Are you ready for the new reporting obligations under the Corporate Transparency Act?

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On January 1, 2021, Congress overrode former President Trump's veto of H.R. 6395, the National Defense Authorization Act of 2021 (the "NDAA"). Title LXIV of the NDAA enacts the Corporate Transparency Act (the "CTA").[1] The CTA, among other things, requires every business entity that meets the definition of a "reporting company" to make a filing with the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") identifying its beneficial owner or owners. The CTA also imposes severe penalties on entities that fail to comply with its reporting obligation.

The CTA is designed to ban anonymous shell companies used by criminals and certain foreign officials to hide and move corrupt proceeds and other illicit financing. It represents the first significant update to the U.S. anti-money laundering laws in 20 years and gives FinCEN significant authority to adopt necessary regulations to implement the provisions of the CTA.

This article provides a summary of some of the key provisions of the CTA. It should be noted, however, that the CTA does not define several important terms, nor does it provide details on the reporting process. Instead, the CTA directs the Department of Treasury to promulgate implementing regulations within one year of enactment (or by January 1, 2022 at the latest). Once finalized and implemented, these Treasury Regulations (and any further guidance from FinCEN) are expected to provide further details on the requirements under the CTA and will need to be reviewed to fully understand the scope and impact of the CTA.

APPLICABILITY

A "reporting company" under the CTA is defined as any corporation, LLC or other similar entity that is created by filing a document with the secretary of state or a similar office under the laws of a state or Indian Tribe or formed under the law of a foreign country and registered to do business in the United States by the filing a document with the secretary of state or a similar office under the laws of a state or Indian Tribe. The CTA does, however, include more than 20 exemptions from the definition of reporting company. Exempt entities include, but are not limited to, the following:

- Entities that (i) employ more than 20 people, (ii) filed a tax return reporting revenues in excess of $5 million, and (iii) have a physical presence in the United States;
- Most financial services institutions, including investment and accounting firms, securities trading firms, investment companies, banks, and credit unions that report to and are regulated by government agencies such as the Securities and Exchange Commission, the Office of the Comptroller of the Currency, or the FDIC;
- Dormant entities which have been in existence for more than one year, are not engaged in "active business," and not owned (either directly or indirectly) by a non-U.S. individual; and
- Churches, charities, and other nonprofit organizations.

BENEFICIAL OWNERS

Under the CTA, a "beneficial owner" is broadly defined as an individual who, directly or indirectly, through contract, arrangement, understanding, relationship, or otherwise (i) exercises substantial control over the entity, or (ii) owns or controls at least 25% of the ownership interests in the entity. A beneficial owner, however, does not include (a) a minor child (as defined in the state in which the entity is formed), (b) an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual, (c) an individual acting solely as an employee and whose economic benefits derive solely from their employment status, (d) an individual whose only interest is through a right of inheritance, and (e) a creditor of the entity, unless it exercises substantial control or has 25% of the interests in the entity.

REPORTING REQUIREMENTS

The CTA states that, in accordance with the Treasury Regulations, each reporting company must submit a report (which will need to be updated annually) to FinCEN which identifies each beneficial owner by the following:

- Full legal name;
- Date of birth;
- Current residence or business address; and
- Unique identifying number from an acceptable document (*i.e.*, a non-expired driver's license number or a passport number), or a FinCEN identification number (which can be requested upon submission of the beneficial owner's information required by the CTA).

Any reporting company that has been formed or registered **before** the effective date of the Treasury Regulations must, within two years of the effective date of the Treasury Regulations, submit to FinCEN a report which contains the required beneficial ownership information. Any reporting company that has been formed or registered **after** the effective date of the Treasury Regulations must, at the time of their formation or registration, submit to FinCEN a report which contains the required beneficial ownership information. Any change to a reporting company's beneficial ownership information must be submitted to FinCEN within one year of such change.

ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Beneficial ownership information reported to FinCEN pursuant to the CTA is required to be kept confidential and disclosed only through appropriate protocols to authorized government authorities such as federal agencies engaged in national security, intelligence, or law enforcement activities, for use in furtherance of such activities. Beneficial ownership information may also be disclosed to law enforcement agencies at the state, local or Tribal levels; provided, that, such disclosure is authorized by a court order in connection with a criminal or civil investigation. Additionally, FinCEN is permitted to disclose beneficial ownership information to financial institutions, with the consent of the reporting company, to facilitate the financial institution's customer due diligence requirements.

The CTA requires the Secretary of the Treasury to establish security protocols to protect the confidentiality of the beneficial ownership information collected by FinCEN. FinCEN must maintain the beneficial ownership information submitted under the CTA for no less than five (5) years after the date on which the applicable reporting company terminates. Additionally, beneficial ownership reports filed with FinCEN under the CTA may not be disclosed under the Freedom of Information Act or similar laws.

VIOLATIONS AND PENALTIES

Any person who willfully provides, or attempts to provide, false or fraudulent beneficial ownership information to FinCEN, or willfully fails to report complete or updated beneficial ownership information to FinCEN may be subject to a fine of up to $10,000 and/or imprisoned for up to two years. Further, any such person may also be liable to the United States for a civil penalty of up to $500 per day that the violation continues or has not been remedied. However, there will be no criminal or civil penalty assessed against a person who reports inaccurate information; provided, that, such person voluntarily and promptly corrects such information within ninety (90) days after submission and in accordance with the Treasury Regulations.

Unauthorized disclosure of beneficial ownership information by a government employee or third-party recipient is also a violation subject to similar civil penalties and criminal fines up to $250,000 and/or imprisonment for up to five years.

IMPACT AND WHAT SHOULD BUSINESS OWNERS DO NOW

As we continue to await the Treasury Regulations which, as noted earlier, are expected to provide further guidance on complying with the CTA, business owners should begin (if not started already) reviewing the CTA to determine whether their entity will qualify as a "reporting company" subject to its requirements. If so, then business owners will want to (i) begin gathering beneficial ownership information, (ii) review governance documents to confirm there are no confidentiality clauses or other obligations that will conflict with the requirements under CTA, (iii) consider revising governance documents to require owners to disclose the required information, and (iv) implement a process for meeting the CTA's requirements.

For more information or help with navigating the new reporting requirements imposed by the Corporate Transparency Act, please contact a member of our Private Investment Funds and Advisers Practice.

Footnotes.

1. *See* Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf. The CTA has not yet been codified in the United States Code.