

FinCEN Proposes Rules Under Corporate Transparency Act

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The FinCEN arm of the Treasury Department recently proposed regulations to implement the reporting rules in the Corporate Transparency Act (“CTA”) enacted about a year ago. (Pub. L. 116-283, Jan. 1, 2021; § 6401-03). The overall goal of the rules is to require disclosure of the identity of persons – typically foreigners – investing in the US who want to hide their identities behind various entities they control. According to the Preamble, “the proposed definition of domestic reporting company would likely include limited liability partnerships, limited liability limited partnerships, business trusts . . . and most limited partnerships.” 86 Fed. Reg. 69920 (Dec. 8, 2021). FinCEN believes the new reporting regime may affect tens of millions of organizations.

Tax-exempt investors have good reason to believe the CTA reporting rules will not result in the confusion and reporting burdens that arose roughly 10 years ago under FinCEN’s Foreign Bank Account Reporting (“FBAR”) requirements. Those rules focused on ownership of foreign bank accounts by US entities – including retirement plans. Unlike the FBAR rules, the CTA reporting rules focus primarily on enhancing “law enforcement efforts to counter money laundering, the financing of terrorism and other illicit activity” in the United States. The law seeks to do so by requiring the reporting entity to disclose names, addresses and other identifying information of beneficial owners of domestic organizations – who are often foreign individuals or organizations.

Our review of the proposed CTA rules indicates that persons managing retirement plans and their beneficiaries typically will be exempt from reporting under one or more of the following exemptions contained in Proposed Regulation § 1010.380(c)(2) –

- (ii) any entity that is established under the laws of the United States, a State or a political subdivision of a State, and exercises governmental authority on behalf of the United States, a State or political subdivision,

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- (iii) any “bank” as defined for FDIC purposes or in the Investment Company Act or Advisers Act,
- (vii) any “broker or dealer” registered with the SEC,
- (x) any “investment company” as defined in the Investment Company Act of 1940 or any “investment adviser” as defined in the Investment Advisers Act,
- (xviii) any “pooled investment vehicle” operated or advised by one of the above entities,
- (xix) any Code section 501(c) tax-exempt organization exempt from tax under Code section 501(a) which includes tax-qualified retirement plans described in section 401(a), but apparently not IRAs (which technically are not described in Code section 501(a), but are tax-exempt via Code section 408(e)(1)), and
- (xx) an entity that
 - (A) operates exclusively to provide financial assistance to, or hold governance rights over, any entity described in paragraph (c)(2)(xix) of this section;
 - (B) is a United States person;
 - (C) is beneficially owned or controlled exclusively by one or more United States persons that are United States citizens or lawfully admitted for permanent residence; and
 - (D) derives at least a majority of its funding or revenue from one or more United States persons that are United States citizens or lawfully admitted for permanent residence.

We note that the lack of an explicit exemption for millions of IRAs is perhaps an oversight, as the identities of the owners are clearly reported annually to the IRS on Form 5498. This issue appears worthy of comment.

In the absence of an exemption, a reporting company must report information about itself and each “beneficial owner.” The latter is defined as an individual who directly or indirectly exercises “substantial control” over the reporting entity or who owns or controls at least 25% of the ownership interests of the reporting company.

Once the CTA reporting rules are adopted in final form, initial reports will be due in one year (for existing entities), and much more quickly for newly formed entities. Penalties of up to \$500 per day may apply, with additional penalties – and up to two years imprisonment – for willful violations.

Once reports have been filed, FinCEN may disclose the information to a variety of federal agencies, foreign law enforcement entities and financial institutions subject to due diligence requirements.

Comments should be filed by February 7.

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