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The Corporate Transparency Act: Is it Actually Helpful for Private Parties?

By passing the Corporate Transparency Act, the U.S. is joining a growing list of countries that require registered corporate entities to disclose their beneficial ownership information. However, the Act insists that only government authorities are entitled to such information. Below, our global Claim Monetization team discusses how private parties – such as creditors or victims of fraud – could potentially work around this roadblock to obtain crucial information through legitimate legal means.

The U.S. Corporate Transparency Act (CTA), part of the recently-passed National Defense Authorization Act (NDAA), has broken new ground by requiring beneficial owners of U.S. corporate entities to register with U.S. government authorities. While the CTA appears to shut out private parties – such as creditors and victims of fraud – from accessing such information, there may be potential creative ways to work around this roadblock, bringing creditors one step closer to a substantial recovery of their assets.

With the CTA, the United States joined a growing list of countries—including the United Kingdom, the British Virgin Islands, the Cayman Islands, Bermuda and Cyprus, among others—that require the disclosure of such valuable beneficial ownership information, as governments seek to clamp down on the use of shell companies to conceal assets, launder illicit funds or evade taxes. Under the law, all beneficial owners of certain U.S. shell companies (defined to be those with a 25% or greater ownership stake, or those who otherwise exert substantial control) will be required to disclose their names, addresses and date of birth to the U.S. Treasury Department's Financial Crimes Enforcement Network, or FinCEN.

How Private Parties Could Get a Hold of Beneficial Ownership Information

Unfortunately for private parties looking to enforce a judgment, the CTA only requires beneficial ownership information to be shared with FinCEN, and it makes clear that FinCEN may not disclose that information to private parties.

Nevertheless, creative creditors and their counsel might be able to obtain this information through three potential channels:

1. The Middle Men

The shell companies submitting the information – which by definition will be U.S. entities – may be directly subject to subpoenas seeking the information. Less directly, if shell companies that submit the information to FinCEN utilize attorneys, corporate services companies or other intermediaries to generate, handle or submit the beneficial ownership to FinCEN, creditors may be able to use U.S. discovery tools (including Section 1782 applications) to obtain that information from the intermediaries without involving FinCEN itself.

2. Allies Abroad

In addition to targeting intermediaries, the CTA expressly authorizes FinCEN to share beneficial ownership information with state, federal, or overseas authorities pursuant to a Mutual Legal Assistance Treaty ("MLAT") or similar agreement. Thus, where a foreign criminal investigation or prosecution is afoot, coordination with an overseas prosecutor (for example in a country such as Switzerland, Monaco or Portugal, where a victim of wrongdoing can participate in a criminal proceeding) may prompt an MLAT or other request for beneficial ownership information that can be used in the foreign proceeding and potentially also be shared with, or otherwise benefit, the private party.

3. State-Level Investigators or Prosecutors

In addition, a number of U.S. states—including Delaware, California, Florida, Massachusetts, Nevada and South Dakota—maintain criminal prohibitions on certain fraudulent transfers undertaken to evade creditors. Here too, creditors may be able to work with government investigators or prosecutors who, in turn, are authorized to request beneficial ownership information from FinCEN and may then use that information in state or local proceedings that have the effect of unmasking the beneficial owners.

While the full impact of the CTA remains to be seen, one thing remains clear: U.S. shell companies will now be required by law to provide details of their beneficial ownership to U.S. authorities. While FinCEN is not allowed to freely share this information with private creditors, the genie may be difficult to put back in the bottle once released. As the CTA goes into effect in the coming years, creative and aggressive creditors and their counsel may find it fruitful to leverage the information generated as a result of the CTA's disclosure requirements to cut off escape routes for debtors and fraudsters, and obtain more complete recoveries.

About Kobre & Kim's Claim Monetization & Dilution Team

Kobre & Kim is a global law firm focused on cross-border disputes and investigations, often involving fraud and misconduct. By avoiding repeat client relationships, and the conflicts of interest that come with them, we maintain our independence as advocates ready to litigate against virtually any institution.

The firm's claim monetization and claim dilution team has significant experience acting on behalf of judgment and arbitration award debtors to develop and implement enforcement defense strategies to dilute and protect entities against aggressive, high-value judgments. We are guided by an in-depth understanding of the latest asset structuring techniques and defensive litigation strategies that judgment/award debtors can deploy.

Many of our cases involve closely coordinated cross-border proceedings, and we are able to either advocate directly or to work cooperatively with local counsel, as well as in jurisdictions in the U.S., UK, EMEA, Asia and Latin America as well as key offshore financial centers.