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New Reporting Requirements

The Corporate Transparency Act ("***CTA***") imposes new federal reporting requirements for a great number of private corporations, limited liability companies, limited partnerships, and business trusts, and for most persons who ultimately own or control those entities, beginning January 1, 2024. The reports include the name, address and taxpayer identification number for the entity, and similar information for the controlling persons. Reports are filed with the U.S. Treasury's Financial Crimes Enforcement Network ("***FinCEN***"). The CTA also authorizes FinCEN to disclose this information to authorized government authorities and to financial institutions in certain circumstances.

This report will outline for our clients and friends the reporting requirements so they can add the CTA into their corporate compliance procedures.

The Purpose of the CTA

Congress passed the CTA to "better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity." In other words, Congress wants to keep track of businesses in case law enforcement decides to take enforcement action. We anticipate that law enforcement agencies will also implement increasingly sophisticated data mining approaches to use CTA reports in anti-money laundering and other corruption investigations.

Implementation of the CTA

The reports required by the CTA will be filed through a FinCEN internet portal called the Beneficial Ownership Secure System ("BOSS"), at https://www.fincen.gov/boi. FinCEN assures us that the portal is highly secure to prevent unauthorized access. Reports will be filed by the affected companies (called "***reporting companies***" in the regulations), and not by the individual controlling persons (called "***beneficial owners***" in the regulations).

Additionally, reporting companies and beneficial owners have the opportunity to apply for a "***FinCEN Identifier***" which will be a unique identification number that can be provided to complete a report instead of entering the beneficial owner's personal information each time a report is due. This should help to preserve confidentiality of an individual's Social Security Number and other sensitive information required to be reported.

When are reports due?

Reports will be due on the first to occur of (1) 90 days after a new reporting company is created on or after January 1, 2024 and (2) January 1, 2025 for reporting companies in existence prior to January 1, 2024. Following December 31, 2024, reports for a new reporting company will be due 30 days after the new reporting company is created.

After the initial filing, update reports will be due within 30 days after a change in any beneficial ownership information required by the reports. Reporting companies will therefore need internal procedures to monitor the whereabouts of their beneficial owners.

Who must file reports?

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Unless exempted, the following types of entities must file reports:

- U.S. corporations
- U.S. LLCs
- Other similar U.S. entities "created by the filing of a document with a secretary of state or other similar office" such as limited partnerships and business trusts/statutory trusts.
- Non-U.S. corporations, LLCs and other similar entities that are registered to do business in the United States

Sole proprietorships, general partnerships and non-business trusts will not be reporting companies.

Who are the exempted companies?

There are a number of companies exempted from filing reports. Following is a list of some of the most relevant types of companies:

- Public companies filing reports under Sections 12 or 15(d) of the Securities Exchange Act of 1934;
- Banks, credit unions and bank holding companies;
- Brokers and dealer in securities;
- Insurance companies and state-licensed insurance producers;
- Accounting firms;
- Tax-exempt entities under section 501(c), 527(e) political organizations, charitable trusts and split-interest trusts;
- "Large Operating Companies", which means a company (i) with more than 20 full-time employees in the US, (ii) which has "an operating presence at a physical office within the United States," and (iii) filed a Federal income tax return for the immediately previous year demonstrating more than $5 million in gross receipts or sales from sources inside the US; and
- Subsidiaries controlled or wholly owned by the foregoing.

Certain inactive companies that have been in existence since January 1, 2020 are also exempt.

What must be reported?

A reporting company must report the following about itself:

- Full legal name and all trade or d/b/a names, regardless of whether they are registered;
- Street address of principal place of business, or principal location, in the United States, if any (Not a P.O. box, registered agent's address or a c/o third party);
- Jurisdiction of formation and registration; and
- TIN for domestic reporting companies. Foreign reporting companies without a TIN will be required to provide a foreign tax identification number and the name of the relevant jurisdiction as an alternative.

Reporting companies must report the following information regarding its beneficial owners:

- Full legal name;

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- Date of birth;
- Current residential address (or business address for "***company applicants***");
- For U.S. citizens and individuals with dual citizenship in the U.S., an identifying number from and scanned image of a U.S. passport, driver's license, or other document issued by a state or local U.S. government; and
- For foreign persons, an identifying number from and a scanned image of a foreign passport.

A reporting company formed or registered on or after January 1, 2024, must also report the above information for "***company applicants***", that is, the individual principally responsible for filing, or controlling the filing, of the reporting company's state registration document (such as articles of incorporation or certificate of organization). A company applicant will also be the individual who actually files the initial registration document. For example, if an attorney oversees the preparation of, and directs when to file, incorporation documents and a paralegal actually makes the filing, the reporting company would report both the attorney and paralegal as company applicants. There can be, however, no more than two company applicants.

Who is a beneficial owner?

A "***beneficial owner***" is any individual who, directly or indirectly, either exercises substantial control over the reporting company or owns or controls at least 25% of the fully-diluted ownership interests of the reporting company.

An individual exercises "***substantial control***" over a reporting company if such individual:

- Serves as a senior officer (except for corporate secretary or treasurer);
- Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- Directs, determines, or has substantial influence over important decisions made by the reporting company; or
- Has any other form of substantial control over the reporting company, including as a trustee of a trust.

There are five exclusions from the definition of a beneficial owner:

1. Minor children, if the child's parent's or guardian's information is reported properly;
2. Individuals acting as a nominee, intermediary, custodian, or agent on behalf of another individual;
3. An individual acting solely as an employee who is not a senior officer;
4. An individual whose interest in an entity is only through a right of inheritance; or
5. Creditors who are individuals owed money.

What happens if a reporting company fails to report?

Reporting companies or beneficial owners who violate the CTA will be subject to civil penalties of not more than $500 per day, capped at $10,000, and imprisonment of up to two years if an individual willfully provides false information or fails to report. Beneficial owners and senior officers of the reporting company can be held liable for the reporting company's failure to comply.

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What should you do now?

Companies should determine if they will be a reporting company and start compiling the required information on all of the beneficial owners and company applicants.

Companies should create mechanisms that will allow them to monitor compliance with the requirements of the CTA. This could take the form of a compliance program, a dedicated compliance officer, the adoption of a formal company policy, or the inclusion of additional covenants in employment contracts or company handbooks. Representative provisions might include the following:

- A representation by each shareholder, member or partner, as applicable, that it will be in compliance with or exempt from the CTA;
- A covenant by each shareholder, member or partner, as applicable, requiring continued compliance with and disclosure under the CTA or to provide evidence of exemption from its requirements;
- An indemnification by each shareholder, member or partner, as applicable, to the company and its other shareholders, members or partners, as applicable, for its failure to comply with the CTA or for providing false information; and
- A consent by each disclosing party for the company to disclose identifying information to FinCEN, to the extent required by law.

In M&A deals due diligence will need to include, and representations should cover, CTA compliance.

If you would like additional information or have questions regarding the CTA, please contact Gary L. Wollberg at g.wollberg@musickpeeler.com.

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