

TAXATION



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2024 Estate and Gift Tax Conference

Panel 16: Fiduciaries And Practitioners Can't Run From
Corporate Transparency

Friday, March 22, 2024

3:15pm - 4:15pm

Speakers: Todd Hammond and Karen Sugihara

Conference Reference Materials

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We have to
take this!

Business Development

Not a chance.

Trust Group Manager

Fiduciaries Can't Run From Corporate Transparency: An In-Depth Review of the CTA and Other Fiduciary Obstacles



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A WELLS FARGO COMPANY

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CORPORATE TRANSPARENCY ACT





THE CORPORATE TRANSPARENCY ACT

- New Law that requires a reporting company to file a report identifying its beneficial owners and company applicant.*
- Purpose: To crack down on Money Laundering by identifying who owns closely held companies which include entities formed in the US, Foreign Entities registered to do business in the US (Closely Held Businesses, LLC's and Partnerships)
- Existing Companies prior to Jan 1, 2024 have one year to get in compliance – i.e., file the report.
- New Companies formed after Jan 1, 2024 have 90 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. The report is filed with the Financial Crimes Enforcement Network – FINCEN.

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



LATEST UPDATES ON THE CTA

- U.S. District Court in Alabama ruled on March 2, 2024 in *National Small Business Association v. Yellen* that the CTA is unconstitutional.
- Federal District Court Judge ruled the CTA cannot be justified as an exercise of Congress's enumerated powers and is therefore unconstitutional.
- Link to the opinion: [https://urldefense.com/v3/https://s-corp.org/wp-content/uploads/2024/03/051.-Memorandum-Opinion.pdf;!!OiWDNh-9Pw!53vjbANE1-wlfSrJjU1Gxk2TRe9aOV3FVvLWcbSYrf-A0WG2x56Q5GmCgQOyGJsrWgWJix1uKb9aCGVfoftAtW4\\$](https://urldefense.com/v3/https://s-corp.org/wp-content/uploads/2024/03/051.-Memorandum-Opinion.pdf;!!OiWDNh-9Pw!53vjbANE1-wlfSrJjU1Gxk2TRe9aOV3FVvLWcbSYrf-A0WG2x56Q5GmCgQOyGJsrWgWJix1uKb9aCGVfoftAtW4$)
- Decision expected to be appealed to the U.S. Court of Appeals and/or to the U.S. Supreme Court



TRUSTS AS BENEFICIAL OWNERS

- Trusts are Beneficial Owners when they own 25% or more of a Reporting Company
- Aggregation Rule: All of an individual's ownership interests in an entity are considered for purposes of determining the 25% threshold.
 - Examples:
 - A corporate trustee is the trustee of three trusts for individual family members, each holding a 10% interest in an entity. The 25% threshold is met (30%).
 - A sole beneficiary owns 10% of an entity individually and 15% in trust. The 25% threshold is met (10% + 15% = 25%).
- As part of the pre-acceptance process, if a trust holds an interest in a reporting company, it may be advisable for corporate trustees to ask about the ownership held outside of the trust.
- Trusts are Beneficial Owners when the trust fiduciaries exercise “substantial control” over the Reporting Company, regardless of the trust's percentage ownership in the reporting company.



SPECIAL CONSIDERATIONS FOR CORPORATE TRUSTEES

- CTA is concerned with:
 - -Individuals who directly or indirectly own or control over a 25% interest in a Reporting Company; *and*
 - -Individuals who directly or indirectly have substantial control over a Reporting Company.
- Who at the Trust Company Must Report?
 - Who at the Trust Company makes decisions regarding the trust? These individuals have a duty to report as Beneficial Owners. But what about the individuals at the Trust Company who have the ability to appoint these individuals and are therefore deemed to have indirect control?



WHEN DOES THE TRUSTEE HAVE TO REPORT?

- Trust Company serves as Trustee of a trust that owns an entity and is also the sole manager of the entity. Individuals at the Trust Company are Beneficial Owners, and the Trust Company must file the CTA BOI report.
- Trust Company serves as Trustee of a trust that owns an entity, and the entity is managed by a third party. The third-party manager has the duty to file the CTA BOI report.
 - -Does the Trust Company have a duty to ensure that the third-party manager complies?
- Does it matter if the Trust Company has discretion or is directed as a Trustee in determining whether the Trustee is a Beneficial Owner? No. What matters is that the Trustee has the authority to distribute the trust assets.



RESOURCES

- FinCEN Small Entity Compliance Guide:
<https://www.fincen.gov/boi/small-entity-compliance-guide>
- CTA FAQs from FinCEN: <https://www.fincen.gov/boi-faqs>
- FinCEN Beneficial Ownership Information Guide:
<https://www.fincen.gov/boi>
- *The Corporate Transparency Act: A Big Deal for Small Companies*, BNY Mellon Wealth Management:
https://www.bnymellonwealth.com/content/dam/bnymellonwealth/pdf-library/articles/corporate_transparency_act_pdf.pdf



ONBOARDING NEW BUSINESS





ONBOARDING OF NEW BUSINESS

THE BASICS

- Who are the individuals associated with this trust?
- What are the assets?
- What is the purpose of this trust?
- What is the dispositive language and what are we being asked to do?
- What is the tax treatment of this trust?



ONBOARDING OF NEW BUSINESS

THE BASICS

- What is the anticipated Transaction Activity (Domestic and Foreign Wires)?
- Are there any Non-US Individuals and/or Foreign Assets in this trust?
- Are there Removal and Appointment provisions?
- What is the Liability Standard?
- What are the agreed upon fees for this trust?
- Is there any pending litigation and/or is there any particular rush in getting this trust set up?



UNUSUAL ASSETS





UNUSUAL ASSETS

- Crypto Currency
- Cannabis Assets
- Art and Collectibles
- Real Estate
- Closely-Held Entities
 - Foreign
 - Domestic
- High Risk Businesses
- Luxury Items – Cars, Boats, Planes, etc. and do they comply with government regulations
 - ex. FAA Guidelines for Aircraft
- We have a responsibility to make sure these assets are appropriately reported on tax returns.



UNUSUAL PEOPLE





UNUSUAL PEOPLE

- Are they litigious?
- Are they US Individuals or is there any US Connection?
- What is the level of dysfunction?
- What is the Source of Wealth?
- Are they Politically Exposed Persons (PEP)?
- Do they have history of improper dealings?
- Are you comfortable with this client's connections to potentially high risk individuals or situations that could cause reputational risk?
- Do the clients understand how the client/trustee process works (or do they think this is just a glorified checking account)?



HANDING OFF THE TRUST TO ADMINISTRATION





HANDING OFF THE TRUST TO ADMINISTRATION

- Has the Prior Trustee Resigned or have they officially been notified of their removal?
- Is there a change of Situs or change in Governing Law?
- For existing trust matters, has the Prior Trustee been contacted about Asset Transfer and Original Document collection?
- For existing trust matters requiring modification, have all (NJSA, Decanting/Modification) instruments been executed correctly?
- Consideration Trust Officer Account Load, which Trust Officer/Team will receive the new account, and have they been introduced to the client?
- Has the Trust Officer been informed of the incoming trust matter during the onboarding process?



SAFETY & SECURITY-IS YOUR TRUST PROTECTED?

- Bank Failures-Ex. Silicon Valley Bank, First Republic
- Does your Trust have Merger and Acquisition Language?
 - What if the Acquiring Company has a different culture towards High Net Worth Clients? If it's a Bank owned Company, is it Retail-driven?
 - If the Acquiring Company is Bank-Owned, is it stable?
- Does your Trust have Successor Fiduciary Language?
- Does your Trust have the ability to change Situs?
- Mergers and Acquisitions



FINAL THOUGHTS





SECTION V FINAL THOUGHTS/QUESTIONS

- Communication between Sales, Administration, Operations and Tax is critical for onboarding success. Ex. Year-End Influx of New Business
- Is the grass really greener at other Trust Companies? (Same circus, different clowns)
- You can get to the same place more than one way (each institution will have its own processes).
- Please feel free to share your process!

