REAL ESTATE

Massive New Federal Reporting Requirements Will Start In 2024

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Do you own 25% or more of a limited liability company, partnership, or other small entity that owns real estate or runs a small business (any of these, a "company")? Are you the president, CEO, general counsel, or COO of a company? Even if you don't have that title, do you perform a similar role? Do you have "substantial control" over any company?

If you answer yes to any of those questions, then starting in 2024 you will need to register, or be registered, in a new federal database designed to identify and ferret out criminals, money launderers, and other bad actors who use companies to conceal their identities and evil deeds. That registration requirement will apply for every company for which you answered "yes" to any question in the previous paragraph, and maybe more.

Each registration will need to include your name, date of birth, residential street address (a business address won't do), a driver's license or other ID number, and a photograph of the document substantiating that number. This information will mostly be collected online.

If anyone registered in the database moves to a new residence, the new address must be reported within 30 days. Someone will need to keep track of where a company's executives and owners live, as well as any time they relocate.

The new reporting requirements don't apply to larger companies or a long list of regulated companies such as banks and insurance companies. The requirements target only smaller companies, as that seems to be where the bad guys go.

Any company that already exists as of January 1, 2024 will need to register by the end of that year. Companies newly created on or after January 1, 2024 will need to register within 30 days after creation. Special registration requirements apply for anyone who files the paperwork necessary to create companies. It remains to be seen whether those requirements will lead law firms to stop handling that work.

These and many other new requirements appear in regulations recently released by the Financial Crimes Enforcement Network, part of the U.S. Treasury Department, in response to the Corporate Transparency Act (you can read it starting at page 1218 of the PDF file). Congress enacted this law in 2021 over a presidential veto. The regulations as first published occupy about 20 pages of double-spaced text. They are preceded by over 300 double-spaced pages with 446 footnotes explaining, among other things, why the new database and registration requirements won't be unreasonably burdensome.

The 300 double-spaced pages dismiss in passing the possibility that the law enforcement community could obtain any of the newly required information through existing Internal Revenue Service, Social Security, motor vehicle, or postal change of address databases: "there are specific legal and regulatory frameworks that limit FinCEN's ability to obtain information from other agencies." The comment ignores the possibility that the same federal government that now wants to have the new company database could also do something about information exchange between bureaucratic silos. The entire FinCEN regulations and commentary can be reviewed in printed format, where they occupy only 99 pages, here.

The legislation that required FinCEN to create this new database also requires all the collected information to be kept confidential, and to be used only for law enforcement, including tax enforcement. One can only hope that no federal employee who will administer this database and enforce its requirements will ever share any information, not even for pay or for political advantage against opponents, especially those deemed a "danger to democracy."

As the world becomes aware of this new database, it seems reasonable to expect some pressure for "mission creep," such as by making the information available to anyone with a "legitimate need" for the information – perhaps starting with private investigators, divorce lawyers, and plaintiffs. The Corporate Transparency Act already opens that door a bit by allowing disclosure to financial institutions with the "consent" of the reporting company. It's a consent that, as a practical matter, no company could ever refuse.

FinCEN estimates the new database will require initial filings for over 30 million companies. Each year for the next 10 years, FinCEN estimates 5 million new companies will need to file. These numbers seem high. The annual estimate far exceeds the annual estimate that appeared in the Corporate Transparency Act itself. But these are FinCEN's numbers.

Based on FinCEN's numbers, if the new database enables law enforcement to catch 10,000 bad guys who otherwise wouldn't have been caught, then for each such bad guy, about 3,000 companies, and more over time, will need to register and then update their registrations every time someone moves to a new house or apartment. If the new system catches less than 10,000 bad guys, which seems likely, then the reference to 3,000 companies in the previous sentence is an understatement.

Although the Corporate Transparency Act and the FinCEN regulations require extensive reporting on companies and on FinCEN's information gathering, they do not require any reporting at all on whether the new database in fact, over time, enables any law enforcement agency to catch bad guys.

More likely, of course, the bad guys will give the government inaccurate or incomplete information—why would bad guys suddenly turn good?—or figure out new ways to hide. As a result, the new database system with all its millions of registrations and updates, a new federal workforce, total costs "in the billions of dollars on an annual basis" according to FinCEN, and penalties for failure to file, will just force law enforcement to develop new investigative techniques.

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I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don't. It's important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals. **Read Less**