PUBLICATIONS | 06.12.2024

Update Memo: Corporate Transparency Act

We are writing with an update on the Corporate Transparency Act (the "CTA"). Please click here if you would like to see an earlier Memo from Choate about the CTA.

As you are likely aware, the requirements of the CTA are being implemented in three stages. First, for any entity formed during 2024, a CTA filing is due (unless an exemption applies) within ninety days after its formation. Second, for any entity formed in an earlier year, a CTA filing is due (unless an exemption applies) on or before January 1, 2025. Third, for any entity formed in a future year, 2025 or later, a CTA filing will be due (unless an exemption applies) within thirty days after its formation. This Memo describes the CTA requirements in general terms and is not intended to constitute advice with respect to any specific entity or filing.

We would be glad to help our clients assess how to comply with the CTA. In general, however, Choate is not responsible to conduct analysis of CTA filing requirements, or to make CTA Submissions (or updates), unless we discuss this with you expressly.[1]

Overview

The CTA is intended to combat money laundering and related financial crimes. Subject to certain enumerated exemptions, the CTA requires corporations, limited liability companies, limited partnerships, and similar entities that are formed in (or registered to do business in) any of the states of the U.S. to identify their beneficial owners by providing information in an electronic form (a "CTA Submission") submitted to the Financial Crimes Enforcement Network of the U.S. Treasury Department ("FinCEN").

In general, the CTA applies to any entity that was formed in the U.S. (or to any foreign entity that has registered to do business in the U.S.) by the filing of a document with the appropriate state governmental office. This occurs, for example, when a limited liability company is formed by filing a certificate of formation with a given state's secretary of state.

The CTA provides for twenty-three exemptions, and they should be reviewed carefully if a company believes it may qualify for and intends to rely on an exemption. FinCEN has posted an extensive set of Frequently Asked Questions and other guidance materials, which are designed to help companies work through the scenarios that occur most often.[2]

The CTA provides for civil penalties (up to $500 per day) and criminal penalties (including imprisonment) for willful failure to file.

Litigation Uncertainty

Litigation makes it somewhat uncertain, however, whether the CTA requirements will remain in place at the end of the year or otherwise.

On March 1, 2024, a U.S. District Court in Alabama ruled that Congress did not have authority to enact the CTA and that the CTA is unconstitutional in its entirety. The suit in Alabama was brought by the National Small Business Association. At this stage, the District Court's ruling applies only to the members of the plaintiff Association; FinCEN has stated that all other entities must comply with the CTA. The Alabama District Court's ruling is currently on appeal before the Eleventh Circuit. The United States and the plaintiff Association have joined in asking it to expedite the appeal — in light of the January 1, 2025 deadline — but there is no indication how soon the Eleventh Circuit will rule, or which side will win the appeal.

At least four additional lawsuits have been filed in federal courts, stating similar challenges to the CTA. These additional lawsuits are in their early stages. At this point we do not know whether any of them will lead to an alteration of the January 1, 2025 deadline.

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Information That Will Be Required

The CTA rules primarily require information about beneficial ownership. In addition, entities that are formed after January 1, 2024, must identify one or two people who applied to form the entity. FinCEN rules set out the information that must be included in the CTA Submission, which may be summarized as follows:[3]

(1) *Information on the reporting company*:

- The full legal name of the entity, all trade and d/b/a names, and the street address of the entity's principal place of business.
- The jurisdiction of formation and EIN of the entity.

(2) *Personal information for each individual beneficial owner and applicant*:

- The individual's name, date of birth, and residential address.
- A copy of one of the following: (a) a non-expired U.S. driver's license (including any driver's licenses issued by a commonwealth, territory, or possession of the United States); (b) a non-expired identification document issued by a U.S. state or local government, or Indian Tribe; (c) a non-expired passport issued by the U.S. government; or (d) a non-expired passport issued by a foreign government (only when an individual does not have one of the other three forms of identification listed above).

According to FinCEN, the information contained in the CTA Submission will not be made available to the public. In general, FinCEN states it will disclose the information only to federal and state law enforcement agencies and regulators, as well as to certain financial institutions.

Beneficial Owners and Applicants

The category of beneficial owners, for whom information is required, includes any individual who, directly or indirectly, (i) "exercises substantial control over the entity" (e.g., any senior officer) or (ii) "owns or controls 25 percent of the ownership interests of the entity."[4] These terms are intentionally broad and will likely be broadly construed.

The category of applicants, for whom information is required, is relevant only for entities formed after January 1, 2024. Applicants include a maximum of two individuals: (i) the individual who directly files the formation or registration document of the reporting entity, and (ii) the individual who is primarily responsible for directing such filing.

In addition to the CTA at the federal level, please be aware that certain states may be enacting similar beneficial owner disclosure legislation, sometimes with different disclosure requirements. Legislation of this nature has been introduced, for example, in California, New York and Pennsylvania. Going forward, it makes sense for you to check on the requirements of each state where you form an entity.

The Filing Process

Once the appropriate person has determined that a CTA Submission is required, it will be important for you to identify who is going to prepare the filing and submit it to FinCEN. If you wish to engage Choate to help with the CTA review and filing process, and if Choate accepts the engagement, Choate will perform this work at our regular hourly rates.

Many companies have found, however, that they are able to file the CTA Submission themselves. We have heard this from clients, and in our own experience the FinCEN website is not hard to use.

Many people have found that it is useful to obtain a FinCEN identification number. This can be a practical step if the same individual will need to provide information for multiple companies. The amount of work to obtain the FinCEN identification number is roughly the same as the amount of work to file a CTA Submission. Then, once you have obtained your own FinCEN identification number, you can reference this identification number in future filings, and you will not need to input your personal information again, except if that information changes (e.g., a new residential address).

The specific information that a company submits to FinCEN is likely to change and it may change frequently. Please note that an entity is required to notify FinCEN within thirty days in the event there is any change to the information that the entity filed in its CTA Submission. Each company will want to establish a process for detecting and reporting those changes. Choate will not be

responsible to detect when there has been a change that requires an update, and will not be responsible for any related filing requirement.

Conclusion

We anticipate that a large number of companies will try to submit their CTA filings in the fourth quarter of 2024. If you would like us to work through the CTA analysis with you, please reach out to us no later than September 9, 2024, so that we and you can confirm an engagement for this work.

Please contact any of your lawyers at Choate if you have questions. We appreciate the privilege of providing legal services to our clients.

This Memo is for educational purposes and does not establish an attorney-client engagement. Please contact counsel if you need advice in a specific situation.

[1] Choate may, however, handle certain filings that are related to clients of the Choate Wealth Management Group. If you are a WMG client, and if you have questions, please reach out to your contacts at Choate.

[2] The FAQs are posted by FinCEN on its website at www.fincen.gov/boi-faqs.

[3] You can read these rules at 31 C.F.R. §1010.380. They are posted on the FinCEN website at www.fincen.gov/boi/reference-materials [click on Regulations].

[4] You can read the precise language of the requirement at 31 U.S.C. §5336(a)(3). It is posted on the FinCEN website at www.fincen.gov/boi/reference-materials [click on Corporate Transparency Act].

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