Steve Leimberg's Business Entities Email Newsletter - Archive Message #288

Date:	**21-Dec-23**
From:	**Steve Leimberg's Business Entities Newsletter**
Subject:	**Chriseanna Mitchell, Martin M. Shenkman, Alan S. Gassman & Anthony Del Rosario: Five Recent Corporate Transparency Act Changes - A Christmas Gift (Mostly) from FinCEN and the House of Representatives**

"There have been five major events relating to the Corporate Transparency Act: 1) Reporting companies formed during the calendar year of 2024 will now have 90 days to file their initial BOI reports rather than 30 due to a final regulation issued by FinCEN; 2) The House has passed a Bill that will give pre-2024 entities until December 31, 2025, to register, thus deferring the effective date of general filings for existing entities by a full year ***if*** *passed by the Senate and President; 3) The same House Bill will allow new companies formed after January 1, 2024, 90 days to file rather than 30. (Note that this would apply to all companies formed after January 1, 2025, as well.); 4) The House Bill would give reporting companies 90 days to report updates or changes rather than 30 days; and 5) The House Bill has a unique provision not understandable by Grammarly or a high percentage of the population that would amend the Beneficial Ownership Reporting (BOI) Requirements to clarify that reporting companies are not allowed to submit a report describing how the company is unable to obtain identifying information, i.e., driver's licenses and passports, instead of filing reports in accordance with the statute."*

It is important to note that the House Bill would still need to be passed by the Senate and presented to President Biden to have legal effect. Still, it is clear the legislative intent behind the Bill is to extend deadlines for reporting companies."

Chriseanna Mitchell, **Martin Shenkman**, **Alan Gassman** and **Anthony Del Rosario** provide members with timely commentary on five recent Corporate Transparency Act changes.

Chriseanna Mitchell is a 2nd-year student at Stetson College of Law. She graduated from the University of Florida and is from Ocala, Florida. Chriseanna has gained practical experience through her work at the law firm Gassman, Crotty & Denicolo, where she conducts legal research and analysis as a clerk. Currently, she serves as a fellow for the Suncoast Estate Planning Council, where she collaborates with industry professionals to further promote estate planning in the community and gain valuable insights into the intricacies of the field.

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in New York City who concentrates on estate planning. He is the author of 42 books and more than 1,200 articles. He is a member of the NAEPC Board of Directors (Emeritus), served on the Board of the American Brain Foundation, the American Cancer Society's National Professional Advisor Network, Weill Cornell Medicine Professional Advisory Council, and is active in other charitable organizations.

Alan S. Gassman, J.D., LL.M., is a partner in the law firm of **Gassman, Crotty & Denicolo, P.A.** and practices in Clearwater, Florida. He is a frequent contributor to LISI and has published numerous articles in publications such as BNA Tax & Accounting, Estate Planning, Trusts and Estates, and Interactive Legal. Mr. Gassman is also co-author of Gassman and Markham on Florida and Federal Creditor Protection and several other books on tax and estate planning. His email is alan@gassmanpa.com.

Anthony Del Rosario is a 3rd-year law student at Stetson University College of Law. Anthony graduated from USF with a Bachelor of Arts in Philosophy and works as the head law clerk at Gassman, Crotty & Denicolo, P.A., in Clearwater, Florida. In spring 2023, Anthony had the privilege of interning in the Middle District of Florida's Bankruptcy Court for Judge Robert A. Colton. Anthony has a passion for bankruptcy, tax law, and estate planning.

Here is their commentary:

EXECUTIVE SUMMARY:

There have been five major events relating to the Corporate Transparency Act:

1) Reporting companies formed during the calendar year of 2024 will now have 90 days to file their initial BOI reports rather than 30 due to a final regulation issued by FinCEN;

2) The House has passed a Bill that will give pre-2024 entities until December 31, 2025, to register, thus deferring the effective date of general filings for existing entities by a full year **if** passed by the Senate and President;

3) The same House Bill will allow new companies formed after January 1, 2024, 90 days to file rather than 30. (Note that this would apply to *all* companies formed after January 1, 2025, as well.);

4) The House Bill would give reporting companies 90 days to report updates or changes rather than 30 days; and

5) The House Bill has a unique provision not understandable by Grammarly or a high percentage of the population that would amend the Beneficial Ownership Reporting (BOI) Requirements to clarify that reporting companies are not allowed to submit a report describing how the company is unable to obtain identifying information, i.e., driver's licenses and passports, instead of filing reports in accordance with the statute:

> (H) UNABLE TO OBTAIN –FinCEN may not by rule, guidance, or otherwise, permit a reporting company from submitting a report relating to the inability of the reporting company to obtain or identify information in the alternative to submitting a report required under this subsection.[i]

It is important to note that the House Bill would still need to be passed by the Senate and presented to President Biden to have legal effect. Still, it is clear the legislative intent behind the Bill is to extend deadlines for reporting companies.

FACTS:

The Initial BOI Report Filing Deadline Extended from 30 Days to 90 Days

On November 29, the Financial Crimes Enforcement Network (FinCEN) issued a final regulation under the Corporate Transparency Act extending the deadline for reporting companies to file their initial BOI Reports. Reporting companies created or registered during the 2024 calendar year will now have 90 days from the date of their creation to file rather than 30. FinCEN still will not accept the reports until January 1, 2024, and has clarified that no reports should be submitted before that date.[ii]

A reporting company is any corporation, limited liability company, or other similar entity created by filing a document with the Secretary of State or similar office in any state or territory or with a federally recognized "Indian Tribe" or formed under the laws of a foreign country and registered to do business in the United States.

Beneficial owners are defined as any individual who, directly or indirectly, (1) exercises substantial control over the entity or (2) owns or controls not less than 25 percent equity in the entity. In the BOI report, FinCEN requires the owner's name, date of birth, residential or business address, and a unique identifying number from an acceptable identification document (such as a state driver's license or passport).[iii] The purpose of collecting this sensitive data is to enable authorized recipients, such as law enforcement and regulators, the ability to combat criminal activity such as money laundering and the financing of terrorism.

According to the FinCEN director Andrea Gacki:

> This deadline extension will have significant benefits and will provide valuable extra time for company applicants and for reporting companies created or registered in 2024 to understand this new regulatory obligation and obtain the required information to file their BOI reports[iv]

FinCEN extended the deadlines to provide reporting companies with more time to gather the necessary information to complete the reports. The extension would allow reporting companies to acclimate to the new process of completing BOI reports. FinCEN provided educational reference materials on its website with the aim of streamlining the compliance process and answering potential questions. The new timeframe will also encourage the creation and growth of the BOI database Congress requires under the Corporate Transparency Act.

This change only applies to reporting companies created or registered during the 2024 calendar year. The extension **does not** apply to reporting companies created or registered on or after January 1, 2025. Companies created or registered on or after January 1, 2025, would still need to adhere to the original 30-day reporting deadline. Furthermore, reporting companies created or registered on or after January 1, 2024, will still have until January 1, 2025, to file their initial BOI reports.

House Passes Bill to Extend Deadlines for Initial BOI Reports

The House of Representatives passed a Bill extending the Corporate Transparency Act's (CTA) deadlines by a vote of 420-1. The Senate has yet to act, so it is unclear if it will allow any changes. *Therefore, the rules are currently still the same as before.* However, if the House Bill becomes law as it is, the following are changes that will be made:[v]

(1) If passed, this House Bill would extend the initial BOI filing deadline for entities created before 2024 to January 1, 2026, rather than January 1, 2025.

(2) Consistent with FinCEN's new regulation, entities formed on or after January 1, 2024, would have 90 days rather than 30 to file their BOI Reports. However, unlike FinCEN, the extension would apply to *all* companies formed after January 1, 2024.

(3) The House Bill also extends the deadline for any updates to the report from 30 days to 90 days. This extension would not apply to corrections to the report, only changes from updates.

(4) Additionally, the bill would add the following new provision at the end of 31 USC §5336(b)(1) from the House Bill, which reads as follows:

> (H) UNABLE TO OBTAIN.—FinCEN may not by rule, guidance, or otherwise, <u>permit</u> a reporting company <u>from submitting</u> a report relating to the inability of the reporting company to obtain or identify information in the alternative to submitting a report required under this subsection. [IRC §5336(b)(1)(H) proposed to be added by HR 5119] [Emphasis Added][vi][vii]

The above-indented provision wins the Thursday Report's "Worst Grammar in a Proposed Statute of 2023" award. A grammar check suggests the following:

> FinCEN may not, by rule, guidance, or otherwise, permit a reporting company to submit a report relating to the inability of the reporting company to obtain or identify information as an alternative to submitting a report required under this subsection.[viii]

The provision's language is ambiguous, so it is unclear what the House intends to do with it on its face. However, the Congressional Record Vol. 169, No. 203 adds necessary context. Congressman Zachary Nunn of Iowa stated, "By removing the option to basically claim absentia when it comes to ownership, we can crack down on the Chinese Communist Party's economic incursion into the United States."[ix] FinCEN will therefore not have the power to excuse entities if they cannot obtain the necessary information to comply with the reporting requirements if this bill passes.

COMMENT:

FinCEN's Regulation

The extension is a response to the 50 comments FinCEN received from various corporate organization professionals, small business owners, trade groups, and individual members of the public.[x] The extension for initial BOI Reporting is something to celebrate and a win for business owners nationwide. Small business owners are already overwhelmed by the paperwork and administrative tasks they must complete when forming a business.

Additionally, most of the time, entities must gather in coordination with other parties, like attorneys. The potential delays would have expensive consequences for the business owners as they could be subjected to fines of $500 per day and up to two years in prison.

The one-year extension will reduce the number of corrective reports companies would otherwise have to file, providing more time for FinCEN to issue clarifying guidance and for professionals and business owners to digest the new requirements.

Business owners and their advisers will probably make many mistakes as they learn to comply with FinCEN. The Regulations are 312 pages long, and that is in addition to FAQs, a Small Business Guide, and other materials. The extension will reduce the overall amount of time and expenses associated with filing for many because owners can get it right the first time.

Business owners should not be made responsible for paying the price in terms of time investment, costs for professional guidance, and potential penalties because of the complexity of the CTA guidance and the myriad of still open items. The extension also gives attorneys providing filing assistance more time to understand BOI reporting requirements and, therefore, lighten the initial regulatory burdens on Reporting Entities and Beneficial Owners.[xi]

House Bill

The House Bill would extend the initial BOI filing deadline by a year for entities created before 2024 to January 1, 2026, rather than January 1,

2025. This is especially crucial for small businesses that might need more resources to learn all the necessary intricacies for compliance.

Additionally, for companies that have existed for decades or have substantial owners who are not readily accessible, this extra year can make all the difference. The data required is sensitive, and those trying to comply with the regulations must explain in detail why it is necessary to some shareholders.

There are bound to be beneficial owners who refuse to share the information needed for filing with the company. The extra time gives entities a higher likelihood of getting the necessary data.

Entities formed after 2024 would have 90 days rather than 30 to file their BOI Reports under the House Bill. As mentioned, the FinCEN extension is only for reporting companies formed in 2024. FinCEN has addressed this by stating that companies formed in 2024 are uniquely positioned as the legal framework they must navigate is new, but by 2025, it will be more familiar. If this House Bill becomes law as it is, it would significantly decrease the imposition of the BOI and Reporting Entity Reports.

Business owners, CPAs, attorneys, and other professionals are still struggling to navigate the complex guidance from FinCEN and, in particular, the still uncertain application of the CTA to so many common business and trust scenarios. This is especially true when, with a little over a week before 2024, there are so many unanswered questions about how compliance will look in practice.

Extending the deadlines for initial filings, as well as for updates for changes, is reasonable. Updates would likely be due to significant life changes like moving, marriages, and deaths. Considering that these momentous events often come with their own challenges, it makes sense for Beneficial Owners and Reporting Companies to have more time to address changes. Reporting changes to FinCEN is the last thing a person would prioritize

While the new provision added to the House Bill's end is unclear on its face, it is evident, after Congressman Nunn's statements, that the House wants to close the loophole of entities being unable to obtain information. Considering the intent of the CTA, it stands to reason that the House Bill would seek to prevent FinCEN from allowing relief for companies failing to report if that is, in fact, what the language means. Such relief would be contrary to ensuring transparency for entity ownership and reducing activities that criminals use shell companies for.

While the CTA's objective might make sense, what are Reporting Companies supposed to do when their Beneficial Owners refuse to provide the require information to report? It is not clear that the penalty provisions apply to Beneficial Owners who fail to provide information. Also, there is no mechanism or leverage that Reporting Companies can assert to motivate recalcitrant Beneficial Owners to comply.

A more productive way to address the issue would be to create such mechanisms, impose penalties on Beneficial Owners who do not report, and provide a mechanism by which Reporting Companies can inform FinCEN of non-compliant Beneficial Owners. Otherwise, the CTA approach could subject those in control of a Reporting Company to fines and even possible imprisonment for matters that they cannot control. FinCEN and others will hopefully figure this out sometime soon.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Chriseanna Mitchell

Martin M. Shenkman

Alan Gassman

Anthony Del Rosario

CITE AS:

CITATIONS:

[i] See: https://www.congress.gov/bill/118th-congress/house-bill/5119/text

[ii] See: https://www.federalregister.gov/documents/2023/11/30/2023-26399/beneficial-ownership-information-reporting-deadline-extension-for-reporting-companies-created-or#:~:text=This%20final%20rule%20extends%20that,information%20to%20complete%20their%20filings.

[iii] See: https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf

[iv] See: https://www.federalregister.gov/documents/2023/11/30/2023-26399/beneficial-ownership-information-reporting-deadline-extension-for-reporting-companies-created-or#:~:text=This%20final%20rule%20extends%20that,information%20to%20complete%20their%20filings.

[v] See: https://www.congress.gov/bill/118th-congress/house-bill/5119

[vi] See: https://www.congress.gov/bill/118th-congress/house-bill/5119/text

[vii] This provision is not easy to understand, but not as difficult to understand as the flush language of Section 509a of the Internal Revenue Code which describes certain kinds of supporting foundations such as:

> For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in section 501(c)(3).

[viii] This is a redlined comparison of the bill section after it was ran through grammar check software.

[ix] *Protect Small Business and Prevent Illicit Financial Activity Act*, Congressional Record Vol. 169, No. 203. See: https://www.congress.gov/118/crec/2023/12/11/169/203/CREC-2023-12-11-pt1-PgH6752.pdf; *Bipartisan Bill Seeks to Delay FinCEN's Beneficial Ownership Reporting* Requirements; JDSUPRA (Aug. 15, 2023), https://www.jdsupra.com/legalnews/bipartisan-bill-seeks-to-delay-fincen-s-1793175/ (According to JD Supra Legal news, Congressman Zachary Nunn and the senior Democrat on the House Financial Services Subcommitee on National Security, Illicit Finance and International Financial Institutions, Joyce Beatty, first introduced the "bipartisan bill" on August 1, 2023 to the U.S. House of Representatives); Megan Brenan, *Record-Low 15% of Americans View China Favorably*, GALLUP (Mar. 7, 2023), https://news.gallup.com/poll/471551/record-low-americans-view-china-favorably.aspx (According to an early 2023 Gallup Poll "a record-low 15% of Americans view China favorably," and more than "eight in 10 U.S. adults have a negative opinion of China."

[x] See: https://www.federalregister.gov/documents/2023/11/30/2023-26399/beneficial-ownership-information-reporting-deadline-extension-for-reporting-companies-created-or#:~:text=This%20final%20rule%20extends%20that,information%20to%20complete%20their%20filings.

[xi] *Id.*