



# PIERCING THE PRIVACY VEIL

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# Who am I?

## **GARY L. FLETCHER**

Gary is a partner with the Tucson law firm Nystedt & Fletcher, PLLC. Gary is both an Attorney and CPA and has practiced law in Tucson for 32 years. Gary is a Fellow of the American College of Trust and Estate Counsel (ACTEC). His practice is focused on estate, gift, and income taxation, with a concentration in estate planning, tax, trust formation and administration, charitable gift planning, complex business transactions and trust, probate, and select commercial litigation, including mediation, alternative dispute resolution and representation before state and federal courts and administrative agencies. Gary received both his undergraduate (BSBA, with High Distinction, Accounting, 1985) and graduate (JD, Cum Laude, 1989) degrees from the University of Arizona, where he was published member of the Arizona Law Review and subsequently served as a Note and Comment Editor on the Editorial Board. He served as a legislative intern for the Arizona House of Representatives Ways and Means Committee between undergrad and law school (Spring, 1986). Gary has served on the Board of Directors of Casa de los Ninos for the past 15 years and served as President of the Casa de los Ninos Foundation from 2008 to 2015. Gary was a member the Arizona State Bar Probate and Trust Executive Council from 2013 through 2019, where he served as Treasurer and was active on the Council's subcommittee advocating for Probate and Trust Section concerns regarding the legislation recently enacted as the Arizona Limited Liability Company Act.

# WHY IS THE CTA A TOPIC?

*Isn't this the the topic of the week?*



# THIS IS WHY IT'S WORTHY OF OUR TIME TODAY WITH THE BEAUTY OF BANFF OUTSIDE

- Corporate Transparency Act enacted in January, 2021...
- My first exposure was at my first ACTEC Annual Meeting (virtual) in March, 2021...
- My next public exposure was at the March, 2022 Annual Meeting (live) in San Diego...
- More recently, I have presented locally, in AZ, in May, 2022...
- Consistently, throughout this period, the responses I witness or experience are:
  - From attorneys (including ACTEC Fellows) – What is that? What are you talking about?
  - From clients – That is interesting but how does that effect me?
- Even though reporting deadline requirements have yet to be solidified, the CTA has been in effect for approximately 18 months and yet there remains a significant gap in awareness among a wide array of those who will have reporting requirements as well as their advisors (whether US, CPAs, planners or otherwise).
- Those with reporting responsibilities under the CTA, whether our clients, their other advisors, or our colleagues without our own firms, will be looking to us (those of us within this room) either for assistance with compliance or as their perceived reason for lack of compliance.
- Today, we'll not only address the high points of the CTA and the Proposed Rules, but hopefully commence a dialog about the impact on planners in the estate planning and asset protection world.

# AUTHORITATIVE RESOURCES AS OF TODAY

- As of the time of its enactment, we were to have final rules or regulations regarding the CTA by one year out, January, 2022. As of today, such do not exist.
- Although there have been numerous presentations, the basic source materials available remain the Corporate Transparency Act itself and the proposed rules issued in December, 2021 (full copy of each included within your materials).
- Presentation outlines often reflect a presenter's summary of source material; in this instance the best reference in addressing questions are the source materials themselves (the CTA and the Proposed Rules) – especially with regard to definitions and listed exempt entities.

# CORPORATE TRANSPARENCY ACT

- Enacted under the National Defense Authorization Act (2021)
- “Corporate” title is a misnomer
  - Act applicable to all “Reporting Companies” (not just Corporations)
- Results from numerous legislative attempts - with an underlying rationale of Anti-Money Laundering (AML) and Counter-Financing of Terrorism (CFT)
- Significant International Pressure based on non-compliant status of US under Financial Action Task Force standards.....
- Target - money laundering (Panama Papers, etc.) and financing of terrorism; and the need for beneficial ownership disclosure.
- General Requirement – Disclosure of Beneficial Owners via FinCen (broad reach, beyond stated targets)
- No clearly defined starting point (potentially impacting, or being applicable to, up to 26,000,000 existing entities)
- Effective Date – Upon the effective date of final regulations; first reporting due one year following adoption of Final Regulations – which were to be promulgated by January 1, 2022; thus far only proposed regulations issued December, 2021.

# BACKGROUND

- Intended Targets – entities used for money laundering – real estate condos, etc.
- Beneficial Ownership disclosure in Anti Money Laundering structure.
- Attention garnered by Panama Papers, FinCen Papers, etc.
- Results from numerous legislative attempts from 2008 through 2019
- With no backward limitation, estimated to be applicable to approximately 26,000,000 existing Reporting Companies and approximately 2,000,000 Reporting Companies per year on a go forward basis

# REPORTING REQUIREMENTS

- Reporting Companies disclose, via FinCen filing, Beneficial Owners and Company Applicants
- No Backward stop as yet; record keeping go forward onerous; record keeping backward, in some instances, impossible.
- Record keeping requirements introduces high volume cyber security issues



# REPORTING COMPANY

- Corporation, LLC or SIMILAR ENTITY created by the **FILING OF A DOCUMENT** pursuant to laws.....
- Any entity formed via filing with Corporation Commission, Secretary of State, etc.

# BENEFICIAL OWNERS

- Substantial control over a reporting Company or owns or controls at least 25 % of the Reporting Company.
  - Substantial Control – Broad Reach
  - Ownership or Control – Joint ownership/attributed ownership
  - Trustee with ability to dispose
  - Beneficiary who is sole permissible recipient of income and principal or right to demand withdrawal
  - Grantor with right to revoke or withdrawal

# COMPANY APPLICANT

- Anyone who files or directs or controls the filing person (EVERYONE).

# EXEMPTIONS

- Basically, entities already otherwise regulated or already required to report; more specifically, the following entities (“exempt entities”):
  - an issuer of securities registered under Section 12 of the Securities Exchange Act of 1934 (the “Exchange Act”) or that is required to file supplementary and periodic information under Section 15(d) of the Exchange Act;
  - an entity established under the laws of the United States, a state, or a political subdivision of a state, or under an interstate compact between two or more states and that exercises governmental authority on behalf of the United States or any such state or political subdivision;
  - a bank;
  - a Federal or state credit union;
  - a bank or savings and loan holding company;
  - a registered money transmitting business;

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# EXEMPTIONS (Cont.)

- a broker or dealer registered under Section 15 of the Exchange Act;
- an exchange or clearing agency registered under Section 6 or Section 17A of the Exchange Act;
- any other entity registered with the Securities and Exchange Commission (the “SEC”) under the Exchange Act;
- an investment company or investment adviser registered with the SEC;
- an investment adviser that has made certain required filings with the SEC;
- an insurance company as defined in the Investment Company Act of 1940;
- an insurance producer that is authorized by a state and subject to supervision by the insurance commissioner or a similar official or agency of a state and has an operating presence at a physical office within the United States;
- certain entities registered with the Commodity Futures Trading Commission under the Commodity Exchange Act;

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# EXEMPTIONS (Cont.)

- a public accounting firm registered under the Sarbanes-Oxley Act of 2002;
- a public utility that provides telecommunication services, electrical power, natural gas, or water and sewer services within the United States;
- a financial market utility designated by the Financial Stability Oversight Council; a pooled investment vehicle that is operated or advised by certain entities described in other clauses above; a tax-exempt Section 501(c) corporation, political organization, charitable trust or split-interest trust exempt from tax;
- certain corporations, limited liability companies or other similar entities that operate exclusively to provide financial assistance to, or hold governance rights over, tax-exempt Section 501(c) corporations, political organizations, charitable trusts or split-interest trusts exempt from taxation;

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# EXEMPTIONS (Cont.)

- an 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; and (iii) has an operating presence at a physical office within the United States;
- a corporation, limited liability company or other similar entity of which the ownership interests are owned or controlled, directly or indirectly, by one or more aforementioned exempt entities (“exempt subsidiaries”);
- a corporation, limited liability company or other similar entity: (i) in existence for over one year; (ii) that has not engaged in active business; (iii) that is not owned, directly or indirectly, by a foreign person; (iv) that has not, in the preceding 12- month period, experienced a change in ownership or sent or received funds in an amount greater than \$1,000; and (v) that does not otherwise hold any kind or type of assets, including an ownership interest in any corporation, limited liability company or other similar entity (an “exempt grandfathered entity”); and
- any entity or class of entities that the Secretary of the Treasury has determined by regulation, with the written concurrence of the Attorney General of the United States and the Secretary of Homeland Security, should be exempt because requiring beneficial ownership information would not serve the public interest and would not be highly useful in national security, intelligence and law enforcement efforts to detect, prevent or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud or other crimes.

# REPORTS/RECORD RETENTION/PENALTIES

- For Beneficial Owners and Applicants:
  - Name
  - DOB
  - Residential Address –Beneficial Owners and Applicants
  - Business Address for Professionals
  - Identifying Number or FinCen Identifier
- Voluminous Private Information Storage
- Reporting requirement – Reporting Company (but who will that burden fall on?)
- One Year from Effective Date of Final Regulations (existing Reporting Companies)
- 30 days following a change/update
- 14 Business Days for Reporting Companies formed after effective date of final regulations.
- 500 Dollars per day up to max of \$10,000
- Up to 2 years imprisonment
- Willful (similar to FBAR standard?)



# ACTEC Comments to Proposed to Regs

- Discretionary trusts with multiple beneficiaries/Contingent Beneficiaries
- Powers of Appointment.....
- Trust Protectors/Special Trustees, etc.
- Institutional Trustees – scope of disclosure
- Revenue levels for newly formed entities
- Broad scope of definition of Applicants

# ASSET PROTECTION PLANNING IMPLICATIONS

- Historical inventory of entities formed from the beginning of time?
- Notices to existing “Reporting Companies”
- Engagement agreements going forward for entities formed
- LLC’s have become second nature – it’s not that long ago that they didn’t exist.....
- Given the plethora of state LLC statutes accommodating privacy, constitutionality of CTA?
- Have LLC’s become too easy? Eliminating evaluation of entity/vehicle selection?
- Pause to look at options pre-LLCs – TRUSTS?
- Evolution of a new entity form that does not require a state filing? NFT?
- OA provisions for CTA Compliance – similar to existing OA provisions requiring execution, spousal consent, etc.?
- Silent LLC states
- High end personal property transactions (example – Colorado LLCs used for CA sales of Yachts, Planes, Luxury Autos)
- Re-evaluate benefits of single member LLC’s vs Spendthrift Trusts when profit distribution not at issue?

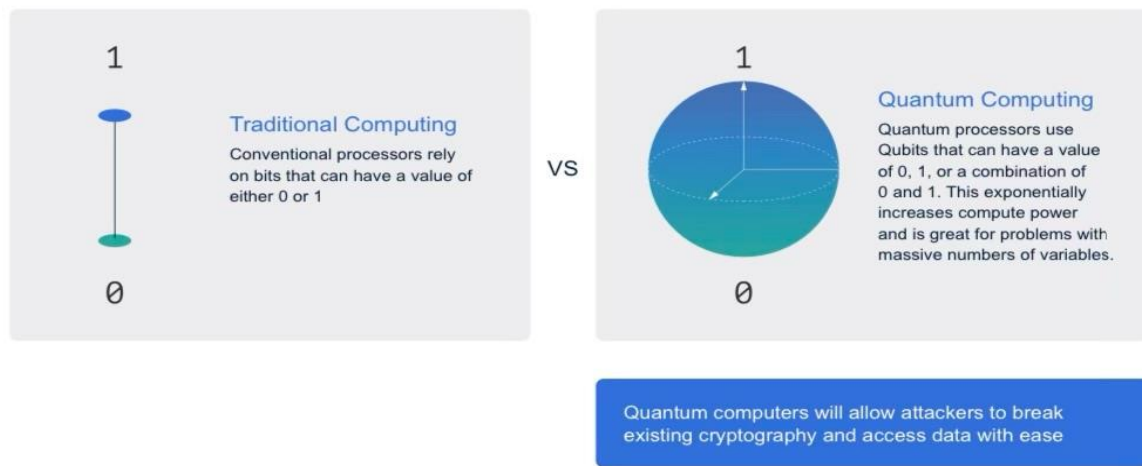
# ASSET PROTECTION – ATTORNEY AS THE ASSET

- What will malpractice carries require or reflect as a questionnaire item for compliance with the CTA?
- Dramatic changes brought about by the CTA may call for creativity by the attorney; caution with regard to private rights to action for conspiracy or aiding and abetting - see, for example *In Re Koehner* (Arizona).

# PROTECTING THE “ASSETS”

- What does protecting the “Assets” involve in the Cyber age?
- New Focus on Cyber Info as the “Asset”
- Quantum Computing....
- Quantum Security...
- HNDL/SNDL..... Harvest Now Decrypt Later..... (Have we already lost?)

## Traditional vs Quantum Computing



NOW – PROTECT YOUR ASSETS.....

