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Generations Fall 2022 - Federally Required Disclosure of Beneficial Owners: FinCEN Issues Final Regulations

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. On September 29, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) adopted a final rule implementing the beneficial ownership information reporting requirements of the act. The act generally requires that certain privately held companies (reporting companies) disclose to FinCEN the name, address, date of birth and unique identification number from an "acceptable identification document" 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 provides that "beneficial ownership information collected under the [act] is sensitive information and will be directly available only to authorized government authorities, subject to effective safeguards and controls," and it is intended to facilitate national security and law enforcement activities and to confirm beneficial ownership information provided to financial institutions in connection with various other reporting regimes. 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 upon receipt of certain requests from (i) federal or state agencies engaged in national security, intelligence or law enforcement activity for use in furtherance of such activity or from a state or local law enforcement agency if ordered by a court of competent jurisdiction; (ii) a federal agency on behalf of foreign authorities; (iii) a financial institution subject to customer due diligence requirements (but only with the consent of the reporting company); and (iv) a federal functional regulator or other appropriate regulatory agency ascertaining compliance of financial institutions.

What Is a Reporting Company?

The act only mandates disclosure by "reporting companies." A reporting company is a corporation, limited liability company or other similar entity (i) created by the filing of a document with the secretary of state of a given state or (ii) formed under the laws of a foreign country and registered to do business in the United States. Common law trusts and common law partnerships are not reporting companies. Examples of "other similar" entities are limited partnerships and limited liability partnerships. The act is intentionally designed to capture small businesses and passive holding companies as reporting companies and excepts certain regulated entities (including investment advisers, investment companies, chartered financial institutions and publicly traded companies) from its requirements. Further, certain privately held operating companies are also exempt from the requirements of the act if they meet all of the following: (i) they employ more than 20 employees on a full-time basis in the United States, (ii) they filed a federal return that reported more than $5 million in gross receipts or sales (including by subsidiaries and operating affiliates) and (iii) they have an operating presence at a physical office within the United States.

What Are the Reporting Requirements?

Reporting companies are required to file information identifying "beneficial owners," and reporting companies formed or registered after January 1, 2024, must 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 (and for entities formed after January 1, 2024, each applicant) 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" (e.g., a driver's license or passport) 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. After a reporting company has filed its initial report, it is required to file an updated report if the information contained in its report has changed, including any change in beneficial ownership.

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 by another. Reporting companies existing prior to January 1, 2024, will not be required to disclose information relating to company applicants.

Who Is a Beneficial Owner?

A "beneficial owner" is defined as an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise (i) exercises "substantial control" over the entity or (ii) owns or controls not less than 25 percent of the ownership interest of the entity. The act and its regulations set forth a range of activities that could constitute substantial control of a reporting company. This list captures anyone who is able to make important decisions on behalf of the entity and includes managers, officers, directors and third parties empowered to make decisions on behalf of the reporting company. A beneficial owner does *not* include (i) a minor child; (ii) a nominee, intermediary, custodian or agent on behalf of another individual; (iii) an employee of the reporting company; (iv) an individual whose only interest in the reporting company is through a right of inheritance; or (v) a creditor of the reporting company.

Penalties for Noncompliance

Any party that willfully fails to file an application or files an application for the formation of a reporting company that intentionally fails to comply with the act will be liable for fines of no more than $500 for each day there is a willful failure to report complete beneficial ownership information. Such parties may be subject to aggregate fines of up to $10,000, a prison term of up to two years or both. Negligent violations, however, will not be subject to any civil or criminal penalties.

Given the broad application of the act—which creates reporting requirements for many privately held entities and small businesses as well as the significant civil and criminal penalties that may accrue—care will need to be taken in order to ensure compliance once the act is effective. Even before the provisions of the act are effective, however, there are opportunities to begin planning for it. Potential filers can consider now what internal systems and personnel changes may be needed to meet these future reporting obligations and to include provisions in their organizational documents regarding the collection and reporting of the information required by the act.

There is presently no portal for filings; FinCEN is still developing a website for submitting filings so it is unclear what the electronic forms will look like.

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