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Navigate the Current Uncertainty on FinCEN Matters

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By now, you have likely heard about the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") Beneficial Ownership Information Reporting Rule (the "Rule") from your accountant, attorney, or business colleagues. Promulgated under the Corporate Transparency Act ("CTA"), the Rule requires most business entities to disclose information to FinCEN about their 'beneficial owners': individuals who directly or indirectly own or control such entities.

Enacted as part of the Anti-Money Laundering Act in 2021, the CTA is intended to "prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity." The Rule aims to enhance transparency and support the mission of the CTA by requiring domestic and U.S. registered foreign entities to report information about their beneficial owners to FinCEN. Most entities in the U.S. will likely be required to comply with the Rule, and FinCEN estimates approximately 32 million business will be required to make a filing. The Rule exempts 23 types of entities from reporting requirements, primarily large or regulated entities already subject to various reporting requirements, such as banks, SEC-reporting companies, insurance companies, and 'large operating companies', as well as wholly owned subsidiaries of the foregoing. Entities formed before January 1, 2024, have until 2025 to comply, while entities formed in 2024 have a 90-day compliance period.

Under the Rule, reporting companies must provide detailed personal identifying information for each individual beneficial owner, including name, date of birth, residential street address, and unique identifying number (such as a passport or driver's license number). A 'beneficial owner' is a natural person who directly or indirectly owns or controls at least 25% of the ownership interests of a reporting company or who exercises 'substantial control' over the reporting company. Both 'substantial control' and 'ownership interests' are defined broadly to prevent loopholes allowing corporate structures to obscure owners or decision-makers. Companies formed after January 1, 2025, must also provide this information for 'company applicants', the individuals who make or direct the filing of a reporting company's formation or foreign registration documents. The Rule also requires supplemental filings to be made within 30 days of any change to any of the reported information, for example, a change in residential address. Businesses will need to monitor changes in ownership and management throughout the year for compliance purposes.

FinCEN is authorized to disclose the reported information upon request under specific circumstances to federal agencies engaged in national security, intelligence or law enforcement activities and to state local and tribal law enforcement agencies, as well as certain other limited entities. Failure to comply with the requirements may result in potential civil and criminal consequences, including civil penalties of up to \$500 per day a violation has not been remedied and criminal penalties of \$10,000 and/or up to two years in prison for willful

noncompliance.

The future of enforcement is uncertain as the Rule is currently being challenged in the courts on constitutional grounds. Reporting requirements have been paused for certain entities following an injunction issued by the Northern District of Alabama on March 1, 2024, which ruled the CTA unconstitutional because it exceeds Congress's enumerated powers. With this and other cases challenging the validity of the Rule making their way through the courts, what should companies do in the meantime? Given the uncertainty about the constitutionality of the Rule and future enforcement, we recommend the following:

- New entities formed or registered on or after January 1, 2024, and before January 1, 2025, should comply with the applicable reporting requirements and make their filings within 90 calendar days after formation or registration.
- Existing entities formed or registered prior to January 1, 2024, should begin their reporting analysis now to ensure compliance in advance of the New Year's deadline.

Every entity organized under U.S. law or registered to do business in the U.S. will need to determine (i) whether it is exempt from reporting requirements and (ii) if not, what information it must report. Companies with simple management and ownership structures may be able to navigate the filing on their own. However, where complex management or ownership structures or uncertainty about determinations of beneficial ownership or substantial control exist, an attorney can help you avoid missteps.