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# The Corporate Transparency Act From an Estate Planning Perspective

The Corporate Transparency Act (or CTA) establishes uniform beneficial ownership information reporting requirements for certain types of entities created in or registered to do business in the United States effective as of January 1, 2024. We discuss some key aspects of the law as they relate to individuals with entities in their estate planning and wealth management structures.

## What is the CTA?

The CTA was enacted as part of the National Defense Authorization Act for Fiscal Year 2021 as a means to address abuses resulting from the anonymity provided by many forms of entities in the United States. To carry out this mission, Congress tasked the Financial Crimes Enforcement Network (or FinCEN) with collecting information on certain entities (or Reporting Companies).

Under the CTA and the regulations promulgated by FinCEN pursuant to the authority granted by the CTA, Reporting Companies are required to provide reports to FinCEN with information about the entities and identifying two categories of individuals: (i) the beneficial owners of the Reporting Companies and (ii) individuals who have filed applications to create the Reporting Company or register it to do business (but only for reporting entities formed on or after January 1, 2024).

## How does the CTA impact high-net-worth individuals?

Apart from their operating businesses, many high-net-worth individuals use limited liability companies and other Reporting Companies as family investment, asset management and privacy vehicles, for estate planning transfers, and as family offices and private trust companies. The CTA will significantly impact these individuals as a substantial number of these vehicles will not meet the exceptions to the definition of a Reporting Company under the CTA and therefore will be subject to reporting.

## What are Reporting Companies under the CTA?

A Reporting Company is any domestic or foreign entity that is a corporation, limited liability company or “similar entity” that is created by the filing of a document with a secretary of state or similar office. Depending on the laws of the state of formation, limited partnerships, limited liability partnerships, business or statutory trusts, and even general partnerships (if required to file with the secretary of state or equivalent office) are likely considered Reporting Companies for purposes of the CTA. Foreign companies that register to do business in the United States generally are included in the definition of a Reporting Company.

## What are the exceptions to the definition of Reporting Company under the CTA?

There are 23 exceptions to the definition of Reporting Company under the CTA, some of which are addressed in greater detail below. Because most closely held entities used for estate planning and asset management purposes do not meet the exceptions under the CTA, a full discussion of the exceptions is outside the scope of this memorandum.

Generally, the exceptions to the definition of Reporting Company are designed to capture entities that are already subject to similar disclosure requirements, such as certain non-profit entities, entities in heavily regulated industries and large operating businesses.

Some of the notable exceptions to the definition of a Reporting Company include:

- **Large Operating Companies:** A large operating company (i) employs more than 20 employees on a full-time basis in the United States, (ii) reported more than \$5 million in gross receipts or sales on its prior year's federal income tax return (including through its subsidiaries) and (iii) has an operating presence at a physical office within the United States.
- **Tax-Exempt Entities:** A tax-exempt entity is an organization described under section 501(c) of the Internal Revenue Code and is exempt from taxation under section 501(a) of the Internal Revenue Code. The definition also includes a wholly charitable trust and a charitable split-interest trust, such as a charitable remainder trust or a charitable lead trust.
- **Registered Investment Companies and Advisors:** A registered investment company or advisor includes companies that are registered with the Securities and Exchange Commission as an investment advisor, or using the venture capital fund adviser exemption, under the Investment Advisors Act of 1940.
- **Subsidiaries of (Most) Exempt Entities:** With some exceptions, entities that are owned or controlled (directly or indirectly) by one or more entities which are exempt from the definition of a Reporting Company are also exempt from the definition of Reporting Company.
- **Inactive Entities:** An inactive or dormant entity is one that (i) has been in existence since or before January 1, 2020, (ii) is not engaged in active business, (iii) is not owned (directly or indirectly) by a foreign person, (iv) has not, in the preceding 12-month period, experienced a change in ownership or sent or received funds greater than \$1,000 and (v) does not otherwise hold any kind or type of assets, including an ownership interest in another entity.

### **Do the exceptions to Reporting Companies include family offices?**

FinCEN did not create a special exception from registration for family offices. However, certain family offices may be able to meet one of the exceptions to the definition of a Reporting Company.

Potentially relevant exceptions include certain entities that are registered as an investment advisor, or using the venture capital fund adviser exemption, under the Investment Advisors Act of 1940. Similarly, certain family offices may be able to meet the exception for large operating companies under the CTA, provided the family office has more than 20 full-time employees in the United States, (b) reported more than five million dollars of gross receipts or sales in the previous year's federal income tax return and (c) maintains an operating presence at a physical office within the United States.

### **Is a private foundation or charitable trust a Reporting Company?**

Generally, no. Tax exempt entities, including charitable trusts and charitable split-interest trusts, are excluded from the definition of Reporting Companies under the CTA. However, a charitable organization that loses its tax-exempt status will not be excluded from the definition of a Reporting Company after a 180-day grace period from the date of the loss of exempt status.

### **Is there an exception to the definition of Reporting Companies that applies to private trust companies?**

Yes, but only for regulated private trust companies. One exception to the definition of a Reporting Company includes a bank. Bank is defined to include a trust company if (i) a substantial portion of the business of the trust company consists of exercising fiduciary powers and (ii) the trust company is supervised and examined by state bank regulators. A regulated private trust company should meet this definition due to the level of state oversight.

In contrast, unregulated private trust companies generally are subject to limited state oversight, and therefore would not meet the definition of a bank. Accordingly, to be exempt from registration, an unregulated private trust company would need to meet one of the other exceptions, described above.

## When does information need to be reported to FinCEN?

Entities in existence prior to January 1, 2024, must report to FinCEN no later than January 1, 2025. Entities formed on or after January 1, 2024 must file within 30 days after receiving notice of their creation or registration. On September 28, 2023, FinCEN proposed extending the deadline to file for entities formed during calendar year 2024 to 90 days. The proposed extension has not been finalized as of the date of this publication.

Companies have 30 days to report changes or corrections to previously submitted information. Similarly, whenever there is a change to the beneficial ownership of the Reporting Company, a report with the updated entity information must be submitted to FinCEN within 30 days. Although the proposal described above (if implemented) would extend the initial time to file for entities formed during calendar year 2024 from 30 days to 90 days, the proposal does not extend the time to file changes and corrections.

FinCEN will not begin accepting applications until January 1, 2024.

Although it is advisable to begin preparing for the CTA to go into effect on January 1, 2024, there has been significant pushback to the implementation of the CTA's reporting requirements both from industry groups and lawmakers. Most recently, the Protecting Small Business Information Act of 2023 (H. R. 4035/S. 2623) seeks to delay the effective date of the CTA until such time as all the final rules required under the CTA have been issued by the Secretary of the Treasury.

## What information must a Reporting Company file with FinCEN?

Reporting Companies must submit information including:

- the name of the entity (including any trade name or doing business as name);
- if the company's principal place of business is located in the United States, the address of the company's principal place of business, or, if the company's principal place of business is not located in the United States, the address from which the company conducts business in the United States;
- the jurisdiction of formation;
- the company's unique identification number; and
- reports on the beneficial owners and (for companies created on or after January 1, 2024) company applicants.

As described below, the Reporting Company will need to report similar information on each beneficial owner and company applicant.

## What information on beneficial owners and company applicants must be provided to FinCEN?

Individual beneficial owners and company applicants will be required to report the following information:

- full legal name;
- date of birth;
- except as noted below, the individual's current residential street address;
- unique identifying number from a valid identification document, such as a passport or driver's license, and its issuing jurisdiction; and

- an image of the document with the unique identifying number.

With respect to company applicants, if the company applicant is an individual who engages in the business of corporate formation, he or she must report the current street address of the company applicant's business, rather than his or her residential street address.

FinCEN is currently creating a process to obtain a unique FinCEN identifying number for an individual which can be used in lieu of filing the above information each time an entity is formed. To obtain a FinCEN ID, the individual will be required to submit an application containing the information listed above.

### **Who is a beneficial owner of a Reporting Company?**

A beneficial owner of a Reporting Company includes any individual who directly or indirectly (i) exercises substantial control over the Reporting Company or (ii) owns or controls at least 25% of the ownership interests in the Reporting Company.

Exercising substantial control is defined as a non-exhaustive list of illustrative powers, including serving as a senior officer of the company and having substantial influence over important decisions such as compensation schemes, business lines and major transactions such as mergers.

Ownership interest is defined broadly and includes direct and indirect interests.

### **What if a trust owns a portion of a Reporting Company?**

Although trusts used for estate planning purposes generally are not considered Reporting Companies themselves, where a trust has substantial control over a Reporting Company or owns or controls 25% or more of the ownership interests in a Reporting Company, the CTA looks through the trust and requires information on the trustee and, in some cases, the beneficiaries and settlor of the trust to be reported.

Where a trust owns or controls a Reporting Company, the following individuals must be registered as beneficial owners with FinCEN:

- a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;
- a beneficiary who is the sole permissible recipient of income and principal from the trust;
- a beneficiary who has the right to demand a distribution of or withdraw substantially all assets from the trust; and
- a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust.

It is not clear at this time how information on corporate trustees will be reported to FinCEN. It is further unclear whether the investment trustee (or a fiduciary of a trust whose powers are limited to investment management) and trust protectors must be reported under the CTA.

FinCEN has made clear that the examples illustrating substantial control are non-exhaustive, and therefore any trust arrangement should be carefully considered for purposes of identifying beneficial owners.

Depending on the facts of a particular trust arrangement, it is possible that more than one individual (for example, a trustee and a beneficiary) would be considered the beneficial owner of the Reporting Company with respect to a single trust. Under such circumstances, all parties would need to be reported to FinCEN.

### **Does information on minor children get reported to FinCEN?**

Generally, no. If a minor child is considered a beneficial owner for purposes of the CTA, his or her information does not need to be reported to FinCEN if the minor child's parent or guardian information is provided instead.

When the minor child reaches the age of majority, an updated ownership report should be filed with FinCEN within 30 days of the child's birthday.

### **What other exceptions to the definition of a beneficial owner might apply?**

The following individuals are not deemed beneficial owners for purposes of the CTA:

- individuals whose interest in the Reporting Company is a future interest through a right of inheritance (for example, remainder beneficiaries of a trust);
- individuals acting as nominee, intermediary, custodian or agent on behalf of another individual;
- other than senior officers, employees of a Reporting Company who have substantial control or economic benefits from a Reporting Company based solely on their status as an employee; and
- creditors of a Reporting Company (who do not otherwise qualify as a beneficial owner).

### **Who is a Company Applicant under the CTA?**

For a domestic Reporting Company, the company applicants are the individuals who file the document that creates the entity or who are primarily responsible for directing or controlling such filing. For a foreign Reporting Company, the company applicants include any individual who files the document that first registers the entity to do business in the United States.

There can be up to two individuals who qualify as company applicants—(i) the individual who directly files the document that creates, or first registers, the Reporting Company and (ii) the individual who is primarily responsible for directing or controlling the filing of the relevant document.

Again, only companies created after January 1, 2024, must file information on their company applicants.

### **Is the information reported to FinCEN private?**

FinCEN is currently developing procedures to govern the access and protection of beneficial ownership information. FinCEN has assured that the system will comply with federal data privacy laws and is also developing a new IT system to protect the information.

The information on the beneficial owners reported to FinCEN will not be public and should not be subject to disclosure under the Freedom of Information Act. However, the CTA authorizes FinCEN to release information on beneficial ownership to six types of requesters:

- United States federal agencies for purposes of national security, intelligence and law enforcement activities;
- state, local and tribal law enforcement agencies with court authorization;
- the United States Department of the Treasury;
- with customer consent, financial institutions using such information to conduct legally required customer due diligence;

- federal and state regulators assessing financial institutions for compliance with legally required customer due diligence obligations; and
- foreign law enforcement agencies and certain other foreign authorities who submit qualifying requests for the information through a United States federal agency.

The Department of the Treasury has clarified that information provided to FinCEN under the CTA will be exempt from certain sections of the Privacy Act of 1974: beneficial owners and company applicants will not be able to access records containing information about themselves if that information was gathered under the CTA.

### **Is there a fee to submit beneficial ownership information to FinCEN?**

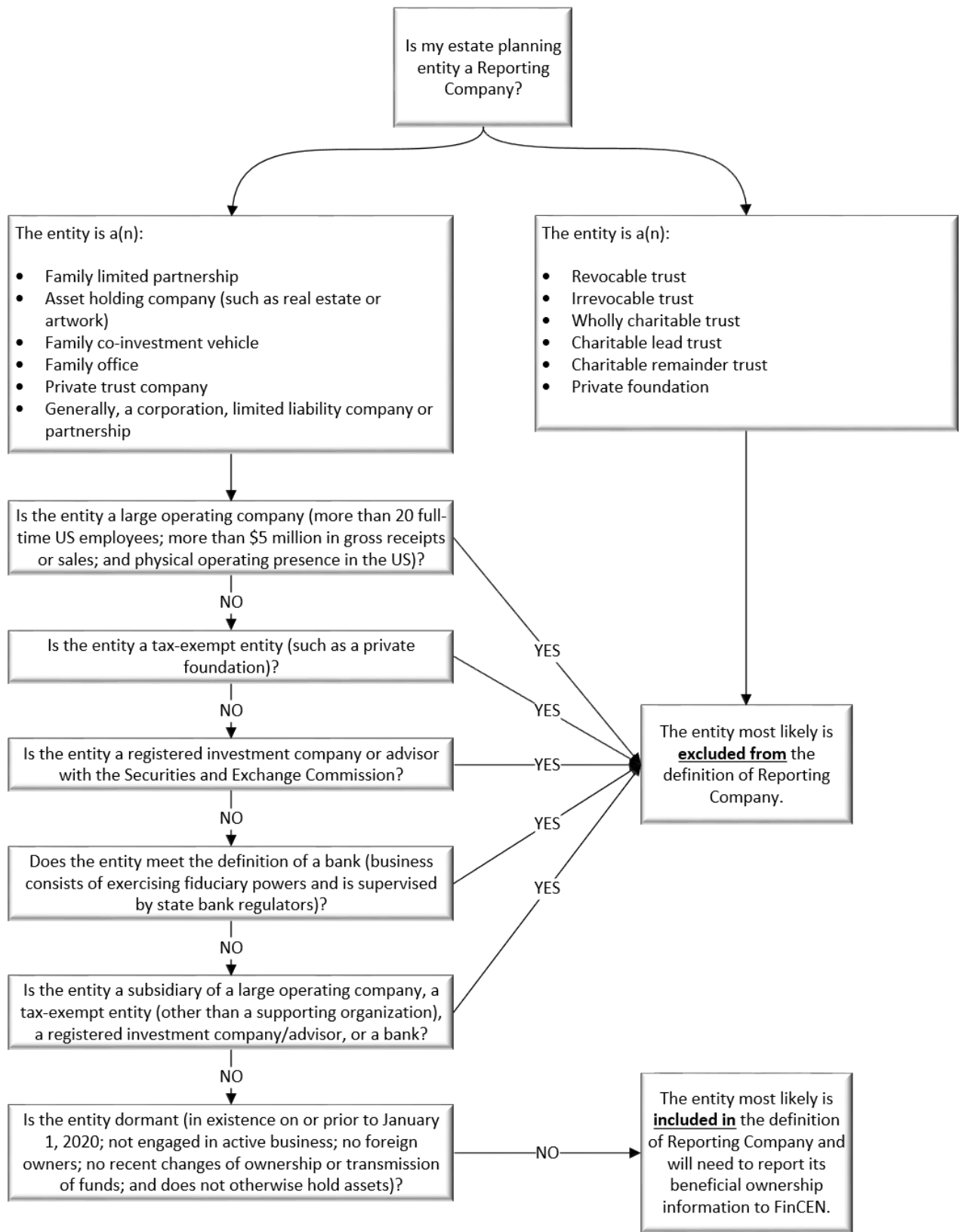
No. As of the date of this publication, the FinCEN website states that there will not be a fee to submit the beneficial ownership information report to FinCEN.

### **What are the penalties if a Reporting Company does not comply with the CTA?**

Willful violations of the CTA's reporting requirements may be subject to civil and criminal penalties. That is, (i) willful failure to file a complete or updated report with FinCEN or (ii) willfully providing (or attempting to provide) a report containing false or fraudulent information is subject to a civil penalty of a fine of up to \$500 per day (capped at \$10,000 per violation) and a criminal penalty of imprisonment for up to two years.

### **What should I do to prepare for the CTA?**

The first step for many individuals is to identify whether there are Reporting Companies in their estate planning structures. The following chart provides a quick reference guide as to whether an entity likely will need to report its beneficial ownership information to FinCEN.



The CTA is a nuanced law and there remain outstanding questions that have not yet been addressed by FinCEN. The processes for reporting information and regulations implementing the CTA are still evolving. Paul, Weiss is carefully monitoring these developments.

Although there will be a one-year period to report information on existing entities to FinCEN, owners of Reporting Companies are encouraged to begin compiling the relevant information on their entities and identifying the beneficial owners sooner rather than later.

We recommend that those who wish to better understand how the CTA applies to their individual circumstances reach out to us.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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