

The Corporate Transparency Act

May 2022 Update



Today's Panel

- Allison DeSantis, Office of the Ohio Secretary of State



- Pia Angelikis, Cogency Global Inc.



- Alan Stachura, CT Corporation



Agenda

- The Corporate Transparency Act (CTA)
 - Overview
 - FinCEN Proposed Rulemaking
 - Reporting Requirements
 - Exemptions from Reporting
 - Information Retention and Disclosure
 - Violations and Penalties
 - Timeline
- State Agency Duties and Considerations
 - How to Prepare for Implementation
- Registered Agent and System Vendor Duties and Considerations
- Open Discussion



The Corporate Transparency Act (CTA)



Overview

- H.R. 6395, The National Defense Authorization Act FY 2021, enacted January 1st, 2021 (NDAA) Includes the **Corporation Transparency Act (CTA)**
 - 13 years in the making
 - First Federal Beneficial Ownership disclosure requirement in the United States
 - Targets shell companies (many exemptions)
 - FinCEN regulations: issuance will trigger compliance deadlines



FinCEN's Proposed Rules

- Advanced Notice of Proposed Rulemaking
 - Spring 2021
 - Over 200 comments submitted, included those from trade associations, state government agencies, IACA, Law Firms, NPRRA, ABA Committees, AICPA, and more
 - Included requests for clarification of key terms:
 - “Applicant”, “Substantial Control”, and “Other Similar Entity” and comments on impact on small businesses



FinCEN's Proposed Rules

- Notice of Proposed Rulemaking

- Issued 12/21/2021 with Public Commentary due 02/07/2022

- First of Three sets of Proposed Rules:

- (1) to implement the beneficial ownership information reporting requirements

- (2) to implement the CTA's protocols for access to and disclosure of beneficial ownership information

- (3) to revise the existing Customer Due Diligence Rule (BSA)

- FinCEN Acting Director's 04/28/2022 Statement



CTA Beneficial Ownership Reporting Requirements

- “Reporting Companies” must submit a report to FinCEN providing each “beneficial owner” and “applicant’s”:
 - Full legal name
 - Date of birth
 - Current business or residential street address
 - Proposed Rule: residential address for Beneficial Owners
 - Proposed Rule: different address requirement depending on type of “company applicant”
 - Unique identifying number, or a “FinCEN identifier”



CTA Beneficial Ownership Reporting Requirements (continued)

- Proposed Rule: specifies that the “Reporting Company” provide a scanned copy of the identification document
- Proposed Rule: requires the “Reporting Company” to identify itself by including any “alternative names” or d/b/a’s, its jurisdiction of formation, and a TIN, EIN, DUNS, or LEI
 - Corporate Identifier?



CTA Beneficial Ownership Reporting Requirements (continued)

- “Reporting Company”
 - A corporation, LLC, or other similar entity that is created by the filing of a document with the secretary of state or a similar office under the law of a state or Indian Tribe; or formed under the law of a foreign country and registered to do business in the U.S. by the filing of a document with a secretary of state or similar office under the laws of a state of Indian Tribe.
 - 31 USCS § 5336(a)(11)
- Many exemptions



CTA Beneficial Ownership Reporting Requirements (continued)

- Proposed Rule: Discussed meaning of “other similar entity”
 - Likely to include LLPs, LLLPs, Business (Statutory) Trusts, and most limited partnerships



CTA Beneficial Ownership Reporting Requirements (continued)

- “Beneficial Owner”
 - An individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, exercises substantial control over the entity, or owns or controls 25 percent or more of the ownership interests of the entity, or receives substantial economic benefits from the assets of the entity.
 - “exercises *substantial* control... or receives *substantial* economic benefits from the entity”
 - What is substantial?



CTA Beneficial Ownership Reporting Requirements (continued)

- Proposed Rule re “Beneficial Owner”
 - Defines “substantial control”
- “Beneficial Owner” – express exclusions distinct from “reporting company exemptions”



CTA Beneficial Ownership Reporting Requirements (continued)

- “Applicant” is any individual who:
 - Files an application to form a corporation, limited liability company, or other similar entity under the laws of a state or Indian Tribe; or registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the U.S.
 - 31 USCS §5336(a)(2)(A), 31 USCS §5336(a)(2)(B)



CTA Beneficial Ownership Reporting Requirements (continued)

- Proposed Rule Defines Two Types of “Applicants”:
 - The individual who directs or controls submission of formation document, and
 - The individual who actually submits the formation document for filing at a state
- Reporting Companies to provide information on BOTH applicant types



CTA Beneficial Ownership Reporting Requirements (continued)

- “FinCEN Identifier”
 - Unique identifier assigned by FinCEN to an individual or entity upon request
 - Exclusive – FinCEN will only issue one per individual or entity (including any successor entity)
 - Act gives Treasury the authority, through its regulations, to prescribe procedures and standards governing the FinCEN identifier
 - 31 USCS §5336(a)(6)



Exempt Entities

- Exempt entities include, among others:
 - Companies that issue securities and are regulated by the SEC
 - U.S. banks, credit unions, bank holding companies, and money transmitters
 - U.S. insurance companies and producers
 - Accounting firms subject to Sarbanes-Oxley
 - Public Utilities (U.S.)
 - Certain nonprofits
 - AND...



Exempt Entities (continued)

- Any entity that
 - Employs more than 20 full-time employees in the U.S.
 - Filed in the previous year federal income tax returns in the U.S. demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate, **and**
 - Has an operating presence at a physical office within the U.S.
 - Act targets shell companies rather than legitimate businesses
 - Proposed Rules further clarify
 - 31 USCS §5336(a)(11)(B)(xxi)
- Additional entity exemptions in Act



Exempt Entities (continued)

- Filing requirement for exempt entities?
 - Not addressed in the CTA
 - Proposed Regs are seeking more commentary on this (FinCEN undecided)
- Reporting companies with a Beneficial Owner that is exempt:
 - Reports only the name of the exempt entity and not the other required information
 - 31 USCS §5336(b)(1)(D)



Timing of Reports

- Proposed Rules:
 - Timing of initial reports, update or correction reports
 - Newly formed on or after the effective date of the regs, within 14 calendar days of the date it was formed as specified by a secretary of state or similar office: for any entity that becomes a foreign reporting company on or after the effective date of the regulation shall file a report within 14 calendar days of the date it first became a foreign reporting company.
 - For entities formed or registered before the effective date of the regulations: any domestic reporting company: not later than one year after the effective date of the regulation



Timing of Reports (continued)

- Proposed Rules: Timing of initial reports; update or correction reports



Information Retention and Disclosure

- Retention:
 - Min. 5 years after date reporting company terminates
- Disclosure:
 - No public access, information is confidential
 - Upon proper request by:
 - Federal agency for law enforcement, nat'l security, intel
 - State, local, or Tribal for law enforcement, via court order
 - Federal agency, on behalf of foreign law enforcement, judicial, prosecutorial authorities – by treaty, etc...
 - Financial institution with consent
 - Federal regulatory agency



Violations and Penalties

- Types of Violations:
 - Reporting requirement: willfully providing false or fraudulent information, including false or fraudulent identifying photograph or document
 - 31 USCS §5336(h)(1)(A)
 - Reporting requirement: willful failure to report complete or updated information
 - 31 USCS §5336(h)(1)(B)
 - Requesting Agency: violation of protocols, including unauthorized disclosure or use
 - 31 USCS §5336(h)(2)



Violations and Penalties (continued)

- Criminal and Civil Penalties

- Reporting violations: up to \$500 for each day, not more than \$10,000 or 2 years in prison, or both
- Unauthorized disclosure or use violations: up to \$500 for each day, not more than *\$250,000 or 5 years in prison, or both* or
- While violating another law (pattern) of any illegal activity involving more than \$100,000 in 12 months, not more than \$500,000, 10 years in prison, or both



Violations and Penalties (continued)

- Criminal and Civil Penalties

- Proposed Regs state that reporting penalties apply to any individual, reporting company or other entity, who directly or indirectly provides false or fraudulent information
- Includes reporting companies, beneficial owners and company applicants



Timeline

- Enactment date: January 1st, 2021
- Treasury **had** until January 1st, 2022 to issue regs
 - **Notice of Proposed Rulemaking December 8th, 2021**
- Effective date: **“As Soon as Possible”**
 - Reporting companies existing *prior* to date Treasury issues regs – **1 year** from **effective date of regulations**
 - Reporting companies that form or register *on or after* **effective date of regulations** – **14 days**
 - **Must update information in prior reports within 14 calendar days to correct any inaccurate information filed with FinCEN from the date on which the inaccuracy is discovered and 30 calendar days to update FinCEN information that has changed after the filing.**



State Agency Duties and Considerations



What are the Duties of the State Filing Offices?

- States will be required to inform “applicants” for incorporation/organization of their obligations under this act and provide copies of the forms or links
 - Notify filers of BO Reporting Duties at the time of formation, annual fees, and license renewals as well as on websites. §5336(e)(2)
 - What does this actually mean?
 - Notice on receipts? Evidence?
 - Large mailing? Is email sufficient?
 - New filings vs existing database



What are the Duties of the State Filing Offices? (continued)

- States must also cooperate with and provide the information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information. §5336(d)(2)
 - Conflicting proposals and ideas
 - Exempt reporting becomes a big factor
 - Will any Federal Funding be provided?



Assisting Constituents

- Who will handle all the questions?
- Consider:
 - Volume
 - Complexity
 - Legal Advice
 - Profile of those asking
- More information may mean more questions
- Budgets – call center impact



Thoughts on Existing SOS Systems

- Will any database information ultimately be required?
 - Delivering database information is ALWAYS challenging
 - Consider:
 - Format
 - Frequency
 - Specific Data Fields/Data Elements
 - System downtime/bandwidth to run reports
 - How far should States bend for the Feds to produce data requested?
 - Would partnerships with Agents & Data Aggregators be beneficial?
 - Will any Federal Money be provided for expenses?



Known Obstacles

- FinCEN's Budget and Limited Headcount
- State Budgets and Limited/Decreasing Headcount
- Historic Exploration Exercises
- What do we do with Questions??
- Political Fallout
- Cybersecurity Concerns



Jurisdictions Proceed Forward

- Washington, DC
 - Beneficial Ownership Requirements (DCRA Bill 22-317)
 - Effective January 1st, 2020
- New York State
 - Proposed NY Assembly Bill 9415
 - CTA Requirements plus:
 - Federal or State taxpayer identification number or, if none, a legal entity identifier issued by the Global Legal Identifier Foundation
 - The nature of the legal or economic relationship between the beneficial owner and the entity



Moving Forward Together

- FinCEN Responses and Discussions
 - IACA Group
 - Individual Jurisdiction
- Education and Seminars
 - Proactive
 - Are you ready??
- System Readiness
 - Security, Security, Security



Registered Agent and System Vendor Duties and Considerations



What About the Registered Agents?

- Registered Agents should continue to discuss and plan for best and worst-case scenarios
- Track how this will impact Agents, including:
 - Will we be considered Applicants?
 - Will we be required to report?
 - What does this truly mean for us/our clients?
 - Will we have to obtain or report additional data?
 - What part of the notification process do we own?
 - Will this impact other products we provide?
 - Will we need any internal system modifications?
- Stay involved individually but also with industry groups like NPRRA



What About the System Vendors?

- Will any existing system modifications be required?
 - If so, when?
- Will modifications be required going forward?
 - If so, what?
- Are there ways the vendors can proactively assist the states with any new requirements?



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Open Discussion



Contact Information



Allison DeSantis Director of Business Services and Deputy Assistant Secretary of State Ohio	180 East Broad Street, 16th Floor Columbus, Ohio 43215 Direct: 614.466.0952 adesantis@ohiosos.gov
Pia Angelikis Vice President, Government Relations and Legal Research Cogency Global Inc.	122 E 42nd Street, 18th Floor New York, New York 10168 Direct: 347.284.6185 Mobile: 415.377.9617 pangelikis@kogencyglobal.com
Alan Stachura Senior Manager - Government Relations CT Corporation	1209 Orange Street Wilmington, Delaware 19801 Direct: 302.777.0211 Mobile: 267.377.5222 alan.stachura@wolterskluwer.com

