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IMPORTANT ANNOUNCEMENT - YOUR ACTION IS REQUIRED!

Happy New Year but as Britney Spears might sing, "Oops They Did It Again" or maybe you can say “everyone is guilty until proven innocent.”

If you are a manager of an LLC, a general partner of a limited partnership or an officer of a corporation you are required to file so called “Beneficial Owner” reports with the Criminal Division of the Department of the Treasury also known as the Financial Crimes Enforcement Network (“FinCEN”) unless your company is a so-called large operating company having gross annual revenue of more than $5,000,000 and at least 20 full-time employees.

FAILURE TO COMPLY LEAVES YOU SUBJECT TO A CIVIL PENALTY OF $500.00 PER DAY AND/OR CRIMINAL PENALTIES INCLUDING A FINE OF UP TO $10,000.00 AND/OR TWO (2) YEARS IN JAIL. NO JOKE!

Compliance:

Existing entities, such as LLCs, limited partnerships, S corporations, and C corporations (unless eligible for an exception, such as the large operating company exception), are required to report by January 1, 2025. This is the good news. The bad news is that entities formed any time on or after January 1, 2024 but before January 1, 2025 must file within 90 days of formation and any new entity filed after January 1, 2025 must file within 30 days of formation. Additionally, if there is any change in the Beneficial Ownership a report is required to be filed within 30 days.

Corporate Transparency Act Background:

The new Corporate Transparency Act (“CTA”) was passed in 2021 as part of the "National Defense Authorization Act". Unprecedented in its scope, the CTA was designed to allow the Department of the Treasury to identify and police "shell companies” whose main purpose was to launder money and finance terrorist activities. The CTA will affect approximately 32,000,000 existing entities, including limited liability companies (LLCs), S corporations, C corporations, limited partnerships, limited liability partnerships, and any other entity that was formed by virtue of filing organizational documents with any state. The CTA does not include general partnerships or sole proprietorships, since they do not require a filing with a state but does include single member disregarded LLCs since these do require a filing with a state.

In an effort to root out "terrorism and money laundering schemes," the government has now swept up virtually every legitimate entity utilized for estate planning purposes, limiting liability purposes, and virtually every other enterprise, including simply holding real estate and other assets through a limited liability company unless subject to the large operating company exception.

Reporting Obligations:

a. The Reporting Company

The CTA requires that "Reporting Companies" file certain "Beneficial Owner" reports. Note that any entity formed by filing organizational documents with a Secretary of State is a Reporting Company. This includes all of the garden variety LLCs, limited partnerships, and corporations which are formed by filing organizational documents with a state. There is no exception for entities such as LLCs that merely hold real estate or equipment.

b. Beneficial Owner’s Obligation

A "Beneficial Owner" means, with respect to a Reporting Company, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise - (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25% of the ownership interest of the entity. An owner who owns less than 25% of the entity is not a "Beneficial Owner" of such entity and fortunately there are no attribution rules.

PLANNING NOTE:

Consider the case of an LLC that is owned by an individual. Prior to death, the LLC would be a “Reporting Company” required to file a “Beneficial Owner” report. If the individual has undertaken estate planning, it is likely that upon death, the LLC will be divided between a marital share (perhaps a QTIP) and a family share (perhaps a spray). In addition to requiring the LLC to report before the decedent's death, there will be a change in ownership following death and the company will have 30 days after the funding of the sub-shares to update the Beneficial Owner report with FinCEN.

PLANNING NOTE:

If there is a gift of an interest in an LLC, limited partnership, S corporation, or C corporation, this would be considered a "change" and require an updated report which must be filed within 30 calendar days after the date on which such change occurs.

If you are a 25% owner, either individually or as trustee, or if you have substantial control over the Reporting Company (such as the Manager of an LLC, the officer of a corporation, or the general partner of a limited partnership), then you are a “Beneficial Owner” and you must provide the following personal information to the Reporting Company which then files a “Beneficial Owner Report” with the criminal division:

(1) Full Legal Name;
(2) Date of birth;
(3) Residential street address;
(4) Business street address; and,
(5) A unique identifying number from one of the following documents:
a. A non-expired passport issued by the United States Government;
b. A non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual;
c. A non-expired driver's license issued to the individual by a State, or
d. A non-expired passport issued by a foreign government to the individual, if the individual does not posses any of the documents described in paragraph (a), (b) or (c), and,
(6) An image of the document from which the unique identifying number in subsection (c)(5) was obtained which include both the unique identifying number and photograph of the individual in sufficient quality to be legible and recognizable (collectively referred to as "CTA Information").

FinCEN Identifier (I GOT MINE AND YOU SHOULD GET YOURS):

Since most individuals will not want to provide this information to the Reporting Company you can obtain a so-called FinCEN Identifier by submitting this information directly to the criminal division. In lieu of providing personal information to the Reporting Company, in which case only your FinCEN Identifier needs to be added to the Reporting Company.

If you would like to do this on your own, please login to **https://www.fincen.gov/boi** and follow the instructions and you will need to provide the criminal division with a copy of your license.

PLANNING NOTE:
It is recommended that every individual who is, has, or may become a "Beneficial Owner" should request on their own a "FinCEN Identifier" which will facilitate the filing required by the "Reporting Company" since only the FinCEN Identifier will need to be reported.

Reporting Company Report

In addition to identifying the Beneficial Owners to FinCEN, the "Reporting Companies" are required to file reports that include any information regarding the company and any individual who is a "Beneficial Owner." The information that must be included in the "company report" includes:

(1) legal name and trade name such as DBAs (doing business as)

(2) street address where the company's principal place of business is located

(3) state of formation

(4) tax identification number

(5) an identifying document from an issuing jurisdiction such as a certification of incorporation or certificate of formation in the image of that document.

PLANNING NOTE:
Post Office Boxes, law firms, CPA firms, and other third-party addresses are not permitted unless that is, in fact, the actual "street address" of the entity.

PLANNING NOTE:
A single member LLC that may not have a tax identification number and will now need to obtain one.

Exceptions to the Reporting Requirements:

The CTA provides 23 specific types of entities that are exempt from the reporting requirements. Unfortunately, none of these exempt your typical family-owned business, LLC, S corporation, C corporation, or limited partnership unless it is a large operating company.

Large Operating Company Exception

The only exception that could apply to a number of operating family businesses would be the large operating company exception. The large operating company exception would be applicable if the entity employs more than 20 full-time employees with respect to a calendar month where the employee who is employed provides at least 30 hours of service per week with the employer; the operating entity has an operating presence at a physical office within the United States and the entity filed a federal income tax or information return in the United States for the previous year demonstrating more than $5,000,000 in gross receipts or sales.

PLANNING NOTE:
The owners of many operating companies, such as construction companies, likely will have separate LLC's owning real estate and/or equipment leased to the operating entity. While the operating entity itself might be exempt from filing, the separate real estate and leasing entities would not be exempt because they likely do not employ anyone.

Bank and Lender's Obligations

While neither a bank nor a lender appears to be subject to the CTA Rules banks and lenders are affected by the CTA. Banks and lenders should probably add to their loan commitments and loan documents, a certification that the entity is in full compliance with their reporting obligations as a Reporting Company and make it an event of default to fail to file any required reports under the CTA.

Who is Responsible for Reporting to FinCEN?

While it seems clear that the Manger of an LLC or Officer of a Corporation will be responsible for filing the company reports there are questions as to the responsibility of the CPAs who provide tax and accounting services and attorneys who prepare and file operating documents with the state.

Attorneys should pay close attention as failure to notify your clients of their obligations as a Reporting Company upon the formation of an entity or a change in the Beneficial Ownership of a company may be considered negligent.

On November 8, 2023, the government issued 312 pages of regulations which are still being digested.

Stay Tuned!

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