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CLIENT MEMORANDUM

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FEDERAL REPORTING REQUIREMENTS FOR BENEFICIAL OWNERSHIP INFORMATION TAKE EFFECT ON JANUARY 1, 2024

Starting on January 1, 2024, many business entities, including limited liability companies and other corporate structures created through filings with state and local authorities, must provide information about their beneficial owners to the federal Financial Crimes Enforcement Network (FinCEN), a component of the U.S. Treasury. Failure to timely file, correct mistakes, or update filed information as it changes, may result in financial penalties—up to $500 per day (capped at $10,000)—or, in the case of willful violations, criminal penalties including imprisonment for up to 2 years and criminal fines. Although existing entities need not file before December 31, 2024, businesses and their owners should familiarize themselves with the new regulations and collect the necessary information well in advance of the filing deadline. Entities created on or after January 1, 2024, must file the required information within 30 days of their creation or registration. This memorandum summarizes key provisions of the applicable rules and provides links to useful resources to assist our clients.

Background

Corporate financial transparency has become a major concern of governments around the world as a consequence of terrorist financing, tax evasion, money laundering, noncompliance with sanctions regimes, and other illegal activities. In partial response, Congress enacted the Corporate Transparency Act ("CTA") as Sections 6401-6403 of the National Defense Authorization Act for Fiscal Year 2021. Following an administrative rulemaking process, on September 30, 2022, FinCEN published in the Federal Register a final rule (the "Rule") implementing the CTA.

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FEDERAL REPORTING REQUIREMENTS

Which Entities Must Report?

Reporting Companies generally include: (1) domestic corporations, limited liability companies, or any other entity that is created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe; and (2) any entity that is formed under the law of a foreign country and that is registered to do business in the United States by the filing of a document with a secretary of state or equivalent office under the law of a state or Indian tribe.

Only domestic entities that are *created by* the filing of a document with the relevant authority are considered to be Reporting Companies; domestic entities that merely register to do business in a state (but are created without the need for a filing) are not Reporting Companies.

There are 23 exempt categories, including tax-exempt entities, inactive entities and subsidiaries of exempt entities.

Specifically excluded from the definition of Reporting Companies are "large operating companies" which: (1) employ more than 20 employees on a full-time basis in the United States; (2) filed federal tax returns in the United States in the previous year demonstrating more than $5,000,000 in gross receipts or sales in the aggregate; and (3) has an operating presence at a physical office within the United States.

Given the potential penalties for a failure to report, and the complexities that new regulations may not explicitly address, in determining whether an entity is a Reporting Company, or whether it is exempt, it would be prudent to consult with counsel, accountants, and other professionals. Moreover, if it is determined that an entity is exempt, it may lose that exemption—for example—if the exemption is based on being a "large operating company," and the number of its full-time employees drops below 20, the entity would lose its exemption and would be required to report within 30 days of that event. Accordingly, entities should keep track of the basis of any exemption(s) from the reporting requirements, and monitor and evaluate on a regular basis any changes that would nullify the exemption.

What Information Must be Reported?

Each Reporting Company must provide information about: (1) itself; (2) its beneficial owners; and (3) the individuals that were responsible for the creation of the entity (the "Company Applicants").

1. **Entity Information**: (a) the full legal name of the reporting company, (b) any trade name or "doing business as" name of the reporting company, (c) the address of the principal place of business of the reporting company; if non-U.S. entity, street address of the primary location in the U.S. where the reporting company conducts business, (d) the state or Tribal jurisdiction of formation of the reporting company (or for a foreign reporting company, the state or Tribal jurisdiction where such company first registers), and (e) an IRS TIN of the reporting company.

2. **Beneficial Ownership Information** ("BOI"): (1) full name; (2) date of birth; (3) residential street address; and (4) unique identification number, name of issuing jurisdiction, and picture of an acceptable form of government identification (*e.g.*, driver's license or passport) ((1)-(4) are referred to, collectively, as "Individual Identifiers").

3. **Corporate Applicant Information:** Individual Identifiers for the individual who directly filed the document(s) creating or registering the Reporting Company and the individual who was principally responsible for directing the filing. (Note that Reporting Companies in existence prior to January 1, 2024 need not provide Corporate Applicant Information; only newly-formed companies after the effective date must do so.)

Who is a Beneficial Owner?

A Beneficial Owner is any individual who, directly or indirectly, either exercises substantial control over a Reporting Company or owns or controls at least 25 percent of the ownership interests of such Reporting Company.

An individual has "substantial control" if they: serve as a senior officer of a Reporting Company (not including as corporate secretary or treasurer); have authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body); or direct, determine, or have substantial influence over, important decisions made by a Reporting Company. The Rule also makes clear that an individual can exercise substantial control directly or indirectly through a contract, arrangement, understanding, or other relationship, through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual, including through various trust arrangements.

In calculating the 25% ownership threshold, the Reporting Company must aggregate all types of ownership interests, including options and other contingent interests, which are treated as though they have been exercised.

Exclusions from Beneficial Owners

The Rule provides that the following are ***not*** included within the definition of Beneficial Owners: (1) minor children (if parent or guardian information is provided); (2) nominees, intermediaries, custodians, and agents; (3) employees acting solely as an employee and where control over or economic benefits from the company are derived solely from the individual's employment status; (4) individuals with a future interest through inheritance; and (5) creditors.

When Must the Information be Filed?

Existing Reporting Companies must file the required information by the end of 2024 (within one year of the January 1, 2024 effective date).

Newly created Reporting Companies (*i.e.*, those created after January 1, 2024) must file the required information within 30 days from the earlier of (a) actual notice that creation/registration

has become effective or secretary of state provides public notice that entity has been created/registered.

Obligation to Ensure that Reported Information is Accurate and Current

Reporting Companies must correct any inaccuracies within 30 days of being aware or having reason to know that a correction is required. Likewise, Reporting Companies must update information (*e.g.*, changes of name, address, new beneficial owners, minority children reaching age of majority, etc.) within 30 days. (Reporting Companies need not keep information about Company Applicants up-to-date.)

How Will Reporting Companies File the Required Information?

FinCEN is developing a secure electronic portal through which the required information may be filed. FinCEN will not accept any information until January 1, 2024.

Who Will Have Access to the Information and How May it be Used?

According to FinCEN's FAQs for the Rule:

> The Corporate Transparency Act authorizes FinCEN to disclose beneficial ownership information in certain circumstances to six types of requesters:
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> • U.S. Federal agencies engaged in national security, intelligence, and law enforcement activities;
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> • State, local, and Tribal law enforcement agencies with court authorization; •The U.S. Department of the Treasury;
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> • Financial institutions using beneficial ownership information to conduct legally required customer due diligence, provided the financial institutions have their customer consent to retrieve the information;
>
> • Federal and state regulators assessing financial institutions for compliance with legally required customer due diligence obligations; and
>
> • Foreign law enforcement agencies and certain other foreign authorities who submit qualifying requests for the information through a U.S. Federal agency.

What are the Potential Penalties for Non-Compliance?

Failures to file, correct, or keep BOI information up-to-date may result in civil penalties of up to $500 per day (capped at $10,000) for each Reporting Company and/or, in the case of willful violations, criminal penalties including up to two years' imprisonment and criminal fines.

What Else is on the Horizon?

There is similar legislation in New York State that has been passed by the Assembly and Senate and is awaiting the signature of Governor Kathy Hochul. That legislation only requires BOI for limited liability companies; however, unlike the FinCEN federal regime, it contemplates creation of a database that would make each LLC's name, address, and the full name of each beneficial owner available to the public.

Resources

Please use the following links to additional resources pertinent to the Rule:

- FinCEN's website
- Final Rule
- Final Rule News Release
- Final Rule Fact Sheet
- FAQs
- Small Entity Compliance Guide

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