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The Corporate Transparency Act: The Final Regulations Provide Limited Guidance With No Surprises

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Previous articles in this space have addressed the Corporate Transparency Act of 2020 (the “CTA”).¹ With issuance of final regulations, the CTA becomes fully operative on January 1, 2024.² Domestic entities formed on or after that date will have 30 calendar days to file with FinCEN an initial report which provides information required regarding the newly formed company, its beneficial owners, and each “company applicant” who submitted organizational documents to the state in which the company was or-

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¹ Ward, *We May Not Know Who You Are or Where You Live, But We Intend to Find Out: The Corporate Transparency Act of 2020*, 50 Tax Mgmt. Int’l J. No. 3 (Mar. 5, 2021). For a discussion of the proposed regulations, see Ward, *The Corporate Transparency Act Will Change the Way You Practice*, Bus. Law Today, Feb. 9, 2022.

² 87 Fed. Reg. 59,498 (Sept. 30, 2022).

ganized.³ The same reporting obligation is imposed on foreign entities within 30 calendar days of the earlier of (a) the date on which the foreign reporting company receives actual notice of its registration to do business or (b) the date on which the secretary of state or other state office with which the foreign reporting company has registered provides public notice.⁴ In the case of domestic reporting companies created before January 1, 2024 and foreign reporting companies registered to do business before January 1, 2024, the initial report must be filed with FinCEN on or before January 1, 2025.⁵ In a significant departure from the proposed regulations, the final regulations do not require information regarding company applicants in the case of reporting companies created or registered before January 1, 2024.⁶

The final regulations leave the requirements for the content of the initial report substantially unchanged. The address of a reporting company with a principal place of business in the United States must be the street address of that principal place of business.⁷ In the case of a reporting company with a principal place of business outside the United States, the address provided in the initial report must be the address of the primary U.S. location where the reporting company conducts business.⁸ Reporting companies must provide an EIN or, in the case of a foreign reporting company that has not been issued a TIN, the tax identification number issued by a foreign jurisdiction.⁹ Legal entity identifiers and Dun and Bradstreet universal

³ 31 C.F.R. §1010.380(a)(i).

⁴ 31 C.F.R. §1010.380(a)(ii).

⁵ 31 C.F.R. §1010.380(a)(iii).

⁶ 31 C.F.R. §1010.380(b)(2)(iv). However, pre-January 1, 2024 reporting companies must still disclose the involvement of a company applicant in their creation or registration.

⁷ 31 C.F.R. §1010.380(b)(1)(i)(C)(1).

⁸ 31 C.F.R. §1010.380(b)(1)(i)(C)(2).

⁹ 31 C.F.R. §1010.380(b)(1)(F).

numbers permitted by the proposed regulations are not acceptable.

Final regulations extend the period for correcting the initial report from 14 days to 30 calendar days after the reporting company becomes aware or has reason to know of any inaccuracy in the initial report.¹⁰ The requirement set forth in the proposed regulations, that reports must be updated whenever there is a change in the information provided to FINCEN, is continued by the final regulations. However, updates are required in two new circumstances. First, information reported must be updated when a minor child attains the age of majority under the law of the minor's state of residence, if the identity initially reported was that of the minor's parent or guardian instead of the minor.¹¹ Second, with respect to the image of the identifying document from which the beneficial owner's or company applicant's identification number was taken, an updated report must be filed when the name, date of birth, address, or identification number on the identification document changes.¹²

Individuals who are regarded as beneficial owners of a reporting company solely as a result of their ownership interest in an exempt entity that owns the reporting company were required by the proposed regulations to include the name of the exempt entity in lieu of information otherwise required regarding the beneficial owner. The final regulations make it elective to disclose the exempt entity in lieu of information regarding its beneficial owner.¹³

Except for the changes noted above, the final regulations continue the requirements of the proposed regulations regarding the content, form, and manner of reports to be submitted by reporting companies, the sorts of companies required to submit reports, and the entities exempt from reporting.¹⁴ Final regulations leave the definition of a beneficial owner of a reporting company unchanged from the proposed regulations as "any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25% of the ownership interests of such reporting company."¹⁵ The proposed and final regulations list many ways an individual may exercise substantial control over a reporting company. Final regulations expressly include trustees "of trusts and similar arrangements" among

those individuals.¹⁶ Interestingly, the final regulations do not contain the assertion appearing in the proposed regulations that an individual who has the right or ability to exercise substantial control is deemed to exercise substantial control.

Three modest changes were made to the definition of the term "ownership interest" by the final regulations. First, "proprietorships" were deleted from the list of ownership interests which determine beneficial ownership. Second, reporting companies are relieved of any obligation to disclose ownership interests created through puts, calls, straddles, or other options when the option or privilege of buying and selling equity interest is created and held by a third party without the knowledge or involvement of the reporting company.¹⁷ Third, equity interests include, in addition to those specifically identified, any "other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership."¹⁸

Under both the proposed and the final regulations, individuals who directly or indirectly own or control an ownership interest in a reporting company must be disclosed by the reporting company.¹⁹ The final regulations expressly state that indirect ownership or control may include contracts, arrangements, understandings, relationships, or other circumstances by which ownership or control is exercised through "another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual. . . ."²⁰

The final regulations provide additional guidance regarding calculation of total ownership interests for purposes of meeting the 25% threshold which requires disclosure of a beneficial owner, clarifying that total ownership interests an individual is considered to own or control, directly or indirectly, are calculated as a percentage of the total outstanding ownership interests of the reporting company.²¹ While the final regulations are explicit that ownership interests are "calculated at the present time," options and similar interests are treated as exercised. In the case of reporting companies that issue capital or profits interests, the beneficial owner's ownership interest are that individual's capital and profits interest in the entity calculated as a percentage of the total outstanding capital and profits interests of the entity. For corporations and entities treated as corporations for federal income tax purposes, as well as other reporting companies that issue shares of stock, the ownership interests owned or

¹⁰ 31 C.F.R. §1010.380(a)(3).

¹¹ 31 C.F.R. §1010.380(a)(2)(iv).

¹² 31 C.F.R. §1010.380(a)(2)(v).

¹³ 31 C.F.R. §1010.380(b)(2)(i).

¹⁴ See 31 C.F.R. 1010.380(b)(3), §1010.380(c)(1), §1010.380(c)(2).

¹⁵ 31 C.F.R. §1010.380(d).

¹⁶ 31 C.F.R. §1010.380(d)(1)(D)(ii).

¹⁷ 31 C.F.R. §1010.380(d)(2)(i)(D).

¹⁸ 31 C.F.R. §1010.380(d)(2)(i)(E).

¹⁹ 31 C.F.R. §1010.380(d)(2)(ii).

²⁰ 31 C.F.R. §1010.380(d)(2)(ii)(B).

²¹ See 31 C.F.R. §1010.380(d)(2)(iii).

controlled by an individual are determined by voting power or value, whichever is greater.²² If facts and circumstances do not permit a calculation of voting power or value owned or controlled by the individual relative to total voting power and value of all classes of ownership interest issued and outstanding by the corporation, any individual who owns or controls 25% or more of any class or type of ownership interest is deemed to own or control the requisite 25% necessary to make that individual a beneficial owner.²³

Final regulations continue to take the position of the proposed regulations that creditors of reporting companies are not beneficial owners of reporting companies but omit the language of the proposed regulations that holders of convertible debt or interests in the form of debt with rights to participate in the value or profits of the reporting company are not creditors.

OBSERVATIONS

The most significant contribution made by the final regulations is the additional guidance with regard to the definition of ownership interests and the calculation of an individual's total ownership interests in the reporting company for purposes of satisfying the 25% threshold for disclosure of the reporting company's beneficial owners. As explained above, the final regulations appear to confirm capital and profits interests in pass-through entities and voting power and value of

shares in corporate entities all count for determining the percentage of the beneficial owner's ownership interest.

Opportunities to avoid reporting suggested by the terms of the statute and confirmed by both proposed and final regulations remain.

- Only entities deriving limited liability through State or Tribal charter (in the case of domestic entities) or registration with State or Tribal authorities (in the case of foreign entities) are subject to reporting.
- Ownership of a reporting company through a non-grantor multi-beneficiary trust with respect to which the beneficiaries do not possess withdrawal rights requires disclosure of information regarding the trustee, but not the settlors or beneficiaries of the trust. Trusts with Crummey powers will not avoid disclosure of beneficiaries who hold powers of withdrawal. However, settlors willing to forgo annual exclusions for gifts to such trusts will continue to be able to protect the identity and other information regarding trust beneficiaries.
- Organization of the reporting company as one of the types of organizations exempted from reporting avoids disclosure of beneficial owners and company applicants, as well. Obviously, this opportunity is limited and may require a willingness to assume other reporting obligations and regulatory oversight. However, in certain cases, regulatory oversight may not exist or may not extend to disclosure of individuals exercising substantial control or satisfying the 25% beneficial ownership threshold of the CTA.

²² 31 C.F.R. §1010.380(d)(2)(iii)(C).

²³ 31 C.F.R. §1010.380(d)(2)(iii)(D).