

The Corporate Transparency Act: Where We Are Now

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Estate Planning Council of Eastern New York, Inc.

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The LLC Transparency Act

- A New York act
- Passed in June by the Assembly (A-3484) and the Senate (S-995)
- Signed by Governor Hochul December 22, 2023
- Uses the same terms as the Corporate Transparency Act
- Only applies to LLCs, not partnerships or corporations
- Would have created a public registry of beneficial owners administered by the NY Secretary of State
- Governor secured a “compromise agreement” with the Legislature limiting access to law enforcement and regulators.
- Unclear what the terms of the compromise agreement actually are.
- Will take effect January 1, 2025.

Why the Corporate Transparency Act (CTA)?

- Protect U.S. national security and commerce
- Enable national security, intelligence, and law enforcement agencies to counter money laundering, terrorism financing, and other illicit activities
- Bring the U.S. into compliance with international anti-money laundering and countering of terrorism financing standards

What Does the CTA Require?

- A **Reporting Company** must disclose information about **the entity itself**, the **Company Applicant**, and its **Beneficial Owners** to the Financial Crimes Enforcement Network (FinCEN) of the Department of Treasury
- The Act does **not** create a public registry of business entities in the U.S.
- Effective January 1, 2024

The Questions You Must Answer

- Is this entity a Reporting Company?
 - If no, then the CTA doesn't apply.
 - If yes, then you must file an Initial Beneficial Owner Information Report and keep it up to date.
- Who are the Beneficial Owners?
 - 25% owners
 - Those with “substantial control”
- For entities formed after 1/1/24- Who are the Company Applicants?
 - Limited to two individuals.

When is a Report Due?

- Initial Report
 - Reporting Companies Existing 12/31/23- by January 1, 2025
 - Domestic Reporting Companies formed or Foreign Reporting Companies registered during 2024- 90 days
 - Domestic Reporting Companies formed or Foreign Reporting Companies registered after 2024- 30 days
- Updated Report
 - Within 30 calendar days after there is any change to any information previously submitted to FinCEN regarding a Reporting Company or a Beneficial Owner.
 - No update needed for change to Company Applicant information.

What Information is Disclosed?

- A Reporting Company must disclose its:
 - Full legal name
 - Any “doing business as” names
 - A complete current business address
 - The State, Tribal, or foreign jurisdiction of formation
 - For a foreign reporting company, the State or Tribal jurisdiction where such company first registers
 - The TIN of the reporting company or foreign equivalent if a foreign reporting company has not been issued a TIN by the IRS

What Information is Disclosed?

- For each Beneficial Owner or Company Applicant, the disclosure must include
 - Full legal name and date of birth
 - Each Beneficial Owner's current residential address, and each Company Applicant's current business address
 - An identification number (such as a driver's license or passport number) and a digital copy of the identifying document
- In lieu of the foregoing, a Reporting Company can provide the FinCEN Identifier of a Beneficial Owner or Company Applicant

FinCEN Identifier

- Provide the information that normally must be shared with a Reporting Company and FinCEN will issue you an identifier number that can be provided to any Reporting Company.
- Any individual or entity with a FinCEN identifier must report to FinCEN within 30 days of (1) any change in BOI or (2) if they become aware or have reason to know any information was inaccurate.
- If a Reporting Company and an entity that owns it have the same beneficial owners, the Reporting Company can use the entity FinCEN identifier instead of disclosing BOI of the owners of that entity.

When Do BOI Reports Need to be Updated?

- *Any time there is a change in reported information*
- About a Reporting Company
 - Name, DBA, Address, when it becomes exempt or is no longer exempt
- About a Beneficial Owner
 - Name, address, new drivers license/passport
- List of Beneficial Owners
 - New 25% owner or existing owner drops below 25%
 - Death of a BO
 - Change of Senior Officers
 - Change of Trustee
 - Minor reaches age of majority

Correcting a Report

- If a Reporting Company becomes aware “or has reason to know” that information contained in a report is inaccurate they have 30 calendar days from that date to file a corrected report.

Protection of Beneficial Ownership Information (BOI)

- The CTA does not authorize public disclosure of BOI
- FinCEN can disclose the information to:
 - A Federal agency engaged in national security, intelligence, or law enforcement activity, for the use in furtherance of such activities;
 - A State, local, or tribal law enforcement agency as part of a criminal or civil investigation, with court approval;
 - A foreign government, to assist an investigation if a Federal agency requests the information;
 - A financial institution with the consent of the reporting company, to facilitate compliance of the institution with customer due diligence; or
 - A Federal regulator to determine compliance of a financial institution with their customer due diligence requirements.

Tax Administration

- Officers and employees of the Department of the Treasury can access “beneficial ownership information for tax administration purposes...”
5336(c)(5)(B)

Security Protocols

- The protocols are intended to:
 - Protect the security and confidentiality of any BOI by prohibiting further disclosure;
 - Require requesting agencies to establish, maintain, and abide by a secure system that would store BOI;
 - Limit the scope of information sought, consistent with the purpose of seeking the information;
 - Restrict access to BOI to those who have undergone appropriate training, and who are authorized to access the information; and
 - Establish an auditable system of records to track each request, purpose of the request, name of requesting individual, and any disclosure of information.
- Final regulations were issued December 21, 2023.

Penalties for Governmental Misuse of Information

- Any individual guilty of unauthorized disclosure or use of Beneficial Owner information
 - Is liable for a civil penalty of \$500 per day the violation continues or is not remedied **and**
 - If found criminally liable shall be fined no more than \$250,000, or imprisoned for 5 years, or both **or**
 - If violating another law of the United States or any illegal activity involving more than \$100,000 over a 12-month period, the maximum criminal fine increases to \$500,000 or 10 years imprisonment.

Penalties For Individuals

- An individual who willfully provides false or fraudulent information, or willfully fails to report complete or updated Beneficial Ownership information faces a civil penalty of \$500/day the violation continues or is not remedied, and a criminal fine of up to \$10,000, and/or 2 years imprisonment
- There is a 90-day safe-harbor if an individual voluntarily submits a report containing correct information

What is a “Willful” Action?

- The CTA defines willful as “the voluntary, intentional violation of a known legal duty.”
- FinCEN views refusing to provide BOI to a reporting company as a willful act subject to both civil and criminal penalties.
- Senior Officers of a reporting company that fails to file can held responsible for the failure.

What Does the Corporate Transparency Act (CTA) Require?

- A **Reporting Company** must disclose information about **the entity itself**, the **Company Applicant**, and its **Beneficial Owners** to the Financial Crimes Enforcement Network (FinCEN) of the Department of Treasury

Reporting Companies

- The Act defines a Reporting Company as:
 - A corporation, LLC, or other similar entity that is
 1. Created by filing a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or
 2. Formed under the law of a foreign country and registered to do business in the United States by the filing of a document with the secretary of state or a similar office under the laws of a State or Indian Tribe.
- LPs, LLPs and business trusts (statutory trusts) are “similar” entities
- Trusts and general partnerships are excluded from this definition

Jack and Jill- Scenario 1

- In January of 2024 Jack and Jill went up a hill to fetch a pail of water.
- Jack and Jill discovered a fresh water spring that never froze.
- Thrilled with their discovery they built a large home, called it the J&J B&B, and began renting rooms.
- Jack and Jill took no legal advice, so they own their home as JTWROS.
 - *Is there a Reporting Company?*
 - *What are the obligations of J&J under the Corporate Transparency Act?*

Reporting Company Exemptions

- The Act **excludes twenty-three types of entities** from qualifying as a Reporting Company.
 - Publicly traded organizations
 - Domestic governmental authorities
 - Banks, credit unions, depository institutions, and money transmitting businesses
 - Broker dealers and RICs
 - Securities exchanges
 - Insurance companies
 - Public utilities
 - Public accounting firms registered under Section 102 of the Sarbanes-Oxley Act
 - Financial market utilities
 - Certain pooled investment vehicles

More Common Exemptions

- A “*Large Operating Company*”
 - With more than 20 full time employees in the United States
 - 30 hours a week or 130 hours per month
 - With gross receipts or sales as reported on the prior year's federal income tax return of over \$5 million
 - Must be U.S. sourced income
 - This means a new entity cannot be a “Large Operating Company”
 - With an operating presence at a physical office within the United States
- 501(c) tax exempt charitable organizations and foundations

Are These Reporting Companies?

1. Dewey, Cheatem, and Howe LLP- A law firm of over 600 attorneys.
2. The Law Offices of Perry Mason- 1 attorney and 2 staff
3. Real Estate LLC- Owns a single piece of rental property with two owners.
4. Property Management Co- A corporation with one owner, 21 employees and \$8 million of income.
 1. What if an employee quits?
5. Liss Family Investments- A general partnership co-owned by my sister and I and governed by a 30 page operating agreement.

Subsidiaries of Exempt Entities

- An entity wholly owned or controlled by an exempt entity is also exempt from the obligations of a reporting company unless the exempt entity was:
 1. A money service business,
 2. A pooled investment vehicle, or
 3. An entity assisting a tax exempt entity.

Who is a Company Applicant?

- An individual who directly files a document creating a domestic reporting company.
- An individual who directly files the first document registering a foreign reporting company.
- The individual primarily responsible for directing such filing.
- There can be two Company Applicants, but no more.

Only applies to a reporting company formed or registered after January 1, 2024.

What About Business Formation Services?

Who is a Company Applicant?

1. Attorney directs paralegal to form LLC and paralegal faxes required documents to secretary of state.
2. Attorney directs paralegal to form LLC and paralegal completes online form provided by Formation Co.
3. Attorney directs paralegal to form LLC and paralegal faxes form to Formation Co. Employee of Formation Co. then faxes that form to Secretary of State.
4. Partner tells associate to form LLC. Associate tells paralegal and paralegal faxes required documents to secretary of state.

Who is the Beneficial Owner?

Beneficial Owner	Not a Beneficial Owner
<p>An individual who</p>	<ul style="list-style-type: none"> • A minor child (as defined in the State in which the entity is formed) if the information of the parent or guardian of the minor child is reported in accordance with the Act.
<ul style="list-style-type: none"> • Directly or indirectly • Through any contract, arrangement, understanding, relationship, or otherwise— 	<ul style="list-style-type: none"> • An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual.
<p>(i) Exercises substantial control over the entity; or</p>	<ul style="list-style-type: none"> • An individual acting solely as an employee of reporting company and whose control over or economic benefits from such entity is derived solely from the employment status of the person. This does not apply to senior officers.
<p>(ii) Owns or controls at least 25% of the ownership interests of the entity.</p>	<ul style="list-style-type: none"> • An individual whose only interest in a reporting company is through a right of inheritance.
	<ul style="list-style-type: none"> • A creditor of a reporting company, unless the creditor otherwise falls within the definition of a Beneficial Owner.

Who Has “Substantial Control”?

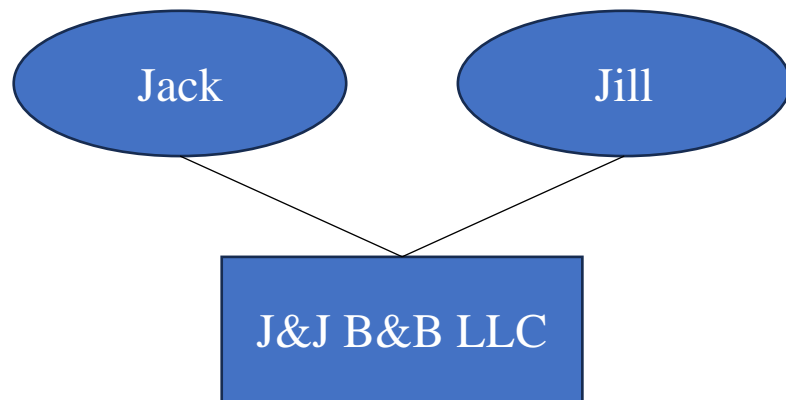
- Senior officers
 - Includes a president, CFO, general counsel, CEO, COO, or anyone who performs a similar function
- Those with authority to appoint or remove any senior officer
- Those with authority to appoint or remove a majority of the board of directors (or equivalent)
- Those who can direct, determine, or have a “substantial influence” over important decisions made by the reporting company.

What is an “important decision”?

- The sale, lease, mortgage, or transfer of any principal asset
- Reorganization, dissolution or merger
- Major expenditures, investments, and issuance of equity or debt
- Selection of business lines or geographic focus
- Setting compensation for senior officers
- Entering into significant contracts
- Amendment of governance documents

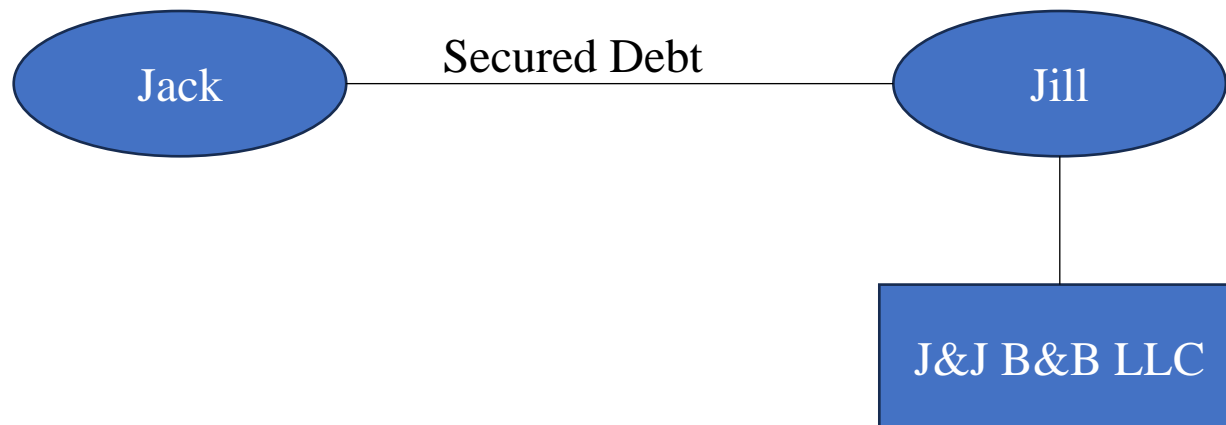
Jack and Jill: Scenario 2

- Jack and Jill are each 50% owners of J&J B&B LLC.
- Jack is the Manager of the LLC (but everyone knows Jill really runs the place).
 - *Is there a Reporting Company?*
 - *What are the obligations of J&J under the Corporate Transparency Act?*



Jack and Jill: Scenario 3

- While everyone joked that Jill ran J&J B&B LLC, the truth is it ran them. After several years the stress was too much, and Jack and Jill got divorced.
- Jill is now the 100% owner of J&J B&B LLC.
- Jack has a \$1 million debt secured by Jill's LLC Units.
 - *Is an updated Beneficial Ownership Form required?*
 - *Who are the Beneficial Owners of J&J B&B LLC*



Who is a 25% Owner?

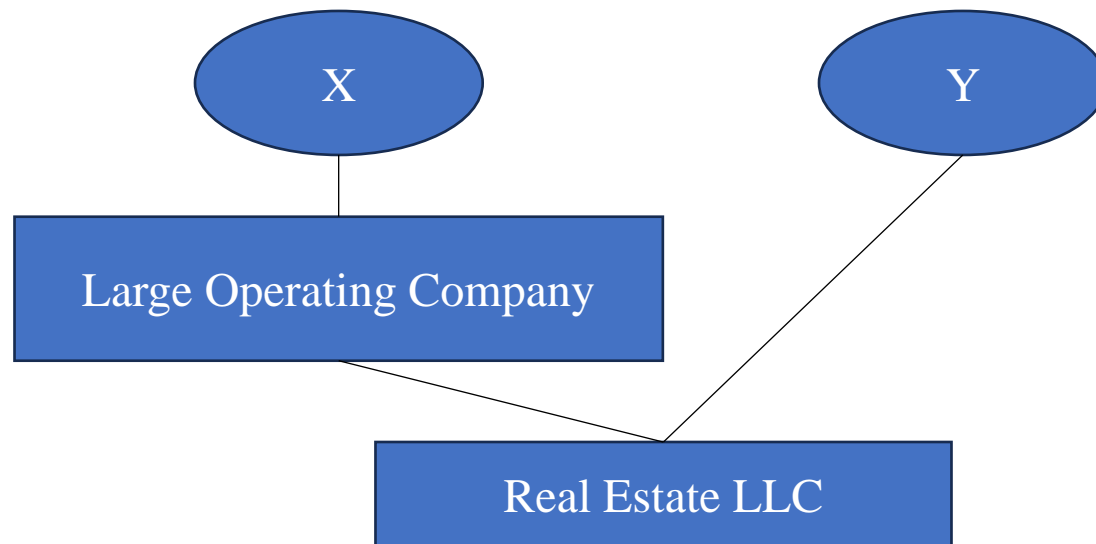
- Ownership interest is defined broadly to include equity, profit sharing agreements, voting trusts, convertible debt, and options.
- Ownership interests can be direct or indirect, and can include a mere understanding or relationship.
- Trust assets are attributed to:
 - A trustee or other individual with authority to “dispose of trust assets”.
 - A beneficiary who is the sole income and principal beneficiary.
 - A beneficiary who has the right to demand substantially all of the trust assets.
 - A grantor if the trust is revocable or they otherwise have the right to withdraw trust assets regardless of form.

Dispose of Trust Assets?

- Powers of Appointment?
- Directed Trust
 - Administrative Trustee?
 - Distribution Advisor?
 - Investment Advisor?
- Trust Protector?
- Power to Exchange Assets of Equal Value (a “swap” power)?

Ownership Through Exempt Entities

- If an individual is a beneficial owner of a reporting company “exclusively” because they own an interest in an entity that is exempt from being a reporting company, the name of that exempt entity can be reported instead of the BOI of the individual.

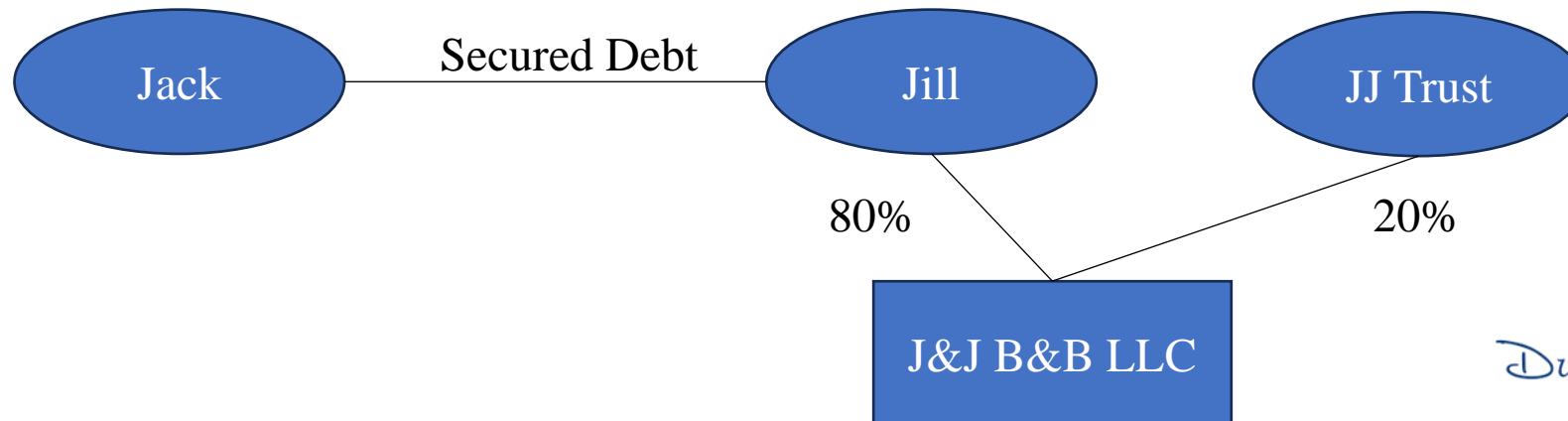


Calculating Ownership of a Reporting Company

- Any options or similar interests are treated as exercised.
- If there are capital and profits interests you compare the individuals interests to “the total outstanding capital and profit interest of the entity...”
- For corporations, it is the greater of the vote or value held by the individual.
 - Note that for corporations 25% of vote makes you a beneficial owner, but for other entities you require a majority of the voting power.
- If an ownership interest cannot be calculated with “reasonable certainty” an individual is a beneficial owner when owning or controlling at least 25% of any class or type of ownership.

Jack and Jill: Scenario 4

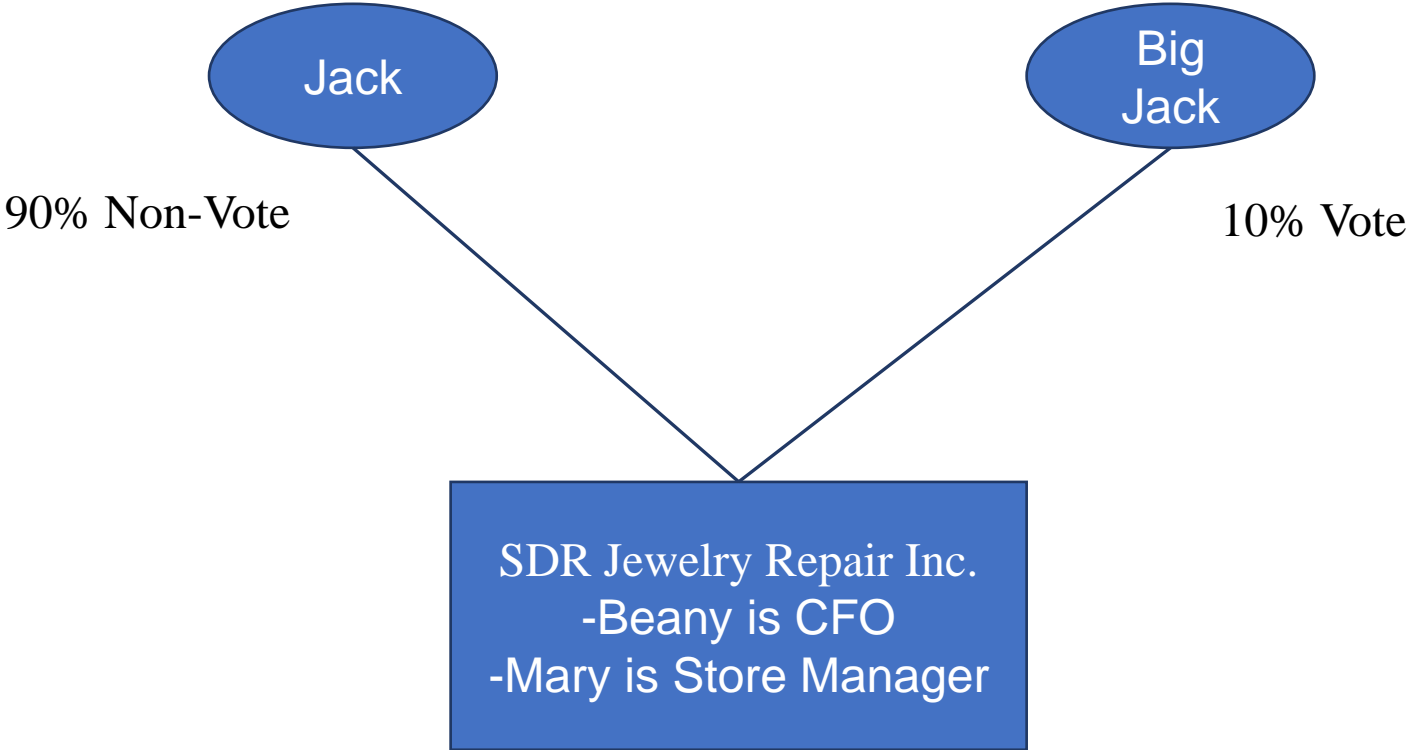
- Jack and Jill had one child during their marriage, little JJ.
- Jill creates a non-grantor trust for the benefit of JJ and funds it with a 20% interest in J&J B&B LLC.
- Jack was a terrible husband, but there's no denying he's a doting father so Jill names Jack as sole Trustee. Of course, Jill kept the right to change the trustee or to name additional Trustees.
 - *Is an updated Beneficial Ownership Form required?*
 - *Who are the Beneficial Owners of J&J B&B LLC*



Jack, Big Jack, and Beany: Scenario 5

- Meanwhile, Jack started a new business called Stop, Drop and Roll Jewelry Repair. Officially this is SDR Jewelry Repair, Inc.
- Jack owns 90% of the business and his father, Big Jack, owns the other 10%. It's an S corporation. Big Jack has all the voting shares.
- They gave their country cousin “Beany” a job as CFO. SDR Jewelry Repair has two locations, so they've hired a Store Manager named Mary.
 - *Is SDR Jewelry Repair, Inc. a Reporting Company?*
 - *Who are the Beneficial Owners of SDR Jewelry Repair, Inc.*

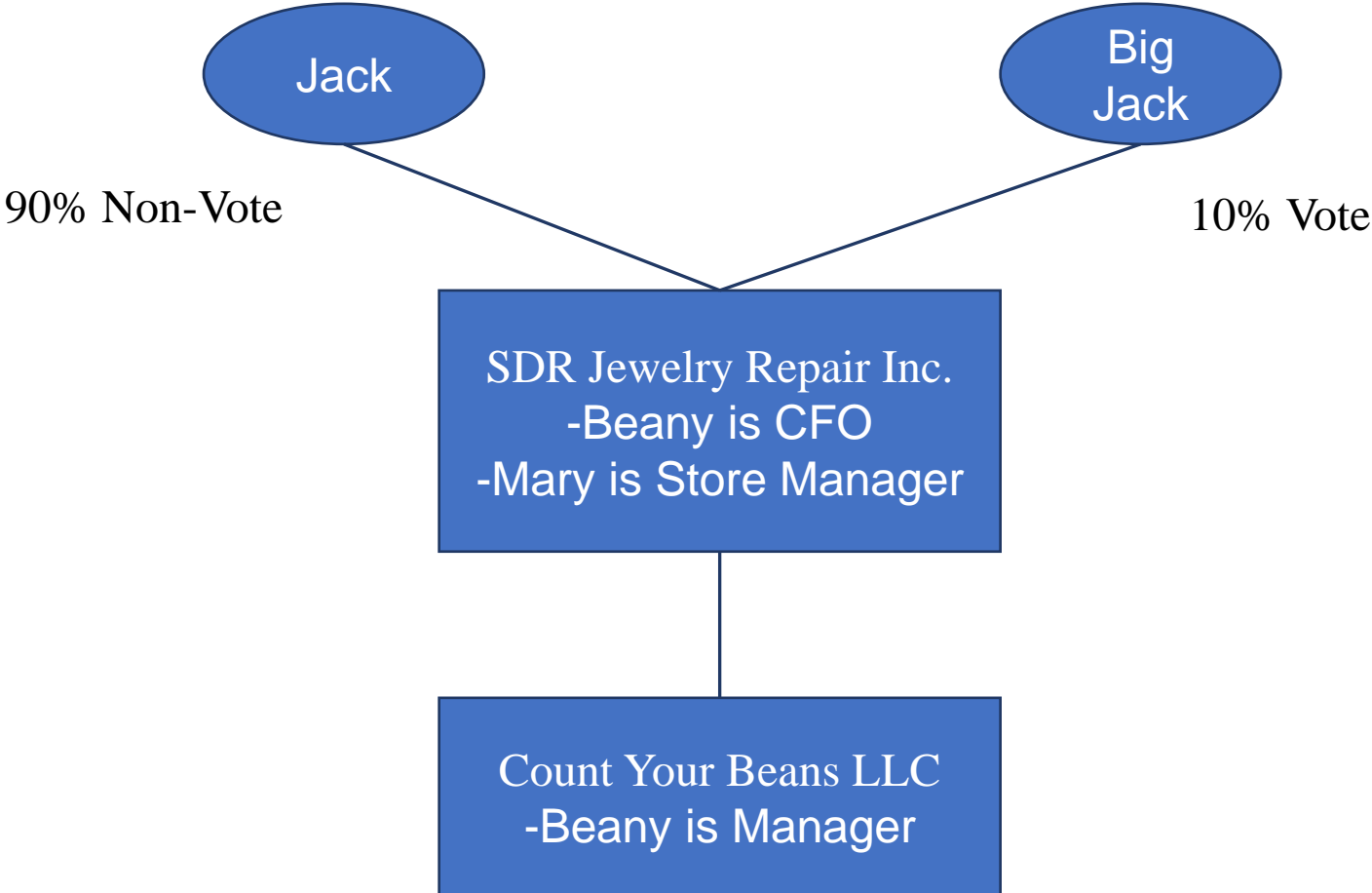
Scenario 5



Jack, Big Jack, and Beany: Scenario 6

- Beany is so efficient that he's barely using half his time to fulfill his duties as CFO, so he convinces Big Jack to let him start a side business offering CFO services to other small businesses.
- The new company, Count Your Beans LLC, is a wholly owned subsidiary of SDR Jewelry Repair, Inc. and Beany is the Manager.
 - *Is Count Your Beans LLC a Reporting Company?*
 - *Who are the Beneficial Owners of Count Your Beans LLC?*

Scenario 6



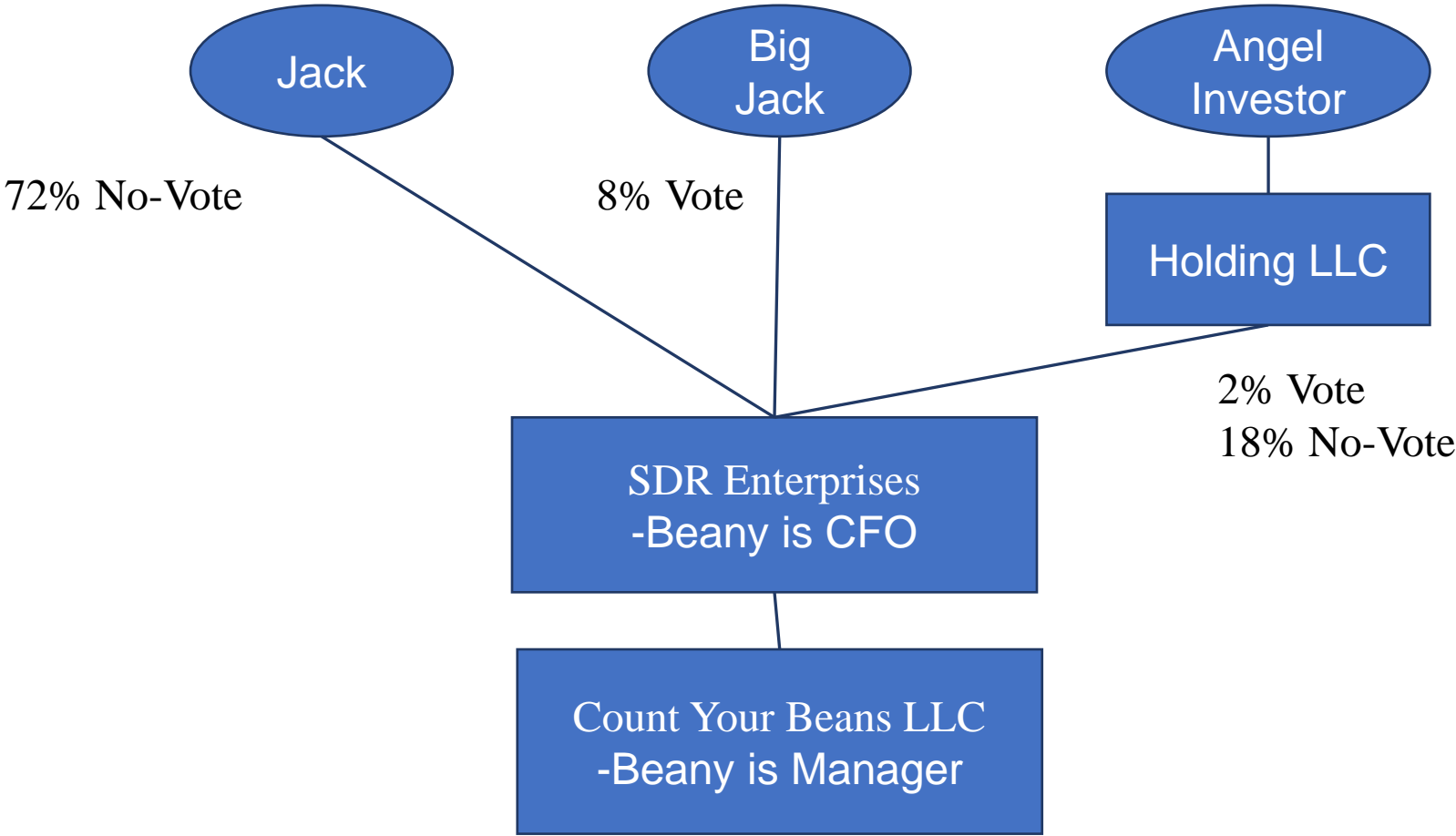
Jack, Big Jack, and Beany: Scenario 7

- Same facts as Scenario 6 except:
 - SDR Jewelry Repair, Inc **IS** exempt as a Large Operating Company
 - Beany has the option to acquire 25% of Count Your Beans LLC if certain performance objectives are achieved, none of which have been satisfied at this time.
- *Is Count Your Beans LLC a Reporting Company?*
- *Who are the Beneficial Owners of Count Your Beans LLC?*

Jack, Big Jack, and Beany: Scenario 8

- SDR Jewelry Repair, Inc. is doing so well Big Jack decides to expand. He converts to a C Corporation, changes the name to SDR Enterprises, and brings on an angel investor who, through his wholly owned LLC, now controls 20% of the voting stock, 20% of the non-voting stock, and has the right to appoint 2 of 5 members of the board of director.
- Big Jack is excited because this investor is known for actively participating in his portfolio companies.
 - *Is an updated Beneficial Owner Information report required?*
 - *Who are the Beneficial Owners?*

Scenario 8



Jack, Big Jack, and Beany: Scenario 8A

- Same as Scenario 8, except the angel investor acquires 25% of the voting stock and 25% of the non-voting stock through his investment management company, which qualifies as a Large Operating Company.
- In addition, this investor is known for being passive and letting founders run their business.
 - *Is an updated Beneficial Owner Information report required?*
 - *Who are the Beneficial Owners?*

Enter The Goose: Scenario 9

- The expansion of SDR Enterprises has been more expensive than Big Jack expected. Equipment and employee expenses are both way over budget.
- While sales are strong, Big Jack is desperate for a bridge loan to carry him through. He asks Beany to arrange a meeting with The Goose, and the Goose agrees to provide an unlimited line of credit.
- “No lawyers,” says the Goose. “My word is my bond. I know a man like you, Big Jack, would understand that. Oh, and it would be great if your next location was on Castle Drive. I own a building there with a beautiful space.” At the end of the meeting the Goose says, “If anything important is happening, just make sure you run it by me. I like to hear things ya know.”
 - *Does the Goose have Substantial Control over SDR Enterprises?*
 - *Is an updated Beneficial Owner Information report required?*

What should you be doing now?

- Obtain a FinCIN Identifier as soon as you can.
 - You may be reporting as a business owner, a company applicant, and a trustee.
- Notify all your clients the CTA was effective January 1, 2024.
- Decide- Will you provide CTA advice or will you find a vendor?
 - Initial formation vs. ongoing reporting
 - Simple vs. complex structures
- Address the CTA in operating agreements, assignment documents, reps and warranties etc.
 - Require BO's to get a FinCEN Identifier?
 - Withhold distributions if a Beneficial Owner doesn't disclose?
 - Require BOI for transfer to be valid?
- Address the CTA in your "Care and Maintenance" advice
- Address the CTA in your engagement letters.
 - Is this necessary?



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