



The Corporate Transparency Act is Here: *Now What?*

Presented by: David A. Warren, JD – Co-Founder and Chairman

Welcome




David A. Warren, JD

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- ▶ President & CEO of sister company, Bridgeford Advisors.
- ▶ Co-Founder & Owner of sister company, Bridgeford Global.
- ▶ Attorney with over 20 years of professional experience practicing law and working in the financial services industry serving the trust and wealth management needs of high and ultra-high net worth families.

U.S. as a Tax and Privacy Haven?

- ▶ “The U.S. is emerging as a leading tax and secrecy haven for rich foreigners.”
Bloomberg Magazine, January 27, 2016
- ▶ “America is the new Switzerland.”
Financial Times, May 16, 2016
- ▶ “The United States is now becoming one of the world’s largest tax and secrecy havens.”
Washington Post, April 5, 2016
- ▶ “The United States has become a place of choice for foreign investors.”
Daily Business Review, April 25, 2017



“For reference, in planning, “secrecy” has historically meant that no one – not even the government – sees your affairs. “Privacy” has historically meant that the public can’t see your affairs but the government can. The days of secrecy are dead. So, we talk about privacy.”

- The Worlds Best Tax Haven: The United States. Forbes

Corporate Transparency Act (CTA)

Introduction to the CTA

- ▶ Came into effect: January 1, 2024
- ▶ Implemented by: U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN)
- ▶ Purpose: Enhance corporate transparency to combat illicit financial activities

Key Objectives of the CTA

- ▶ Prevent money laundering and tax evasion
- ▶ Increase corporate transparency
- ▶ Target anonymous shell companies used for illegal purposes

CTA – Definitions

- ▶ The CTA applies only to certain domestic companies and foreign entities that are registered to do business in the U.S – “Reporting Companies.”
- ▶ **Reporting Company** – as a corporation, limited liability company, or other similar entity that is;
 - ▶ (i) created by the filing of a document with a secretary of state or similar office under the law of a U.S. state or Indian Tribe, or
 - ▶ (ii) 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 a similar office under the laws of a U.S. state or Indian Tribe.

CTA – Definitions (cont'd)

Reporting Company – Exceptions:

- ▶ Financial institutions or certain issuers of securities in heavily regulated industries (e.g., banks, credit unions, broker-dealers, money services businesses registered with FinCEN, and issuers registered with the U.S. Securities and Exchange Commission).
- ▶ “Large operating companies” (defined in the final rule as an entity that employs more than 20 full time employees in the U.S., has an operating presence at a physical office within the U.S., and filed a federal income tax or information return in the U.S. for the previous year demonstrating more than \$5,000,000 in gross receipts or sales).
- ▶ Legal entities, including certain trusts, will be excluded to the extent that they are not created by the filing of a document with a secretary of state or similar office.

CTA – Definitions (cont'd)

- ▶ **Beneficial Owner** – as an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise:
 - ▶ (i) exercises substantial control over the entity, or
 - ▶ (ii) owns or controls not less than 25 percent of the ownership interests of the entity.
- ▶ **Substantial Control** –
 - ▶ serving as a senior officer of the reporting company;
 - ▶ having authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
 - ▶ or directing, determining, or having substantial influence over important decisions made by the reporting company.

“Designed to close loopholes that allow corporate structuring that obscures owners or decision-makers.”

- Corporate Transparency Act FinCEN Fact Sheet

CTA – What is Reported?

▶ **Reported Information:**

- ▶ full legal name;
- ▶ date of birth;
- ▶ complete current address;
- ▶ a unique identifying number and the issuing jurisdiction from an acceptable identification document, and an image of the document from which the unique identifying number was obtained.
- ▶ If an individual has obtained a FinCEN identifier and provided that FinCEN identifier to a reporting company, the reporting company may include the FinCEN identifier in its report in lieu of the information required for that individual.

CTA – Penalties

▶ **Penalties for Non-Compliance:**

- ▶ Any person who provides false information, or fails to report complete or updated information, is subject to a civil penalty of not more than \$500 for each day that the violation continues, and may face fines not more than \$10,000, imprisonment for not more than two years, or both.
- ▶ Separate from the CTA, persons could face criminal liability under the federal criminal code, which prohibits knowingly and willfully providing false information or concealing a material fact to any of the three branches of the federal government.

CTA – Use/Storage of Information

▶ **Use/Storage Beneficial Owner Information:**

- ▶ The CTA mandates that such information will be available only to authorized government authorities, subject to effective safeguards and controls.
- ▶ The U.S. Department of the Treasury will maintain the information in a secure, nonpublic database. Importantly, however, the collected information may also be available to financial institutions so that they can confirm beneficial ownership information provided by their customers.

CTA – Implementation Phases

Phase 1:

Starting in spring 2024, a pilot program will be available for select federal agencies.

Phase 2:

In summer 2024, access will be extended to Treasury offices and other federal agencies involved in national security and law enforcement.

Phase 3:

Anticipated for fall 2024, access will be expanded to additional federal agencies, as well as state, local, and tribal law enforcement partners.

Phase 4:

In winter 2024, intermediary federal agencies that handle foreign government requests will gain access.

Phase 5:

In spring 2025, access will be granted to financial institutions and their supervisors that are subject to customer due diligence requirements.

The Controversy Surrounding the CTA

Ongoing Debate and Opposition:

- ▶ From its inception, the CTA has been met with significant opposition and criticism.
- ▶ Hundreds of conflicting comments were submitted during the drafting phase by business owners, lawyers, CPAs, and professional organizations.
- ▶ Key complaints:
 - ▶ The CTA is too invasive and unmanageable.
 - ▶ Enforcement is viewed as difficult and ineffectual.

The Controversy Surrounding the CTA (cont'd)

- ▶ **National Small Business United v. Janet Yellen:** A Northern District of Alabama Federal Judge ruled the CTA unconstitutional.
 - ▶ The CTA exceeds Congress's powers and violates privacy rights.
 - ▶ The ruling questioned the nexus between the CTA and any legitimate legislative powers.
 - ▶ The appeals process is ongoing, with oral arguments scheduled for the week of September 16, 2024.
- ▶ Other Lawsuits
- ▶ Legislation H.R. 5119 and S. 3625 to delay filing deadlines H.R. 8147 (Repealing Big Brother Overreach Act)
- ▶ “Wait and see” approach to reporting
 - ▶ Many companies are deciding to wait to file until end of 2024.

Privacy Protections in the CTA

Restricted Access to Beneficial Ownership Information:

- ▶ FinCEN is the central repository for beneficial ownership data.
- ▶ Confidentiality Requirements:
 - ▶ Information reported under the CTA is ***not*** publicly accessible.
 - ▶ ***Restricted access*** to government authorities, law enforcement, and certain financial institutions.

Authorized Users Only:

- ▶ Federal, state, local, and tribal law enforcement agencies with proper requests.
- ▶ Foreign authorities via U.S. law enforcement for international investigations.
- ▶ Financial institutions for customer due diligence, but only with consent from the reporting entity.
- ▶ Regulatory authorities for enforcing corporate governance laws.

Privacy Protections in the CTA (cont'd)

Stringent Security Measures:

- ▶ FinCEN is required to implement *advanced security protocols* to ensure data protection, including:
 - ▶ Encryption and secure data storage.
 - ▶ Regular audits and security compliance checks to prevent unauthorized access.

Limited Usage:

- ▶ Data can only be used for specific purposes:
 - ▶ Anti-money laundering (AML) investigations.
 - ▶ Counterterrorism financing (CTF) efforts.
 - ▶ Regulatory compliance and enforcement.

Privacy Protections in the CTA (cont'd)

Penalties for Misuse of Information:

- ▶ Strict penalties for any unauthorized disclosure or misuse of beneficial ownership data including civil and criminal penalties (fines and imprisonment).

Data Retention and Deletion:

- ▶ Retention policy: FinCEN must maintain beneficial ownership data for a minimum of 5 years after the company ceases to exist.
- ▶ Data is securely deleted after this period unless further investigations are ongoing.

Privacy in a Transparent World

Balancing Transparency and Privacy:

- ▶ The CTA's goal of exposing beneficial ownership for transparency can conflict with the need for privacy in trust and estate planning.
- ▶ Trusts and holding companies often used for *asset protection* and *privacy purposes* now face **new reporting obligations** under the CTA.

Privacy in a Transparent World (cont'd)

CTA's Impact on Trust Structures

- ▶ Reporting Obligations for Trusts:
 - ▶ Trusts with **LLCs** or **holding companies** may trigger reporting if they meet the CTA's ownership/control thresholds.
 - ▶ **Beneficial owners**, including trustees or beneficiaries, may need to be reported.
- ▶ Key Questions:
 - ▶ Who qualifies as a beneficial owner in a complex trust structure?
 - ▶ Will trustees, beneficiaries, or others with control or ownership interest be required to disclose their personal information?

Privacy in a Transparent World (cont'd)

Restructuring Trusts and Holding Companies

- ▶ Need for Review:
 - ▶ Clients must review and possibly restructure trusts and holding companies to comply with the CTA while protecting privacy.
- ▶ Considerations for Restructuring:
 - ▶ Layered entities (i.e., using multiple entities) may need simplification or adjustment.
 - ▶ Alternative structures: Some may shift from LLCs or corporations to limited partnerships or foundations that may offer better privacy protection or avoid reporting requirements.

Privacy in a Transparent World (cont'd)

South Dakota's Role in Navigating the Corporate Transparency Act

- ▶ South Dakota's trust laws provide enhanced privacy and asset protection features, even in a transparent regulatory landscape.
- ▶ South Dakota offers unique privacy protections that can help clients navigate CTA reporting requirements while maintaining confidentiality.
- ▶ Directed Trusts can maintain a clear separation of control, potentially reducing the burden on trustees or other fiduciaries to report as beneficial owners under the CTA.
- ▶ Fiduciary duty: Trustees and advisors must ensure that clients' structures are both compliant with the CTA and continue to protect privacy and assets.

Trust Matter Privacy

- ▶ Very important issue for high-net-worth families and closely held business owners.
 - ▶ Quiet Trust – no disclosure requirement.
 - ▶ Court Seal – Keeps trust information out of the public domain.
- ▶ South Dakota – Total Seal Forever/Not Discretionary/Quiet Trust
 - ▶ Delaware – Seal for 3 years/discretionary.
 - ▶ Most states – Open to the public.

Privacy vs. Secrecy: The Importance of KYC

- ▶ Strong and thorough KYC (Know Your Customer) is essential.
 - ▶ World checks.
 - ▶ Source of funds.
 - ▶ Verification of good character/tax compliance in home state.
- ▶ Not everyone coming to the U.S. is nefarious.
- ▶ Need for Uniformity of Regulations among trust companies and states.

South Dakota Division of Banking

- ▶ The South Dakota Division of Banking has created specific policies and procedures around best practices for onboarding and administering trusts applicable to companies in the international space to develop uniform regulations designed to protect against nefarious actors and to protect the overall integrity of the South Dakota trust industry.

FinCEN FAQs

A. 3. Under the CTA, who can access beneficial ownership information?

- ▶ Federal agencies engaged in national security, intelligence, or law enforcement activity;
- ▶ State, local, and Tribal law enforcement agencies with court authorization;
- ▶ Officials at the Department of the Treasury;
- ▶ Foreign law enforcement agencies, judges, prosecutors, and other authorities that submit a request through a U.S. Federal agency to obtain beneficial ownership information for authorized activities related to national security, intelligence, and law enforcement;
- ▶ Financial institutions with customer due diligence requirements under applicable law (in order to facilitate compliance with those requirements); and
- ▶ Federal functional regulators or other appropriate regulatory agencies that supervise or assess financial institutions with access to beneficial ownership information (in order to supervise such financial institutions' compliance with customer due diligence requirements).

FinCEN FAQs (cont'd)

A. 6. Is beneficial ownership information reported to FinCEN accessible under the Freedom of Information Act (FOIA)?

- ▶ No. Beneficial ownership information reported to FinCEN is exempt from disclosure under the Freedom of Information Act (FOIA).

FinCEN FAQs (cont'd)

B. 7. Is a reporting company required to use an attorney, certified public accountant, enrolled agent, or other service provider to submit beneficial ownership information to FinCEN?

- ▶ No. FinCEN expects that many, if not most, reporting companies will be able to submit their beneficial ownership information to FinCEN on their own using the guidance FinCEN has issued.
- ▶ Reporting companies that need help meeting their reporting obligations can consult with professional service providers, such as lawyers, accountants, or enrolled agents.

FinCEN FAQs (cont'd)

B. 9. If a third-party service provider who is not an attorney submits a reporting company's beneficial ownership information to FinCEN, has that provider engaged in the unauthorized practice of law?

- ▶ Nothing in the CTA or FinCEN's regulations prevents a third-party service provider who is not an attorney from submitting a reporting company's beneficial ownership information (if authorized by the company to do so) or otherwise assisting a reporting company with preparing or submitting a BOI report.
- ▶ Whether an action qualifies as the unauthorized practice of law, however, is generally determined by state law, and thus may vary.

FinCEN FAQs (cont'd)

D. 18. If one spouse has an ownership interest in a reporting company, is the other spouse also considered a beneficial owner if the reporting company is created or registered in a community property state?

- ▶ Possibly. Whether State community property laws affect a beneficial ownership determination will depend upon the specific consequences of applying applicable State law.
- ▶ If, applying community property State law, both spouses own or control at least 25 percent of the ownership interests of a reporting company, then both spouses should be reported to FinCEN as beneficial owners unless an exception applies.

Questions?



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