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The Corporate Transparency Act and Secretary of State Filing Offices

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Today's Panel



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The Corporate Transparency Act

- The Corporate Transparency Act, adopted as Title LXIV (64) of the 2021 National Defense Authorization Act, mandates the creation of a national database for the “beneficial ownership” of many businesses, and requires an affirmative election by certain companies exempt from the ownership reporting requirements.





Timeline

- 2006 June – Delaware passes increased regulation of Registered Agents and requires that the business entity provides a contact person to the RA
- 2008 May – Senators Levin and Obama introduce S 2956 “Incorporation Transparency and Law Enforcement Assistance Act.” It would have:
 - Placed business formation agents (attorneys) of beneficial owners of business entities and make info available to law enforcement under BSA
 - Required Secretary of State Offices to maintain beneficial ownership (BO) list
- 2010 August – HR 6098 “Incorporation Transparency and Law Enforcement Assistance Act” introduced. Sponsored by Representatives Maloney and Frank
- 2018 July – Delaware HB 404
 - Requires Registered Agents to conduct customer CDD before filing documents for a new customer
 - Identification and SDN check
 - Must periodically review clients against SDN list



Timeline (continued)

- 2016 et seq. Geographic Targeting Orders
- 2019 DC Ordinance requires the disclosure of BO with 10% interest or more (DC Code § 29-102.01)
- Arizona LLC Act – if member-managed, identify each member. Ariz §29-3902(B)(11-(2))
- 2019 H.R. 2513: (S 2513) Corporate Transparency Act of 2019, Maloney (Passed the House of Representatives)
- Nov 2020: The Corporate Transparency Act added to HR 6395, the National Defense Authorization Act (NDAA)
- December 2020: NDAA Passes House and Senate with veto proof margins. Vetoes December 23rd, 2020.
- Veto overridden January 1st, 2021



Beneficial Ownership Reporting - Highlights

- Requires subject businesses to register the “personally identifiable information” of their “beneficial owners” with the Financial Crimes Enforcement Network (FinCEN) and update that information regularly for the life of the business.
 - “Beneficial Owners” are individuals who, directly or indirectly, (i) exercise substantial control over an entity or (ii) own 25% or more of an entity.
- Willful noncompliance could result in jail time of up to 2 years and up to \$10,000 in fines (\$500 per day).
- Businesses with over 20 employees and more than \$5 million in gross receipts or sales and who have a US physical presence are exempt from this regulation, as well as publicly traded companies and certain businesses engaged in financial services.

Who is Affected by this Newly Passed Legislation and the Compliance Requirements?



- Corporations and Limited Liability Companies
- “Other similar entities” created by filing with a Secretary of State
- § 5336(a)(11) – definition of “Reporting Company”
 - Includes non-US organized entities qualified to transact business
- Limited Partnerships
- Expect further detail in regulations





When Must Entities File their BO Information?

- For newly formed businesses (created after the adoption of the regulations), at incorporation or formation.
- None will have a prior year tax return reporting +\$5 million of revenue.
- For existing businesses, they must file within 2 years of the regulation's effective date.
- Update filed information within one year of any changes to the information provided.
 - Unknown up the line changes?
- The Treasury Secretary has the authority to increase the frequency of reporting requirements pending the outcome of a cost-benefit analysis.

Is the Incorporator or Organizer a “Beneficial Owner”?



- “Applicant” – the Act defines “applicant” to include any individual who files an application to form a US entity with an US State or Indian Tribe, or an individual who applies or files to register a non-US entity to do business in the United States § 5336(a)(2)
- “Identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company” § 5336(b)(2)(A)

Who is Exempt from Reporting Beneficial Ownership?



- Excluded Industries
- Not a Corporation, LLC, or a “Similar Entity”
 - Will an affirmative exemption be required?
 - Regulations?
- More than 20 employees and more than \$5 million of operating revenue and a physical presence in the US



Who is Exempt? § 5336(a)(11)(B) (“does not include”)



- Companies that issue securities registered under section 12 of the Securities Exchange Act of 1934, or that are required to file supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934);
- Entities established under the law of the United States, an Indian Tribe, a State, or a political subdivision of a State, or under an interstate compact between two or more States that are designated to exercise governmental authority on behalf of such governments;
- Banks, federal or state credit unions, bank holding companies;
- Money transmitting businesses registered with the Secretary of the Treasury;
- Brokers or dealers as defined in section 3 of the Securities Exchange Act of 1934;
- An exchange or clearing agency, as defined in section 3 of the Securities Exchange Act of 1934, that is registered under section 6 or 17A of the Securities Act of 1934;
- Any other entity not otherwise described that is registered with the SEC under the 1934 Securities and Exchange Act;
- An entity that is an investment company or investment adviser properly registered with the SEC;
- An investment adviser described in section 203(l) of the Investment Advisors Act of 1940 that has filed designated schedules with the SEC;
- An insurance company as defined in section 2 of the Investment Company Act of 1940;
- An entity that is an insurance producer authorized by a State and subject to supervision by the state insurance commissioner or similar official and has an operating presence and physical office in the United States;
- A registered entity or various other specified entities under the Commodity Exchange Act;
- A public accounting firm registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002;
- A public utility;
- A financial market utility;
- Any pooled investment vehicle operated or advised by a bank, credit union, broker/dealer, entities acting as an investment company or investment adviser, or an investment adviser;
- Any of the following:
 - An organization described in section 501(c) of the Internal Revenue Code (the “Code”) without regard to section 508(a) of the Code;
 - A political organization under section 527(e)(1) of the Code that is exempt from tax under section 527(a) of the Code;
 - A trust described in section 4947(a)(1) or (2) of the Code;
- An entity that operates exclusively to provide financial assistance to, or holds governance rights over, any entity described immediately above.

(or any wholly-owned or controlled subsidiary of the above)



What are the Duties of the State Filing Offices?

- States will be required to inform “applicants” for incorporation/organization of their obligations under this act and provide copies of the forms or links.
 - Notify filers of BO Reporting Duties at the time of formation, annual fees, and license renewals as well as on websites. § 5336(e)(2)
- States must also cooperate with and provide the information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information. § 5336(d)(2)
 - § 5336(a)(2) definition of “Applicant”
- States have until January 1st, 2023 to become compliant with information requirement of the Act. § 5336(e)(2)(a)
 - Note that businesses formed after the adoption of rules will have to file the BO reports.



Issues the Regulations Should Resolve

- What entities must file BO reports?
- How does an entity file for exemption?
- Clarification of who is a Beneficial Owner
- “Applicant” identification
- If Annual Reports are necessary?





The Regulatory Process

- Treasury has until January 1st, 2022 to issue initial regulations
 - Treasury is directed to consult with small business and other related parties § 5336(g)
 - Establish partnerships with State, local, and tribal § 5336(b)(F)(i)
 - Likely publish BO rules schedule in Agenda of Regulatory actions in Spring & Fall
 - Proposed rules must provide 30-60 days notice for comments
 - Adoption must include response to comments
- Secretary Yellen discussed BO Reporting in her testimony, so reasonable to expect it will not be a back-burner issue
- FinCEN should have its database and reporting program up and going by the time of adoption of rules



What are the Penalties Related to the Act?

- For failure to file Beneficial Owner Report or file incorrect information § 5336(h)(1)
 - Civil fine of up to \$10,000 § 5336(h)(3)(A)
 - Two years in prison
 - Safe Harbor § 5336(h)(C)
- For unauthorized disclosure of the information § 5336(h)(2)
 - Fine up to \$250,000
 - Five years in prison
 - Enhanced sentences possible





Questions?



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Thank You for
Attending

