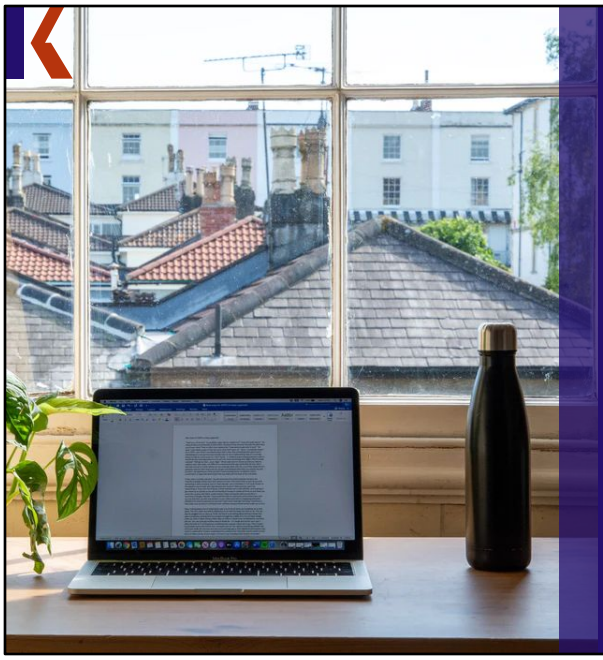


Current Federal Tax Developments

July 15, 2024

Kaplan Financial Education

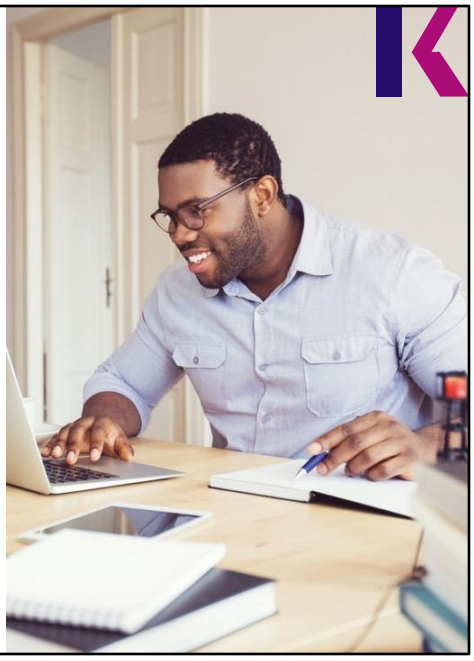
KAPLAN

This Week We Look At:

FinCEN updates the FAQs for BOI reporting, adding information about entities that cease to exist

New Jersey Committee on Unauthorized Practice of Law releases letter outlining when CPAs and EAs may prepare and/or file BOI reports for clients without the assistance of an attorney

Another PLR issued for missed ESBT elections for trusts that qualified to make such elections



https://www.currentfederaltaxdevelopments.com

More FAQ Updates from FinCEN on BOI Reporting

Photo by Evestetix Studio on Unsplash

- Beneficial Ownership Information Frequently Asked Questions Page, FinCEN BOI Website, July 8, 2024
  - Added three more Q&As to the website - deals with issues related to the January 1, 2024 effective date and whether filing is required for:
    - Entities formed before the date of enactment
    - Entities that ceased to exist before January 1, 2024
    - Entities in existence during 2024 that cease to exist before initial filing date
- Updated question on Indian Tribe owned entities

https://www.fincen.gov/boi-faqs

More FAQ Updates from FinCEN on BOI Reporting

C. 12. Do beneficial ownership information reporting requirements apply to companies created or registered before the Corporate Transparency Act was enacted (January 1, 2021)?

Yes. Beneficial ownership information reporting requirements apply to all companies that qualify as "reporting companies" (see Question C.1), regardless of when they were created or registered. Companies are not required to report beneficial ownership information to FinCEN if they are exempt (see Question C.2 and, generally, Section L) or ceased to exist as legal entities before January 1, 2024 (see Question C.13).

https://www.fincen.gov/boi-faqs#C_12

More FAQ Updates from FinCEN on BOI Reporting

C. 13. Is a company required to report its beneficial ownership information to FinCEN if the company ceased to exist before reporting requirements went into effect on January 1, 2024?

A company is not required to report its beneficial ownership information to FinCEN if it ceased to exist as a legal entity before January 1, 2024, meaning that it entirely completed the process of formally and irrevocably dissolving. A company that ceased to exist as a legal entity before the beneficial ownership information reporting requirements became effective January 1, 2024, was never subject to the reporting requirements and thus is not required to report its beneficial ownership information to FinCEN.

Although state or Tribal law may vary, a company typically completes the process of formally and irrevocably dissolving by, for example, filing dissolution paperwork with its jurisdiction of creation or registration, receiving written confirmation of dissolution, paying related taxes or fees, ceasing to conduct any business, and winding up its affairs (e.g., fully liquidating itself and closing all bank accounts).

https://www.fincen.gov/boi-faqs#C_13

More FAQ Updates from FinCEN on BOI Reporting

If a reporting company (see Question C.1) continued to exist as a legal entity for any period of time on or after January 1, 2024 (i.e., did not entirely complete the process of formally and irrevocably dissolving before January 1, 2024), then it is required to report its beneficial ownership information to FinCEN, even if the company had wound up its affairs and ceased conducting business before January 1, 2024.

Similarly, if a reporting company was created or registered on or after January 1, 2024, and subsequently ceased to exist, then it is required to report its beneficial ownership information to FinCEN—even if it ceased to exist before its initial beneficial ownership information report was due.

For specifics on how to determine when a company ceases to exist as a legal entity, consult the law of the jurisdiction in which the company was created or registered. A company that is administratively dissolved or suspended—because, for example, it failed to pay a filing fee or comply with certain jurisdictional requirements—generally does not cease to exist as a legal entity unless the dissolution or suspension becomes permanent.

https://www.fincen.gov/boi-faqs#C_13

More FAQ Updates from FinCEN on BOI Reporting

C. 14. If a reporting company created or registered in 2024 or later winds up its affairs and ceases to exist before its initial BOI report is due to FinCEN, is the company still required to submit that initial report?

Yes. Reporting companies created or registered in 2024 must report their beneficial ownership information to FinCEN within 90 days of receiving actual or public notice of creation or registration. Reporting companies created or registered in 2025 or later must report their beneficial ownership information to FinCEN within 30 days of receiving actual or public notice of creation or registration. These obligations remain applicable to reporting companies that cease to exist as legal entities—meaning wound up their affairs, ceased conducting business, and entirely completed the process of formally and irrevocably dissolving—before their initial beneficial ownership reports are due. If a reporting company files an initial beneficial ownership information report and then ceases to exist, then there is no requirement for the reporting company to file an additional report with FinCEN noting that the company has ceased to exist.

https://www.fincen.gov/boi-faqs#C_14

More FAQ Updates from FinCEN on BOI Reporting

D. 17. Who should an entity fully or partially owned by an Indian Tribe report as its beneficial owner(s)?

The answer depends in part on the nature of the entity owned by the Indian Tribe. This informs the determination on whether the entity is a reporting company that must report beneficial ownership information.

In general, a reporting company must report as beneficial owners all individuals who, directly or indirectly, exercise substantial control over the reporting company (see Question D.2), and any individuals who directly or indirectly own or control at least 25 percent or more of the reporting company's ownership interests (see Question D.4).

An Indian Tribe is not an individual, and thus should not be reported as an entity's beneficial owner, even if it exercises substantial control over an entity or owns or controls 25 percent or more of the entity's ownership interests. However, entities in which Tribes have ownership interests may still have to report one or more individuals as beneficial owners in certain circumstances.

https://www.fincen.gov/boi-faqs#D_17

More FAQ Updates from FinCEN on BOI Reporting

Entity Is a Tribal Governmental Authority. An entity is not a reporting company—and thus does not need to report beneficial ownership information at all—if it is a "governmental authority," meaning an entity that is (1) established under the laws of the United States, an Indian Tribe, a State, or a political subdivision of a State, or under an interstate compact between two or more States, and that (2) exercises governmental authority on behalf of the United States or any such Indian Tribe, State, or political subdivision. This category includes tribally chartered corporations and state-chartered Tribal entities if those corporations or entities exercise governmental authority on a Tribe's behalf.

Entity's Ownership Interests Are Controlled or Wholly Owned by a Tribal Governmental Authority. A subsidiary of a Tribal governmental authority is likewise exempt from BOI reporting requirements if its ownership interests are entirely controlled or wholly owned by the Tribal governmental authority. See Questions L.3 and L.6 for information on this "subsidiary exemption." See Question C.2 and Section L generally for more information about other exemptions.

https://www.fincen.gov/boi-faqs#D_17

More FAQ Updates from FinCEN on BOI Reporting

Entity Is Partially Owned by a Tribe (and Is Not Exempt). A non-exempt entity partially owned by an Indian Tribe should report as beneficial owners all individuals exercising substantial control over it, including individuals who are exercising substantial control on behalf of an Indian Tribe or its governmental authority. The entity should also report any individuals who directly or indirectly own or control at least 25 percent or more of ownership interests of the reporting company. (However, if any of these individuals owns or controls these ownership interests exclusively through an exempt entity or a combination of exempt entities, then the reporting company may report the name(s) of the exempt entity or entities in lieu of the individual beneficial owner. See Question D.12.)

FinCEN's Small Entity Compliance Guide includes additional information on how to determine if an individual qualifies as a beneficial owner in Chapter 2, "Who is a beneficial owner of my company?". This chapter includes separate sections with more information about substantial control and ownership interest: Chapter 2.1 "What is substantial control?" and Chapter 2.2 "What is ownership interest?"

https://www.fincen.gov/boi-faqs#D_17

New Jersey UPL Committee Issues Guidance on UPL and the BOI Reports

Photo by AbsolutVision on Unsplash

- Letter from Carol Johnston, Committee Secretary/Counsel for the New Jersey Committee on the Unauthorized Practice of Law to Aiysha Johnson, CEO & Executive Director, New Jersey Society of Certified Public Accountants, UPLC Docket No. 01-202, July 9, 2024
  - Letter issued to NJCPA by the New Jersey Committee on the Unauthorized Practice of Law
  - Asked whether CPAs could prepare and file BOI reports under the CTA for clients
  - While it only directly applies to New Jersey, the concepts are likely to be considered in other states if the matter comes up

https://www.njcpa.org/docs/default-source/stay-informed/advocacy/01-2024-cpa-inquiry-response.pdf?sfvrsn=7223573a_4
https://www.currentfederaltaxdevelopments.com/blog/2024/7/12/new-jersey-committee-on-unauthorized-practice-of-law-issues-guidance-applicable-to-cpas-and-eas-who-prepare-and-file-fincen-beneficial-ownership-information-reports

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  - Outlines two factors that must be considered
    - Is the preparation and/or filing of BOI reports the practice of law and
    - Is it in the public interest to permit nonattorneys to prepare the forms, considering whether the public needs to be protected from the activity

https://www.njcpa.org/docs/default-source/stay-informed/advocacy/01-2024-cpa-inquiry-response.pdf?sfvrsn=7223573a_4
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  - Determines that preparing and/or filing BOI reports is the practice of law in New Jersey - involves "applying the terms of a dense statute to a set of potentially complicated facts."
  - But that is not the end of inquiry - should all such preparations and/or filing be restricted to attorneys to protect the public?

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  - Public interest question
    - Should non-lawyers be allowed to engage in activities that may constitute the practice of law?

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  - NJ Supreme Court determined in 1986 that CPAs (and later EAs) were allowed to prepare and file NJ Inheritance Tax Returns
    - *In re Application of New Jersey Society of CPAs*, 102 N.J. 231, 241-42 (1986)
    - CPAs do have to tell clients review of the return by an attorney would be advisable

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  - The Court noted that any limitation on the practice of law must deal with the overlap of professional disciplines
    - Although not stated, arguably a number of BOI exemption rules involve the practice of accounting (e.g. gross income for large entities)
    - Could end up with no one being able to give advice absent a consideration for the overlap

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  - Letter also refers to the Committee's opinion granting non-attorneys a limited right to draft corporate documents (UPL Opinion 47, 2011). Considered
    - Any demonstrable harm from allowing
    - Cost savings accruing to the public
    - Voluntary nature of not using an attorney and
    - Client's understanding of the risks

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  - The Committee again requires that those allowed to perform this task must advise their clients that the assistance of counsel in drafting is advisable

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  - Now to apply this to the BOI
    - Public needs some protection due to
      - The complexity of some matters under the CTA
      - Significant criminal and civil penalties
      - Complex filings require a lawyer's "judgment, training and expertise"

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  - Now to apply this to the BOI
    - However most BOI reporting situation are not complex
      - Knowledge of an attorney is not required to complete the form
      - In such cases, there would be a significant cost savings to the public in not having to have an attorney prepare the filing

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  - Now to apply this to the BOI
    - Insufficient information yet to determine if entities are aware of the risks of using a nonlawyer
    - The Act is simply too new to make this determination (frankly a lot may depend on FinCEN's enforcement stance)

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  - Committee concludes
    - A NJ licensed CPA (or EA) can engage in this conduct if the CPA (or EA) notifies the client it may be advisable to consult with a lawyer
    - Specifically, the Committee relies on the professionalism of CPA (or EA) to recognize when a filing is complex and it is in the client's interest for an attorney to be retained

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  - That last point is not just required by this ruling - AICPA Code of Conduct ET §0.300.060.04 requires CPAs to
    - Assess his/her and the firm's competence to perform the service and
    - Make a referral or obtain a consultation when the engagement exceeds the personal competence of a member or a member's firm

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New Jersey UPL Committee Issues Guidance on UPL and the BOI Reports

ET §0.300.060.04

.04 Competence represents the attainment and maintenance of a level of understanding and knowledge that enables a member to render services with facility and acumen. *It also establishes the limitations of a member's capabilities by dictating that consultation or referral may be required when a professional engagement exceeds the personal competence of a member or a member's firm. Each member is responsible for assessing his or her own competence of evaluating whether education, experience, and judgment are adequate for the responsibility to be assumed. (emphasis added)*

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  - Compliance with this is required quite often
    - Either by direct reference to the Code of Conduct by state board regulations (for example, Arizona Accountancy R4-1-455.A and New Jersey N.J.A.C. 13:29-3.19)
    - Or by an explicit regulation that requires the same (New Jersey N.J.A.C. 13.29-3.3)

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  - This is in line with what many have been suggesting and what insurance carriers are now beginning to accept
    - Simple BOI reports where the client wants assistance can be handled by the CPA or EA
    - But the CPA or EA must always be aware of when the matter has strayed heavily into legal analysis and require the client to seek legal counsel or do it themselves

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  - It's also important to be sure anyone in tax has documented that they have informed the client of this matter even if they and/or their firm have decided not to take on these engagements
  - The huge problem is not really the legal issue - it's rather figuring out how to get clients to notify any professional promptly when events occur that will require an updated report

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Trust Goes Through 2 Separate Modifications to the Trust and Fails to Make ESBT Elections Each Time

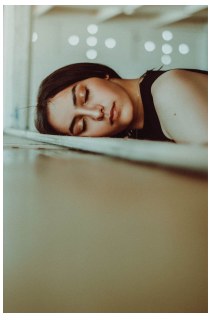

Photo by Houcine Ncib on Unsplash

- PLR 202428001, July 12, 2024
  - Another case where it appears advisers were asleep regarding trusts as S shareholders
  - The IRS continues to be extremely forgiving in granting relief to S corporations where ESBT and/or QSST elections aren't made - but always collects the fee if the problem isn't caught in time for automatic relief
  - In this case we have a trust holding shares that went through two separate major revisions - presumably with professional advice - but somehow missed the required tax elections both times

https://www.irs.gov/pub/irs-wd/202428001.pdf

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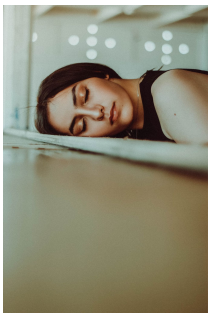

Photo by Houcine Ncib on Unsplash

- PLR 202428001, July 12, 2024
  - Originally the trust was a 100% grantor trust, which is an eligible S corporation shareholder
  - At a later date the trust was revised to
    - No longer meet the requirements to be taxed as a grantor trust but
    - Have provisions that would allow the trust to be an ESBT
  - However the election was never made by the trustee
  - S election terminated at this point

https://www.irs.gov/pub/irs-wd/202428001.pdf

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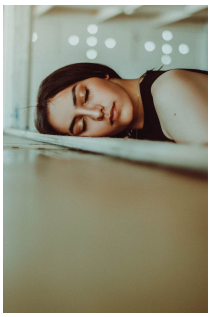

Photo by Houcine Ncib on Unsplash

- PLR 202428001, July 12, 2024
  - On a later date, the trust was divided into four separate shares, creating 4 separate shares under IRC §663(c)
    - Again these separate shares met the requirements to be treated as ESBT
    - And, again, the trustees failed to make the election
    - So even if the S election hadn't already been terminated, it would have been terminated now

https://www.irs.gov/pub/irs-wd/202428001.pdf

Trust Goes Through 2 Separate Modifications to the Trust and Fails to Make ESBT Elections Each Time

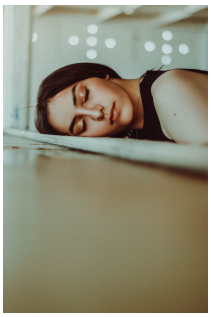

Photo by Houcine Ncib on Unsplash

- PLR 202428001, July 12, 2024
  - The problem is noticed by the S corporation (again, often this is during a due diligence review for a proposed sale to a larger entity), and the corporation files for a PLR to retroactively restore S status
    - IRS agrees that the terminations were inadvertent
    - Restores S status contingent on ESBT elections being filed by the deadline in the letter

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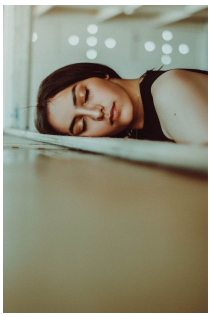

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- PLR 202428001, July 12, 2024
  - Clearly there is a real problem in this area because these ruling keep on coming - and the situations are getting worse
    - If you are involved in trust or estate work be sure you understand the QSST and ESBT election rules - and read the documents to determine if it appears such an election was contemplated by the drafter of the documents

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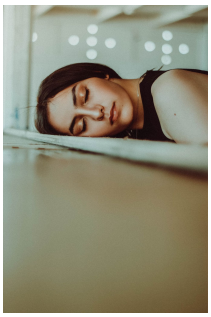

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- PLR 202428001, July 12, 2024
  - Clearly there is a real problem in this area because these ruling keep on coming - and the situations are getting worse
    - Similarly, if you handle S corporation clients, be sure to inquire about whether any shares have been transferred to a trust
      - If a trust is involved, document why it is an eligible shareholder
      - Remind the corporation of any required elections by trust shareholders

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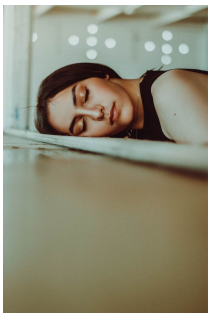

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- PLR 202428001, July 12, 2024
  - Clearly there is a real problem in this area because these ruling keep on coming - and the situations are getting worse
    - Counsel that drafts estate plans that contemplate having S shares move into trusts should be sure to clearly inform all parties (including, importantly, ones that will still be alive after a shareholder dies) about the importance of ESBT or QSST elections

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