Updates
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AMLA 2020 Series Part 1: New and Expansive Beneficial Ownership Reporting Requirements

As we reported in April, the Anti-Money Laundering Act of 2020 (AMLA 2020) aims to strengthen protections against money laundering, terrorism financing, and other illegal activities through a variety of mechanisms, including new corporate reporting requirements, enhanced penalties, and new offenses for conduct that may facilitate money laundering. This first substantive installment of our multipart series addresses arguably the most significant implication of AMLA 2020—a new and expansive requirement to disclose corporate beneficial ownership, set out by the Corporate Transparency Act (CTA).

Perkins Coie is representing clients in this space as they engage with the Financial Crimes Enforcement Network (FinCEN) with regard to the scope, implementation, and possible exceptions to the CTA.

What Must Be Reported?

The CTA establishes requirements for certain types of corporate entities that are registered in the United States to disclose information regarding their beneficial owners to U.S. authorities. Specifically, the CTA requires companies subject to its reporting requirements ("reporting companies") to disclose detailed information about their "beneficial owners," defined as individuals who (1) exercise "substantial control" over the company, or (2) own or control 25% or more of the company's ownership interests.

Companies will be required to report several pieces of personal information, including all beneficial owners' full names, birthdates, addresses, and unique identifying numbers. This requirement is not yet effective but will be implemented through rules currently under consideration by FinCEN, which has until January 1, 2022, to issue regulations setting out the reporting requirements in more detail.

Who Must Report?

The new rules will apply to corporations, limited liability companies, and similar entities registered in the United States, subject to relatively broad exceptions. The CTA exempts 24 categories of entities from its reporting requirements, including, without limitation: banks, credit unions, public utility companies, certain tax-exempt entities, certain dormant entities, and entities employing more than 20 people and reporting more than $5 million in gross receipts or sales in the aggregate. While the exemptions absolve significant swaths of corporate America from reporting (including public companies and mid-sized to large employers), the requirements are still expected to capture a wide range of entities, including entities structured as limited partnerships, business trusts created by a filing with the secretary of state, entities that rely on the family office exclusion under the Investment Advisers Act of 1940, and possibly some general partnerships.

Importantly, the CTA authorizes FinCEN to exempt additional entities by regulation. On April 1, 2021, FinCEN began the rulemaking process by issuing an advanced notice of proposed rulemaking (ANPRM) seeking public comments on the regulatory process. The ANPRM identified several questions that FinCEN intends to address through the regulatory process, including soliciting comments regarding what other entities should be exempt

from the reporting requirements and whether exempt companies should be required to file with FinCEN to claim their exemptions. The latter suggestion has stirred some controversy, with commenters arguing that requiring an affirmative application for an exemption would impose an undue burden on companies that would otherwise be unaffected by the new rules and thereby undermine the primary objective of the exemptions, which was to reduce administrative burden. Transparency advocates would argue that the inability to track companies claiming an exemption leaves critical information gaps and creates hurdles to enforcement of the new reporting regime.

How Will This Information Be Used?

The CTA also sets out the framework for the database in which reported ownership information will be maintained and sets parameters regarding use and disclosure of that information. Notably, FinCEN must maintain the reported beneficial ownership information in a secure, non-public database until at least five years after the termination of each reporting company. The database will be accessible by the U.S. Department of the Treasury and shared with other law enforcement agencies. Moreover, FinCEN may disclose beneficial ownership information stored in the database to federal, state, local, and foreign law enforcement agencies, as well as federal regulators, upon request from those entities. FinCEN may also disclose information to financial institutions that are subject to the Customer Due Diligence Rule under the Bank Secrecy Act (the BSA), with the consent of the reporting company.

However, some stakeholders have questioned the usefulness of this information—though the CTA requires FinCEN to collect beneficial ownership information in a secure database, it contains no mechanism for verifying its accuracy.

What's the Big Deal?

This is a sea change in terms of transparency as to corporate ownership, intended to curb the abuse of the corporate form to hide nefarious dealings and money laundering by criminal owners. However, it will also result in significant administrative burdens on reporting companies, with filing requirements possibly extending to every entity formed in the United States if exempt companies are ultimately required to document their exemptions. More importantly, the penalties for noncompliance are steep: reporting companies that fail to comply with the CTA requirements may face civil penalties of up to $500 for each day that a violation continues or has not been remedied or criminal penalties consisting of a fine of up to $10,000 and/or imprisonment for up to two years.

Beyond the administrative burdens and potential penalties, some entities are concerned with the security of their data in FinCEN's database, which is another topic raised for comment by FinCEN in the April ANPRM. There are also many complicated questions that remain unanswered but could have enormous implications for the potential scope of reporting under this rule. For instance, there are questions regarding how the exemption rules will apply to affiliates and subsidiaries and how FinCEN may define or interpret vague terminology such as "substantial control." Moreover, many stakeholders are concerned that the CTA reporting requirements may be duplicative for entities that routinely do business with federally regulated financial intermediaries, that are already subject to reporting requirements under the BSA and its implementing regulations and Know Your Customer (KYC) rules.

Key Takeaways

While it is clear that the new disclosure requirements under the CTA will have a broad impact, the true breadth of the requirements will not be discernible until some key questions are answered through FinCEN's rulemaking process. Comments to the ANPRM closed on May 5, 2021, and the CTA gives FinCEN until January 1, 2022, to issue rules implementing this new requirement. The effective date for those rules also remains to be determined. In the meantime, companies as well as advisors involved in the corporate formation process should start working with counsel to consider appropriate procedures to vet their disclosure obligations under these new rules and ensure that they are in a position to gather and disclose the necessary information regarding beneficial ownership and/or application of relevant exemptions once the requirements take effect.

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