NEW CORPORATE TRANSPARENCY ACT REQUIRES REPORTING OF COMPANY OWNERS TO FINCEN

January 8, 2021 | Alert

The National Defense Authorization Act, which recently passed over the veto of President Trump, included the Corporate Transparency Act (CTA). The CTA is intended to assist the Federal Government in cracking down on money laundering by the use of anonymous shell companies. Prior to adoption of the CTA, the burden of determining the beneficial owners of corporations and limited liability companies fell mainly on financial institutions, which are required to determine the beneficial ownership of their customers through the Bank Security Act's "know your customer" requirements. The CTA will now require certain "reporting companies" to disclose the beneficial ownership to a newly created U.S. database within the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN).

The CTA defines a "reporting company" to include any "corporation, limited liability company or other similar entity that is (i) created by the filing of a document with the U.S. State or Indian Tribe, or (ii) formed under the law of a foreign country and registered to do business in the United States…" A reporting company excludes (i) companies already subject to supervision or closely regulated by the federal government (e.g., banks, commodity brokers, registered investment advisors); (ii) other publicly traded companies; (iii) dormant companies; (iv) companies that (a) employ more than 20 full time employees in the U.S., (b) annually report more than $5,000,000 in gross receipts or sales to the IRS, and (c) have an operating presence at a physical office in the U.S., and (v) an entity owned by another already exempt entity. Exempt entities will have to apply for an exemption from FinCEN.

Reporting companies are required to submit specified information to FinCEN on any beneficial owners, including: (i) full legal name, (ii) date of birth, (iii) residential or business address, and (iv) unique identifying members from an acceptable identification

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document, such as a driver's license, U.S. passport or other U.S. state-issued identification document. The CTA defines a "beneficial owner" as any individual who (i) owns a 25% equity stake, or (ii) exercises "substantial control" over the reporting company. The CTA does not define "substantial control", which term will be presumably further defined in the regulations to be promulgated by FinCEN. The following are specifically excluded from the definition of "beneficial owner": (i) individuals acting as agents, intermediaries or custodians on behalf of another; (ii) an employee of a reporting company whose control or economic benefit is derived solely from their employment; and (iii) creditors of the reporting company, unless a creditors has "substantial control" or owns 25% or more of the reporting company.

The requirement for reporting companies to submit beneficial ownership information to FinCEN is triggered by the adoption of FinCEN's implementing regulations at which time all newly formed reporting companies will have to submit the required information. Pre-existing reporting companies will be required to submit the information within 2 years following adoption of the regulations.

The database compiled and maintained by FinCEN will not be publicly available, but the CTA allows FinCEN to disclose beneficial ownership information upon request to (i) U.S. federal law enforcement agencies; (ii) U.S. federal law enforcement agencies requesting information on behalf of a non-U.S. law enforcement agency, or (ii) with the consent of the reporting company, a financial institution in order to meet customer due diligence requirements.

Failure of a reporting company to report or submitting false or fraudulent information is subject to $500 per day penalty or a maximum of a $10,000 penalty and up to 2 years imprisonment.