

## Steve Leimberg's Business Entities Email Newsletter - Archive Message #283

**Date:** 29-Nov-23  
**From:** Steve Leimberg's Business Entities Newsletter  
**Subject:** [Anthony Del Rosario, Martin M. Shenkman & Alan S. Gassman: Immediate Actions Needed for Transparency Act Planning](#)

*“Many wonder how the Treasury Department will be able to keep up with the new CTA disclosure law, which calls for an expected ‘32.6 million initial filings in Year 1’ and 5 million additional filings each year in ‘Years 2-10’ thereafter, with the vast majority of these filings being required to include information on multiple individuals and entities, copies of driver’s licenses or passports, personal residency and other confidential information. It is exhausting even thinking about this. Nevertheless, we all must face reality – the \$500 per day civil penalty and possible two years of imprisonment for intentionally disregarding this law in 2024 will get everyone’s attention, even if nothing else does.”*

**Anthony Del Rosario, Martin M. Shenkman** and **Alan S. Gassman** provide members with timely commentary on the Corporate Transparency Act. Members who wish to learn more about the CTA should consider watching Marty and Alan’s [LISI Webinar “Corporate Transparency Act: Practical Considerations Practitioners Must Know.”](#) Click this link to register or to learn more: [Marty/Alan](#)

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frequent contributor to LISI and has published numerous articles in publications such as BNA Tax & Accounting, Estate Planning, Trusts and Estates, and Interactive Legal. Mr. Gassman is also co-author of Gassman and Markham on Florida and Federal Creditor Protection and several other books on tax and estate planning. His email is [alan@gassmanpa.com](mailto:alan@gassmanpa.com).

Here is their commentary:

## EXECUTIVE SUMMARY:

The Corporate Transparency Act (“CTA”) is scheduled to be effective January 1, 2024, and there are important steps that should be considered before the end of 2023. The prudent step is to assume the CTA will in fact become effective as the law presently provides for. That being said, it is hard not to ponder the reality of the CTA, given the lack of timely advice by the Financial Crimes Enforcement Network, Department of the Treasury (“FinCEN”, which the authors also sometimes refer to as “the Treasury Department” in this newsletter), the incredible unfairness and burdens it will create, and the tendency of the government to allow delays in the implementation of complicated legislation where there is such a lack of guidance.

Many wonder how the Treasury Department will even be able to keep up with this new CTA disclosure law, which calls for an expected “32.6 million initial filings in Year 1” and 5 million additional filings each year in “Years 2-10” thereafter, with the vast majority of these filings being required to include information on multiple individuals and entities, copies of driver’s licenses or passports, personal residency and other confidential information.<sup>[1]</sup>

REQUIRED COMPANY AND BENEFICIARY OWNERSHIP INFORMATION	
REPORTING COMPANY INFORMATION:	1) Full legal name of the reporting company.  2) Any trade name or "doing business as" name of the reporting company.

	<p>3) A complete and current address consisting of:</p> <ul style="list-style-type: none"> <li>• The street address of the business, if reporting company has a principal place of business in the U.S.</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>• The street address of the primary location in the U.S. where the reporting company conducts business.</li> </ul> <p>4) State, Tribal, or Foreign jurisdiction of where the reporting company was formed. - If it is a foreign reporting company, the State or Tribal jurisdiction where the company first registered.</p> <p>5) The TIN or EIN. If foreign, the TIN and name of a foreign jurisdiction</p>
<p>BENEFICIAL OWNER:</p>	<p>1) Full legal name of the individual.</p> <p>2) The date of birth of the individual.</p> <p>3) A complete current addressing consisting of:</p> <ul style="list-style-type: none"> <li>• The street address of such business (for company applicants who form or register an entity in the course of such company applicant's business)</li> </ul> <p>OR</p>

• In any other case, the individual's residential street address.

4) A unique identifying number and the issuing jurisdiction from one of the following documents:

• A non-expired passport issued to the individual by the United States government;

• A non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual;

• A non-expired driver's license issued to the individual by a State or

• A non-expired passport, issued by a foreign government, to the individual if the individual does not possess any of the previous three documents

5) An image of the above-mentioned documents from with the unique identifying number.

It is exhausting even thinking about this. Nevertheless, we all must face reality – the \$500 per day civil penalty and possible two years of imprisonment for intentionally disregarding this law in 2024 will get everyone's attention, even if nothing else does.

**FACTS:**

In 2021, Congress first enacted the CTA as part of the National Defense Authorization Act. As discussed below, the purpose of the CTA is to make sure that shell companies fully report ownership and control information to allow the government to more actively pursue financial terrorists. We expect that at a later time the Act will be updated to require disclosure of all Trust arrangements, because we expect that many criminals and “ne'er-do-wells” will simply convert their arrangements to Trust arrangements to avoid having to register under the Act. Legislation, in fact, has already been considered for similar reporting for trusts. While the policy and reasoning behind this law is sound, the enforcement will be broad, as discussed below.

The CTA will require stringent reporting of both beneficial owners with at least 25% of the ownership interest of such a company and by Control Persons who directly or indirectly exercise substantial control over the reporting company and control persons. Control persons in these companies may include officers, directors, managers of an LLC, key employees, etc., as shown below:

<b>Terms</b>	<b>Explanation</b>
Beneficial Owner	Any individual who directly or indirectly exercises substantial control over the reporting company or controls at least 25% of the ownership interest of such company.
Ownership/Control of Ownership Interest	Direct or indirect ownership/control through any of the following:  (A) Joint ownership;  (B) Through another agent on behalf of such individual;  (C) With regard to a trust or similar arrangement that holds such ownership interest:

	<p>(1) As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;</p> <p>(2) As a beneficiary who: i) is sole recipient of income from trust or ii) has distribution rights of all assets or iii) grantor with the right to revoke trust;</p> <p>(D) Through ownership or control of one or more intermediary entities.</p>
Substantial Control	<p>An individual exercises substantial control over a reporting company if the individual:</p> <p>(A) Serves as a senior officer of the reporting company;</p> <p>(B) Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);</p> <p>(C) Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding:</p> <p>(1) The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;</p> <p>(2) The reorganization, dissolution,</p>

	<p>or merger of the reporting company;</p> <p>(3) Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;</p> <p>(4) The selection or termination of business lines or ventures, or geographic focus, of the reporting company;</p> <p>(5) Compensation schemes and incentive programs for senior officers;</p> <p>(6) The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;</p> <p>(7) Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or</p> <p>(D) Has any other form of substantial control over the reporting company.</p>
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Trusts, the foundation of many estate plans, add incredible complexity and uncertainty to these reporting requirements. Therefore, the notes below will help to advisors and all of those affected by these new laws.

While not everyone will be responsible for making sure that an entity registers under the Act, every person and every advisor could potentially be

accused of being a co-conspirator or an aider and abettor for those entities that do not comply, or which inaccurately comply.

## **COMMENT:**

### **LET YOUR CLIENTS AND KEY COMMUNICATORS KNOW THIS IS COMING.**

While many advisors have been hiding their heads in the sand, hoping that this law would not become effective, a large number of clients still do not realize that this will be a formidable project in 2024, if it is not delayed. Before 2024, clients should take advantage of creating new entities because an entity created in 2023 will not have to file in compliance with the CTA until January 1, 2025.

The above schedule is much more forgiving than those companies created in 2024, which will have 30 days<sup>iii</sup> from their formation to report on their beneficial owners and control persons.

<b>BENEFICIAL OWNERSHIP INFORMATION REPORTING DEADLINES</b>	
Companies Formed Before January 1, 2024:	If the Company exists as of January 2024, the initial BOI report must be filed by January 1, 2025
Companies Formed After January 1, 2024:	If the Company is created or formed after January 1, 2024, the Company must file BOI within 30 days of receiving actual or public notice of the company's creation or registration is effective.

### **COMMUNICATE WITH OTHER PROFESSIONALS.**

Most CPA and law firms share a high concentration of clients with other CPA and law firms. The banter going back and forth is very interesting and includes the following:

- 1) Filling out the forms for CTA compliance constitutes the practice of law because judgments have to be made as to the ownership



and control of an entity. Accounting firms and other professionals cannot do this.

- 2) Counterpoint - CPA firms regularly only fill out S-corporation and partnership tax forms, as well as disregarded entity-related tax returns, which require a decision to be made as to ownership. In completing those forms, CPAs routinely identify the person with the authority on behalf of the entity or trust to sign the return.

Further, accountants and other professionals also regularly file gift tax returns and estate tax returns, which disclose and describe ownership and are impacted in many situations by who has control over a particular asset or entity.

On the other hand, law firms may handle or at least advise accounting firms on the proper treatment for entities that are owned by trusts or other LLC's that themselves have multiple ownership, trusteeship separate from beneficiaries, or special provisions that could cause confusion. What will likely occur is that each CPA firm will make decisions as to whether they will be involved at all in CTA filings, and if so to what level of complexity. Even CPA firms that believe they can avoid and refer out the filing CTA forms may find that they are so inundated with client questions that they will have to at minimum bill for the time to advise on the filings, and once they go down that path assisting with at least some filings may become inevitable.

It will be important to establish who will be responsible for registration for each category of entity or each particular client's entity in early 2024, if possible, because it may take all 365 days to facilitate proper registration for pre-existing entities.

### **SHIFTING OWNERSHIP BEFORE 2024 TO SIMPLIFY REPORTING AND FINE-TUNE ESTATE, TAX AND CREDITOR PROTECTION PLANNING.**

We often see situations where a high-risk individual like a physician or a business owner who hires, fires and trains employees, signs on guarantees and may be implicated in all types of litigation is the owner of valuable assets, including entity interests that may be more appropriately held under creditor protection trusts, or by a spouse, or by splintered ownership (i.e., multiple owners) to facilitate at least having charging order protection. If all or most of the ownership interest is transferred to the lower-risk spouse, the entity interests may be less likely to be lost in litigation, and the high-risk

spouse's ownership and personal information would not have to be reported to FinCEN.

Accounting firms may want to be responsible for reporting for most applications, where there is no question or confusion with respect to ownership and control of a given entity, such as a single member LLC that is disregarded or taxed as an S-corporation or partnership and has only individual owners. When employment agreements or complex trust provisions have to be analyzed in light of CTA regulations, CPAs may turn to legal counsel for guidance. For example, does an equity participation or percentage rent agreement trigger a requirement to file for the employee or landlord?

### **REDUCE OWNERSHIP FOR OVER 25% AND ELIMINATE CONTROL SITUATION.**

An example of this is that there may be elderly family members or young adult members of an LLC that could cause a high degree of risk or inconvenience with respect to not being able or willing to provide a copy of their driver's license or passport, and not being notified when they change primary addresses, which can be common for individuals who are simply not responsive, a/k/a "trust babies." Yes, these people actually do exist.

It might be best to cash out of the entities or have them gift their interests to others before these rules take effect, especially if those entities are shelf companies. Shelf companies are entities created for business and real estate deals that might happen in the future, (or which did not happen but the entity shell was retained), and which continue to exist. If there is no good reason for the entity dissolving it before the end of 2023 will avoid CTA filings. If it is dissolved after January 1, 2025 filing will be required, and the law is not clear as to whether a company dissolved in 2024 will be exempt from filing because it is not a Reporting Entity once dissolved. Please note that the exception for inactive entities is very limited and will not apply to many shelf entities.

Other shelf companies are LLCs created by individuals for personal liability protection reasons and separate personal assets from small home businesses. Individuals owning these shelf companies would need to complete their CTA filings by January 1, 2025, but dissolving these companies would remove the need to waste time and resources on such an entity.

While we are hopeful that the rules will allow the 2024 reporting to be based only on the status quo of the entity of owners and people in control, as of the date of filing, it is not clear whether it will be possible to shift ownership and control in the middle or even late 2024 and to only disclose the post-transition ownership and control.

### **UPDATE YOUR FINANCIAL AND ESTATE PLANNING INFORMATION.**

Many law firms, CPA firms and financial advisors try hard to keep client data updated in real time, or at least whenever they have large changes, and in some situations, annually or even twice a year. The CTA is an excellent opportunity for legal, accounting and financial professionals to ask their clients for an updated personal financial statement, copies of tax returns and financial information, and to consider updating planning where appropriate. Advisors may wish to offer their clients more frequent updating for multiple purposes, including compliance with the CTA.

In particular, we find that a high percentage of affluent taxpayers who have multiple entities and trusts also have inconsistency with respect to tax, Financial Statements, and actual Operating Agreement, Shareholder Agreement and Stock Certificate, reporting, and titling. The Financial Statement may say one thing, the tax return may reflect another position, and the Operating Agreement may be inconsistent with one or both of them.

Then, there is the fourth question as to what the client thinks the ownership should be. The opportunity to review all information and update charts and documentation will cause thousands of taxpayers to have significant savings in federal estate and income taxes and reduce exposure from creditor protection and bank compliance standpoint (and higher professional fees, which is not always a bad thing 😊).

Additionally, modifying or decanting trusts before 2024 could be a prudent strategy. In trusts, many individuals are named in several positions, i.e., beneficiaries, trustees, grantors, etc...it will be essential for them to know what their CTA obligations are after losing touch with these individuals. Modifying trusts with people that are more appropriate, and decanting an existing trust into a better-positioned one, may relieve planners of such an inevitable headache.

### **DISCUSS AND COUNSEL ON CONFIDENTIALITY.**

The purpose of this law is to prevent criminals from clandestinely owning interests in entities that are used for tax evasion, evasion of F-BAR and other disclosure requirements, and/or organized crime, including but not limited to, drug trafficking, sex worker trafficking and money laundering and financing terrorism. The law does not prevent individuals in compliance with this CTA from arranging and conducting their affairs in a manner that does not make it easy for non-governmental individuals or entities to be aware of the actual ownership of an entity.

Many affluent and professional individuals and families do not want patients, customers, or debtors to be able to go on the internet and discover where they live, what they own, and what they control without much effort. In addition, there are still a great many families who experienced the loss of life and assets in the Holocaust and similar pogroms for whom confidentiality and safety of their family, identity and assets is a high priority for planning. The recent college campus and other protests and concerns with respect to antisemitism and anti-Muslim sentiments are not only abhorrent, but also fueling concern over what may happen in the future, and the degree of confidentiality that individuals who may be discriminated against should maintain in their planning.

The CTA does not prevent protective planning. The use of LLCs and jurisdictions, like Wyoming, Colorado and Delaware, which do not require or publish disclosure of managers of entities, land trusts that may have such LLCs as trustees, and irrevocable trusts which are not required to directly register under the CTA, will be used more frequently as world events and the loss of privacy both continue to worsen. Thus, while the CTA causes concern, notwithstanding that the disclosures made under the CTA are required to be kept strictly confidential and not used by the government without significant safeguards.

### **UPDATE OPERATING AND OTHER AGREEMENTS.**

There will no doubt be issues and substantial inconveniences when individuals or entities refuse to assist companies and professionals when seeking to comply with the CTA. When LLC members or shareholders are not getting along, it is not uncommon for individuals and entities to be uncooperative and to put entities and other owners at risk.

It makes good sense to have provisions under operating agreements, shareholder agreements, and partnership agreements to require each owner and any managers to cooperate to comply with any and all laws that

require disclosure or the submission of information as may be suggested by legal counsel for the entity, including with respect to the CTA.

While retroactively requiring such provisions to be binding additions to presently existing agreements, there may be a fiduciary duty on the part of a shareholder or a member to cooperate with such laws, or a good business reason to exclude or "freeze out" a shareholder or member who refuses to be cooperative. Consider for example: "Every Member and Manager executing this Agreement has or shall within thirty (30) days of the later of (i) the execution of this Operating Agreement, (ii) thirty days from the date that the FinCEN portal becomes operative, obtain a FinCEN Identification Number and provide same to the CTA Reporting Manager designated under this Operating Agreement. Any Member or Manager not cooperating after receiving 10 days' written notice thereof may be excluded as a Manager and bought out of the Company for the fair market value of such Member's ownership interest, or such portion as would reduce such Member to under 25%, as determined by the Certified Public Accountant of the Company and such valuation expert or experts as such Certified Public Accountant may retain, with the purchase price being reduced by the costs incurred by the Company as a result of such non-cooperation, and with payments to be made over 60 equal monthly payments with interest at the Mid Term Applicable Federal Rate effective on the date of purchase, with the Company having the power to execute such documents, including a Sale Agreement, a Stock Power or Assignment and a resignation as recommended by legal counsel for the Corporation. "

### **RECONSIDER RELATIONSHIPS WITH BAD ACTORS.**

We often counsel clients to not enter into business relationships or associated arrangements with individuals who may be "ne'er-do-wells" or disreputable. While the vast majority of individuals intend to follow this advice, many individuals are now "stuck in" relationships where they have learned after the fact that their partners or other associated individuals are unethical, and may even be criminals.

The CTA is a strong reminder that danger (or at least investigation) may be just around the corner if and when there is an association between an otherwise innocent and well-meaning individual or entity and an individual or entity that intentionally or unintentionally breaks the law, or may be sought out by law enforcement. Severing ties before the end of 2023, or sometime during 2024, may be an even more important objective for those who remain in such relationships.

## **COMPREHENSIVE TRUST REVIEWS.**

It will come as no surprise to most advisors that a high percentage of trust arrangements are not properly administered, accounted for, and reported for fiscal and tax purposes. To properly evaluate a trust structure to determine who may be a Beneficial Owner and required to file under the CTA, it would seem necessary to identify all relevant trust documents and ancillary documents from the inception of the trust until the date the filing is made. For example, did a trustee resign? Did a powerholder relinquish or exercise a power? Did the Trust Protector take any actions? In many cases, no one has maintained a full set of records in chronological order to facilitate having an efficient review to determine the current status of the trust. Without these steps, it cannot be sure what the current status of the trust is.

If the above steps are taken to facilitate a CTA filing, will the advisers involved avoid liability if there are other issues with the trust? It would seem that even if liability can be limited with a narrow scope engagement letter the better course of action would be, while collecting and organizing all trust records, to review trust administration for other issues that those same records may indicate exist. Therefore, when the Trustee of the Trust is the owner of a company or other state registered entity, or has a management or control or lender relationship, it could also make good sense to have a qualified lawyer and tax advisor review the Trust and its circumstances carefully to help assure compliance with the CTA, and also checking for compliance and best practices with respect to federal tax law, proper disclosure on financial statements, and following appropriate accounting rules and formalities with respect to the relationship between the Trust, entities involved with the Trust, and beneficiaries.

Filing incorrectly under the CTA will be a breach of fiduciary duty by Trustees who may not know the difference. In addition, advisors who serve as Trustees under Trust Agreements may want to rethink whether they want the liability exposure or to require compliance with sound business practices to help ensure that what is intended to be a simple and well-meaning gesture of willingness to serve does not turn into a nightmare for the well-meaning professional. Traps for the unwary with respect to the CTA implications for trusts will include situations where a grantor or other person has the power to replace trust assets with assets of equal value, withdrawal powers with power to replace a trustee or trustees, and the possession of Trust Protector powers.

## **CHECK TAX PLANNING.**

Oftentimes, we find that optimum income tax and estate tax planning is not occurring with respect to existing entities, properties and arrangements.

Common examples include:

- 1) having businesses that, if operated under a sole proprietorship or partnership, could qualify for a Section 199A deduction on all income but instead erroneously operate under S-corporations, which require the payment of salaries that cause the imposition of employment taxes and, therefore, do not qualify for the Section 199A deduction;
- 2) the existence of significantly profitable operations under LLCs taxed as disregarded or partnerships that could avoid significant employment taxes and Medicare tax exposure by being taxed as S-Corporations;
- 3) arrangements between multiple individuals or entities under LLCs taxed as partnerships that do not meet the substantial economic effect rules under Internal Revenue Code Section 704(b) with respect to the allocation of income and capital accounts: and
- 4) entities that have been “given away,” where the Donor has retained control or ownership rights that would cause the entity to be included in the Donor’s estate for estate tax purposes under Internal Revenue Code Section 2036(a)(1) or (2).

To many advisors, opportunity to review the circumstances for the primary purpose of complying with the Corporate Transparency Act will extend to helping clients improve upon arrangements for income tax, estate planning, asset protection and other purposes.

## **CHECK OR RECHECK TITLING, INSURANCES AND ENTITY RELATIONSHIPS.**

Quite often, we will recommend that a client allow us to review the titling of assets associated with an entity, or we can simply go to the property appraiser's website in the county where the real estate is owned and pull the most recently recorded deeds to determine whether the title appears to be proper. Looking at a client’s declaration pages for liability and casualty insurance, checking to see whether personal umbrellas provide liability coverage for entities owned by LLCs and other entities, and periodically conferring with good property and casualty insurance lawyers or

independent agencies or other advisors may significantly reduce both risk and premiums, and enhance coverage.

**Conclusion: “Toto, I’ve got a feeling we’re not in Kansas anymore.”**

The yellow brick road through the Land of the CTA will be long, winding, and incredibly complex for advisors and business owners who must navigate it. While there is no place like home, the penalties and fines for failing to take this journey are formidable, so advisors should decide what role they will play and beginning preparations for helping our clients and other advisors on what can be a very positive journey for those who we serve.

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

*Anthony Del Rosario*

*Martin M. Shenkman*

*Alan S. Gassman*

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## **CITATIONS:**

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<sup>[i]</sup> 87 FR 59498, *Beneficial Ownership Information Reporting Requirements*, FINCEN (September 30, 2022), <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>.

<sup>[ii]</sup> As of November 18, 2023, there is a proposed rule to extend the deadline to 90 days. The comments have been closed as of October 10, 2023.