Steve Leimberg's Business Entities Email Newsletter - Archive Message #280

Date: 23-Oct-23

From: Steve Leimberg's Business Entities Newsletter

Subject: Abigail O'Connor, Martin M. Shenkman and Jonathan G. Blattmachr on the Corporate Transparency Act: Implications to Estate Planning

In Business Entities Newsletter #273, **Abigail O'Connor**, **Martin M. Shenkman** and **Jonathan G. Blattmachr** provided members with a guide to the basics of the Corporate Transparency Act, as well as some ideas for how to help clients. Now, they return with a comprehensive, 26-page guide to the CTA that includes practical considerations for advisors addressing CTA filings, documentation/communication considerations for advisors as well as a sample client letter. Members should click this link to access their commentary: O'Connor/Shenkman/Blattmachr

Abigail O'Connor is an attorney in Anchorage, Alaska, who concentrates on trusts and estates. She is a Fellow of the American College of Trust and Estate Counsel, the Vice President of the Alaska Trust and Estates Professionals, a member of the Board of the Anchorage Estate Planning Council, and a member of the Executive Committee of the Estate Planning and Probate Law Section of the Alaska Bar Association. She is licensed in Alaska and Florida.

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in New York City who concentrates on estate planning. He is the author of 42 books and more than 1,200 articles. He is a member of the NAEPC Board of Directors (Emeritus), served on the Board of the American Brain Foundation, the American Cancer Society's National Professional Advisor Network, Weill Cornell Medicine Professional Advisory Council, and is active in other charitable organizations.

Jonathan G. Blattmachr is author or co-author of several books and many articles. He is a director at **Pioneer Wealth Partners LLC**, director of estate planning for the **Peak Trust Company** and co-developer with Michael L. Graham, Esq., of Dallas, Texas of **Wealth Transfer Planning.** He is co-author with Georgiana J. Slade, Esq., and Diana S.C. Zeydel. Esq., of Bloomberg Tax Management Portfolio 836-3rd (Partial Interests--GRATs, GRUTs, and QPRTs (Section 2702)).

Contents

1. Introduction.

a. The Corporate Transparency Act ("CTA")[1] is a new federal law that will impact the owners, principles and other control persons involved in almost all limited liability companies (LLCs), corporations (both C and S corporations), limited partnerships (LPs), and other closely held entities, as well as those who form those companies. Congress enacted the CTA in 2021 as part of the National Defense Authorization Act for Fiscal Year 2021. The principal purpose of the CTA is to strip U.S. shell companies of anonymity that can hide illicit financial activity and for use in financing terrorist activities. But the reach will be very broad and will impact millions of legitimate small businesses. This is accomplished by requiring "reporting companies" to file information with the Federal government about those who control or own interests in them. There are exceptions to these filing requirements that are discussed below; generally, those exceptions apply to very large or already-regulated industries. Most of the entities created by individuals as

part of an investment plan (e.g., a holding company for securities or owning rental real estate or almost any type of a small business,), an estate plan (e.g., an LLC designed to hold various investments to facilitate trust funding or administration), or asset protection planning (any entity created to insulate the assets it holds, or to insulate those who own the entity for claims arising from the assets the entity holds) likely will be subjected to the new reporting rules. Unlike most laws which are aimed at larger entities, the CTA is aimed at smaller ones: those with fewer than 20 fulltime employees or whose gross receipts for the prior year do not exceed $5 million.

b. The US Treasury's Financial Crimes Enforcement Net (known as FinCEN and which is charged with enforcing the law), estimates that 32 million existing entities may face filing obligations. That will be increased by all new entities formed in the future. Thus, the CTA will impact a wide swath of Americans and their advisers as all try to grapple with this broad new requirement. FinCEN will be in charge of creating and maintaining the database, which as of now will not be public record but it will be available to a variety of governmental agencies, and possibly others in the future.
c. Existing entities (those in existence prior to January 1, 2024) will have until January 1, 2025 to comply. But as discussed in more detail below, entities and owners/control persons should begin planning for the filings now. New entities formed after January 1, 2024 will have 30 days to file their initial reports. FinCEN has proposed to extend the initial filing deadline for beneficial ownership reports from 30 to 90 days for entities created or registered on or after Jan. 1, 2024, and before Jan. 1, 2025, from formation to file.[2] As of the writing of this article, that extension has not been granted and companies should for now plan on the 30-day requirement. While lawsuits have been filed challenging these new requirements, considering that similar requirements apply in many other countries, it may be unlikely for the challenges to succeed. But in any event, given the proximity of the filing requirements, the challenges of 32 million entities complying with a new and complex law, everyone who might be impacted should begin planning now for how they will comply.
d. Considering the severe penalties for non-compliance, anyone who may even possibly be effected should proactively address the requirements. These are discussed below.
e. Most, if not all, small businesses will be subject to the new rules (other than proprietorships and general partnerships), including "business" entities that are formed as part of what most practitioners consider regular, everyday estate planning. The couple who purchases a weekend home but uses an LLC to insulate themselves from liability for anything occurring on the property, will be subject to these rules. The group of siblings, who inherit a family cabin together and create an LLC to govern coownership more easily, will be subject to the new rules. Although there are exemptions to the rules, there are no exemptions for small entities such as these. It matters not if the entity has no (or virtually no) receipts, if

the entity holds assets. Indeed, while there is an exemption for very large entities, there is no exemption for very small entities, even if there is no gross income, as long as there are assets held by the entity.

f. There are significant civil and criminal penalties for failing to comply, so all entities, entity owners, managers and those controlling these entities, need to be aware of these developments. Importantly, the reporting requirement is not a one-time event. There is an initial reporting requirement and then ongoing reporting requirements if there is a change, e.g., a control person moves to a new home address, or perhaps a new manager is named for an LLC and that might have to be reported as a change in control persons. These rules will impact many who have implemented estate planning or asset protection planning. The clients of most estate planning practitioners are likely to be affected.

g. A critical issue will be who will handle the filing. Corporate filing services that assist in the formation of entities and serve as registered agents may try to expand to meet the new CTA filings as yet another service they offer. CPAs may try to assist in the CTA reporting but may not have the information or expertise for all aspects of this. Wealth advisory firms might even endeavor to expand the scope of services they offer. However, attorneys will have the most relevant expertise and in addition to handling the filings may also be able to identify other legal matters that need to be tended to (e.g., an update of the entity governing documents, identifying "beneficial owners" of trusts that hold interests in LLCs).

h. As an example the complexity and challenges that will face potential filers involved with estate planning the guidance issued to date is not clear or particularly instructive as to complex trust planning. The guidance provided: "*Note for trusts: The following individuals may hold ownership interests in a reporting company through a trust or similar arrangements: A trustee or other individual with the authority to dispose of trust assets; A beneficiary who is the sole permissible recipient of trust income and principal or who has the right to demand a distribution of or withdraw substantially all of the trust assets; A grantor or settlor who has the right to revoke or otherwise withdraw trust assets*." Given the tremendous variation it fiduciary and non-fiduciary positions, variations in state laws that govern trusts, trustees, powerholders, etc. there will be significant uncertainty over filing requirements and who will have responsibility. Beginning the analysis of each trust and its position and rights will be a daunting task that should begin now. Note that while trusts themselves are not among the entities directly covered by the new CTA, a trust which owns or controls an entity that is covered will have reporting requirements.

2. Corporate Transparency Act**.**

a. The purpose of the CTA is to create a national database of companies in the U.S. that identifies the human beings behind the companies (both owners and those in control of the entities). The law is part of an increasing effort to combat money-laundering, terrorism, tax evasion and other financial crimes. Congress intended to try to help law enforcement by creating this national database that would allow law

enforcement to sift through so-called "shell companies" that are used for nefarious purposes. These rules are very different from any reporting that people have faced previously (e.g., annual reports to states where formed and income tax returns). Because the reporting requirements are quite different from income tax returns, clients' CPAs may not be able to, or perhaps may not be willing to, handle these filings.

b. These rules and reports will be uncomfortable as well as burdensome. Those required to report may have to disclose their names and home addresses to comply with the rules, even if they do not actually own an interest in a company. This could apply, for example, to someone who has control over certain financial aspects of a reporting entity, but owns no interests, and will have to make detailed personal disclosures. Many will find these disclosures invasive and a further erosion of whatever limited privacy they believed they still have.

3. Resources and Status.
   a. FinCEN published a Small Entity Compliance Guide to assist the small business community in complying with the beneficial ownership information ("BOI") reporting rule required by the CTA. Starting in 2024, many entities created in, or registered to do business in, the United States will be required to report to FinCEN information about their beneficial owners. These are the individuals who ultimately own or control a company. Revised and new FAQs about the BOI reporting requirements that incorporate content from the Guide. Additional guidance will be issued, including reporting forms.
   b. BOI reports must be filed electronically using FinCEN's secure filing system.
   c. A key point for everyone to consider that this is all new and likely new guidance will be issued as this all unfolds.
      i. News Release: https://www.fincen.gov/news/news-releases/fincen-issues-compliance-guide-help-small-businesses-report-beneficial-ownership
      ii. Small Entity Compliance Guide:
      iii. https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide_FINAL_Sept_508C.pdf
      iv. FAQs: https://www.fincen.gov/boi-faqs
      v. FinCEN's BOI Web page : https://www.fincen.gov/boi
   d. The Reporting Rule2 issued on September 30, 2022, implements Section 6403 of the Corporate Transparency Act. The rule describes who must file BOI reports, what information they must provide, and when they must file the reports.
   e. The Reporting Rule is found at 1010.380 in title 31 of the Code of Federal Regulations (CFR). An electronic version is also available through FinCEN's website.
4. What Companies Are Subject to the Reporting Requirements**.**
   a. The CTA requires that "reporting companies" file certain "beneficial owner reports." Any entity that is created *by filing paperwork* with a Secretary of State (or an American tribal jurisdiction) is a "reporting company" unless the company meets one of the limited exceptions to avoid reporting. Common examples of

reporting entities are LLCs, which are formed by filing articles of organization with a state, or corporations, which are formed by filing articles of incorporation with a state. These would include, for example, an LLC that holds rental real estate as part of an estate plan or asset protection plan; a professional corporation that holds a dental, medical, legal, or other professional practice; and a corporation that holds the family business (unless it meets the large company exception).

b. Exceptions include charities, large companies (20 or more full time employees and $5 million or more in revenues), and certain types of other entities that already are subject to significant government regulation (e.g., banks). The full list of exceptions of entities that are not subject to CTA reporting is as follows:
    i. Securities reporting issuer
    ii. Governmental authority
    iii. Bank
    iv. Credit union
    v. Depository institution holding company
    vi. Money services business
    vii. Broker or dealer in securities
    viii. Securities exchange or clearing agency
    ix. Other Exchange Act registered entity
    x. Investment company or investment adviser
    xi. Venture capital fund adviser
    xii. Insurance company
    xiii. State-licensed insurance producer
    xiv. Commodity Exchange Act registered entity
    xv. Accounting firm
    xvi. Public utility
    xvii. Financial market utility
    xviii. Pooled investment vehicle
    xix. Tax-exempt entity
    xx. Entity assisting a tax-exempt entity
    xxi. Large operating company
    xxii. Subsidiary of certain exempt entities
    xxiii. Inactive entity
c. The Small Entity Compliance Guide ("Guide") provides details on each of the above exemptions. From a practical perspective the above exemptions will not exempt from reporting most of the entities that are involved in estate planning.
d. The inactive entity exception may be important to understand. The Guide provides this exemption if:
    i. The entity was in existence on or before January 1, 2020.
    ii. The entity is not engaged in active business.
    iii. The entity is not owned by a foreign person, whether directly or indirectly, wholly or partially. "Foreign person" means a person who is not a United States person. A United States person is defined in section 7701(a)(30) of

the Internal Revenue Code of 1986 ("Code") as a citizen or resident of the United States, domestic partnership and corporation, and other estates and trusts.

iv. The entity has not experienced any change in ownership in the preceding twelve-month period.

v. The entity has not sent or received any funds in an amount greater than $1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve-month period.

vi. The entity does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.

e. The inactive entity exception is quite limited. A passive holding company will not qualify for exclusion. An entity that holds assets but which was dissolved under state law for failure to meet state law filing, tax or other requirements would also not appear to qualify.

5. Company Reporting: What Will Have to Be Reported**.**

a. Reporting companies will have to file reports that consist of information regarding the company and any individual who is a "beneficial owner."

b. The information that will have to be included in company reports includes:

i. Legal name and any trade names such as DBAs (doing business as).

ii. Street address for company's principal place of business (not a P.O. box or lawyer or other adviser's address).

iii. State of formation.

iv. Tax Identification Number (TIN). A passthrough entity, like single member LLC that doesn't have a tax identification number, may have to obtain and provide a unique identifying number.

v. An identifying document from an issuing jurisdiction (e.g., a certificate of incorporation) and the image of that document. Note that FinCEN will issue unique identifying numbers (and some entities, such as single member LLCs will not want a separate TIN as they want to report just using the owner's tax identification number).

6. Beneficial Owner Reporting: What Will Have to Be Reported**.**

a. The CTA provides that reporting companies will also have to file reports for "beneficial owners."[3] This is a term defined by the CTA that has broad, as and of yet, uncertain reach.

b. The information to be reported for each beneficial owner will consist of:

i. Full legal name. This requires the "full legal name" not initials.

ii. Date of birth.

iii. Home (street) address (not a P.O. box or lawyer or other adviser's address).

iv. PDF (photocopy) of the individual's U.S. passport or state driver's license.

c. Advisers should understand that the above information for many entities will be more personal and invasive then the information that people have ever disclosed

and many will be quite uncomfortable with these requirements. For those used to sending all entity information c/o their attorney, wealth adviser or business consultant, to avoid personal disclosures the initial response may be to again disclose in that manner which will not suffice for the CTA.

d. There is an alternative approach that may lessen the information a reporting entity must disclose. A beneficial owner may obtain a special identification number and that number alone may be disclosed instead of disclosing all the information otherwise required. The FinCEN identifier is a unique identifying number that FinCEN will issue to an individual or reporting company upon request after the individual or reporting company provides certain information to FinCEN.
e. Individuals may electronically apply for FinCEN identifiers. In the application, an individual must provide their name, date of birth, address, unique identifying number and issuing jurisdiction from an acceptable identification document (e.g., a driver's license), and an image of the identification document. These are the same items of personal information and image reporting companies submit for beneficial owners.
f. Once a beneficial owner or company applicant has obtained a FinCEN identifier, reporting companies may report it in place of the otherwise required four pieces of personal information about the individual in BOI reports. The advantage of this appears to be that the individual is then responsible for keeping their personal information current with FinCen so that the reporting entity should not have an obligation, for example, to report a correction, e.g., updated information? of filed information. If the beneficial owner's home address changes, the reporting entity would have to identify that change and report it within a required time frame. If instead, that beneficial owner gave the reporting entity a FinCen identifier number the beneficial owner might be responsible instead. If this is correct way to handle such a change, then it may be advisable for all reporting entities to require that every beneficial owner obtain a FinCen identifier number.
g. FinCEN has indicated that it will publish reporting forms that can be used to comply with the obligations under these reporting rules.

7. When Reports Must be Filed**.**
   a. For entities created on or after January 1, 2024, the initial reports are due within 30 days from the creation of the entity, but as noted above FinCen has proposed extending this to 90-days. That provides little time for practitioners to respond. Likely, attorneys creating entities will have to add the documentation to the templates they use for entity creation so that the filings are prepared as part of the process of forming the entity given the tight deadline. Practitioners are advised to begin the process of form revision now to be prepared for that eventuality. Because the reporting time for entities formed before 2024 do not have to report until January 1, 2025, it may be appropriate to form companies this year to defer reporting until after January 1, 2025.
   b. Every reporting company must file an initial report. For entities that already exist on January 1, 2024 , their initial reports are due by January 1, 2025. While that

seems quite far off from today, the efforts that may be required for people to compile the relevant information in some cases will be significant, and practitioners may well want to begin the process now of creating documentation for communicating the necessary steps to clients now, so that they can inform people of the need for filings and the steps involved well in advance of that date.

c. Reporting companies must also report changes to any filing within 30 days of any change. A change with respect to required information will be deemed to occur when the name, date of birth, address, or unique identifying number on such document changes. This is a very burdensome and easy to miss requirement. If someone with ownership or control (see discussions below) moves to a new residence, or changes their name (e.g., gets married and takes on a new name), that change will have to be reported quickly. Business owners and others, as well as advisers assuming responsibility for reporting, may have to ensure that all of those people know to inform them of such changes so that they can assure that the required filings are made on time.

d. As of now, there are no extensions to any due dates.

8. Who Reports**.**

a. The reporting company (not the beneficial owners) is required to file the reports. The actual owners are not the ones required to file anything. This part of the rule places significant burdens on companies to keep track of all of the required information for anyone who constitutes a beneficial owner. At the moment, there does not appear to be any "good faith" defense to failing to provide updated information; so the burden is on the company to keep track of all of its beneficial owners.

b. For that reason, if a person is involved in an entity that will be a reporting company, people should start thinking now about how they will gather and track all required information.

c. A reporting company can have multiple beneficial owners. For example, a reporting company could have one beneficial owner who exercises substantial control over the reporting company, and a few other beneficial owners who do not own or control at least 25 percent of the ownership interests of the reporting company. A reporting company could have one beneficial owner who both exercises substantial control and owns or controls at least 25 percent of the ownership interests of the reporting company. There is no maximum number of beneficial owners who must be reported.

9. Entities and People That May Be Subject to Reporting.

a. This new law will affect virtually all small family businesses, including LLCs and other entities designed only to hold real estate. Even if an entity has only one owner and is ignored for federal income tax purposes (like a single-member LLC), it will still have to file reports with FinCEN, unless it falls into one of the 23 exempt entities.

b. Specifically, any person may be affected if he or she has an ownership interest or control position.

c. Ownership is not as simple or obvious as it may sound. If the individual owns, directly or indirectly, at least 25% of an entity that will be a reporting company, that person's interest must be reported. But ownership is broader. "Ownership" is not limited to obvious ownership (e.g., the person owns membership interests in an LLC). It is broadly defined to include any type of equity interests. This could include a profits interests, convertible instruments, warrants, options, puts, calls, and other entity interests. For example, an instrument that is labelled as debt may be viewed as equity under this rule if it is or may be converted to such in certain events. Ownership interests can be owned or controlled through joint ownership, through a trust arrangement, or other indirect arrangements and may be subject to these rules. Determining who has an ownership interest may require the review of not only governing documents for an entity but ancillary documents and agreements as well.
d. The concept of a "beneficial owner" who will have to be disclosed in a report is complicated. In broad terms, a beneficial owner is anyone who owns at least 25% of the company, as noted above.
e. The Guide lists the following questions to provide guidance:
    i. Does your company issue equity, stock, or any similar instruments that confer voting power?
    ii. Does your company issue any pre-organization certificates or subscriptions?
    iii. Does your company issue any transferable shares of, or voting trust certificates or certificates of deposit for:
        1. an equity security,
        2. interest in a joint venture, or
        3. certificate of interest in a business trust?
    iv. Do individuals hold capital or profit interests in your company (sometimes referred to as "units")?
    v. Does your company issue any instruments convertible into any share, equity, stock, voting rights, or capital or profit interest? Note: It does not matter whether anything must be paid to exercise the conversion. It is not clear whether a discretionary versus mandatory conversion would have any impact on the filing requirements.
    vi. Does your company issue any convertible instrument?
    vii. Does your company issue any warrant or right to purchase, sell or subscribe to a share or interest in equity, stock, or voting rights, or capital or profit interests? Note: It does not matter if such warrant or right is a debt.
    viii. Does your company issue any non-binding put, call, straddle, or other option or privilege of buying or selling equity, stock, or voting rights, capital or profit interest, or convertible instruments? Note: Options or privileges created by others without the knowledge or involvement of your company do not apply.

ix. Does your company have any other instrument, contract, arrangement, understanding, relationship, or mechanism to establish ownership?

f. But there is a second prong to the definition that reaches any person who has "substantial control" over the company.
   i. A manager or officer of any entity that is a reporting company.
   ii. The director of an entity that will be or is a reporting company.
   iii. All officers are beneficial owners by default, even those who own no equity in the entity. But these leaves many open issues. For example, is the CFO of an entity a control person? Will that depend on what an employment agreement provides? What if there is no formal written agreement? What about the head of a family office that manages family entities even though he or she is not a manager of an LLC or officer/director of a family corporation?
   iv. A beneficial owner will also include an individual with authority over the appointment or removal of any senior officer or the majority of a corporation's board of directors. A similar group would be included.
   v. A person will be considered to have substantial control if he or she has authority for direction, determination, or decision of, or substantial influence over, important matters of a reporting company. This, of course, raises the question of what important matters for a company are.

g. The Guide provides the following questions to help identify those who may be subject to reporting on behalf of an entity:
   i. Does your company have a president, chief financial officer, general counsel, chief executive officer, or chief operating officer?
   ii. Does your company have any other officers that perform functions similar to those of a President, chief financial officer, general counsel, chief executive officer, or chief operating officer? Note: One individual may perform one or more functions for a company, or a company may not have an individual who performs any of these functions.
   iii. Does your company have a board of directors or similar body AND does any individual have the ability to appoint or remove a majority of that board or body?
   iv. Does any individual have the ability to appoint or remove a senior officer of your company?
      1. Note that in the context of trusts an investment director may hold the power to control decisions as to an entity interests held in a trust. That investment director (who may be labeled and investment trustee or investment advisor) would likely seem to be required to report.
      2. Separately, if the entity is a corporation, some tax advisers carve out the ability to vote stock to avoid an estate inclusion issue. See Section 2036(b) of the Code. The right to vote such stock may be

deliberately granted to another named person. That person would seem to be covered and hence be a reporting person.

v. Does any individual direct, determine, or have substantial influence over important decisions made by your company, including decisions regarding your company's business, finances, or structure? Note: Certain employees who might fit this description may nevertheless be exempt from the beneficial owner definition. See section 2.4 for more information.

vi. Are there any other individuals who have substantial control over your company in ways other than those identified above?

h. There is also an exception for a minor child. There is no requirement to report information about a beneficial owner of the reporting company who is a minor child, provided you have reported the required information about the minor child's parent or legal guardian. Note: If you report a parent or legal guardian's information instead of a minor child's information, then you must indicate in your BOI report that the information relates to a parent or legal guardian of the minor child. This exception will raise complex issues for many. What if the parents are divorced? If the husband is the legal guardian and the wife has a reporting entity, she will have to get information and report using her ex-husband's information. That seems inherently problematic. Will those getting divorced have to address CTA filings in their marital settlement agreements? In addition, once the child becomes an adult, a reporting will be required to update the information. How will all of this be monitored?

i. Some of those involved in the formation of an entity will have to report.

i. The individual who actually forms the entity and that individual's supervisor are referred to as "Company Applicants." For entities formed after January 1, 2024, the initial reports must identify the Company Applicants. [4] This rule means that a paralegal who performs the administrative task of filing articles of organization online to create an LLC, and that paralegal's supervisor, are Company Applicants. Some practitioners may opt not to assist with the formation of entities after January 1, 2024. Each reporting company that is required to report Company Applicants will have to identify and report to FinCEN at least one Company Applicant and at most two. All Company Applicants must be individuals. Companies or legal entities cannot be company applicants.

ii. There are two categories of Company Applicants – the "direct filer" and the individual who "directs or controls the filing action." The direct filer is individual would have actually physically or electronically filed the document with the secretary of state or similar office. The other possible company applicant is the individual who was primarily responsible for directing or controlling the filing of the creation or first registration document. This individual is a Company Applicant even though the individual did not actually file the document with the secretary of state or

similar office. Professionals may plan who will handle these filings so that that reporting requirement applies to fewer people

10. Inheritors and Trusts Who May Be Affected by Reporting.
    a. A very limited exception is provided for who is referred to as an "Inheritor." An individual qualifies for this exception the individual's only interest in the reporting company is a future interest through a right of inheritance, such as through a will providing a future interest in a company. However, once the individual inherits the interest, this exception no longer applies, and the individual may qualify as a beneficial owner. That description is still too vague to provide sufficient guidance. When a beneficial owner dies, is the executor a beneficial owner until the interest is distributed to the recipient? What about a divorce context or a prenuptial agreement when an inheritance becomes a contractual obligation? Is a remainder beneficiary of a trust an inheritor when the interest is vested and not subject to divestment (to A for life, then B)?
    b. There still are significant questions about "who" is considered a beneficial owner of a trust that owns a reporting company. Trusts, except for those that are formed under a specific state statute that requires a filing with the state to be formed[5], are themselves not reporting companies because a trust can be formed without any state law filing. A trust that is a beneficial owner of a company, however, will be included in a beneficial information report by virtue of being a beneficial owner. In that situation, who is identified as the beneficial owner? It seems certain that it is the trustee. What about the investment trustee or adviser of a trust that has fiduciary responsibility for whether the trust continues to hold that entity? What about a trust protector? And if a trust protector may be deemed a control person will that decision vary depending on the actual powers given to a particular trust protector? What about a person who holds a presently exercisable power of appointment over the equity or control of the company? Each of these people may also be deemed control persons and hence one, some or all may be beneficial owners about whom information must be reported.
        i. The trustee of a trust that owns (or controls) an entity that will be a reporting company clearly will be a beneficial owner.
        ii. What is not clear is whether, as for corporate trustees, what level if invasiveness is required beyond the identity of the corporate trustee. The policy of the CTA is to get to the humans behind the companies. A corporate trustee is not a human. Does the identity of the trustee mean only the trust company? Or does the requirement mean the trust officer? If decisions are made by committees within the trust company, does everyone in the committee need to be identified? The rules contemplate individual trustees, but these questions regarding corporate trustees are complex.
        iii. Whether trust protectors and trustee advisors fit within this category is an open question, so for now, if a person fills any of these roles, make sure this issue is on radar for reporting. If the trustee must have the trustee advisor or trust protector's consent to make any kind of disposition of an interest in

the entity, caution dictates to include that person. For other advisors and protectors, whether to include them will require additional analysis. This may raise a practical issue if those other persons have not signed the trust and may not have even been informed of their roles.

iv. If the individual has any other kind of control that would constitute "significant control" for the purposes of the rule. This category is broad, and the CTA apparently intends to cast a wide net. When in doubt, the prudent answer may be to assume the person may be affected.

c. The guidance provides the following guidance as to trusts.

i. A trustee of the trust or other individual with the authority to dispose of trust assets. Many modern trusts have several trustees each with different powers. Whether or not a particular trustee can dispose of trust assets may depend on the terms of the trust instrument, state law, and which asset is involved. Not infrequently, one trustee will have investment control and, therefore, could sell the trust's interest in the company while another has the power to pay assets (including a reporting company) to a beneficiary and, as indicated above, a beneficiary or another may have a power of appointment to direct the disposition of trust assets.

1. For example, if a trust owns personal use property (such as a home or a painting), the governing instrument may place the ownership or sale of that property in the purview of an investment trustee. Alternatively, in some trust documents that authority may be within the purview of the general or distributions trustee. If the same property is a rental property, or converted from personal use to rental, the responsible trustee may change. Parsing these powers may not be simple.
2. The word "dispose" is broad. A trustee can "dispose" of an interest in a reporting company by selling it, transferring it to a beneficiary, or even abandoning it. Different trustees may have specific powers within a trust instrument. If one trustee can sell the interest but another trustee can transfer or distribute that interest to a beneficiary, then both can "dispose" of the interest and should be included in a report.
3. The CTA appears to require that a trustee with authority to dispose of trust assets must be reported. There does not seem to be a requirement that there actually be that type of assets under that trustees purview in the trust. Thus, the practical approach may be to report for each trustee that could even theoretically dispose of an asset, even if the current circumstances do not permit that trustee to make such a decision at this time. However, the individuals involved may wish to avoid reporting and may argue against that approach. Another practical issue is what knowledge and involvement do the individuals involved have of the trust?

4. Many irrevocable trusts vest powers in fiduciaries and non-fiduciaries, such as trust protectors, to change trustees and replace them, to circumvent powers of a trustee, etc. Before filing the BOI with FinCEN, it may be advisable to obtain an affidavit from all such persons as to any actions they may have taken that could affect the trust in terms of CTA reporting. But as indicated, it may be that having the power is sufficient to require reporting about the individual even if he or she has not exercised the power.
5. The CTA appears to require reporting for any "other individual with the authority to dispose of trust assets." As indicated above, that might also include any person holding a power of appointment over the trust. Since these powers can be so different from trust to trust, and peppered in various provisions throughout the trust document, it likely will require some care and considerable effort to identify powers and then to analyze them to decide as to whether the powerholder must report.
6. An individual may have created an irrevocable trust years ago naming various persons in different roles. Those individuals, even if they signed the trust document, may have had no communication or involvement with the trust in more than a decade. Now they will be asked for copies of a driver's license, home and address and other personally sensitive information for CTA reporting. That could cascade into a series of issues and problems that could be dramatic for a particular client to address. And note that some individuals, such as trust protectors, may not have had to have signed the trust document and are unaware that they hold such power making them Beneficial Owners. How will they even know of the requirements? These potential pitfalls only stress why it is vital that counsel be involved in the evaluation of filings but appropriate counsel, e.g. estate planning counsel for trusts and corporate counsel for entity documents should be involved.

ii. A beneficiary who is the sole permissible recipient of income and principal from the trust must report. Some simple trusts have only one person as an income and principal beneficiary. But many trusts have a class or number of persons who are beneficiaries. Would that avoid their having to report?

iii. A beneficiary, or any other person, who has the right to a distribution of or withdrawal of, substantially all of the assets from the trust.
    1. The above provision may include a special power of appointment trust where a powerholder has a special power of appointment to appoint assets to a particular person, e.g. to the settlor. The CTA does not appear to require that the person be able to benefit themselves from the demand or withdrawal.

2. Annual demand or so called Crummey powers[6] used to qualify gifts to a trust as gifts of a present interest for gift tax purposes and, therefore, the gift tax annual exclusion may subject those powerholders to reporting. It is not clear what "substantially all of the assets from the trust" means. If, when a trust is first formed, Crummey powerholders may be able to withdraw all trust assets. As the value of the trust assets increase, a lesser percentage of assets in the trust may be withdrawn. At what point does the power cease being "substantially all"?
3. A similar consideration is whether a person holding a power to loan assets to the settlor[7] would be deemed to hold the power equivalent to the withdrawal from the trust for CTA reporting purposes.
4. It is not uncommon in estate planning for structures including trusts owning interests in entities, such as an LLC, to create separate or special voting interests to remove from the taxpayer's purview control over liquidation of or distributions from an entity. These rights might be sold to a separate trust that would hold them to avoid the taxpayer engaging in estate planning controlling these rights.[8] In these types of plans, those exercising control over the trust that owns these special voting rights would appear to be subject to BOI reporting. This would be in addition to the trustee and others in the primary trust that owns the "regular" interests in the entity. In short, the number of people required to report can grow rather significant in even a common estate plan for a wealthy taxpayer.

iv. A settlor of a trust who has the right to revoke the trust or otherwise withdraw the assets of the trust.[9]
1. A revocable trust, under which the settlor may evoke the trust, will be required to report.
2. But the provision seems to also include a settlor who has the right to withdraw assets from the trust. Suppose the settlor only a power to substitute assets for those in that trust. This power, also known as a swap power, typically gives the settlor of the trust the right to swap assets of equivalent value with the trust in order to cause it to be a grantor trust for income tax purposes.[10] So, properly exercised, this power does not enable the settlor to benefit economically since equal value must be given to the trust in exchange for any trust assets withdrawn. Is that covered by this reporting requirement?

11. Updating Reports.
a. The following are some examples of changes that would require an updated BOI report:
i. Any change to the information reported for the reporting company, such as registering a new DBA (doing business as).

ii. A change in beneficial owners, such as a new Chief Executive Officer, a sale that changes who meets the ownership interest threshold of 25 percent, or the death of a beneficial owner.
iii. When a beneficial owner dies, resulting in changes to the reporting company's beneficial owners, report those changes within 30 days of when the deceased beneficial owner's estate is settled. The updated report should, to the extent appropriate, identify any new beneficial owners. It is unclear what this will actually mean in practice. If a beneficial owner dies and his or her interest passes to his or her estate, that needs, perhaps, to be reported. If the estate funds a trust post-death then it may be that that transfer would constitute another reportable change. Also, the concept of an estate being "settled" envisions one particular day on which everything concludes. Often, as in the case of revocable trusts that do not require probate, transfers of assets happens in stages. When is the estate "settled" in this context? Would it be when a final IRS Form 1041 is filed? Or when an executor is discharged? If there is no probate, then there is no executor to discharge. What might that mean to filing requirements and deadlines?
iv. Any change to a beneficial owner's name, address, or unique identifying number provided in a BOI report. If a beneficial owner obtained a new driver's license or other identifying document that includes the changed name, address, or identifying number, the reporting company also would have to file an updated beneficial ownership information report with FinCEN, including an image of the new identifying document. Consideration should be given to having every beneficial owner obtain a FinCen identifier number so that the changes can be reported by that person and not the reporting entity. This requirement alone may prove onerous due to the change of address issue. The entity will need to plan for the future in requiring any change of an address to be reported to the entity so that the entity can update its BOI. Should bylaws and operating agreements be amended to include a mandatory reporting to the entity of a change in address, name, or identifying number, or else indemnify the entity for the penalty of failing to update a report?
v. When a beneficial owner who was a minor child reaches the age of majority, an updated BOI report must be filed, identifying the individual as a beneficial owner and, if warranted, replacing their parent or legal guardian's information with their own. It is not clear that this modification can be avoided by the parents obtaining a FinCen identifier number while the beneficial owner is a minor.

12. Effective Dates**.**
    a. The rule for new entities is effective January 1, 2024.
    b. While there is time to prepare, everyone who may be affected should begin that process now to avoid pressure as the deadline approaches. Entities formed on or after January 1, 2024 originally would have had only 30 days to file. There was

some discussion of extending this time period to provide 90 days to file, but as of the date of the writing of this article no extension has been granted.

c. Existing entities will have until January 1, 2025, to file.

13. Penalties.
    a. There are severe penalties, including possible imprisonment, if someone fails to comply with these new rules. There are severe civil and criminal penalties for failing to file. This is not a risk that should be taken lightly. Civil penalties can be up to $500 per day and up to $10,000, and imprisonment of up to two years.
    b. If a person has reason to believe that a report filed with FinCEN contains inaccurate information and voluntarily submits a report correcting the information within 30 days of learning of the inaccuracy and within 90 days of the filing of the inaccurate report, then the CTA creates a safe harbor from penalty. Given the complexity of the CTA and the newness of the reporting requirements that is not particularly lenient. What happens if an inaccuracy is identified after this date? Will clients be hesitant to voluntarily disclose if the safe harbor is not available?
    c. Should anyone willfully fail to report complete or updated beneficial ownership information to FinCEN as required under the Reporting Rule, FinCEN will determine the appropriate enforcement response in consideration of its published enforcement factors.
    d. The willful failure to report complete or updated beneficial ownership information to FinCEN, or the willful provision of or attempt to provide false or fraudulent beneficial ownership information may result in a civil or criminal penalties, including civil penalties of up to $500 for each day that the violation continues, or criminal penalties including imprisonment for up to two years and/or a fine of up to $10,000. Senior officers of an entity that fails to file a required BOI report may be held accountable for that failure.
    e. Providing false or fraudulent beneficial ownership information could include providing false identifying information about an individual identified in a BOI report, such as by providing a copy of a fraudulent identifying document.
    f. Additionally, a person may be subject to civil and/or criminal penalties for willfully causing a company not to file a required BOI report or to report incomplete or false beneficial ownership information to FinCEN.
    g. For example, an individual who is a beneficial owner or a Company Applicant might refuse to provide information, knowing that a company would not be able to provide complete beneficial ownership information to FinCEN without it. Also, an individual might provide false information to a company, knowing that information is meant to be reported to FinCEN. Entities should consider how they want to address this potential for liability created by uncooperative owners or persons with substantial control. Bylaws, shareholder agreements, operating agreements, and employment agreements (as for senior officers) and similar contractual arrangements may need to include obligations for updating information that has not been on the radar in the past.

14. Special Practice Considerations for Professional Advisors**.**

a. If you may be responsible for filing reports with FinCEN, start preparing now. The recommended course of action is to start compiling a list of every entity for which the client is an owner or is involved and have the attorney review the reporting implications for that entity.
b. The CTA affects all practitioners who advise clients on the creation of entities, as well as the operation and governance of entities. While that will obviously include corporate/business attorneys, the impact and reach is much broader. Professional advisers who prepare tax returns (e.g. CPAs, but also others), guide clients generally on the structure and ownership of entities (CPAs, estate planning attorneys, even some financial advisers and business consultants) may all have a role to serve in CTA compliance. A concern that all professional advisers should consider is whether their role may expose them to any responsibility for CTA compliance for a particular client. This may hinge in part on what the client may perceive. If a financial adviser meets quarterly with a client and provides income tax planning and estate planning advice, will the adviser have exposure? What about the CPA that prepares the entities income tax return and the client believes, perhaps mistakenly, that the CPA is handling all filing requirements. It may be prudent for all advisers who might be perceived as having any responsibility to assist clients with CTA filings to inform clients of the CTA obligations, at least in general communications. And if the advisory firm will not take any action with respect to flings for their clients, that point should be communicated in writing. This can be done in a constructive and positive manner of providing information as to the CTA and recommending that the client seek the assistance of other advisers if they require help. Advisers who delve into planning generally and don't take this precaution may face questions from clients who misunderstand the scope of the advisers role.
c. Other issues advisers will have to consider is what role they will want to serve in CTA filings. Some advisers are simply not equipped to handle volume of filings their clients will require, or the type of compliance work involved. What will be the time and costs to complete filings? Will clients be willing to pay these costs? It may be that there will be modest costs involved for some entities where the ownership structure is simple and obvious, e.g. a client owns 100% of an entity personally and is the sole control person. In contrast, if an entity is owned by a series of complex trusts, each of which has various fiduciaries, non-fiduciaries, powerholders, etc. the initial cost merely to determine who has to report may be significant. This should be considered if a professional chooses to handle CTA filings and is endeavoring to determine pricing for such service. It may be that for the initial filing a fixed fee may be impossible to estimate.
d. FinCen provided the following estimates. If these are anything like the tax return preparation estimates the IRS provides, caution is in order.
    i. FinCEN estimates the average burden of reporting BOI as 90 minutes per response for reporting companies with simple beneficial ownership structures (40 minutes to read the form and understand the requirement, 30

minutes to identify and collect information about beneficial owners and company applicants, 20 minutes to fill out and file the report, including attaching an image of an acceptable identification document for each beneficial owner and company applicant).

ii. FinCEN estimates the average burden of reporting BOI as 650 minutes per response for reporting companies with complex beneficial ownership structures (300 minutes to read the form and understand the requirement, 240 minutes to identify and collect information about beneficial owners and company applicants, 110 minutes to fill out and file the report, including attaching an image of an acceptable identification document for each beneficial owner and company applicant).

iii. From a practical perspective how can a practitioner determine whether a filing will be a 90 minute or 650 minute job until all relevant documents are reviewed. Further, those estimates don't include the costs of obtaining documents, such as filed entity documents or a certificate of good standing which some practitioners might view as advisable or even necessary.

e. The final rule indicated the following comments raising concerns over costs to small businesses to comply. "Costs of professional expertise. Multiple comments stated that the RIA should have included in its cost estimate the costs to reporting companies, and particularly small businesses, of hiring professional experts to help them understand and comply with the rule. Commenters gave examples of lawyers, accountants (many comments cited CPAs), and U.S. tax preparers as professionals that companies would likely consult to understand the reporting company definition, identify beneficial owners pursuant to the rule's definition and their business structure, and prepare initial and updated reports, among other compliance steps. One commenter noted having polled attorneys who represent early stage and startup companies, and reported that the attorneys expected to spend a substantial amount of time with clients, on an ongoing and continuous basis, regarding the proposed rule and its frequent update requirements. Commenters noted that the penalties for violating the rule's reporting requirements create an incentive to obtain this expertise. A commenter noted, in a sentiment echoed by others, that small businesses cannot afford attorneys, accountants, and clerks, and will instead rely on do-it-yourself compliance. However, other commenters stated that small businesses were likely to hire external expertise. One comment anticipated that the vast majority of small business owners will rely on outside professionals, and another stated that entities are more likely than not to require the help of a professional. A comment stated it was highly likely that professionals will add guidance on complying with the rule to their current service offerings, but the commenter hoped that financial institutions would not be expected to provide guidance. A commenter noted that paying for external legal counsel to comply with the requirements would impose a "new cost on small businesses at a time when they are trying to recover from two years of pandemic-imposed recession, and would not be in the public interest."

f. Another situation that may affect practitioners determining their involvement with filing is that some entities, e.g., law firms, CPA firms, financial planning firms, corporate filing services, may gear up to provide filing assistance on a wide basis. But they may require that input forms or questionnaires be completed by the business to provide the data it needs to handle the filings. Clients may then reach out to their attorneys, CPAs and other advisers for assistance with complete what they may view as a simple organizer. Ther reality is that it is the filing itself that may be simple and readily automated. The gathering of the data and the making complex decisions as to ownership and control, and in particular how that will apply to trust concepts that are not addressed in any of the guidance, will be time consuming. Some clients may not understand that the cost of the actual filing may pale in comparison to the analysis and data gathering to facilitate that filing.

g. Practitioners may be contacted by long inactive or former clients. Practitioners should be cautious about re-engaging with clients for the sole purpose of complying with the CTA unless the new engagement clearly establishes the scope of work and required information. A practitioner's information regarding an entity may be long outdated, but the client may think that the practitioner already has all information needed to comply with the rule. Or the practitioner may not have any information at all, depending on the document retention policy. Clients need to be aware that they may be starting from scratch with a practitioner even if there was a previous relationship. This is important to address with clients to avoid a misunderstanding as to what work and costs will be involved.

h. What could be a decision for practitioners is what type of engagement are they willing to accept? Is it worthwhile financially to accept a CTA filing engagement given the limited nature of the involvement, the likely resistance some clients may have to start from scratch, provide all new information, pay fees for the practitioner to get up to speed, when the client may view the filing as something that "should be simple."

i. Engagements for complying with the CTA should be carefully crafted and focused, and expressly state whether the engagement is for the initial report only or to include updates as required by law? If the engagement is to include updates, then the client needs to accept liability and responsibility for providing information as to updates to the practitioner. Given the timing deadlines for filing an updated report, the practitioner needs to consider the practitioner's own schedule. If a client emails a practitioner on September 1st that there has been a change in address, and that practitioner is about to embark on a three week vacation, is it realistic for that practitioner to accept responsibility for preparing a report for the change in information?

15. Practical Considerations for Professional Advisors Addressing CTA Filings**.**

a. Even if entity documentation is identified for dormant files, what verification steps might need to be taken to confirm the status of the entity? Should a certificate of good standing be obtained for any entity for which a filing will be made? If an entity has been dissolved by the state of formation (e.g., for lack of meeting annual

filing requirements) there may be no entity for which to file. What might the consequences be if a filing is made for a dissolved entity? While the cost of obtaining a certificate of good standing is not significant, it may be material to the price quote from the organization offering to complete a filing. Clients may be resistant to this step, but can it be appropriately ignored?

b. Even if the attorney consulted had created the entity, it may still be advisable to obtain copies of all documents filed with the state since inception to confirm the current status of the documents. Clients may have filed changes on their own, or may have worked with other attorneys in the interim who made changes.
c. In addition, copies of all entity governing documents, e.g., operating agreements and all amendments, for an LLC, in order to determine the current control provisions and persons named. For tiered entities (that is, entities where there are "subsidiary" entities), these steps may be necessary for every layer of entity.
d. If a trust is included in the ownership structure the trust document will have to be obtained and reviewed to determine who holds what powers and who may, therefore, be obligated to be disclosed as a control person. Given the common use of changes in the terms of trusts, through so-called decanting,[11] non-judicial modifications, trust protector actions and other steps that might modify a trust instrument, and/or replace or modify the power of fiduciaries, non-fiduciaries and powerholders, all of these documents may have to be obtained in order to ascertain the current status of the trust for purposes of CTA reporting. Once the complete sequence of governing documents is obtained those documents will have to be reviewed and analyzed considering the limited guidance that has been issued.
e. All of the above may be far more than those required to consummate the CTA filings might anticipate.
f. Once the initial filing is completed, how will practitioners and those affected, identify when follow up filings will be required to be made? That process seems more daunting and fraught with challenges than the initial filing. How will practitioners be aware of a change that may trigger additional filing requirements? Practitioners might consider in any engagement to assist with CTA filings making clear that it is solely the client's responsibility to notify the practitioner of any future changes on a timely basis so that new filings can be made. Practitioners may consider formally concluding the engagement after the initial filing (or assistance depending on what the engagement entailed) so that it is clear that they have no ongoing responsibility to monitor facts that may trigger future filings (if such monitoring would even be possible). That may also be prudent given the significant uncertainty that may exist as to the nature of the services and how they should be priced. As mentioned above, if the practitioner does wish to accept an ongoing engagement, the practitioner should think through personal availability in making such changes.

16. Documentation/Communication Considerations for Professional Advisors**.**

a. Practitioners should consider communicating now to their clients and, perhaps, even inactive clients, in the form of a general letter informing them of the

requirements of the CTA. This might at least prompt them to start gathering information and contact the advisor. A sample letter to clients follows this article. Given the significance of the reporting requirements, how different it is from other compliance tasks? It may take time for clients to understand the rules and what actions they will have to take, practitioners might consider following up with progressively more detailed letters as the January 1, 2024, and January 1, 2025, dates approach. Practitioners may want to make it clear in their letters whether they will or will not accept engagements for filing the reports. Clients may, albeit incorrectly, perceive the receipt of such a letter as an indication that the practitioner will handle the filing.

b. Practitioners, in addition to informing clients of the new requirements, should consider preparing revised forms, templates and updated firm policies. Also, practitioners should consider modifying templates used for operating agreements, shareholder agreements, and partnership agreements where reporting may be required. The modifications might include a representation by members to inform the company of changes that may have to be reported. But that will not be enough as trust documents, employment agreements and other documentation might also need to be amended to include similar requirements to disclose changes to the company.

c. Practitioners may consider how legal documentation may warrant being modified to address CTA requirements. A sample Governing Document Clause to Consider: "*Each party will cooperate fully with respect to providing information to the Company so that the Company can comply with the reporting requirements of the Corporate Transparency Act's ("CTA") beneficial ownership information reporting requirements. Within Seven (7) days of any change in facts that may trigger the requirement to report or amend a prior report the undersigned shall provide to the Company all relevant information necessary to the Company timely filing under the CTA. The information to be provided to the Company shall be all relevant information necessary for the Company to comply on a timely basis with the CTA reporting requirements and may include by way of example and not limitation: your full legal name and any changes made thereto, your date of birth, your home address (not a P.O. box or lawyer or other adviser's address) and any changes thereto, and you must provide a PDF copy of your U.S. passport or state driver's license, and any changes or renewals thereof*." Also consider adding an indemnification for penalties assessed against the company or any individuals for the failure to provide an updated report if the party does not provide the required information within the required timeframe.

d. Another consideration, perhaps, is requiring in employment agreements, entity governing documents, etc. that every person classified as a beneficial owner will obtain a FinCen identifier number and provide it to the reporting entity. In that way the individual, not the reporting entity, would have the responsibly to report future changes. That could avoid some of the risks and concerns with future updates and save costs and problems for the reporting entity.

17. Sample Initial Client Letter**.**

RE: Corporate Transparency Act

Dear _____:

This letter alerts you of a new Federal law, called the Corporate Transparency Act, which will impact **almost all** LLCs, corporations, limited partnerships, and other closely held entities. There are a few exceptions. The law becomes effective January 1, 2024, so there should be adequate time to prepare. Exempted from this requirement are entities such as the following. These are generally entities that are already subject to significant reporting requirements: :

- An issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934.
- Bank, credit union or depository institution.
- Money transmitting business registered with FinCEN.
- Broker or dealer in securities.
- Investment company or investment adviser.
- Insurance company.
- A futures commission merchant.
- Any public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act.
- Public utility.
- Pooled investment vehicle.
- Tax exempt entity that is described in section 501(c) of the Internal Revenue Code ("Code").
- A political organization as defined in section 527(e)(1) of the Code.
- A trust described in paragraph (1) or (2) of section 4947(a) of the Code.

The purpose of the CTA is to create a national database of companies in the U.S. that identifies the human beings behind the companies as owners or control persons. The law is part of an increasing effort to combat money-laundering, terrorism, tax evasion and other financial crimes. Congress intended to try to help law enforcement by creating this national database of organizations that might be involved in such activities but it will apply even if the entity is not so involved.

The Financial Crimes Enforcement Network ("FinCEN"), which is a bureau of the United Stated Treasury Department but is not part of the IRS, will be in charge of creating and maintaining the database, which as of now will not be of public record but available to a variety of agencies and possibly others in the future. All "reporting companies" will be required to file reports with FinCEN that provide certain information regarding the companies and "beneficial owners" of the companies – the humans behind the companies.

This new law will affect virtually all small family businesses, including even LLCs and other entities designed only to hold real estate and conduct no active business activities. Even if an entity has only one owner and that entity is ignored for Federal income tax purposes (such as a single-member LLC), that entity still will have to file reports with FinCEN.

The rule goes into effect January 1, 2024. For entities that already exist by that date, their initial reports are due by January 1, 2025. For entities created on or after that date, their initial reports are due within 30 days from the creation of the entity. As of now, there are no extensions available. There are stiff civil and criminal penalties for failing to file – this is not something that can be missed.

If you have any interest in a closely held entity, such as an LLC, corporation, or limited partnership, or if you exert significant control over any such entity (which might include any officer, director, manager, chief financial officer or investment trustee) then you may be subject to these requirements. If so then you may be responsible for filing reports with FinCEN.

Given the difficulties of identifying all the entities and persons that will have to report, we suggest that you begin now to assemble a list of every privately held entity that you own an interest in or exert control over. You should try to obtain a copy of the certificate that was filed with the state where the entity was formed as well. Because we may have formed entities years or decades ago, we may not have accessible records to identify all such entities. In any case, we do not accept responsibility to attempt to obtain or provide information about such entities unless we are specifically engaged in writing to do so. Also, you may have had other advisers form entities of which we are not aware. You may have even formed entities on your own. In any case, we will not undertake to find these entities for you or to prepare the forms required to report to FinCEN unless you separately engage us to do so.

If you do wish to engage us to help with this new requirement, please contact us as soon as possible and we will prepare a separate written engagement with you that will define the scope of our assistance. If engaged to do so, we will begin the process of determining if it is a reporting entity and whether you or someone else will assume responsibility for the reporting. We believe that assembling such a comprehensive list may be prudent to avoid missing any entities, particularly considering the penalties that may be imposed. For purposes of clarification, you are responsible for filing the reports. If you wish for our assistance in any way, you will need to contact us and engage us in writing to do so. Please contact me if you have any questions or would like to discuss them further.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Abigail O'Connor

Martin M. Shenkman
Jonathan G. Blattmachr

CITE AS:

LISI Business Entities Newsletter #280 (October 23, 2023) at http://www.leimbergservices.com

---

[1] Federal Register Vol. 87, Nov. 189, Beneficial Ownership Information Reporting Requirements (Sept. 30, 2022), https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf.

[2] FinCEN issued a Notice of Proposed Rulemaking on September 27, 2023, to extend the deadline from 30 days to 90 day for reporting entities created in 2024 to make their initial filing.

[3] On March 24, 2023, FinCen released additional guidance, "FinCEN Issues Initial Beneficial Ownership Information Reporting Guidance." This includes information on FAQs, key filing dates and key questions. https://www.fincen.gov/news/news-releases/fincen-issues-initial-beneficial-ownership-information-reporting-guidance

[4] 31 CFR § 1010.380(a)(2)(i).

[5] "The Delaware Statutory Trust (DST), however, is a statutory entity, created by filing a Certificate of Trust with the Delaware Division of Corporations…." Bell, "What Is a Delaware Statutory Trust?" January 23, https://www.delawareinc.com/blog/what-is-a-delaware-statutory-trust/ .

[6] See Crummey v. Commissioner, 397 F.2d 82 (1968).

[7] Often, a trust will be a so-called "grantor trust" for income tax purposes meaning the income, deductions and credits against tax will be imputed to the grantor (or in one situation to a beneficiary who is not a settlor). Section 671 of the Code. Often, the trust will intentionally be made such as trust. One way to accomplish that is to allow someone to be able to direct the trustee to loan to the grantor. See Section 675(2) of the Code.

[8] Powell v. Comr., 148 T.C. No. 18 (May 18, 2017).

[9] 31 CFR Part 1010.380(d)(3)(ii)(C).

[10] See Section 675(4)(C) of the Code.
[11] See, e.g., New York EPTL 10-6.6.