

Alert | Corporate



October 2019

U.S. House Passes Bill That Would Require Disclosure of Beneficial Owners of U.S. Corporations and Limited Liability Companies

On Oct. 22, 2019, the U.S. House of Representatives, in a 249 to 173 vote, passed H.R. 2513, known as the “**Corporate Transparency Act of 2019**” (the “Corporate Transparency Act” or the “Bill”).¹ The Corporate Transparency Act, if enacted into law, would require each person who creates a corporation or limited liability company in the United States (each, a “U.S. Company” and, collectively, “U.S. Companies”) **to report, on an ongoing basis, to the U.S. Department of the Treasury, Financial Crimes Enforcement Network (FinCEN) the identities of the “beneficial owners” of the U.S. Company.** The Bill generally defines “beneficial owner” as a natural person who, directly or indirectly:

- i. exercises substantial control over a U.S. Company;
- ii. owns 25% or more of the equity interest of a U.S. Company; or
- iii. receives substantial economic benefits from the assets of a U.S. Company.

¹ <https://www.congress.gov/116/bills/hr2513/BILLS-116hr2513eh.pdf>

Today in the United States, any person can incorporate or form a U.S. Company in any state jurisdiction in the United States without having to disclose beneficial ownership data to the state incorporation or formation authority. Every year, thousands of such companies are incorporated or formed quickly all over the United States by entrepreneurs, family businesses, and larger businesses, the latter group often in connection with merger and acquisition opportunities or corporate reorganizations. Of course, not having to report beneficial ownership data for such entities also offers the owner a high level of secrecy, and this secrecy is abused by money launderers, tax evaders and other bad actors. The Financial Action Task Force on Money Laundering (FATF), of which the United States is a member, has criticized the United States for failing to have legislation that addresses FATF standards on the collection of company beneficial ownership data. In contrast to the United States, all 28 countries in the European Union are required to maintain corporate registries that include beneficial ownership information of the companies organized in the jurisdictions that comprise the European Union.

The Bill, if passed by the U.S. Senate and signed into law by the President of the United States, would amend the U.S. Bank Secrecy Act (BSA) by inserting a new section 5333, titled “Transparent incorporation practices,” which would, among other things, require U.S. Companies to:

- i. identify each beneficial owner by disclosing the beneficial owner’s:
 - full legal name;
 - date of birth;
 - current residential or business address; and
 - unique identifying number from a non-expired U.S. passport, personal identification card issued by a state, Indian Tribe or local government, or state driver’s license (non-U.S. persons may provide a unique identifying number from a non-expired foreign government passport and a copy of the pages of the passport bearing the photograph, date of birth, and identifying information for the beneficial owner);²
- ii. **file annually** with FinCEN a list of its current beneficial owners and any changes in beneficial ownership that occurred during the previous year; and
- iii. update its list of beneficial owners within time periods prescribed by rule.

The Bill exempts the following entities from beneficial ownership disclosure requirements, many of which are already required to disclose their beneficial owners:

- i. entities that: (a) employ more than 20 employees on a full-time basis in the United States; (b) file income tax returns in the United States demonstrating more than \$5 million in gross receipts or sales; and (c) have an operating presence at a physical office within the United States,
- ii. entities that are registered under section 12 of the Securities Exchange Act of 1934 (the “Exchange Act”) or that are required to file reports under section 15(d) of the Exchange Act,
- iii. entities constituted, sponsored, or chartered by a state or Indian Tribe, a political subdivision of a state or Indian Tribe, under an interstate compact between two or more states, by a department or agency of the United States, or under the laws of the United States,

² The same identifying information would also be required of natural persons who form a U.S. Company if such person is not a beneficial owner of the U.S. Company.

- iv. depository institutions,
- v. credit unions,
- vi. bank holding companies or savings and loan holding companies,
- vii. brokers or dealers registered under section 15 of the Exchange Act,
- viii. exchange or clearing agencies registered under section 6 or 17A of the Exchange Act,
- ix. investment companies (as defined in section 3 of the Investment Company Act of 1940 (the “1940 Act”) or investment advisers (as defined in section 202(11) of the 1940 Act), if they are registered with the Securities and Exchange Commission, have filed an application for registration which has not been denied, or are investment advisers described under section 203(l) of the 1940 Act,
- x. insurance companies,
- xi. registered entities, or futures commission merchants, introducing brokers, commodity pool operators, or commodity trading advisers registered with the Commodity Futures Trading Commission,
- xii. public accounting firms registered in accordance with section 102 of the Sarbanes-Oxley Act or an entity controlling, controlled by, or under common control of such firm,
- xiii. public utility providers of telecommunications services, electrical power, natural gas, or water and sewer services within the United States,
- xiv. churches, charities, nonprofit entities or other organizations described in section 501(c), 527 or 4947(a)(1) of the Internal Revenue Code of 1986, that have not been denied tax exempt status, and that have filed the most recently due annual information return with the Internal Revenue Service (if required to file such return),
- xv. financial market utilities designated by the Financial Stability Oversight Counsel under section 804 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,
- xvi. insurance producers, and
- xvii. any U.S. company that is a subsidiary of an entity described in (i)-(xvi) above.

The Bill also provides the Secretary of the Treasury and U.S. Attorney General with discretion to exempt additional entities if they jointly determine that requiring beneficial ownership information from such entities would not serve the public interest and would not assist law enforcement efforts to detect, prevent, or prosecute terrorism, money laundering, tax evasion, or other misconduct.³

³ The Bill provides that U.S. Companies proposed to be formed, which are exempt from beneficial ownership disclosure requirements, would have to file a written certification with FinCEN: (i) identifying the specific provision under which such U.S. Company would be exempt, (ii) stating that the U.S. Company meets the requirements for the exemption, and (iii) providing identifying information for the natural person or prospective officer, director, or similar agent making the certification to the same extent that a beneficial owner of a non-exempt entity would provide.

If the Bill is enacted into law, ***existing U.S. Companies will have two years after the issuance of FinCEN final regulations implementing the Corporate Transparency Act to comply with the beneficial ownership disclosure requirements*** unless the existing U.S. Company submits to FinCEN a written certification: (i) identifying the specific provision under which the U.S. Company would be exempt; (ii) stating that the U.S. Company meets the requirements for the exemption, and (iii) providing identification information for the officer, director, or similar agent making the certification in the same manner as a beneficial owner of a non-exempt entity would disclose.

If the Bill with its current provisions becomes law, a new, annual federal reporting burden would be placed on tens of thousands of existing and future corporations and limited liability companies all over the United States – in addition to those companies submitting their annual U.S. federal corporate income tax returns. The likely effect of this is that the annual reporting obligation for non-exempt companies will disproportionately impact entrepreneurs and small businesses.

The Bill provides for civil and criminal penalties for persons who willfully submit false or fraudulent beneficial ownership information, or who knowingly fail to provide complete or updated beneficial ownership information. Importantly, persons who negligently fail to provide complete or updated beneficial ownership information to FinCEN would not be subject to civil or criminal penalties under the Bill.

The Bill includes some elements to protect the privacy of the beneficial ownership information provided to FinCEN, providing that FinCEN may only disclose beneficial ownership information to: (i) a U.S. local, tribal, state, or federal law enforcement agency; (ii) significantly, a U.S. federal agency making a request for information on behalf of a non-U.S. law enforcement agency under an international treaty, agreement, convention, or an order under 18 U.S.C. 3512 or 28 U.S.C. 1782; or (iii) a financial institution (with the customer’s consent) for purposes of complying with customer due diligence requirements imposed under the BSA. The Bill, if enacted into law, would also require FinCEN to revise its customer due diligence rule⁴ (“CDD Rule”) to, among other things, bring the CDD Rule into conformance with the requirements of the Corporate Transparency Act.

Despite the Bill’s passage in the House, it is unclear if or when the Bill will pass in the Republican-controlled Senate. Nonetheless, the Bill was supported by the White House in a published [Statement of Administration Policy](#), which commended the bipartisan work undertaken to develop the Bill, and stated that the Bill “represent[ed] important progress in strengthening national security, supporting law enforcement, and clarifying regulatory requirements.” However, the White House believes that the Bill could still be improved by: (i) aligning the definition of “beneficial owner” to FinCEN’s CDD Rule; (ii) protecting small businesses from unduly burdensome disclosure requirements; and (iii) providing for adequate access controls with respect to information gathered by FinCEN under the Bill.

For questions regarding the Bill, please contact any of the authors in this Alert or your GT counsel of preference. GT’s financial services team can assist with any questions regarding the Bill and its effect on U.S. Companies.

⁴ 31 C.F.R. § 1010.230.

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