Corporate Transparency Act: What You Really Need To Do

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Corporate Transparency Act raises new reporting requirements but there may be some simplifying and ... [+]

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The Corporate Transparency Act ("CTA") is upon us. January 1 all new entities have to register with the FinCEN. Unless Congress acts to defer filings for pre-2024 entities, those will be required to be filed by January 1, 2025.

While there have been extensive articles discussing in some detail the new rules, there seems to have been less in terms of practical advice about what you should do. The following endeavors to provide that practical guidance.

Most Filings May Be Pretty Simple DIY Endeavors

There has been lots of hullabaloo about the cost, complexity and hassles of the CTA. There have been detailed articles pondering whether a key employee, or person holding a loan power in a trust have to file. But the reality is likely that most entities will be pretty straightforward.

John and Jane formed a limited liability company ("LLC") to own a rental property. Jane and John each own 50% of the entity and each is in a control position. The LLC has to file as a Reporting Company and each of John and Jane have to file as beneficial owners. It would seem that if Jane and John go to the FinCEN portal (not available at the time this article is being written) it should be a pretty quick and simple matter to upload the documents require and to input the limited information.

Let's say that Jane transferred her interests to her revocable trust. No biggie. She would still report that trust likely meets the exception as being "wholly revocable" and it would have no impact on her CTA filings.

Let's say John got fancier and gifted his interests to a trust for his kids. While trusts can be incredibly complicated with lots of different potential Beneficial Owners, most trusts, just like most LLCs, are probably pretty simple. John named his brother Tom as trustee. The trust benefits Tom's three adult children. Tom and the three children have to file as Beneficial Owners.

While there is really no way to determine how complex most filing situations will be, if your situation is pretty plain vanilla, it just may not be a big deal and may not be more than a DIY Sunday afternoon project.

But what if you get the decision as to who has to file wrong? Is that a DIY danger? Maybe not. Read the next tip.

When In Doubt File Is The Simple Mantra

OK, so let's say you hired fancy lawyers and have much more complicated LLC structure including a phantom stock arrangement with a key employee, a manager named, and part of your interest is owned by a complicated trust that has a trustee, investment trustee and loan director.

So what to you do? You can hire a CPA or attorney to dig through the documents. If the legal language gets thick and you hired a CPA, at some point in the analysis the CPA may punt and say: "This is now a legal decision and you have to hire your attorney."

How much in professional fees might be incurred to figure out if the trust protector and key employee must file? And here's a reality check, even if you spend oodles of money on professionals to figure out if whether a particular person falls within the definition of "Beneficial Owner" in the end it may at best be a judgement call because there are lots of uncertainty in the law and on many of these nuanced decisions the guidance is just not clear. And guess what, if you want to avoid the harsh penalties ($500/day and possible jail time), if there is an ambiguity in the determination as to whether a particular person has to file as a Beneficial Owner, isn't the safer option just to file? Seems to be.

So, let's review: You can spend a lot of money on professional advisers trying to determine if a particular person has to provide Beneficial Ownership Information ("BOI"), or you can just file. If they cannot determine with certainty whether or not someone has to file, the professionals may just conclude that the answer is uncertain. If the answer is uncertain, they will likely tell you to file to avoid a penalty. So, why not cut to the chase?

If it is not pretty clear from the charts FinCEN has provided in its Small Business Guide that someone is not a beneficial owner, why not just file? Considering that filing may well take little time to do, and doesn't cost anything to do on your own, isn't that the simpler, cheaper and safer route? The FinCEN Guide is pretty well done and understandable.

This reasoning leads to the CTA mantra: “When in doubt, file!”

But what if you get the decision as to who has to file wrong? What if you file and you did not have to? There is no discernable penalty or negative consequence of filing if you did not have to. Penalties only apply if you were supposed to file and did not do so.

This reasoning leads to reinforcing the CTA mantra: “When in doubt, file!” This mantra also makes the risk of DIY, so long as you err on the side of “when in doubt, file” perhaps less risky then trying other legal tasks on your own.

Have Beneficial Owners Obtain FinCEN Identification Numbers

A much talked about issue is once a Reporting Company files a report it has to update that report in 30 days if, for example, Beneficiary Owner Information (“BOI”) changes. But how can a Reporting Company know if a Beneficial Owner’s name, address, driver's license, etc. changes?

FinCEN’s rules provide a simple solution. All Beneficial Owners should directly register with FinCEN. That way if there information changes they will know and they can file and update and the Reporting Company is not involved. The concept is pretty simple, if Beneficial Owners file directly they get a FinCEN Identification Number that they give to the Reporting Companies involved and the Reporting Companies only have to disclose the name and FinCEN Identification Number of the Beneficial Owner. Easy Peasy! Require this step of everyone.

Bonus benefit. If each Beneficial Owner files directly with FinCEN no one else has to see their confidential information.

Modify Entity and Trust Documents Providing For Agreement To Get A FinCEN Identification Number

When your attorney updates your entity governing document (e.g. shareholders' agreement for a corporation), or decants a trust, discuss the benefits of including requirements that everyone who might be a Beneficial Owner obtain a FinCEN Identification Number and provide it to the entity. That may avoid issues in the future.

An approach that might be worth considering is to have the signature blocks for trusts and entity documents include a representation that the person singing agrees to obtain a FinCEN Identification Number and provide it to the entity . In some instances, it might be worth discussing with your attorney whether the person's appointment might be contingent on, and not effective until, they provide a FinCEN Identification Number.

Have Trust Protectors Empowered To Appoint Persons In The Future

Here's a simple approach to reduce filing requirements. It has been common for complex trusts to name a bunch of persons in various capacities. Until now, it may have been common to list many different functions (investment trustee, distributions, trustee, loan director, person who can add beneficiaries, etc.). A simple approach to minimize the current CTA filings may be not to name all those people now, but rather give the Trust Protector the right to appoint those persons in the future when the functions are needed. That could easily cut by ½ or 2/3rds the number of Beneficial Owners required to report for a trust.

Do You Really Want To Hire A Lawyer?

Consider the practical discussion above. If the mantra is "When in doubt, file" and if there is no downside to filing, is it worth incurring the cost of a CPA and/or attorney analyzing the law on reporting especially considering the possibility that in the final analysis they may not have certainty as to whether a particular person must submit BOI information. Might it be a better practice to "when in doubt, file?"

Consider A Bonus To The Recalcitrant Beneficial Owner

Say, for example, you have a key employee in your business. It is not clear whether he has sufficient power to be a “substantial control person” that the CTA would characterize as a Beneficial Owner. You could hire counsel to evaluate the legal agreements in light of whatever guidance the FinCEN has provided. Alternatively you might just ask the key employee to submit Beneficial Owner Information to the Reporting Company. If a lawyer would require a minimum of three hours at $1,000/hour to evaluate the issue. Might it be a better result to offer the key employee a bonus to file instead of having the issue evaluated, the evaluation which might just be inconclusive or determine that filing is required?

Do You Really Want To Hire A Filing Service?

Filing services of all types are gearing up to help Reporting Companies and Beneficial Owners file. Consider what assistance you will actually receive. The information to be reported by Reporting Companies and Beneficial Owners is pretty simple. That information will have to be uploaded to a Service provider’s website not much differently then it would be uploaded to the FinCEN website directly. As a Beneficial Owner a service provider or professional adviser might email you periodically remining you that if your name or address changes you have to provide amended information to the Reporting Company (or as recommended above file an amendment with FinCEN for your FinCEN Identification Number). If the driver’s license or passport you gave as part of your Beneficial Owner Information changes or expires an update will be due. Services or professional advisers might monitor that date. But is it really a big deal to calendar that date on your personal or business calendar so that you have your own reminder? If a filing services is retained, if there are tough questions they will likely require that you have independent counsel, or captive law firms, evaluate the issue.

Review Trusts Now

If you have entities that may be Reporting Companies owned in whole or part by irrevocable trusts review those trusts now. You should consider whether the people in that trust that might be characterized as Beneficial Owners (including "substantial control persons") under FinCEN will be cooperative providing the Beneficial Owner Information to the Reporting Company? If not, evaluate removing or replacing them before the Reporting Company files its first FinCEN report.

Review Entity Arrangements Now

Similar to the suggestion for trusts, review all entities you have interests in to determine who may be Beneficial Owners, indirect owners, or substantial control persons. Can those people obtain FinCEN Identification Numbers to avoid having to file amendments when their Beneficial Owner Information changes? Can or should steps be taken to change those who might be Beneficial Owners?

Review, Revise And Update Entity Documents For Everything Not Just The CTA

When reviewing entity documents, don't just review them for CTA considerations, but rather be certain that all the relevant documents are current and address entity formalities. Otherwise, if there is a challenge to the entity by the IRS or a creditor the entity might not be respected. Don't limit steps to just the CTA.

Review, Decant And Update Trusts For Everything Not Just The CTA

When reviewing trust documents, don't just review them for CTA considerations, but rather be certain that all the relevant documents are current and address trust formalities. Otherwise, if there is a challenge to the trust by the IRS or a creditor the entity might not be respected. Don't limit steps to just the CTA.

Conclusion

The CTA is a substantial new reporting law that will require a type of reporting that has not existed before. The rules are complex and there are significant gaps in the guidance provided. Rather than focusing on the uncertainties, it may be possible to take simplifying steps, and a different perspective, on CTA compliance that is broader and more holistic to your planning, entities and trusts as well.