



## TRUST AND ESTATE CONSIDERATIONS WITH THE CORPORATE TRANSPARENCY ACT

The Corporate Transparency Act (“CTA”) was enacted as part of the National Defense Authorization Act and establishes that certain types of business entities must report to the Financial Crimes Enforcement Network (“FinCEN”) certain information about their beneficial ownership.

The CTA became effective on **January 1, 2024** and has an impact on estate planning structures, including irrevocable and revocable trusts, due to interests held in various types of business entities. Reporting companies may be required to report personal identifying information to FinCEN on Executor(s) of estates, trustee(s) of trusts, settlor(s) and/or beneficiaries of trusts, under the beneficial ownership interest (“BOI”) reporting obligations of the CTA, as discussed below.

### What Information Must be Reported?

A reporting company must identify itself and provide four pieces of information about *each* “beneficial owner”: (i) name, (ii) date of birth, (iii) residential address, and (iv) unique identifying number and issuing jurisdiction from acceptable identifying document (e.g. a passport or driver’s license), and an image of the document containing the identifying number.

### When Must Information be Reported?

The CTA effective date is January 1, 2024, but the deadline to comply with the CTA depends on when the entity was created or registered. Reporting companies created or registered before January 1, 2024 will have one year (until January 1, 2025) to file initial reports. Reporting companies created or registered *after* January 1, 2024 but *before* January 1, 2025, will have 90 days after receiving notice of their creation or registration to file initial reports. Reporting companies created or registered *after* January 1, 2025, will have 30 days after receiving notice of their creation or registration to file initial reports.

### Who the CTA Applies to

The CTA requires reporting companies to report information on beneficial owners to FinCEN.

### What is a “Reporting Company”?

Reporting companies are generally privately held companies. Publicly traded companies, certain other regulated entities and large operating companies are included in a group of 23 types of entities that qualify for an exemption under the CTA. There are two types of reporting companies: domestic and foreign. A domestic entity is a corporation, LLC, or other entity created by filing a document with a secretary of state or a similar office under the law of a state or Indian tribe. A foreign entity is a corporation, LLC, or other entity formed under the law of a foreign country that

is registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office.

Estates and trusts are not reporting companies because they are not formed by filing a document with a secretary of state. However, if an estate or trust holds an interest in a reporting company, an executor, a trustee, settlor, and/or beneficiary may be considered a beneficial owner of that reporting company.

Further, private foundations and other tax-exempt entities that are described in IRC Section 501(c) and exempt from tax under IRC 501(a) are exempt as reporting companies under the CTA.

## **Who is a “Beneficial Owner”?**

A beneficial owner is an “individual” who, directly or indirectly, **either** (1) exercises “substantial control” over a reporting company, **or** (2) owns or controls at least 25 percent of the ownership interests of a reporting company.

- The final regulations define “ownership interest” to include:
- Any equity, stock or similar instrument; preorganization certificate or subscription; or transferable share of , or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust:
- Any capital or profit interests;
- Convertible instruments or futures:
- Warrants, rights or option or privileges to acquire equity, capital or other interests in a reporting company regardless of whether they are characterized as debt;
- Puts, calls, straddles or other option or privilege of buying or selling ownership interests; or
- Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.
- *Note- FinCEN specifies that the underlying reality of ownership, not its form, drives the identification of beneficial owners.*

When evaluating whether an individual meets the 25 percent ownership or control test, the individual should consider the collective ownership interests that the individual holds individually, and through ownership or control of one or more intermediary entities.

FinCEN has determined that rules of constructive ownership or attribution by familial relationships would not apply when determining “ownership interest” or “substantial control.”

Since beneficiaries, settlors, executors and trustees can each be considered beneficial owners, the ownership interests held in an estate or trust could be considered simultaneously as owned or controlled by multiple persons.

## **What is “Substantial Control” of a Reporting Company?**

The CTA does not define “substantial control” for purposes of determining whether an individual is a beneficial owner. However, the final rules set out specific indicators, two of which are (i) authority over the appointment or removal of any senior officer or dominant majority of a board or similar body of a reporting company, or (ii) direction, determination, or decision of, or substantial influence over important decisions made by a reporting company.

The CTA final BOI rules provide examples of important decisions, which may include:

- The nature, scope, and attributes of the business of the company including the sale, lease, mortgage, or other transfer of any principal assets of the company;
- The reorganization, dissolution, or merger of the reporting company;
- Major expenditure or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the company; and
- Amendments of any substantial governance documents of the company, including articles of incorporation or similar formation documents, bylaws, and significant policies or procedures.

The rules also includes a catch-all provision to make clear that substantial control can take additional forms not specifically listed.

### ***Executors and Trustees as a “Beneficial Owner”***

An executor or trustee of a trust, or similar arrangements, or other individual (such as a trust protector) with the authority to dispose of assets will be considered a beneficial owner under the CTA.

### ***Beneficiary as a “Beneficial Owner”***

A beneficiary who is (i) the sole permissible recipient of income and principal from the trust; or (ii) has the right to demand a distribution of or withdraw substantially all of the assets from the trust is considered to be a beneficial owner.

The final regulations suggest that joint ownership of an undivided interest in ownership interests of a reporting company can result in the same assets being attributed to all of the joint owners. Beneficiaries of “common pot” trusts or trusts in which a group of beneficiaries share an undivided interest in the trust assets may each be considered beneficial owners under this rule.

A beneficiary of a trust where distributions to the beneficiary are solely at the discretion of the trustee may not be considered a beneficial owner until a decision is made to actually make a distribution to the beneficiary.

In the case of a contingent beneficiary, FinCEN has provided that an individual whose only interest in a reporting company is a future interest through a right of inheritance will not be considered a beneficial owner. The regulations clarify that the inheritor exception in the CTA refers to a “future” interest associated with a right of inheritance, not a present interest that a person may acquire as a result of exercising such a right. Therefore, individuals who may in the future come to own ownership interests in an entity through a right of inheritance do not have ownership interests until the inheritance occurs. The precise moment at which an individual acquires an ownership interest in an entity through inheritance may be subject to a variety of existing legal authorities, such as probate proceedings, the terms of a will, the terms of a trust, applicable state laws, and other valid instruments and rules.

### ***Settlor/Grantor as a “Beneficial Owner”***

A settlor/grantor will be considered to be owned or controlled by the settlor/grantor if they have the right to revoke the trust or otherwise withdraw the assets of the trust.

In the case of certain irrevocable grantor trusts, settlors or other powerholders often retain a right to substitute assets of equivalent value. This power, until released by the settlor or powerholder, may qualify as having the “right to withdraw the asset of the trust.”

## ***A Minor is not a “Beneficial Owner”***

In the case of a minor child, a parent or legal guardian will be considered the beneficial owner.

“Minor child” is defined under the law of the state or Indian tribe in which a domestic reporting company is created or in which a foreign reporting company is first registered.

In addition, FinCEN has emphasized that a reporting company must submit an updated report when a minor child reaches the age of majority, which is determined under the law of the state or Indian tribe in which a domestic reporting company is created or a foreign reporting company is first registered.

## ***An Agent is not a “Beneficial Owner”***

An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual will not be considered a beneficial owner. This may extend to an agent that is acting pursuant to a durable power of attorney.

## **Situations Requiring an “Updated Report”**

If there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner, the reporting company shall file an updated report within 30 calendar days after the date on which such change occurs. A change requiring an updated report may include, but is not limited to:

1. Death of reporting individual<sup>1</sup>;
2. Change of trustee;
3. Change of address of a beneficial owner;
4. A minor child reaching the age of majority;
5. Death of beneficiary or settlor; or
6. Release of grantor trust powers.

## **Who Will Have Access to the Beneficial Owner Information?**

The beneficial ownership information submitted to FinCEN is sensitive information and will be directly available only to authorized government authorities subject to safeguards and controls. It will not be available to the general public.

The CTA provides for limited disclosure exceptions allowing beneficial owner information to be disclosed upon request by certain US federal agencies, financial institutions, and regulatory agencies to facilitate important national security, intelligence, and law enforcement activities; and to confirm beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law.

The CTA expressly permits the IRS to be able to access the beneficial ownership information for tax administration purposes.

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<sup>1</sup>A change is deemed to occur when the estate of the beneficial owner is settled. The updated report shall remove the deceased beneficial owner and, if applicable, identify any new beneficial owners.

## Further Considerations

Settlers and trustees should review current trust holdings to determine what individuals will be subject to the reporting requirements. Trustees are in a unique position since they often times serve as intermediaries between companies and the beneficiaries of the trusts that hold an interest in those companies. Reporting companies may look to trustees to help coordinate the information needed for the initial report and subsequent updates on behalf of the trust's settlors and beneficiaries. Trustees should familiarize themselves with the circumstances that may require an updated report. For example, if a trustee knows that a foreign beneficiary will need a non-expired passport issued by a foreign government, that beneficiary should be alerted so they have sufficient time to obtain one prior to the reporting deadline.

**We urge you to consult with your accountant to determine whether you have any reporting obligation to help ensure your timely compliance.**

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