminal penalties for willfully causing a company not to file a required BOI report or to report incomplete or false beneficial ownership information to FinCEN.
d. For example, an individual who qualifies as a beneficial owner or a company applicant might refuse to provide information, knowing that a company would not be able to provide complete beneficial ownership information to FinCEN without it. Also, an individual might provide false information to a company, knowing that information is meant to be reported to FinCEN.

Practice Considerations

What Should Practitioners Do?

What Role Will Your Firm Serve?

- The CTA affects all practitioners who advise clients on the creation of entities, as well as the operation and governance of entities.
- A concern that all professional advisers should consider is whether their role may expose them to any responsibility for CTA compliance for a particular client. This may hinge in part on what the client may perceive. If a financial adviser meets quarterly with a client and provides income tax planning and estate planning advice, will they have exposure? What about the CPA that prepares the entities income tax return and the client believes, perhaps mistakenly, that the CPA is handling all filing requirements.
- It may be prudent for all advisers who might be perceived as having any responsibility to assist clients with CTA filings to inform clients of the CTA obligations, at least in general communications. And if the advisory firm will not take any action with respect to flings for their clients, that point should be communicated in writing. This can be done in a constructive and positive manner of providing information as to the CTA and recommending that the client seek the assistance of other advisers if they require help. Advisers who delve into planning generally and don't take this precaution may face questions from clients who misunderstand the scope of the advisers role.

How Will Services be Priced?

- Other issues advisers will have to consider is what role they will want to serve in CTA filings. Some advisers are simply not equipped to handle volume of filings their clients will require, or the type of compliance work involved. What will be the time and costs to complete filings? Will clients be willing to pay these costs? It may be that there will be modest costs involved for some entities where the ownership structure is simple and obvious, e.g. a client owns 100% of an entity personally and is the sole control person. In contrast, if an entity is owned by a series of complex trusts, each of which has various fiduciaries, non-fiduciaries, powerholders, etc. the initial cost merely to determine who has to report may be extensive. This should be considered if a professional chooses to handle CTA filings and is endeavoring to determine pricing. It may be that for the initial filing a fixed fee may be impossible to estimate.

Time to Complete a Filing

- FinCEN estimates the average burden of reporting BOI as 90 minutes per response for reporting companies with simple beneficial ownership structures (40 minutes to read the form and understand the requirement, 30 minutes to identify and collect information about beneficial owners and company applicants, 20 minutes to fill out and file the report, including attaching an image of an acceptable identification document for each beneficial owner and company applicant).
- FinCEN estimates the average burden of reporting BOI as 650 minutes per response for reporting companies with complex beneficial ownership structures (300 minutes to read the form and understand the requirement, 240 minutes to identify and collect information about beneficial owners and company applicants, 110 minutes to fill out and file the report, including attaching an image of an acceptable identification document for each beneficial owner and company applicant).

Questionnaires from Filing Services

- Another situation that may affect practitioners determining their involvement with filing is that some entities, e.g., law firms, CPA firms, financial planning firms, corporate filing services, may gear up to provide filing assistance on a wide basis. But they may require that input forms or questionnaires be completed by the business to provide the data it needs to handle the filings. Clients may then reach out to their attorneys, CPAs and other advisers for assistance with complete what they may view as a simple organizer. The reality is that it is the filing itself that may be simple and readily automated. The gathering of the data and the making complex decisions as to ownership and control, and in particular how that will apply to trust concepts that are not addressed in any of the guidance, will be time consuming. Some clients may not understand that the cost of the actual filing may pale in comparison to the analysis and data gathering to facilitate that filing.

Inactive or Former Clients

- Practitioners may be contacted by long inactive or former clients. Decisions will have to be made as to whether to accept those clients back and be reengaged. In what capacity can or should an adviser accept a re-engagement? If the practitioner created an entity a decade or more ago, the practitioner may have no information or documentation on the entity that is current. That will have to be obtained.
- The attorney that formed the entity, or a CPA that assisted with filing of income tax returns for the entity, may not have any documentation or information for long dormant client matters.
- This may be particularly problematic for clients that became inactive before scanning was common. For accountants that did not maintain detailed permanent files for tax compliance clients they may never have had entity documentation.

What Scope of Engagement?

a. What could be a decision for practitioners is what type of engagement are they willing to accept? Is it worthwhile financially to accept a CTA filing engagement given the limited nature of the involvement, the likely resistance some clients may have to fees for what they may view as a simple filing not appreciating the complexity of the analysis and the steps that practitioners might believe necessary.
b. Another question practitioners will have to address is will they be willing to accept a narrow CTA filing engagement or will they view that as potentially problematic in light of the myriad of issues that might affect the entity involved, or the ownership entities/trusts involved. If, for example, there is a trust owner of an entity and the client has been inactive for a decade, will an adviser be comfortable opening a file for just the CTA filing if they are not also engaged and paid to review the status and operation of the entity and trust for the intervening decade where no professional guidance was provided.

Entity Documentation to Obtain Before Filing?

- Even if entity documentation is identified for dormant files, what verification steps might need to be taken to confirm the status of the entity? Should a certificate of good standing be obtained for any entity for which a filing will be made? If an entity has been dissolved by the state of formation (e.g., for lack of meeting annual filing requirements) there may be no entity for which to file. What might the consequences be if a filing is made for a dissolved entity. While the cost of obtaining a certificate of good standing is not significant, it may be material to the price quote from the organization offering to complete a filing. Clients may be resistant to this step, but can it be appropriately ignored?
- Even if the attorney consulted had created the entity, it may still be advisable to obtain copies of all documents filed with the state since inception to confirm the current status of the documents.
- In addition, copies of all entity governing documents, e.g. operating agreements and all amendments, for an LLC, in order to determine the current control provisions and persons named. For tiered entities, these steps may be necessary for every layer of entity.

Trust Documents to Obtain

- If a trust is included in the ownership structure the trust document will have to be obtained and reviewed to determine who holds what powers and who may therefore be obligated to be disclosed as a control person.
- Given the common use of decanting, non-judicial modifications, trust protector actions and other steps that might modify a trust instrument, and/or replace or modify the power of fiduciaries, non-fiduciaries and powerholders, all of these documents may have to be obtained in order to ascertain the current status of the trust for purposes of CTA reporting. Once the complete sequence of governing documents is obtained those documents will have to be reviewed and analyzed considering the limited guidance that has been issued.

Post-Filing Steps

- Once the initial filing is completed, how will practitioners and those affected, identify when follow up filings will be required to be made? That process seems more daunting and fraught with challenges than the initial filing. How will practitioners be aware of a change that may trigger additional filing requirements? Practitioners might consider in any engagement to assist with CTA filings making clear that it is solely the client's responsibility to notify the practitioner of any future changes on a timely basis so that new filings can be made. Practitioners may consider formally concluding the engagement after the initial filing (or assistance depending on what the engagement entailed) so that it is clear that they have no ongoing responsibility to monitor facts that may trigger future filings (if such monitoring would even be possible). That may also be prudent given the significant uncertainty that may exist as to the nature of the services and how they should be priced.

Communicate with Clients Now

- Practitioners should consider communicating now to their clients, and perhaps even inactive clients, in the form of a general letter informing them of the requirements of the CTA. This might at least prompt them to start gathering information and contact the advisor. A sample letter to clients follows this article. Given the significance of the reporting requirements, how different it is from other compliance tasks. It may take time for clients to understand the rules and what actions they will have to take, practitioners might consider following up with progressively more detailed letters as the January 1, 2024, and January 1, 2025, dates approach.

Update Entity and Other Documents for the CTA

- Practitioners may consider how legal documentation may warrant being modified to address CTA requirements. A sample Governing Document Clause to Consider: "*Each party will cooperate fully with respect to providing information to the Company so that the Company can comply with the reporting requirements of the Corporate Transparency Act's ("CTA") beneficial ownership information reporting requirements. Within Ten (10) days of any change in facts that may trigger the requirement to report or amend a prior report the undersigned shall provide to the Company all relevant information necessary to the Company timely filing under the CTA. The information to be provided to the Company shall be all relevant information necessary for the Company to comply on a timely basis with the CTA reporting requirements and may include by way of example and not limitation: your full legal name and any changes made thereto, your date of birth, your home address (not a P.O. box or lawyer or other adviser's address) and any changes thereto, and you must provide a PDF copy of your U.S. passport or state driver's license, and any changes or renewals thereof.*"

Conclusion and Additional Information

CTA Is Coming

Conclusion

- Practitioners should immediately evaluate what roles they will, or will not, serve with respect to CTA filings.
- Evaluate what steps should be taken to “gear up” for whatever roles will be served.
- Determine what minimum standards/requirements should be followed (e.g. should a good standing certificate be obtained for every entity)?
- Communicate with clients informing them of the CTA requirements and what role the firm is willing to serve in to help.

Thank you to our sponsor

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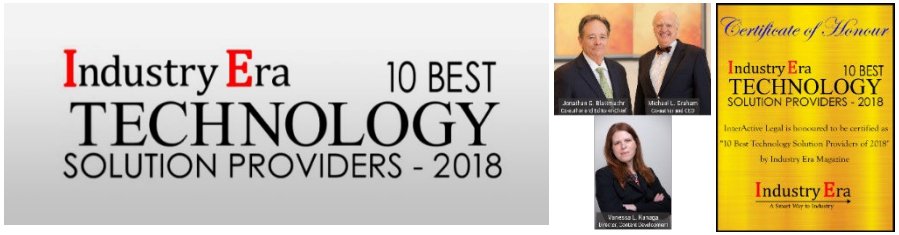

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