

A Brave New World: U.S. Implements Company UBO Reporting Regime

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Effective as of January 1, 2021, Congress enacted—over President Trump's veto—the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (the "NDAA"). As with any U.S. defense bill, the NDAA largely addresses various U.S. Department of Defense funding and intelligence matters for the new year. But the NDAA does far more. Consistent with a global trend toward transparency over the last decade, the NDAA includes unprecedented provisions under its Corporate Transparency Act (the "Act")—a mere 22 pages amid its voluminous, nearly 1,500 pages. The Act essentially implements a new ultimate beneficial owner, or UBO, reporting regime for many U.S. companies and non-U.S. companies registered to do business in the United States. At the same time, it imposes various requirements upon the U.S. Department of Treasury ("*Treasury*") itself, including by way of mandating meaningful revision to the current federal regulatory regime applicable to financial institutions in their anti-money laundering (AML) and know-your-customer (KYC) customer due diligence efforts.

As a consequence, the Act will have broad and cascading implications to financial institutions, service providers, fiduciaries, private clients and family offices, inbound investors, and state agencies alike. With respect to private clients, both U.S. *and* non-U.S. citizen and resident individuals will fall within the Act's reach.

What Obligations Are Imposed?

In accordance with forthcoming regulations prescribed by the U.S. Department of Treasury, each *Reporting Company* is required to submit to FinCEN a report that contains the following information ("*Reportable Information*") of each *Beneficial Owner* and each *Applicant* with respect to such Reporting Company:

1. full legal name,
2. date of birth,
3. current residential or business address, and
4. unique identifying number from a non-expired U.S. passport or U.S. state identification (e.g., driver's license), or from a non-expired foreign passport, or a FinCEN identifier (i.e., the unique number issued by FinCEN to a person under the Act).

Key Terms Defined.

Reporting Company: A corporation, limited liability company, partnership or similar entity (an "*Entity*") that either:

1. is created by the filing of a document with a secretary of state or a similar office under the laws of any U.S. state, the District of Columbia, the Commonwealth of Puerto Rico, or any other commonwealth, territory or possession of the United States (collectively, the "*United States*" or "*U.S.*"), or
2. registers or files an application to register an Entity under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under U.S. law.

The definition of Reporting Company may, depending upon the specific facts, not include various Entities, including, but not limited to, financial institutions and regulated investment entities, utility companies, companies filing U.S. Federal income tax returns demonstrating at least \$5 million in historical gross receipts or sales and having at least 20 full-time employees, qualified charitable organizations and their affiliated entities, and certain inactive, non-foreign owned entities that have no assets.

Applicant: Any individual who (i) files an application to form an Entity under U.S. law, or (ii) registers or files an application to register an Entity under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under U.S. law. Based upon the foregoing definition, an employee of an Entity tasked with forming a new subsidiary or group company, or an attorney filing a Certificate of Formation on behalf of a client, would constitute an Applicant and be subject to disclosing his or her Reportable Information.

Beneficial Owner: With respect to a Reporting Company, an individual who, directly or indirectly, through any contact, arrangement, understanding, relationship or otherwise, (i) exercises substantial control over the Entity, or (ii) owns or controls not less than 25 percent of the ownership interests of the Entity. A Beneficial Owner expressly excludes certain individuals, including, but not limited to, a minor child; an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual with respect to a Reporting Company; or an individual acting solely as an employee of an Entity and whose control over or economic benefits from the Entity is derived solely from the employment status of such person.

When Does Reporting Commence?

The reporting requirements described above take effect on the effective date of the forthcoming regulations prescribed by Treasury, which are required to be promulgated during calendar year 2021.

Any Reporting Company that has been formed or registered *prior* to the effective date shall have two years after the effective date in which to submit its report to FinCEN. On the other hand, any Reporting Company that is formed or registered *after* the effective date shall submit its report to FinCEN at the time of its formation or registration.

Upon material changes in ownership or control of a Reporting Company, or any change in Reportable Information, following the effective date of the regulations, the Reporting Company must submit to FinCEN an updated report providing then-current Reportable Information.

Who May Access Reported Data?

FinCEN will have access to and maintain Reportable Information. Pursuant to the Act, FinCEN may disclose Reportable Information only upon receipt of an appropriate request from a U.S. Federal law enforcement, national security, or intelligence agency; a U.S. (non-Federal) law enforcement agency if a court or authorized officer of such court has authorized such agency to seek the information in a criminal or civil investigation; a financial institution subject to customer due diligence requirements to facilitate its compliance obligations; or to certain Federal regulatory agencies. Certain protocols and safeguards are called for by the Act with respect to FinCEN's disclosure of Reportable Information. The forthcoming regulations are anticipated to likewise address the same.

Penalties for Non-Compliance.

Unless otherwise exempted under the safe harbor provided in the Act, violations of the Act's reporting requirements, and unauthorized disclosure or use of Reportable Information, may give rise to civil and criminal liability. Civil penalties for reporting violations may consist of a monetary fine of up to \$500 per day that the violation continues unresolved, while criminal exposure may include a fine of up to \$10,000, imprisonment for up to two years, or both.

For unauthorized use or disclosure violations, the civil penalty is the same, while criminal liability may consist of a fine of up to \$250,000, imprisonment of up to five years, or both. If one is guilty of a disclosure or use violation while also violating other U.S. Federal law or engages in a pattern of any illegal activity involving more than \$100,000 in a 12-month period, the criminal monetary fine and imprisonment ceilings are doubled (*i.e.*, \$500,000 and 10 years, respectively).

Concluding Remarks.

The Act on its face leaves several issues unresolved. For example, trusts are commonplace in inbound investment structures utilized by foreign persons to own U.S. assets, including the ownership interests in U.S. Entities. The Act does provide that certain charitable trusts are outside the scope of the Reporting Company definition, but otherwise is silent as to reporting by trusts and their fiduciaries. The forthcoming regulations—which are due to be promulgated in 2021—are likely to clarify reporting requirements and considerations applicable to alternative, hybrid and non-entities, including trusts.

Indeed, the Act mandates that Treasury revise its final rule entitled "Customer Due Diligence Requirements for Financial Institutions" so that it better conforms to and facilitates the reporting called for by the Act. In carrying out the foregoing rule revision, a significant portion of the federal beneficial ownership requirements for legal entity customers are to be rescinded and replaced, including the current provisions applicable to trust owners of a legal entity customer. The exact extent of these changes should be clearer in 2021 and into 2022.

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