

## Steve Leimberg's Business Entities Email Newsletter Archive Message #218

Date:21-Jan-21

### Subject: John A. Terrill & Michael A. Breslow - Congress Passes Corporate Transparency Act to Require Disclosure of Beneficial Owners of Entities and the Creation of a National Registry of Entities

*“On December 28, 2020, the House of Representatives, and on January 1, 2021, the Senate, passed the National Defense Authorization Act (the ‘NDAA’) over President Trump’s veto. Title LXIV of the NDAA includes the adoption of the Corporate Transparency Act (the ‘CTA’), which represents the most significant anti-money laundering legislation adopted in the United States in many years. Through the CTA, the United States joins the vast majority of nations involved in the global financial community in developing a legal and regulatory framework to combat the use of anonymous entities, such as corporations, limited liability companies and partnerships (also referred to as ‘shell companies’), for money laundering, tax evasion and the financing of terrorism.*

*The two key substantive aspects of the CTA are first, the requirement for certain entities to disclose identifying information about (i) the individual owners of the entity and (ii) those who control an entity (the ‘beneficial owners’) upon creation and upon a change of ownership, and second, provisions relating to the creation of a national registry of entities and their owners required under the CTA.*

*The Financial Crimes Enforcement Network (‘FinCEN’) adopted regulations in 2016, which became effective in 2018, implementing customer due diligence (‘CDD’) obligations on banks and financial institutions when opening bank accounts for entities, which regulations (the ‘CDD Regulations’) were the subject of the authors’ posts of May 11, 2016 and September 25, 2018. At this stage, the CTA is largely a legislative authorization; importantly the detail of the beneficial ownership reporting requirements and the national registry will be outlined in regulations promulgated in the coming months and years by the Treasury Department.”*

**Jack Terrill** and **Michael Breslow** provides members with important commentary that reviews the Corporate Transparency Act's required disclosure of beneficial owners of entities as well as the creation of a national registry of entities.

**John A. Terrill, II** is a Partner at **Heckscher Teillon Terrill & Sager, PC** in West Conshohocken, Pennsylvania. Mr. Terrill's practice largely focuses on estate planning for clients with complex assets, such as businesses, real estate, and other significant assets. Mr. Terrill is a fellow of the American College of Trust and Estate Counsel ("ACTEC") where he currently serves as Immediate Past President. He was the founding chair of ACTEC's Asset Protection Committee and is a member of the College's Asset Protection and Legal Education committees. He also formerly co-chaired ACTEC's Task Force on FATF (the Financial Action Task Force) and was ACTEC's Pennsylvania state chair from 2012 through 2015. He is a member of the American Bar Association and its Real Property, Trust & Estate Law, and Law Practice Management Sections; the Pennsylvania Bar Association and its Real Property, Probate, & Trust Law Section; the Philadelphia Bar Association; and the Philadelphia Estate Planning Council. He is a frequent speaker around the country on asset protection planning, the impact of FATF on law practice, and more. He is a graduate of Dartmouth College (A.B. 1973) and the University of Pennsylvania Law School (J.D. 1976).

**Michael A. Breslow** is a Partner at **Heckscher, Teillon, Terrill & Sager, P.C.** in West Conshohocken, Pennsylvania. Mr. Breslow's practice focuses on a variety of private client work, including tax and estate planning, planning for owners of closely-held businesses, charitable planning and trust and estate administration. He is a member of the Pennsylvania Bar Association and its Real Property, Probate, & Trust Law Section; the Philadelphia Estate Planning Council; and is a member of the Executive Committee of the Philadelphia Bar Association, Probate and Trust Law Section. Mr. Breslow writes and speaks about individual and fiduciary income tax planning, planning for gift, estate and generation-skipping transfer taxes and on developments in the law pertaining to the international effort to combat money laundering and terrorist financing. He is a graduate of University of Maryland, College Park (B.A. 2007), Temple University Beasley School of Law (J.D. 2011) and New York University School of Law (LL.M. 2014).

Here is their commentary:

## **EXECUTIVE SUMMARY:**

On December 28, 2020, the House of Representatives, and on January 1, 2021, the Senate, passed the National Defense Authorization Act (the “NDAA”)<sup>i</sup> over President Trump’s veto. Title LXIV of the NDAA includes the adoption of the Corporate Transparency Act (the “CTA”), which represents the most significant anti-money laundering legislation adopted in the United States in many years. Through the CTA, the United States joins the vast majority of nations involved in the global financial community in developing a legal and regulatory framework to combat the use of anonymous entities, such as corporations and limited liability companies (also referred to as “shell companies”), for money laundering, tax evasion and the financing of terrorism.

The two key substantive aspects of the CTA are first, the requirement for certain entities to disclose identifying information about (i) the individual owners of the entity and (ii) those who control an entity (the “beneficial owners”) upon creation and upon a change of ownership, and second, provisions relating to the creation of a national registry of entities and their owners required under the CTA.

The Financial Crimes Enforcement Network (“FinCEN”) adopted regulations in 2016, which became effective in 2018, implementing customer due diligence (“CDD”) obligations on banks and financial institutions when opening bank accounts for entities, which regulations (the “CDD Regulations”) were the subject of the authors’ posts of May 11, 2016<sup>ii</sup> and September 25, 2018.<sup>iii</sup> At this stage, the CTA is largely a legislative authorization; importantly the detail of the beneficial ownership reporting requirements and the national registry will be outlined in regulations promulgated in the coming months and years by the Treasury Department.

## **COMMENT:**

### **General Background on International Efforts Regarding Beneficial Ownership**

The international community, through the Financial Action Task Force (“FATF”), has long been in agreement that financial institutions should conduct CDD when forming customer/client relationships, including when customers seek to open financial accounts, and that member countries should not support a legal system that tolerates the use of anonymous entities. It is important to note that the United States was a founding member of, is an active participant in and has agreed to be bound by, FATF and its so-called Forty Recommendations. Specifically, FATF has recommended that member countries gather and maintain identifying information on the beneficial ownership and control of companies, entities and trusts. Recommendation 24 of the FATF Recommendations<sup>iv</sup> provides as follows:

Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.

The Interpretive Note to Recommendation 24 of the FATF Recommendations provides more specific detail on what the international community, including the United States, has agreed to in regards to gathering beneficial ownership information. The Interpretive Note states that the authorities should gather and maintain identifying information about the owners of a company, and the individuals who can control the company, and that companies and their advisors should be accountable for keeping such information up-to-date and timely reporting changes in ownership.<sup>v</sup> In addition, the Interpretive Note to Recommendation 24 dictates that all companies should be registered in a national registry of entities, that such registry should be readily available to law enforcement authorities and that authorities should cooperate with their international counterparts’ efforts to access beneficial ownership information.<sup>vi</sup> Recommendation 25 and its Interpretive Note offer similar requirements relating to gathering beneficial ownership information and creating a national registry for legal arrangements, such as private trusts; ***however, important for readers of this post, the United States, through the CDD Regulations<sup>vii</sup> and the CTA, described below, has not imposed any such reporting obligations with respect to private trusts.***

Europe is well ahead of the United States in implementing the beneficial ownership and national registry mandates of Recommendations 24 and 25. Many countries had already adopted laws requiring the gathering of beneficial ownership information; however, the Fourth E.U. Anti-Money Laundering Directive (“4 AMLD”), adopted in 2015, required E.U. member states to create central national registries of the beneficial ownership information for corporations and trusts.<sup>viii</sup> In July 2018, the EU amended 4 AMLD with the 5th Anti-Money Laundering Directive (“5 AMLD”), which, among other measures, provided for improved access to beneficial ownership registers. Member States had until January 10, 2020 to implement 5 AMLD into domestic law.

Although the problem of anonymous shell entities has been a subject of concern for many years in the international financial community, it seems that only in the last few years has the issue really risen to the consciousness of the American public. The Panama Papers and the Paradise Papers scandals<sup>ix</sup> highlighted the unfortunate fact that anonymous entities are routinely abused by the corrupt for tax evasion, money laundering and the financing of terrorism. In recent years, FinCEN has adopted the CDD Regulations, which represented a significant step by the United States toward to the international consensus. The Corporate Transparency Act represents another important step in that direction.

### **Recent U.S. Efforts Regarding Beneficial Ownership**

In recent years, the United States has made some important efforts to satisfy the requirements of FATF Recommendations 24 and 25. As outlined in the authors’ posts of May 11, 2016<sup>x</sup> and September 25, 2018,<sup>xi</sup> FinCEN issued regulations (the “CDD Regulations”) requiring a financial institution, when opening a bank account for an entity, to gather identifying information on the individuals that own a 25% or greater equity interest in a “legal entity customer,” and on a single individual who has “significant responsibility to control, manage or direct a legal entity customer,” such as a director or officer of a corporation or a manager of a limited liability company.<sup>xii</sup> Over the last few years, FinCEN has also implemented and renewed a program of geographic targeting orders (GTOs), which require title insurance companies to provide beneficial ownership information for legal entities used to make high-end cash and wire purchases of real estate in several US metropolitan areas.<sup>xiii</sup> Despite these efforts, the United

States continues to be the subject of international criticism as a jurisdiction vulnerable to money laundering and tax evasion because of a lack of progress on corporate transparency and the perception that the laws relating to beneficial ownership reporting are weak.<sup>xiv</sup> The Corporate Transparency Act should improve the United States' international standing in this regard.

### **Corporate Transparency Act**

Versions of the Corporate Transparency Act had been introduced into Congress in various forms over the last decade by Representative Carolyn Maloney (D-NY),<sup>xv</sup> and by Senator Ron Wyden (D-OR). In the CTA, Congress acknowledged the current deficiency in the United States' legal and regulatory framework relating to beneficial ownership reporting requirements, stating in Section 6402 of the NDAA, entitled, the "Sense of Congress," that "most or all States do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities formed under the laws of the State," that "malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity" and therefore the CTA is necessary to "set a clear Federal standard" and "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards."

### **Beneficial Ownership Reporting Requirements**

Section 6403 of the NDAA sets forth the beneficial ownership reporting requirements. Certain corporations, partnerships and limited liability companies, with a number of exceptions, will be required to disclose their beneficial owners to FinCEN when the entity is formed.<sup>xvi</sup> For this purpose, a beneficial owner is (a) an individual who exercises substantial control over the entity or (b) an individual who owns or controls not less than 25% of the ownership interests of the entity.<sup>xvii</sup> This definition tracks largely with the definition from the existing CDD Regulations. The CTA does not mention trusts that own interests in an entity, but the authors predict that FinCEN, in adopting regulations to implement the CTA, will adopt a similar rule to the existing CDD Regulations, requiring that the trustee (and not the individual beneficiaries) is deemed the beneficial owner with respect to a trust that owns 25% or more of the ownership interests in an entity.<sup>xviii</sup> The beneficial ownership information required to be reported will be each beneficial owner's name, date of birth, address and unique identifying

number.<sup>xix</sup> The companies must report any changes in beneficial owners that occurred during the previous year.<sup>xx</sup>

Generally, the entities that will be required to report (referred to as a “reporting company” in the CTA) are any corporations, limited liability companies, or other similar entities that are created by the filing of a document with a secretary of state or a similar office of the law of a State or Indian Tribe (which would include limited partnerships), or is formed under the law of a country and registered to do business in the United States through the filing of a document with a State or Indian Tribe.<sup>xxi</sup> Most private trusts are not created by filing documents with any state office.

Accordingly, trusts would not fit within the definition of a “reporting company” and are not required to report beneficial ownership information under this statute. Other explicitly stated exceptions to the definition of reporting company include entities with a physical presence in the United States with over 20 full-time employees and which file federal tax returns reporting more than \$5 million in gross receipts or sales, charitable organizations, and other entities that do not pose a significant risk of transparency related concerns, such as banks, credit unions, insurance companies and other regulated businesses.<sup>xxii</sup>

Newly formed reporting companies will be required to report the beneficial ownership information, and existing reporting companies will have two years after the effective date of regulations issued by the Treasury Department to submit a report containing beneficial ownership information to FinCEN.<sup>xxiii</sup> The CTA also imposes civil and criminal penalties for providing false information, or willfully failing to complete or update beneficial ownership information, and there are also penalties for knowingly disclosing or using beneficial ownership information submitted to FinCEN, except under certain circumstances and with proper authorization.<sup>xxiv</sup>

### **Beneficial Ownership Register**

The CTA requires FinCEN to create a national registry and to maintain beneficial ownership information on reporting companies for not fewer than five years after the reporting company terminates.<sup>xxv</sup> The CTA also requires FinCEN to establish protocols to protect the security and confidentiality of beneficial ownership information, subject to the authorities permitted to access the information contained in the registry. The CTA outlines who will be permitted to access the beneficial ownership information reported to FinCEN. It is available upon request to federal law

enforcement (including federal agencies acting on behalf of law enforcement of another country), state law enforcement with a judicial order, financial institutions subject to CDD requirements with the consent of the reporting companies, and other federal regulators.<sup>xxvi</sup>

### **Regulatory Implementation**

The CTA also contains a broad authorization to the Secretary of the Treasury to implement regulations.<sup>xxvii</sup> However, given the overlap of the CTA with the existing CDD Regulations, Congress directed FinCEN to conform the CDD Regulations with the CTA and to eliminate unnecessary or duplicative burdens on financial institutions and legal entity customers. Congress also mandated that the Secretary of the Treasury will “use risk-based principles for requiring reports of beneficial ownership information.”

### **Concluding Thoughts**

The CTA represents an important step forward for the United States for increasing transparency and reducing the risk that anonymous entities may be used for money laundering, tax evasion or the financing of terrorism. The United States, although belatedly, has joined the international community in creating a legal framework for identifying the individuals behind a broad class of legal entities, and to make anonymously accessing the United States’ financial system that much more difficult. The authors will remain focused on this issue as FinCEN develops implementing regulations under the CTA and revises the existing CDD Regulations. Although an important step in the overall transparency effort, the United States likely will continue to be subject to criticism from the international community because the CTA does not extend to trusts. However, in the authors’ experience with FATF delegates from other member nations, this criticism tends to be unwarranted and unfair because of biases against trusts in non-common law nations, and a stereotype around trusts as being merely vehicles for tax evasion.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**



# John A. Terrill

# Michael A. Breslow

## CITE AS:

**LISI** Business Entities Newsletter #218 (January 21, 2021) at <http://www.leimbergservices.com> Copyright 2021 Leimberg Information Services, Inc. (LISI). Reproduction in Any Form or Forwarding to Any Person Prohibited, Without Express Permission. This newsletter is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that LISI is not engaged in rendering legal, accounting, or other professional advice or services. If such advice is required, the services of a competent professional should be sought. Statements of fact or opinion are the responsibility of the authors and do not represent an opinion on the part of the officers or staff of LISI.

## CITATIONS:

---

<sup>i</sup> H.R. 6395 (116<sup>TH</sup> Congress): NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, available at <https://www.govtrack.us/congress/bills/116/hr6395/text> [hereinafter, the “NDAA”].

<sup>ii</sup> [John Terrill & Michael Breslow: FinCEN Issues Final Customer Due Diligence Regulations Requiring Financial Institutions to Gather Beneficial Ownership Information on Entity Bank Accounts \(May 11, 2016\).](#)

<sup>iii</sup> [John Terrill & Michael Breslow: FinCEN Issues Frequently Asked Question Guidance on Final Customer Due Diligence Regulations Requiring Financial Institutions to Gather Beneficial Ownership Information on Entity Bank Accounts \(September 25, 2018\).](#)

---

<sup>iv</sup> The FATF Recommendations, at 22. <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>. [herein the “RECOMMENDATIONS”].

<sup>v</sup> RECOMMENDATIONS, at 91-95.

<sup>vi</sup> *Id.*

<sup>vii</sup> See *supra*, note ii.

<sup>viii</sup> DIRECTIVE 2015/849/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 May 2015 Official Journal L 141, 5/6/2015 P. 73-116. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>. For example, effective October 1, 2017, the German Anti-Money Laundering Act created a Transparency Register in response to 4 AMLD. [https://www.pplaw.com/sites/default/files/filefield\\_paths/171019-ci-reporting-obligation-to-german-transparency-register.pdf](https://www.pplaw.com/sites/default/files/filefield_paths/171019-ci-reporting-obligation-to-german-transparency-register.pdf). In addition, the United Kingdom’s Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017) became law on June 26, 2017 and implemented the enhanced measures of 4 AMLD relating to collecting BO information and creating a BO register for corporations and trusts.

<sup>ix</sup> *Center Unit, the ICIJ, releases Panama Papers*. International Consortium of Investigative Journalists. <https://www.publicintegrity.org/2016/04/04/19518/center-unit-icij-releases-panama-papers>. *Paradise Papers: Secrets of the Global Elite*. International Consortium of Investigative Journalists. <https://www.icij.org/investigations/paradise-papers/>

<sup>x</sup> See *supra*, note ii.

<sup>xi</sup> See *supra*, note iii.

<sup>xii</sup> 31 C.F.R. §1010.230(d)(1), (2).

<sup>xiii</sup> <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-1>

---

<sup>xiv</sup> *Financial Secrecy Index 2020 reports progress on global transparency – but backsliding from US, Cayman and UK prompts call for sanctions* (February 18, 2020), available at <https://www.taxjustice.net/press/financial-secrecy-index-2020-reports-progress-on-global-transparency-but-backsliding-from-us-cayman-and-uk-prompts-call-for-sanctions/>

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

<sup>xvi</sup> Sec. 6403(b)(1)(C) of the NDAA.

<sup>xvii</sup> Sec. 6403(a)(1)(a) (3) of the NDAA.

<sup>xviii</sup> 31 C.F.R. §1010.230(d)(3).

<sup>xix</sup> Sec. 6403(b)(2) of the NDAA.

<sup>xx</sup> Sec. 6403(b)(1)(D) of the NDAA.

<sup>xxi</sup> Sec. 6403(a)(11)(A) of the NDAA.

<sup>xxii</sup> Sec. 6403(a)(11)(B) of the NDAA.

<sup>xxiii</sup> Sec. 6403(b)(1)(B)-(C) of the NDAA.

<sup>xxiv</sup> Sec. 6403(h) of the NDAA.

<sup>xxv</sup> Sec. 6403(c)(1).

<sup>xxvi</sup> Sec. 6403(c)(2)(B)(i)-(iv) of the NDAA.

<sup>xxvii</sup> Sec. 6403(d) of the NDAA.