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Generations Spring/Summer 2023 - The Corporate Transparency Act: FinCEN Provides Further Guidance

Beginning on January 1, 2024, many privately held companies—including corporations, limited liability companies, limited partnerships and other similar entities—will be required to file a beneficial ownership report with the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). The reporting requirement is imposed by the Corporate Transparency Act (the act) and regulations adopted by FinCEN. The act creates a broad beneficial ownership reporting requirement for certain privately held companies—requiring reporting companies to 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 that exercise control over the reporting company ("beneficial owners" under the act). These reports will not be open to public inspection.

In September 2022, FinCEN issued a final rule implementing the beneficial ownership information reporting requirements. In December 2022, FinCEN published proposed regulations to govern access to and protection of beneficial ownership information. The proposed regulations specified how government officials may access beneficial ownership information to support law enforcement, national security and intelligence activities. The proposed regulations also described how financial institutions and their regulators will have access to such information in order to fulfill customer due-diligence requirements and conduct supervision. On March 24, 2023, FinCEN provided further guidance on these new reporting requirements.

FinCEN is also developing an online reporting system called the Beneficial Ownership Secure System (BOSS) to receive, store and maintain information about beneficial ownership of reporting companies. BOSS will be an online portal through which reporting companies may submit their beneficial ownership reports. BOSS will be secured to a Federal Information Security Management Act "High" compliance level.

What Is a Reporting Company?

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, which are also classified as reporting companies. However, there are 23 categories of exempt entities that are not subject to the reporting requirements of the act. Exempt entities are mostly entities that are already subject to federal and state regulatory reporting requirements.

What Are the Reporting Requirements?

Reporting companies are required to file information identifying beneficial owners, and, for reporting companies formed or registered on or after January 1, 2024, "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. Reporting companies formed on or after January 1, 2024, will have 30 days from the date of formation 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 an individual who either (i) directly files the document that creates the entity or registers the foreign reporting company and (ii) is primarily responsible for directing or controlling the filing of the relevant document by another. FinCEN, in published guidance, has noted that no reporting company will have more than two 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 it includes managers, officers, directors and third parties empowered to make decisions on behalf 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.

In preparation for the effectiveness of the act, privately held companies should now review the applicability and requirements of the act and establish internal protocols for determining the identity of and collecting required information on beneficial owners.

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