

**ACHIEVING CORPORATE TRANSPARENCY ACT EXPERTISE
– THIRTEEN BASIC QUESTIONS THAT CTA EXPERTS
MUST BE ABLE TO ANSWER**

John M. Cunningham is an attorney of counsel to the New Hampshire-based law firm of McLane Middleton, PA. His practice is focused on LLC law and tax. He is the principal author of Drafting Limited Liability Company Operating Agreements, the leading US LLC formbook and practice manual, and he is the author of Maximizing Pass-Through Deductions under Internal Revenue Code Section 199A, the only book on section 199A published by a recognized publisher. Both books are published by Wolters Kluwer, a global provider of legal, tax, and medical information. John has substantial experience in drafting operating agreements both for large and small LLCs.

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I. INTRODUCTION

On January 1, 2021, Congress enacted a major new federal statute called the Corporate Transparency Act (the “CTA”). The CTA imposes stringent duties on almost all U.S. business entities and on many foreign entities doing business in the United States to provide potentially sensitive information about themselves, their owners, their managers and, if any, their “company applicants” to the Financial Crimes Enforcement Network (“FinCen”). (FinCen is the agency of the U.S. Treasury Department responsible for CTA matters.) The provision of these reports (“FinCen reports”) by covered business entities (called “reporting companies” under the CTA) may impose significant administrative burdens on these companies and may trigger significant professional fees. But any failure by reporting companies to comply with their CTA duties may make them and their personnel liable for serious civil and criminal penalties.

In this article, I will assume that while you may have at least a general awareness of the above CTA facts, you are not a CTA expert. However, I will also assume that, in order to provide useful CTA advice and services to your current clients and future clients, you want to become one. The purpose of this article is to help you achieve CTA expertise.

In this post, I will address 13 CTA questions, set forth in Part II of the article, Paragraphs A through M. These paragraphs address questions that every CTA expert must be able to answer, but that, to my knowledge, have not yet been addressed in any other journal. As further noted below, these and 35 other questions that CTA experts must know how to answer are set forth comprehensively in Exhibit A to this article.

II. THE CORPORATE TRANSPARENCY ACT—13 BASIC QUESTIONS

A. WHY IS THE STATUTORY TITLE OF THE CTA MISLEADING?

The statutory title of the CTA can easily be misread by non-experts to imply that the CTA applies only to *corporate* companies and that it provides information about these companies to the *general public*. This understandable misreading by non-experts may result in their ignoring the CTA. However, as further discussed below, the CTA applies, in fact:

- Not just to corporations but also to all other types of U.S. business entities and to certain types of foreign business entities except for the U.S. and foreign business entities that the CPA exempts from coverage. These entities include, for example, LLCs, general and limited partnerships and, in some cases, business trusts.
- The CTA provides transparency (i.e., knowledge) about basic facts concerning these entities not to the general public but only to FinCen itself and to the federal and state authorities narrowly defined in the CTA.

B. WHAT QUESTIONS MUST CTA EXPERTS BE ABLE TO ANSWER BESIDES THE ABOVE QUESTION?

As noted, all of the questions that CTA experts must be able to answer—for example, in response to calls from clients—are listed in the attached Exhibit A. By my count, there are 35 such questions. Obviously, to have expertise about any subject means, above all, to be able to answer all significant questions about that subject.

In my view, if you are able to answer all of the questions in Exhibit A and if, in addition, with the help of colleagues who are already CTA experts, you have had a reasonable amount of experience in providing sound advice about the CTA to your clients and in competently planning and drafting CTA provisions in their ownership agreements, you will be a CTA expert.

C. WHAT IS THE FORMAL STRUCTURE OF THE CTA?

Lawyers whose primary focus in their law practice on the state laws of the states in which they are licensed but not on statutory federal law may find it difficult to develop a CTA expertise because of the very structure of the CTA. As you will see if you make even a quick review of the CTA:

- Its key provisions are set forth in a section numbered § 5336.
- However, under that section are six successively indented provisions—namely, subsections, paragraphs, subparagraphs, clauses, subclauses and, in some cases, a final indentation in the form of two lower-case letters of the alphabet—for example, (aa)—but no formal name.
- However, as published by the U.S. Congress, these six levels of indentations are not shown, and this very fact can make it extremely difficult, in consulting the CTA, to understand where specific CTA provisions fit within the statute as a whole.

Furthermore, each of the above six indented CTA sub-provisions explains or elaborates the contents of the indented paragraph above, which may be difficult to understand for even the most astute lawyers unless they know the level of subordinate sub-provisions. That is, subsections provide explanations of Section 5336, the principal section containing CTA provisions. CTA paragraphs explain CTA Section 5336, CTA subparagraphs explain paragraphs; CTA clauses explain CTA subparagraphs; CTA subclauses explain CTA clauses; and the CTA provisions under CTA subclauses explain these subclauses. As illustrated in the table below, the sequence of provisions in the CTA, as in many other federal statutes, consists of sub-provisions marked, for example, in a hypothetical § 111:

- 1) A subsection in Section 111 marked Section 111(a)(1);
- 2) A paragraph in Section 111 marked, for example § 111(a)(1)(A);
- 3) A subparagraph in Section 111 marked, for example, Section 111(a)(1)(A)(I);
- 4) A clause in Section 111 marked, for example, § 111(a)(1)(A)(I)(i);
- 5) A subclause in Section 111 marked, for example § 111(a)(1)(A)(I)(i)(a); and
- 6) A final indented sub-provision marked, for example, Section 111(a)(1)(A)(I)(i)(a)(aa).

Furthermore, your ability to read the provisions of the CTA on the basis of the above six indentations may be critical in determining the proper statutory numbering of these provisions when you cite these provisions in memoranda your for clients and others or in litigation briefs.

The table below illustrates the seven-level structure of the CTA. As you will see, the letters and numbers of the sub-provisions of the CTA that indicate which of the above seven levels of statutory indentation are indicated in the CTA by shading.

RELEVANT SECTION OR SUBSECTION OF THE CTA	LEVEL OF INDENTATION IN INDENTED VERSION OF CTA	EXAMPLE	INDICATOR OF SECTION NUMBER
1. Section	None	§ 5336	The section number itself
2. Subsection	None	§ 5336(a)	Lower-case alphabetical letter” in parentheses. Example: (a)
3. Paragraph	One level	§ 5336(b)(1)	Arabic number in parentheses. Example: (1)
4. Subparagraph	Two Levels	§ 5336(b)(1)(A)	Upper-case alphabetical letter in parentheses. Example: (A)
5. Clause	Three levels	§ 5336(b)(1)(F)(iii)	Lower-case Roman number in parentheses. Example: (iii)
6. Subclause	Four levels	§ 5336(b)(1)(F)(iii)(I)	Upper-case Roman number in parentheses. Example: (I)
7. No formal name	Five levels	§ 5336(c)(2)(B)(i)(II)(aa)	Two lower-case alphabetical letters in parentheses. Example: (aa)

For purposes of my own study of the CTA, I have found it convenient to revise as indicated below the unindented version of the CTA provided by Congress. You may want to make the same revisions in your own copy of the CTA. In my revision:

- I have made no indentation in the numbering of the principal CTA section—namely, Section 5336.
- In each of the nine main subsections of Section 5336, I have also found it unnecessary to make any indentation.
- I have made a one-level indentation in the CTA text to indicate each paragraph in that text.
- I have made a two-level indentation in the CTA text to indicate each subparagraph in that text.
- I have made a three-level indentation in the CTA text to indicate each clause in that text.
- I have made a four-level indentation in the CTA text to indicate each subclause in that text.
- I have made a five-level indication to indicate provisions of the CTA text that are marked with lower-case pairs of letters of the alphabet—e.g., provisions marked in the text with (aa).

However, please note that the drafters of the CTA have used a somewhat different system of indentations in the “Sense of Congress” concerning the CTA in an initial CTA section numbered Section 6402.

D. WHAT ARE THE SUBSECTION NUMBERS, TITLES AND KEY CONTENTS OF THE NINE SUBSECTIONS OF THE CTA?

The numbers and titles of the subsections of the CTA and the key contents of these subsections are set forth in the following table:

THE NINE CTA SUBSECTIONS

SUBSECTION LETTER	SUBSECTION TITLE	PAGE NUMBERING IN MY INDENTED VERSION OF THE CTA	CONTENTS OF THE SUBSECTION—SUMMARY
1. § 5336(a)	Definitions	Pages 1 to 8	This subsection contains 14 defined terms, all of which are indispensable in understanding and applying the CTA.
2. § 5336(b)	Beneficial Ownership Information Reporting	Pages 8 to 12	This subsection and its sub-provisions require reporting companies to report the information required in paragraph (2) of the subsection.
3. § 5336(c)	Retention and Disclosure of Beneficial Information by FinCen	Pages 12 to 17	This subsection requires FinCen to retain for five years the information it receives from reporting companies, and it imposes on FinCen detailed rules concerning the disclosure of this information and requirements on the Treasury to establish protocols to

SUBSECTION LETTER	SUBSECTION TITLE	PAGE NUMBERING IN MY INDENTED VERSION OF THE CTA	CONTENTS OF THE SUBSECTION—SUMMARY
			protect the confidentiality of this information. In addition, the subsection imposes requirements on agencies that request the information.
4. § 5336(d)	Agency Coordination	Page 17	This subsection requires the Treasury to update the information covered by subsection (b).
5. § 5336(e)	Notification of Federal Obligations	Page 17 to 18	This subsection requires the Treasury to provide notice to federal, state and tribal authorities concerning the reporting of disclosed information and other matters.
6. § 5336(f)	No Bearer Shares Corporations Or Limited Liability Companies	Page 18	This subsection prohibits business entities from issuing ownership interests in the form of bearer shares or similar documents.
7. § 5336(g)	Regulations	Page 19	This subsection requires the director of FinCen, in promulgating regulations under § 5336 applicable to business entities and other third parties, to ensure the efficiency and effectiveness of these regulations for these entities.
8. § 5336(h)	Penalties	Page 19 to 21	This subsection provides penalties for breaches of Section 5336. However, in its principal provisions, it also provides a safe harbor for business entities failing to comply with their CTA duties, and it contains a

SUBSECTION LETTER	SUBSECTION TITLE	PAGE NUMBERING IN MY INDENTED VERSION OF THE CTA	CONTENTS OF THE SUBSECTION— SUMMARY
			definition of the key term “willfulness” as applicable in determining whether to assessing the above penalties.
9. § 5336(i)	Several titles	Page 21 to 23	The principal provisions in these pages impose duties on the Treasury with regard to exempt entities under Section 5336(a)(11)(B); it provides for conforming amendments to non-CTA federal statutes; it sets forth certain provisions relevant to federal contractors; it updates certain non-CTA statutory provisions; and it sets forth a number of relatively minor final provisions.

E. WHAT ARE THE MAIN FEATURES OF THE CTA THAT THE OWNERS OF REPORTING COMPANIES, THEIR MANAGERS, AND THEIR COMPANY APPLICANTS (IF ANY) SHOULD KNOW?

The CTA is lengthy and complex. However, if you are a lawyer providing CTA advice to your clients, you should also provide a document to your clients with the following basic instructions about that section:

1. The primary purposes of the CTA. The primary purposes of the CTA are:
 - a. To prevent foreign countries hostile to the U.S. from using business entities formed under U.S. state law or foreign companies registered in the U.S. to attack U.S. national security; and
 - b. To prevent criminals from using the above types of companies to commit purely domestic crimes in the U.S., such a money-laundering and tax evasion.
2. CTA reporting companies. The companies that the CTA requires to file reports with FinCen are called reporting companies. There are many tens of millions of these companies. However, under the terms of the CTA, 23 types of companies are exempt from the status and duties of reporting companies. But, with very few exceptions, the only business entities that are likely to be exempt from the CTA reporting company requirements are those often described as “large operating agreements.” To be a large

operating company within the meaning of the CTA, a business entity must meet both of two main conditions:

- a. It must have more than 20 employees.
 - b. Its gross income from U.S. sources must be at least \$5 million.
3. How the CTA seeks to achieve its purposes. The method by which the CTA seeks to achieve the above purposes is to require company applicants to file reports with FinCen that disclose critical identifying information about:
- a. Companies defined as reporting companies;
 - b. Persons who are the real owners, even if not listed as such in the documents of these business entities;
 - c. Persons who are the real managers and owners of reporting companies, even if not listed as such in the reporting company's documents; and
 - d. Their company applicants—that is, the persons who file documents, including CTA reports to FinCen, on behalf of reporting companies, with state or tribal authorities.

Confusingly, the CTA describes all of the above persons, including both business owners and business managers, as “Business Owners”; and the CTA identifies all of the information that the applicants must file with the FinCen, including information about reporting company applications, as Business Owner Information, even though it includes both business owners and business managers.

4. Reporting company updates. If there is any change in the identity of the real owners and managers of a reporting company, that company must file an updated report with the FinCen advising FinCen of that change.
5. The Theory Underlying the CTA. The theory that underlies the CTA is apparently that if the Treasury Department has Business Owner Information about the real owners or managers of a company that individuals plan to use for illegal U.S. domestic crimes or to undermine U.S. national security:
 - a. The company itself and these individuals will not even form or register the company in any state because of their concern that this information will enable the Treasury or other U.S. law enforcement entities to identify the company or these individuals as the agents of these activities and to prosecute them; and
 - b. For the same reasons, these persons will liquidate any existing business entities they may own. In other words, in enacting the CTA, Congress intended to provide the Treasury and other law enforcement agencies with transparency about these companies and their real owners and managers of companies that, if formed, might engage in serious illegal misconduct in the United States.
6. Penalties. The CTA provides that unless they qualify for the safe harbor provided in CTA Section 5336, any persons willfully violating the reporting requirements of the CTA will be liable for civil penalties of not more than \$500 for each day that the violation continues and for criminal penalties of imprisonment of up to two years and fines of up to \$10,000.

F. WHAT ARE THE MAIN OFFICIAL PUBLICATIONS ABOUT THE CTA WHICH CTA EXPERTS MUST MASTER?

In order to provide expert CTA advice to their small business entity clients, CTA experts must master the following seven official publications about the CTA. You can readily obtain copies of these publications from the FinCen website or from a Google search.

1. The FinCen “Guidance.” The first of these publications is a FinCen CTA “Guidance,” numbered FIN-2018 and dated April 3, 2018. This publication addresses frequently asked questions regarding customer due diligence by financial institutions.
2. The CTA Text. The second publication is the text of the CTA itself, which is set forth in 20 single-spaced pages. Regrettably, the CTA contains several key ambiguities. However, many of these ambiguities are resolved in the additional CTA-related documents identified below.
3. The September 30, 2022 CTA regulations. The third is the 90 pages of CTA regulations set forth in pages 9498 through 9596 of the Federal Registry for September 30, 2022. These regulations include an extensive identification and discussion of the CTA duties of reporting companies. They also contain extensive regulations (i) about the reasons for the enactment of CTA, which may be critical in interpreting ambiguous CTA provisions; and (ii) about the requirements imposed by the CTA on the United States Department of the Treasury to ensure the confidentiality of the information that the CTA requires reporting companies to disclose to FinCen.
4. The September 29, 2022 FinCen Factsheet. The fourth is a FinCen publication entitled “Beneficial Ownership Information Reporting Rule Factsheet,” dated September 29, 2022.
5. The April 3, 2023 U.S. Congress Letter. The fifth is a letter, dated April 3, 2023, from the U.S. House Committees on Financial Services and on Small Business and the U.S. Senate Committees on the Budget and on Banking, House, and Urban Affairs. You should be able to obtain a copy of this letter through Google, but if this doesn’t work for you, I can provide you with a copy.
6. The FinCen September 18 Small Entity E-book. The sixth is an e-book for “small entities” published by FinCen on September 18, 2023, discussed further below. The title of the FinCen e-book (which I’ll refer to here as the “Guide”) is “Small Entity Compliance Guide.” The link for access to the Guide is <https://www.fincen.gov/boi/small-business-resources>. The subtitle of the Guide is “BOI—Beneficial Ownership Information—Reporting Requirements.”
7. The FinCen September 28, 2023 Proposal. The seventh is the FinCen’s proposal, published on September 28, 2023, for amendments concerning the filing of FinCen reports.

G. WHAT REPORTING COMPANY EXCLUSIONS IN THE CTA ARE THE MOST LIKELY TO BE USEFUL TO PRIVATELY HELD BUSINESS ENTITIES?

The CTA lists several somewhat common types of business entities that are excluded from the status and duties of CTA reporting companies. These include, for example, entities subject to heavy regulation and thus to extensive disclosures to federal or state agencies. These entities include banks, many credit unions, all public utilities, all federally tax-exempt organizations, and many trusts. However, the only CTA statutory exemption that is likely to provide an exemption

from reporting company status to a large number of business entities is set forth in Section 5336(a)(1)(b)(xxi). This section excludes:

(xxi) any entity that—

- (I) employs more than 20 employees on a full-time basis in the United States;
- (II) filed in the previous year Federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of—
 - (aa) other entities owned by the entity; and
 - (bb) other entities through which the entity operates; and
- (III) has an operating presence at a physical office within the United States.

H. WHAT PENALTIES ARE REPORTING COMPANIES POTENTIALLY LIABLE FOR IF THEY VIOLATE THE CTA, AND HOW WILL A REPORTING COMPANY’S LACK OF WILLFULNESS (AS DEFINED IN THE CTA) AFFECT ITS LIABILITY FOR THESE PENALTIES?

CTA Section 5336(h)(1) (entitled “Penalties”) provides as follows:

(1) REPORTING VIOLATIONS.—It shall be unlawful for any person to—

- (A) *willfully* provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance with subsection (b) [emphasis added]; or
- (B) *willfully* fail to report complete or updated beneficial ownership information to FinCEN in accordance with subsection (b). [emphasis added]

CTA § 5336(h)(6) defines the term “willful” as follows:

(6) DEFINITION.—In this subsection, the term ‘willfully’ means the voluntary, intentional violation of a known legal duty.

CTA Section 5336(h)(3) provides as follows:

(3) CRIMINAL AND CIVIL PENALTIES.—

(A) REPORTING VIOLATIONS.—Any person that violates subparagraph (A) or (B) of paragraph (1)—

- (i) shall be liable to the United States for a civil penalty of not more than \$500 for each day that the violation continues or has not been remedied; and
- (ii) may be fined not more than \$10,000, imprisoned for not more than 2 years, or both.

However, CTA § 5336(h)(3)(C) provides as follows:

(C) SAFE HARBOR.—

(i) SAFE HARBOR.—

(I) IN GENERAL.—Except as provided in subclause (II), a person shall not be subject to civil or criminal penalty under subparagraph (A) if the person—

(aa) has reason to believe that any report submitted by the person in accordance with subsection (b) contains inaccurate information; and

(bb) in accordance with regulations issued by the Secretary, voluntarily and promptly, and in no case later than 90 days after the date on which the person submitted the report, submits a report containing corrected information.

(II) EXCEPTIONS.—A person shall not be exempt from penalty under clause (i) if, at the time the person submits the report required by subsection (b), the person—

(aa) acts for the purpose of evading the reporting requirements under subsection (b);and

(bb) has actual knowledge that any information contained in the report is inaccurate.

(ii) ASSISTANCE.—FinCEN shall provide assistance to any person seeking to submit a corrected report in accordance with clause (i)(I).

Under the above CTA provisions:

1. Very few business entities or their owners or managers are likely to *willfully* commit the TA violations set forth in § 5336(h)(i).
2. Very few business entities or their owners or managers and perhaps even their lawyers will be likely to “[have] reason to believe that any report submitted by [these persons] in accordance with subsection (b) contains inaccurate information. . .”
3. If any of the above persons meet the “awareness” test of Section 5336(h)(3)(C)(i)(aa), they will very probably also be aware of the requirement under Section 5336(h)(3)(C)(bb) in order to order take advantage of the above safe harbor.

I. WHAT OFFICIAL DOCUMENTS CONCERNING THE CTA MUST CTA EXPERTS MASTER IN ADDITION TO THE CTA TEXT?

In order to provide expert advice to their small business entity clients about CTA filing requirements, lawyers should master the following six publications: JOHN, YOU LISTED THESE ABOVE UNDER SECTION F.

1. The first is the FinCen “Guidance,” numbered FIN-2018 and dated April 3, 2018, addressing frequently asked questions regarding customer due diligence by financial institutions.
2. The second is the 90-page set of CTA regulations set forth in pages 9498 through 9596 of the Federal Registry for September 30, 2022 (the “September 30, 2022 regulations.” These pages include extensive regulations:

- a. About the reasons for the enactment of CTA, which may, of course, be critical in interpreting ambiguous CTA provisions;
 - b. About the requirements imposed by the CTA on the United States Department of the Treasury to ensure the confidentiality of the information that the CTA requires reporting companies to disclose to FinCen in FinCen reports; and
 - c. About the duties of CTA reporting companies.
3. The third is the FinCen publication entitled “Beneficial Ownership Information Reporting Rule Factsheet,” dated September 29, 2022.
 4. The fourth is the letter, dated April 3, 2023, from the U.S. House Committees on Financial Services and on Small Business and the U.S. Senate Committees on the Budget and on Banking, House, and Urban Affairs. You should be able to obtain a copy of this letter through Google, but if this doesn’t work for you, I can provide you with a copy.
 5. The fifth is the new FinCen e-book, published on September 18, 2023, entitled “Small Entity Compliance FC Small Business Guide” (which I’ll refer to here, using the relevant term in the book itself, as the “FinCen FC Small Business Guide”). The link for access to the FinCen FC Small Business Guide is <https://www.fincen.gov/boi/small-business-resources>. The FinCen FC Small Business Guide’s subtitle is “BOI—Beneficial Ownership Information—Reporting Requirements.”
 6. The sixth is the September 28, 2023 FinCen propose to amend the reporting deadlines under the CTA.

J. WHAT ARE THE PRINCIPAL CONTENTS OF THE FINCEN SMALL BUSINESS GUIDE?

Technically, the FinCen Small Business Guide does not have the legal force of a statute or of regulations published in the Federal Register. However, if a business entity complies with the FC Small Business Guide, it can be confident that FinCen will treat it as complying with the CTA itself; but if it doesn’t comply with the FinCen Small Business Guide, the company may face serious CTA problems.

Fortunately, the FinCen Small Business Guide is written in plain English and in a user-friendly style. The FinCen Small Business Guide should be read carefully by small business owners and their managers and but above all by their lawyers and accountants.

A relatively brief article like this one can’t provide a comprehensive overview of the FinCen Small Business Guide. However, the following are 14 comments about key contents of that publication. These comments will provide readers with a useful basic understanding of the FinCen Small Business Guide.

1. The comprehensiveness of the FinCen Small Business Guide. The FinCen Small Business Guide contains six chapters. Taken together, these six chapters address virtually everything that small business owners need to know about how to comply with the CTA. Obviously, however, lawyers with CTA expertise who provide clients with CTA advice and who draft CTA provisions for operating agreements and shareholder agreements will need to know a lot more.
2. FinCen Disclosure Form and Portal. On and after January 1, 2024, small business entities must use a FinCen form to file CTA disclosures, and they must file this form electronically in

online CTA portal created, maintained and, as necessary, used by FinCen for law enforcement purposes. However, FinCen has not yet finished constructing this portal, publishing this form or disclosing the digital address to which to send completed CTA reports, and the FinCen Small Business Guide is silent about these key matters. I suspect that FinCen won't finish its CTA portal or publish its CTA disclosure form or the address to which to send CTA disclosures to the portal until sometime in November or even December.

3. The 23 Exceptions Available to CTA Reporting Companies. Chapter 1 of the FinCen Small Business Guide (referred here as the "Guide") lists the 23 types of reporting companies exempt from filing CTA reports. However, as noted above, only one of these exemptions is likely to apply to a significant number of business entities--namely, the "large operating company" exemption discussed above. As noted above, most of the rest of the reporting company exemptions are for companies already subject to substantial federal or state regulation and thus unlikely to be owned or managed by the "malign actors" the CTA is designed to identify and prosecute.
4. The Lack of Clarity with Regard to Many Reporting Company Exceptions. Unfortunately, however, Chapter 1 gives only brief descriptions of these heavily regulated companies, and some business owners may well be uncertain whether any of them applies to their entity. These business owners should discuss this question with lawyers who are CTA experts.
5. What Is a Small Business Entity? Although the Guide does not define the term "small business entity," it very probably intends the term to refer to any business entities that do not have at least 20 full-time employees and that have not reported at least \$5 million in net U.S.-source income in their most recent federal tax returns.
6. Explanations of Key CTA Concepts. Two critically important concepts in the CTA and in the Guide are "ownership interest" and "substantial control" [of a reporting company]. The Guide explains these terms in substantial detail and with numerous hypothetical examples. Small business entity owners and managers and their lawyers must thoroughly understand these concepts and examples.
7. CTA Company Applicants. In their CTA reports, reporting companies must disclose information about their "company applicants"—i.e.:
 - a. The individuals who file the state or tribal documents that will create these companies; and,
 - b. Arguably, those who control them.
8. Prohibition of Filing Companies. According to a rule set forth in the Guide, filing companies may not be company applicants. However, there are probably workarounds to this rule, and, in order to avoid filing errors, many business owners, notwithstanding the rule, should consider hiring filing companies to file their CTA reports.

K. WHAT ARE THE PRINCIPAL CONTENTS OF THE FINCEN SEPTEMBER 28, 2023 PROPOSAL TO AMEND THE CTA FILING DEADLINES?

On, September 28, 2023, in a publication whose title is "Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024," mentioned above, FinCen proposed an important amendment to the currently effective CTA rule that business entities that are formed on or after January 1, 2024 must file their the FinCen reports 30 days after their formation. The FinCen proposal proposes, in effect, that while new businesses will still be required to file what the

proposal refers to as “initial” FinCen reports, these reports need not disclose the detailed information about their “Beneficial Owners” and the other required detailed CTA information disclosure until 90 days after their formation. The FinCen proposal states that the basis for the proposal is FinCen’s recognition that many new companies will need more than 30 days to compile the above information and that they may also need additional FinCen information as to how to do so—which information the FinCen states will provide shortly.

The above FinCen proposal is *merely* a proposal, and the FinCen has requested comments on the details of the proposal before FinCen issues it in final form. Comments are due by October 30, 2023.

My guess is that the final terms of the revised filing rules proposed by FinCen will be essentially the same as to those to FinCen’s initial proposal. However, I believe that as stated, the FinCen’s proposal will effectively require most or all affected new companies to make two quite separate FinCen reports:

- The first filing will simply inform FinCen that these companies exist and were formed on the dates stated in their initial FinCen reports.
- The second, will provide the above detailed information.

I suspect that the proposed duty under the FinCen proposal that new businesses must make two required FinCen reports will be confusing to these businesses, will impose additional administrative burdens on their own personnel and on their professional advisers.

In any event, my guess is that the final version of the proposal will appear within just a few weeks.

L. HOW SHOULD CTA EXPERTS RESPOND TO CLIENT CONCERNS ABOUT THE CONFIDENTIALITY OF DATA THEY MUST SUBMIT TO FINCEN?

The following CTA provisions address issues relating to the confidentiality of information disclosed to FinCen by reporting companies in their FinCen reports:

- 1) CTA Section 6402 (entitled “Sense of Congress”). Section 6402(7)(A)(a) provides that the Secretary of the Treasury must maintain the information that the CTA requires business entities to disclose to the Financial Crimes Enforcement Network (“FinCen”), the agency of the United States Department of the Treasury responsible for CTA matters, “in a *secure, nonpublic database*, using information security methods and techniques that are appropriate to protect nonclassified information systems *at the highest security level*. . . .”
- 2) CTA section 5336(c)(2), and CTA § 5336(c)(3)A(3) also contains lengthy and stringent provisions requiring the Treasury to implement the requirements of Section 6402(7)(A).

I have no doubt that because of the above provisions, the Treasury, FinCen and the federal and state agencies with whom they share reporting company information make every reasonable effort to ensure the confidentiality of this information. But whether this effort will protect the information from highly skilled and determined hackers remains to be seen.

M. WHAT PROVISIONS SHOULD THE OWNERS OF REPORTING COMPANIES INCLUDE IN THEIR OWNERSHIP AGREEMENTS TO HELP ENSURE THEIR COMPLIANCE WITH CTA REQUIREMENTS?

It is critical that the ownership agreements of both single-owner and multi-owner reporting companies contain provisions that will help to ensure that these companies themselves, their owners, their managers and, if any, their company applicants comply with their CTA reporting obligations. The relevant ownership agreements include, for example, the operating agreements of single-member and multi-member LLCs and the shareholder agreements of single- and multi-

shareholder business corporations. These agreements should contain the following provisions:

- 1) An exhibit to their ownership agreement that provide reasonably detailed instruction to the above persons about their CTA duties;
- 2) Provisions in which the reporting company, its owners, its managers and, if any, its company applicant owners certify that they have reviewed and understood the above exhibit and that they commit to comply with their duties under it;
- 3) A plan that provided detailed measure for filing initial disclosure reports with FinCen;
- 4) Provisions under which business entities, their owners, managers and company applications, if any, formally commit to implement the above plan;
- 5) A provision in their ownership agreement that lists in detail all of the situations in which the entity must file CTA updates with FinCen and that sets forth a procedure for ensuring that the relevant company files these updates with FinCen;
- 6) Provisions under which business entities, their owners, managers and company applications, if any, formally commit to implement the above plan;
- 7) Provisions in which the reporting company, its owners, its managers and, if any, its company applicant owners certify that they have reviewed and understood the above document and commit to comply with their duties under it;
- 8) Provisions providing for the efficient and effective filing of copies of all reporting company reports filed with FinCen and of all documents relating to communications to and from FinCen.

EXHIBIT A

QUESTIONS ABOUT THE CORPORATE TRANSPARENCY ACT THAT CTA EXPERTS SHOULD BE ABLE TO ANSWER

As noted above, ideally, in order to answer the questions below if their clients call them about them, CTA experts should be able to promptly answer these questions below with consulting the CTA itself, the regulations thereunder, or the FinCen Guide for Small Businesses. However, CTA experts should know precisely which provisions of the above publications are relevant to the above answers in case they need to consult them.

- 1) CTA Title. Why is the title of the CTA likely to mislead persons who are not CTA experts, and what may be the consequences for persons who are misled by the CTA title?
- 2) Sense of Congress. What are the key points in the “Sense of Congress” set forth in CTA Section 6402 (entitled “The Sense of Congress”).
- 3) CTA Historical Background. What is the historical background of the CTA?
- 4) Number of CTA reporting companies. How many U.S. business entities are likely to have to file FinCen reports?
- 5) Formal Structure of CTA. What is the formal structure of the CTA? In particular, how does the text of the CTA indicate statutory sections, subsections, paragraphs, subparagraphs, clauses and subclauses.
- 6) Main Types of CTA Provisions. What are the main types of provisions in the CTA, and in which CTA sections are these provisions set forth?
- 7) The 14 CTA Defined Terms. What are the 14 terms defined in CTA sections 5336(a)(1) through (14), and how do those provisions define those terms?
- 8) Reporting Company—Definition. In particular, what is the definition of the term “reporting company” under the CTA?
- 9) Beneficial Owner—Definition. In particular, what is the CTA definition of the key term “Beneficial Owner”?
- 10) Ownership interest--definition. How do the CTA regulations define the term “ownership interest” for purposes of the CTA?
- 11) Definition of “Ownership Interest.” How does the CTA define the key term “ownership interest”?
- 12) Definition of “Substantial Control.” How does the CTA define the key term “substantial control [over a business entity]”?
- 13) Business Entity Owners Who Are not Beneficial Owners. What are the five types of owners of business entities who are not Beneficial Owners within the meaning of the CTA?
- 14) The 23 Reporting Company Exclusions. What are the 23 types of companies that, under CTA Section 5336(a)(ii)(B), are excluded from the legal status of reporting companies; how does the CTA define each of these types of companies; and what are the names of actual companies that are excluded from that status under the above provision?
- 15) Large Operating Companies. What tests must a business entity meet in order to qualify for

the “large operating company” exclusion set forth in Section 5336(a)(ii)(B)(xxi)?

- 16) Passive Business Entities. How does Section 5336(a)(ii)(B)(xxiii) define the CTA exclusion available to the passive business entities addressed in that section?
- 17) Filing Deadline—Business Entities Formed Before January 1, 2024. What is the deadline for the filing of initial FinCen reports by business entities formed before January 1, 2024?
- 18) Filing Deadline—Business Entities Formed on or After January 1, 2024. What is the deadline for the filing of initial FinCen reports by business entities formed on or after January 1, 2024?
- 19) Required Information in FinCen Reports. What are the types of information that reporting companies should provide in their FinCen reports concerning themselves, their owners, their managers and, if any, their Company applicants.
- 20) Confidentiality of FinCen Reports filed with FinCen. If a client is concerned about the confidentiality of the information that it is required to submit to the FinCen, which provisions of the CTA will be relevant in addressing the client’s concern?
- 21) Main Provisions in CTA 2022 regulations. What are the main provisions of the September 30, 2022 CTA regulations that add significantly to the provisions of the CTA itself?
- 22) Main Official CTA Publications. What are the main official publications with which CTA experts must have a thorough knowledge?
- 23) Most useful reporting company exclusion. What CTA exclusion is most likely to be useful to business entities in order to avoid the status of reporting companies?
- 24) FinCen Reports Concerning Beneficial Owners. Under the CTA and the CTA regulations, what information must a reporting company disclose in its FinCen report concerning each of its Beneficial Owners?
- 25) CTA Rules Applicable to Trusts. What rules are set forth in the CTA and the CTA regulations applicable to trusts?
- 26) CTA Rules Applicable to Exempt Organizations under IRC § 501(c). What rules are set forth in the CTA and the CTA regulations applicable to exempt organizations under IRC section 501(c)?
- 27) CTA Issues to Address In LLC Operating Agreements, Etc. What issues should be identified and addressed in LLC operating agreements, corporate shareholder agreements, and the agreements among the partners of general partnerships and limited partnerships?
- 28) CTA Articles, Etc. What are the leading articles and other leading secondary sources concerning the CTA?
- 29) CTA Ambiguities. What are the significant ambiguities under the CTA that are not resolved by CTA regulations or by any other official publications?
- 30) The CTA and estate planning. How does the CTA apply to estate planning issues?
- 31) The CTA and trusts. How does the CTA apply to trusts?
- 32) Non-reportable business entity events. What significant changes affecting reporting

companies do the CTA and the CTA regulations not require reporting companies to report to FinCen?

- 33) “Similar Entities.” What types of organizations besides LLCs and corporations is FinCen likely to view as entities “similar” to LLCs and corporations?
- 34) LLC Expertise, Etc. Why is it necessary, and in many cases indispensable, for CTA experts to all be experts concerning LLC law and tax, concerning law and tax applicable to privately held business corporations, and concerning the drafting of LLC operating agreements and business corporation shareholder agreements?
- 35) Ownership Agreement Provisions, What provisions should CTA experts recommend to the owners of reporting companies to include in their ownership agreements?

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