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New Corporate Transparency Act Will Require Private Companies to Disclose Beneficial Ownership

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In what has been heralded by some as a major step towards combating money laundering, the financing of terrorism and financial fraud, and by others as a sweeping intrusion on privacy and a burden on small businesses, the Corporate Transparency Act (CTA) was enacted on January 1, 2021. The CTA will require private companies to file a report with the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) disclosing the reporting company's beneficial owners and the individual forming or registering the reporting company. Information collected under the CTA will not be available to the general public but is to be maintained in a secure, private database available only to authorized government authorities for national security, intelligence or law enforcement activities and, with the consent of the reporting company, to financial institutions for confirmation of beneficial ownership information.

Who is required to comply with the CTA?

The CTA broadly covers any corporation, limited liability company or "similar entity" that was created by filing a document with a secretary of state or similar office under state or Tribal law or was formed under the law of a foreign country and registered to do business in the United States by filing a document with a secretary of state or similar office under state or Tribal law. The CTA does not define "similar entity," and it does not explicitly cover other common types of organizations or arrangements under which businesses are conducted and assets are held, such as partnerships or other types of business associations or trusts or estates.

The CTA *exempts* the following general categories of companies from its requirements: (i) publicly-traded companies or companies otherwise subject to reporting requirements under Section 15(d) of the Securities Exchange Act of 1934; (ii) other companies closely regulated by the federal government (such as banks, credit unions, bank holding companies, registered securities brokers or dealers, registered investment companies, registered investment advisers, insurance companies and registered public accounting firms); (iii) companies

owned or controlled by exempt companies; (iv) companies employing more than 20 full-time employees in the United States that previously filed federal tax returns demonstrating more than \$5 million in gross receipts or sales and that have an operating presence at a physical office in the United States; and (v) dormant companies that meet certain conditions. The Secretary of the Treasury is authorized to issue regulations to exempt additional categories of companies.

What information must be reported to FinCEN?

The report to FinCEN identifies each beneficial owner of the reporting company and each individual forming or registering the reporting company, by name, date of birth, current residential or business address, and a unique identifying number from acceptable identification (such as a passport or driver's license) or a unique identifier issued by FinCEN. The CTA defines "beneficial owner" as any individual who, *directly or indirectly*, exercises substantial control over, or owns or controls not less than 25% of the ownership interests of, the reporting company.

The CTA does not define the key terms "substantial control" or "ownership interests." Applying these requirements in particular cases may be challenging, given the myriad of control and economic arrangements found in private companies. Also, compliance with the CTA may be difficult or impossible for companies without the means to obtain information in respect of their indirect owners.

When must companies comply with the CTA?

Companies subject to the CTA will be required to begin reporting to FinCEN only after the Secretary of the Treasury has adopted regulations implementing the CTA's requirements. The CTA provides that such regulations must be adopted within one year after the CTA's enactment (in other words, by January 1, 2022). Once these regulations are adopted, companies that were formed or registered *prior* to the effective date of the regulations must submit the required report to FinCEN no later than two years after the effective date of the regulations. Companies formed or registered *after* the effective date of the regulations must submit the required report to FinCEN at the time of formation or registration.

After the initial report to FinCEN, companies must update any change in the reported information within one year after the date on which the change occurred. However, the CTA also requires the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of Homeland Security, to conduct a review to evaluate the desirability of requiring reporting of changes in beneficial ownership *sooner* than one year after the change in beneficial ownership, and to implement any such desired shorter reporting period in the regulations.

Will companies be penalized for failing to comply with the CTA's requirements?

Yes. The CTA provides for civil penalties of up to \$500 per day and fines of up to \$10,000 or imprisonment for up to two years (or both) for 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.

Because the Secretary of the Treasury has not yet adopted regulations implementing the CTA's requirements, details about the effective date, key definitions and other interpretive matters, and the procedures and standards for reporting to, or requesting the reported information from, FinCEN are not clear yet. We will continue to monitor the CTA's implementation.

Companies and affected individuals, and their legal and other advisors, should be aware of compliance obligations under the CTA. Companies may wish to include provisions in their governing documents to obligate owners to provide to the company information needed to comply with the CTA, such as indirect ownership information and changes in indirect ownership.

Please contact one of the authors or your regular Vorys attorney for more information.