

Corporate Transparency Act: Trusts and Related Considerations

By: Martin M. Shenkman, Chriseanna Mitchell, Jonathan G. Blattmachr, and Alan S. Gassman



**A KEY ESTATE
PLANNING GUIDE**

Law Easy

General Disclaimer

- The information and/or the materials provided as part of this program are intended and provided solely for informational and educational purposes. None of the information and/or materials provided as part of this PowerPoint or ancillary materials are intended to be, nor should they be construed to be, the basis of any investment, legal, tax, or other professional advice. Under no circumstances should the audio, PowerPoint, or other materials be considered to be, or used as independent legal, tax, investment, or other professional advice. The discussions are general in nature and not person-specific. Laws vary by state and are subject to constant change. Economic developments could dramatically alter the illustrations or recommendations offered in the program or materials.

Thank you to our sponsors

- InterActive Legal
 - **Teresa Bush**
 - *Director of Education and Support Services*
 - (321) 252-0100
 - sales@interactivelegal.com



InterActive Legal

Thank you to our sponsors



Andre Sears

National Business Development Officer

(888) 544-6775

expert@peaktrust.com

www.PeakTrust.com

Trusts as Beneficial Owners

**Complications and
Uncertainties
Abound**

General Considerations

- It is common in estate planning for trusts to own interests in entities. Many of those entities, but not all, will be reporting companies. If the trusts ownership is 25% or more or the trust has “substantial control” over the reporting company then the trust instrument needs to be evaluated to determine who may have to report as a BOI for that trust.
- The guidance on trusts from FinCEN is quite limited and difficult to apply to many common trust transactions. Obtaining the required information by year end 2024 may prove difficult. Assuring that if the filed information changes that an amended report is filed within 30 days (90 days just for 2024) may be impossible.
- Some, perhaps many, clients may wish to decant trusts to modify provisions and change the persons appointed before filings are due.

Beneficial Owner Reporting

**Personal
Information**



How Will BOIs React when Contacted to Report?

- A client created a trust in the waning days of 2012 to use exemption. A trust protector was named as well as a person with a loan power. Both would appear to have to report as BOIs if the trust is required to report. Neither may have signed the trust instrument and neither may even be aware that they hold this position.
- What will the reaction be when the settlor calls them asking for their cooperation reporting? Potentially not cooperative or worse!

Beneficial Owner Reporting: What Will Have to Be Reported

- The CTA provides that reporting companies will also have to file reports for “beneficial owners.” This is a term defined by the CTA that has broad, as and of yet, uncertain reach.
 - The information to be reported for each beneficial owner will consist of:
 - Full legal name. This requires the “full legal name” not initials.
 - Date of birth.
 - Home address (not a P.O. box or lawyer or other adviser’s address).
 - PDF (photocopy) of the individual’s U.S. passport or state driver’s license.
- Advisers should understand that the above information for many entities will be more personal and invasive than the information that people have ever disclosed and many will be quite uncomfortable with these requirements.
- As explained in more detail below, if an individual who a reporting company must include in their report has obtained a FinCen Identifier Number, the entity will merely report the name and Identification Number. That appears to relieve the entity of having to report changes to the name, home address, etc. of the individual and that may be a strategy many entities should pursue.

Include FinCEN Identifier Numbers in Standard Trust Signature Blocks

- For trusts that may have interests in Reporting Companies practitioners may consider at the time of trust signature obtaining everyone's FinCEN Identifier Number by including it in the signature blocks for the various parties signing the trust document.

Small Business Compliance Guide

**FinCEN Guidance on
Trusts**



Small Business Compliance Guide

- Trusts

- P. 19: “Note for trusts: a trustee of a trust or similar arrangement may exercise substantial control over a reporting company.”
- P. 21: “Note for trusts: The following individuals may hold ownership interests in a reporting company through a trust or similar arrangement:
 - 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.”

Small Business Compliance Guide

- Estates

- Pg 30: “Inheritor (Exception No. 4) An individual qualifies for this exception if the following criterion applies: Note: Once the individual inherits the interest, this exception no longer applies, and the individual may qualify as a beneficial owner. See Chapter 6 for more information on when an updated report may be required in this circumstance.”
- P.45: Note: 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.

FAQ: D.15

**FinCEN Guidance on
Trusts**



FAQ: D.15. Who are a reporting company's beneficial owners when individuals own or control the company through a trust?

- A beneficial owner is any individual who either: (1) exercises substantial control over a reporting company, or (2) owns or controls at least 25 percent of a reporting company's ownership interests. Exercising substantial control or owning or controlling ownership interests may be direct or indirect, including through any contract, arrangement, understanding, relationship, or otherwise.
- Trust arrangements vary. Particular facts and circumstances determine whether specific trustees, beneficiaries, grantors, settlors, and other individuals with roles in a particular trust are beneficial owners of a reporting company whose ownership interests are held through that trust.

FAQ: D.15. Who are a reporting company's beneficial owners when individuals own or control the company through a trust?

- For instance, the trustee of a trust may be a beneficial owner of a reporting company either by exercising substantial control over the reporting company, or by owning or controlling at least 25 percent of the ownership interests in that company through a trust or similar arrangement.
- Certain beneficiaries and grantors or settlors may also own or control ownership interests in a reporting company through a trust. The following conditions indicate that an individual owns or controls ownership interests in a reporting company through a trust:
 - a trustee (or any other individual) has the authority to dispose of trust assets;
 - a beneficiary is the sole permissible recipient of income and principal from the trust, or has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or
 - a grantor or settlor has the right to revoke the trust or otherwise withdraw the assets of the trust.
- This may not be an exhaustive list of the conditions under which an individual owns or controls ownership interests in a reporting company through a trust. Because facts and circumstances vary, there may be other arrangements under which individuals associated with a trust may be beneficial owners of any reporting company in which that trust holds interests.

FinCen Identifier Number

**An Approach Many
Companies Might
Mandate**

FinCen Identifier Number

- This is likely the better approach for trusts. See suggestion above for new trusts to include a space for the FinCEN Identifier in the trust signature blocks.
- 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.
- 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 drivers license), and an image of the identification document. These are the same items of personal information and image reporting companies submit for beneficial owners.

FinCen Identifier Number

- 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 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, then it may be advisable for all reporting entities to require that every beneficial owner obtain a FinCen identifier number.

“Substantial Control” Persons

**Complex
Determinations
Especially For
Trusts**

Who Has “Substantial Control”

- There is a second prong to the definition that reaches any person who has “substantial control” over the reporting company.
 - A manager or officer of any entity that is a reporting company.
 - The director of an entity that will be a reporting company.
 - 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 they are not a manager or an LLC or officer/director of a family corporation?

Who Has “Substantial Control”

- 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 body would be included.
- A person will be considered to have substantial control if they have authority for direction, determination, or decision of, or substantial influence over, important matters of a reporting company.
 - What are important matters of a company?
- In the context of a trust who will have substantial control over a Reporting Company in which the trust has an interest?

Questions To Help Identify Those Who May Be Subject To Reporting

- Does the company have a president, chief financial officer, general counsel, chief executive officer, or chief operating officer?
- Does the 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.
- Does the 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?
- Does any individual have the ability to appoint or remove a senior officer of the company?
 - Note that in the context of trusts (see below) 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.
 - But other people

Questions To Help Identify Those Who May Be Subject To Reporting

- Separately, if the reporting company is a corporation, some tax advisers carve out the ability to vote stock to avoid an estate inclusion issue under IRC Sec. 2036(b). The right to vote such stock may be deliberately granted to another named person. That person would seem to be covered by the above question and hence be a reporting person.
- Does any individual direct, determine, or have substantial influence over important decisions made by the company, including decisions regarding the company's business, finances, or structure? Note: Certain employees who might fit this description are nevertheless exempt from the beneficial owner definition. See section 2.4 of the Guide for more information.
- Are there any other individuals who have substantial control over the company in ways other than those identified above?

Agent under Financial Power of Attorney

- What about the agent under a power of attorney? Would they only report if acting? But if the power of attorney is immediately effective and not springing, would that assure that they have to report? FinCEN guidance indicates that a mere agent should not report but if the principal is incapacitated the agent may be functioning as the primary or even sole person with substantial control
- See Small Business Guide, page 21.

Minors Do Not Report

- 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.
- This creates another problem. Can a minor legally own interests in an entity? If the minor's signature is required for a transaction will a guardian have to be appointed?
- 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?

Professionals Handling Filings Must Report

- Initially advisors handling filings were going to have been subject to reporting. That could have included an attorney assisting in the formation of an entity, the paralegal and administrative assistant who completed documentation, etc.
- This now applies for entities formed after January 1, 2024. Some practitioners may opt not to assist with the formation of entities at this point.
- 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.
- 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 fewer people will be subject to reporting requirements and that those who will be required to report will be agreeable to do so.

Inheritors and Trusts

**Uncertainty,
Complications and
Issues**



Inheritors

- 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.
- If the testator died, is the ultimate beneficiary the inheritor or is the executor the control person until the interest is actually distributed?

Trustees and More

- What happens when a trust 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, 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? Each of these people may also be deemed control persons and hence one, some or all may be beneficial owners required to report.

The guide provides the following guidance as to trusts

- 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.
- For example, if a trust owns **personal use property**, the governing instrument may place the ownership or sale of that residential 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.
- The CTA appears to require that a trustee with authority to dispose of trust assets to be reported. There does not seem to be a requirement that there actually be that type of assets under that trustee's 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 don't permit that trustee to make such a decision. 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?

The guide provides the following guidance as to trusts

- 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 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.
- The CTA appears to require reporting for any “other individual with the authority to dispose of trust assets.” That might also include any person holding a power of appointment (“POA”) over the trust. Since these powers can be so different from trust to trust, and peppered in various provisions throughout the trust document, it may require some care and effort to identify powers and then to analyze them to decide as to whether the powerholder must report.
- An individual may have created an irrevocable trust in 2012 naming various persons in different roles. Those individuals, even if they signed the trust document, may have had no communication or involvement 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 trust to address.

FinCen BOI FAQ D.15 Addressing Trusts

- On April 30, 2024, FinCen updated their FAQs regarding BOIs and added additional information on Reporting Companies with Trust Owners. Question D.15 addresses who are the BOIs in a Trust owned Reporting Company.
- The language FinCen uses in their response is vague. They note “...*Trust arrangements vary. Particular facts and circumstances determine whether specific trustees, beneficiaries, grantors, settlors, and other individuals with roles in a particular trust are beneficial owners of a reporting company whose ownership interests are held through that trust...*”
- FinCen goes on to list *trustees*, a *beneficiary who is the sole permissible recipient of trust income and principal*, and the *grantor if the trust can be revoked* or if the grantor can otherwise withdraw assets from the trust. However, FinCen further states “...*This may **not** be an exhaustive list of the conditions under which an individual owns or controls ownership interests in a reporting company through a trust...*”
- The guidance provided by FinCen does not include a discussion of many positions and powerholders estate planners incorporate in modern trust planning. FinCen states the facts and circumstances of a trust’s terms determine which powerholders are considered BOIs. The potential for *Trust Protectors, Loan Directors, Substitutors, Designators (Hybrid-DAPTs), Appointers (SPATs), and more*, to be considered BOIs is dependent on the terms of the trust. Practitioners may need to review the terms of each trust, and the powers granted to each powerholder, in order to determine which individuals in a Trust have to include BOI.

Beneficiaries

- 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?
- 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.
 - 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. the settlor. The CTA does not appear to require that the person be able to benefit themselves from the demand or withdrawal.
 - Annual demand or Crummey powers used to qualify gifts to a trust as gifts of a present interest for gift tax purposes 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”?

Beneficiaries

- A similar consideration is whether a person holding a power to loan assets to the settlor would be deemed to hold the power equivalent to the withdrawal from the trust for CTA reporting purposes.
- 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. 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.

Settlors

- A settlor of a trust who has the right to revoke the trust, or otherwise withdraw the assets of the trust.
- Clearly a revocable trust would have the settlor who can revoke the trust and would be required to report.
- But the provision also includes a settlor who has the right to withdraw assets from the trust. Does that cause the settlor who holds a power of withdrawal (substitution of assets) that would characterize that trust as a grantor trust for income tax purposes. 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. 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?

More on Trusts and Trustees

**CTA Makes These
Issues Daunting**



Are Trusts Reporting Companies Under the CTA?

- Most trusts are not Reporting Companies, but as the FAQs point out, the FAQs begin with “It depends.” They continue to explain that a domestic entity such as a statutory trust, business trust, or foundation is a Reporting Company only if it was created by the filing of a document with a secretary of state or similar office. Most trusts do not file to be formed and are rather created by contract. But as with so many legal matters, state laws vary as to whether certain trusts (sometimes called “statutory” or “business” trusts) require the filing of a document with the secretary of state to be created. If a trust is created in a U.S. jurisdiction that requires such filing, then it is a Reporting Company, unless an exemption applies. But if a trust is a Reporting Company, it should then consider if it may nonetheless be exempt from filing. For example, a foundation may not be required to report beneficial ownership information to FinCEN if the foundation qualifies for the tax-exempt entity exemption.

Beneficial Owners Owning or Controlling a Reporting Company Through a Trust

- The FAQ provides the following guidance to this significant question for estate planning: “Yes, *beneficial owners can own or control a reporting company through trusts*. They can do so by either exercising substantial control over a reporting company through a trust arrangement or by owning or controlling the ownership interests of a reporting company that are held in a trust.”
- In a simple trust situation, [1] if a trust owns 25% or more of an entity that is classified as a Reporting Company, then the trust would be deemed an owner which is required to report Beneficial Ownership Information. If a trust owned less than 25% of an entity that is classified as a Reporting Company, then [2] an analysis would have to be performed to determine whether the trust can exercise substantial control over the entity. But there is another prong to the analysis about which the FinCEN guidance provides little insight.

Beneficial Owners Owning or Controlling a Reporting Company Through a Trust

- If the trust might exercise substantial control over the Reporting Company, which individuals named in trust positions, powerholders, etc., could be those who exercise the requisite control. That might require an analysis of the trust instrument and any amendments. Given the complexity of modern trusts, if a powerholder acted, or a trustee decanted (that is, transferred the assets to another trust), or perhaps if a trust director or protector (which might be labeled under different titles depending on the draftsman involved) has acted, the ancillary documents evidencing those actions would have to be identified and evaluated. The Reporting Company's governing documents may be relevant to the analysis. There may be many other relevant documents apart from the obvious trust instrument and operating (or other) agreement for the Reporting Company that could impact the analysis. The FinCEN guidance does not provide any meaningful insight into this analysis.

Trust Ownership/Control of Reporting Company

- The FAQs elaborate on trust ownership or control of a Reporting Company. FinCen poses the question: *“Who are a reporting company’s beneficial owners when individuals own or control the company through a trust?”*
- Following is the text of FAQ D.15, which will then be analyzed:
- *“A beneficial owner is any individual who either: (1) exercises substantial control over a reporting company, or (2) owns or controls at least 25 percent of a reporting company’s ownership interests. Exercising substantial control or owning or controlling ownership interests may be direct or indirect, including through any contract, arrangement, understanding, relationship, or otherwise.”*

Which Persons File

- In the context of a trust with one beneficiary and one trustee, this is the trustee, as indicated above. However, consider what this might mean if a complicated trust is involved. A trust might have an investment advisor or trustee who can exercise control over trust investment assets. The person serving in that capacity would seem to be an individual who exercises substantial control over a Reporting Company holding investment assets owned by a trust. **Some trusts have several different investment advisor roles.** A trust might name a different trust advisor for marketable securities, for life insurance, and for private equity. In such a situation, it would seem that only the trust advisor with authority over private equity assets would be deemed a Beneficial Owner.

Which Persons File

- Trusts may hold entities where the only asset is a residential property occupied by a beneficiary. For those entities (which under the CTA are typically considered a Reporting Company) trust terms may dictate a **distribution trustee** or advisor has substantial control over the entity. In addition, might there be a **distinction between a trust that is a directed trust** (in which the investment advisor directs the trustee as to what actions to take with respect to trust investment assets) and a **delegated trust** (in which the trustee may delegate to the named person investment decisions but for which the trustee nonetheless retains some measure of oversight responsibility)? It would seem, given the lack of specific FinCEN guidance and the potential severity of penalties for failing to file,[viii] that the prudent approach would be to have all such persons file and not to endeavor to parse through whether the person holding delegated investment authority or distribution authority might avoid filing because of the responsibility retained by the trustee.

Facts and Circumstances

- *“Trust arrangements vary. Particular facts and circumstances determine whether specific trustees, beneficiaries, grantors, settlors, and other individuals with roles in a particular trust are beneficial owners of a reporting company whose ownership interests are held through that trust.”*
- The FAQ's above language seems to acknowledge that “other individuals with roles in a particular trust” suggests or encompasses the wide array of positions, powerholders, etc., that the myriad varieties of trusts might include. All individuals named in the trust must be evaluated to ascertain whether they are Beneficial Owners required to report.

-

Example from FAQs on Trust Ownership

- *“For instance, the trustee of a trust may be a beneficial owner of a reporting company either by exercising substantial control over the reporting company, or by owning or controlling at least 25 percent of the ownership interests in that company through a trust or similar arrangement. Certain beneficiaries and grantors or settlors may also own or control ownership interests in a reporting company through a trust. The following conditions indicate that an individual owns or controls ownership interests in a reporting company through a trust:*
 - *“a trustee (or any other individual) has the authority to dispose of trust assets;”*

Authority to Dispose of Trust Assets

- The authority to dispose of trust assets could include various modern trust positions. In many trusts, a trustee may have that authority. Co-trustees would all seem to be Beneficial Owners. The authority to dispose of investment assets could be controlled instead, as discussed above, by an investment advisor or director. Someone holding a lifetime power of appointment who could, by the exercise of that power, shift the interests in a Reporting Company held by the trust to a new trust or person would also seem to hold the “authority to dispose of trust assets.” A person holding power to loan trust assets to the settlor, a power that has been used historically to characterize a trust as a grantor trust for income tax purposes pursuant to Section 675(4)(C) of the Internal Revenue Code (Code), but which more recently has been used to provide another potential means of access to trust economic value to a settlor, would also seem to be characterized as a Beneficial Owner.

Authority to Dispose of Trust Assets

- Many modern trusts have positions such as a **trust protector**, whose rights and power can vary dramatically. In a narrow drafting, a trust protector may only have the power to remove and replace a trustee or change the situs and governing law of a trust. In a broader context, some draftspersons give an array of powers to the trust protector. So, whether a trust protector has the power to “dispose of trust assets” will depend on the terms of the governing instrument and perhaps state law as well. But even if the trust protector avoids Beneficial Owner status by not being able to “dispose of trust assets,” the control that the trust protector may exercise over the persons who directly can “dispose of trust assets,” such as the power to remove and replace those persons, may itself characterize the trust protector as a Beneficial Owner.

Does a Beneficiary Report?

- “a beneficiary is the sole permissible recipient of income and principal from the trust, or has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or”
- In a simple trust, a person may be named as the sole permissible recipient of income and principal and hence be deemed a Beneficial Owner. For example, in a QTIP marital trust the surviving spouse may be named as the sole “permissible recipient of income and principal from the trust.” But what if, for example, in a second or later marriage situation, the surviving spouse is not named a beneficiary of principal (but only if income)? It would seem that the spouse might not, under such trust terms, be a Beneficial Owner.

Does a Beneficiary Report?

- But what if the surviving spouse is named as only an income beneficiary, but the trust is governed by the laws of a state, like New Jersey, that has **the power to adjust so corpus can be considered income**? What if the trust is governed by the laws of a state, like Delaware, that permit a unitrust election that might once made require the payment of portions of QTIP corpus to the surviving spouse? Would either of those situations then make the surviving spouse qualify as a Beneficial Owner as then meeting the requirements of “the sole permissible recipient of income and principal?”
- Is it worth the cost of trying to evaluate these issues in light of the vagueness of the FinCEN guidance and when compared to the cost of having the surviving spouse (or other beneficiaries as applicable in another type of trust) simply obtain a FinCEN Identifier number and then provide it to the Reporting Company?

Does a Beneficiary Report?

- When might a beneficiary have “the right to demand a distribution of or withdraw substantially all of the assets from the trust?” In a Beneficiary Defective Irrevocable Trust, or “BDIT,” the beneficiary may be given an annual demand power to withdraw assets. In the first year, the settlor, e.g., a parent of the beneficiary who will be characterized as the “grantor” of the trust for income tax purposes, may make a \$5,000 gift to the trust. The beneficiary’s right to withdraw that would constitute “the right to demand a distribution of or withdraw substantially all of the assets from the trust.” What if, later that year, the beneficiary sells a valuable asset to the trust? In the following year, the value of the trust has grown substantially so that any withdrawal right would no longer constitute “the right to demand a distribution of or withdraw substantially all of the assets from the trust.”

Does a Beneficiary Report?

- Does that beneficiary no longer constitute a Beneficial Owner even though he or she had been one in the prior year? Does that constitute a change in Beneficial Owners that requires that an updated report be filed within 30 days?
- How, and more importantly, when might that change in Beneficial Owners have occurred?
- It would seem that the date on which the value of trust assets increases to the point that the beneficiary's "right to demand a distribution of or withdraw" no longer encompasses "substantially all of the assets from the trust." In most, if not all, instances BDIT transactions involve the sale of private equity. Is an appraisal required to determine when the threshold of "substantially all" is no longer crossed? As with prior discussions above, these requirements are unclear and likely impossible to meet.

Practice Considerations When Trusts May be BOIs

**What Should
Practitioners Do?**



Who do you Represent?

- A threshold issue is who the practitioner is representing?
- What should be incorporated into an engagement letter?

Trust Documents to Obtain

- 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 decanting, 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.

Client Questionnaires and Attestations

- The BOI Report itself is simple.
- Some attorneys and CPAs may want clients to fill out information checklists for who has 25% entity ownership, which individuals meet the various “important decision maker” (i.e., substantial control) and other control conditions that would make an individual a Beneficial Owner, and why they do.
- Consider requiring client to provide a Form 8879-like attestation that all of the information provided to the attorney or CPA filing the form on the client’s behalf that “to the best of the client’s knowledge and belief, the information provided is true, correct and complete.”

Post-Filing Steps

- 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.

Update Entity and Other Documents for the CTA

- 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 Ten (10) 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.”*

Conclusion and Additional Information

CTA Is Coming



Conclusion

- The application of the CTA generally can range from simple and obvious to incredibly complex.
- Introducing trusts and the myriad of complexities that arise in complex modern trust drafting.

Additional information

- Jonathan G. Blattmachr
jblattmachr@pioneerllc.com
- Alan S. Gassman agassman@gassmanpa.com
- Chriseanna Mitchell
mitchellchriseanna@gmail.com
- Martin M. Shenkman
shenkman@shenkmanlaw.com