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Trustee Talk

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Navigating Corporate Transparency Act Requirements as Trustees



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Since its enactment, the Corporate Transparency Act (CTA) has caused confusion for business entities and their beneficial owners regarding the necessary filing and compliance requirements. Among bankruptcy trustees, there also exists a high level of uncertainty about how to navigate the reporting requirements and penalties in their roles as fiduciaries for insolvent companies. Until more guidance becomes available, trustees can benefit from understanding what the CTA entails and requires, as well as an overview of the questions and issues it raises, and how it impacts their role as fiduciaries for reporting companies undergoing bankruptcy.

The CTA's History and Overview

The CTA was adopted by Congress on Jan. 1, 2021, as a bipartisan act to amend the Bank Secrecy Act, which was originally created to deter money-laundering activities, tax evasion, corruption and other financial crimes. It went into effect on Jan. 1, 2024,¹ and created new reporting requirements for a wide range of entities that must report beneficial ownership and registrant information to the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) in order to identify beneficial owners: those who exercise substantial control over the reporting company or individuals who own or control at least 25 percent of the reporting company's ownership interests.

Reporting companies include any entity created as a corporation or limited liability company, or any entity created by filing a document with the Secretary of State or any similar office under the law of a state or Indian tribe. Similar entities created under the laws of foreign countries and registered

as businesses in the U.S. or any tribal jurisdiction also must comply with the CTA's reporting rules. The required information for inclusion in the report includes the company's legal name; trade name, such as a d/b/a; current street address of place of business (no mailing address or P.O. box); jurisdiction of formation; and the company's EIN/TIN and personal identifying information for each beneficial owner, including full legal name, birth date, legal address, an identifying number from a driver's license, passport or other approved legal documents, and a photograph of that document.

Exemptions to the CTA reporting requirements apply to 23 types of entities, which include banks, credit unions, money-services businesses, registered broker-dealers, government authorities, exchanges and clearing agencies, insurance companies, public utilities and accounting firms, among others. Generally, if a business entity is already regulated, it is likely to be considered exempt. Tax-exempt organizations such as 501(c)(3) or political entities also are exempt, as well as large, U.S.-based operating companies with more than 20 full-time employees and more than \$5 million in gross receipts, and that maintain a physical presence at a business office in the U.S.

Companies formed before Jan. 1, 2024, had been permitted to file reports by Jan. 1, 2025. Entities that were formed and registered in 2024 had been required to file the necessary reporting within 90 days. Beginning Jan. 1, 2025, the deadline for filing the required report has been accelerated to 30 days after formation. If any corrections need to be made to the filing, the applicant must file them within 30 days of becoming aware of them. There also is a 30-day deadline to report any changes to beneficial ownership, including a change of address; renewal of a driver's license or passport; ceasing to

¹ 31 U.S.C.A. § 5336; see 31 C.F.R. § 1010.380.

be the beneficial owner due to death, sale of the business or bankruptcy; the addition of a beneficial owner through marriage, bankruptcy or assignment; or if the company becomes eligible or ineligible for an exemption.

For U.S. bankruptcy trustees, FinCEN issued a clarification on July 8, 2024, that entities ceasing to exist before Jan. 1, 2024, were not required to comply with the beneficial ownership information reporting rules. However, companies that were not formally dissolved before Jan. 1, 2024, were held to the requirements — even if they were dissolved before the deadline of the initial beneficial ownership information report.

Significant penalties apply for beneficial owners who are not compliant with the reporting requirements. When the violation continues or has not been remedied, beneficial owners can be fined \$591 per day and up to \$10,000. In addition, they risk legal penalties that can lead to sentencing of up to two years in prison. These same fines apply as a result of failing to file reporting of initial ownership information or for reporting changes and inaccuracies. It should be noted that these fines are most likely not dischargeable within bankruptcy.²

Questions and Challenges Presented by the CTA

While the CTA was enacted more than a year ago, questions remain for bankruptcy trustees regarding their roles in complying with the filing requirements under the CTA. When an entity files for bankruptcy, the trustee steps into the corporation's shoes but might not have the resources or access needed to fulfill the required reporting and related responsibilities. As of December 2024, further guidance is needed to assist trustees in determining the role they are expected to play as fiduciaries for reporting companies undergoing bankruptcy.

Among the challenges and questions raised by the CTA is the limited access to information required for beneficial ownership reporting. As a company undergoes bankruptcy, it is not an easy task to obtain personal identifying information for each person who owns 25 percent of the company. Ideally, these individuals should participate in the process by directly reporting personal information themselves.

Bankruptcy trustees must also contend with time constraints in their role as fiduciaries. With an added responsibility on top of their other duties, tracking down the necessary information for beneficial ownership reporting can be a significant time and cost burden.

Interestingly, litigation is underway challenging the CTA's constitutionality in at least six pending lawsuits around the U.S. On Dec. 3, 2024, the U.S. District Court for the Eastern District of Texas issued a preliminary injunction finding the CTA likely to be unconstitutional.³ The court ruled that it was a nationwide injunction, enjoining the CTA's enforcement and its impending Jan. 1, 2025, filing deadline.

As a result, FinCEN confirmed on Dec. 7, 2024, that reporting companies were not required to file beneficial ownership reporting while the nationwide injunction remains in place, and that reporting companies will not be penalized if they do not file these reports.

A turn of events at the end of December 2024 seemingly changed the course of this decision, but then reinstated it. On Dec. 23, 2024, the U.S. Court of Appeals for the Fifth Circuit struck down the injunction that paused the CTA's enforcement, once again requiring that business entities formed prior to 2024 submit beneficial ownership reporting by Dec. 31, 2024.

In response, FinCEN provided deadline extensions for reporting companies according to their formation dates. However, on Dec. 26, 2024, the Fifth Circuit entered an order "at the direction of the Court" that vacated the stay and again put the CTA's reporting requirements on hold.⁴

Trustee Actions and FinCEN Feedback

To date, bankruptcy professionals have utilized some effective strategies to navigate the new requirements. In *YLG Partners Inc.* and *BOA Nutrition Inc.*,⁵ Bankruptcy Administrators filed motions with the court to be excused from fulfilling the responsibilities imposed by the CTA due to limited access to the necessary information. FinCEN filed responses and entered into consent orders that indicated that chapter 7 trustees generally are not required to submit the debtor's beneficial ownership reporting.

In their response, FinCEN stated that "a chapter 7 bankruptcy trustee is not typically responsible for fulfilling a debtor reporting company's duty to report beneficial ownership to FinCEN: the responsibility is the reporting company's duty." In addition, "the obligation to report beneficial ownership information to FinCEN under the CTA lies with reporting companies themselves." FinCEN further indicated that "[s]imply becoming a chapter 7 trustee does not make an individual a 'senior officer' of the reporting company, i.e., 'any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function.'"⁶

On the other hand, FinCEN stated that chapter 7 trustees might be liable in situations with "unusual circumstances," such as the trustee had indicated to the debtor that they would file the requisite beneficial ownership reporting and failed to do, or where the trustee prevented the debtor from filing the information. FinCEN also noted that "a bankruptcy estate is not a 'reporting company' obligated to file beneficial ownership information with FinCEN." This is due to the criteria that a "domestic entity is a reporting company only if it was created by the filing of a document with [the] secretary of state or similar office."

Another cautious and conservative approach that trustees have taken in other recent cases involves submitting a

2 11 U.S.C. § 523(a)(7).

3 *Texas Top Cop Shop Inc. v. Garland*, 2024 U.S. Dist. LEXIS 218294 (E.D. Tex. Dec. 3, 2024).

4 This information is current as of Jan. 8, 2025.

5 *In re YLG Partners Inc.*, No. 23-10709 (Bankr. M.D.N.C.); *In re BOA Nutrition Inc.*, No. 23-03665-5-PWM (Bankr. E.D.N.C.).

6 31 C.F.R. § 1010.380(f)(8) of the CTA.

letter to the debtor's attorney informing them that the debtor could be required to report beneficial ownership information to FinCEN pursuant to the CTA, and noting that, as the trustee, they do not have the requisite information to complete the beneficial ownership information report. In doing so, the debtor's attorney is asked to advise their client to take any timely, necessary action.

Conclusion

While further guidance from FinCEN is anticipated, there has been none issued to provide greater clarification as to the trustee's role and responsibilities as of December 2024. Until this is provided, bankruptcy trustees would be well-served to take a careful approach in each case, considering the practices in recent cases that have been effective, and to stay attuned to any future updates from FinCEN. **abi**

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