

Memorandum

Corporate Transparency Act Reporting

December 15, 2023

A new federal law will require many Personal Planning clients to file reports with the Financial Crimes Enforcement Network (“FinCEN”), or face harsh penalties.

How Do You Know If You Have a Filing Obligation?

You may have a filing obligation if, for example:

- Your residence, art, investments or other assets are held in an LLC, partnership, or corporation
- You have domestic employees and their payroll is handled via an LLC, partnership, or corporation
- You and other family members invest together through a pooled entity
- You own or control family office entities that are not registered as investment advisers, and are not taking advantage of the venture capital fund adviser exemption, under the Investment Advisers Act of 1940
- You own or control a small business with fewer than 20 full-time U.S.-based employees or less than \$5 million in U.S.-source gross receipts or sales (which may include your family office entities)

The U.S. Corporate Transparency Act (the “CTA”) will impact many LLCs, corporations, limited partnerships, and other closely held entities (“reporting companies”) beginning on January 1, 2024. If you have an ownership interest (even if only with respect to governance rights) in entities of this type, or if you exert control over any such entity or serve as an officer of such an entity, the CTA will be relevant to you. The manager, general partner, or senior officers, as the case may be, of such entity will likely be required to submit a report to FinCEN containing information about the entity itself and personal information about others involved with the entity. The information will not be publicly available but will be maintained in a government database. There are meaningful civil and criminal penalties associated with failing to comply with the CTA. The stated purpose of the CTA is to establish a central database of those who own and/or control small, unregulated entities in order to increase transparency and combat money laundering, terrorism, tax evasion, and other financial crimes.

What About Trusts and Foundations?

Estate planning trusts (other than trusts formed by registering with a U.S. state, which are rare) are not reporting companies, but if a trust owns interests in or controls a reporting company that has to file with FinCEN, then that reporting company may need to identify the Trustees of that trust to FinCEN and, in certain cases, may need to

identify the beneficiaries of that trust to FinCEN (*e.g.*, if the beneficiary is the sole permissible recipient of income and principal from that trust). According to the Treasury Department, more guidance on trusts is forthcoming. A private foundation is not a reporting company regardless of whether it is formed as a trust or a not-for-profit corporation, but a reporting company owned or controlled by a private foundation may need to identify individuals involved with that private foundation.

What Entities Are Relevant?

A “reporting company” includes (1) any corporation, LLC, limited partnership, statutory or business trust, or similar entity created by filing a document with any U.S. state, territory or Indian tribe, and (2) any non-U.S. entity that registers to do business with any U.S. state, territory or Indian tribe. Certain entities already subject to significant reporting requirements (such as banks, public companies, and certain tax-exempt entities and regulated private companies) do not have to file under the CTA.

What Information Must Be Reported?

Generally, the managers, general partners, or senior officers of a reporting company must provide information on the reporting company itself (the company’s name, current address, jurisdiction of formation, and tax identification number) and on its “beneficial owners” (full legal name, date of birth, current residential address, and scanned copy of a U.S. passport, U.S. driver’s license, U.S. identification card or, if no U.S.-issued document is available, a foreign passport). A “beneficial owner” is one who (1) owns or controls at least 25% of the ownership interests in a reporting company or (2) directly or indirectly exercises “substantial control” over the reporting company. An individual or entity exercises “substantial control,” for example, by serving as an officer of the company, having the authority to appoint or remove senior officers or a majority of directors, or having direction or substantial influence over important company decisions.

The managers, general partners, or senior officers of a reporting company formed on or after January 1, 2024 must also provide information on the reporting company’s “company applicants.” A “company applicant” means any individual who (1) files an application to form or register the reporting company or (2) is primarily responsible for directing or controlling such filing (in the event more than one individual participates in the filing). The report must include the same information for company applicants as it does for beneficial owners (full legal name, date of birth, etc.), except that a company applicant must provide their business address instead of their residential address.

The managers, general partners, or senior officers of a reporting company may in certain instances report a “FinCEN identifier” instead of the information for an individual beneficial owner or company applicant, which enhances privacy and alleviates the obligation on the reporting company to keep information current. A FinCEN identifier is a unique identifying number that FinCEN will issue to individuals or entities upon request.

When Must Reports Be Filed?

The CTA becomes effective January 1, 2024, and non-exempt reporting companies formed prior to that date will have until January 1, 2025 to submit reports to FinCEN (extensions are under consideration but as of now have not been enacted). Non-exempt reporting companies formed in 2024 must submit a report within 90 days of formation, and non-exempt reporting companies formed thereafter must submit a report within 30 days of formation.

Obligation to Update Information

If there is any change with respect to required information previously submitted to FinCEN (such as if an individual whose information has been provided as a beneficial owner moves his or her residence, or if his/her passport or driver's license is renewed), or if any report was inaccurate when filed, an updated or corrected report must be filed within 30 days of such change or discovery of such inaccuracy.

What Are the Penalties for Failing to Comply With the CTA?

There are civil and criminal penalties for failure to comply with the CTA, including jail time. Civil penalties can be up to \$500 per day for continuing violations, and criminal penalties include imprisonment for up to two years and/or a fine of up to \$10,000.

NY LLC Transparency Act

At the time of this memo, there is a similar "NY LLC Transparency Act" (the "NY Act") which has been sent to Governor Hochul for her signature. The NY Act, if enacted in its current form, will require LLCs formed or registered to do business in New York to provide information regarding their owners and others involved in management to the state for a public registry. The penalties for non-compliance with the NY Act are limited to \$250 per entity. **Unlike the CTA, this information will be publicly available.**

Closing Thoughts Regarding the CTA

Unfortunately, the CTA places a significant administrative burden on individuals who hold property in entity form for personal and investment reasons. This is particularly onerous in light of the requirement to update personal information and the filing obligations with respect to entities that were in existence prior to the enactment of the CTA. The potential penalties make it inadvisable to take a relaxed approach regarding compliance. **Most of our clients will find it most cost-effective for their family office professionals, financial advisors, and accountants to take the lead on CTA compliance, and so, absent a client request, we will not be managing or monitoring compliance for our clients' new or existing entities. If you have any questions about how the CTA applies to any of your existing family entities, please reach out to one of the attorneys in the Personal Planning Department.**

Additional Estate Planning News

In addition, and unrelated to the CTA and the NY Act, starting January 1, 2024, the federal lifetime gift and estate tax exemption amount is set to increase from \$12.92 million per person to \$13.61 million per person and the annual exclusion for gifts is set to increase from \$17,000 to \$18,000. These increased amounts mean you can transfer up to \$13.61 million tax-free during life or at death (or \$27.22 million if you are married and you treat your gifts as split gifts) and you can transfer \$18,000 to each other individual during life without paying gift tax (or \$36,000 if you are married and you treat your gifts as split gifts). As a reminder, the \$13.61 million per person amount is the result of inflation-adjustments to the \$10 million amount that was implemented in 2018 as part of the Tax Cuts and Jobs Act (“TCJA”), and, absent additional legislative action, the \$10 million amount will be reduced to the pre-TCJA exemption amount of \$5 million plus inflation-adjustments at the end of 2025.

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