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FinCEN Reporting Requirements Affect Everyone – Regulations Now Final

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The Corporate Transparency Act (the "CTA") authorizes the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") to require entities to report information about their "beneficial owners." Although the CTA became law in early 2021, FinCEN did not publish final rules setting forth reporting requirements until last month.

When Must an Entity's Initial Report Be Filed? A "reporting company's" deadline for compliance depends on when the company was created.

- "Reporting companies" created before January 1, 2024, must file an "initial report" on or before January 1, 2025.
- "Reporting companies" created on or after January 1, 2024, must file an "initial report" within 30 calendar days following certain formation events.

One hopes that, by January 1, 2024, businesses will have protocols in place to make initial reporting with FinCEN an ordinary and automatic part of the formation process for new companies. This memorandum focuses on the herculean task that faces businesses in identifying which entities now in existence are subject to the CTA requirements, collecting the needed information, and preparing the required reports.¹

As noted above, reports for entities in existence on January 1, 2024, will not be due until January 1, 2025. Actual filing of reports will have to await FinCEN's creation of a new electronic system, anticipated to be on line by January 1, 2024. Thus, the period between now and early 2024 should be used to collect and analyze the information needed to comply with the reporting requirements. In light of the severe penalties provided for failure to comply, a civil penalty of \$500 **per entity per day** and potential criminal penalties of up to two years in prison, all should take the CTA very seriously.

What Is a "Reporting Company"? In general, a "reporting company" is a corporation, a limited liability company, or any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state, commonwealth, territory, or possession of the United States or of an Indian tribe. The Preamble to the final rule states that "sole proprietorships, certain types of

¹ This memorandum focuses solely on the rules for "domestic reporting companies" (formed under the laws of a State, commonwealth, territory, or possession of the United States or of an Indian tribe). A parallel, but somewhat different, scheme applies to "foreign reporting companies" (formed under the laws of a foreign country, but registered to do business in a State, commonwealth, territory, possession, or tribal jurisdiction).

trusts, and general partnerships in many, if not most, circumstances are not created" through the filing of such a document and would not be reporting companies. Limited partnerships, on the other hand, are included, even though not explicitly mentioned in the final rule, and perhaps even limited liability partnerships are covered. Entities "disregarded" for Federal tax purposes, such as most single-member LLC's, can be reporting companies.

Having cast this broad net, the final rule then enumerates 23 types of exempt entities that will not be reporting companies. Most of the exempt classes consist of entities already subject to substantial reporting requirements under Federal or state law, such as issuers of securities registered under section 12 of the Securities Exchange Act, banks and credit unions, brokers or dealers in securities, and insurance companies.

Private business entities not exempt under the foregoing rules may seek to qualify under the exemption for "large operating companies." A "large operating company" is one that:

- Employs more than 20 full-time employees within the United States;
- Has an operating presence at a physical office in the United States; and
- Filed a tax return for the previous year demonstrating more than \$5,000,000 in gross receipts or sales, excluding gross receipts or sales from outside the United States.

The final rule does not address explicitly whether an entity can take into account its share of the gross receipts of a subsidiary entity classified for income tax purposes either as a disregarded entity or as a partnership in determining its gross receipts. However, it does seem clear that a subsidiary entity, except perhaps for a disregarded entity, cannot take into account either gross receipts or employees of its parent or other affiliates in determining whether the exemption applies to it. A detailed examination of organization charts and tax returns may be needed to identify exactly which entities are subject to the reporting requirements.

Wholly owned subsidiaries, whether direct or indirect, of exempt entities, including of large operating companies, are generally exempt as well. However, ownership of even a "sliver interest" by a non-exempt person may create a reporting obligation.²

In the real estate industry, where use of a separate legal entity to own each property is common, a business organization may have multiple reporting entities, few, if any, of which meet all of the requirements for exemption, even though the organization as a whole exceeds the 20 employee and \$5,000,000 gross receipts thresholds.

What Information Must Be Reported? Information required to be reported by each non-exempt company includes not only the company's full legal name and trade name(s), current address of its principal place of business, jurisdiction of formation, and taxpayer identification number, but also, for every individual "beneficial owner," the individual's name, date of birth, and address and a copy of the

² There is also an exemption for certain "inactive entities" in existence on or before January 1, 2020. The requirements for this status, however, are quite onerous, including that no foreign person have any direct or indirect ownership interest in the entity.

individual's non-expired driver's license or passport. The term "beneficial owner" is defined broadly and includes:

- Any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, or chief operating officer, regardless of title.
- Any individual who, directly or indirectly, otherwise exercises "substantial control" over a reporting company.
- Any individual who, directly or indirectly, owns or controls at least 25% of the ownership interests in such reporting company. For this purpose, an individual trustee of a trust generally is (and the beneficiary or grantor of a trust may be) considered to control all of the ownership interests owned by the trust. There is generally a "look-through" of intermediate entities to determine whether an individual's ownership hits the 25% benchmark with respect to any lower-tier entity, but there is no "family attribution," except in the case of interests owned by minor children.

Identifying a reporting entity's beneficial owners under these rules will be a serious challenge except in the case of the simplest structures.³ In some cases, if an individual's ownership interest in a reporting company is held solely through an upper-tier exempt entity, the reporting company may be permitted to report information on the exempt entity, rather than on the individual.

The final rule contains no exception or waiver regarding reporting entities that simply do not have, and cannot obtain, the required information regarding their beneficial owners. For entities formed in the future, one might consider including contractual undertakings on the part of beneficial owners to provide the needed information, although this may be impractical in complex or multi-tiered structures.

Updated reports are required within 30 days of the occurrence of any change in previously reported information, including things as trivial as a change in a residence address of a senior officer. Thus, compliance is an ongoing challenge, restricted neither to a one-time, pre-January 1, 2025, catch-up filing for all existing entities nor to adding a FinCEN filing to the checklist for entity formation commencing on January 1, 2024.

Who Has Access to This Information? Under the CTA, FinCEN may disclose the information it collects in response to requests by Federal, state, and local law enforcement, Federal intelligence and national security agencies, financial institutions and their regulators under certain circumstances, and certain foreign authorities, subject to a host of individualized requirements. For example, state and local law enforcement may access the information only pursuant to a court order authorizing it as part of a criminal or civil investigation, and foreign authorities may access the information only if a Federal agency asks on their behalf. Certain Treasury Department officials may also access the information, including for tax administration purposes. The CTA requires FinCEN to promulgate protocols regarding the access of this information, which FinCEN has said it will do before January 1, 2025. The information cannot be disclosed to the press or other private parties under the Freedom of Information Act.

³ In the case of an entity created on or after January 1, 2024, information will also be required concerning the individual who handles the task of actually filing, or of directing the process of filing, the entity's formation documents (a "company applicant").

Conclusion. The new reporting regime requires every business organization, including those headed by "large operating companies" and other exempt entities, to assess which existing entities in which it owns any interest are reporting companies and to cause those entities to file appropriate reports by the appropriate deadline. The foregoing summary, while necessarily oversimplified, highlights many of the subtle questions that may arise, and some organizations may choose just to file for all of their entities. Whatever approach is to be taken, the January 1, 2025, deadline for existing entities will creep up on all of us surprisingly quickly, as will the "30 days after formation" deadline for entities formed on or after January 1, 2024, so now is the time to begin the process of collecting data and making decisions.

For assistance with any questions arising under these rules, please contact one of the individuals listed below or any of our other attorneys.

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