Corporate Transparency Act Updates

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CORPORATE TRANSPARENCY ACT

Overview

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- The Corporate Transparency Act requires certain “Reporting Companies”, who generally do not otherwise report to the government the identities of those who own or control them, to a federal database for law enforcement purposes.

CORPORATE TRANSPARENCY ACT Overview

- Passed on January 1, 2021, and codified in 31 U.S. Code § 5336. Culmination of years of other attempts to aggregate beneficial owner information into a database (Beneficial Ownership Secure System ("BOSS")).
- The purpose of the CTA is to (1) set federal standards for incorporation, (2) protect U.S. national security and commerce including with respect to money laundering, terrorism financing and other illegal activities; and (3) comply with international standards with respect to money laundering and anti-terror financing.

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Overview

- Some estimates indicate more than 90% of U.S. Companies must file; FinCEN has proffered its belief that companies with “simple management and ownership structures” will spend $85 to prepare and submit an initial BOI report.
- On April 1, 2021, FinCEN released an initial Advance Notice of Proposed Rulemaking and, on December 8, 2021, the agency published its proposed rules (the “Proposed Rules”) in the Federal Register.

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- On September 30, 2022 FinCEN issued its final rule with respect to the reporting of Beneficial Ownership Information.
- Additional rulemaking is contemplated with respect to:
  - Who may access beneficial ownership information; and
  - FinCEN's customer due diligence rules.

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- In theory, the database is only accessible to:
  - Federal law enforcement;
  - Other enforcement agencies with court approval;
  - To certain foreign law enforcement agencies in conjunction with a request of a U.S. federal law enforcement agency; and
  - To financial institutions and their regulators with consent of the reporting company.

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- Ancillary effects of the CTA include:
  - Revisions to CDD rules for banks; and
  - An email address for the Treasury to receive comments or complaints regarding the CTA; CorporateTransparency@oig.treas.gov.

Reporting Companies

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Reporting Companies

- Subject to exclusions (which we will discuss next), the term "reporting company":
  - Means a corporation, limited liability company, or other similar entity that is—(i)created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or
  - Is formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe.

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Reporting Companies

- Exclusions: There are a few general categories of excluded entities:
  - Companies who already report their beneficial ownership;
  - Certain service providers;
  - Certain large operating companies (more than 20 full time employees who filed a prior-year return documenting $5,000,000 in gross receipts and with a physical office within the United States);
  - Inactive businesses;
  - Certain tax-except entities; and
  - Wholly-owned subsidiaries of exempt entities.

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Reporting Companies

Examples of exempt entities	
Securities issuers	Certain governmental authorities
Certain banks and credit unions	Money transmitting businesses
Securities broker-dealers	Certain tax-exempt entities
Venture capital funds	Certain insurance companies
Inactive businesses	Large operating companies

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Beneficial Owners

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Beneficial Owners

- Subject to certain exceptions, a beneficial owner is an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise:
  - Exercises substantial control over the entity; or
  - Owns or controls not less than 25 percent of the ownership interests of the entity. (Final rule provides guidance as to how this is calculated).

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Beneficial Owners

- A beneficial owner excludes:
  - Minor child (if the parent or guardian is reported);
  - Certain custodians;
  - Employees whose control is derived solely from employment;
  - Individuals who are beneficial owners only through inheritance; and
  - Certain creditors.

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Beneficial Owners

- Substantial control includes the following individuals:
  - Those who serve as senior officers of the Reporting Company;
  - Those who have authority over the appointment or removal of senior officers of the company or certain aspects of the board of directors (or similar body); and

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Beneficial Owners

- Those who direct, determine or have substantial influence over important matters of the Reporting Company such as:
  - The nature, scope, and attributes of the business of the reporting company;
  - The reorganization, dissolution, or merger of the reporting company;
  - Major expenditures or investments, any significant debt, or approval of the operating budget;
  - The selection or termination of business lines or ventures or geographic focus;
  - Compensation schemes and incentive programs for senior officers;
  - The entry into or termination, or the fulfillment or non-fulfillment of significant contracts;
  - Amendments of any substantial governance documents of the reporting company; or
  - Any other form of substantial control over the reporting company.

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Company Applicants

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Company Applicants

- The rule also requires the reporting of company applicants (such as the incorporator).
- The Final Rule contemplates that companies formed before January 1, 2024, do not need to report their company applicants.
- This exclusion was likely prompted by comments illustrating how difficult it may be to track down applicant information for legacy entities.

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Company Applicants

- A Company Applicant is:
  - For a domestic Reporting Company, the individual who files the document that creates the company.
  - For foreign Reporting Companies, the individual who files the document which first registers the foreign Reporting Company.
  - If there is more than one individual, the Company Applicant includes the individual who files the document <u>and</u> the individual "who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing".

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Reporting Requirements

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Reporting Requirements

- The following information must be reported with respect to all Reporting Companies:
  - Legal name, including all DBAs/assumed names;
  - Street address of principal place of business;
  - Jurisdiction of formation and registration; and
  - TIN or, if no TIN, a Dun & Bradstreet Data Universal Numbering System (DUNS) or Legal Entity Identifier (“LEI”).

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Reporting Requirements

- The following information must be reported with respect to all beneficial owners:
  - Owner's full legal name;
  - Date of birth;
  - Current address; and
  - A unique identifying number from a nonexpired: US passport; state, local or tribal ID; driver's license; or, if none of the foregoing, a foreign passport. An image of the document must be uploaded as well.

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Reporting Requirements

- FinCEN Identifier.
  - Rule contemplates that individuals and reporting companies can apply for a FinCEN Identifier.
  - This is useful for reporters who are tied to several reporting companies.
  - Updates to the FinCEN Identifier will update all reports which that Identifier is tied to.
  - Process is voluntary and will require the submission of the same information required of the applicant independently of the Identifier.

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Reporting Requirements

- Initial reports.
  - Initial reports for new companies due within 30 days of actual notice of creation or public notice (i.e. through a database) of creation.
  - Existing companies have one year from effective date to submit initial report.

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Reporting Requirements

- Updates.
  - Deceased – within 30 days of settlement of estate
- Corrections.
- Termination or dissolution – no requirement to report as of now.

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Reporting Requirements

- Uncertainty as to exempt entities losing their status during the first year; however, comments indicate that they will have the longer period to register (i.e. remaining time within 1 year or 30 days).
- No mechanism to request extensions (for example, if there is a buyout which renders calculations difficult); however, comments indicate that FinCen may consider providing guidance in the future.

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Enforcement

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Enforcement

- It is unlawful to willfully provide, or attempt to provide, false or fraudulent information or willfully fail to report when required.
- Penalties include:
  - Fines of up to $500 per day up to $10,000; and
  - Up to two years in prison.

CORPORATE TRANSPARENCY ACT Enforcement

- Certification.
  - How does the person certify other's information.
  - Person will have to certify that information is "true, correct, and complete."
  - FinCEN's comments takes the position that the person signing the report is doing so on behalf of the Company and not individually although the rule is void of those protections.

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Next Steps

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Next Steps

- Begin compiling a list of non-exempt Reporting Companies.
- Begin compiling a list of potential Beneficial Owners, discuss the impact of the Corporate Transparency Act, and address any necessary changes/clarifications.
- Meet with your accountant and attorney to discuss the compliance and identifying potential Beneficial Owners.

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Next Steps

- Review ongoing rulemaking which may alter your duties under the Corporate Transparency Act.
- For up-to-date information, visit: fosterswift.com/f-corporate-transparency-act-resources.html

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