

January 4, 2021

Pulling Back the Curtain: Congress Establishes a Beneficial Ownership Registry for U.S. and Foreign Businesses

Adam Bramwell; Jonathan S Abernethy; Andrew J Pecoraro

On January 1, 2021, Congress overrode President Trump's veto, passing into law the annual National Defense Authorization Act for Fiscal Year 2021 ("NDAA"). Included within the NDAA is the Corporate Transparency Act ("CTA"), which is intended to combat the use of "shell companies" as havens for money laundering and other illicit activity. The CTA creates a beneficial ownership registry within FinCEN (the Treasury Department's Financial Crimes Enforcement Network) and requires millions of domestic and foreign companies registered to do business in the United States to disclose information regarding their beneficial owners.

The CTA marks a significant step in U.S. corporate transparency policy and is yet another reason (along with COVID-19 relief and tax and regulatory changes) for domestic and foreign entities to focus on how Congress and a new Biden Administration will impact their operations in the United States.

Background

Versions of the CTA have been debated in Congress since 2009, as there was extensive congressional interest in furthering corporate ownership transparency in order to pierce the veil of corporate ownership. The goal was to unmask the identity of beneficial owners to stop criminal enterprises from hiding illicit gains in anonymous "shell companies."

At the same time, there were competing concerns: Some small businesses felt that requiring this transparency and disclosure would create unnecessary burdens. The establishment of a federal registry of business owners also raised serious privacy issues. Moreover, issues of corporate ownership and governance have typically been the purview of state law, and many states have taken steps to ensure that anonymity does not hide or further illicit activities.

Nevertheless, Congress ultimately decided that Federal action was necessary to "crack down on anonymous shell companies, which have long been the vehicle of choice for money launderers, terrorists, and criminals."¹

¹ *Maloney Celebrates Inclusion of Corporate Transparency Act in FY2021 NDAA* (Nov. 19, 2020), <https://maloney.house.gov/media-center/press-releases/maloney-celebrates-inclusion-of-corporate-transparency-act-in-fy2021>.

What's Changed

To date, the burden of verifying the beneficial ownership of corporate entities has fallen on financial institutions. Under the Bank Secrecy Act and FinCEN's "Customer Due Diligence Requirements for Financial Institutions,"² financial institutions were required to identify and verify beneficial owners as part of "know your customer" rules.

The CTA shifts the burden to reporting companies and creates a first-of-its-kind federal database of beneficial ownership. The law also requires the Treasury Department to revise its current customer due diligence rules to conform to the CTA's broad disclosure and verification requirements.

A. Applicability and Exceptions of the CTA

The CTA requires that a reporting company disclose information on any beneficial owners to the federal government. The CTA broadly defines a "reporting company" to include any "corporation, limited liability company, or other similar entity" that is "(i) created by the filing of a document with a U.S. State or Indian Tribe or (ii) formed under the law of a foreign country and registered to do business in the United States."

Because the law targets "shell companies," it excludes certain categories of regulated entities that are already subject to significant reporting requirements, such as banks, securities broker-dealers, investment advisors, political organizations, registered 501(c) organizations, and insurance companies. The CTA also excludes taxable entities that:

- employ more than 20 full-time employees in the United States;
- annually report more than \$5 million in gross receipts or sales to the Internal Revenue Service (IRS); and
- have an operating presence at a physical office within the United States.

B. Required Reporting Information

A reporting company must report the name, date of birth, current address (business or residential) and unique identifying number from an acceptable document (such as a state driver's license, other U.S. state-issued identification, U.S. or foreign passport) for each "beneficial owner." Under the CTA, a "beneficial owner" is any natural person who, directly or indirectly:

- owns a 25% or more of the equity interest in a reporting company; or
- exercises "substantial control" over the reporting company.

The CTA does not define the term "substantial control." Certain individuals are expressly excluded from the definition of "beneficial owner," including:

- individuals acting as agents, nominees, intermediaries, or custodians on behalf of another;
- individuals who control an entity solely because of their employment; and
- individuals whose only interest in a reporting company is through a right of inheritance.

² 81 Fed. Reg. 29398 (May 11, 2016); see also 31 C.F.R. § 1010.230.

Companies in existence as of the effective date of the CTA's implementing regulations are required to report beneficial ownership information within two years, while companies created as of the effective date are required to report that information upon formation. The CTA also mandates that reporting companies update their disclosures within one year of any change in ownership or control.

Willful failure to comply with the CTA's reporting requirements can lead to both civil and criminal penalties. Any person who willfully fails to report complete beneficial ownership information to FinCEN or who willfully provides false or fraudulent information in any such report is subject to a civil penalty of \$500 per day until the violation is remedied (up to a maximum of \$10,000) and up to two years' imprisonment.

Negligent omissions or mistakes in beneficial ownership reports are insufficient to trigger the law's penalties. In addition, if a company becomes aware of any inaccuracies in its report, it may avoid penalties by "voluntarily and promptly" submitting corrected information no later than 90 days after the submission of the original report. This safe harbor provision does not apply if the original omission was made with the intent to evade the CTA's reporting requirements or if the original report was submitted with actual knowledge that the information was inaccurate.

C. Access to the Information

FinCEN will maintain information reported under the CTA in a private registry, and the CTA imposes penalties for the unlawful disclosure of collected information. The Treasury Department, the custodian of the records through FinCEN, is authorized to use the information in this database for a variety of purposes, including tax purposes.

The information also may be made available to federal agencies upon receipt of an appropriate request and to state, local, or tribal law enforcement agencies in accordance with a court order. Foreign law enforcement can request information from the database through an appropriate U.S. agency, but the information is not subject to any automatic reporting or exchange of information. Financial institutions will be permitted to access beneficial owner information with the consent of a reporting company for customer due diligence purposes. FinCEN will maintain CTA information for the life of the reporting company, plus five years.

Implications for Reporting Companies

The CTA likely will have significant implications for both U.S. and foreign businesses. Domestic and foreign companies operating in the United States should, first and foremost, determine whether they are considered a "reporting company." Although the law is intended to target shell companies with little or no business operations, the plain language of the statute may capture many legitimate brick and mortar small businesses who fail to qualify for one of the exemptions.

If an entity is found to be a reporting company, it should carefully consider who might be considered a "beneficial owner" under the CTA. For some entities, this may not be a simple question, and consultation with counsel is advised. Under current customer due diligence regulations, beneficial owners include individuals "with significant responsibility to control, manage, or direct a legal entity," including executive officers and senior managers.³ The CTA appears to modify that definition, defining

³ 31 C.F.R. § 1010.230(d)(2).

beneficial owners as those who exercise “substantial control” over a company and excluding, among others, individuals whose control of a legal entity is derived solely from their employment. Thus, some officers and executives who are deemed beneficial owners under the current regulations may not fall within the ambit of the CTA’s definition. Companies should monitor proposed implementing regulations and guidance issued by FinCEN on this subject and any other requirements that will be imposed by CTA implementing regulations.

It also remains to be seen how the regulations promulgated under the Act will handle beneficial ownership of complex structures commonly used to meet multi-jurisdictional requirements for private clients and their families. There are significant legal and privacy reasons for individuals to hold assets through corporate structures, such as trusts and multiple subsidiaries. It is imperative that families and individuals consult with counsel to determine whether their current structures implicate the CTA’s reporting requirements and whether any change makes sense in light of their particular circumstances.

Implications for Financial Institutions

Financial institutions should similarly monitor any new regulations and proposed changes to current customer due diligence rules in light of the CTA. Although these institutions may be exempt from the CTA’s reporting requirements, under the Bank Secrecy Act and FinCEN’s Customer Due Diligence Final Rule, they are required to develop and maintain effective anti-money laundering (“AML”) programs. The CTA offers these institutions a means to verify beneficial owner information provided by customers and improve the effectiveness of their AML programs. However, because the CTA mandates revisions to customer due diligence rules, financial institutions must ensure that their practices remain compliant with any updated regulations in this area.

The CTA is a significant step in corporate transparency in the United States. Domestic and foreign entities are well advised to stay up to date on the Treasury Department’s and FinCEN’s implementation of this law.

About C&G's Government Relations & White Collar Practices:

Cohen & Gresser has significant experience advising both U.S. and foreign businesses on compliance with complex regulatory requirements, responding to government subpoenas and investigations, and conducting internal corporate investigations. Our lawyers are ideally positioned to help companies understand their obligations under U.S. law. Further, our Government Relations practice continues to serve as "eyes and ears" in Washington, D.C., monitoring the Treasury Department's actions, FinCEN's implementation, Congressional oversight, as well as developments in other areas of interest.

The Authors:



Adam Bramwell
Principal, and Chair of
Government Relations

+1 202 851 2077
[Email Adam](#)



Jonathan S Abernethy
Partner

+1 212 707 1322
[Email Jon](#)



Andrew J Pecoraro
Associate

+1 202 851 2075
[Email Andrew](#)

About Cohen & Gresser:

Cohen & Gresser is an international law firm with offices in New York, Paris, Washington, DC, and London. We have an outstanding record of success in high-stakes and high-profile litigation, investigations, and transactional work for our clients, including major financial institutions and companies across the world. Our attorneys have superb credentials, and are committed to providing the efficiency and personal service of a boutique law firm along with the quality and attention to detail that are the hallmarks of the best firms in the world. The firm has been recognized in a wide range of publications, including *Chambers* and *The Legal 500*.

New York | Paris | Washington DC | London

www.cohengresser.com
info@cohengresser.com
+1 212 957 7600
+1 202 851 2070

 [View C&G's Profile](#)