Steve Leimberg's Business Entities Email Newsletter - Archive Message #301

Date: **11-Jul-24**

From: **Steve Leimberg's Business Entities Newsletter**

Subject: **Martin M. Shenkman, Alan S. Gassman & Chance Cook on CTA's Updated FAQs: Treasury Department Requires Filing for Dissolved Entities**

"Even if your company has vanished into thin air, the Corporate Transparency Act's reporting requirements haven't, so know the rules to stay compliant."

Martin Shenkman, **Alan Gassman** and **Chance Cook** provide members with timely and important commentary that reviews the updated FAQs that address the CTA's filing requirements for dissolved entities.

Martin M. Shenkman is an attorney in private practice in New York 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 at the Clearwater, Florida law firm of **Gassman, Crotty & Denicolo, P.A.** He is a frequent contributor to LISI and has published numerous articles in publications such as BNA Tax & Accounting, Estate Planning, Trust and Estates, and recently co-authored an article entitled *Community Property Planning in Non-Community Property States & Understanding the Florida Community Property Trust Act Opportunities, Developments and Traps for the Unwary* in the Stetson Business Law Review. Mr. Gassman is a board certified Trust and Estate lawyer. Alan Gassman, Jerry Hesch, Jonathan Blattmachr, Bob Keebler and Eido Walny are working together to improve and formally issue EstateView Estate and Estate Tax Planning Software in 2024, which will be marketed by LISI. EstateView is an estate and estate tax planning software program that provides calculations and illustrations for many facets of estate planning and more. His e-mail address is alan@gassmanpa.com.

Chance Cook is a 3rd-year law student at Stetson University College of Law. Chance obtained his bachelor's degree from Cox School of Business while attending SMU in Dallas, Texas. He is a member of the business law concentration, the president of Tax Law Society, and is planning on obtaining his LL.M. after graduating from Stetson.

Here is their commentary:

EXECUTIVE SUMMARY:

The Treasury Department updated its frequently asked questions on July 8, 2024. The big news: if the plan was to dissolve the company before 2025, register you must!

If an entity was created by filing with a secretary of state, BOIR must be filed unless the entity completed the process of formally and irrevocably dissolving before January 1, 2024. By "formally and irrevocably dissolving," FinCEN means "filing dissolution paperwork with its jurisdiction of creation or registration, receiving written confirmation of dissolution, paying related taxes or fees, ceasing to conduct any business, and winding up its affairs (e.g., fully liquidating itself and closing all bank accounts)." Where an entity was created after January 1, 2024, and has ceased to exist by "formally and irrevocably dissolving," it also must file BOIR.

Dissolution by not updating an annual report is not enough. FinCEN suggests, "For specifics on how to determine when a company ceases to exist as a legal entity, consult the law of the jurisdiction in which the company was created or registered. A company that is administratively dissolved or suspended—because, for example, it failed to pay a filing fee or comply with certain jurisdictional requirements—generally does not cease to exist as a legal entity unless the dissolution or suspension becomes permanent."

In Florida, if you do not file an annual report by the third Friday in September, your entity will be administratively dissolved or revoked in Florida's records by the end of the day on the fourth Friday of September. But is that "permanent" enough to avoid filing BOIR?

This harsher than anticipated position comes at a time when the CTA is being challenged Constitutionally, and in the wake of the recent Supreme Court case, Loper, which may or may not increase the likelihood of some of the guidance being challenged. Meanwhile, the CTA remains law and with it we must comply.

COMMENT:

The most important FAQ published in this update released by FinCEN is most certainly C.13. C.13 is a massive wake-up call for many business owners who thought they could avoid reporting requirements by dissolving their company, or by simply letting the company die out, before the first report is filed. But that is no longer the case. For those who thought they would terminate their entity before the first report was filed (before 12/31/24) they will not have avoided the requirement of filing. Worse, it may, as discussed below, create considerable complications.

Instead, owners have to deliberately and formally terminate their companies and do it the right way, i.e. completely. The consequences of this FAQ are significant. It will require thousands of owners of defunct companies to step back in the saddle, hire lawyers, spend money, and formally close the doors on their operations, and file their BOI information for the terminated company.

This raises potentially difficult issues. If the company was dissolved in 2024 it will now be required to file under the CTA. IF there is no or only a nominal bank account remaining how will the costs of this be paid for? If professional guidance is needed, how will those professionals be paid? If under state law the officers, directors, managers, etc. have resigned or been terminated as part of the dissolution, who will have legal authority to file for the company? What if the senior officer refuses to become involved in filing for a dissolved entity? Who will have authority to force that person to cooperate and file?

It also raises many questions about what it means for a company to properly cease operations which varies state by state. But it seems that FinCEN's view is that if there was even a nominal bank account, e.g., held merely to pay expenses of winding up the company's affairs, the company will not be deemed dissolved before 2024 and will have to file.

Many people that dissolve a company, do not tell the bank and then spend the money later. The bank is not aware the company dissolved and if you reinstate the company you would officially have control over the account again. FinCEN apparently knows that this happens and therefore many companies that dissolve in 2024 will still be considered to have existed for FinCEN purposes as long as the account is open. For example, if control of the account changes they will have to file another change.

The FAQ's do not appear to effect "Exemption #23, Inactive Entity", which enables entities formed before January 1, 2020 which have no activities and only nominal assets to not be required to file. It still seems best to terminate these entities to avoid these issues, perhaps best to, "file anyway" in case the client has not informed us that there are activities or assets under the company that would be of concern which would deprive them of the exemption.
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The unicorn companies meeting these elements are still exempt from reporting requirements, although thousands of corporation owners and advisors will clearly be confused as a result of this pronouncement, as may Treasury employees who will someday be enforcing these rules.

Is FAQ C.13 Inconsistent with FAQ G.4?

G. 4. Should an initial BOI report include historical beneficial owners of a reporting company, or only beneficial owners as of the time of filing?

An initial BOI report should only include the beneficial owners as of the time of the filing. Reporting companies should notify FinCEN of changes to beneficial owners and related BOI through updated reports.

Based on the reasoning of FAQ G.4. if there is a change in BOs before the initial filing only the BOs as of the date of the initial filing must be reported. If an entity is dissolved in 2024 before the 1/1/25 filing date, there are no BOs and based on FAQ G.4 no one would have to file. But the new FAQ C.13 contradicts that and would require the last serving BOs to file.

Loper Implication Analysis

With the recent Supreme Court decision in Loper[i] which shifted interpretation power back to the court, there is a possibility that some of the regulations interpreted by the Treasury Department and FinCEN might be overturned as their interpretations may be improper if they exceed the discretion given to the agency by the statute.

The New FAQs

C.12. Do beneficial ownership information reporting requirements apply to companies created or registered before the Corporate Transparency Act was enacted (January 1, 2021)?

Yes. Beneficial ownership information reporting requirements apply to all companies that qualify as "reporting companies" (see Question C.1), regardless of when they were created or registered. Companies are not required to report beneficial ownership information to FinCEN if they are exempt (see Question C.2 and, generally, Section L) or ceased to exist as legal entities before January 1, 2024 (see Question C.13). [Issued July 8, 2024]

C.13. Is a company required to report its beneficial ownership information to FinCEN if it ceased to exist as a legal entity before January 1, 2024, meaning that it entirely completed the process of formally and irrevocably dissolving. A company that ceased to exist as a legal entity before the beneficial ownership information reporting requirements became effective January 1, 2024, was never subject to the reporting requirements and thus is not required to report its beneficial ownership information to FinCEN.

Although state or Tribal law may vary, a company typically completes the process of formally and irrevocably dissolving by, for example, filing dissolution paperwork with its jurisdiction of creation or registration, receiving written confirmation of dissolution, paying related taxes or fees, ceasing to conduct any business, and winding up its affairs (e.g., fully liquidating itself and closing all bank accounts).

If a reporting company (see Question C.1) continued to exist as a legal entity for any period of time on or after January 1, 2024 (i.e., did not entirely complete the process of formally and irrevocably dissolving before January 1, 2024), then it is required to report its beneficial ownership information to FinCEN, even if the company had wound up its affairs and ceased conducting business before January 1, 2024.

Similarly, if a reporting company was created or registered on or after January 1, 2024, and subsequently ceased to exist, then it is required to report its beneficial ownership information to FinCEN-even if it ceased to exist before its initial beneficial ownership information report was due.

For specifics on how to determine when a company ceases to exist as a legal entity, consult the law of the jurisdiction in which the company was created or registered. A company that is administratively dissolved or suspended-because, for example, it failed to pay a filing fee or comply with certain jurisdictional requirements-generally does not cease to exist as a legal entity unless the dissolution or suspension becomes permanent.

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C.14. If a reporting company created or registered in 2024 or later winds up its affairs and ceases to exist before its initial BOI report is due to FinCEN, is the company still required to submit that initial report?

Yes. Reporting companies created or registered in 2024 must report their beneficial ownership information to FinCEN within 90 days of receiving actual or public notice of creation or registration. These obligations remain applicable to reporting companies that cease to exist as legal entities-meaning wound up their affairs, ceased conducting business, and entirely completed the process of formally and irrevocably dissolving-before their initial beneficial ownership reports are due. If a reporting company files an initial beneficial ownership information report and then ceases to exist, then there is no requirement for the reporting company to file an additional report with FinCEN noting that the company has ceased to exist.

[Issued July 8, 2024]

Section-by-Section Analysis of the New FAQs

Companies Created Before Jan. 1, 2021, and BOI Compliance (Question C.12):

> Beneficial ownership information reporting requirements apply to all entities classified as "reporting companies," irrespective of their creation or registration date. Exemptions exist for companies that either qualify under specific criteria or ceased to exist as legal entities before January 1, 2024.

Dissolved Companies and Reporting Requirements (Question C.13):

> A company is not required to report its beneficial ownership information to FinCEN if it ceased to exist as a legal entity before January 1, 2024, having fully and irrevocably dissolved. However, if a company continued to exist in any legal capacity after this date, it must comply with BOI reporting requirements, even if it had ceased operations prior to January 1, 2024. Additionally, companies created or registered on or after January 1, 2024, are required to report BOI, even if they

dissolve before their initial report is due. For dissolution specifics, consult the jurisdiction's laws where the company was formed.

Winding up and Reporting for Newly formed Companies (Question C.14):

Reporting companies established in 2024 must submit their beneficial ownership information to FinCEN within 90 days of receiving notice of their creation or registration. Those created in 2025 or later have 30 days to report. These requirements apply even if the company ceases to exist as a legal entity before the initial report is due. Once a company has filed its initial report and subsequently dissolves, no further reporting to FinCEN is necessary.

Conclusion

The internet will be abuzz with people googling to discover, "how to formally and irrevocably dissolve my entity."

- Do I have to revive my dead entity in order to formally and irrevocably dissolve it?

- May Florida-created entities consider themselves dead after the fourth Friday in September, or, is that enough for FinCEN to consider it "permanent"?

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Martin Shenkman
Alan Gassman
Chance Cook

CITE AS:

LISI Business Entities Newsletter #301 (July 11, 2024) at http://www.leimbergservices.com.

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CITATIONS:

[i] Loper Bright Enterprises v. Raimondo, 603 U.S. __, __ S.Ct. __, 2024 WL 3208360 (2024).