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The Corporate Transparency Act Aims to Remove Business Anonymity

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The Corporate Transparency Act (“CTA”) will seriously impact the vast majority of non-public, small businesses and business owners throughout the United States. In passing the CTA, Congress seeks to bring more transparency into corporate ownership by collecting identification information of those responsible for organizing and owning entities.

On January 1, 2021, the CTA was passed as a part of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, but it was thirteen years in the making. Intended as the United States’ response to the European Union’s Anti-Money Laundering Directive, Congress passed the CTA to limit the use of entities to conceal the ownership of individuals engaged in illegal activities, and to support government efforts to prevent money laundering, terrorist financing, and tax evasion.

While the Secretary of the Treasury has yet to finalize regulations for the CTA, the currently-proposed regulations will require all existing and newly-created, domestic and foreign entities (with limited exceptions) to provide certain identifying information about their businesses, their owners, and any individuals who participated in the formation and registration of such entities to the Financial Crimes Enforcement Network (“FinCEN”).

Those Required to Report

The CTA will require both domestic and foreign entities to Report Beneficial Owner and Applicant information to FinCEN. Domestic entities include any entity created by filing a document with a secretary of state or any similar office under the law of a State or Indian Tribe (each, a “Non-Federal Authority”). This definition includes, but is not limited to, domestic corporations, limited liability entities, limited partnerships, and limited liability limited partnerships, but does not appear to include trusts and similar non-statutorily created forms of entities. Foreign entities are required to report if they have registered to do business by filing with a Non-Federal Authority.

The majority of entities that are exempt from reporting under the CTA are already subject to state and federal supervision, such as companies required to report to securities, investment, insurance, or banking regulators. Large Operating Companies (which are defined as having more than 20 employees, more than \$5 million in annual gross receipts, and an operating presence at a physical office within the United States) and existing entities that meet certain criteria to be classified as “inactive” may also be exempt. Additionally, the CTA provides an avenue for the Secretary of the Treasury to exclude different types of entities in the future by issuing a written concurrence of the Attorney General and Secretary of Homeland Security.

In addition to information about the companies themselves, the CTA also imposes reporting requirements on all Beneficial Owners and Applicants (with limited exceptions including minor children and employees). The CTA defines a “Beneficial Owner” as any individual who either exercises Substantial Control over the entity or owns or controls at least 25 percent of the ownership interests in the entity. “Substantial Control” can be established in a number of ways, including serving as a senior officer, having authority over the removal or appointment of senior officers, having substantial influence over important matters, or having any other form of substantial control over the entity. The CTA defines an “Applicant” as anyone that directs or controls the filing of formation documents by another (which would include an attorney that files the entity formation documents with the secretary of state on behalf of an entity).

Information to be Provided to FinCEN

Entities that are required to Report must provide FinCEN with the full name of the entity (including any trade names), its street address, the state or tribal jurisdiction of formation, and the taxpayer identification number for the entity (if an entity has not been issued a taxpayer identification number, then they may use the Dunn and Bradstreet Data Universal Numbering System).

In addition to information on the entity, each Beneficial Owner and Applicant of that entity are also required to report their full legal name, a residential or business address, their date of birth, and an identifying number from an acceptable identification document. FinCEN noted in the notice of proposed rulemaking that they believe the collection of an image of an acceptable identification document (driver’s license,

passport, etc.) would be beneficial in making it more difficult to provide false information; however, FinCEN did not include this requirement in the proposed regulations and has requested public comment on this issue specifically.

The proposed regulations provide that a Beneficial Owner or Applicant will be able to obtain a “FinCEN Identifier” rather than having to provide the personal identification information called for by the CTA with respect to each entity, but the regulations regarding this are not final. In such case, a Beneficial Owner could provide personal information to FinCEN one time and then use the FinCEN Identifier for purposes of reporting under the CTA.

Timing of Reporting; Penalties for Failure to Report

The amount of time that entities have to report is based on whether they were created before or after the effective date of the CTA (which has not yet been established). Under the proposed regulations, entities that were created or registered to do business *before* the effective date of the final regulations will have one year from such effective date to file the required information, while an entity formed *after* the effective date of the final regulations must file the required information within fourteen days of their creation or registration.

If there are any errors in the information reported to FinCEN, an entity has 14 days from the date that they knew or should have known about the inaccuracy to cure it. If any of the information reported to FinCEN changes, an entity has 30 days to file any updated information. Under the proposed regulations, FinCEN will require entities and reporting individuals to update their information annually.

Willfully failing to provide FinCEN with complete and accurate information or willfully providing false information to FinCEN will be punishable (under the proposed regulations) by civil fine (up to \$500 per day that the violation continues), criminal fine (up to \$10,000), and/or imprisonment of up to two years. While the CTA does provide the punishment for willful misrepresentations, it does not provide guidance on liability or punishment for accidental misrepresentations.

Neither the CTA nor FinCEN have provided further detail on how these punishments will be enforced. There is, however, a safe harbor provision for individuals that have reason to believe that the report that they submitted contains inaccurate information and, in accordance with applicable regulations, voluntarily and promptly submit a report with corrected information, not later than 90 days after the original report.

Access to Information

FinCEN is responsible for creating a registry and prescribing regulations regarding how it will collect this information, but those regulations have not been proposed to date.

FinCEN is permitted to disclose reported information to agencies and institutions for law enforcement and national security purposes. FinCEN is not authorized to provide information to the general public, and it may not disclose the information through a Freedom of Information Act request. It is unclear at this point if information provided to FinCEN may be obtained through a subpoena or other court mandated discovery.

Effective Date of Regulations

The window for public comment on the CTA has ended and FinCEN will publish a final rule in the Federal Register when the rules is finalized. FinCEN has two additional notices of proposed rulemakings pending. It is also possible that they will open the first for supplemental comments, once those proposed regulations have been modified (based on the prior comments received).

The final regulations will likely go into effect thirty days after being published in the Federal Register, but at this point, the timing of finalization and publication is not set and continues to push further out.

Conclusion

Though we are waiting on the final regulations, the text of the CTA and the proposed regulations have given significant insight into the likely impact of these regulations. Entities, their Beneficial Owners, and their Applicants will be subject to significant reporting requirements as a result of the CTA. In the next two sets of proposed rule makings, there are numerous details regarding information collection and enforcement that will need to be established.

We are providing this alert now, so that our clients have the opportunity to prepare for the proposed regulations and are in a position to timely act when the regulations are finalized. Please contact us to discuss how the CTA may impact your businesses and how we may be able to help.

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