

Reporting of Beneficial Ownership Information; Employee Retention Credit; Exclusion of Gain on Sale of Land with Residence; and a Farm Lease

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Introduction

As I try to catch up on my writing after being on the road for a lengthy time, I have several items that seem to be recurring themes in what I deal with.

Another potpourri of random ag law and tax issues – it's the topic of today's post.

New Corporate Reporting Requirements

The Corporate Transparency Act (CTA), P.L. 116-283, enacted in 2021 as part of the National Defense Authorization Act, was passed to enhance transparency in entity structures and ownership to combat money laundering, tax fraud and other illicit activities. In short, it's an anti-money laundering initiative designed to catch those that are using shell corporations to avoid tax. It is designed to capture more information about the ownership of specific entities operating in or accessing the U.S. market. The effective date of the CTA is January 1, 2024.

Who needs to report? The CTA breaks down the reporting requirement of "beneficial ownership information" between "domestic reporting companies" and "foreign reporting companies." A domestic reporting company is a corporation, limited liability company (LLC), limited liability partnership (LLP) or any other entity that is created by filing of a document with a Secretary of State or any similar office under the law of a state or Indian Tribe. A foreign reporting company is a corporation, LLC or other foreign entity that is formed under the law of a foreign country that is registered to do business in any state or tribal jurisdiction by the filing of a document with a Secretary of State or any similar office.

Note: Sole proprietorships that don't use a single-member LLC are not considered to be a reporting company.

Reporting companies typically include LLPs, LLLPs, business trusts, and most limited partnerships and other entities are generally created by a filing with a Secretary of State or similar office.

Exemptions. Exemptions from the reporting requirement apply for securities issuers, domestic governmental authorities, insurance companies, credit unions, accounting firms, tax-exempt entities, public utility companies, banks, and other entities that don't fall into specified categories. In total there are 23 exemptions including an exemption for businesses with 20 or more full-time U.S. employees, report at least \$5 million on the latest filed tax return and have a physical presence in the U.S. But, for example, otherwise exempt businesses (including farms and ranches) that have other businesses such



as an equipment or land LLC or any other related entity will have to file a report detailing the required beneficial ownership information. Having one large entity won't exempt the other entities.

What is a "Beneficial Owner"? A beneficial owner can fall into one of two categories defined as any individual who, directly or indirectly, either:

- Exercises substantial control over a reporting company, or
- Owns or controls at least 25 percent of the ownership interests of a reporting company

Note: Beneficial ownership is categorized as those with ownership interests reflected through capital and profit interests in the company.

What must a beneficial owner do? Beneficial owners must report to the Financial Crimes Enforcement Network (FinCEN). FinCEN is a bureau of the U.S. Department of the Treasury that collects and analyzes information about financial transactions to combat domestic and international money laundering, terrorist financing and other international crimes. Beneficial owners must report their name, date of birth, current residential or business street address, and unique identifier number from a recognized issuing jurisdiction and a photo of that document. Company applicants can only be the individual who directly files the document that creates the entity, or the document that first registers the entity to do business in the U.S. A company applicant may also be the individual who is primarily responsible for directing or controlling the filing of the relevant document by someone else. This last point makes it critical for professional advisors to carefully define the scope of engagement for advisory services with clients.

Note: If an individual files their information directly with FinCEN, they may be issued a "FinCEN Identifier" directly, which can be provided on a BOI report instead of the required information.

Filing deadlines. Reporting companies created or registered in 2024 have 90 days from being registered with the state to file initial reports disclosing the persons that own or control the business. *NPRM (RIN 1506-AB62) (Sept 28, 2023)*. If a business was created or registered to do business before 2024, the business has until January 1 of 2025 to file the initial report. Businesses formed after 2024 must file within 30 days of formation. Reports must be updated within 30 days of a change to the beneficial ownership of the business, or 30 days from when the beneficial owner becomes aware of or has reason to know of inaccurate information that was previously filed.

Note: FinCEN estimates about 32.6 million BOI reports will be filed in 2024, and about 14.5 million such reports will be filed annually in 2025 and beyond. The total five-year average of expected BOI update reports is almost 12.9 million.

Penalties. The penalty for not filing is steep and can carry the possibility of imprisonment. Specifically, noncompliance can result in escalating fines ranging from \$500 per day up to \$10,000 total and prison time of up to two years.



State issues. A state is required to notify filers upon initial formation/registration of the requirement to provide beneficial ownership information to the FinCEN. In addition, states must provide filers with the appropriate reporting company Form.

Withdrawing an ERC Claim

Over the past year or so many fraudulent Employee Retention Credit claims have been filed. You may have heard or seen the ads from firms aggressively pushing the ability to claim the ERC. It's gotten so bad that the IRS stopped processing claims for the fourth quarter of 2023. Many farming operations likely didn't qualify for the ERC because they didn't experience at least a 20 percent reduction in gross receipts on an aggregated basis (an eligibility requirement for the ERC) but may have submitted a claim.

Now IRS has provided a path for those that want to withdraw their claim so as not to be hit with a tax deficiency notice and penalties. *IR 2023-169 (Sept. 14, 2023).*

A withdrawal is possible for those that filed a claim but haven't received notice that the claim is under audit. Just file Form 943 and write "withdrawn" on the left-hand margin. Make sure to sign and date the Form before sending it to the IRS. If your claim is under audit provide the Form directly to the auditor. If you received a refund but haven't cashed it, write "VOID and ERC WITHDRAWAL" and send it back to the IRS.

How Much Gain on Land Can Be Excluded Under Home Sale Rule?

When you sell your principal residence, you can exclude up to \$500,000 of gain on a joint return (\$250,000 on a single return) if you have owned the home and used it as your principal residence for at least two out of the last five years immediately preceding the sale. *I.R.C. §121*. But how much land can be included with the sale of the home and have gain excluded within that \$500,000 limitation? The Treasury Regulations provide guidance.

For starters, the land must be adjacent to the principal residence and be used as a part of the residence. *Treas Reg. §1.121-1(b)(3)*. In addition, the taxpayer must own the land in the taxpayer's name rather than in an entity that the taxpayer has an ownership interest in (unless the entity is an "eligible entity" defined under *Treas. Reg. §301.7701-3(1)*). Land that's been used in farming within the two-year period before the sale isn't eligible because its use in farming means it's not been used as part of the residence.

Note: Sale of the principal residence and sale of the adjacent land is treated as a single sale for purposes of the gain limitation amount. That's true even if the sale occurs in different years but within the two-year time constraint. *Treas. Reg. §1.121-1(b)(3)(ii)(c)*. Also, when computing the maximum limitation for the gain exclusion, the sale of the principal residence is excluded before any gain for the sale of the vacant land. *Treas. Reg. §1.121-1(b)(3)(ii)*.

For land that is eligible to be included with the residence, how much can be included? It depends. Land that contains a garden for home use and land that is landscaped as a yard can be



included. Also, local zoning rules might be instructive. This all means that it's a fact-based analysis. There is no bright-line rule. IRS rulings and caselaw illustrate that point.

Written Farm Lease Expires by its Terms; No Holdover Tenancy

A recent case from Kansas illustrates how necessary it is to pay attention to the terms of a written farm lease. Under the facts of the case, the plaintiff entered into a written farm lease with a landowner on January 10, 2018. The purpose of the lease was the maintenance and harvesting a hay crop on the leased ground. By its terms, the lease terminated on December 31, 2018, and contained a provision specifying that the parties could mutually agree in writing to extend the lease. However, the parties did not extend the lease and it expired as of December 31, 2018.

In 2019, the landowner sold the farm to a third-party buyer. After the sale, but before the buyer took possession, the plaintiff had the hay field fertilized. During the summer of 2019, the new landowner hired the defendant to cut and bale the hay, which the defendant ultimately completed late one night. However, early the next morning the plaintiff entered the property and took some of the hay after it was harvested and baled. The new owner called law enforcement and the plaintiff was informed not to return to the property. But the plaintiff returned to the property and took more hay. The plaintiff was criminally charged for multiple offenses. Ultimately, the plaintiff received a diversion in lieu of prosecution for the charges (against the new owner's wishes) and was required to provide restitution and perform community service.

The plaintiff claimed that he was entitled to the hay bales because he had a verbal lease and tried to tender a rent check after removing the bales. The landowner refused to cash the check and moved cattle onto the hay ground. The plaintiff sued for breach of contract, breach of duty of good and fair dealing, and tortious interference with a contract or business relationship. The trial court rejected all of the claims and dismissed the case as a matter of law on the basis that the plaintiff did not have a valid lease after 2018. The trial court denied a motion to reconsider. On appeal, the appellate court affirmed noting that the lease had not been extended in writing and a holdover tenancy did not exist. As for monetary damages, the new landowner recovered \$27,000 from the plaintiff. *Thoele v. Lee*, 2023 Kan. App. Unpub. LEXIS 381 (Kan. Ct. App. Sept. 15, 2023).

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