

THE LEGAL INTELLIGENCER

Corporate Transparency Act: It's Time for Estate Planners to Start Paying Attention

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Every morning, my anxious dog must take medicine to calm her nerves for the day. Like clockwork, as soon as I open the medicine bottle, she darts across the room, hides behind a chair, and turns her back as if to say, “if I can’t see you, then you can’t see me.” Every day, I try to show her the fallacy of her logic when I do in fact see her, turn her around, give her the pill, and we both move on with our morning knowing that tomorrow we will do the same dance. For estate planners, that pill will soon be the Corporate Transparency Act (CTA), and no matter how far we stick our heads in the sand or, like my dog, hide behind furniture, we need to be prepared when the CTA goes into effect on Jan. 1, 2024.

Starting on Jan. 1, 2024, many U.S. legal entities and foreign entities registered to do business in the United States will be required to report information about themselves, their beneficial owners, and their company applicants with the U.S. Treasury’s Financial Crimes and Enforcement Network (FinCEN). Reporting companies will need to file beneficial ownership information (BOI) reports using FinCEN’s beneficial ownership secure system, which has yet to go live on FinCEN’s website, to report the BOI of the beneficial owners of a reporting company.

Reporting Companies

The CTA divides reporting companies into two categories: domestic reporting companies, and foreign reporting companies. Domestic reporting companies are corporations, limited liability companies, or other entities created by filing a document with a secretary of state or similar office under state or tribal law. Foreign reporting companies are corporations, limited liability companies, or other entities formed under a foreign country’s laws and registered to do business in a U.S. state or tribal jurisdiction by filing a document with a secretary of state or similar office under state or tribal law.

The CTA currently exempts 23 types of entities from the definition of a reporting company. For example, the CTA exempts banks, credit unions, depository institutions, holding companies, brokers or dealers of securities, investment companies or investment advisers, insurance companies, accounting firms, tax-exempt entities (including charitable trusts), large operating companies, subsidiaries of certain exempt entities, and inactive entities.



In estate planning, we frequently create domestic and foreign entities to structure business, real estate, or art investments, to facilitate asset protection, or to segregate voting from nonvoting business interests in order to pass future value to lower generations. The creation of these entities in estate planning is so common that the CTA's reporting requirement will impact most, if not all, estate planners who work with business entities.

Beneficial Owners


The CTA divides beneficial owners into two categories: individuals who directly or indirectly exercise "substantial control" over a reporting company, and individuals who directly or indirectly own or control at least twenty-five percent of the "ownership interests" of a reporting company.

An individual exercises substantial control over a reporting company if he or she is a senior officer (i.e., 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 as the foregoing officers, but not a secretary or treasurer who likely has little control over a reporting company), has authority to appoint or remove certain officers or a majority of directors of the reporting company, is an important decision-maker (i.e., makes decisions on reorganizations, acquisitions, compensation, and entry or termination of significant contracts), or has any other form of substantial control over the reporting company. All individuals who exercise substantial control over a reporting company must be reported as beneficial owners.

Many clients who create a business entity for estate planning purposes will fall into this expansive and sometimes subjective definition of a substantial owner because business entities created for estate planning purposes are often designed so that the client maintains control over the entity and is the important decision-maker in the business entity. A client may gift interests in the business entity either immediately or over time, but at least at the outset, the client will likely have substantial control over the entity.

Ownership interests of a reporting company are broadly defined and may be held through equity, stock or voting rights; capital or profit interest; convertible instruments; options; or any other interests in a reporting company. While a business entity may be created for estate planning purposes as a means of ultimately transferring interests in an asset more efficiently over time, at the outset of creation, if the estate planning client owns at least twenty-five percent of the ownership interests of the reporting company, the individual will be a beneficial owner.

When a trust owns an entity, the beneficial owners of the trust are any trustee or other individual with authority to dispose of trust assets (other than an exempt corporate trustee); any beneficiary who either is the sole permissible recipient of trust income and principal or has the right to demand a distribution or withdraw of substantially all of the trust assets; and any grantor or settlor who has the right to revoke the trust or otherwise withdraw trust assets. Any future changes in the trust that could impact the identity of the beneficial owner must also be reported on an updated BOI report. Trustee appointments and resignations, for example, will need to be reported by the reporting company. It will be less clear, however, in other situations whether a reporting company will need to file an updated BOI report. For example, it is unclear in a trust modification under state law involving the grantor or settlor whether the modification would cause the grantor or settlor, who was not already a beneficial owner, to become a beneficial owner. Or, if a beneficiary of a trust, who wasn't already a beneficial owner, possesses a testamentary power of appointment, whether the beneficiary will, at some point, become a beneficial owner. Would it matter if the beneficiary's power of appointment was general, such that the beneficiary could appoint the assets to himself or herself as opposed to a limited power of appointment where the beneficiary could only appoint to someone other than the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate? These are all questions that will hopefully become clearer as both filers and FinCEN start to implement the CTA.



Certain individuals are exempt from the definition of “beneficial owner.” These individuals include minor children (provided that the minor child’s parent or guardian is reported and an updated BOI is reported when the minor attains the age of majority); individuals acting as a nominee, intermediary, custodian, or agent on behalf of another individual, provided that the actual beneficial owner must still be reported; individuals acting as an employee of a reporting company who are not senior officers; individuals whose only interest in a reporting company is a future interest through a right of inheritance (provided that upon receiving the inheritance the individual must file a BOI); and creditors of a reporting company.

When a beneficial owner dies, an updated BOI report must be filed when the estate of the deceased beneficial owner is settled and the interest in the reporting company is distributed to the beneficiary. An updated BOI report is not required to be filed by the executor during the period of estate administration. When the interest in the reporting company is distributed from the estate, the updated report must identify the new beneficial owners.

Company Applicants

Reporting companies created or registered on or after Jan. 1 must include information about up to two of its “company applicant(s)” on BOI reports. A company applicant is the individual who directly files the document creating a reporting company. If more than one individual is involved in filing the document, the company applicant is also the individual primarily responsible for directing or controlling the filing. Third parties such as attorneys, paralegals or accountants may be company applicants if they file on behalf of clients or oversee the filing process. For example, if a law firm prepares the organizational documents, the two company applicants would be the person actually filing the documents, and the attorney who oversees the preparation and filing. Only where the organizer creates and files the documents without using a law firm would the organizer be considered the company applicant.

Contents of BOI Report

Reporting companies created or registered on or after Jan. 1 must report information about themselves, their beneficial owners, and their company applicants. Reporting companies created or registered before Jan. 1 must report about themselves and their beneficial owners, but they do not need to report on their company applicants.

In a BOI report, a reporting company must report the reporting company’s legal name, any trade, “doing business as” or “trading as” names, the reporting company’s current address of its principal place of business, jurisdiction of formation or registration, and the reporting company’s taxpayer identification number.

A reporting company must report the following about each beneficial owner: name of beneficial owner, date of birth, residential address, unique identifying number from a nonexpired driver’s license, nonexpired identification document issued by a U.S. state, local government or tribe, nonexpired passport issued by the U.S. government, or nonexpired passport issued by a foreign government, state or jurisdiction that issued the identification document, and image of the identification document. For a reporting company created or registered after Jan. 1, similar information must also be reported for each company applicant.

When Must BOI Reports be Filed?

Beginning on Jan. 1, entities formed on or after Jan. 1 must file their initial BOI report within 30 days of the earlier of the reporting company’s creation date or registration date. FinCEN has recently proposed extending this deadline to 90 days. Entities formed prior to Jan. 1 have until Jan. 1, 2025, to file their initial reports. From a planning perspective, clients who know that they will be creating an entity in the near future may want to create the entity before Jan. 1, 2024, so that the reporting company has an additional year to file its initial BOI report.

Penalties for Noncompliance

Failure to comply with the CTA can result in civil penalties up to \$500 for each day a violation persists. Failing to comply or willfully providing false information may result in criminal penalties, including a fine up to \$10,000 or two years imprisonment.

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It is unclear whether and to what extent FinCEN will be enforcing the BOI reporting requirement of the CTA. Given the significant number of entities that will now be required to file initial and updated BOI reports, FinCEN will undoubtedly need to allocate substantial resources for any meaningful audit program. Regardless of how the CTA is enforced, estate planners, advisers, and their clients will need to start paying attention to the CTA because in just a few weeks, the CTA will be upon us and we are no longer going to be able to continue to bury our heads in the sand.

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