

## Insights

### Corporate Transparency Act: New Obligations to Disclose Beneficial Ownership in Private Companies

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On January 1, 2021, Congress enacted the Corporate Transparency Act (the "CTA" or the "Act") as part of the greater National Defense Authorization Act for Fiscal Year 2021. The CTA requires certain domestic and foreign companies to disclose beneficial ownership information to the U.S. Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") and establishes information sharing obligations on private businesses (and others) designed to help fight the misuse of corporate structures that facilitate various criminal enterprises, such as money laundering, terrorism, tax fraud, human and drug trafficking and other financial-related criminal acts that are harmful to the national security interests. The CTA will become effective after the Secretary of the Treasury issues regulations implementing the CTA's requirements, for which the CTA sets an issue date of no later than January 1, 2022.

#### Who Must Comply

The obligations under the CTA apply to "reporting companies." Even though this phrase has a meaning tied to public companies with reporting obligations under the securities laws, its meaning under the CTA includes corporations, limited liability companies and other similar entities that are created by filing a document with a secretary of state or similar office under state or Tribal law or that are formed under the laws of a foreign country and registered to do business in the United States. The Act does not define "similar entities," but by extension of the underlying policy, we anticipate that this will likely include other business entities that must file organizational documents to come into existence, such as limited partnerships.

The CTA excludes the following categories of companies from the definition of "reporting company," thus making these companies exempt from the reporting requirements of the CTA: (a) publicly traded companies; (b) companies closely regulated by the federal government (e.g. banks, credit unions, bank holding companies, registered money transmitting businesses, insurance companies, and others); (c) U.S.-based companies with more than 20 full-time, US-based employees which reported at least \$5 million in gross receipts or sales to the IRS in the previous year and which have an operating presence at a physical office in the United States; (d) companies owned or controlled by exempt companies; and (e) dormant companies that meet certain conditions under the Act.

Reporting companies are required to submit information on "beneficial owners." Beneficial owners include

individuals who own or control not less than 25% of the ownership interests of the reporting company or who exercise “substantial control” over the reporting company. The Act does not define “substantial control.” We anticipate that the required regulations will provide guidance on this concept and that this will follow other areas where control concepts have been developed. If that occurs, “substantial control” will likely involve the ability to place a majority of members of the board of directors or to block or direct other significant corporate decisions. The definition of “beneficial owner” excludes certain individuals, such as individuals acting solely as employees, and those who receive interest in the reporting company through a right of inheritance.

Additionally, individuals who file an application to form a reporting company under the laws of a state or Indian Tribe or who register or file an application to register a foreign reporting company to do business in the United States, are also required to submit information under the CTA.

### **Information to be Reported and Who Will Have Access**

The CTA requires reporting companies to provide for the beneficial owners who are disclosed their full legal name, date of birth, current address, and a unique identifying number (e.g. driver’s license number or passport number) or a unique identifier supplied by FinCEN.

While beneficial ownership information will be confidential and may not be disclosed to the public, the information will be accessible for inspection by or disclosure to the Department of Treasury. Further, beneficial ownership information reported to FinCEN may also be disclosed upon request to: (a) federal agencies and law enforcement for national security intelligence purposes or other purposes consistent with the CTA; (b) state, local and tribal law enforcement with a court order for purposes in connection with a criminal or civil investigation; (c) financial institutions, with the consent of the reporting company, pursuant to customer due diligence requirements; and (d) federal agencies on behalf of foreign law enforcement pursuant to an international treaty, agreement or convention.

### **Timeline for Compliance**

Once the CTA becomes effective, reporting companies formed or registered after the effective date must submit the beneficial ownership information at the time of formation or registration. Reporting companies formed prior to the effective date of the CTA will have two years after the effective date of the implementing regulations to provide beneficial ownership information to FinCEN. Additionally, reporting companies will be subject to ongoing reporting obligations to update any change in beneficial ownership information within one year after the date the change occurred.

### **Penalties for Non-Compliance**

The CTA establishes criminal and civil penalties for willful failure to report complete or updated beneficial ownership information, for willfully providing false or fraudulent information to FinCEN or for knowingly disclosing or using information obtained through the report submitted to FinCEN or disclosed by FinCEN. Any person (and not just the reporting company) that violates reporting requirements under the Act may be subject to penalties of up to

\$500 per day and fines of up to \$10,000 and imprisonment for up to two years. Safe harbors from these penalties are provided to allow for correction of inaccurate information.

### **Observations**

While little argument can be made against the intended benefit of the CTA relating to combatting criminal behavior, the CTA presents an expansion of the scope of private information that will be filed with a government agency. Based on the list of excluded companies, the reporting obligations and risks will impact small, privately-held businesses most directly and expose those having responsibility and involvement in the reporting process to criminal risk for failure to report or update accurately the required information about beneficial ownership of the reporting companies. Guidance will no doubt come from the regulations to be issued by the Department of the Treasury, but companies will almost certainly need to consider processes for gathering and updating accurate information from its owners. This could include changes to governing documents, shareholder agreements, operating agreements and similar documentation among the owners. We will continue to monitor the developments with the CTA and provide further updates as appropriate.

If you have any questions regarding the CTA or obligations to comply with the reporting requirements, please contact **Robert A. Greising**, **Virginia A. Talley** or **Maria M. Vladimirova**.

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