Steve Leimberg's Business Entities Email Newsletter - Archive Message #273
Date: 15-May-23
From: Steve Leimberg's Business Entities Newsletter
Subject: **Abigail O'Connor, Martin M. Shenkman and Jonathan G. Blattmachr on the New Corporate Transparency Act: A Quick Guide for Practitioners**

"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). This newsletter is intended to provide practitioners with a quick guide to the basics and some ideas for how to help clients."

In their commentary, **Abigail O'Connor**, **Martin M. Shenkman** and **Jonathan G. Blattmachr** provide practitioners with a quick guide to the basics of the Corporate Transparency Act as well as some ideas for how to help clients.

Abigail O'Connor is an attorney in Anchorage, Alaska, who concentrates on trusts and estates. She is a Fellow of the American College of Trust and Estate Counsel, the Vice President of the Alaska Trust and Estates Professionals, a member of the Board of the Anchorage Estate Planning Council, and a member of the Executive Committee of the Estate Planning and Probate Law Section of the Alaska Bar Association. She is licensed in Alaska and Florida.

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in New York City who concentrates on estate planning,. He is the author of 42 books and more than 1,200 articles. He is a member of the NAEPC Board of Directors (Emeritus), served on the Board of the American Brain Foundation, the American Cancer Society's National Professional Advisor Network, Weill Cornell Medicine Professional Advisory Council, and is active in other charitable organizations.

Jonathan G. Blattmachr is author or co-author of several books and many articles. He is a director at **Pioneer Wealth Partners LLC**, director of estate planning for the **Peak Trust Company** and co-developer with Michael L. Graham, Esq., of Dallas, Texas of **Wealth Transfer Planning.** He is co-author with Georgiana J. Slade, Esq., and Diana S.C. Zeydel. Esq., of Bloomberg Tax Management Portfolio 836-3rd (Partial Interests--GRATs, GRUTs, and QPRTs (Section 2702)).

Here is their commentary:

EXECUTIVE SUMMARY:

The Corporate Transparency Act ("CTA")[i] is a new federal law that will impact the owners or principles involved in almost all limited liability companies (LLCs), corporations (both C and S corporations), limited partnerships (LPs), and other closely held entities. There are a few exceptions 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.

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. The group of siblings who inherit a family cabin together and create an LLC to govern coownership more easily, they will be subject to the new rules. Although there are exemptions to the rules, there are no exemptions for entities such as these. It matters not if the entity has no (or virtually no) receipts. Indeed, while there is an exemption for very large entities, there is no exemption for very small entities, even if there is no gross income.

There are significant civil and criminal penalties for failing to comply, so all practitioners who represent entity owners, or those controlling these entities, need to be aware of these developments. Importantly, the reporting requirement is not a one-time event. There is an initial reporting requirement and then ongoing reporting requirements if there is a change, e.g., a control person moves to a new home address, or perhaps a new manager is named for an LLC and that might have to be reported as a change in control persons. These rules will impact the clients of most estate planning practitioners – and, therefore, all practitioners need to be aware of the rules.

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).

This newsletter is intended to provide practitioners with a quick guide to the basics and some ideas for how to help clients.

COMMENT:

Corporate Transparency Act

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 clients 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. Clients 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.

What Companies Are Subject to the Reporting Requirements

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).

Company Reporting: What Will Have to Be Reported

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.
- 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 indentifying document from an issuing jurisdiction (e.g., a certificate of incorporation) and the image of that document.

Beneficial Owner Reporting: What Will Have to Be Reported

The CTA provides that reporting companies will also have to file reports for "beneficial owners."[ii] 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 clients have ever disclosed and many will be quite uncomfortable with these requirements. For clients used to sending all entity information c/o their attorney, wealth adviser or business to avoid personal disclosures the initial response may be to again disclose in that manner which will not suffice for the CTA.

The concept of a beneficial owner is rather complicated. In broad terms, a beneficial owner is anyone who owns at least 25% of the company or who has substantial control over the company. All officers are beneficial owners by default, even those who own no equity in the entity. For example, is the CFO of an entity a control person? 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?

There still are significant questions about "who" is considered a beneficial owner of a trust that 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[iii], 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. We hope that will have more clarity as we move closer to the effective date.

The Financial Crimes Enforcement Net (FinCEN), which is a bureau of the United States Treasury Department and charged with the enforcement of the CTA, has indicated that it will publish reporting forms that can be used to comply with the obligations under these reporting rules.

When Reports Must be Filed

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 clients 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 clients of the need for filings and the steps involved well in advance of that date.

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. Clients and/or 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.

As of now, there are no extensions to any due dates.

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 client is involved in an entity that will be a reporting company, that client should start thinking now about how the client will gather and track all required information.

FinCEN

The Financial Crimes Enforcement Network ("FinCEN") will be in charge of creating and maintaining the database, which as of now will not be public record but it will be available to a variety of governmental agencies, and possibly others in the future.

Many Clients May Be Affected

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, a client may be affected if any of the following apply to the client:

- The client owns, directly or indirectly, at least 25% of an entity that will be a reporting company. "Ownership" is not limited to obvious ownership (e.g., the client owns membership interests in an LLC). It is broadly defined to include any type of equity interests, 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.

- The client is a manager or officer of any entity that is a reporting company.
- The client is a director of an entity that will be a reporting company.
- The client is the trustee of a trust that owns an entity that will be a reporting company. Whether trust protectors and trustee advisors fit within this category is an open question, so for now, if a client fills any of these roles, make sure this issue is on the client's radar.
- The client has any other kind of control that would constitute "significant control" for the purposes of the rule. Yes, this category is broad, and the CTA intends to cast a wide net. When in doubt, assume the client may be affected.

Effective Date

The rule goes into effect January 1, 2024. There are stiff civil and criminal penalties for failing to file – this is not something that can be missed. Civil penalties of up to $500 per day and up to $10,000 and imprisonment of up to two years. While there is time to prepare, everyone who may be affected should begin that process now to avoid pressure as the deadline approaches. There are severe penalties, including possible jail time, if someone fails to comply with these new rules.

Action Steps Clients Should Take Now

If a client may be responsible for filing reports with FinCEN, start preparing now. The recommended course of action is to start compiling a list of every entity for which the client is an owner or has involvement and have the attorney review the reporting implications for that entity.

Action Steps Advisors Should Take Now

Consider giving clients a heads up! A general letter informing them of the requirements will 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, and that 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.

Practitioners, in addition to informing clients of the new requirements, should consider preparing revised forms, templates and updated firm policies. Also, practitioners should consider modifying templates used for operating agreements, shareholder agreements, and partnership agreements where reporting may be required. The modifications might include a representation by members to inform the company of changes that may have to be reported. But that will not be enough as trust documents, employment agreements and other documentation might also need to be amended to include similar requirements to disclose changes to the company.

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*."

Sample Initial Client Letter

RE: Corporate Transparency Act

Dear ______________:

This letter alerts you of a new federal law, Called the Corporate Transparency Act, that will impact **almost all** LLCs, corporations, limited partnerships, and other closely held entities. There are a few exceptions. The law becomes effective January 1, 2024, so there still is plenty of time to prepare. Exempted from this requirement are entities such

as the following. These are generally entities that are already subject to significant reporting requirements: :

- An issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934.
- Bank, credit union or depository institution.
- Money transmitting business registered with FinCEN.
- Broker or dealer in securities.
- Investment company or investment adviser.
- Insurance company.
- A futures commission merchant.
- Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act.
- Public utility.
- Pooled investment vehicle.
- Tax exempt entity that is described in section 501(c) of the Internal Revenue Code ("Code").
- A political organization as defined in section 527(e)(1) of the Code.
- A trust described in paragraph (1) or (2) of section 4947(a) of the Code.

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 as owners or control persons. 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 of organizations that might be involved in such activities but it will apply even if the entity is not so involved.

The Financial Crimes Enforcement Network ("FinCEN"), which is a bureau of the United Stated Treasury Department is not part of the IRS, will be in charge of creating and maintaining the database, which as of now will not be of public record but available to a variety of agencies and possibly others in the future. All "reporting companies" will be required to file reports with FinCEN that provide certain information regarding the companies and "beneficial owners" of the companies – the humans behind the companies.

This new law will affect virtually all small family businesses, including even LLCs and other entities designed only to hold real estate. Even if an entity has only one owner and that entity is ignored for federal income tax

purposes (such as a single-member LLC), that entity still will have to file reports with FinCEN.

The rule goes into effect January 1, 2024. For entities that already exist by that date, their initial reports are due by January 1, 2025. For entities created on or after that date, their initial reports are due within 30 days from the creation of the entity. As of now, there are no extensions available. There are stiff civil and criminal penalties for failing to file – this is not something that can be missed.

If you have any interest in a closely held entity, such as an LLC, corporation, or limited partnership, or if you exert significant control over any such entity (which might include any officer, director, manager, chief financial officer or investment trustee) then you may be subject to these requirements. If so then you may be responsible for filing reports with FinCEN.

Given the difficulties of identifying all the entities and persons that will have to report, we suggest that you begin now to assemble a list of every privately held entity that you own an interest in or exert control over. You should try to obtain a copy of the certificate that was filed with the state where the entity was formed as well. Because we may have formed entities years or decades ago, we may not have accessible records to identify all such entities. Also, you may have had other advisers form entities of which we are not aware. You may have even formed entities on your own. In any case, we will not undertake to find these entities for you or to prepare the forms required to report to FinCEN unless you separately engage us to do so. If you do wish to engage us to help with this new requirement, we will then begin the process of determining if it is a reporting entity and whether you or someone else will assume responsibility for the reporting. We believe that assembling such a comprehensive list may be prudent to avoid missing any entities, particularly considering the penalties that may be imposed.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Abigail O'Connor

Martin M. Shenkman
Jonathan G. Blattmachr

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LISI Business Entities Newsletter #273 (May 15, 2023)
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CITATIONS:

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[i] Federal Register Vol. 87, Nov. 189, Beneficial Ownership Information Reporting Requirements (Sept. 30, 2022), https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf.

[ii] On March 24, 2023, FinCen released additional guidance, "FinCEN Issues Initial Beneficial Ownership Information Reporting Guidance." This includes information on FAQs, key filing dates and key questions.   https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

[iii] "The Delaware Statutory Trust (DST), however, is a statutory entity, created by filing a Certificate of Trust with the Delaware Division of

Corporations…." Bell, "What Is a Delaware Statutory Trust?" January 23, https://www.delawareinc.com/blog/what-is-a-delaware-statutory-trust/ .