Proskauer

Countdown to Transparency: Beneficial Ownership Reporting

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In 2021, the U.S. enacted the Corporate Transparency Act (the "CTA") as part of a multi-national effort to rein in the use of entities to mask illegal activity. The CTA directs the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") to propose rules requiring certain types of entities to file a report identifying the entities' beneficial owners and the persons who formed the entity. FinCEN issued the final rule on Beneficial Ownership Information Reporting Requirements (the "Reporting Rule") on September 29, 2022. FinCEN recently published a Small Entity Compliance Guide intended to assist entities in determining whether they are required to file a report and what information will need to be reported. The Reporting Rule will become effective on January 1, 2024.

The Reporting Rule requires certain entities (both U.S. and non-U.S.), primarily smaller, otherwise unregulated entities ("Reporting Companies"), to submit a "beneficial ownership information" ("BOI") report to FinCEN. Any corporation, limited liability company ("LLC"), or any other entity created by filing with a Secretary of State or any similar office under the law of a U.S. State or Indian tribe (such as a statutory trust) is required to comply with the Reporting Rule. Any corporation, LLC, or other entity that is formed under the laws of a foreign country and is registered to do business in any U.S. State or tribal jurisdiction is also subject to the Reporting Rule. Notably, the Reporting Rule does not require a BOI for sole proprietorships, general partnerships or trusts created by agreement (and not by filing).

Each Reporting Company is required to report the entity name (and any alternative trade or d/b/a names), business street address, jurisdiction of formation and, for foreign entities, the State or Tribal jurisdiction of registration, and a unique identification number (such as TIN, EIN, LEI, etc.). The Reporting Rule also requires Reporting Companies to identify their beneficial owners - defined as anyone who owns at least 25% of the Reporting Company or who has substantial control over the Reporting Company. Additionally, Reporting Companies that are created or registered to do business in the U.S. on or *after* January 1, 2024 are also required to report the "company applicants" who directly file, and who are primarily responsible for filing, or directing or controlling the filing of, the entity's formation documents (the "Company Applicants"). It is important to note that the reporting obligation lies with the Reporting Company and not the beneficial owner or Company Applicant.

The identifying information required to be reported for beneficial owners and Company Applicants includes:

- Full legal name
- Date of birth
- Current residential or business street address
- A unique identifying number from an acceptable identification document (such as a State-issued ID or passport) along with an image of the document

The Reporting Rule lists 23 types of entities that are exempt from the definition of Reporting Company and consequently are not required to file reports under the Reporting Rule. These include governmental authorities, banks, credit unions, money services businesses, registered broker dealers, exchanges and clearing agencies, insurance companies, large operating companies, accounting firms, public companies, registered investment companies, and certain tax-exempt entities, among others. Of note, although the Reporting Rule exempts directly or indirectly wholly owned subsidiaries of a number of entity types, including registered investment companies, there is no such blanket exemption for subsidiaries of private funds. Some feeder fund vehicles, AIVs, other subsidiaries of private funds, and holding company entities that are not otherwise eligible for an exemption, are likely to be subject to the Reporting Rule. Certain kinds of pooled investment vehicles, such as real estate vehicles relying on the Section 3(c)(5)(c) exemption under the Investment Company Act of 1940, certain commodity pools (even if advised by a registered commodity trading advisor and operated by a registered commodity pool operator), and certain foreign pooled investment vehicles are not exempt from the Reporting Rule.

The CTA authorizes FinCEN to disclose BOI to U.S. government agencies, certain foreign agencies and authorized persons, and financial institutions using the information for certain KYC purposes. The information reported to FinCEN under the Reporting Rule will not be accessible to the public and is not subject to Freedom of Information Act requests.

FinCEN is developing a new electronic filing system for Reporting Companies to submit BOI reports. The system will be available when the Reporting Rule goes into effect on January 1, 2024.

Reporting Companies created *before* January 1, 2024 will have one year (until January 1, 2025) to file the required information. These companies are required to submit information about their beneficial owners but are not required to report information about their Company Applicants.

Reporting Companies created *on or after* January 1, 2024 will be required to file the required information within 30 days after receiving notice of an effective formation or registration. Companies formed or registered after the effective date of the Reporting Rule are required to include information on both Company Applicants and beneficial owners.

Proskauer offers a full suite of services for the investment management industry, with a market-leading global team dedicated solely to advising asset managers, investment funds and their advisers, financial institutions and institutional investors across the asset class. Our cross-border team based in the U.S., UK, Asia and Latin America features specialists in tax, ERISA, financial services, employment, insurance, fund finance, litigation and risk management who understand the unique technical and commercial issues relevant to investment managers. We also have deep experience advising on significant and diverse regulatory, enforcement and compliance matters with professionals that include former members of regulatory agencies such as the SEC and DOJ, and others who have spent decades guiding clients in the private sector, all actively collaborating with each other and across our Firm as well as working with various advocacy groups and trade organizations.

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