Dear Friends of Duval & Stachenfeld:

There is a significant change coming to your obligation to disclose to the US government the beneficial ownership and control interests in LLCs, LPS, and corporations not only that you form for your transactions but also your operating and ownership vehicles. This will be of importance to you, as you may find that you are required to report to the US Government what was previously private information regarding the ownership and control of these entities.

All of this is from the imminent enactment of the William (Mac) Thornberry National Defense Authorization Act (NDAA) for the Fiscal Year 2021 (H.R. 6395). The NDAA, although mostly dealing with national defense issues, has new disclosure requirements with respect to corporate entities called The Corporate Transparency Act (the "CTA"). President Trump has threatened to veto the NDAA for reasons unrelated to the CTE, but it appears that Congress will nonetheless pass the NDAA with a veto-proof vote margin. Our guess is that the CTS will remain in the NDAA and that Congress will pass the NDAA by the end of 2020.

In brief, the CTA will require, for LLC's, corporations, and similar entities, that direct or "indirect" (i.e., up the chain) beneficial ownership of more than 25% and control parties will have to be disclosed to the Financial Crimes Enforcement Network of the Department of the Treasury ("FinCEN"). This will be required of new entities as well as existing entities (with a two year time period to make the required disclosure for existing entities). The disclosures will generally be kept confidential by FinCEN, with some limitations on that confidentiality.

In addition, the failure to accurately disclose the required information can result in fines and penalties, including criminal penalties. This gives rise to obvious concerns and questions. Who is going to be required to be disclosed and how far up the chain? Who is responsible for these disclosures (i.e., if a disclosure is inaccurate, are the fines and penalties assessed to the individual signing the disclosure or to the "reporting company")? If a disclosure is inadvertently inaccurate, how can corrections be made? What happens when ownership and control shifts? How secure will this confidential information be and what will the

government do to prevent disclosure?

Yes, all of those, and many more questions, need to be answered. If the CTA is passed, it is expected the Treasury will issue regulations outlining the process and procedures and hopefully resolving these open questions.

We at Duval & Stachenfeld have put together a quickie Transparency Task Force to stay on top of developments with the CTA and the eventual regulations, as well as advise you on all of this – see the end of this article.

Below is a summary from our Transparency Task Force. It gives you the basics; however, if the CTA is passed, we urge our clients to contact us so that together we can put policies and procedures in place to ensure compliance with the requirements of CTA.

CONGRESS PASSES THE CORPORATE TRANSPARENCY ACT

Will Require Disclosure of Beneficial Ownership of
Many Entities Commonly Used in Real Estate

On December 11, 2020, the United States Senate passed the William (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021 (H.R. 6395), which had previously passed the House of Representatives. The President has threatened to veto the bill, but observers believe that there are enough votes in Congress to override a veto. While the NDAA largely focuses on appropriations and policies of the United States armed forces, the NDAA also contains a significant expansion of beneficial ownership disclosure requirements for corporate entities in the United States. The Corporate Transparency Act aims to prevent money laundering, the funding of terrorist organizations, and other illicit activities that threaten national security.[1]

Under the bill, “reporting companies,” which are corporations, limited liability companies, and similar entities (presumably including limited partnerships) formed in the U.S., or non-U.S. entities registered to do business in the U.S., will be required to report certain information about each beneficial owner, including their name, date of birth, current address, and a unique identifying number from an acceptable identification document, such as a driver’s license or non-expired passport number. Reporting companies will be required to file the report with the Financial Crimes Enforcement Network of the Department of the Treasury (FinCEN) upon registration or formation. Entities that already exist as of the effective date of the regulations will have a two-year grace period before reporting is required. The information reported to FinCEN will be kept confidential and will not be made public, but can be requested by a financial institution in connection with their customer due diligence requirements (with the

consent of the reporting company) and in connection with certain law enforcement activities.

Under the bill, a beneficial owner is defined as an individual that, directly or indirectly, either (i) "exercises substantial control over the entity" or (ii) "owns or controls not less than 25% of the ownership interests of the entity." Notably, the phrase "substantial control" is not defined in the Act. Beneficial owners do not include minor children if the information of their parent or guardian is reported; an individual acting as a nominee, intermediary, custodian, or agent; an employee whose control is derived solely from the employment status of that person; an individual whose right in interest is through a right of inheritance; or a creditor, unless that person exercises substantial control or owns more than 25% of the ownership interests or the reporting company.

The bill also provides a list of more than twenty categories of entities that are exempted from making the reports required under the bill, including public companies, banks, brokers, dealers, investment companies, investment advisors, insurance companies, not-for-profits, and pooled investment vehicles operated or advised by, among others, a bank or registered investment advisor. In addition, entities that (i) have more than 20 full-time domestic employees, (ii) filed a federal tax return in the previous year demonstrating more than $5 million in gross receipts or sales in the aggregate (including receipts and sales of other entities owned by the entity and other entities through which the entity operates), and (iii) have a physical office in the US, are exempt from reporting.

Note, however, foreign pooled investment vehicles are required to identify an individual that exercises substantial control over the pooled investment vehicle. A reporting company is also required to disclose the exempt entities that have an ownership interest in it but does not need to report the beneficial owners of the exempt entity. Reporting companies that have a change of beneficial ownership and certain exempt entities that no longer meet exemptions are required to update or file a report with FinCEN.

The bill provides civil penalties of up to $500 for each day that a violation continues or has not been remedied, and criminal penalties, including up to $10,000 fines and two years' imprisonment, for persons who willfully submit false or fraudulent beneficial ownership information, or who knowingly fail to provide complete or updated beneficial ownership information.

It is important to note that the bill is not immediately effective as the United States Department of Treasury has up to one year to enact enabling regulations.

Given the widespread use of LLCs and LPs in the real estate industry, the impact to the industry will be significant and may be burdensome. We encourage companies to stay cognizant of these regulations and their impacts on their internal governance.

For further guidance, please contact any of the members of our Transparency Task Force:

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[1] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402- 6404 (2020).