ACTEC
THE AMERICAN COLLEGE OF
TRUST AND ESTATE COUNSEL

McPherson Building
901 15th Street, NW, Suite 525
Washington, DC 20005
(202) 684-8460 • Fax (202) 684-8459
actec.org

Please Address Reply to:

Executive Director
DEBORAH O. MCKINNON

May 4, 2021

Felicia Swindells
Associate Director
Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Submitted electronically at www.regulations.gov

RE: Request for Comments on Questions Pertinent to the Implementation of the Corporate Transparency Act – Docket Number FINCEN—2021—0005 and RIN 1506—AB49

Dear Ms. Swindells,

The American College of Trust and Estate Counsel (ACTEC) is pleased to submit the attached comments on questions pertinent to the implementation of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA) in response to the advance notice of proposed rulemaking RIN 1506-AB49 and FINCEN—2021—0005 (ANPRM).

ACTEC is a professional organization of approximately 2,400 lawyers from throughout the United States. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of personal income tax, transfer tax and retirement plan rules and providing advice to IRA and retirement plan administrators on plan administration. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

If you or your staff would like to discuss ACTEC's recommendations, please contact Carolyn Ann Reers, Chair of ACTEC Financial Action Task Force (FATF) at (203) 363-7668 or CReers@wiggin.com, Edward M. Manigault, ACTEC FATF Task Force member at (404) 279-5245 or emm8@ntrs.com, or Deborah McKinnon, ACTEC Executive Director, at (202) 684-8460 or domckinnon@actec.org.

Respectfully submitted,

Ann B. Burns, President

Attachment

Corporate Transparency Act
Advanced Notice of Proposed Rulemaking for
Beneficial Ownership Information Reporting Requirements

ACTEC Replies to Questions 1, 3, 4, 5 & 8
in response to Request for Comments on Questions Pertinent to the Implementation of the Corporate Transparency Act – Docket Number FINCEN—2021—0005 and RIN 1506—AB49

The Corporate Transparency Act ("CTA") was enacted on January 1, 2021, as part of the National Defense Authorization Act, and effectively created a national beneficial ownership registry. The CTA requires certain business entities to report their "beneficial owners" and "applicants" to the Financial Crimes Enforcement Network ("FinCEN") in an attempt to prevent the use of shell companies to evade anti-money laundering rules or to hide other illegal activities. Reporting obligations under the CTA will take effect on the effective date of the regulations thereunder, which must be promulgated by January 1, 2022, but may have an effective date thereafter.

On April 5, 2021 FinCEN issued an advance notice of proposed rulemaking (Docket Number FINCEN—2021—0005 and RIN 1506—AB49, the "ANPRM"). In the ANPRM, FinCEN has requested comments on FinCEN's implementation of certain provisions in Section 6403 of the CTA. FinCEN has required such comments to be submitted by May 5, 2021.

ACTEC has chosen to limit its comments to those questions posed in the ANPRM that ACTEC believes are most closely related to the purposes and mission of ACTEC, and the situations in which ACTEC Fellows are most frequently involved with their clients. Specifically, ACTEC is responding below to ANPRM questions 1, 3, 4, 5 and 8.

Question 1: The CTA requires reporting of beneficial ownership information by "reporting companies," which are defined, subject to certain exceptions, as including corporations, LLCs, or any "other similar entity" that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe or formed under the law of a foreign country and registered to do business in the United States by the filing of such a document.

Question 1a: How should FinCEN interpret the phrase "other similar entity," and what factors should FinCEN consider in determining whether an entity qualifies as a similar entity?

For the purpose of clarifying what type of entities are "reporting companies" under the CTA, FinCEN should interpret the phrase "other similar entity" to refer to entities that have purposes and characteristics similar to corporations and LLCs under state corporation and business entity laws and under federal tax law. Applying the CTA to entities that do not have such purposes and characteristics would not be within the scope of the plain language of the CTA. Just as a taxpayer may not circumvent the plain language of a tax statute by relying on the IRS Commissioner's regulation interpreting that statute, FinCEN should not broaden the plain meaning of the CTA by defining a reporting company to include an entity that is not similar to a corporation or LLC.[1]

State law generally provides that a corporation or LLC may be organized to conduct, promote, or carry on any lawful business, purpose, or activity.[2] State law also generally provides that the liability of a stockholder of a corporation or of a member of an LLC is limited to the consideration payable for such

[1] *Comm'r v. Schleier*, 515 U.S. 323, 333 (1995).
[2] *See e.g.* 8 Del. C. §101(b), 18 Del. C. §106(a).

person's shares in the corporation or interest in the LLC and that such person shall not be personally obligated for any debt, obligation, or liability of the entity solely by virtue of owning an interest therein.[3] In addition, state law generally provides that a corporation is formed by filing with the secretary of state a certificate of incorporation and that an LLC is formed by filing with the secretary of state a certificate of formation.[4]

The federal Treasury Regulations define a "business entity" as any entity recognized for federal tax purposes that is not classified as a trust and provide that for tax purposes a business entity with two or more members is either a corporation or partnership and a business entity with one member is either a corporation or disregarded.[5] In terms of defining a "trust" for tax purposes, the Treasury Regulations provide that this term ". . . refers to an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts."[6] This portion of the Treasury Regulations concludes by stating that beneficiaries of a trust ". . . are not associates in a joint enterprise for the conduct of business for profit."[7]

Based on the characteristics of corporations and LLCs under state law and federal tax law, when determining whether an entity qualifies as a "similar entity" and is therefore a reporting company under the CTA, the factors FinCEN should consider are: (i) whether the entity is generally established to conduct, promote, or carry on a business or other activity; (ii) whether the entity is designed to shield its owners or members from personal liability; and (iii) whether it is formed by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe or formed under the law of a foreign country and registered to do business in the United States by the filing of such a document. If an entity does not satisfy all of the above criteria, it should not be considered a similar entity and therefore should not be a reporting company for purposes of the CTA.

Question 1b: What types of entities other than corporations and LLCs should be considered similar entities that should be included or excluded from the reporting requirements?

An entity or structure that does not satisfy all of the above criteria set forth in response to question 1a should be excluded from the CTA reporting requirements and an entity that satisfies all of these criteria should be included within the CTA reporting requirements.

As such, a common law trust should be excluded from the CTA reporting requirements. A common law trust does not meet the above criteria, as it is created by an agreement or inter vivos declaration between a settlor and a trustee (not by a filing with a secretary of state) and it is established for the purpose of protecting or conserving property for beneficiaries under the ordinary rules applied in chancery or probate courts (not for the purpose of conducting a specific business or activity). See our response to question 8 below for a more detailed discussion of the treatment of trusts under the CTA, which includes a discussions of trusts that are not common law trusts that should be included within the CTA reporting requirements.

As to a general partnership, state law may provide that it is formed simply by the association of two or more persons who intend to form a partnership and carry on as co-owners a business for profit or carry on

[3] *See e.g.* 8 Del. C. §162(a), 18 Del. C. §303(a).
[4] *See e.g.* 8 Del. C. §101(a), 18 Del. C. §201(a).
[5] Treas. Reg. §301.7701-2(a).
[6] Treas. Reg. §301.7701-4(a).
[7] *Id.*

an activity that is not for profit. Such an entity should be excluded from the CTA reporting requirements since it is not formed by a filing with the secretary of state and as a general partnership, it is not designed to shield its owners or members from personal liability.[8]

In comparison, state law may provide that a limited partnership is formed at the time of the filing of the certificate of limited partnership with the secretary of state or at any later date specified in the certificate of limited partnership.[9] In addition, state law may provide that a limited partnership is established to carry on a lawful business, purpose, or activity[10] and that limited partners are generally not liable for the obligations of the limited partnership.[11] If a limited partnership is governed by state law with such provisions, it should be included in the group of reporting companies under the CTA since it satisfies all of the above criteria.

Question 1c: If possible, propose a definition of the type of "other similar entity" that should be included, and explain how that type of entity satisfies the statutory standard, as well as why that type of entity should be covered. For example, if a commenter thinks that state chartered non-depository trust companies should be considered similar entities and required to report, the commenter should explain how, in the commenter's opinion, such companies satisfy the requirement that they be formed by filing a document with a secretary of state or "similar office."

See the three-part definition set forth in the response to question 1a above.

Question 3: The CTA defines the "beneficial owner" of an entity, subject to certain exceptions, as "an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise" either "exercises substantial control over the entity" or "owns or controls not less than 25 percent of the ownership interests of the entity." Is this definition, including the specified exceptions, sufficiently clear, or are there aspects of this definition and specified exceptions that FinCEN should clarify by regulation?

Question 3a: To what extent should FinCEN's regulatory definition of beneficial owner in this context be the same as, or similar to, the current CDD rule's definition or the standards used to determine who is a beneficial owner under 17 CFR 240.13d–3 adopted under the Securities Exchange Act of 1934?

FinCEN's regulatory definition of beneficial owner in this context should be substantially the same as the current CDD rule's definition. Firstly, the statutory language is almost identical.[12] Secondly, the CTA is arguably a "next step" after the CDD regulations in the United States' effort to combat money laundering, terrorist financing and other illicit activity. The CDD regulations were issued under the Bank Secrecy Act to clarify and strengthen CDD requirements of financial institutions. The purpose of that regulatory action was described in strikingly similar terms to that described under the CTA, that is, to prevent criminals,

[8] *See e.g.* 6 Del. C. § 15-202(a).
[9] *See e.g.* 6 Del. C. § 17-201(b).
[10] *See e.g.* 6 Del. C. § 17-106(a).
[11] *See e.g.* 6 Del. C. § 17-303(a).
[12] The CTA definition of beneficial owner differs from the CDD definition found at 31 CFR § 1010.230 in only two ways. The first difference is the inclusion of the phrase "or controls" in the CTA definitional phrase "owns or controls not less than 25 percent of the ownership interests of the entity." The second difference is that the CTA includes any individual who, directly or indirectly, exercises substantial control over the entity, while the CDD rule definition only requires the identification of a single control person.

kleptocrats and others looking to hide ill-gotten proceeds from being able to conceal their identity, in the case of the CDD regulations by accessing the financial system anonymously, and in the case of the CTA by creating corporations anonymously.[13]

The CDD regulations were issued on May 11, 2016, and went into effect on May 11, 2018. On April 3, 2018, FinCEN published Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions.[14] These FAQs have provided very useful information and guidance in the implementation of the CDD regulations. It would be both efficient and practical for FinCEN to use these as a framework and reference point in providing rules under the CTA.

Finally, the CTA, like the CDD regulations, advances Treasury's ongoing effort to partner with the G-20, the Financial Action Task Force (FATF), and the Global Forum on Transparency and Exchange of Information for Tax Purposes to improve CDD practices worldwide. Much of the terminology included in the CTA and under the CDD regulations track words and definitions included in the FATF Recommendations[15] that seek to implement international standards on combating money laundering and the financing of terrorism and proliferation, as well as those found in the European Anti-Money Laundering Directives. The 25 percent threshold, for example, is consistent with that of many foreign jurisdictions, including EU member states, and with the FATF standard. The FATF standard in turn is used to define the controlling persons of an entity in the intergovernmental agreements the United States has entered into with more than 110 other countries to enforce the Foreign Account Tax Compliance Act (FATCA). The CTA regulations should be written with this context in mind.

In a more specific context, but for the same reasons, FinCEN should follow the CDD regulations in clarifying that the "beneficial owner" to be reported for a trust that directly or indirectly owns 25 percent or more of the ownership interests of an entity is the trustee only.[16]

Question 3b: Should FinCEN define either or both of the terms "own" and "control" with respect to the ownership interests of an entity? If so, should such a definition be drawn from or based on an existing definition in another area, such as securities law or tax law?

The term "own", prefaced by the phrase "directly or indirectly" should be sufficiently descriptive. The word "control", however, could be further defined particularly in the context of corporate agreements that provide parties with consent or veto rights. It would be helpful to clarify whether those types of rights, for example, constitute "control" of more than 25% of the entity.

Question 3c: Should FinCEN define the term "substantial control"? If so, should FinCEN define "substantial control" to mean that no reporting company can have more than one beneficial owner who is considered to be in substantial control of the company, or should FinCEN define that term to make it possible that a reporting company may have more than one beneficial owner with "substantial control"?

FinCEN should define the term "substantial control" using similar examples to those set forth for a "control" person under the CDD regulations at 31 CFR § 1010-230(2). In other words, an individual with substantial control would be defined to include, (i) an executive officer or senior manager (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner,

[13] 81 FR 29397, page 29297 (2016); H.R.6395 — 116th Congress (2019-2020)
[14] FIN-2018-G001
[15] www.fatf-gafi.org
[16] 31 CFR §1010-230(d)(3)

President, Vice President, or Treasurer); or (ii) any other individual who regularly performs similar functions. This definition provides ample description of the kind of significant managerial role that rises to "substantial control."

FinCEN should further follow the CDD rule in requiring that only one natural person with substantial control be specifically identified. This provides FinCEN with assurance that an individual behind the entity is disclosed, while also not leaving the class of individuals to be disclosed open to interpretation. The one person rule would provide companies with clarity and assurance as to how to completely comply with the CTA reporting rules.

Question 4: The CTA defines the term "applicant" as an individual who "files an application to form" or "registers or files an application to register" a reporting company. Is this language sufficiently clear, in light of current law and current filing registration practices, or should FinCEN expand on this definition, and if so, how?

We believe FinCEN should provide further clarification to the definition of "applicant."

First, although it is clear that there can be multiple beneficial owners, it is not (in our opinion) as clear that the definition of "applicant" is intended to be singular. ACTEC believes that the purposes of the CTA would be best served with clarity, and if the CTA is aimed at identifying one applicant, that the proposed regulations should make that clear.

Second, the term "files" is not defined in the CTA. Read literally, if the applicant is the individual who "files" an application to form a corporation, that could mean the individual who physically delivers the application, or who places the application in the mail. ACTEC believes that the purposes of the CTA would be better served in that instance in making clear that the applicant is the person who is undertaking more than ministerial duties, so that the incorporator (as an example) would be the "applicant" – even if the incorporator subsequently delegated to others the transmittal of the articles of incorporation. If someone is using reporting companies for illegitimate purposes, it would seem that the incorporator in this example is more important as an "architect" of the scheme, rather than others who may be carrying out ministerial steps to form the entity.

We recommend that FinCEN consider clarifying that there can be only one "applicant" for each reporting company, and that it is the individual who signs the articles of incorporation, articles of organization, certificate of formation or other legal instrument which creates the reporting company upon filing of such instrument. This approach would not only provide for a clear result, it would also allow entities that form reporting companies, such as law firms or corporate service providers, to identify a specific employee with management authority who could be charged with executing such instruments, and therefore qualify as the applicant for purposes of the CTA.

Question 5: Are there any other terms used in the CTA, in addition to those the CTA defines that should be defined in FinCEN's regulations to provide clarity? If so, which terms, why should FinCEN define such terms by regulation, and how should any such terms be defined?

Section 5333(d)(3)(B) of the CTA excludes certain individuals from classifying as a "beneficial owner" and thus, their identifying information is not required to be provided by the reporting company. One such exclusion applies to "[a] person whose only interest in the corporation or limited liability company is

through a right of inheritance." We believe that this term "right of inheritance" should be defined, as well as the time period for which the exclusion applies.

Depending upon the country in which the decedent died, an individual can generally inherit from a testate estate, intestate estate, or via forced heirship. It is also possible that the inheritance can pass through a trust, foundation, or similar entity. FinCEN should clarify the types of inheritances to which the exemption applies, so that there is no confusion. We believe the exemption should only apply to an individual who becomes a beneficial owner as a result of someone's death.

Further, it can take several months and even years for title to a decedent's assets to pass to their intended beneficiaries. It is unclear how long the exemption applies, but we believe it should continue to apply until legal title to the asset has actually been changed to the individual. At that point, the individual will become a beneficial owner, and the reporting company will have one year in which to report the information to FinCEN.

Question 8: If a trust or special purpose vehicle is formed by filing with a secretary of state or similar office, should it be included or excluded from the reporting requirements?

A trust or special purpose vehicle that is formed by filing with a secretary of state or similar office and satisfies the two other parts of the three-part test set forth in our above response to question 1a (i.e., formed for a business purpose and designed to shield its owners from personal liability), is described by the phrase "other similar entity" within the CTA's definition of a reporting company. Such a trust or special purpose vehicle should be included in the CTA reporting requirements.

For two reasons this answer would not apply to "ordinary" or "common law" trusts most frequently used by trust and estate lawyers for their clients. First, as discussed with respect to our above response to question 1b, common law trusts are not created by a filing with a secretary of state or similar office. Second, as also discussed in that response, common law trusts generally do not have associates or an objective to carry on business for profit.[17]

In contrast, however, certain other vehicles, which are sometimes referred to as "business trusts," "investment trusts" or "statutory trusts", are not "common law" trusts (or "ordinary trusts," as defined in Treas. Reg. §301.7701-4(a)), and instead are more likely to be described as an "other similar entity" – in part because they often have associates and an objective to carry on a business.[18] In such case, the fact that the vehicle may be named, or may be referred to as, a "trust" should not, by itself, exclude it from the definition of a reporting company. Therefore, if such a vehicle is formed by filing with a secretary of state or similar office, and it is an "other similar entity", it should be included in the reporting requirements of the CTA.

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[17] *See* Treas. Reg. §301.7701-1(b).
[18] *See* Treas. Reg. §301.7701-4(b) and (c).