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THE CORPORATE TRANSPARENCY ACT (CTA) BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS FOR CLIENTS OWNING PARTNERSHIPS, CORPORATIONS AND LLCs

On January 1, 2024, reporting obligations imposed under the CTA by the Financial Crimes Enforcement Network (“FinCEN”) went into effect. Unless an exemption¹ applies to an entity, the CTA obligates all “Reporting Companies” to file a report with FinCEN. Reports must include certain information about the Reporting Company, as well as personal information about its “Beneficial Owners” and, if applicable, its “Company Applicants.”

The term “Reporting Company” is defined broadly enough to include any United States domestic entity (e.g., limited liability companies, corporations, partnerships and others) created by filing a document with a secretary of state or similar office of a jurisdiction within the United States (“US”).

In 2022, the National Small Business Association (“NSBA”) challenged the CTA in federal court. On March 1, 2024, United States District Court Judge Liles Burke ruled that the CTA is unconstitutional, barring the enforcement of the CTA against the NSBA and its members.² No other entities are protected against CTA filing obligations by the NSBA case. The Treasury Department plans to appeal Judge Burke’s ruling, and the case is likely to have far-reaching effects, as it is expected to ultimately end up being presented to the United States Supreme Court. In the meantime, companies that are not NSBA members must still comply with the CTA’s reporting obligations.

Individuals Affected: Beneficial Owners

A Beneficial Owner is any individual who directly or indirectly (i) exercises “substantial control” over the Reporting Company (the control test), or (ii) owns or controls at least 25% of the ownership interest of the Reporting Company (the ownership test).

¹ FinCEN has provided a quick reference list of all 23 exemptions that may apply. See <https://www.fincen.gov/boi-faqs> (C.2.). As a practical matter, due to the considerable uncertainty concerning how certain of these exemptions may apply, the exemptions must be examined vis-à-vis each company on a facts and circumstances basis.

² *National Small Business United, d/b/a the National Small Business Association, et al., v. Janet Yellen, in her official capacity as Sec’y of the Treasury, et al.*, 2024 WL 899372 (N.D. Ala. Mar. 1, 2024). Given the limited reach of the ruling to the plaintiffs of the case, the Treasury Department and its FinCEN arm will probably not issue guidance universally suspending CTA enforcement while the appeals process plays out. Because the appeals process may reverse Judge Burke’s ruling, even the NSBA and its members should seriously consider complying with the CTA, notwithstanding the NSBA opinion.

Substantial Control Test

An individual can be found to exercise substantial control over an Entity where the individual: (i) serves as a senior officer (e.g., a president, officer, general counsel etc.); (ii) has authority over appointment or removal of (a) a senior officer or (b) a majority of a board of directors (or similar body); (iii) maintains substantial influence over important business, corporate structure or financial decisions made by the Reporting Company; or (iv) has “any other form” of direct or indirect substantial control.

25% Ownership Interest Test

Ownership is broadly defined to include all interests in equity, stock, subscription rights, options, and numerous other forms of ownership. Both direct and indirect interests are counted for purposes of determining a person’s ownership interest percentage. If a trust is deemed to be a Beneficial Owner of a Reporting Company under the ownership test, certain individuals (related to such trust) are also deemed Beneficial Owners of the same Reporting Company (such as sole current beneficiaries, Trustees with authority to dispose of trust assets, or Trustors with rights to revoke or withdraw trust assets).

Individuals Affected: Company Applicants

A “Company Applicant” includes (i) the person who directly files formation (or registration) documents when forming or registering a Reporting Company and (ii) the individual primarily responsible for directing or controlling the filing.

Timing of Initial Filings and Updated Filings

Initial Filing

FinCEN launched an E-Filing website for reports (<https://boiefiling.fincen.gov>) on January 1, 2024. However, ***Reporting Companies that were already in existence as of January 1, 2024, will have a full year to make required FinCEN filings, with a due date for initial reports of January 1, 2025.*** Although FinCEN initially proposed requiring entities formed after January 1, 2024 to file reports within 30 days of formation, FinCEN formally adopted rules in December of 2023 (and officially updated its public guidance on January 4, 2024) to require that ***Reporting Companies formed after January 1, 2024 must file within 90 days of formation.***

Updated Filings

If a Reporting Company experiences changes with respect to information previously submitted to FinCEN in a prior filing (e.g., change in Beneficial Owner identity), the Reporting Company generally must file an updated report with FinCEN no later than 30 days after the change occurs. Reporting Companies should consider: (i) incorporating policies and procedures that require Beneficial Owners to report relevant changes to the Reporting Companies’ management; and/or (ii) requiring Beneficial Owners to obtain individual FinCEN identifiers and submit them to Reporting Companies.

Use of FinCEN Identifiers.

An individual can obtain a “FinCEN identifier” by submitting to FinCEN an application containing all of the information otherwise required to be reported about such individual as a Beneficial Owner. If an individual has obtained a FinCEN identifier and provided it to a Reporting Company, the Reporting Company may include that FinCEN identifier in its report *in lieu of* the individual’s personal information.

Additionally, to the extent (i) a Reporting Company submits a Beneficial Owner’s FinCEN identifier, and (ii) the Beneficial Owner’s personal information (contained in its FinCEN identifier application) subsequently changes, the Beneficial Owner (and **not** the Reporting Company) will be required to update such Beneficial Owner’s information with FinCEN (within 30 days following any change). *(In contrast, however, even if FinCEN identifiers are used, Reporting Companies will still have to file updated reports reflecting new Beneficial Owners and removal of existing Beneficial Owners.)*

Non-Compliance Penalties

The CTA imposes civil and criminal penalties for willfully providing (or attempting to provide) false or fraudulent information, and for willfully failing to file a report (or willfully failing to provide updated reporting).

The penalties for any of these violations include a \$500 daily fine for an uncorrected violation, up to a maximum of \$10,000 per individual, as well as up to two years’ imprisonment.

If you have any specific question about the implications of the CTA and the reporting obligations arising thereunder, please do not hesitate to contact your Anderson, Yazdi, Hwang, Minton + Horn LLP attorney.

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