

FinCEN provides Corporate Transparency Act reporting guidelines for bankruptcy but uncertainty remains

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As previously reported (<https://reut.rs/3RnvuR2>), the Corporate Transparency Act (CTA) has created unique uncertainty and ambiguity in the context of bankruptcy cases throughout the country. The goals of the CTA are to prevent financial crimes like money laundering and tax evasion.

In *In re YLG Partners, Inc.*, No. 23-10709 (Bankr. M.D.N.C.) and *In re BOA Nutrition, Inc.*, No. 23-03665-5-PWM (Bankr. E.D.N.C.), the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) has provided guidance that Chapter 7 bankruptcy trustees are generally not responsible for providing a debtor's beneficial ownership report under the CTA.

While FinCEN's position applies specifically to Chapter 7 trustees, FinCEN's guidance may have a broader impact, including in Chapter 11 cases.

The CTA and bankruptcy

The CTA generally requires "reporting companies" to report their "beneficial owners" to FinCEN. "Reporting companies" include corporations, limited liability companies, and other entities that are created or registered to do business in the United States. There are two categories of "beneficial owners" that must be reported to FinCEN under the CTA. The first category includes any individual who, directly or indirectly, through any means, owns or controls not less than 25 percent of the ownership interests of the reporting company. The second category includes individuals who, directly or indirectly, exercise "substantial control" over the reporting company.

The CTA's reporting requirement has created several issues in the context of a bankruptcy case. For example, does an operating trustee of a debtor, such as a Chapter 7 or 11 trustee, have an obligation to comply with CTA reporting obligations? Likewise, does a post-confirmation liquidating trustee have a CTA reporting obligation where a debtor is not immediately dissolved, but all of the debtor's assets and liabilities are transferred to a trust?

In *BOA Nutrition* and *YLG Partners*, the Chapter 7 bankruptcy case administrators in both cases filed similar motions seeking a judicial determination that they had no duty or obligation to report beneficial ownership information on the debtor's behalf under the CTA.

In both cases, FinCEN filed similar responses, indicating that it "does not oppose the request for a determination that the Trustee here does not have a duty to report the Debtor's beneficial ownership information to FinCEN."

On May 28, 2024, and June 3, 2024, the *YLG Partners* and *BOA Nutrition* courts, respectively, entered consent orders "that the trustee in this case is not responsible for reporting beneficial ownership information to FinCEN on the debtor's behalf."

Chapter 7 trustees' arguments

In both cases, the bankruptcy administrators largely made the same arguments for why a Chapter 7 trustee has no CTA reporting obligation.

FinCEN has provided guidance that Chapter 7 bankruptcy trustees are generally not responsible for providing a debtor's beneficial ownership report under the CTA.

First, they principally argued that the reporting obligation remains with the debtor because a Chapter 7 trustee is distinct from the debtor. More specifically, they argued that "[a] trustee does not become the debtor or the debtor's agent." Rather, a trustee is appointed to administer the newly created estate and a trustee is "the representative of the estate" under 11 U.S.C. § 323(a).

However, "the bankruptcy estate is not the debtor." While both administrators acknowledged that the debtors were corporations and constituted reporting companies under the CTA, they asserted that the administrators themselves were not obligated to comply with the CTA's reporting requirement.

Second, the administrators argued that a Chapter 7 trustee has no duty to comply with the CTA reporting requirements on behalf of a debtor, relying on various statutes enumerating a Chapter 7 trustee's obligations. For example, under 26 U.S.C. § 6012(b)(3),

a trustee or receiver has an express duty to file income tax returns for a debtor. And under 11 U.S.C. § 704(a), a Chapter 7 trustee has certain enumerated duties. However, the administrators argued that “none of those enumerated duties can be construed as requiring a Chapter 7 trustee to file beneficial ownership reports to FinCEN on a debtor’s behalf.”

Finally, they argued that “there are strong policy reasons not to place this reporting obligation on [C]hapter 7 trustees.” They argued that if a trustee had a reporting obligation, they would be required “to make factual inquiry as to whether each of the cases they are assigned is a ‘filing entity’ under the CTA.” This would not only cover prospective case assignments but may also include prior assignments, potentially even in closed cases where there were no assets administered.

Then, if they made a determination that reporting requirements were applicable, trustees would “be required to conduct discovery to obtain the required information, on a subject that is entirely unrelated to the administration of the bankruptcy estate (in most instances where there is no possibility they will be fairly compensated for the work they would be required to perform).”

FinCEN’s response

In both cases, FinCEN filed a response, indicating that it did not oppose the administrators’ requests for a determination that they had no CTA reporting requirement. FinCEN argued that “a [C]hapter 7 bankruptcy trustee is not typically responsible for fulfilling a debtor reporting company’s duty to report beneficial ownership information to FinCEN: the responsibility is the reporting company’s duty” and “the obligation to report beneficial ownership information to FinCEN under the CTA lies with reporting companies themselves.”

Generally, to be held responsible for a CTA reporting violation, a person must either (i) “cause[] the [CTA reporting] failure” or (ii) be a “senior officer.”

FinCEN reasoned that “[s]imply becoming a [C]hapter 7 trustee does not make an individual a ‘senior officer’ of the reporting

company, i.e., ‘any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function’” under 31 C.F.R. § 1010.380(f)(8) of the CTA.

While FinCEN argued that Chapter 7 trustees generally do not have CTA reporting obligations, FinCEN noted that a Chapter 7 trustee nevertheless could be held liable for a reporting company’s failure to comply with CTA reporting obligations under “unusual circumstances.”

FinCEN provided two examples: a Chapter 7 trustee who (1) falsely informed a debtor company that the trustee would file the required beneficial ownership information for the company but then willfully failed to do so,” and (2) “willfully prevented the debtor company from filing the required information.”

In a footnote, FinCEN also argued that a “bankruptcy estate is not a ‘reporting company’ obligated to file beneficial ownership information with FinCEN.” That is because “[a] domestic entity is a reporting company only if it was created by the filing of a document with a secretary of state or similar office.” And “[a] bankruptcy estate is not created by such a filing.”

Conclusion

While FinCEN’s position was limited to Chapter 7 bankruptcies, its guidance in *YLG Partners* and *BOA Nutrition* may have broader implications, including in Chapter 11 cases. For example, it may be possible for FinCEN’s reasoning to apply to Chapter 11 operating trustees and receivers.

It may also provide guidance to post-confirmation liquidating trustees if the trust in question was not “created by the filing of a document with a secretary of state or similar office.” Further case law and guidance from FinCEN will hopefully resolve many of the bankruptcy-specific CTA reporting issues.

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