May 5th, 2021

Submitted Through Federal E-rulemaking Portal

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Beneficial Ownership Information Reporting Requirements - ANPR Request for Comments (FINCEN-2021-0005; RIN 1506-AB49)

To whom it may concern:

We are pleased to submit this comment on the Advance Notice of Proposed Rulemaking[1] (the "ANPRM") issued by the Financial Crimes Enforcement Network ("FinCEN"), which relates to regulations to be promulgated under the Corporate Transparency Act (the "CTA").[2]

Introduction

The CTA is a part of the Anti-Money Laundering Act of 2020, which modernizes and reforms the Anti-Money Laundering ("AML")/Combatting Financing of Terrorism ("CFT") regime.[3] The CTA requires certain "reporting companies" to report beneficial ownership information to FinCEN and establishes rules relating to access to the information, including for purposes of tax administration. This comment letter focuses on the interaction of the CTA's requirements with the administration and enforcement of tax law.

This comment is not a comprehensive review of the importance of the CTA reporting for tax administration. Instead, this comment focuses on four points.

First, the comment reviews the longstanding and mutually reinforcing interaction between the AML/CFT regime and domestic and international tax administration.

Second, the comment discusses tax administration access. It recommends that the regulations integrate to the extent possible with Internal Revenue Service processes for requesting, storing and protecting

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[1] Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17,557 (April 5, 2021).
[2] The CTA is Title LXIV of the National Defense Authorization Act for Fiscal Year 2021 (the "NDAA"). William (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, §§ 6401-03, 134 Stat. 3388, 4604-25 (2020).
[3] The Anti-Money Laundering Act of 2020 is Division F of the NDAA. NDAA §§ 6001-6511.

information and with responding to information requests from foreign governments, and that the regulations are as responsive as possible to state tax administration needs.

Third, consistent with the ANPRM's specific request, this comment provides a proposed definition of "other similar entities." It recommends broadly defining the term "other similar entity" to mean: "any other nongovernmental entity recognized under state law (or Tribal law) or U.S. federal tax law."

Fourth, this comment contributes tax law's experience that different kinds of entities and arrangements are often easy to substitute for one another. To the extent that some entities and arrangements that allow beneficial owners to conceal their identity do not fall within the boundaries of the regulations implementing the CTA, the reporting rules will be vulnerable to avoidance.

I. The Link Between AML/CFT and Tax Enforcement

The 2020 National Strategy to Counter Illicit Finance ("NSCIF") highlights that the objectives of the U.S. regime to counter illicit finance are to prevent money laundering of illicit funds and to prevent use of illicit funds for terrorist financing and proliferation of weapons of mass destruction ("WMD").[4] These critical national objectives are reflected in the CTA's "sense of Congress" including the express need for legislation to "protect vital United States national security interests;" "protect interstate and foreign commerce;" and "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards."[5]

The common denominator underlying these objectives is that malign actors seek either to profit from their illicit activity or to use funds from illegal and legal activity for illicit purposes. This fact explains the essential role played by tax administration and enforcement in achieving these goals. The tax system provides key visibility into circumstances where illicit income is invested into legal businesses that then can be used as cover or where income with legal origins is the source for financing illegal objectives, including terrorism or WMD proliferation.

There is a longstanding and mutually reinforcing interaction between the AML/CFT regime and domestic and international tax administration. A key link between the two is that both require information about beneficial ownership of entities, as well as beneficial ownership of other arrangements and accounts. The reason is simple: entities have the capacity to conceal the identity of those who use them to commit crimes. Thus AML/CFT regimes and tax administrations have established overlapping and mutually enforced systems to gather, organize, protect and share beneficial ownership information.

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[4] U.S. Dep't of Treas., *National Strategy for Combating Terrorist and Other Illicit Financing* (2020), https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf.
[5] NDAA § 6402.

The intergovernmental Financial Action Task Force (FATF) seeks to establish international standards to combat money laundering and the financing of terrorism. In 2003, FATF updated its signature Forty Recommendations document to include the recommendation that "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."[6] Similarly, in 1998, the intergovernmental Organisation for Economic Cooperation and Development (OECD) published a groundbreaking report on harmful tax competition that identified "lack of effective exchange of information" and "lack of transparency" as key barriers to identifying "harmful tax practices" that might facilitate tax avoidance or tax evasion.[7] Today, more systematic G20/OECD best practices require adequate transparency concerning the beneficial ownership and control of corporations, LLCs, partnerships, trusts and other arrangements.[8]

Over the past thirty years, an earlier historic norm of bank secrecy has given way to a new norm of information collection and sharing.[9] At each step of the way, AML/CFT has relied on tax, and vice versa. For example, the Foreign Accounts Tax Compliance Act, or FATCA,[10] requires non-U.S. banks to collect information about U.S. beneficial owners of entities and accounts for tax withholding and reporting purposes. Under intergovernmental agreements between the U.S. and 113 other jurisdictions,[11] the processes used by non-U.S. banks to provide beneficial owner information to the U.S. in turn often rely on know-your-customer banking due diligence rules in effect in local jurisdictions. These know-your-customer rules have their primary roots in anti-money laundering law, rather than tax law.

Another example involves the Bank Secrecy Act,[12] which combats money laundering by requiring, for instance, the reporting of foreign accounts and the reporting of cash transfers that exceed $10,000. The Bank Secrecy Act specifically mentions tax law enforcement as one of its goals.[13] Also, the Internal Revenue Service supports the enforcement of the Bank Secrecy Act.[14] For example, the IRS builds and administers the systems for submitting forms and reports that the Bank Secrecy Act requires.[15]

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[6] Financial Action Task Force, *FATF 40 Recommendations* 11 (2004), http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf.
[7] Org. Econ. Coop. & Dev., *Harmful Tax Competition: An Emerging Global Issue* 27 (1998), https://read.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en.
[8] Org. Econ. Coop. & Dev., *Terms of Reference: To Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes* 4 n.5 (2010), https://www.oecd.org/ctp/44824681.pdf.
[9] Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. Rev. 304, 315-16 (2012).
[10] 26 U.S.C. §§ 1471 et seq.
[11] U.S. Dep't of Treas., *Foreign Account Tax Compliance Act*, https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act (last visited May 4, 2021).
[12] Bank Secrecy Act, 31 U.S.C. §§ 5311-5330.
[13] 31 U.S.C. § 5311, noting that one purpose of reporting and recordkeeping requirements is to support "criminal, tax or regulatory investigations" as well as "intelligence or counterintelligence activities … to protect against international terrorism."
[14] *See*, *e.g.*, 31 C.F.R. § 1010.810(b)(8), assigning examination authority under the Bank Secrecy Act to the IRS for financial institutions not subject to other direct federal regulation.
[15] Internal Revenue Service, *Bank Secrecy Act* (2020), https://www.irs.gov/businesses/small-businesses-self-employed/bank-secrecy-act.

The U.S. systems for collecting beneficial owner information have attracted international criticism because these systems are incomplete. In 2016, the FATF found U.S. beneficial ownership disclosure requirements to be deficient.[16] In 2018, the G20/OECD Global Forum provided a peer review of the United States' capacity to provide needed beneficial owner information. The U.S. received a grade of only "partially compliant" for availability of owner information because U.S. systems did not provide information about all beneficial owners of companies, LLCs, trusts, partnerships and other entities.[17] The CTA can help address these shortcomings, for AMT/CML and for tax enforcement purposes.

II. Tax Administration Access to Beneficial Ownership Information under 31 U.S.C. § 5336(c)

A. Internal Revenue Service Access

This comment recommends that FinCEN work closely with the IRS to ensure that beneficial ownership information collected under the CTA be available and useful for tax enforcement purposes to the full extent allowed by the statutory scheme, an approach consistent with the language and purposes of the CTA.

Ensuring tax compliance is one of the key purposes of the CTA identified by the sense of Congress in Section 6402(3) of the NDAA, which notes that "malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate . . . serious tax fraud [and other acts] harming the national security interests of the United States and allies of the United States."

The reason why beneficial ownership information is so important for tax administration purposes is that, as experts have noted, a "taxpayer can control a group of related entities – such as trusts, corporations, or partnerships – in a network. These networks can serve a variety of legitimate business purposes, but they can also be used in complex tax evasion schemes that are difficult for the Internal Revenue Service to identify."[18]

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[16] Financial Action Task Force, *Anti-money Laundering and Counter Terrorist Financing Measures – United States, Fourth Round Mutual Evaluation Report* (2016), https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf.

[17] Org. Econ. Coop. & Dev., *Global Forum on Transparency and Exchange of Information for Tax Purposes: United States 2018 (Second Round)* 13, 31-36 (2018).

[18] U.S. Gov't Accountability Off., GAO-10-968, *Tax Gap: IRS Can Improve Efforts to Address Tax Evasion by Networks of Businesses and Related Entities* (2010). *See e.g.*, John Guyton et al., *Tax Evasion at the Top of the Income Distribution: Theory and Evidence* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28542, 2021), "Confirming the flow of income, deductions, credits and other tax features of pass-through businesses takes expertise and resources. Partnerships create a specific additional challenge to the audit process, because partnerships can be owned by other entities, sometimes leading to complex ownership structures involving numerous partnerships, corporations, trusts, or other intermediaries." *See also* Natasha Sarin & Lawrence H. Summers, *Shrinking the Tax Gap: Approaches and Revenue Potential*, 165 Tax Notes 1099 (2019), "Around 80 percent of the tax gap accrues from underreporting of tax liabilities on filed returns. Underreporting is most common in categories of income that are less visible to the IRS—like sole proprietorship income, partnership income, and self-employment returns—as these are subject to relatively little information reporting and not automatically withheld."

The CTA recognizes the importance of IRS access to beneficial ownership data of reporting companies for tax administration purposes. It includes an explicit provision providing for the beneficial ownership data reported under the CTA to be made available to the IRS for tax administration purposes: "[o]fficers and employees of the Department of the Treasury may obtain access to beneficial ownership information for tax administration purposes in accordance with this subsection."[19]

The centrality of tax administration in the purposes of the CTA is evidenced by both the sense of Congress and the specific access provision above. In developing specific procedures for IRS access to beneficial ownership information, FinCEN should closely coordinate with the IRS to ensure that these procedures are designed to support sound tax administration. Such coordination is also contemplated elsewhere in the Anti-Money Laundering Act of 2020.[20]

B. State Tax Administration Access

The CTA allows disclosure if FinCEN receives a request from a state or Tribe for use in an investigation if "a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation."[21]

State and Tribal tax administrators are responsible for enforcing tax laws, and as noted above, ensuring tax compliance is one of the key purposes of the CTA. Tax fraud and other forms of non-compliance, which the CTA is intended to prevent, are also important issues for state tax administrators.[22] Just as at

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[19] 31 U.S.C. § 5336(c)(5)(B).

[20] "The Secretary, in consultation with [federal agency officials including] the Commissioner of Internal Revenue, shall— (1) undertake a formal review of the regulations implementing the Bank Secrecy Act and guidance related to that Act— (A) to ensure the Department of the Treasury provides, on a continuing basis, for appropriate safeguards to protect the financial system from [AML, CFT and other] threats; (B) to ensure that those provisions will continue to require certain reports or records that are highly useful in countering financial crime; and (C) to identify those regulations and guidance that [may be outdated, redundant or] do not conform with the commitments of the United States to meet international standards to combat money laundering, financing of terrorism, serious tax fraud, or other financial crimes; and (2) make appropriate changes to the regulations and guidance described in paragraph (1) to improve, as appropriate, the efficiency of those provisions." NDAA § 6216.

[21] 31 U.S.C. § 5336(c)(2)(B)(i).

[22] Regular estimates of the aggregate cost of state tax fraud and other non-compliance are not made and regular estimates of state tax gaps representing taxes owed but not paid are rarer than for the federal tax gap. However various estimates suggest that these costs are large and non-compliance rates are generally similar to those for federal taxes. *See, e.g.*, Cal. Dep't of Just., *Attorney General Becerra and Assemblymember Stone Advance Legislation to Strengthen False Claims Act and Protect California Taxpayers from Fraud* (2020), https://www.oag.ca.gov/news/press-releases/attorney-general-becerra-and-assemblymember-stone-advance-legislation-strengthen, estimates that California's tax gap of state taxes owed but not paid is $20 billion annually. *See also* James Alm & Kyle Borders, *Estimating the 'Tax Gap' at the State Level: The Case of Georgia's Personal Income Tax*, 34 Pub. Budgeting & Fin. 61 (2014) for analysis of Georgia. *See* Mont. Dep't of Rev., Memorandum (2018), https://leg.mt.gov/content/Committees/Interim/2017-2018/Revenue-and-Transportation/Meetings/Feb-2018/dor-tax-gap-memo.pdf, estimating the FY2017 Montana tax gap from individual income tax underreporting as 19.2 percent of revenues collected. *See* Rod Hoheisel, Minn. Dep't of Rev., *Minnesota Consumption Tax Model and Sales Tax Gap* (2008), https://www.taxadmin.org/assets/docs/Meetings/08rev_est/hoheisel2.pdf, analysis of Minnesota's sales tax gap. For examples of tax evasion investigations at the state level, *see* Press Release, Letitia James, N.Y. Att'y Gen., James E. Johnson, N.Y.C.

the federal level, combating financial and economic crimes is deeply intertwined with state tax enforcement.[23] Coordination between federal and state tax administration is also an important tool for addressing certain forms of tax fraud.[24]

State tax administrators also address certain forms of tax fraud and other types of tax non-compliance that have no direct federal analog, such as in the administration of state sales tax regimes.[25] This also means that state tax administrators may have unique potential insight into specific types of financial fraud and other information required for detecting and addressing it that federal agencies do not. We understand as well that state tax administrations have initiated enforcement actions that support Federal tax enforcement, which is another reason why supporting and leveraging state tax enforcement capabilities is sound Federal tax administration policy.

An approach to implementing access procedures that is as responsive as possible to the needs of state and Tribal tax administrators is supported by 31 U.S.C. § 5336(b)(1)(F), which states, "In promulgating the regulations required under subparagraphs (A) through (D) (i.e., the beneficial ownership reporting regulations), the Secretary of the Treasury shall, to the greatest extent practicable—''(i) establish partnerships with State, local, and Tribal governmental agencies; . . ."

Accordingly, we recommend that FinCEN propose rules addressing procedures for access by state tax administrators and other law enforcement agencies that are as responsive as possible to the needs of state and Tribal tax administrations to have timely access to this information for use in investigations and enforcement actions.

C. Foreign Tax Administration Access

The statute would presumably allow data to flow to foreign tax administrators if FinCEN receives a "request" from the IRS on behalf of another country's revenue authority (which is a "law enforcement agency") that makes an "official request."[26]

Corp. Couns., *Attorney General James and NYC Corporation Counsel Johnson Announce Recovery of $105 Million from Hedge Fund Manager Who Evaded Taxes* (March 2, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-and-nyc-corporation-counsel-johnson-announce-recovery-105; Press Release, Edmund G. Brown Jr., Cal. Att'y Gen., *Investigation Leads to Arrests of 15 Individuals who Evaded $34 Million in Tobacco Taxes* (Aug. 9, 2010), https://oag.ca.gov/news/press-releases/investigation-leads-arrests-15-individuals-who-evaded-34-million-tobacco-taxes; N.J. Dep't of L. & Pub. Safety, *Middlesex County Couple Faces Up to 20 Years in Prison After Arrests for Alleged Scheme Involving Fraud, Money Laundering, Tax Evasion and the Concealment of More Than $30 Million in Income*, https://www.njoag.gov/middlesex-county-couple-faces-up-to-20-years-in-prison-after-arrests-for-alleged-scheme-involving-fraud-money-laundering-tax-evasion-and-the-concealment-of-more-than-30-million-in-income/ (last visited May 4, 2021).

[23] *See, e.g.*, Demesia Padilla, N.M. Tax & Rev. Dep't, *Reducing New Mexico's Tax Gap* 21 (2013), https://www.nmlegis.gov/handouts/ALFC%2008212013%20Item%207%20Reducing%20New%20Mexico%27s%20Tax%20Gap%202013.pdf.

[24] *See, e.g.*, Internal Revenue Service, *Reducing the Federal Tax Gap, A Report on Improving Voluntary Compliance* 55 (2007).

[25] *See* Rod Hoheisel, *supra* note 22.

[26] 31 U.S.C. § 5336(c)(2)(B)(ii).

Requests from competent authorities under treaties and international agreements should follow established processes, which incorporate IRS discretion to decline a request from a counterpart that does not satisfy standards for protecting confidential information. Because the U.S. participates in international peer reviews of responses to information requests, including in relation to timeliness and completeness, it is important that these processes be operationally effective to allow progress on meeting U.S. international commitments to longstanding beneficial ownership transparency standards.

III. Defining a "reporting company"

In general, the CTA requires a "reporting company"—in accordance with rules to be issued by FinCEN—to submit to FinCEN information that identifies the beneficial owners and applicants of the reporting company.

The statute defines "reporting company" to mean "a corporation, LLC, or any 'other similar entity' that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe or formed under the law of a foreign country and registered to do business in the United States by the filing of such a document"[27] that is not statutorily exempted from the definition. This list of statutory exemptions is extensive. In addition to the listed exemptions, the statute allows the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, to by regulation exempt certain entities from the definition of "reporting company" upon the determination that requiring beneficial ownership information from such entities would not serve the public interest and would not be highly useful to the various agencies entitled to the information.[28]

The ANPRM[29] asks for specific comments about this definition, including:

> a. How should FinCEN interpret the phrase "other similar entity," and what factors should FinCEN consider in determining whether an entity qualifies as a similar entity?
>
> b. What types of entities other than corporations and LLCs should be considered similar entities that should be included or excluded from the reporting requirements?
>
> c. If possible, propose a definition of the type of "other similar entity" that should be included, and explain how that type of entity satisfies the statutory standard, as well as why that type of entity should be covered. For example, if a commenter thinks that state-chartered non-depository trust companies should be considered similar entities and required to report, the commenter should explain how, in the commenter's opinion, such

[27] 31 U.S.C. § 5336 (codified as amended at CTA § 6403 (2021)).
[28] *Id.*
[29] Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17,557, 17,561 (April 5, 2021).

> companies satisfy the requirement that they be formed by filing a document with a secretary of state or "similar office."

This comment recommends broadly defining the term "other similar entity" to mean: "any other nongovernmental entity recognized under state law (or Tribal law) or U.S. federal tax law."

This definition would include partnerships (including general and limited partnerships and limited liability partnerships) and trusts (whether business or ordinary), as well as other entities that could, among other things, sue or be sued in state or federal courts. It would not include governments, Indian tribes, or governmental agencies, nor would it include sole proprietorships or divisions of an entity.

This broad definition of "entity" is advisable for a number of reasons. First, it is consistent with the expressed Congressional intent behind the CTA. Section 6402 of the Act explains the sense of Congress that "malign actors seek to conceal their ownership of corporations, limited liability companies, and other similar entities to facilitate illicit activity." As discussed in Part IV, specific types of entities are often easily interchangeable, and a narrow interpretation would allow malign actors to shift their illicit activities between entity types to avoid reporting responsibility.

Second, a broad interpretation is strongly implied by the structure of the highly detailed CTA. Not all "other similar entities" will be required to report under the Act. Classification as an "other similar entity" is merely an initial threshold condition. Only "other similar entities" that are either (i) domestic entities that are found to make specified filings with a secretary of state (or similar Tribal office) or (ii) foreign entities that are found to register to do business in the United States by making specified filings with a secretary of state (or similar Tribal office) are potentially subject to the reporting obligations. These filing requirements narrow the scope of the CTA reporting obligations to entities who can be put on notice of those obligations.

Furthermore, not all "filing" entities are subject to reporting obligations. A large number of entities are statutorily exempted. Exemptions are provided for, among other entities, certain charitable trusts and charitable split-interest trusts, nonprofit and political organizations, and pooled investment vehicles. These exemptions alone indicate that the definition of the term "other similar entity" must be broad enough to cover trusts, nonprofit and political organizations, and pooled investment vehicles. Otherwise, those exemptions would be entirely superfluous. In addition, the Secretary of the Treasury has explicit statutory authority to create even more exemptions by regulation.

In sum, to be subject to CTA reporting obligations, a noncorporate, non-LLC entity must be (1) an "other similar entity" (2) that is found to make the specified filings with a state (or Tribe) (3) that is not on the lengthy statutory list of exemptions and (4) is not on the regulatory list of exemptions. The inclusion of all of these off-ramps strongly indicates that Congress did not intend for the initial threshold determination of "other similar entity" to be strenuous. Any policy desire to exempt entities (broadly construed) from reporting (beyond the statutory list) can be satisfied by regulatory exemption on a case-by-case basis after taking into account the costs and benefits of such an exemption. A narrow interpretation of “other similar entity” risks exempting broad categories of entities out of the starting gate for no good policy reason.

Third, a broad interpretation is consistent with sound law enforcement. A narrow interpretation would allow malign actors to shift their activities among organizational types to avoid CTA reporting. Because organizational types are generally interchangeable, any gaps in the entity definition could be exploited.

Finally, the definition is both administrable and flexible. It is based on existing legal concepts that are routinely applied by lawyers, courts, and agencies. And because it is based on substantive legal consequences (and not form alone) it can be applied to novel types of situations that could arise in the future.

IV. Entity Planning and Substitution

The CTA may be interpreted so that it does not cover the full range of entities used in planning to disguise sources of funds and income. Entities left out might include some common law partnerships, common law trusts and bespoke entities created by jurisdictions to attract business to their local professionals and service providers. To the extent that the CTA’s coverage is incomplete, malign actors will plan to take advantage of the loopholes. As experienced tax practitioners and scholars, we highlight in this section how easily an entity not treated as a reporting company (for example, because it is deemed not to satisfy the “filing” requirement) may be substituted for an entity that would be required to report, without meaningful tax or non-tax frictions. Just as tax professionals routinely look for cases where ready entity substitutes can legally enhance tax results, the same planning will occur to find loopholes in the definition of a reporting company or to simply use an entity substitute to avoid beneficial owner disclosures.

State filings often may be reliable indicators of the existence of an entity capable of shielding illegal activity from view. In part this is because a state filing is often required in order for beneficial owners of entities to hide their identity behind that of the entity. But even under current state law, a state filing is not a precondition for the formation of an entity that can conceal its beneficial owners’ identity.[30]

For instance, in Massachusetts (and we believe most states) a common law trust may be formed through the execution of private agreements and does not require a state filing. Similarly, in Massachusetts a common law general partnership may be formed by private agreement to jointly pursue profit and accept loss, without the filing of a document with the state.[31]

[30] It is also possible that state laws will in the future be amended to expand the availability of entity status without a state filing.
[31] *See* Mass. Gen. Laws ch. 108A, § 6 (2021).

Furthermore, while some partnerships and trusts are created by the filing of a document with a secretary of state or a similar office under the law of a state or Tribe, others may not be required to make such a filing at creation. For example, in Massachusetts it is necessary to file a certificate of limited partnership with the Secretary of State to form (i.e., "create" for purposes of the statute) a Massachusetts limited partnership.[32] It is possible, however, to form a general partnership and at a later date register the partnership with the Secretary of State to be a limited liability partnership (LLP).[33]

The CTA regulations should adopt the view that in the Massachusetts case a later limited liability partnership filing "creates" a reporting entity, if the common law partnership is not already covered by the CTA reporting requirements. Unless the limited liability registration satisfies the "filing" requirement (whether by treating the entity as a new entity for purposes of constituting a reporting entity or deeming the filing to be at creation) the simple maneuver of later LLP registration could avoid the reach of the statute. Entities that do not have any filing requirement, such as certain common law partnerships and certain trusts, present an even more fundamental problem as they can be used to avoid disclosure of beneficial owners.

Failure to cover all entities that could be easily substituted for reporting entities would undermine the objectives set out in Section 6402(5): to protect U.S. national security; to protect interstate and foreign commerce; and to support law enforcement efforts to counter money laundering, the financing of terrorism, tax evasion, and other illicit activity. To the extent that the CTA is not interpreted to require readily interchangeable entities to report beneficial owners, and the expected migration to such entities occurs, the United States risks continuing to fail to meet the FATF and G20/OECD Global Forum beneficial owner reporting standards described above. This would be inconsistent with the statutorily stated Congressional objectives of the Act.

These considerations also weigh towards narrowly interpreting the listed exceptions.

There are a range of possible views on the scope of interpretative alternatives that would permit FinCEN to require reporting for domestic entities that do not file a document with a state or Tribe at creation and for foreign entities that do not register to do business in the United States by filing a document with a state or Tribe.

For instance, the Secretary has been granted broad discretion in the Bank Secrecy Act, as amended by the NDAA, to establish "appropriate procedures," "including the collection and reporting of certain information" under regulations, "to guard against money laundering, the financing of terrorism, or other forms of illicit finance."[34] We do not fully assess this and other alternatives here, but FinCEN should do so. Our intent in this part is to share our tax planning experience as relevant context for alternative

[32] Mass. Gen. Laws ch. 109, § 8 (2021).
[33] Mass. Gen. Laws ch. 108A, § 45(1) (2021).
[34] 31 U.S.C. § 5318, (codified as amended at NDAA § 6102 (2021)).

interpretations of the statute and for evaluating regulatory alternatives. Quite simply, failing to cover entities that can be substituted for reporting entities would undermine the objectives of the CTA.

Conclusion

Thank you for the opportunity to comment on some selected ways in which tax administration is important to the purposes of the CTA and should be carefully considered in crafting the implementing regulations.

Sincerely,

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