

Publication

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Client Alert: Corporate Transparency Act's Impact on Family Offices and Trust and Estate Planning

The Financial Crimes Enforcement Network ("FinCEN"), a unit of the U.S. Treasury, is mandated with protecting the U.S. financial system from illicit use by making it more difficult for bad actors to conceal their financial activities through entities with opaque ownership structures.

The Corporate Transparency Act (the "CTA") requires that most U.S. domestic and certain non-U.S. legal entities disclose their beneficial owners information ("BOI") to FinCEN. New reporting rules go into effect on January 1, 2024, but entities in existence as of that date will have until January 1, 2025 to make the required filings.

Below, we outlined key questions and answers regarding the BOI reporting requirements and the issues they may create for family offices, trusts and other entities typically used in estate planning.

Q: *Is a "family office" a "reporting company" under the CTA?*

A: Generally, yes. The regulations create two distinct types of reporting companies that must file reports with FinCEN: domestic reporting companies and foreign reporting companies. Subject to certain exemptions, a domestic reporting company includes any entity that is created by the filing of a document with a

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secretary of state or similar office of a jurisdiction within the U.S. As most U.S. "family offices" are organized as corporations, limited liability companies or limited partnerships, it is likely that such entities will be domestic reporting companies.

Q: *Are there any exemptions from the "reporting company" requirements for family offices?*

A: Certain large family offices may fall within the exemption from the definition of reporting company made available to "Large Operating Companies." Under the CTA, an entity is a "large operating company" if it: (1) employs more than 20 employees on a full-time basis in the U.S.; (2) filed in the previous year federal income tax returns in the U.S. demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of other entities owned by the entity and through which the entity operates; and (3) has an operating presence at a physical office within the U.S. If the family office is registered as an investment adviser under the Investment Advisers Act of 1940, as is often the case for "multi-family offices", or is a "venture capital fund adviser" under the Investment Advisers Act, the entity also would qualify for an exemption from the definition of reporting company. Similarly, if the entity is a "commodity pool operator", "commodity trading advisor" or other entity registered with the U.S. Commodity Futures Trading Commission, it also would qualify for an exemption from the definition of reporting company.

Q: *Is the information submitted to FinCEN kept confidential and secure?*

A: Generally, yes, subject to certain limitations. The CTA imposes strict confidentiality, security, and access restrictions on the data FinCEN collects through BOI reports. But, FinCEN is authorized to share this BOI with other government agencies, financial institutions,

and financial regulators, subject to appropriate protocols. To implement this requirement, FinCEN has been developing the Beneficial Ownership Secure System ("BOSS") to receive, store and maintain BOI. All reports filed under the CTA will, however, be exempt from search and disclosure under the Freedom of Information Act ("FOIA").

Q: *Is a "trust" a "reporting company" under the CTA?*

A: Generally, no. A domestic reporting company is an entity created by the filing of a document with a secretary of state or other similar office. Certain types of entities, including most trusts, generally are not created through the filing of a document with a secretary of state or similar office and, therefore, would not be a reporting company under the regulations.

Q: *Who are the beneficial owners of reporting companies?*

A: Any individual who meets at least one of two criteria: (1) the individual exercises substantial control over the reporting company; or (2) the individual owns or controls at least 25 percent of the ownership interests of a reporting company. The regulations define the terms "substantial control" and "ownership interest" and rules for determining whether an individual owns or controls 25% of the ownership interests of a reporting company. An individual may own or control an ownership interest directly or indirectly. For example, an individual may directly or indirectly own or control an ownership interest that is held in a trust or similar arrangement. The regulations define five types of individuals exempt from the definition of beneficial owner.

Q: *What information must be provided for each beneficial owner of reporting entities?*

A: Four pieces of information: (i) the individual's full legal name; (ii) date of birth; (iii) current residential or business street address, and (iv) a unique identifying number from an acceptable identification document (e.g., a passport). Reports will need to include images of an identifying document. Reporting companies will need to provide updates – including images of an identifying document – only where there is a change with respect to required information previously submitted to FinCEN. Changes in expiration dates or personally identifiable information other than the data specified by FinCEN (i.e., the four pieces of information) do not require the submission of an updated image. Or, in lieu of that information, a reporting entity could provide a beneficial owner's FinCEN identifier. A FinCEN identifier is a unique identifying number that FinCEN will issue to individuals or reporting companies upon request, subject to certain conditions. For individuals, FinCEN will issue a FinCEN identifier if an individual submits to FinCEN the same four pieces of identifying information as would be required in a BOI report.

Q: *Must BOI reports be amended when someone dies?*

A: Yes. Updated BOI reports must identify new beneficial owners of a reporting company within 30 days of settlement of the estate of the deceased beneficial owner, either through the operation of the intestacy laws of a jurisdiction within the U.S. or through a testamentary disposition. An updated report must be filed if the deceased individual was a beneficial owner "by virtue of property interests or other rights subject to transfer upon death," not solely because the deceased beneficial owner owned or controlled 25 percent of the reporting company's ownership interests. For the purposes of determining whether any of the successors to the

deceased beneficial owner continues to be beneficial owners of the reporting company, no special rules apply, and the reporting company will need to apply the beneficial owner definition to assess whether any successor is a beneficial owner by virtue of the new property interests or rights.

Q: *Must reporting entities provide information about beneficial owners who are minor children?*

A: No. The regulations provide for five exceptions to the definition of beneficial owner, including a minor child, provided that a parent or guardian's information is reported.

Q: *Must BOI reports be amended when a minor child reaches the age of majority?*

A: Yes. If a previously submitted BOI report provided information of a parent or legal guardian of a minor child in lieu of the minor child's own information, the reporting company must submit an updated report when the minor child attains the age of majority.

Q: *Must reporting companies include potential future owners as beneficial owners through inheritance?*

A: No. If a person's *only* interest in a reporting company is a possible future interest through inheritance, such person falls within an exception from the definition of "beneficial owner."

Q. *Can a "trust" be a beneficial owner of a reporting entity?*

A: No, not directly. As indicated above, the regulations define "beneficial owner" as an *individual*. However, the rules makes clear that an individual who directly or indirectly exercises substantial control of a reporting company, including as a trustee of

a trust or similar arrangement, would be a beneficial owner. Depending on the particular facts and circumstances, trusts may serve as a mechanism for the exercise of substantial control over a reporting company. Therefore, the regulations specify that a trustee of a trust can exercise substantial control over a reporting company through the exercise of his or her powers as a trustee over the corpus of the trust, for example by exercising control rights associated with shares (of a reporting company) held in trust. In addition to trustees, the rules specify that other individuals with authority to control or dispose of trust assets are considered to own or control the ownership interests in a reporting company that are held in trust. Note that there is no exception to the definition of beneficial owner for trust beneficiaries. In certain circumstances, ownership interests held in trust will be considered as owned or controlled by a beneficiary, if the beneficiary is the sole permissible recipient of income and principal from the trust, or if the beneficiary has the right to demand a distribution, or withdraw substantially all, of the assets in the trust. In addition, trust assets will be considered as owned or controlled by a grantor or settlor who has the right to revoke the trust or withdraw its assets. FinCEN noted that trust arrangements can vary significantly in form, so the examples in the regulations are not exhaustive and do not address all applications of the general principle requiring disclosure of all beneficial owners who may directly or indirectly own or control an ownership interest in a reporting company.

Q: *How do reporting companies disclose information about ownership interests held by trusts?*

A: Generally, a reporting company will be required to provide information about the trustee *and* other individuals with authority to control or dispose of trust assets. Under certain circumstances, such as where a beneficiary of a trust is the sole permissible recipient of assets from the trust, information about the beneficiary

would need to be provided. Ownership interests held in trust could be deemed simultaneously as owned by multiple parties. FinCEN declined to provide additional guidance about which parties in a trust arrangement should be reported as a beneficial owner when the regulatory language suggests that more than one individual could be considered to own or control the same ownership interests held in trust. For example, FinCEN declined to provide additional guidance as to trust arrangements with multiple beneficiaries or persons who serve as trust protectors and advisors.

Q. *What happens if an incorrect report is submitted?*

A: The regulations provide a safe harbor to any person that believes that any report submitted by the person contains inaccurate information and voluntarily and promptly, and consistent with FinCEN regulations, submits a report containing corrected information no later than 90 days after the date on which the person submitted the inaccurate report. The CTA makes clear that the safe harbor is only available to reporting companies that file corrected reports no later than 90 days after they filed, even if a reporting company files a correction promptly after becoming aware or having reason to know that a correction is needed. The regulations do NOT include a good faith standard regarding the requirements to update or correct reports. The CTA places the reporting responsibility on reporting companies, and such responsibility includes the obligation to report accurately.

Should you have any questions about the issues outlined above or other matters related to the Corporate Transparency Act or FinCEN's reporting rules, please contact John Koenigsknecht, Earl Melamed, Wesley Nissen, Lawrence Richman, Peter Miles or your Neal Gerber Eisenberg attorney.



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