



Corporate Transparency Act: Rules, Recent Developments, And Practical Considerations For Family Office Clients

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Corporate Transparency Act (CTA)

- Passed on January 1, 2021; final beneficial ownership rules issued on September 29, 2022
- Establishes beneficial ownership reporting requirements that require compliance with certain disclosure rules regardless of whether “reporting companies” were established before or after the January 1, 2024, effective date
- Targeted at small, privately-held business entities and requires entities to report their “beneficial owners” (BOs) and “applicants” to the Financial Crimes Enforcement Network (FinCEN)
- Establishes a centralized national registry/database operated by FinCEN for reporting beneficial ownership information (BOI) known as Beneficial Ownership Secure System (BOSS)
- Defines beneficial ownership as an individual who exercises “substantial control” or owns or controls a 25% or more ownership interest of the entity; this represents a change in definition from FinCEN’s existing Customer Due Diligence Rule (“CDD Rule”)
- Numerous exemptions to reporting company status apply for companies already regulated at the federal or state level and for large companies with a U.S. operating location (23 exemptions)

This presentation is meant to provide a high-level overview of the CTA reporting requirements, providing practical examples involving commonly used family office-type structures.



When Does Reporting Need To Be Completed?

- **New Companies:** For companies formed/registered on or after January 1, 2024, reporting must be done within 90 days of formation/registration, but starting January 1, 2025, newly formed/registered entities must report within 30 days of formation/registration.
- **Existing Companies:** For companies formed/registered before January 1, 2024, reporting must be done by January 1, 2025.
- **For any change in reportable information with respect to any beneficial owner, an updated report will be due within 30 days.**
 - A change to the beneficial owner(s) (e.g., change in senior officer)
 - A change to the reportable information for a beneficial owner (e.g., address)
 - When a reporting company meets requirements for an exemption (this should not apply to entities meeting requirements for an exemption from inception).

BOI Reporting Company Exemptions



The CTA exempts 23 types of entities from the BOI reporting requirements. Each legal entity should be looked at individually for purposes of determining whether an exemption applies.

Notable Reporting Company exemptions for family offices include the following:

- Banks and bank-type entities (likely including regulated private trust companies)
- Tax-exempt entities: 501(c) organizations, political organizations, and trusts under §4947(a)(1) or (2) of the Internal Revenue Code ("IRC") (note: common law trusts are not excluded as exempt; rather, they appear to fall outside the definition of a reporting company).
- Any broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934, that is registered under section 15 of that Act (15 U.S.C. 78o)
- Certain types of investment companies as defined in section 3 of the Investment Company Act of 1940, or investment advisers as defined in section 202 of the Investment Advisers Act of 1940
- Certain types of pooled investment vehicles
- Publicly traded companies
- Large Operating Companies (employing 20+, gross receipts or sales over \$5M, & physical presence in US)
- Entities identified in future regulations, such as highly regulated entities.
- Subsidiaries owned entirely by one or more exempt entities - This applies to entities whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more exempt entities. Thus, it requires control or 100% ownership of the ownership interests of the subsidiary; and it can apply to a company owned 50/50 by two exempt entities.
- Certain entities not engaged in active business (inactive entity exemption).

Entities Exempt from Corporate Transparency Act

Exemption 1	Securities Reporting Issuer	An issuer of securities that is (a) an issuer of a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or (b) is required to file supplementary or periodic information under Section 15(d) of the Securities Exchange Act of 1934.
Exemption 2	Governmental Entity	Legal entities that are established under U.S. law (federal, state, Indian tribe, political subdivision of a state, or interstate compact between two or more states) and exercises governmental authority on behalf of the United States, an Indian tribe, a state, or political subdivision.
Exemption 3	Banks	Any bank, as defined in (A) Section 3 of the Federal Deposit Insurance Act, (B) Section 2(a) of the Investment Company Act of 1940, or (C) Section 202(a) of the Investment Advisers Act of 1940. ***A regulated private trust company (PTC) can meet the definition of bank under the Investment Company Act of 1940. ***There is currently an interpretation of the subsidiary exemption that may allow trusts with regulated PTCs serving as full trustees to use the subsidiary exemption to try and exempt trust-owned and controlled companies under the right circumstances.
Exemption 4	Credit Unions	Any Federal credit union or state credit union, as those terms are defined in Section 101 of the Federal Credit Union Act (12 U.S.C. 1752).
Exemption 5	Depository Institution Holding Companies	Any bank holding company as defined in Section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841), or any savings and loan holding company as defined in Section 10(a) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)).
Exemption 6	Money Services Businesses Registered with FinCEN	Any money transmitting business registered with FinCEN under 31 U.S.C. 5330, and any money services business registered with FinCEN under 31 CFR 1022.380.
Exemption 7	Brokers or Dealers in Securities	Any broker or dealer (as defined in Section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c) that is registered under Section 15 of the 1934 Act (15 U.S.C. 78o).
Exemption 8	Securities Exchange or Clearing Agency	Any exchange or clearing agency (as defined in Section 3 of the Securities Exchange Act of 1934) that is registered under Sections 6 or 17A of the 1934 Act.
Exemption 9	Other Securities Exchange Act of 1934 Entities	Any other entity not described in the securities reporting issuer, broker/dealer in securities, or securities exchange or clearing agency exemptions that is registered with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.).
Exemption 10	Registered Investment Companies and Registered Investment Advisers	Any entity that is (a) an investment company as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3) or is an investment adviser as defined in Section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2); and (b) registered with the SEC under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or the Investment Advisers Act of 1940 (15 USC 80b-1 et seq.).
Exemption 11	Venture Capital Fund Advisor	Any investment adviser that (a) is described in Section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(l)); and (b) has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the Securities and Exchange Commission.
Exemption 12	Insurance Companies	Any insurance company as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a-2).



Entities Exempt from Corporate Transparency Act (cont.)

Exemption 13	State-Licensed Insurance Producers	Any entity that (a) is an insurance producer that is authorized by a state and subject to supervision by the insurance commissioner or a similar official or agency of a state; and (b) has an operating presence at a physical office within the United States.
Exemption 14	Commodity Exchange Registered Entity	Any entity that is (1) registered under Section 1a of the Commodity Exchange Act (7 U.S.C. 1a), or (2) is a futures commission merchant, introducing broker, swap dealer, major swap participant, commodity pool operator, commodity trading advisor, or retail foreign exchange dealer and is registered with the Commodity Futures Trading Commission under the Commodity Exchange Act.
Exemption 15	Accounting Firms	Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212).
Exemption 16	Public Utilities	Any entity that is a regulated public utility as defined in 26 U.S.C. 7701(a)(33)(A) that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States.
Exemption 17	Financial Market Utility	Entities designated by the Financial Stability Oversight Council ("FSOC") under Section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5463)
Exemption 18	Pooled Investment Vehicle Exemption for Entities that are Operated or Advised by Certain CTA-Exempt Entities	This exemption applies to any pooled investment vehicle that is operated or advised by a person described in the bank exemption, credit union exemption, broker or dealer in securities exemption, investment company or investment adviser exemption, or venture capital fund adviser exemption provided for under the CTA rules. For CTA purposes, a pooled investment vehicle is an entity that is either (1) an investment company (as defined in Section 3(a) of the 1940 Act); or (2) would be an investment company but for the exclusions provided by paragraphs (1) or (7) of 3(c) of the 1940 Act and is identified (or will be identified) by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the SEC.
Exemption 19	Tax-Exempt Entities	<ul style="list-style-type: none"> a. Church, charity or other nonprofit entity described in IRC Section 501(c) and exempt from tax under IRC 501(a), except that if entity ceases to qualify as exempt for tax purposes such entity will continue to be treated b. Political organizations defined in IRC 527(e)(1) that is exempt from tax under IRC 527(a); or c. Charitable Trust or Charitable Split Interest Trust described in IRC 4947 (a)(1) or (2)
Exemption 20	Entity Assisting a Tax-Exempt Entity	Applies to any entity that (1) operates to provide financial assistance/governance rights over an Exemption 19 entity, (2) is a U.S. person under IRC 7701(a)(30), (3) is beneficially owned or controlled exclusively by U.S. person individuals, and (4) derives at least a majority of its funding/revenue from one or more U.S. person individuals.
Exemption 21	Large Operating Company	<ul style="list-style-type: none"> a. Entity must have an operating presence at a physical location in the U.S. - where the legal entity regularly conducts business; must be owned or leased by the legal entity and must be physically distinct from the place of business of any unaffiliated entities (no shared space); however, may be a personal residence b. Entity (and not any affiliates) must have at least 20 full time employees in the U.S.; note, full time = at least 30 hours per week or 130 hours per month c. Must have at least \$5 million in gross receipts or sales (net of returns or allowances) on entity's tax return or consolidated return; so, can include subsidiary's gross receipts to reach qualifying threshold. Gross receipts from sources outside the U.S. are not counted.
Exemption 22	Subsidiaries of Certain Exempt Entities	Exemption here applies to any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more of the above listed entities except for subsidiaries of: Exemption 6 Entities - Money Services Businesses Registered with FinCEN Exemption 18 Entities - Pooled Investment Vehicles Exemption 20 Entities - Entities Assisting a Tax-Exempt Entity Exemption 23 Entities - Inactive Entities
Exemption 23	Inactive Entities	Applies to entities that: (i) predate January 1, 2020, (ii) do not have an active business, (iii) have no foreign ownership, (iv) no recent change of ownership (last 12 months), (v) has not sent or received any funds greater than \$1,000 through any financial account (even account of an affiliate) in last 12 months, and (vi) does not hold any assets (including ownership interests in entities).

Closely Held Business Notable Exemptions

Large Operating Company Exemption

- Contains 3 requirements:
 - Must employ more than 20 full time employees in the US (per entity test that must be met with no aggregation)
 - Must have an operating presence at a physical office in the US
 - Must have filed a US federal income tax return reporting at least \$5M in US source gross receipts (can be consolidated, but must be Line 1 “Gross receipts or sales”)
- A full-time employee is an employee who provides an average of 30 hours of service per week.

The requirement to employ 20 employees raises some important questions for seasonal businesses and those whose employment numbers fluctuate throughout the year.

Bank Exemption

- A regulated private trust company is likely exempt through the incorporation of the definition of a bank in the Investment Company Act of 1940.
- The Investment Company Act of 1940 includes in the definition of a bank, a trust company, a substantial portion of the business of which consists of, exercising fiduciary powers, and which is supervised and examined by state bank regulators.
- Possibly a false victory because the level of disclosure and cost of becoming a regulated private trust company will far exceed the level of disclosure and cost of compliance
- Unclear whether entities owned by the PTC in its fiduciary capacity are exempt under the subsidiary exemption—*some say yes but the better answer is likely NO (one FAQ away from being NO).*

Inactive Exemption

- Applies to entities that:
 - were in existence on January 1, 2020,
 - are not engaged in an active business,
 - are not owned in whole or in part by a foreign person,
 - have not experienced a change of ownership in the past 12 months,
 - have not received funds in an amount greater than \$1,000 in the preceding 12-month period, and
 - do not hold any assets

Tax-Exempt Entity Exemption

- Applies to:
 - a non-profit organization (including charities and private foundations, described in section 501(c) of the Internal Revenue Code);
 - a political organization; or
 - a charitable or split-interest trust described in section 4947 of the Internal Revenue Code



SEC Registered Adviser Exemptions

Investment Company or Investment Adviser Exemption

- Applies to:
 - an investment company as defined in section 3 of the Investment Company Act of 1940, or
 - an investment adviser as defined in section 202 of the Investment Advisers Act of 1940.
- Requires the investment company or the investment adviser to be registered with the SEC.
- Note that many entities in the family office space file with the SEC but claim an exemption from registration in such filing. If that is the case, the better view is that this exemption is likely unavailable.

Venture Capital Fund Adviser Exemption

- Applies to any adviser described in section 203(l) of the Investment Advisers Act of 1940.
- Must have filed Item 10, Schedule A, and Schedule B of Part IA of Form ADV.
- These exemptions are valuable to companies that already meet them.
- Structuring into meeting these requirements is likely a false victory because the information that must be disclosed to the SEC is far greater in scope than the CTA and it is publicly available.
- The subsidiary exemption is not available to subsidiaries of an entity meeting the pooled investment vehicle exemption.

Pooled Investment Vehicle Exemptions

- Must be operated by, among others, an entity qualifying for the investment company or investment adviser exemption or the venture capital fund adviser exemption, and
- Must meet the CTA definition of a “pooled investment vehicle:”
 - an investment company as defined in section 3 of the Investment Company Act of 1940; or
 - any company that:
 - would be an investment company but for the fact it qualifies for the qualified purchaser exemption or the small issuer exemption, and
 - is identified by its legal name by an applicable investment adviser in its Form ADV.



The Subsidiary Exemption

- Applies to entities whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more qualifying exempt entities.
- Control – Control for purposes of the Subsidiary exemption is not defined in the CTA. Based on the preamble, FinCEN believes that the word control in this context is the equivalent of “wholly controlled”
- Control Over “Ownership Interests” – The Subsidiary Exemption looks for control over the ownership interest of the company and not control over the activities or decisions of the company.

Does the subsidiary exemption apply to a company that is 100% owned by a regulated PTC in its capacity as trustee of a family trust (a “fiduciary subsidiary”)?

- Under the right set of facts, we think that there is room for a defensible position that the subsidiary exemption can apply to a fiduciary subsidiary.
- Some relevant questions are:
 - Is it a revocable trust?
 - Is it a directed trust?
 - Does the grantor have a substitution power?

Does the subsidiary exemption apply to a company that is 100% owned pooled investment company?

- No, because the subsidiary exemption is not available to the subsidiaries of a pooled investment company.
- FinCEN explicitly refused to provide extend the subsidiary exemption to pooled investment companies.
- It may be possible to extend the exemption of another exempt entity in the structure with 100% control over the disposition of the pooled investments company’s assets.



Does the Subsidiary Exemption apply to a company that is 100% owned by a regulated PTC in its capacity as trustee of a family trust?

- Currently, a reasonable and defensible position that the subsidiary exemption can apply to a fiduciary subsidiary owned by an exempt regulated PTC in its capacity as full trustee of one or more irrevocable trusts (e.g., not a directed trustee and not a revocable trust).
- If a trust is revocable and/or the exempt regulated PTC was a directed trustee, then the better view is that the subsidiary exemption does not apply because the person with the power to revoke or control investments would control the fiduciary subsidiary via the revocation or investment power (and not the regulated PTC).
- Contrast with the situation where an exempt regulated PTC serves as a full trustee and exercises full control over interests owned by an irrevocable trust. No individual—other than those individuals acting on behalf of and through the exempt regulated PTC—would be exercising any control over the entity's ownership interests in their individual capacity.

Who Gets Reported?

Beneficial Owners (BO)

A BO is any individual directly or indirectly through any contract, arrangement, understanding or relationship exercises

- 1) substantial control over a reporting company (Substantial Control Prong) or
- 2) owns or controls, directly or indirectly, not less than 25% of the reporting company (Ownership or Control Prong)

Neither Substantial Control nor Ownership or Control is defined in the CTA but defined under the regulations. The CTA does not define what constitutes ownership or how to calculate 25%, but this is addressed in the regulations

The depth and breadth of the definition of substantial control cannot be understated. It includes, *“an individual exercises substantial control over a reporting company if the individual...has any...form of substantial control over the reporting company...directly or indirectly...through... any...contract, arrangement, understanding, relationship, or otherwise”*

Company Applicants

These are required to be reported after January 1, 2024, and may be as few as one but are capped at two

It includes the one who physically files the document with the State Corporation Commission and the one who is primarily responsible for directing the filing

None of the company applicants need to be reported for companies formed prior to January 1, 2024



Who Gets Reported?

Beneficial Owners

Substantial Control Prong: Determined directly and indirectly. Financial Crimes Enforcement Network (FinCEN) expects that a reporting company would identify at least one beneficial owner under the substantial control prong

De Facto Authority (Reported): This would include the senior officers (Chief Executive Officer (CEO), Chief Financial Officer (CFO), General Counsel (GC), Chief Operating Officer (COO), although some officers, such as the secretary and treasurer, appear to be exempt)

De Jure Authority (Reported): Individuals with (1) appointment/removal authority of senior officers or dominant majority of BOD of company or (2) control over important matters of the company (e.g., major business decisions – list in regulations)

Catch All Authority (Reported): Any other form of substantial control over reporting company. This definition is very broad and casts a wide net which could lead to over-reporting. More than one person may exercise substantial control

Ownership or Control Prong: Ownership interests defined in regulations. What you would expect (equity like interests and derivatives thereof). Ownership interests are aggregated to determine if threshold met

For trusts, the following individuals are deemed to own/control an interest through a trust:

1. A trustee of the trust or other individual (if any) with the authority to dispose of trust assets;
2. A beneficiary who (a) is the sole permissible recipient of income and principal from the trust, or (b) has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or
3. A grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interest of the reporting company; or through any other contract, arrangement, understanding or relationship



What to Report to FinCEN

The regulations require reporting companies to disclose in their reports filed with FinCEN the following information regarding each of its beneficial owners and company applicants. Regulations also require reporting companies to include certain information about themselves to identify the reporting company in a BOI report.

Beneficial Owners and Applicants	Reporting Company
1. Full legal name	1. Full name of the reporting company
2. Dates of birth	2. Any trade name or "doing business as" name of the reporting company
3. Complete and current address <ul style="list-style-type: none"> • Beneficial Owner: Residential street address that the individual uses for tax residency purposes • Company Applicant: May provide a business street address 	3. Street address of the principal place of business of the reporting company
4. A unique identifying number from an acceptable and unexpired identification document (e.g., a passport or driver's license number)	4. Jurisdiction of formation or registration
5. An image of the acceptable identification document from which the unique identifying number was taken, showing both the unique identifying number and the individual's photograph.	5. Taxpayer identification number (TIN), including an Employer Identification Number (EIN). Foreign entities without a U.S. TIN may report their foreign TIN.

What is not reported:

- No financial information is reported
- No company business information is reported
- Reported information is not available to the public



FinCEN Identifiers – Some More Useful Than Others

Under the CTA, individuals and entities are allowed to obtain unique identifiers, called "FinCEN identifiers" and provide those identifiers in lieu of providing information about themselves. Entity FinCEN Identifiers offer limited utility due to the restricted scope of when they can be used to avoid beneficial owner reporting.

The regulations give further guidance on obtaining and using a FinCEN identifier:

- Beneficial owners and company applicants can apply for a FinCEN identifier by submitting an application containing the information that a reporting company would otherwise be required to provide in its BOI report with respect to such beneficial owners and company applicants.
- Similarly, reporting companies can apply for a FinCEN identifier by submitting an application with or after an initial BOI report with FinCEN.
- Once a FinCEN identifier is obtained, individual and reporting companies may use that number for future FinCEN reports instead of providing the full list of required information in each report.
- The use of FinCEN identifiers could prove very useful given the ongoing obligation on reporting companies to update their BOI filings if/when beneficial owner or applicant information changes.

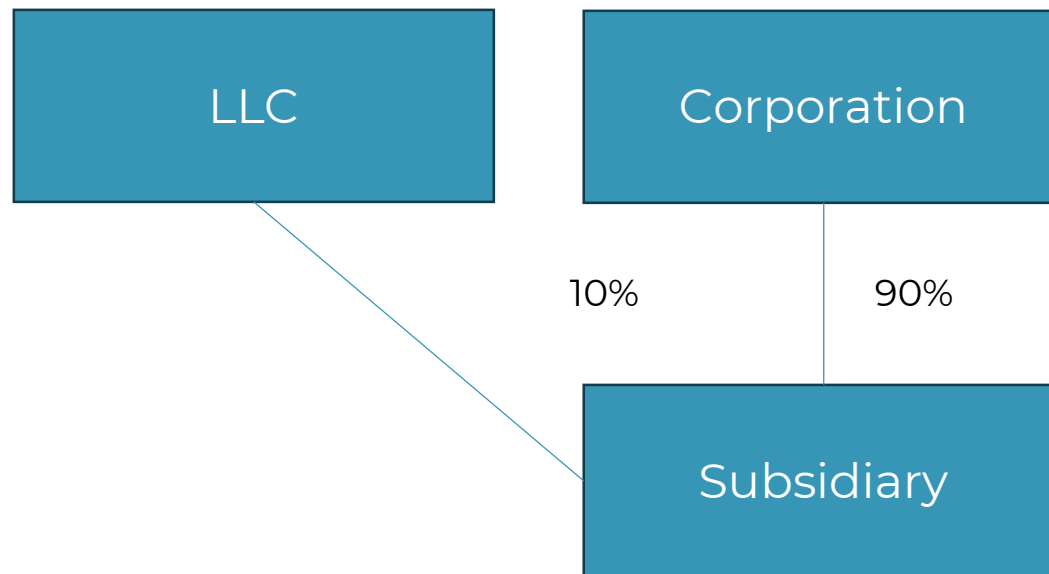
FinCEN Identifiers – Some More Useful Than Others

- The CTA guidance provide for Entity FinCEN Identifier rules that provide a process through which a reporting company may report another reporting company's entity FinCEN identifier and full legal name in lieu of the information on the other entity's beneficial owners. The final Entity FinCEN Identifier rule imposes certain limitations which make the final rule not very helpful/useful in most cases.
- A reporting company may report another entity's FinCEN identifier and full legal name in lieu of certain individual beneficial owners' information with respect to certain beneficial owners of the reporting company only if:
 - 1) The other entity has obtained a FinCEN identifier and provided that FinCEN identifier to the reporting company;
 - 2) An individual is or may be a beneficial owner of the reporting company by virtue of an interest in the reporting company that the individual holds through an ownership interest in the other entity; and
 - 3) The beneficial owners of the other entity (lower level reporting company) and of the reporting company (upper-level company) are the same individuals (both "substantial control" persons and "25% or more ownership/control persons).
- The last requirement is what makes the final clarification/rule most limiting in most cases.
- Keep in mind though that the second requirement for this exception to apply makes the exception very narrow, as all the availability of this exception does is allow the legal name and entity FinCEN Identifier of the immediately upper-tier company to be reported such that the actual owners are the ones that are shielded from additional beneficial owner reporting – but not individuals that control such interests in the lower-level company on behalf of the upper-tier entity.
- As promulgated, this rule is on the same footing as exempt entity owner reporting (see above) that offers similar utility in other cases.

Exempt Entity Reporting Exception – Some Utility, but Also Limited

- Applies when an exempt entity (one that meets one of the 23 exemptions) owns or controls 25% or more of the interests in a reporting company.
- If an exempt entity has a direct or indirect ownership interest in a reporting company, then the reporting company shall, with respect to the exempt entity, only list the name of the exempt entity and shall not be required to report the information with respect to the exempt entity's beneficial owners due to their ownership interests in the exempt entity on the BOI report for the reporting company.
- This exception does not mention control persons. Similar to the entity FinCEN Identifier rules under the CTA, the exempt entity exception provided focuses solely on ownership interests held by exempt entities and does not vitiate the need to consider whether individuals connected to the exempt entity exercise control over the ownership interests in or “substantial control” over the reporting company that the exempt entity holds an ownership interest in.
- FinCEN cut back the utility of this exception to only applying in cases where an individual owns an interest in the reporting company exclusively through their ownership interest (directly or indirectly) in exempt entities.
- In practice, and in working with other clients, if one or more exempt entities has a direct or indirect ownership interest in a reporting company and an individual is a beneficial owner of the reporting company exclusively by virtue of the individual's ownership interest in such exempt entities then they are planning to only list the name(s) of the exempt entities in lieu of the information required with respect to the ultimate beneficial owners. However, the rules require that the individual(s) that control the interests in the reporting company on behalf of the exempt entity owner would also be reportable.
- In other situations, clients have decided that is an identifiable individual that exercises that authority on behalf of an exempt entity owner. This is usually the one individual/person with such power which is usually the President/CEO equivalent for the exempt entity.

Example – Subsidiary Exemption NOT Available, What is Reported?



Assume Corporation meets Large Operating Company Exemption but LLC does not and is a reporting company.

Because exempt entities *do not* own or control all of the ownership interests in Subsidiary, then beneficial owners of Subsidiary are reportable.

With respect to Corporation, as long as its owners do not also own interests in Subsidiary, then just Corporation's name is reported on Subsidiary's BOI report. However, individuals that control Corporation's 90% ownership interest in Subsidiary on Corporation's behalf are reportable on Subsidiary's BOI report as beneficial owners under the "control" prong of the 25% or more control/ownership test.

Who Has Access To BO Information In FinCEN's Database



BO and Company Applicant information will be stored in FinCEN's database, which is **private, not accessible to the public**, and is not subject to automatic exchange of information platforms like the Common Reporting Standard or FATCA

Customer Consent

- Financial institutions must obtain a customer's consent for accessing information from the FinCEN database, and may only use the information to facilitate compliance with customer due diligence requirements

Permitted Disclosures - FinCEN is authorized to disclose BOI to a limited group of requestors including:

- U.S. Federal agencies in furtherance of national security, intelligence, or law enforcement activities
- State, local and Tribal law enforcement agencies with court authorization (for criminal or civil investigations)
- Federal and state regulators with oversight obligations of financial institutions (e.g., FRB, FDIC, SEC, NYDFS)
- Officers and employees of the Department of the Treasury
- Foreign law enforcement agencies and other foreign authorities who submit qualifying requests through a U.S. Federal agency

What Are The Penalties For Failing To Properly File?

Penalties for violating the CTA are as follows:

- Willfully providing or attempting to provide false or fraudulent beneficial ownership information
- Willfully failing to report, complete or update beneficial ownership information
- \$500 per day up to maximum of \$10,000
- Possible imprisonment of up to two years

Under the regulations, it is unlawful for any person to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN; or to willfully fail to report complete or updated beneficial ownership information to FinCEN in accordance with this section

- The regulations clarify that any individual, in addition to the reporting company, will be liable and subject to the civil and criminal penalties

There are no penalties for non-willful violations or negligence pursuant to the rules and published guidance



National Small Business Association (“NSBA”) Case Update

- On March 1, 2024, the U.S. District Court for the Northern District of Alabama ruled that the CTA is unconstitutional because it exceeds the Constitution’s limits on Congress’ power and lacks a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress’ policy goals.
- Unfortunately, the final judgement declaring the act unconstitutional only enjoins the government from enforcing it against the plaintiffs in that case.
- In response, on March 4, 2024, FinCEN issued a release announcing that it will comply with the court’s order for as long as it remains in effect, but (again) only with respect to the plaintiffs in that action which only includes members of the NSBA as of March 1, 2024. It is FinCEN’s position that anyone joining the NSBA after March 1, 2024 will not be exempt from CTA reporting.
- The case has already been appealed, but absent a national, permanent injunction, the enforcement of which is not stayed while the government appeals, everyone else still must comply with the CTA.
- Practitioners are following the case (and others like it) closely.
- Given what we believe to be a high probability of enforceability or reenactment of the CTA in a form that is constitutional, we are recommending that clients assume the CTA will stand and be prepared to report timely.

Practical Considerations (What Others are Doing) And Case Studies

Practical Considerations & Observations

Privacy is affected, but very little information practical information is actually disclosed – no financial information or trade secrets of the business or even the type of business are disclosed

Getting FINCEN identifiers for reportable persons is the best approach long-term

- This is because the burden of updating information when details such as passport numbers or the address of beneficial owners change, reporting responsibility would shift to the individual and the reporting company would not need to update beneficial owner information via updated reports. This would isolate updated reports at the company level to just events where beneficial owners changed.
- The FinCEN Identifier application (and BOIR for that matter) are available at FinCEN's website – www.fincen.gov/boi. The application is straightforward, but please be mindful of the requirements noted previously regarding use of a physical residential address (not a P.O. box or business address).
- FinCEN's FAQs (available at www.fincen.gov/boi-fags) confirm that anyone authorized to act on behalf of an individual may request a FinCEN identifier on the person's behalf. See FAQ M. 7. In the absence of guidance as to what will constitute "authorization" for this purpose, we think an email request to obtain a FinCEN identifier for the individual is likely sufficient for filing purposes. Applicants will need to create a Login.gov account and gather all required information.
- The FinCEN application uses two-factor authentication based on information in the individual's Login.gov profile with a code being sent to the relevant person's cell phone. FO clients have been providing a preferred person's phone number to receive those codes, at least until the application is completed and submitted, to avoid having to trouble individuals to share the code each time they need to login. We've seen other family offices do this, and we've not encountered any guidance prohibiting it yet. You can change the record number back to the person's personal phone number after the FinCEN Identifier application is complete and the FinCEN identifier is assigned.

Practical Considerations & Observations

PTCs may not be reporting companies under the CTA if they are regulated PTCs (as they could qualify under the bank exemption)

- It remains to be fully developed/addressed definitively whether such status could then be used to exempt legally owned companies that would otherwise be reportable under the subsidiary exception due to such entities being “controlled” by an exempt company. I do think there is a reasonable argument in some circumstances where a regulated PTC exercises full trustee control over irrevocable, non-directed trusts (as noted previously).

Identifying beneficial owners of trusts with respect to reporting companies is more complex as noted previously.

There are only willful penalties for CTA-related violations – accordingly, what is important is to come to reasonable reporting positions based on the rules and guidance available

What Other Family Office Clients Are Doing

Getting FinCEN Identifiers for identified company applicants (for 2024 formed entities) and beneficial owners, filing 2024 formed entity BOIR reports, and planning to file pre-2024 formed/registered entities reports by January 1, 2025.

Auditing and reviewing structures to identify compliance obligations and recommend changes

- Adjustments may include terminating unnecessary entities, restructuring entities and/or restructuring controlling person roles to tailor to CTA reporting (along with FinCEN identifier planning), 11/16/2023 FAQ guidance is helpful with respect to initial reports and not having to report historical beneficial ownership changes/information as long as made prior to filing initial BOIR report

Creating CTA-related tools (e.g., checklists, process flow charts, etc.)

Strategize on reporting and substantiating reasonable and defensible reporting positions/frameworks

Being more vigilant and purposeful with entity creation/use

- Entities other than common law trusts, general partnerships and other entities not created by filing/registration with a state will need to decide whether they would prefer to be regulated (therefore qualifying to be exempt from the CTA) or comply with CTA reporting/compliance



What Are Other Clients Asking

Question 1: If I have a company that existed as a reporting company on January 1, 2024, but that company either liquidates or becomes an exempt company in 2024 before the company's initial report is due do I still need to file a BOIR? If so, what do I do?

Answer: If the entity that is a reporting company exists on January 1, 2024 then its existence on that date (even if it dissolves or becomes exempt later in 2024 before January 1, 2025) should not eliminate its requirement to file an initial BOI report based on the CTA rules and guidance issued to date.

The FAQ guidance FinCEN has issued to date (available at www.fincen.gov/boi-fags) provides support for the position that changes in beneficial ownership prior to when the initial BOI report is filed can be done and “historical beneficial owners” do not need to be included in the initial BOI report that eventually gets filed by the reporting company. FinCEN has not addressed the timing of reports for existing reporting companies on January 1, 2024 that either dissolve or become exempt in 2024 before their initial report is filed directly in any of its guidance with respect to an entity. Nothing has said that an entity that would be reportable on January 1, 2024 that dissolves in or becomes exempt sometime in 2024 can take the position they did not exist or were exempt the entire relevant period up to and including the initial reporting date.

A reporting company that dissolves in 2024 should have an initial filing obligation for the period it was a reporting company and have to file an initial BOI report. For reporting companies that existed on January 1, 2024 that become exempt in 2024, those companies likely will need to file an initial report too and then file an exempt company qualification updated report immediately thereafter based on the rules in place now. These outcomes seem to be the intent of the rules, as the trigger for initial BOI report status is existence and reporting company status as of (or after) January 1, 2024.



What Are Other Clients Asking

Question 2: Is “shelf entity” planning dead or, if not, how has it changed?

Answer: Shelf entity planning no longer offers a lot of utility unless you can place those “shelf entities” under an exempt entity (e.g., large operating company exempt entity). Placing any shelf entities under an entity you know is “exempt” facilitates using the subsidiary exemption (assuming the exempt entity qualifies for its subsidiaries to be exempt (e.g., the large operating company exemption)) such that the shelf entity should be exempt from CTA reporting unless/until it is placed into use as a reporting company.

What Are Other Clients Asking

Question 3: Alright Danny, what should I be doing now if I know I have at least one reporting company? What steps should I be taking?

Answer: The sequence you should take once you know you have a reporting company requiring CTA reporting is to identify your beneficial owners (“BOs”) and company applicants (“CAs”) (to the extent applicable) and make sure that those BOs get FinCEN IDs. This is because of the one year period that pre-January 1, 2024 existing entities that are reporting companies for CTA purposes have to file their initial reports and 90 day period reporting companies formed or registered in 2024 will have to file their initial BOIR reports. So long as FinCEN identifiers are obtained for individuals before the initial reports are filed, then the entities are allowed to just enter the FinCEN identifiers of such individuals in the entity’s reports in lieu of the information required under the CTA rules with respect to such individual. This means that, if a FinCEN identifier is obtained for the persons identified as being reportable before the initial reporting company BOIR report is completed then all that would be reported to FinCEN with respect to the reporting company’s initial BOIR report would be the reportable persons’ FinCEN Identifiers. This likely will provide an effective way to try and maintain privacy (to the best extent possible) but also comply with the rules and avoid violations/penalties (which should only occur for willful violations).

What Are Other Clients Asking

Question 4: Fine Danny, but what if one of the people I have to report won't give me their information? What then? What can I tell them to motivate them to give me what I need so I don't get in trouble?

Answer: FinCEN clarified that reporting companies and individuals (e.g., the BOIR filer, Senior Officer of a company, individual) can be liable for willful CTA violations. They also specifically call out that a beneficial owner or company applicant can be held liable for refusing to provide required information to a reporting company and that an enforcement action can be brought against an individual who willfully causes a reporting company's failure to submit complete or updated beneficial ownership information to FinCEN. This would include a beneficial owner or company applicant who willfully fails to provide required information to a reporting company.

What Are Other Clients Asking

Question 5: Any other useful tips you can provide?

Answer: Sure.

For the “privacy centric” client that has accepted the FinCEN Identifier approach: Clients concerned about their privacy are doing a couple other things to manage their exposure. First, those caught as beneficial owners are getting FinCEN Identifiers to prevent disclosure of their personal information on every single BOIR filed for entities where they are a beneficial owner. The payoff for reporting their personal information to get the FinCEN Identifier one time (and updating that information in the application as needed) allows them to just provide their FinCEN identifier that is the only item reported on the BOIR in Part III with respect to them (not even their name).

The personal information that is reported (either on a BOIR report or via the FinCEN Identifier application) is: (1) Full Legal Name; (2) Date of Birth; (3) “A” Residential Address (Cannot be a P.O. Box or business address); (4) Unique Identifying Number from Identifying Document (U.S. ID/driver’s license/passport, or, if none of those, a foreign passport); (5) Image of the Identifying Document (Yes, this means their ID/driver’s license/passport is attached to each BOIR filed).

To address the requirements in (3)-(5) above, privacy-oriented clients are providing copies of their U.S. passport and copy of that document (as it has no address listed on it like a U.S. ID does or a driver’s license does). They are then choosing “a” preferred residential address.

The CTA rules only require “a” residential address to be provided and most clients are choosing the one that appears on their driver’s license or ID to the extent that is the document submitted to FinCEN pursuant to what is required to be filed with respect to “beneficial owners.” Other clients are choosing “a” current “residential address” that they are comfortable with listing. This cannot be a business address or P.O. box or an address of a property that is not available for use as a residence for the client, but can be any acceptable residence type of address that is available to them for their use (e.g., vacation or second home). Also, the address does not need to be in the United States.



Case Studies

Randy and his family



Case Studies – Randy Family Office, Inc.

Case Study

- Randy set up a family office to help administer his investments and his real estate portfolio. Randy owns 51% of the stock of Randy Family Office, Inc., and his 5 children own the remaining 49% in equal shares.
- Randy made himself the President and CEO. He hired Andy, his favorite investment advisor, as CIO, but since Randy was more interested in golf these days, “Andy would be running the show.” He poached Lindy, his favorite lawyer, to serve as his general counsel. Finally, he brought Tandy, his favorite banker, as CFO.

Who are the beneficial owners?

- Under the ownership prong, the only beneficial owner is Randy. His children own less than 25%, and there is no family attribution under CTA.
- Under the substantial control prong, Randy, Lindy and Tandy are caught because their titles are listed as senior officers per se in the CTA regulations. Andy, as CIO, is not deemed to have substantial control per se, but he is “running the show,” so he likely performs the functions of a CEO which means that he is deemed to have substantial control.

Is Randy reported as an owner or as a person with substantial control?

- Trick question! Under the form beneficial ownership report published by FinCEN, the category of beneficial owner is not reported so Randy is reported once with no indication of the basis for reporting him.

Case Study – Randy Family, LLC

Randy’s Family Estate

- Randy dies and leaves significant wealth to his 5 children held in 5 separate trusts (one for each of his children and his/her descendants)
- Each trust owns a 20% interest in a Delaware family investment vehicle (**Randy Family, LLC**)
- The trustee of the trusts is a corporate administrative trustee in Delaware
- **Sandy** is the smartest of the siblings and is selected as investment adviser of all 5 trusts.
- Sandy is also the manager of the LLC, but delegates all activities to the CEO, **Mandy**

Who are the beneficial owners?



Possible Beneficial Owners (BOs)

The siblings are unlikely to be treated as BOs of the LLC because none of their trusts owns or controls 25% of the ownership interests

- Moreover, neither is the grantor, a trustee, a sole beneficiary or has a right of withdrawal with respect to his or her trust, so they do not meet any of the specific examples in the CTA of beneficial ownership through trusts

Sandy likely controls a 100% ownership interest in Randy Family LLC under the Ownership or Control prong because she presumably is an individual with the authority to dispose of the assets of the trusts (as investment adviser) and could direct the trustee to sell 100% of the interests in the LLC (*i.e.*, control over more than 25%)

- Sandy is separately also a beneficial owner under the Substantial Control prong because she has substantial control over the LLC in her capacity as the manager—which is the case even though she delegated all authority to the CEO

Mandy is a BO of the LLC because she has “substantial control” as a senior officer of the LLC (CEO) pursuant to the Substantial Control prong

Case Study – Randy Family LLC (Continued)

Real life scenarios that may require updated reporting to FinCEN

<p>1 Sandy throws her hands up in the air and resigns as investment adviser of the trust and Manager of the LLC</p>	<p>Is Sandy still a beneficial owner of Randy Family LLC?</p>	<ul style="list-style-type: none">• She no longer has control of the ownership interest through the trusts because she is no longer the investment adviser with power to dispose of trust assets.• She no longer has substantial control because she does not have the power to remove and replace senior officers since she resigned as Manager of the LLC
<p>2 What if Sandy has the power to remove and replace the trustee?</p>	<p>Does this make Sandy beneficial owner of Randy Family LLC?</p>	<ul style="list-style-type: none">• There is no indication that the CTA rules would attribute the power of the trustee to Sandy absent more – BUT see next answer below
<p>3 What if the trustee was a pushover that did anything Sandy says?</p>	<p>Does this make Sandy beneficial owner of Randy Family LLC?</p>	<ul style="list-style-type: none">• An individual exercises substantial control over a reporting company if the individual has any other form of substantial control over the reporting company directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise”

Case Study – Randy Family LLC (Continued)

Real life scenarios that may require updated reporting to FinCEN

<p>4 What if Randy Jr., the prodigal son, is redeemed from the structure?</p>	<p>Are the remaining children now beneficial owners of Randy Family LLC?</p>	<ul style="list-style-type: none">• Each of the trusts now owns or controls a 25% interest, but the remaining siblings are still not treated as BOs of the LLC because neither is the grantor, trustee, sole beneficiary or has a right of withdrawal.
<p>5 What if Sandy comes back as investment advisor and manager now that Randy Jr. is out?</p>	<p>Does the report for Randy Family LLC need to be updated?</p>	<ul style="list-style-type: none">• No update should be required because Sandy was already reported as a beneficial owner under the ownership prong and based on the draft report, the basis for reporting does not need to be included.
<p>6 What if Randy Family LLC becomes a large operating company?</p>	<p>Does Randy Family LLC just forget about CTA forever?</p>	<ul style="list-style-type: none">• Randy Family LLC would have 30 days to file a “final” report informing FinCEN that it has now qualified for the large operating company exemption. Note that although a reporting company that qualifies for an exemption must report, an entity that qualified for an exemption from inception does not need to file any reports.

Case Study – Randy Family LLC (Continued)

Real life scenarios that may require updated reporting to FinCEN

<p>7 The four beneficial owners admit one new 4% owner to bring their ownership to 24%</p>	<p>Are the four children still beneficial owners of Randy Family LLC?</p>	<ul style="list-style-type: none">The CTA is not subject to “economic substance” rules or other equitable doctrines, moreover the penalty standard requires willfulness. As a result, this likely works and the four children would no longer be beneficial owners.
<p>8 What if the four children were locked into a side pocket without the ability to admit the new member into the side pocket?</p>	<p>Are the four children still beneficial owners of Randy Family LLC?</p>	<ul style="list-style-type: none">The side pocket is not a separate reporting company, so it should not impact the analysis at the reporting company level beyond factoring into the determination of overall ownership percentages—i.e., each sibling may own a sliver more than 24%

Questions?



Upcoming Events

**FOX
Rising Gen
Leadership
Program**

April 12-13, 2024
Denver, CO

**FOX Premier
Technology and
Risk Management
Days**

April 17-18, 2024
Virtual

**FOX
Family Advisor
Training
Program**

In-person
May 15-16, 2024, Chicago, IL
Virtual modules
April 24, May 8, and June 26

**FOX
Global
Investment
Forum**

May 7-8, 2024
Miami, FL
and Virtual

Please visit our website for more information familyoffice.com/learning-programs

Thank You



Family Office Exchange