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Congress to Include Significant Expansion of Beneficial Ownership Disclosure Requirements for U.S. Companies and non-U.S. Companies Registered to do Business in the United States as a Part of the 2021 NDAA

As has been widely reported¹ and announced in statements by members of both the House and Senate,² Congress has included a significant expansion of beneficial ownership disclosure requirements for companies in the United States as a part of the fiscal year 2021 National Defense Authorization Act (the “2021 NDAA”), a spending bill that is expected to pass by the end of the year. The most recent version of the 2021 NDAA reported out of conference to the House last week includes new beneficial ownership (defined for purposes of the 2021 NDAA as those individuals who own 25 percent or more of the ownership interests of a company and/or who exercise “substantial control” over a company) reporting requirements for companies that closely track the Corporate Transparency Act of 2019,³ which passed the House in October 2019, although certain changes were made to make the disclosure provisions somewhat more business-friendly. Nonetheless, if the 2021 NDAA is passed and signed into law in its current form,⁴ the law would impose new beneficial ownership disclosure requirements on many U.S. companies—and non-U.S. companies that are registered to do business in the United States (collectively, “reporting companies”)—that previously had not been required to disclose their beneficial owners.

If passed into law in its current form, the 2021 NDAA would require, subject to certain exceptions, both newly formed and, eventually, after a two-year implementation period, existing U.S. corporations, limited liability companies, other similar entities, and non-U.S. companies registered to do business in the United States, to file annual reports with the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”) disclosing certain identifying information regarding the reporting company’s beneficial owners. The 2021 NDAA would also require FinCEN to issue implementing regulations within one year of enactment that would govern the process of beneficial ownership reporting for reporting companies. Given that the 2021 NDAA does not define several key terms (including, *e.g.*, what constitutes “substantial control” over an entity sufficient to make an individual a “beneficial owner”), FinCEN’s regulations and any related guidance will be important to understanding the full scope of the 2021 NDAA’s disclosure requirements.

The beneficial ownership information that FinCEN would collect pursuant to the 2021 NDAA would not be publicly available and the law imposes penalties for any unlawful disclosures of such collected information. However, the 2021 NDAA permits FinCEN to disclose beneficial ownership information, upon request, to (i) U.S. federal law enforcement agencies, (ii) a U.S. federal agency requesting information on behalf of a

non-U.S. law enforcement agency, or (iii) with the consent of the reporting company, a financial institution in order to meet customer due diligence requirements imposed by law. The 2021 NDAA also permits FinCEN to disclose beneficial ownership information to state, local, and tribal law enforcement agencies, so long as such agencies have obtained a court order authorizing the agencies to seek such information.

Reporting companies that have not previously been subject to beneficial ownership disclosure requirements should carefully review the requirements of the 2021 NDAA, as well as the numerous exceptions, to determine whether they may have a disclosure obligation. Reporting companies that may be affected by these provisions should also closely monitor FinCEN's rulemaking process with respect to its implementation of the 2021 NDAA, as the regulations and any associated guidance that FinCEN may issue as such guidance will likely provide additional clarity on the scope of the 2021 NDAA's disclosure requirements including, among other things, which individuals will qualify as a beneficial owners by virtue of their "substantial control" over an entity.

2021 NDAA Beneficial Ownership Disclosure Requirements and Exceptions

The relevant provisions of the 2021 NDAA require each reporting company to submit to FinCEN, at the time of its formation (to the extent the reporting company has not yet been formed) and on an annual basis thereafter, its beneficial owner's or owners': (i) full legal name, (ii) date of birth, (iii) current residential or business street address, and (iv) unique identifying number from an "acceptable identification document" (including a U.S. passport, state driver's license or other U.S. state-issued identification document, or, if the person does not hold any U.S.-issued identification documents, a non-U.S. passport). The 2021 NDAA also creates a process through which FinCEN can issue reported beneficial owners a unique identifier that beneficial owners can then use in the future in place of re-providing the personally identifying information in (i)-(iv) above (subject to certain requirements for the beneficial owner to update the identifying information on file with FinCEN in the event of a change).

A "beneficial owner" for purposes of the 2021 NDAA is defined as any individual (*i.e.*, natural person) who, directly or indirectly, either "(i) exercises substantial control over the entity" or "(ii) owns or controls not less than 25 percent of the ownership interest of the entity."⁵ A reporting company could therefore have more than one beneficial owner for purposes of the 2021 NDAA and the 2021 NDAA requires the identifying information to be reported to FinCEN for "each beneficial owner" of a reporting company. As noted above, the 2021 NDAA does not define "substantial control" or even "control" and, therefore, FinCEN's implementing regulations and any associated guidance will be important in defining the precise scope of the disclosure requirements.

The 2021 NDAA also excepts certain persons from the definition of "beneficial owner," including: (i) persons acting as intermediaries, custodians, or agents on behalf of another individuals, (ii) an individual acting as an employee of an entity and whose control or economic benefits with respect to the reporting company is derived solely from their employment, and (iii) creditors of the reporting company, unless the

creditor meets either the “substantial control” prong or owns or controls 25 percent or more of the ownership interests of the reporting company.

The term “reporting company” is defined broadly in the 2021 NDAA to mean any “corporation, limited liability company, or other similar entity” that is (i) created by the filing of a document with a U.S. state or (ii) formed under the law of a foreign (*i.e.*, non-U.S.) country and registered to do business in the United States by filing a document with a U.S. state.⁶ Despite this broad definition, the disclosure requirements of the 2021 NDAA are largely targeted at shell or holding companies as well as smaller corporations or limited liability companies with limited operations. This is due to the definition of “reporting company,” which specifically excludes over 20 broad classes of regulated, publicly traded, non-profit, and government entities.⁷ The 2021 NDAA also authorizes the Secretary of the Treasury (in consultation with other relevant U.S. government agencies) to designate additional types of entities to be excluded from the definition of “reporting company.”

One notable exclusion to the definition of “reporting company” that may be relevant to smaller, non-publicly-listed companies is the exclusion for any entity that: (i) employs more than 20 employees on a full-time basis in the United States; (ii) filed (in the previous year) U.S. federal income tax returns demonstrating more than \$5 million in gross receipts or sales in the aggregate (including the receipts or sales of (A) other entities owned by the entity and (B) other entities through which the entity operates); and (iii) has an operating presence at a physical office within the United States.

Implications

The beneficial ownership disclosure requirements within the 2021 NDAA are the result of almost a decade of bipartisan concern in Congress regarding the use of U.S.-organized shell companies for money laundering and other illicit purposes. Although the disclosure requirements in the 2021 NDAA are not quite as extensive as those originally included in the House’s Corporate Transparency Act of 2019, the requirements in the 2021 NDAA are nonetheless a significant expansion of beneficial ownership reporting requirements for reporting companies and, in particular, will impose new reporting requirements on smaller reporting companies that are not publicly listed or otherwise regulated by a relevant U.S. government agency.

President Trump has threatened to veto the 2021 NDAA for reasons not related to its beneficial ownership disclosure requirements; however, based upon public reporting, Congress currently appears poised to pass the 2021 NDAA in spite of this veto threat, and potentially with veto-proof vote margins in both the House and Senate.⁸ As the disclosure requirements of the 2021 NDAA have bipartisan support and have remained in the bill after going through conference, these provisions are very likely to be included in the version of the 2021 NDAA that Congress ultimately passes. It is anticipated that Congress will pass the 2021 NDAA in the next one or two weeks and, in any event, by the end of 2020.

As a result, reporting companies and particularly those reporting companies that have not previously been subject to beneficial ownership disclosure requirements in the United States, should carefully review the disclosure requirements within the 2021 NDAA to determine whether the bill, if passed into law, may impose reporting requirements on them. U.S. companies and non-U.S. companies registered to do business in the United States should also review the broad list of exclusions from the definition of “reporting company” in the 2021 NDAA to see if any exclusion(s) may be applicable to them. Reporting companies should also closely monitor FinCEN’s rulemaking process to implement the disclosure requirements of the 2021 NDAA as well as any guidance FinCEN issues, as both may provide additional context around certain definitions of terms used in the 2021 NDAA, including, among others, what constitutes “substantial control” over an entity that is sufficient to be considered to be a beneficial owner.

Finally, as a result of the increased beneficial ownership reporting requirements to FinCEN for reporting companies, another section of the 2021 NDAA instructs the Secretary of the Treasury to remove (once the FinCEN regulations implementing the 2021 NDAA beneficial owner reporting requirements are issued) certain customer due diligence requirements with respect to the beneficial owners of financial institutions’ legal entity customers that ARE currently in force at 31 C.F.R. § 1010.230(b)-(j) in order to “reduce any burdens on financial institutions and legal entity customers” that, in light of the new reporting requirements of the 2021 NDAA, would be “unnecessary or duplicative.” However, this section of the 2021 NDAA also allows the Secretary of the Treasury to retain some discretion to revise or undergo additional rulemaking with respect to the remaining customer due diligence regulatory requirements for financial institutions.

We will continue to monitor these developments and will provide further updates as appropriate.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ See, e.g., Alex Gangitano, *Sweeping Financial Crimes Bill to Hitch a Ride on Defense Measure*, THE HILL (Dec. 3, 2020), available [here](#); Zachary Warmbrodt, *Lawmakers Clinch Deal on Decadelong Fight Against Shell Companies*, POLITICO (Nov. 25, 2020), available [here](#).

² See, e.g., Office of Representative Carolyn Maloney, Press Release, *Maloney Celebrates Inclusion of Corporate Transparency Act in FY2021 NDAA*, (Nov. 19, 2020), available [here](#); Office of Senator Sherrod Brown, Press Release, *Brown Hails Inclusion of the Anti-Money Laundering Act and Corporate Transparency Act in NDAA Conference Report*, (Dec. 3, 2020), available [here](#).

³ The Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019), available [here](#).

⁴ The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395 (Conference Report Dec. 2, 2020), 116th Cong. (2020) § 6403 (“2021 NDAA”), available [here](#).

⁵ *Id.*

⁶ *Id.*

⁷ The definition of “reporting company” in the 2021 NDAA does not include:

“(i) an issuer (I) of a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or (II) that is required to file supplementary and periodic information under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));

- (ii) an entity (I) established under the laws of the United States, an Indian Tribe, a State, or a political subdivision of a State, or under an interstate compact between 2 or more States; and (II) that exercises governmental authority on behalf of the United States or any such Indian Tribe, State, or political subdivision;
- (iii) a bank, as defined in (I) section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); (II) section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)); or (III) section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a));
- (iv) a Federal credit union or a State credit union (as those terms are defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752));
- (v) a bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841)) or a savings and loan holding company (as defined in section 10(a) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)));
- (vi) a money transmitting business registered with the Secretary of the Treasury under section 5330;
- (vii) a broker or dealer (as those terms are defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)) that is registered under section 15 of that Act (15 U.S.C. 78o);
- (viii) an exchange or clearing agency (as those terms are defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)) that is registered under section 6 or 17A of that Act (15 U.S.C. 78f, 78q-1);
- (ix) any other entity not described in clause (i), (vii), or (viii) that is registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);
- (x) an entity that (I) is an investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3)) or an investment adviser (as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2)); and (II) is registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.);
- (xi) an investment advisor (I) described in section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(l)); and (II) that has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the Securities and Exchange Commission;
- (xii) an insurance company (as defined in section 2 of the Investment Company Act of 1940 (15 U.S.C. 80a-2));
- (xiii) an entity that (I) is an insurance producer that is authorized by a State and subject to supervision by the insurance commissioner or a similar official or agency of a State; and (II) has an operating presence at a physical office within the United States;
- (xiv) (I) a registered entity (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); or (II) an entity that is (aa)(AA) a futures commission merchant, introducing broker, swap dealer, major swap participant, commodity pool operator, or commodity trading advisor (as those terms are defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); or (BB) a retail foreign exchange dealer, as described in section 2(c)(2)(B) of that Act (7 U.S.C. 2(c)(2)(B)); and (bb) registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.);
- (xv) a public accounting firm registered in accordance with section 102 of 3 the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212);

(xvi) a public utility that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States;

(xvii) a financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5463);

(xviii) any pooled investment vehicle that is operated or advised by a person described in clause (iii), (iv), (vii), (x), or (xi);

(xix) any (I) organization that is described in section 501(c) of the Internal Revenue Code of 1986 (determined without regard to section 508(a) of such Code) and exempt from tax under section 501(a) of such Code, except that in the case of any such organization that loses an exemption from tax, such organization shall be considered to be continued to be described in this subclause for the 180-day period beginning on the date of the loss of such tax-exempt status; (II) political organization (as defined in section 527(e)(1) of such Code) that is exempt from tax under section 527(a) of such Code; or (III) trust described in paragraph (1) or (2) of section 4947(a) of such Code;

(xx) any corporation, limited liability company, or other similar entity that (I) operates exclusively to provide financial assistance to, or hold governance rights over, any entity described in clause (xix); (II) is a United States person; (III) is beneficially owned or controlled exclusively by 1 or more United States persons that are United States citizens or lawfully admitted for permanent residence; and (IV) derives at least a majority of its funding or revenue from 1 or more United States persons that are United States citizens or lawfully admitted for permanent residence;

[(xxi)] any corporation, limited liability company, or other similar entity of which the ownership interests are owned or controlled, directly or indirectly, by 1 or more entities described in clause (i), (ii), (iii), (iv), (v), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii) (xix), or (xxi).”

⁸ Andrew Desiderio, Connor O'Brien, and Marianne Levine, *Congress Shoots Down Trump's Threat to Veto Defense Bill*, POLITICO (Dec. 2, 2020), available [here](#).