

TRUSTEES AND THE CORPORATE TRANSPARENCY ACT

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- Author/Speaker: *9100 Relief for Late Regulatory Elections*, State Bar of Texas Annual Advanced Tax Law Course
- Author/Speaker: *Obtaining Section 9100 Relief Related to a Missed Section 754*, American Bar Association Section of Real Property, Trusts and Estates Spring Symposium

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TRUSTEES AND THE CORPORATE TRANSPARENCY ACT

Brief Overview

Background. Congress adopted and the President signed into law the Corporate Transparency Act. It was a part of the Fiscal Year 2021 National Defense Authorization Act (*see* Section 6401-6403 of H. R. 6395). In the opening text of the act, Congress said states don't collect information about the beneficial owners of companies filed, and that "nefarious actors" seek to conceal their ownership of corporations and other companies to facilitate illicit activity, including money laundering, the financing of terrorism, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud and acts of foreign corruption. The focus of the law is getting information about the individuals behind the companies.

Constitutionality of the CTA has been questioned. On March 1, 2024, in the case of *National Small Business United v. Yellen*, No. 5:22-cv-01448 (N.D. Ala.), a federal district court in the Northern District of Alabama, Northeastern Division, entered a final declaratory judgment, concluding that the Corporate Transparency Act exceeds the Constitution's limits on Congress's power and enjoining the Department of the Treasury and FinCEN from enforcing the Corporate Transparency Act against the plaintiffs. The Justice Department, on behalf of the Department of the Treasury, filed a Notice of Appeal on March 11, 2024. FinCEN announced that it will continue to implement the Corporate Transparency Act as required by Congress, while complying with the court's order. In other words, if you are not covered by the court's injunction, you must comply with the CTA. Just FYI - the government is not currently enforcing the Corporate Transparency Act against the plaintiffs in that action: Isaac Winkles, reporting companies for which Isaac Winkles is the beneficial owner or applicant, the National Small Business Association, and members of the National Small Business Association (as of March 1, 2024). Those individuals and entities are not required to report beneficial ownership information to FinCEN at this time.

Who Reports.

Reporting Company. A Reporting Company means entities that are created by the filing of a document with any Secretary of State or any similar state office, or with any Indian tribe, and any foreign entity registered to do business in the United States. A "state" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands and any other Commonwealth, territory or possession of the United States. In other words, a Reporting Company is a company that comes into existence and is created by the filing of a document with the entities described above. All reporting companies, except exempt entities, will have to file BOI reports.

Please note: no one else has the obligation to file the BOI reports. Only the reporting company. The reports will include information about beneficial owners, but beneficial owners do not have an obligation to file any reports.

Common-law trusts and general partnerships are formed by the execution of agreement and don't have to be filed or registered. As a result, they are not caught up in the reporting requirements. Even though trusts and general partnerships don't have to report, the partnerships or beneficiaries of the trusts may find themselves being reported about because of entities those own.

Sole proprietors are not reporting companies. Filing to get a taxpayer ID number or filing to get a license to pursue a particular trade or profession is not the equivalent of filing with the Secretary of State or similar agency.

There are 23 exceptions that are applicable to the entities that don't have to report. Those most likely to be important to us are banks and trust companies that are already subject to various kinds of government supervision, entities exempt from tax under 501(c), publicly traded companies, large operating companies with more than 20 employees and over \$5 million or more in annual revenue and a physical presence in the United States, and wholly-owned subsidiaries of these entities. Banks include those described in section 202 of the 1940 Investment Act.

Entities can be exempt and later become non-exempt and, at that point, become reporting companies that have to file reports.

If an exempt entity has or will have a direct or indirect ownership interest in a reporting company, and an individual is a beneficial owner of the reporting company exclusively by virtue of the individual's ownership interest in the exempt entity, the report may include the names of the exempt entities in lieu of the information otherwise required for the beneficial owner.

Beneficial Owners. Beneficial ownership information or BOI is the information that identifies the individuals who directly or indirectly own or control the company. More detail on what is required is set forth later in this paper

Note that each person can get what is called a "FinCEN identifier." Each person who gets a FinCEN identifier has to keep that information updated but that's not the same as a BOI report.

There are two paths to being a beneficial owner. One is a path based on actual ownership. The other path is based on substantial control.

An owner is anyone who directly or indirectly owns 25% or more of the company or controls the company. Ownership can be direct or indirect. For example, if Kelly owns 55% of Holding Company, and Holding Company owns 60% of Operating Company, Kelly is deemed to own 33% of Operating Company and thus is one of its beneficial owners.

Ownership can include any means of owning or controlling ownership interests or voting rights. Obviously that includes stock, membership interests or partnership interests (and limited partnerships). All stock options and conversion rates are presumed to have been exercised to bring in the ownership of the holders of those rights as beneficial owners. Profits interests are deemed to be ownership under the rules. The rules are designed to bring in anyone through any kind of mechanism that effectively owns the ownership interests or voting rights.

As noted above, the other path to being a beneficial owner is through substantial control. Substantial control means service as a senior officer, power to appoint or remove senior officers, power to direct substantial influence over major issues, such as major expenditures, compensations schemes. Substantial control can be exercised directly, such as by the president of a company, or indirectly such as by the trustee of a trust that owns the company. The rules regarding control have been written broadly enough to cast a wide net over nearly everyone that could be considered to have control. More regarding trusts will be discussed below.

Because beneficial owners must be individuals, that is, natural persons. In other words, trusts, corporations or other legal entities are not considered to be beneficial owners.

Accountants and lawyers generally do not qualify as beneficial owners but that may depend on the work being performed. If services relate to general accounting or legal services, they are not considered beneficial owners. A lawyer or accountant who is designated as an agent may qualify for the nominee, intermediary, custodian or agent exception. However, an individual who holds the position of General Counsel in a reporting company is a senior officer and therefore a beneficial owner.

Remember that in Texas where we have a community property ownership regime between spouses, the identity of the unnamed spouse of the spouse in whose name ownership appears to reside may also be a beneficial owner.

If a trust owns or controls 25% of the reporting company, the reports must include the trustee and any other person who has the power to dispose of the assets, the grantor who has the power to revoke, any individual who can appoint or remove the trustee, and any beneficiary who is the only permissible beneficiary or has the right to withdraw substantially all of the assets. A beneficiary of a discretionary trust, as long as that trust has more than one beneficiary, is not going to be subject to the rule, unless that beneficiary must be included for other reasons. But by contrast the beneficiary of a QTIP must be reported because s/he has the only interest in the trust.

For entities formed on or after January 1, 2024, the BOI report must also include information about the company applicants. Company applicants are the people who actually do the filing of the initial paperwork with the Secretary of State or similar entity. That might be the company organizer. In many cases it may be an attorney and perhaps also the attorney's legal assistant or paralegal who actually does the filing. Under the Rules, only two people need be included in that regard.

Reports. A report is the original report, and any supplement required, to identify the BOI for the reporting company. BOI reports identify: (a) the individuals who have *ownership interest* in the entities; (b) as well as individuals who have *substantial control*; and (c) for entities formed on or after January 1, 2024, the company applicants, who are the people who actually file the formative documents.

None of the BOI information is intended to be available to the public. The information will be stored on a secure nonpublic database using the controls the US government uses to protect non-classified sensitive information. FinCEN will make this information available to federal, state and local law enforcement. Foreign officials will also have access if they submit a request through a federal agency.

FinCEN estimated that in the first year 32.6 million entities will be required to report. And in each later year there will be an additional 5 million. The cost of filing is estimated to be \$22 billion and \$5.6 billion in each later year. Cost of preparing reports is estimated between \$85 and \$2640.

What.

The whole purpose of the beneficial ownership reporting rules is to get to the people behind the structure. No financial information is involved in the reporting; just identification of people. Further, the reports do not require disclosure of why a person is listed.

The company has to provide its:

- legal name and
- tradename,
- the physical address,
- the jurisdiction of formation and
- the taxpayer ID number.

The information to be provided about each beneficial owner includes:

- legal name,
- date of birth,
- the home address (applies to beneficial all owners – company applicants need only submit office addresses),
- an official identifying number from an acceptable identification document such as a driver’s license or a passport, or a FinCEN identifier (number)
- a copy of an acceptable identification document which includes a non-expired passport or non-expired identification document issued by a state, local government or Indian tribe, a non-expired driver’s license or a non-expired passport issued by a foreign government – must have the person’s photo on it.

Some concern has been raised about people who don’t have any of those non-expired documents, such as beneficiaries of trusts who are elderly, no longer drive, and no longer travel abroad, and who are disabled so that getting a state issued government ID may be a problem. The suggestion has been made to simply provide a copy of a birth certificate although it’s not clear if that will suffice.

Providing a physical residence may be troublesome for some people. Those people can contact FinCEN to apply for a waiver. Thus, no PO boxes can be used, and no addresses of others unless you actually live there.

In lieu of providing information about each individual, it’s enough for the company to provide the FinCEN identification number for each individual. Each individual can obtain such a number by going to the FinCEN website and providing the information required. FinCEN will give the individual the number and that individual can use that number for all reporting companies without having to provide all of the other information. If the individual moves or other information about the individual changes, the individual must update his or her information with FinCEN within 30 days. The reporting company is not responsible for that.

The company can also obtain a FinCEN identifier number and use it in lieu of all of this other information when the company is required to provide information to others.

When Reports and Updates are Due.

Pre-2024 Entities. For entities which existed prior to January 1, 2024 (“Pre-2024 Entities”), the deadline for filing the report is December 31, 2024, unless the entity ceased to exist before January 1, 2024 (no report is required in such a case). There is also a rule that updates to a report have to be filed within 30 days after a change (discussed below) occurs. There has been some question about whether a change in the reporting company during 2024 would trigger an earlier filing requirement than December 31, 2024. Generally, it’s believed that if the entity had

filed its report, and then a change occurs, an update would be due within 30 days of the date on which the change occurred.

However, that is not clear what happens if a change occurs *before* the reporting company has filed its report. One position might be that if no report has been filed, and a change occurs during 2024, then the first report is due on or before the end of this year and the prior information need not be reported. However, considering the fact that reports are required even for entities that ceased to exist in 2024 (only entities that ceased to exist prior to January 1 are excluded), then it may be more likely to believe that information before and after the change might be required, especially if it might appear that the changes made to avoid disclosure of beneficial ownership information on certain individuals.

2024 and Later Entities. The first entity report could have been due by March 31, 2024 (assuming a reporting company could have been filed on January 1, 2024), which is 90 days after the date of filing. All other companies filed during 2024 will have 90 days after having notice that filings have been accepted to file a BOI report.

Starting in 2025, each new entity will only have 30 days to file a Report.

Note: entities that are formed on or after January 1, 2024 (or a later year), and then are dissolved within the same calendar year, must still file a report.

As Needed Report. This is not an annual report but, after the initial filing, it's an "as needed" report. The initial report must contain accurate information. If anything is missing or incorrect, it must be corrected within 30 days after discovery of the error. Changes have to be reported within 30 days. Applicant information, once submitted, does not have to be updated.

Where and How.

On January 1, 2024, FinCEN began accepting reports for companies, and also began accepting applications for FinCEN identifiers. The required reports are electronic reports submitted through [FinCEN.gov/boi](https://fincen.gov/boi). Nothing is submitted by paper. This mechanism is intended to create a national database for all corporations, limited liability companies, limited partnerships, limited liability partnerships and certain other entities.

There are two methods. One involves downloading and filling out a form that can be kept and updated from time to time, and submitting the form to FinCEN through the above website. This can be helpful in the sense that if that form can be preserved, it's easy to do an update and file it. The other method is to do the online form, but it can't be saved. It must be completed and filed. If the information reported needs to be updated, the entire form must be completed again.

There is very helpful five minute video on the FinCEN website about how to file a report.

FinCEN charges nothing to file. It's free. Reporting companies may select others to help them file, and many such services are available. Whether those services charge, or not, and how much, is between the reporting company and the service provider. Nevertheless, avoid any provider which says there is a filing fee. That is a fraudulent representation.

Penalties.

It's unlawful to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, and

for willfully failing to report complete or updated beneficial ownership information. Penalties apply to the entity and the senior officers, who are all liable, as well as those who are beneficial owners. Senior officers are all C-suite officers and/or managers.

Criminal Penalties. Criminal penalties also include a fine of not more than \$10,000, or imprisonment for not more than two years, or both.

Civil Penalty. Any person who violates the rules incurs a penalty of not more than \$500 per day for each day that the violation continues or has not been remedied. There is no dollar limit. Some commentators initially made a mistake saying that there was a cap of \$10,000 on the penalty. There is no such limit in the statute. Most likely, those early misstatements were made based on the maximum criminal fine which maximum doesn't apply to civil penalties.

How the CTA Applies to Trusts and Trustees

Methods of Determining Beneficial Owners.

The Corporate Transparency Act makes no mention of trusts or trustees except in one instance to describe charitable trusts as exempt entities. Otherwise the statute itself does not deal with identification of trustees or beneficiaries as part of the information required about beneficial owners. References to trusts and trustees are found only in the rules and other materials issued by FinCEN. The first mention of trusts and trustees occurs in the Final Rules issued in September 2022 at 31 CFR Part 1010 published in Volume 87, No. 189, Federal Register at 59498. While acknowledging that entities like trusts play essential and legitimate roles in the US and global economies, FinCEN declined to give much in the way of details about how trusts and trustees are involved. After issuance of proposed rules, FinCEN, as part of the preamble to the final rules, remarked "Multiple commenters requested clarification on applying the definition to specific circumstances, including indirect control, agency relationships, and substantial control through trust arrangements." *Id at 59512*. Perhaps most problematic in the proposed, and ultimately in the final rules, is the concept of indirect control. Some commenters suggested that FinCEN not extend the concept to the particular circumstance of a control through a trust until certain other review processes had been completed. Notwithstanding that, FinCEN made only small substantive revisions between the proposed and final rules, at least as far as trusts and trustees were concerned. In their own words, they sought to "clarify" the issue of substantial control through trust arrangements. They said "FinCEN believes that the definition of substantial control in the final rule strikes the appropriate overall balance: it is based on established legal principles and usages of this term in a range of context (as explained in the NPRM) and provide specificity that should assist with compliance, while at the same time being flexible enough to account for the wide variety of ways that individuals can exercise substantial control over entity." *Id at 59526*.

In the final draft, FinCEN expanded the text of the introductory clause in the section on "Direct or Indirect Exercise of Substantial Control" to add "including as a trustee of a trust or similar arrangement." FinCEN said "This addition underscores that the trustee of a trust or similar arrangement can exercise substantial control over all reporting company through the types of relationships outlined in the paragraph. Depending on the particular facts and circumstances, trusts may serve as a mechanism for the exercise of substantial control. Furthermore, "trusts or similar arrangements" can take a wide range of forms. Accordingly FinCEN finds it appropriate – and

directly responsive to comments that requested clarification on this point – to specify that a trustee of a trust can in fact, exercise substantial control over all reporting company through the exercise of his or her powers as a trustee over the corpus of the trust, for example, by exercising control rights associated with shares held in trust.” *Id at 59529.*

Before getting into the final rule, it’s instructive to note what’s not there. Neither the rules nor the examples discuss a very wide range of trust scenarios. They do not address trust arrangements with multiple beneficiaries. There could be situations of trust arrangements in which individuals might have beneficial interest in trust assets but not be required to report under the existing rules. The rules don’t address whether trust protectors or trust advisors are covered or how to address situations where decisions are made by committee. Further, concepts regarding trusts and tax law don’t necessarily square with the rules in the CTA regulations.

Basically the final rule identifies the trustee as an individual who will be deemed to control trust assets for the purpose of determining which individuals own or control if the trust owns 25% or more of the ownership interests of the reporting company. In addition to trustees, the final rule specifies that other individuals with authority to control or dispose of trust assets are considered to own or control the ownership interests in a reporting company that are held in trust. The final rule identifies circumstances in which ownership interests held in trust will be considered as owned or controlled by a beneficiary such as if the beneficiary is the sole permissible recipient of income and principal from the trust, or if the beneficiary has the right to demand a distribution of, or withdraw substantially all, of the assets in the trust. In addition, trust assets will be considered his own or controlled by a grantor or settlor who has the right to revoke the trust or withdraw its assets. As a result of the way the final rules are constructed, the ownership interests held in trust could be considered simultaneously as owned or controlled by multiple parties in a trust arrangement.

Two Tests. There are two methods of determining the identity of the Beneficial Owners. One method is the “Ownership Test.” The other is the “Control Test. While this essentially repeats what is set out above, the emphasis here is on any reference to trusts, whether voting trust or otherwise.

Ownership. The final rule defines ownership interest as “The term “ownership interest” means: (A) Any equity, stock or similar instrument; pre-organization certificate or subscription; or transferable share of, or voting trust certificate or certificate of deposit for, and equity security, interest in a joint venture or certificate of interest in a business trust; in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting powers or voting rights; (B) Any capital or profit interest in an entity; (C) Any instrument convertible, with or without consideration, into any share or instrument described in paragraph (d)(2)(i)(A), or (B) of this section, any future on any such instrument, or any warrant or right to purchase, sell, or to subscribe to a share or interest described in paragraph (d)(2)(i)(A), or (B) of this section, regardless of whether characterizes debt; (D) Any put, call, straddle, or other option or privilege of buying or selling any of the items described in paragraph (d)(2)(i)(A), (B) or (C) of this section without being bound to do so, except to the extent that such option or privilege is created and held by 1/3 party or third parties without the knowledge or involvement of the reporting company; or (E) Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.” *Id at 59595.*

Control. The rule goes on to say “An individual may directly or indirectly own or control an ownership interest of a reporting company through any contract, arrangement, understanding,

relationship, or otherwise including: (A) Joint ownership with one or more other persons of an undivided interest in such ownership interest; (B) Through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual; (C) With regard to a trust or similar arrangement that holds such ownership interest: (1) As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets; (2) As a beneficiary who: (i) Is the sole permissible recipient of income and principal from the trust; or (ii) Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or (3) As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or (D) Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of such entities, that separately or collectively own or control ownership interests of the reporting company.” (emphasis added) *Id at 59595*.

In determining whether an individual owns or controls at least 25% of the ownership interests of a reporting company, the total ownership interests that an individual owns or controls, directly or indirectly, are to be calculated as a percentage of the total outstanding ownership interests of the reporting companies. Ownership interests are calculated at the present time, and, as noted above, any options or similar interests are treated as having been exercised. Where capital or profits interests are involved, including entities treated as partnerships for Federal tax purposes, the individual’s ownership interests are the individual’s capital and profit interests in the entity, calculated as a percentage of the total outstanding capital and profits interests in the entity.

The final rule regarding direct or indirect exercise of substantial control says, “An individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through: (A) Board representation; (B) Ownership or control of the majority of the voting power or voting rights of the reporting company; (C) Rights associated with any financing arrangement or interest in a company; (D) Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; (E) Arrangements are financial or business relationships, whether formal or informal, with other individuals or entities acting as nominee; or (F) any other contract, arrangement, understanding, relationship or otherwise.” (emphasis added) *Id at 59595*.

Ownership Test in the Context of a Trust.

Trustees as Owners.

In addition to the original Rule set out above, FinCEN has issued Q&A materials and just recently updated them on April 18, 2024. An existing Q&A C.3 said that reporting companies include trusts that owe their existence to the filing of a document with the Secretary of State or similar office. However, just because a trust registers with a court of law for the purpose of establishing the court’s jurisdiction over disputes involving the trust, does not turn the trust into a reporting company. For example, in Colorado, trusts that own real estate should file with the District Clerk in the county where the land is located. The trust exists independently from the filing. The filing is merely for the purpose of establishing both who owns and controls the land and the court that will govern issues related to it.

Q&A D.1 says that the objective is to identify individuals who either directly or indirectly own or control. Because beneficial owners must be individuals, trusts, corporations or other legal entities are not considered to be beneficial owners.

Q&A D.14 clarifies the beneficial owners can own or control a reporting company through trusts. They do that 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.

D.15 tells us that a beneficial owner is any individual who either: (1) exercises substantial control over her reporting company or (2) owns or controls at least 25% of her reporting company's ownership interests. Exercising substantial control or owning or controlling ownership interests to be direct or indirect, including through any contract, arrangement, understanding, relationship or otherwise. Obviously, 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 her reporting company whose ownership interests are held through that 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% 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) as 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 withdrawal of 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 from the trust.

The Q&A goes on to say that this is **not** an exhaustive list of the conditions under which an individual owns or controls ownership interests in a reporting company through a trust. Because of facts and circumstances that change from situation to situation, there may be other arrangements under which individuals associated with the trust may be beneficial owners of any reporting company in which the trust holds interests.

The new Q&A includes D.16 which asks “How does a reporting company report a corporate trustee as a beneficial owner?” The answer provided is

For purposes of this question, “corporate trustee” means a legal entity rather than an individual exercising the powers of the trustee in a trust arrangement. If a reporting company's ownership interests are owned or controlled through a trust arrangement with a corporate trustee, reporting company should determine whether any of the corporate trustee's individual beneficial owners indirectly own or control at least 25% of the ownership interests of the reporting company through their ownership interests in the corporate trustee.

For example, if an individual owns 60% of the corporate trustee of a trust, and that trust holds 50% of her reporting company's ownership interests, then the individual owns or controls 30% ($60\% \times 50\% = 30\%$) of the reporting company's ownership interests and is therefore a beneficial owner of the reporting company.

By contrast, if the same trust only holds 30% of the reporting company's ownership interests, the same individual corporate trustee owner only owns or controls 18% ($60\% \times 30\% = 18\%$) of the reporting company and thus is not a beneficial owner of the reporting company by virtue of ownership or control of ownership interests.

The reporting company may, but is not required to, report the name of the corporate trustee in lieu of information about an individual beneficial owner only if all of the following three conditions are met:

- the corporate trustee is an entity that is exempt from the reporting requirements;
- the individual beneficial owner owns or controls at least 25% of ownership interests in the reporting company only by virtue of ownership interests in the corporate trustee; and
- the individual beneficial owner does not exercise substantial control over the reporting company.

In addition to considering whether the beneficial owners of a corporate trustee owner control the ownership interests of a reporting company whose ownership interests are held in trust, it may be necessary to consider whether any owners of, or individuals employed or engaged by, the corporate trustee exercise substantial control over reporting company. The factors for determining substantial control by an individual connected with corporate trustees are the same as for any beneficial owner.

Beneficiaries as Owners.

Following from the rules above, it's clear that a beneficiary is treated as a beneficial owner if that beneficiary either: (1) is entitled to all of the principal and income distributions from the trust at the time of reporting; or (2) has the power to withdraw all or substantially all of the trust assets. A beneficiary may be a beneficial owner through some control other than the above but that is all that FinCEN has given us now regarding beneficiaries.

When it's not clear is whether multiple beneficiaries of a trust might be beneficial owners if none of them fall into one of the above categories. Presumably, having been left out of the rules, those beneficiaries are not required to be identified.

Aggregation Rule.

If beneficial owners have control through various means, not one of which passes the 25% test, but combining all of the various means, an individual has more than 25% ownership interest, that person will be a beneficial owner.

Control Test in the Context of a Trust.

Trustees.

There can be multiple types of trustees. The most common is a general trustee which has all the authority granted to trustees under the trust instrument or will. There can be specialized trustees like distribution trustees, directed trustees, and so on.

General Trustees. In the context of a trust where a trustee owns or controls 25% or more of a reporting company, the trustee is deemed to be a beneficial owner by virtue of the control rights the trustee has. If, by any mechanism, the trustee which owns less than 25%, but the trustee

can control the selection, appointment and election of directors, managers and senior officers, then the trustee may be a beneficial owner on the basis of control rather than ownership.

Directed Trustees. Directed trustees are part of the dialogue back and forth between FinCEN and commenters that occurred in response to the proposed rule and addressed in the preamble to the final rule. However, the final rule doesn't give any clear explanation of what should happen. Generally, most believe that the trustee, even though directed by an advisor, must be reported as a beneficial owner because the trustee owns 25% or more, even if the trustee does not actually have control over the reporting company.

Trust Advisors or Designated Representatives. Because the advisor that can direct the trustee does appear to have control, the advisor likewise should be reported as a beneficial owner.

Trust Protectors. There is nothing in the final rule or any Q & A that gives any indication of how FinCEN views trust protectors. Addressing whether a trust protector should be classified as a beneficial owner and information about the trust protector provided is probably dependent on facts and circumstances. One view is to believe that if the trust protector can remove a trustee and appoint a successor, the trust protector might be a beneficial owner if the trustee being removed or the trustee being appointed would be a beneficial owner under the current rules.

Power Holders.

The only guidance provided in the rules refers to a beneficiary who has the power to withdraw all or substantially all of the assets or a grantor or settlor who can do the same. Presumably, holders of testamentary powers of appointment would not be beneficial owners, but holders of lifetime powers of appointment might be, depending on the nature and extent of the powers.

The question arises about what happens when a beneficiary holds some powers that could be considered lifetime powers of appointment that might be enough to cause that beneficiary to be counted as a beneficial owner, but the power doesn't extend to all of the current assets. For example, suppose the trust is named as a beneficiary of a ESOP/retirement account and payments are either being deferred until the 10th year or, under the current proposed will, might be taken out pro rata over the life expectancy until the 10th year or the beneficiary is disabled or chronically ill so that the assets can be taken out over the beneficiary's life span. If the retirement account were entirely includable as an asset of the trust, and if the percentage of stock were 25% or more, would the beneficiary be a beneficial owner? The answer is not entirely clear.

Some commenters suggest erring on the side of caution and including more people, rather than less.

A question arises about what a trustee's fiduciary duty is concerning the disclosure of information about beneficiaries. The information to be disclosed, as set out above, include the beneficiary's legal name, date of birth, home address, an official identifying number from an acceptable identification document such as a driver's license or a passport, or a FinCEN identifier, plus a copy of an acceptable identification document which includes a non-expired passport or non-expired identification document issued by a state, local government or Indian tribe, a non-expired driver's license or a non-expired passport issued by a foreign government, which must have the beneficiary's photo on it. Remembering that a trust is rarely a reporting company, then the trustee may not have any duty to disclose information about the beneficiaries. However, in

many situations, the trustee may be a senior officer with the reporting company and even though, as a trustee, that person may not be required to produce information about a beneficiary, the senior officer must do this so to avoid penalties.

Subsidiaries.

As a general rule, all reporting companies, whether they are subsidiaries of other reporting companies or exempt entities, must file a report. There is an exception as noted above for a reporting company that is wholly owned by an exempt entity. Any company that is only partially owned by an exempt entity must file its own report in any event.

Fraud.

Fraudsters are already at work.

- People have already reported fraudulent correspondence requesting fees to be paid for filing reports. However, filing is free. FinCEN does not send correspondence requesting payment.
- Further, people have reported receiving correspondence that asks the recipient to click on a URL or scan a QR code. Those are fraudulent.
- Also fraudulent are references to Form 4022 or an “Important Compliance Notice.” There is no such form.
- Also fraudulent are requests from the US Business Regulations Department. No such governmental entity exists.

FinCEN Resources for Small Businesses

- [Brochure: An Introduction to Beneficial Ownership Information Reporting](#)
- [Video: Overview of Beneficial Ownership Information Reporting](#)
- [Video: Remarks by Secretary of the Treasury Janet L. Yellen at the Financial Crimes Enforcement Network](#)
- [Small Entity Compliance Guide](#)
- [Answers to Frequently Asked Questions](#)

FinCEN Social Media Channels

- <https://www.youtube.com/@fincentreasury>
- <https://www.linkedin.com/company/fincen>
- <https://twitter.com/FinCENnews>
- <https://www.facebook.com/fincentreasury>

On the following pages are materials that come directly from the Q&A that are charts that can be helpful.



IMPORTANT DECISION-MAKER

any individual who directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding the reporting company's:

1. **Business**, such as:
 - Nature, scope, and attributes of the business
 - The selection or termination of business lines or ventures, or geographic focus
 - The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts
2. **Finances**, such as:
 - Sale, lease, mortgage, or other transfer of any principal assets
 - Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget
 - Compensation schemes and incentive programs for senior officers
3. **Structure**, such as:
 - Reorganization, dissolution, or merger
 - Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures



SENIOR OFFICER

any individual holding the position or exercising the authority of a:

1. President
2. Chief financial officer (CFO)
3. General counsel (GC)
4. Chief executive officer (CEO)
5. Chief operating officer (COO)

or any other officer, regardless of official title, who performs a similar function as these officers



APPOINTMENT OR REMOVAL AUTHORITY

any individual with the ability to appoint or remove any **SENIOR OFFICER** or a majority of the board of directors or similar body



IMPORTANT DECISION-MAKER

any individual who directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding the reporting company's:

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3. **Structure**, such as:
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 - Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures



CATCH-ALL

any other form of substantial control over the reporting company. Control exercised in new and unique ways can still be substantial. For example, flexible corporate structures may have different indicators of control than the indicators included here



EQUITY, STOCK, OR VOTING RIGHTS

any interest classified as stock or anything similar, regardless whether it confers voting power or voting rights, and even if the interest is transferable

EXAMPLES include:

- equity, stock, or similar instrument
- preorganization certificate or subscription
- transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust



CAPITAL OR PROFIT INTEREST

any interest in the assets or profits of a company organized as an LLC, which is similar to stock in a corporation and sometimes referred to as a 'unit'



CONVERTIBLE INSTRUMENTS

any instrument convertible into **equity, stock, or voting rights** or **capital or profit interest**, whether or not anything needs to be paid to exercise the conversion. The **RELATED** items are also ownership interests:

- any future on any convertible instrument
- any warrant or right to purchase, sell, or subscribe to a share or interest in **equity, stock, or voting rights** or **capital or profit interest**, even if such warrant or right is a debt



OPTION OR PRIVILEGE

any put, call, straddle, or other option or privilege of buying or selling **equity, stock, or voting rights, capital or profit interest, or convertible instruments**, EXCEPT if the option or privilege is created and held by others without the knowledge or involvement of the reporting company



CATCH-ALL

any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership