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Corporate Transparency Act & Common Law Trusts

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What Is The Corporate Transparency Act?

- Law that requires a reporting company to file a report identifying its beneficial owners and company applicant.*
- Companies in existence prior to Jan 1, 2024 have one year to get in compliance – i.e., file the report.
- Companies formed after Jan 1, 2024 have 30 days to file the report.
- The report discloses the company's name, address, EIN, and name, address, date of birth and photo id of each beneficial owner/company applicant. It is filed with the Financial Crimes Enforcement Network – Fin CEN.

*Information about the company applicant does not need to be provided for a reporting company in existence prior to Jan. 1, 2024

3 Key Terms

- Reporting company
- Beneficial owner
- Company applicant

Reporting Company 31 CFR §1010.380(c)

- An entity created by filing a document with the secretary of state or similar office.
 - A Delaware trust is not a reporting company.
- Can be domestic or foreign.
- Many exclusions:
 - Companies subject to other government regulation or oversight
 - Large operating company –
 - Employs more than 20 full time workers
 - Physical presence in US
 - Reported more than \$5 million gross receipts or sales on prior year tax return

Company Applicant 31 CFR §1010.380(e)

- The individual who directly files the document that creates the reporting company – e.g. the certificate of formation
- The individual who is primarily responsible for directing the filing if more than one individual is involved
 - E.g. lawyer and paralegal (preamble p. 59536)

Beneficial Owner 31 CFR §1010.380(d)

- Ownership test
 - Individual owns at least 25% of the ownership interests in the reporting company
 - Individual controls at least 25% of the ownership interests of the reporting company
- Control test
 - Senior officer
 - Individual with power to remove and replace senior officer/or majority of board of directors
 - Power over important decisions for company

Bright Line Checklist for Ownership Test

- Where trust holds at least 25% of a reporting company (either directly or in the aggregate), the following individuals are beneficial owners:
 - An individual trustee who controls at least 25% of ownership interests
 - An individual trustee, adviser, protector, designated representative or other individual with authority to dispose of trust assets
 - A beneficiary who is the sole permissible recipient of income and principal
 - A beneficiary with the right to demand a distribution of, or right to withdraw, substantially all of the assets
 - A grantor who retains the right to revoke the trust
 - A grantor who has the right to withdraw trust assets

Bright Line Checklist for Control Test

- Regardless of the trust's percentage of ownership, the following are beneficial owners:
 - A trustee that owns a majority of the voting power or rights in the reporting company
 - A trustee, adviser, protector, designated representative, grantor, beneficiary or other individual who controls a majority of the voting power or voting rights of the reporting company
 - A trustee, adviser, protector, designated representative, grantor, beneficiary or other individual who directs important company decisions (power to amend)
 - A trustee, adviser, protector, designated representative, grantor, beneficiary or other individual who holds right to remove and replace a majority of the board of directors
 - A trustee, adviser, protector, designated representative, grantor, beneficiary or other individual who holds right to remove and replace the senior officers

Aggregation

- Rule: all of an individual's ownership interests are taken into account for purposes of calculating the 25% threshold.
- E.g. a sole beneficiary owns 10% of the company individually and is the beneficiary of a trust that owns 15% of the company. The 25% threshold is met by combining all of the beneficiary's interests.
- Intake forms might ask about ownership of closely held companies outside of the trust if the trust holds an interest in such company.

Special Situations/Exceptions to Beneficial Owner

- Minors
- Employee
- Nominee, custodian, agent
- Future inheritance
- Creditor
- Exempt entity

Exempt Beneficial Owner

- Corporate trustee – exempt organization exception
 - Banks are exempt from CTA generally
 - A corporate trustee for a trust that holds a reporting company does not have to report the individuals who are beneficial owners of the corporate trustee by virtue of their ownership of the corporate trustee, but would have to report individuals who are beneficial owners of the corporate trustee by virtue of the control test.
 - Trust officer v. senior management

Unresolved

- It is implied that where there are multiple current beneficiaries of a trust, it is not required to report all of them as beneficial owners of a reporting company held in trust.
- Status of administrative or directed trustee is unresolved.
- Power of appointment held by a non-beneficiary/non-grantor
- Swap power
- Power to fill a vacancy but no power to remove
- Power to direct important decision held jointly
- NJMA/NJSA over a trust that holds a reporting company

Responsibility for Reporting

- The reporting company
- Individual with a FinCEN identifier

Traps for the Unwary

- Resignation or removal of trustee, adviser, protector etc.
- Silent trusts with beneficial owners who are unaware
- Minors coming of age
- Change of situs – change of address