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Who Gets to Know and For What Purposes? The Other Side of the Corporate Transparency Act

By Robert E. Ward, J.D., LL.M.*

WardChisholm, LLP

Vancouver, British Columbia and Bethesda, Maryland

Previous articles in this space have addressed the compliance obligations which the Corporate Transparency Act (the “CTA”) and final regulations thereunder impose on owners of many business entities and the professionals who assist them.² As explained and discussed by those articles, the CTA requires disclosure of information regarding certain privately held companies, their beneficial owners, and the “applicants” who prepare and submit the organizational documents by which those companies were established. The information required to be filed with the Financial Crimes Enforcement Network (“FinCEN”) is the full legal name of each beneficial owner who owns or controls at least 25% of the equity interest in the entity, those individuals’ date of birth, and their

residential or business street address, and taxpayer identification number or FinCEN identifier.³

The CTA is explicit as to who is entitled to access the information gathered by FinCEN and the purposes for which such information may be used. The avowed purposes of the CTA are to “prevent money laundering, the financing of terrorism, proliferation financing, serious tax fraud, and other financial crime.”⁴ Consistent with those purposes, disclosure of information which the CTA requires reporting companies to provide to FinCEN regarding their beneficial owners (“CTA information”) is limited to:

- Federal agencies engaged in national security, intelligence, or law enforcement activity;
- State, local, or Tribal law enforcement agencies;
- Law enforcement agencies, prosecutors, judges, and certain authorities of other countries;
- Financial institutions; and
- Regulators of financial institutions.⁵

In addition to the specific safeguards set forth in the CTA,⁶ the statute grants the Secretary of the Treasury authority to prescribe by regulations safeguards determined to be necessary to protect CTA information.⁷ That authority has been delegated by the Secretary to

* Robert E. Ward, J.D., LL.M. is a fellow of the American College of Tax Counsel who advises businesses and individuals on U.S. international and domestic tax matters from his firm’s offices in Vancouver, British Columbia and Bethesda, Maryland.

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² Ward, *We May Not Know Who You Are Or Where You Live, But We Intend To Find Out: The Corporate Transparency Act of 2020*, 50 Tax Mgmt. Int’l J. No. 3 (Mar. 5, 2021); *The Corporate Transparency Act: The Final Regulations Provide Limited Guidance With No Surprises*, 51 Tax Mgmt. Int’l J. No. 12 (Dec. 2, 2022).

³ 31 U.S.C. §5336 (b)(2)(A).

⁴ 31 U.S.C. §5336 (e)(2)(B). The CTA directs that these purposes are required to be communicated by secretaries of state and similar offices in each State or Indian tribe responsible for formation or registration of business entities when communicating the requirements imposed by the CTA to provide information regarding reporting companies and their beneficial owners. See 31 U.S.C. 5336 (e)(2)(B).

⁵ 31 U.S.C. §5336 (c)(2)(B).

⁶ See 31 U.S.C. 5336 (c)(3).

⁷ See 31 U.S.C. 5336 (c)(3)(K).

FinCEN.⁸ The proposed regulations reflect the concerns of lawmakers that CTA information will be used only for purposes intended by the CTA and only for the purposes requested by the recipients identified above.⁹ Proposed regulations issued by FinCEN on December 15, 2022, set forth the procedures by which disclosures will be made and purposes disclosures may serve.¹⁰

The CTA, generally, and the proposed regulations, specifically, compel Federal agencies and State, local, or Tribal law enforcement agencies requesting CTA information to enter into agreements with FinCEN and certify compliance with those agreements. Federal agencies and State, local, or Tribal law enforcement agencies must also audit and submit to audits of the systems and procedures the agencies implement to safeguard the CTA information they receive. Moreover, requests for CTA information are subject to two core conditions. First, the requests must be narrowly tailored and consistent with the agency's purpose in making the request.¹¹ Second, heads of Federal agencies requesting CTA information must certify that the information requested is relevant to and in furtherance of the national security, intelligence, or law enforcement activity of that agency.¹²

Federal agencies and State, local, or Tribal law enforcement agencies receiving CTA information from FinCEN are required to enter into agreements with FinCEN which specify the procedures to be used to protect the confidentiality of CTA information.¹³ In addition to other requirements FinCEN may impose, the agreements must include descriptions of the information the agency will receive, limitations on electronic access to which that information will be subject, the conditions for access, limitations on redisclosure and the requirements to which redisclosure will be subject, requirements for audits of agency protocols and personnel handling CTA information, and "security plans outlining requirements and standards for personnel security, physical security, and computer security."¹⁴ The standards and procedures commemorated by the agreement with FinCEN must be approved by the head of the agency requesting CTA information and include training procedures for agency personnel who will have access to the information. The Federal agency or the State, local, or Tribal law

enforcement agency must provide FinCEN with annual reports describing the procedures used to ensure the security of CTA information.¹⁵ Semi-annually the head of the agency must certify to FinCEN the agency's compliance with the standards and procedures required by the proposed regulations.¹⁶

CTA information must be securely stored in systems satisfying FinCEN standards. Agency records are subject to audit by the agency, FinCEN, and the Comptroller General of the United States.¹⁷ Access to CTA information is limited to the personnel of the Federal agency or State, local, and Tribal law enforcement agency requesting information who are "directly engaged in the activity for which the information was requested" and have duties and responsibilities requiring access to the CTA information.¹⁸

State, local, and Tribal law enforcement agencies are subject to the same requirements which are imposed on Federal agencies.¹⁹ In addition, disclosures to State, local, or Tribal law enforcement agencies require authorization by a court of competent jurisdiction.²⁰ The court must have jurisdiction over the investigation the requested CTA information is intended to facilitate.²¹ The head of a State, local, or Tribal agency requesting CTA information from FinCEN is required to submit a copy of the court order authorizing the agency to seek the information and written justification setting forth the specific reasons why the information is relevant to a civil or criminal investigation conducted by the agency.²²

Foreign requests for CTA information must be made by and through a United States Federal agency that is subject to the requirements described above.²³ The request must be made under an international treaty, agreement, or convention or is otherwise an "official request by a law enforcement, judicial, or prosecutorial authority of a trusted foreign country."²⁴ The request must be for assistance in a law enforcement investigation and prosecution or national security or intelligence activity authorized under the laws

¹⁵ Prop. Reg. 31 C.F.R. 1010.539 (d)(1)(i)(I). *See also* 31 U.S.C. 5336 (c)(3).

¹⁶ Prop. Reg. 31 C.F.R. 1010.539 (d)(2)(i)(H). *See also* 31 U.S.C. 5336 (c)(3)(D).

¹⁷ *See* 31 U.S.C. 5336 (c)(3)(I), (J), and (c)(10). *See also* 31 U.S.C. 5336 (c)(3)(H).

¹⁸ Prop. Reg. 31 C.F.R. 1010.599 (d)(1)(i)(F). *See also* 31 U.S.C. 5336 (c)(3)(G).

¹⁹ *See* Prop. Reg. 31 C.F.R. 1010.599 (d)(1)(ii).

²⁰ 31 U.S.C. 5336 (c)(2)(B)(i)(II).

²¹ *See* Prop. Reg. 31 C.F.R. 1010.599 (b)(2)(i).

²² Prop. Reg. 31 C.F.R. 1010.599 (d)(1)(ii)(B)(2).

²³ Prop. Reg. 31 C.F.R. 1010.599 (b)(3).

²⁴ Prop. Reg. 31 C.F.R. 1010.599 (b)(3)(ii)(B). *See also* 31 U.S.C. 5336 (c)(2)(B)(ii).

⁸ Treasury Order 180-01 (January 14, 2020).

⁹ *See* 31 U.S.C. 5336 (c)(2)(B).

¹⁰ Fr Doc. 2022-2703.

¹¹ Prop. Reg. 31 C.F.R. 1010.599 (d)(ii)(A). *See also* 31 U.S.C. 5336 (c)(3)(F).

¹² Prop. Reg. 31 C.F.R. 1010.599 (d)(1)(ii). *See also* 31 U.S.C. 5336 (c)(3)(E).

¹³ Prop. Reg. 31 C.F.R. 1010.599 (d)(1)(i)(A).

¹⁴ *Id.*

of the foreign country. In addition, the head of the Federal agency requesting CTA information on behalf a foreign law enforcement agency, prosecutor, judge, or foreign authority must retain the request it has received and information establishing a chain of title, including the name, title, agency, and country of the foreign person from which the request emanated and the name, title, e-mail address, and telephone number for the individual at the Federal agency making the request to FinCEN.²⁵

Financial institutions and regulatory agencies may also request CTA information from FinCEN to facilitate customer due diligence requirements. Disclosure to FinCEN is subject to consent of the reporting company whose information is being disclosed.²⁶ In the case of requests by Federal agencies, the regulatory agency must be authorized by law to determine the financial institution's compliance with customer due diligence requirements, and the CTA information must be used solely for assessing, supervising, or investigating the financial institution's compliance with customer due diligence requirements.²⁷

The head of the Federal regulatory agency requesting CTA information must certify to FinCEN the agency's compliance with these conditions and that the CTA information will be used solely for purposes of assessing the financial institution's due diligence activity.²⁸

Officers, employees, contractors, and agents ("Authorized Personnel") of requesting agencies who receive CTA information from FinCEN may redisclose such information to other Authorized Personnel of the same agency for the specific purpose or activity for which such information was requested.²⁹ Authorized Personnel of Federal agencies and State, local, or Tribal law enforcement agencies may disclose CTA information to courts of competent jurisdiction "or parties to a civil or criminal proceeding."³⁰ Authorized Personnel of Federal agencies receiving CTA information may also redisclose such information to personnel of the United States Department of Justice, in connection with referrals to the Department of Jus-

tice for use in litigation related to the activity for which the requesting agency requested the information.³¹ The proposed regulations authorize disclosure by foreign law enforcement agencies, prosecutors, judges, central authorities, and competent authorities without specificity as to whom redisclosure may be made, requiring only that the CTA information be used in a manner that is consistent with the international treaty, agreement, or convention under which the CTA information was requested.³² Directors and Authorized Personnel of financial institutions may redisclose CTA information to other directors and Authorized Personnel of the same financial institution within the United States for the specific purpose or activity for which the information was requested. Such information may also be disclosed to the Federal regulators of such financial institution, self-regulatory organizations registered with or designated by the Federal regulators of such financial institution, and other "appropriate" regulatory agencies if the functional regulator, self-regulatory organization, or other appropriate regulatory agency is authorized to supervise and enforce customer due diligence requirements, uses the CTA information to assess compliance with such requirements, and has entered into an agreement conforming to the requirements set forth above for Federal agency agreements with FinCEN.³³

What about the IRS? The United States Department of Treasury (including the IRS, FinCEN, and other Treasury agencies) is not subject to the requirements described above which are imposed on other Federal agencies. The statute and proposed regulations impose no controls or limitations on use of CTA information by officers and employees of the Department of Treasury other than to require the Secretary of Treasury to determine that their official duties require inspection or disclosure of the CTA information for purposes of tax administration as defined by §6103(b)(4).³⁴ That definition is practically limitless. It includes "assessment, collection, enforcement, litigation, publication, and statistical gathering functions" under State and Federal revenue laws and related statutes and tax conventions into which the United States has entered.³⁵ Tax administration as defined by §6103(b)(4) also extends to formation of tax policy.

Section 6103 and the regulations thereunder contain extensive provisions addressing to whom taxpayers' returns and return information as defined in Sec-

²⁵ Prop. Reg. 31 C.F.R. 1010.599 (d)(1)(ii)(B)(3).

²⁶ 31 U.S.C. 5336 (c)(2)(B)(iii); Prop. Reg. 31 C.F.R. 1010.599 (b)(4).

²⁷ Prop. Reg. 31 C.F.R. 1010.599 (b)(4)(ii). *See also* 31 U.S.C. 5336 (c)(2)(C).

²⁸ Prop. Reg. 31 C.F.R. 1010.599 (d)(1)(i)(5).

²⁹ Prop. Reg. 31 C.F.R. 1010.599 (c)(2)(i).

³⁰ Prop. Reg. 31 C.F.R. 1010.599 (c)(2)(vi). Note that the proposed regulation does not require the particular civil or criminal proceeding of the parties to whom disclosure was made be conducted by the court of competent jurisdiction to which disclosure is made or impose any other limitations other than the general prohibitions on disclosure of CTA information set forth in Prop. Reg. 31 C.F.R. 1010.5999 (d)(1)(F).

³¹ Prop. Reg. 31 C.F.R. 1010.599 (c)(2)(vii).

³² Prop. Reg. 31 C.F.R. 1010.599 (c)(2)(viii).

³³ Prop. Reg. 31 C.F.R. 1010.599 (c)(2)(iv). *See text at footnote 13.*

³⁴ Prop. Reg. 31 C.F.R. 1010.599 (b)(5). *See also* 31 U.S.C. 5336 (c)(5).

³⁵ *See* 6103(b)(4)(B).

tion 6103 (b)(1) and (2) may or may not be disclosed. Rather than invoking those provisions, the proposed regulations merely direct that disclosure of CTA information is to be “[c]onsistent with procedures and safeguards established by the Secretary. . . .”³⁶

As observed at the beginning of this of this article, the information the CTA requires reporting companies to provide is the name, date of birth, address, and taxpayer identification number (or FinCEN identified) of the reporting company’s beneficial owners. This information could be useful for tax administration purposes in many contexts. Two which immediately come to mind are identification of responsible persons for purposes of imposing the trust fund recovery penalty under §6672 and transferee liability under §6901 for those receiving distributions from corporations with unpaid income taxes.³⁷ The beneficial ownership information gathered under the CTA with regard to pass-through entities is already available to the Department of Treasury from the Schedule K-1s filed with the returns of those entities. What Treasury is lacking and what the CTA provides is similar information for owners of corporate entities. In contrast to owners of pass-through entities, disclosure of shareholders is limited to those owning or controlling 25% or more of the outstanding equity of reporting corporations.

Penalties. The CTA deters unauthorized disclosure of CTA information by imposition of civil and criminal penalties.³⁸ Unauthorized disclosure is subject to a civil penalty of not more than \$500 for each day the violation continues without remedy and fines of not more than \$250,000 and possible imprisonment for

not more than five years.³⁹ If disclosure or unauthorized use of CTA information violates another law of the United States or is part of a pattern of illegal activity involving more than \$100,000 in a 12-month period, the fines are increased to \$250,000 with possible imprisonment for not more than 10 years.⁴⁰

Conclusion. As observed above, the objective of Congress in mandating submission and collection of information regarding reporting companies, their beneficial owners, and those who participate in organization and registration of those companies is to prevent and facilitate prosecution of money laundering, terrorism financing, proliferation financing, tax fraud, and other crimes. There are three instances in the CTA and one in the sense of Congress that accompanies the Act where its purposes are articulated.⁴¹ The language used each time is almost identical. In each instance the phrase “tax fraud” is immediately preceded by the word “serious.” However, the CTA and the proposed regulations expressly provide for the use of CTA information for tax administration purposes. Reporting companies and their beneficial owners should not be misled by the language expressing the purposes of the CTA as stated in notices provided in connection with collection of the information it solicits. The Act and the proposed regulations impose no limitations on the use of CTA information for purposes of tax administration as broadly defined by §6103(b)(4) and leave protection of that information in the discretion of the Secretary of the Treasury. Perhaps final regulations will set some limits.

³⁹ 31 U.S.C. 5336 (a)(3)(B).

⁴⁰ 31 U.S.C. 5336 (g)(B)(ii)(II). In contrast, reporting violations for failures to complete or update beneficial ownership information or to provide false or fraudulent information are subject to civil penalties of not more than \$500 for each day the violation continues without remedy, fines of not more than \$10,000 and possible imprisonment of not more than 2 years. See 31 U.S.C. 5336 (g)(3)(A).

⁴¹ See 31 U.S.C. §5336 (a)(11)(B)(xxiv)(II). 31 U.S.C. §5336 (i)(1), and Pub. L. 116-283, div. F, title LXIV, §6402.

³⁶ Prop. Reg. 31 C.F.R. 1010.599 (b)(5).

³⁷ In the case of pass-through entities, the beneficial ownership information gathered by CTA is available to the Department of Treasury from the schedules K1 filed with regard to those entities.

³⁸ See 31 U.S.C. 5336 (c)(4).