

January 24, 2022

January Private Client Update

No Major Estate and Gift Tax Changes Likely in 2022

In our [October Alert](#), we wrote about the House budget reconciliation bill, H.R. 5376, called the Build Back Better bill (the “Bill”). The September version of the Bill included several provisions with far-reaching estate planning implications.

However, the Bill was modified before being passed by the House in mid-November, and most of the estate planning-related provisions we wrote about were eliminated. In particular, the modified Bill does not reduce the applicable exclusion amount; it does not eliminate the benefits of grantor trusts; and it does not change the rules that apply to estate and gift tax discounts on interests in entities holding nonbusiness assets.

The revised Bill has retained provisions that would impact high net worth taxpayers. A key component of the revised Bill is a surtax on modified adjusted gross income more than \$10 million for individuals (or \$200,000 for non-grantor trusts). At \$10 million the surtax would be 5%, and at \$25 million (or \$500,000 for trusts) an additional 3%. The Bill does not otherwise increase current individual income tax rates. Other provisions we mentioned in the October Alert, including a reduction of tax exemption on the sale of Qualified Small Business Stock and various changes to tax rules affecting retirement accounts, remain in the Bill. At the time of this writing the Bill is under consideration in the Senate, and it is unclear whether it will be modified further and whether or when it might be enacted.

Estate Planning Inflation Adjustments for 2022

The basic exclusion amount, which is the amount exempt from the federal estate and gift tax as well as the amount of exemption available from the generation-skipping transfer tax, has increased to \$12,060,000 in 2022. This is a \$360,000 increase from last year.

The gift tax annual exclusion amount is \$16,000 in 2022, up \$1,000 from last year. The inflation adjustment for the annual exclusion applies only in increments of \$1,000; the last increase was in 2018 (from \$14,000 to \$15,000).

The annual exclusion for gifts to non-U.S. citizen spouses has increased to \$164,000, up \$5,000 from last year. Other international-related inflation adjustments include the increase to \$17,339 of the value of foreign gifts that must be reported by U.S. persons who receive them; and the increase to \$178,000 of the 5-year average annual income tax that triggers “covered expatriate” status for purposes of determining whether an exit tax applies upon expatriation from the United States.

Upcoming Reporting Requirements under the Corporate Transparency Act

The Corporate Transparency Act (the “CTA”) became law in January 2021, as part of the National Defense Authorization Act. The CTA will require certain companies (“Reporting Companies”) to report their beneficial owners and other information to the Financial Crimes Enforcement Network (“FinCEN”), a bureau of the Treasury Department. The CTA was enacted primarily to combat money laundering, tax fraud and other illicit activities, and to bring the United States in compliance with international standards that share the same goals.

The reporting obligations under the CTA are expected to affect millions of entities and their owners. These obligations will affect virtually any estate planning structure that includes corporations, LLCs, limited partnerships or similar entities. Any individual or trust who owns these types of entities will be affected.

On December 8, 2021, FinCEN issued proposed regulations under the CTA. Final regulations, which will indicate the effective date of the new reporting requirements (the “Effective Date”), are expected to be issued later in 2022. In anticipation of the Effective Date, individuals and trustees should become familiar with the CTA, consider how it will affect them and how to arrange for compliance once it comes into effect.

Below is a summary of the CTA's reporting requirements under the proposed regulations:

- What is a Reporting Company under the CTA? The CTA defines a Reporting Company as any corporation, limited liability or other similar entity that is either (i) created by the filing of a document with a U.S. State or Indian Tribe, or (ii) formed in a foreign country but registered to do business in the United States by filing of a document with a U.S. State or Indian Tribe. The proposed regulations expand this definition to include any entity that meets either criteria, regardless of whether it is a "similar" entity.

There are twenty-three exceptions from the definition of Reporting Company, which capture banks, publicly traded companies, broker-dealers, and several other entities that are deemed to be already subject to sufficient regulatory oversight. Notably, there is no dedicated exception for the type of unregulated holding company that is commonly used for estate planning purposes. The definition of Reporting Company is therefore designed to encompass most family investment vehicles.

- What must be reported by a Reporting Company? Under the CTA, a Reporting Company will have to report information about itself, its "Beneficial Owners" and its "Applicants." Under the proposed regulations, the reportable information would generally include:
 - For the Reporting Company: Full name, address, jurisdiction of formation and Taxpayer Identification Number ("TIN") or its DUNS Number or LEI if the company has no TIN.
 - For each Beneficial Owner: Full name, date of birth, residential address and a unique identifying number (e.g., passport number, driver's license number) and the image of a document containing both the identifying number and a photograph.
 - For each Applicant: The same information as for Beneficial Owners, except that certain Applicants may use a business address instead of a residential address.

The proposed regulations would allow Reporting Companies, Beneficial Owners and Applicants to obtain a FinCEN identifier number that Reporting Companies may report in lieu of the information listed above.

- Who is a Beneficial Owner?

A Beneficial Owner of a Reporting Company is an individual who directly or indirectly either (i) exercises substantial control over the Reporting Company, or (ii) owns or controls at least 25% of the Reporting Company.

The proposed regulations clarify the definition of substantial control to include serving as a senior officer, authority over appointment or removal of any senior officer and direction or substantial influence over important matters affecting the Reporting Company.

If an interest in a Reporting Company is owned by a trust, any trustee with the power to dispose of trust assets is deemed to own the trust's interest in the Reporting Company. A trust beneficiary would also be attributed ownership if he or she is the sole beneficiary or has the power to withdraw substantially all trust assets. Finally, a trust's settlor is treated as an owner of the trust's interest in a Reporting Company if he or she may revoke or withdraw the trust assets, whether under the terms of the instrument, some other agreement or through ownership in one or more entities.

- Who is an Applicant? Generally, an Applicant is anyone who files (or directs the filing of) the document that creates a Reporting Company or, in the case of foreign companies, anyone who files (or directs the filing of) the document that first registers the foreign company in a State or Indian Tribe.
- What are the penalties for violating the CTA? Penalties for willful reporting violations include civil monetary penalties of up to \$500 for each day the violation continues, criminal fines of up to \$10,000 and up to 2-year imprisonment.
- When will the reporting obligations under the CTA come into effect? The final regulations that are yet to be issued will specify the Effective Date. Under the proposed regulations:
 - Any Reporting Company formed on or after the Effective Date would have to submit the reportable information to FinCEN within 14 days from the date it was formed (or registered in the case of foreign entities).
 - Any Reporting Company formed before the Effective Date would have one year from the Effective Date to submit the report to FinCEN.

In addition, after the Effective Date:

- Reporting Companies that are no longer exempt from the CTA's requirements would have to file a report within 30 days from the loss of exempt status.
- Entities with respect to which there are changes to the reportable would have to file an updated report within 30 days from the date of the change.
- Entities that filed an incorrect report would have to file a corrected report within 14 days of becoming aware or having reason to know the original report was incorrect.