

# Beneficial Ownership Regs Spark Worries Over Burden and Liability

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By Andrew Velarde

Proposed regs on beneficial ownership information reporting under the Corporate Transparency Act (CTA) are raising concerns among practitioners about the potential burdens and penalty liabilities imposed.

The U.S. Treasury's Financial Crimes Enforcement Network released the [proposed rules](#) on December 8. They provide details on reporting requirements, deadlines, and exemptions to the tens of millions of entities subject to the CTA. Practitioners have argued that the rules could have a [significant impact](#) on both states that look to establish high levels of privacy for entities and foreign investors who wish to remain anonymous.

According to Severiano Ortiz of Kozusko Harris Duncan, private clients in particular could be hit with a substantial burden.

"People still are . . . not grasping the breadth of these rules and what's going to be required," Ortiz said. "Unless you can find an exception . . . you're going to find a lot of private structures, and possibly even in the private equity world where this is just going to be a nightmare."

In a December 17 firm alert, Caplin & Drysdale Chtd. called the new rules "broad and sweeping" and said the information gathering and client educational outreach needed under them will require significant resources.

The CTA, [enacted in January](#) to combat tax fraud, terrorism financing, and money laundering, requires corporations, limited liability companies, and similar entities to disclose information about beneficial owners to FinCEN.

Under the rules, reporting requires identifying information — such as names, addresses, and identifying numbers — from the reporting entity, the beneficial owner, and the company applicant. The company applicant is the individual that files or directs and controls the filing of the formation or registration documents.

Exempt from the reporting requirement are large operating companies with 20 or more full-time U.S. employees, more than \$5 million in sales, and a physical operating presence in the United States. Many high-net-worth international individuals would not meet those thresholds, Ortiz

surmised.

According to the regs, FinCEN estimates that an initial report from a company would cost \$45 to prepare and submit. Ortiz found this estimate woefully inadequate.

“I don’t know any CPA or attorney that bills \$45 or less an hour,” Ortiz said, before posing an example of a client with several reportable entities. “By the time I get to see who the senior officers are, who has control, who has financial agreements, who they have limited partnership agreements [with] . . . I’m going to spend between hours and weeks trying to get that information.”

## Liability Rolls Uphill

Penalties for reporting failures under the regime can be high. Persons that willfully fail to provide the beneficial ownership information to FinCEN are liable for civil penalties of \$500 a day, and criminal penalties can amount to \$10,000 and two years' imprisonment. The regs also state that a “person” includes individuals and reporting companies. A person provides beneficial ownership information to FinCEN if they do so directly or indirectly, including by providing the information to another person for reporting purposes.

“While only reporting companies are directly required to file reports or applications with FinCEN, individual beneficial owners and company applicants may provide information about themselves to reporting companies in order for the reporting companies to comply with their obligations under the CTA,” the preamble states. “The accuracy of the database may therefore depend on the accuracy of the information supplied by individuals as well as reporting companies, making it essential that such individuals be liable if they willfully provide false or fraudulent information to be filed with FinCEN by a reporting company.”

According to the guidance, a person fails to report beneficial ownership information if they direct or control another person or are in substantial control of a reporting company that fails to report. The preamble again asserts that placing that requirement on these controlling individuals is “essential” to the CTA’s goals of “preventing malign actors from using legal entities” for ownership concealment.

At least one question about penalties remains unanswered. The Caplin & Drysdale alert argues that the rules don’t make clear whether individuals must contact reporting companies to provide information and ensure the report is filed.

According to Ortiz, the statutory language on liability is a gray area that arguably implies liability on the reportable company and not the affiliated individuals or persons completing the filing. But the regs make clear that liability for reporting the information flows up, Ortiz said.

“If I have my paralegal or an associate do this on behalf of a client . . . I’ve got to report the basic name, residential address, and so forth of my associate or paralegal, plus whoever instructed them to do it,” Ortiz said. “If we know [the information] to be inaccurate . . . it brings liability not just to the reportable company, but the person doing the filing.”

Ortiz wondered if the regs' liability provisions might result in more complex engagement letters

that outline responsibilities when information needs updating.

## A Cottage Industry in the Making

Under the CTA, an individual is a beneficial owner if they own at least 25 percent of the reporting company. The rules also identify what it means to own or control interests, providing an example illustrating that an individual may meet that 25 percent threshold through joint ownership. Still, Ortiz argued that the guidance provides little help on attribution, including for family members and common parents of entities. He added that that could be a significant issue in the international area.

Ortiz found the new regime's requirements comparable with foreign bank account reporting, and not simply because the penalties and definitions under both come from title 31 and not title 26 of the tax code. Those FBAR rules are also broad, and reporting keys off ownership or control as well, which has resulted in duplicative filing, he argued.

Identifying the officers, people named on accounts, and people who can execute the transfers, especially in large businesses, is "a Herculean task," Ortiz said about the FBAR requirements. "Reading through the regulations with regard to the Corporate Transparency Act, I think we're about to go down the same road."

But the CTA guidance departs significantly from the FBAR rules in timing the filing of reports, Ortiz added. The CTA regs require a company to file a report within 14 days of becoming a reporting company. The quick timeline is designed in part to make the reporting "a natural part of the formation or registration process [and] further the CTA's objective" of setting a federal incorporation standard, the preamble states. Any change to reported information should be updated within 30 days, and inaccurate information should be corrected within 14 days of the date the reporting company knew or should have known about it.

"It's not like an FBAR that's filed once a year," Ortiz said. The expectation that information will be updated within 30 days of a change makes the requirements seem "really, really burdensome in practice," he said.

"Because this is broad and I do feel like we are going down the same road as the FBAR . . . it would make sense if maybe it was an annual obligation to worry about," Ortiz said.

The proposed regs ask for comments on the appropriateness of the timing of submissions and the burdens they may impose.

Because the CTA regs' penalties are tied to willful behavior, important questions are raised about what it means to be willful — a question still being litigated in the context of FBAR filings more than a decade after enforcement was ramped up there, Severiano said.

"What does 'willful' mean? What does 'should have known' mean?" Ortiz asked. "I would not be surprised if this . . . creates a little cottage industry of tracking and updating beneficial ownership registries for entities . . . especially with [Treasury] enforcing it like I think they're going to."