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NEW GUIDANCE ON THE CTA¹

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As has been mentioned before by me and others, the January 1, 2024, effectiveness of the federal Corporate Transparency Act (the “CTA”) has the potential of impacting every company doing business in the United States, whether formed in the United States or elsewhere. While not every company will be a Reporting Company, and while many Reporting Companies will be exempt from the reporting requirements, all businesses need to determine whether they are subject to the CTA reporting requirements and how to comply. It remains amazing how few lawyers, accountants, and businesses are actually concerned about this compliance obligation which is backed by potential civil and criminal sanctions as set forth in the CTA.

In the weeks since effectiveness, FinCEN released several frequently asked questions (“FAQs”) on the application of the federal Corporate Transparency Act (“CTA”).² Attorneys and others trying to understand the CTA are likely to find several of these FAQs to be particularly relevant to them. This article also includes a discussion of:

- Whether a Reporting Company can avoid the reporting obligation by dissolving;
- The reporting obligations of foreign (non-U.S.) entities;
- Series LLCs;
- Certain issues related to Company Applicants;
- A discussion of new FinCEN interpretations issued as FAQs in January 2024;
- FinCEN Identifiers; and
- Access to the BOI.

¹ Updates available at <https://ssrn.com/abstract=4717186>. See additional information about the CTA at Lidstone, Herrick K., *Will FinCEN Be Ready for the CTA*, available at <https://ssrn.com/abstract=4666412>, and *Considerations for Attorneys Resulting from the Corporate Transparency Act*, available at: <https://ssrn.com/abstract=4414393> or <http://dx.doi.org/10.2139/ssrn.4414393>.

² See www.fincen.gov/boi.

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In addition, on December 22, 2023, New York Governor Kathy Hochul signed into law the New York LLC Transparency Act (“NYLTA”). The NYLTA will come into effect beginning December 21, 2024, and will impose certain beneficial ownership reporting obligations similar to those imposed by the CTA, but solely with respect to limited liability companies that are organized or registered to do business in New York and for which an exemption under the NYLTA does not apply.

FILING YOUR BENEFICIAL OWNER INFORMATION REPORT

As discussed in several prior articles for the Business Law Section newsletter, the federal CTA is now effective, and the portal created by the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) is now available at fincen.gov/boi for filing a Beneficial Owner Information Report (“BOI Report”) or to obtain a FinCEN Identification number (“FinCEN ID”). The website provides a number of options. Clicking on “File” offers a link to “File a report using the BOI E-Filing System”³ and to “Create a FinCEN ID (optional).”⁴ The person making the filing may either:

- prepare the BOI report offline and then submit the report in a PDF format,
or
- prepare and submit the BOI report online.

In both cases, the person making the filing may download the BOI Report transcript upon submission.

EXEMPTIONS FROM FILING

Being a Reporting Company does not mandate a BOI Report filing; as noted elsewhere, there are twenty-three statutory exemptions for Reporting Companies, and FinCEN continues to explain the exemptions in its Small Entity Compliance Guide⁵ and its Frequently Asked Questions.⁶ Only non-exempt Reporting Companies must make BOI Report filings. However, a Reporting Company that hopes to become exempt must make the filings notwithstanding its expectation of an eventual exemption. For example:

- Many newly formed non-profit entities file their application for tax exempt status shortly after formation. In many cases, it takes time for that exemption application to be approved, at which point it may be exempt from

³ <https://boiefiling.fincen.gov/>.

⁴ <https://fincenid.fincen.gov/landing>.

⁵ <https://www.fincen.gov/boi/small-entity-compliance-guide>.

⁶ <https://www.fincen.gov/boi-faqs>. The FAQs were most recently updated in January 2024. See FAQs A.3, B.1, B.4, B.5, B.6, C.7, D.11, D.12, E.5, E.6, E.7, F.10, F.11, G.3, L.6, M.2, M.3, and N.1.

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filing under Exemption #19.⁷ If the exemption is still pending when the filing requirement arises, the future tax-exempt Reporting Company must make the filing.⁸

- Similarly, no newly formed entity can possibly show prior-year tax returns reflecting \$5,000,000 of income in the first year after their formation. Thus, even if it is a successful agglomeration of other exempt reporting companies subject to the large operating company exemption (#21), the newly-formed Reporting Company will not be exempt from its initial filing obligation.
- Additionally, while there is an exemption for inactive entities (#23), it only applies to inactive entities formed on or before January 1, 2020, and any Reporting Company formed thereafter must meet its BOI Report filing obligations.

While an exempt Reporting Company does not have to file a BOI Report, the BOI Report form has a box to check to indicate that the Reporting Company is an “Exempt entity” when filing the BOI Report (line 37) and (when amending a BOI Report) for “Newly exempt entity” (line 1.d). Thus, an entity that becomes exempt before its original filing or thereafter can report its exempt status.

CAN YOU AVOID THE REPORTING OBLIGATION BY DISSOLVING?

The answer is not yet set forth in the FinCEN rules or FAQs, but the answer is probably “no.” Under Colorado law (C.R.S. § 7-114-105(1)) and the Model Business Corporation Act (§ 14.05(a)), a “dissolved corporation continues its corporate existence.”⁹ Even after a corporation has been finally dissolved and wound up it may be reinstated. C.R.S. § 7-90-1001 says clearly that “Any domestic entity . . . that has been dissolved may be reinstated under this part 10.”¹⁰ Judicial dissolution in Colorado references the effect of dissolution in C.R.S. § 7-114-105 – resulting in the judicially-dissolved corporation continuing its corporate existence.¹¹

Under the MBCA there are provisions for the administrative dissolution of corporations in § 14.20 and following, including § 14.21(c) which provides that “[a] corporation administratively dissolved continues its corporate existence.” MBCA § 14.22 provides for “reinstatement following administrative dissolution.”

⁷ See page 11 of the Small Entity Compliance Guide.

⁸ As noted below, the filing requirement arises 90 days after creation for Reporting Companies created in 2024, and 30 days thereafter. This is being considered for extension in H.R. 5119 as discussed elsewhere.

⁹ The MBCA language is slightly different but to the same effect: “A corporation that has dissolved continues its corporate existence.”

¹⁰ The MBCA provides for reinstatement following administrative dissolution of a corporation in its § 14.22.

¹¹ C.R.S. § 7-114-304(2).

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The Colorado Business Corporation Act does not have a provision for administrative dissolution of corporations, but C.R.S. § 7-90-908 provides for administrative dissolution of any domestic entity. This includes the statement in § 7-90-910 that any “domestic entity that is dissolved pursuant to section 7-90-908 continues its existence.”

Inasmuch as entities continue their existence following dissolution and without further guidance from FinCEN, I believe that dissolved entities continue their reporting obligations as Reporting Companies unless they fall within another exemption. Of course, FinCEN may take a different approach in its future FAQs.

FOREIGN ENTITIES

Many foreign companies do business in the US by either organizing a U.S.-based subsidiary corporation or limited liability company, or by registering the foreign company or a foreign subsidiary entity to do business in the United States. Generally speaking, those foreign entities must go through the analysis to determine whether they are Reporting Companies under the CTA. If the foreign entity that registers to do business in the United States is not exempt from the CTA, it will have to file a BOI report with FinCEN. This may mean that the foreign entity in question must disclose the identities and personal information of non-U.S. nationals from higher up the chain of ownership.

There is no CTA exemption for foreign-owned companies or foreign beneficial owners. Any overseas enterprise with US operations is therefore advised to begin review of the BOI requirements and the 23 CTA exemptions to see whether the law requires a filing from its subsidiaries conducting business in the United States.

SERIES LLCs - AN ESCAPE HATCH TO AVOID REPORTING?

Limited liability companies are clearly reporting companies because they are formed by a filing with the Secretary of State in all 50 states, Washington DC and territories. At least 22 states, the District of Columbia, and Puerto Rico permit their LLCs to organize “series.”¹² The Series LLC was first introduced by Delaware in 1996. A Series LLC consists of the “parent” or “umbrella” LLC with one or more series that are established under the parent. Each series has characteristics that are separate from the Series LLC itself and from every other series of the same umbrella LLC.

- Each series can have its own assets, members, managers, purpose, and business objectives.

¹² Wikipedia contains a list of states and territories where a Series LLC can be formed. See https://en.wikipedia.org/wiki/Series_LLC.

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- Each series may be obligated to file its own tax returns – separate from the umbrella LLC and the other series.
- If certain statutory requirements are met, the debts, liabilities, and obligations of one series are enforceable only against the assets of that series and not against the assets of any other series or the Series LLC.

As such, each series basically functions like a separate entity within the umbrella LLC.

For CTA purposes, what is important is that while the umbrella LLC does make a filing with the Secretary of State for its formation, it need make no filing when forming a series – forming a series under an umbrella LLC is an internal act of the umbrella LLC.

While the formation document for the umbrella LLC will usually contain a statement that the umbrella LLC may establish series which are protected from the liabilities of other series and the LLC itself, no further filing is required with any Secretary of State for the establishment of the underlying series which, as noted, may have different owners, different assets, separate liabilities, and a separate business plan.

While the umbrella LLC will be a Reporting Company under the CTA and must file a BOI Report unless exempt, the underlying series need make no filing and therefore would, under the current definition in the CTA, not be a Reporting Company and not be obligated to file any BOI Reports.

The use of series LLCs and their underlying series may become much more popular to avoid CTA reporting requirements. Colorado has considered adopting legislation for series LLCs several times,¹³ but due to opposition from several sources it has never been passed. In many cases, a series LLC formed outside of Colorado cannot qualify to do business in Colorado because the filing requirements are only available to “a foreign entity.”¹⁴ The term “foreign entity” is specifically defined in C.R.S. § 7-90-102(23) in a manner that does not include foreign series, although the umbrella LLC can qualify to do business in Colorado.

Of course, FinCEN may realize this loophole for series LLCs which do not have to report under the CTA filing requirements. Clearly, bad people can carry on illicit activities in series LLCs without involving the umbrella LLC and wholly avoid the reporting requirements which would only apply to the umbrella LLC. We will have to see what remedy, if any, FinCEN adopts, although it may need Congressional action redefining the term “Reporting Company” to do so.

¹³ Most recently, Colorado H.B. 2021-1026 would have permitted foreign protected series to do business in Colorado provided the umbrella LLC was also at risk.

¹⁴ C.R.S. § 7-90-801(1).

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ISSUES RELATED TO THE COMPANY APPLICANT

At the tab for “Company Applicant,” it will ask whether the Reporting Company is an existing company – that is one existing as of January 1, 2024. If so, it is not necessary to complete the Company applicant information. However, if that box is not checked, the Company Applicant information must be completed. As noted before:

1. There can be no more than two Company Applicants and (as discussed below) one is very likely to be the Reporting Company’s counsel. Where the Reporting Company is an existing company, the Company Applicant information does not need to be completed.
2. Information regarding the Beneficial Owners must be completed for each person who meets FinCEN’s definition of Beneficial Owner for the purposes of the CTA. As set forth in the Small Entity Compliance Guide and the FAQs, this is a very broad definition. For small Reporting Companies with few Beneficial Owners, it is an easy process. For Reporting Companies with a more complicated ownership and management structure, it can be very difficult.
3. When the Beneficial Ownership information is complete, the filing process is not difficult, and at the end, we strongly recommend that you download the transcript for record purposes. Of the information contained in the BOI Report, the BOI Report ID is the most important to allow the Reporting Company to locate its initial report and to make corrections as necessary.

NEW INTERPRETATIONS

As noted above, FinCEN has issued a number of new interpretations in its FAQs since the CTA became effective – and without question other interpretations will be issued. A list of the updated FAQs is in footnote 4, above, and some of the more significant will be discussed here.

FAQ B.1 – Should my company report beneficial ownership information now. Perhaps, needless to say, FinCEN does not answer the question. My answer would be that any person planning to file a BOI Report should wait until shortly before it is due to be filed. There will be more interpretations and hopefully more clarity as time goes on. As noted in the FAQ, a pre-existing Reporting Company that is not exempt must file its first report not later than January 1, 2025; a Reporting Company formed in 2024 has 90 days from the date it is created or registered. Reporting Companies formed in and after 2025 must make their BOI Report filing in 30 days.

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These reporting periods will change if Congress adopts H.R. 5119 – the Protect Small Business and Prevent Illicit Financial Activity Act.¹⁵ This bill, if enacted, extends the deadline for Reporting Companies to file their BOI Reports and amendments with FinCEN. Specifically:

1. Existing Reporting Companies would have to file their initial ownership report within two years of the January 1, 2024 effectiveness (current regulations require the report to be filed by January 1, 2025).
2. New Reporting Companies must file their initial ownership report within 90 days.
3. Reporting Companies must report updates or changes in ownership within 90 days (current regulations require companies to report such changes within 30 days).
4. Removes the option for a Reporting Company when submitting a BOI Report to select “Unable to Obtain” or “Unable to Identify” a Beneficial Owner. “This loophole undermines the effectiveness of the law and degrades the benefits of this registry by allowing bad actors to obscure the identity of a company’s owner.”¹⁶

The House of Representatives has approved H.R. 5119; as of February 12, 2024, there is no indication that the Senate Committee on Banking, Housing, and Urban Affairs has taken any action.¹⁷

FAQ D.11 – What should a reporting company report if its ownership is in dispute. This interpretation provides that if ownership of a Reporting Company is the subject of active litigation and an initial BOI Report has not been filed, a person authorized by the company to file its beneficial ownership information should comply with the requirements by reporting:

- all individuals who exercise substantial control over the company, and
- all individuals who own or control, *or have a claim to ownership or control of*, at least 25 percent ownership interests in the company.

¹⁵ <https://www.congress.gov/bill/118th-congress/house-bill/5119?s=1&r=46>.

¹⁶ See January 18, 2024 press release issued by Senator Tim Scott in connection with his introduction of S 118-3625, a bill identical to the House version, H.R. 118-5119.

<https://www.banking.senate.gov/newsroom/minority/scott-introduces-bill-to-ease-burdens-on-small-business-target-chinese-shell-companies>.

¹⁷ The Senate Banking, Housing, and Urban Affairs Committee is also considering an identical bill introduced by Senator Scott, S. 118-3625. <https://www.congress.gov/bill/118th-congress/senate-bill/3625?q=%7B%22search%22%3A%22s+118-3625%22%7D&s=1&r=1>.

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Of course, not all ownership disputes are subject to active litigation (and what does “active litigation” really mean – is there such a thing as inactive litigation?). In any case, when the ownership issues are resolved, if there are changes to the BOIR Report as originally filed, an updated BOI Report should be filed within 30 days (under the current rules).

FAQ D.12 – Who does a reporting company report as a beneficial owner if a corporate entity owns or controls 25 percent or more of the ownership interests of the reporting company? First of all, notwithstanding the question, this applies when any entity (not just a corporate entity) owns or controls 25 percent or more of the Reporting Company.

This FAQ makes it clear that, as discussed in Chapter 2.3 of the *Small Entity Compliance Guide*, the ultimate owners controlling the parent entity are the persons who need to report – not the intermediate entity. The FAQ identifies two exceptions to this, however:

1. Where the parent entity is itself a Reporting Company subject to one of the twenty-three exemptions (an “Exempt Reporting Company”), the BOI Report must contain the name of the Exempt Reporting Company as the Beneficial Owner and does not have to go through to the underlying individuals.
2. If the Beneficial Owners of the Reporting Company and the parent entity are the same individuals, the Reporting Company may report the FinCEN identifier and full legal name of the parent company instead of the individuals’ information.

FAQ E. 5 – The company applicants of a reporting company include the individual “primarily responsible for directing the filing of the creation or registration document.” What makes an individual “primarily responsible” for directing such a filing? This FAQ discusses that the BOI Report will identify no more than two Company Applicants who will be:

1. The person who directly files the document with a secretary of state or similar office, and
2. If more than one person is involved in the filing of the document, the person who is primarily responsible for directing or controlling the filing.

FAQ E.5 offers three Scenario, two of which clearly provide that the attorney who completes a company creation or reporting document using information supplied by the client will be a Company Applicant – even where the attorney uses a paralegal to actually complete the preparation of the document or a paralegal or a corporate service provider to file the document. In both cases, if a paralegal or employee of a corporate service provider actually pushes the button to make the filing with the secretary of state, that person also would be a Company Applicant.

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The third Scenario is where no attorney is involved, the individual client who initiated the company creation will be the Company Applicant, as will be the person who actually makes the filing (pushes the button).

FAQ E.6 expands upon FAQ E.5 by making it clear that, where paper filings are made by a third-party courier or delivery service employee who only delivers the documents that create or register a Reporting Company, that person is not a Company Applicant.

FAQ L.6 – Does a subsidiary whose ownership interests are partially controlled by an exempt entity qualify for the subsidiary exemption? FinCEN’s answer to that question is a simple “NO.” FinCEN explains that if an exempt entity controls some but not all of the ownership interests of the subsidiary, the subsidiary does not qualify for the subsidiary exemption. To qualify, a subsidiary’s ownership interests must be *fully, 100 percent* owned or controlled by an exempt entity.

A subsidiary whose ownership interests are controlled or wholly owned, directly or indirectly, by certain exempt entities is exempt from the BOI reporting requirements. In this context, control of ownership interests means that the exempt entity entirely controls all of the ownership interests in the reporting company, in the same way that an exempt entity must wholly own all of a subsidiary’s ownership interests for the exemption to apply.

FAQ N.1 – Can a third-party service provider assist reporting companies by submitting required information to FinCEN on their behalf? In the past several months, there have been a large number of companies offering their services to assist Reporting Companies make their BOI Report filings with FinCEN. Some of these are affiliated with law firms and others are affiliated with corporate service companies. In all cases, FinCEN says that Reporting Companies may use third-party service providers to submit beneficial ownership information reports. Third-party service providers will have the ability to submit the reports via FinCEN’s BOI E-Filing website or an Application Programming Interface (API).

Of course, this does not address the interpretive issues that completing a BOI Report for a more complicated entity may be of concern – especially in interpreting who is a Beneficial Owner of the Reporting Company. As noted above, for simple companies this probably does not create any issues.

For more complicated ownership and control structures and for determining whether the Reporting Company is subject to one of the twenty-three exemptions, legal analysis is likely required as described in the FAQs and FinCEN’s Small Entity Compliance Guide. Those who are not lawyers should consider whether offering this legal analysis constitutes the unauthorized practice of law.

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FINCEN IDENTIFIERS

I have suggested before that persons who will be engaged in the FinCEN filing process obtain FinCEN IDs to minimize the availability of their personal identifiable information (“PII”). With a FinCEN Identifier, a Company Applicant or a Beneficial Owner only has to provide the Reporting Company (or other person making the filing on behalf of the Reporting Company) a twelve-digit number. It does not have to provide a passport or a driver’s license for identification purposes. While the PII will be available through FinCEN for those who have access to FinCEN information, it will be available in only a single place.

Without a FinCEN ID, each Company Applicant and Beneficial Owner named in a BOI Report will have to give the Reporting Company the PII which dramatically expands its availability to unauthorized people.

A difficulty with a FinCEN ID, however, is that once a person has a FinCEN ID, that person is obligated to keep the FinCEN ID up to date. There is not yet a way for an individual to de-register his FinCEN ID.

Thus, whether to obtain and use a FinCEN ID or to provide one’s own PII to Reporting Companies and their filing agents is a decision to be made by each person involved.

ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

On December 21, 2023, the Department of Treasury’s Financial Crimes Enforcement Network (“FinCEN”) issued its final rule to establish the framework for access to and protection of beneficial ownership information (“BOI”) to be filed with FinCEN as required by the CTA. The final rule amends 31 CFR § 1010.950 and adds a new § 1010.955.¹⁸

This access rule prescribes the circumstances under which BOI reported in compliance with FinCEN’s September 30, 2022, final BOI Reporting Rule¹⁹ may be disclosed to Federal agencies; state, local, tribal, and foreign governments; and financial institutions, and how it must be protected. FinCEN will also issue today two interagency statements to give banks²⁰ and non-bank financial institutions²¹ guidance on the interplay between the final rule and FinCEN’s

¹⁸ See <https://www.federalregister.gov/documents/2023/12/22/2023-27973/beneficial-ownership-information-access-and-safeguards>.

¹⁹ <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>.

²⁰ See December 21, 2023 Interagency Statement for Banks on the Issuance of the Beneficial Ownership Information Access Rule, available at banks.

²¹ See December 21, 2023 Interagency Statement for Banks on the Issuance of the Beneficial Ownership Information Access Rule, available at [non-bank financial institutions](#).

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existing Customer Due Diligence Rule. In her announcement of the adoption of the final access rule, FinCEN Director Andrea Gacki said:

This final [access] rule is a significant step forward in our efforts to protect our financial system and curb illicit activities. . . . BOI can provide essential information to law enforcement, intelligence, and national security professionals as they work to protect the United States from bad actors who exploit anonymous shell companies to engage in money laundering, corruption, sanctions and tax evasion, drug trafficking, fraud, and a host of other criminal offenses with impunity, while legitimate businesses suffer from their misdeeds.

The final access rule becomes effective on February 20, 2024. FinCEN also issued a fact sheet for the final rule.²² The fact sheet sets forth “FinCEN’s commitment to creating a highly useful database for authorized BOI recipients while protecting this sensitive information from unauthorized disclosure.”

NEW YORK LLC TRANSPARENCY ACT

As discussed above, on December 22, 2023, New York Governor Kathy Hochul signed into law the New York LLC Transparency Act (“NYLTA”), to be effective beginning December 21, 2024.

Beginning on December 21, 2024, the NYLTA will require entities falling within the definition of a Reporting Company under the CTA to disclose information to the New York Department of State (“NY DoS”) for each beneficial owner of the Reporting Company²³ that is a limited liability company formed or authorized to do business in the State of New York.

If a limited liability company qualifies for exemption under the CTA, it also is exempt from the disclosure requirements of the NYLTA. Unlike the CTA, however, the NYLTA requires a member or manager of the limited liability company to file a signed statement with the NY DoS indicating which provision or provisions of the CTA they rely on in claiming exemption.

A limited liability company reporting under the NYLTA must file a beneficial ownership disclosure with the NY DoS identifying each Beneficial Owner of the Reporting Company by the individual’s full legal name, date of birth, current business street address (as opposed to a current residential address as required by the CTA) and a unique identifying number from a valid identification document. The NY LLC Act does not require a copy of the valid identification document to be submitted with the disclosure as does the CTA. Additionally, the NY LLC Act

²² available at <https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-access-and-safeguards-final-rule>.

²³ For the purposes of the NYLTA, the term “Reporting Company” takes its definition from the CTA.

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does not require the disclosure of identifying information related to a Company Applicant, which is a concept that applies only to Reporting Companies under the CTA.

The most significant and problematic difference between the NYLTA and the CTA is that, as originally written, the NYLTA would make certain reported information accessible through a new publicly available database.²⁴

In the case of a reporting limited liability company formed or registered to do business in the State of New York on or before December 21, 2024 (*i.e.*, the NYLTA's effective date), an initial disclosure must be filed with NY DoS no later than January 1, 2025. For a reporting limited liability company formed or registered to do business in the State of New York after December 21, 2024, the initial disclosure is due at the time of filing of the articles of organization or application for authority. An updated disclosure must be filed within 90 days of any change to the information required to be disclosed to NY DoS by a reporting limited liability company.

If a reporting limited liability company fails to file a required disclosure under the NYLTA for a period exceeding 30 days, it will be shown either as "past due" or "delinquent" on the records of NY DoS until the disclosure is appropriately filed and, in some cases, a civil penalty of \$250 is paid.

CONCLUSION

Notwithstanding that we are almost two months past the effective date, we are still learning things about the CTA, the FinCEN regulation of the CTA, and the FinCEN filing mechanisms and requirements. FinCEN has promised to issue more FAQs and responses to address some of the questions that have been discussed publicly. If Congress adopts and the President signs, H.R. 5119, there will be more changes. This will be a continuing learning experience.

While the NYLTA only has effect in New York, since New York (both the state and the city) is such a large national and international financial center, the NYLTA is also likely to have broad effect nationally and internationally.

²⁴ It is likely that the New York legislature will amend this provision to provide for greater confidentiality for PII and to be more in line with the CTA's access rules that disclosed information be accessible only by certain government agencies and officers and, with consent of the Beneficial Owner, to certain financial institutions.