

A Deeper Dive Into the Corporate Transparency Act

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A Deeper Dive Into the Corporate Transparency Act

A Panel Discussion

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Introduction Before the Deeper Dive

A Quick Review of Key Terms

CTA Requirements

“Reporting companies” must identify and report personal identifying information for all “beneficial owners” and “company applicants” through beneficial ownership information reports, or “BOIRs.”

- Reporting company: entity formed by filing paperwork with state Secretary of State or tribal jurisdiction, or any foreign entity that registers to do business in a state.
 - 23 exceptions, including charities and certain large or highly regulated businesses.
 - Excludes general partnerships, sole proprietorships.
 - Excludes trusts and estates.
- Beneficial owner
 - Owns or controls, directly or indirectly, 25% or more of a reporting company’s ownership interest, or
 - Wields “substantial control,” directly or indirectly, over the reporting company.
 - Excludes minors, “inheritors,” certain agents, certain employees, and creditors who lack substantial control.
 - People who have authority over trusts can be beneficial owners if the trust owns or controls a reporting company.
- Company applicant
 - Person who physically files entity formation paperwork, and
 - The person who directs the filing.

Who Reports?

- Reporting companies are responsible for filing accurate BOIRs, so they will need to keep track of all beneficial owners and report each beneficial owner's personal identifying information or FinCEN Identification Number.
- Individuals who obtain FinCEN identifiers are responsible for updating FinCEN when personal identifying information changes (e.g., changes in address).
- Reporting companies are not liable for reporting a FinCEN identifier of a beneficial owner who fails to update personal identifying information.

Filing Deadlines

- a. Entities that exist before January 1, 2024, will have until January 1, 2025, to file initial reports.
- b. Entities formed during 2024 will have 90 days to file initial reports.
- c. Entities formed on or after January 1, 2025, will have 30 days to file initial reports.
- d. Updated reports must be filed no more than 30 days after a change in information previously reported to FinCEN.
- e. At most, there is a 90-day period for correcting incorrect reports.

How Can Firms Adapt?

Practical Measures

Important Next Steps

- Notify Clients
- Modify Engagement Agreements
- Update Intake Procedures
- Updating Existing Documents
- Updating Form Documents
- Understanding Whether and When to Handle CTA Reporting
- Economics

What Role Will Your Firm Serve?

- The CTA affects all practitioners who advise clients on entity formation, operation, and governance.
- Professional advisers should consider whether their role may expose them to any responsibility for CTA compliance for a particular client. This may hinge in part on client perceptions. 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 who prepares an entity's 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 their CTA obligations, at least in general communications. And if the advisory firm will not take any action with respect to filings 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 adviser's role.

Notifying Clients

- Many law firms expressly refuse to take responsibility for informing clients of changes in the law.
- Newsletters warning about the CTA can help clients protect themselves and can help protect attorneys from claims.
- Who to notify?
 - Business clients – it is not too late to notify clients who have existing business entities.
 - Estate planning clients – who knows what they may have transferred into trust?
 - Other advisers – CPAs, investment advisers, attorneys in other practice areas.

Notifying Clients, Continued

- Consider sending multiple letters.
- Explain the law and some of the problems it creates.
- Explain the consequences for noncompliance – nobody wants to be a felon.
- Explain that you need clients to tell you if they need help complying.
 - Law firms cannot keep tabs on all their clients' comings and goings.
 - Without knowing about changes in a client's situation, we can only guess at whose information must be reported. Clients need to provide current information to obtain assistance.
- Explain whether you will or will not assist clients with CTA filings while there is still time for them to figure out their responsibilities.

Reporting Checklist

- ❑ Can the document change, hold, or control an ownership interest in a reporting company?
 - ❑ If no, then the document does not implicate the CTA. Don't be complacent here, though.
- ❑ If yes, what provisions can affect whether someone is a beneficial owner?
 - ❑ Identify all such provisions.
 - ❑ See the appendix, past presentations, the FinCEN Small Entity Compliance Guide, and the regulations.
- ❑ After identifying beneficial ownership provisions, identify the beneficial owners.
 - ❑ If a trust or entity has authority under that provision, then begin this checklist over for that trust or entity.
 - ❑ Go through this process until all natural persons who can be beneficial owners are identified.
- ❑ Obtain beneficial ownership information for all beneficial owners.
- ❑ File timely BOIRs.

Engagement Agreements

- Engagement agreements must make clear whether and under what circumstances your firm will help clients with BOIRs.
 - Include a paragraph regarding CTA compliance.
 - Specify whether the client or the law firm will be responsible for filing initial reports.
 - Consider having the client initial the option they choose.
 - By default, engagement agreements should require clients to provide beneficial ownership information and should disclaim any responsibility on the law firm’s behalf to file updated reports.
- Update existing agreements with a simple CTA addendum.
- Ongoing engagements to serve as a business’s attorney pose some problems.
 - Can you tell the client that you will not be filing for them without action on their behalf?
 - Letters requesting BOI for initial BOIRs – can you assume that clients will provide this information to you, or should you tell them that you assume they will do it themselves unless they ask for help?
 - Beware of any circumstance where a firm is serving as a true “general counsel” – general counsels can be beneficial owners if the substance of their responsibilities aligns with those of a senior officer.

Collecting Information from Clients

- It is common to ask prospective clients for personal information in the intake process.
- Asking for every possible beneficial owner's passport and home address before an initial consultation will not be doable.
- A second round of information collection will be important after a client engages your firm and once things like LLC managers, trustees, and powerholders are decided on.
 - Some clients will not need to provide BOI because they are not involved in reporting companies.
- Should you insist that clients obtain FinCEN identifiers?
 - FinCEN identifiers will make things easier for both your firm and for the reporting company.
 - Some clients may be ill suited to getting FinCEN identifiers because of concerns they will fail to update information with FinCEN as necessary.

Collecting Information from Clients, Continued

- Existing entities and new entities present different information collection challenges.
 - Easier to identify beneficial owners when the ownership structure already exists.
 - Greater control over when the 30-day clock runs when forming new entities, funding trusts.
- What information should clients provide?
 - Clearly, a reporting company's operating agreements or bylaws, amendments, minutes naming senior officers, and the like will be necessary for identifying the beneficial owners.
 - The same information will be needed at every layer of ownership.
 - If a trust is included in the ownership structure, then the trust document will have to be reviewed to identify beneficial owners.
 - Decanting; judicial and non-judicial modifications; trust protector actions; and other steps that might modify a trust instrument, replace or modify fiduciary powers, non-fiduciaries, and powerholders under powers of appointment may be needed to ascertain beneficial owners.
 - 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.

Collecting Information from Clients, Continued

- Once the beneficial owners are identified, BOI collection will be a necessary step. This will surprise many beneficial owners.
- Obtaining BOI for all beneficial owners will require significant cooperation and assistance from both clients and others.
- Attorneys have an ethical responsibility to protect client confidences by using technology responsibly.
 - Need secure practices for receiving sensitive identifying information electronically from clients.
 - Less risk with FinCEN identifiers.
 - Encourage clients to provide information in person.

Problems Collecting BOI

- Reporting companies bear the primary responsibility to provide accurate information to FinCEN.
- But how can reporting companies compel beneficial owners to provide identifying information?
 - Changes to bylaws and operating agreements?
 - Requiring all beneficial owners to obtain and report FinCEN identifiers?
 - This only protects against changes for *existing* beneficial owners.
 - Does nothing to protect the reporting company if the investment trustee changes.
 - Penalties for not providing accurate information? Won't protect against criminal liability.
 - Divestiture of ownership interests? Harsh penalty, might adversely affect tax planning.
 - Requiring copies of trust documents? Settlers might not wish to share with LLC managers.
- Who would want to run a reporting company owned by a trust? Under what conditions?

Fixing Existing Documents: Operating Agreements and Bylaws

- Updating operating agreements and bylaws will be extremely important to clarify responsibilities and prevent reporting failures.
- Different approaches:
 - Short: require the LLC manager or Corporation CEO to comply with CTA and take all steps necessary to do so, including right to obtain identifying information, remove senior officers who fail to comply, etc.
 - Long: detail the steps that a senior officer should follow to comply with the CTA.
 - Difficult to do well when the guidance is so limited.
- Older operating agreements and bylaws may need fixing anyway; good opportunity to revisit and fix old or problematic documents.

Fixing Existing Documents: Trusts

- 2024 will require significant work on the part of reporting companies, trustees, and counsel to identify all beneficial owners and obtain their personal identifying information.
- Is there a good way to compel the people who control existing trusts to provide information?
 - New language conditioning service as a trustee on providing a FinCEN identifier?
 - Can powers of appointment be similarly limited without causing adverse tax consequences?
 - Preparing a form amendment or codicil for existing trusts could make it easier and more affordable fix trust problems but may create new problems.
 - Trust protector actions adding CTA provisions may be common this year, but they cannot solve the underlying problems with the law.
- With so little guidance, trusts that own reporting companies will “over-include” beneficial owners.
 - Normally, over-reporting is not punished, but...
 - FinCEN has suggested that over-inclusion could be treated as filing an inaccurate report because it makes reported BOI less useful. This could theoretically be punished.

Fixing Other Existing Documents

- Any documents that can change a reporting company's beneficial owners will need to be reviewed and, if necessary, changed.
 - Debt instruments that are convertible into equity. Buying out creditors might make sense.
 - Buy-sell agreements should contain CTA compliance requirements to avoid confusion.
 - Countless other documents can be impacted.

Checklist: Fixing Existing Documents

- ❑ Identify problematic existing documents (trusts, wills, bylaws, operating agreements, etc.). Cast a wide net here.
- ❑ Get client approval to fix the document.
- ❑ Determine what steps will be necessary to fix the document.
 - ❑ In many cases, a new article or paragraphs identifying CTA compliance responsibilities could be enough.
 - ❑ What will the solution entail?
 - ❑ Can someone act unilaterally to fix the document?
- ❑ Determine who has the power to fix the documents to facilitate CTA compliance.
- ❑ Contact the person(s) who can fix the problematic document.
- ❑ Amend and restate the problematic document.

Fixing Form Documents: New Operating Agreements and Bylaws

- Give senior officers the power to identify beneficial owners and, to the extent possible, the power to compel the provision of BOI from beneficial owners.
 - Should CTA compliance language be short and general, or serve as a guide to the ignorant but well-intentioned senior officer?
 - There are serious limits to a senior officer’s power to obtain BOI.
- Allocate costs for compliance.
 - The reporting company is responsible for filing, but a trust that owns the interest may be the source of many of the compliance costs. Spelling out how costs are allocated is essential.
 - Consider apportioning compliance costs among beneficial owners.
- For operating businesses, consider appointing a “CTA Officer” responsible for obtaining and reporting BOI.

Fixing Form Documents: New Trusts

- Drafting trusts to comply with the CTA
 - Clearly identifying the provisions that may create beneficial owners will be good client service.
 - Conditioning service as trustee or the exercise of certain powers under the document on obtaining and providing a FinCEN identifier may make sense.
 - Should you reconsider granting general or non-general powers of appointment?
- Trust Funding
 - Before transferring ownership interests into trust or creating trust-owned entities, it will be critical to be ready to file updated beneficial ownership reports.
 - What about for trusts created by another trust instrument (e.g., a discretionary inheritance trust funded on the settlor's death)? How long will the reporting companies have to get their house in order?
 - Obtain identifying information for as many potential beneficial owners as possible before funding.

Checklist: Forms

- ❑ Identify form documents that can change, hold, or control beneficial ownership.
- ❑ Add provisions regarding CTA compliance.
 - ❑ Expressly state reporting requirements.
 - ❑ Expressly allocate reporting responsibilities.
 - ❑ Require FinCEN Identifier?
 - ❑ Include penalty provisions?
- ❑ Identify all provisions of a form that can change, hold, or control beneficial ownership.
 - ❑ Consider using a tag or highlight color that can be easily identified and removed after drafting.
 - ❑ Consider expressly identifying those provisions within the four corners of the document.
- ❑ Identify provisions to client both in person and in writing:
 - ❑ Draft reviews.
 - ❑ Funding letters.
 - ❑ Follow-up letters.

Will Your Firm Assist with CTA Compliance?

- Estate planners must prepare documents that help clients comply with the CTA. But will they undertake to help clients file BOIRs?
 - Do you have the capacity to file BOIRs? Many small firms or solo practitioners do not, and will need to communicate to clients the need to turn elsewhere for help.
 - If a firm will take on BOI reporting, under what circumstances?
 - Does the firm control when the reporting obligation arises?
 - Hold off on entity formations or trust funding until information is acquired.
 - Refuse to close a sale or transfer until updated BOI is obtained.
 - Can become extremely complex for entities owned by multiple trusts governed by the laws of multiple jurisdictions.
 - Absolutely must have governing documents for every layer of ownership.
 - Will a firm ever want to file updated reports after the 30-day clock starts to run?
- Is the risk worth it?

Will Your Firm Assist with CTA Compliance?

- Filing initial BOIRs will generally be easier than filing updated reports.
- Hard to imagine a firm agreeing to file updated BOIRs without the client providing information to the firm – firms are not in a position to monitor BOI changes.
- Would a firm agree to file an updated BOIR after the 30-day clock starts to run?
 - Very rare circumstance.
 - Need a highly cooperative and proactive client.
 - Need a clear ability to fire a client who does not provide necessary information within X days of the reporting deadline.
- Engagement agreements and letters must make the responsibilities crystal clear.

Economics

- How long will it take to collect the necessary information to file BOIRs?
 - FinCEN estimates that simple filings will take approximately 90 minutes and that complex filings will take roughly 11 hours, but this figure will vary significantly between reporting companies.
- Until we have experience filing BOIRs, hourly billing seems like the way forward.
 - Eventually, flat fees may be appropriate, especially if clients are providing all necessary BOI.
- Will clients be willing to pay the costs associated with identifying beneficial owners and filing BOIRs?
- Identify who is paying?
 - The reporting company?
 - One or more trusts?
 - One or more individuals?
- Can firms engage assistance to develop compliance procedures?
- Will third-party vendors be able to facilitate compliance?

Economics

- The CTA is a strong disincentive against the legitimate use of business organizations.
- The CTA will also deter the use of valid and highly beneficial estate planning tools.
- The alternatives to liability-limiting business organizations have serious problems:
 - Insurance can have significant ongoing costs, exclusions, regions with no coverage.
 - General partnerships and sole proprietorships give no protection.
- Trusts and business organizations remain some of the best tools for asset protection and management and will remain necessary parts of sound estate planning.

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.

Additional information

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