Summer 2023

Estate Planning Update Summer 2023 - The Corporate Transparency Act: New Reporting Requirements Soon Will Apply to Many Private Clients

The Corporate Transparency Act (the act), tucked into the end of the National Defense Authorization Act for 2021, creates a broad beneficial ownership reporting requirement for certain privately held companies. The act will apply to many active businesses as well as to limited partnerships (LPs) and limited liability companies (LLCs) created by our private clients for purposes such as holding real estate and investments. The act and the regulations adopted thereunder generally require that certain privately held companies (reporting companies) disclose to the Treasury's Financial Crimes Enforcement Network (FinCEN) the name, address, date of birth and unique identification number from an "acceptable identification document" (e.g., a driver's license or passport) of all significant equity holders and persons who exercise control over the reporting company (beneficial owners). The requirements under the act will become effective January 1, 2024.

The act does *not* create a publicly accessible database of beneficial owner information. Rather, the act permits FinCEN to disclose beneficial ownership information only to certain organizations in specified circumstances, such as to federal or state agencies engaged in national security, intelligence or law enforcement activity.

Who Has To Report?

The act requires reporting by corporations, LPs, LLCs and similar entities formed or registered to do business under the laws of any state. Trusts commonly used in estate planning are not reporting companies, nor are general partnerships. Charitable corporations and trusts are exempt as long as they are up to date on any required annual IRS filings (Forms 990 or 990-PF). The act is intentionally designed to capture passive holding companies and small businesses as reporting companies. The act exempts certain regulated companies. It also exempts privately held operating companies that (i) employ more than 20 employees on a full-time basis in the United States, (ii) file a federal return reporting more than $5 million in gross receipts or sales, and (iii) have an operating presence at a physical office within the United States.

What Are the Reporting Requirements?

All reporting companies are required to file information identifying beneficial owners and for reporting companies formed or registered after January 1, 2024, to identify "applicants" as well. Any entity existing prior to January 1, 2024, that qualifies as a reporting company will have until January 1, 2025, to file the required information. The reporting company must submit a report to FinCEN that identifies each beneficial owner with respect to the reporting company by (i) full legal name, (ii) date of birth, (iii) current residential or business street address and (iv) unique identifying number from an acceptable identification document or FinCEN identifier. A FinCEN identifier is a unique identifying number that will be assigned by FinCEN to a person or entity in connection with the filing of an application. Reporting companies will be required to file updated reports if there is a change in beneficial ownership or in other information contained in the reports.

For reporting companies formed on or after January 1, 2024, information will have to be filed identifying applicants as well. An applicant includes (i) the individual who directly files the document that creates the entity or in the case of a foreign reporting company, the document that first registers the entity to do business in the United States, and (ii) the individual who is

primarily responsible for directing or controlling the filing of the relevant document. Reporting companies existing prior to January 1, 2024, are not required to disclose information relating to applicants.

Who Is a Beneficial Owner?

A beneficial owner is an individual who directly or indirectly exercises "substantial control" over the entity or owns or controls not less than 25 percent of the ownership interest of the entity. Anyone who is able to make important decisions on behalf of the entity—including managers, officers, directors and third parties empowered to make decisions on behalf of the reporting company—has substantial control.

The act can apply to trusts that hold ownership interests in a reporting company. If a trust is a beneficial owner, the reporting company will be required to disclose the identity information described above for (i) the trustee or any other individual with the authority to dispose of trust assets; (ii) a beneficiary who is the sole permissible recipient of income and principal, or someone who has the right to withdraw substantially all of the assets from the trust; and (iii) a grantor or settlor who has the right to revoke the trust or otherwise withdraw assets of the trust.

Penalties for Noncompliance

Willful failure to comply can result in fines of up to $500 per day, up to a maximum of $10,000, and a prison term of up to two years. Negligent violations, however, will not be subject to any civil or criminal penalties.

Does This Apply to You?

In many instances, LLCs and similar entities occupy space in a client's overall estate plan. For instance, a client may have created an LLC to own investments, real estate or other assets, a small "mom and pop" shop, or a family office. These entities will generally be subject to these new reporting requirements.

Given the broad application of the act—which creates reporting requirements for many privately held entities and small businesses—as well as the significant penalties that may accrue, care will need to be taken in order to ensure compliance once the act is effective. Potential filers and their advisors should begin to prepare now.

A Look Ahead

Given the widespread application of this new law, the Private Client Department of Day Pitney has formed a task force to develop guidance for our clients who may have reporting obligations under the act. More information will be forthcoming via an alert or other email communication prior to the end of the year. In the meantime, please contact your Day Pitney attorney with any questions.