

## Congress Enacts Corporate Transparency Act Requiring Corporations, Limited Liability Companies and Similar Entities to Disclose Beneficial Ownership Information

January 4, 2021

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### KEY POINTS

- This advisory summarizes the requirements and legislative intent of the Corporate Transparency Act, which is included under the National Defense Authorization Act, known as the Defense Bill.

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- The Defense Bill was initially passed by Congress but then subsequently vetoed by President Trump on December 23, 2020.

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- President Trump's veto was overridden by the US House of Representatives on December 28, 2020 and the US Senate on January 1, resulting in the enactment of the Defense Bill.

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On January 1, the National Defense Authorization Act for Fiscal Year 2021 (the "Defense Bill") was enacted into law. This Defense Bill includes the Corporate Transparency Act (the "Act"), a revised version of legislation that was originally introduced to the House in 2019, requiring limited liability companies and corporations to disclose certain ownership information. The Defense Bill was vetoed by President Trump on December 23, 2020 after it was initially passed by Congress, but the US House of Representatives voted to override the presidential veto by a super majority margin of 322-87 on December 28, 2020, and the US Senate voted to override the presidential veto by a super majority margin of 81-13 on January 1. The Act requires that all corporations, limited liability companies and "other similar entities" that are formed within any US State (including the District of Columbia, and Puerto Rico and other US Territories), Indian tribe or foreign entities that are registered to do business in the United States (collectively, "Reporting Companies") disclose certain information regarding their beneficial owners. The reasoning behind President Trump's veto of the Bill was entirely unrelated to the Act.

### Legislative Intent

The stated intent of the Act is to establish federal legislation for the collection of beneficial ownership information of Reporting Companies in order to "(A) set a clear, Federal standard for incorporation practices, (B) protect vital United States national security interests, (C) protect interstate and foreign commerce, (D) better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity; and (E) bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards."

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## Key Requirements

- The Act requires Reporting Companies to disclose to the Financial Crimes Enforcement Network (“FinCEN”) of the US Department of the Treasury the below personal information of the beneficial owners of such Reporting Companies. Such disclosure is required to be made through completion of a beneficial ownership statement that is filed at the time of formation (or, if the entity was formed prior to the passage of the Act, within two years after the effective date of the issuance of final regulations for the Act) containing the following information of the applicable beneficial owner(s):
  - Full legal name;
  - Current residential or business street address;
  - Date of birth; and
  - Identification number (such as a driver’s license or passport number).
- Once a Reporting Company has submitted its initial beneficial ownership statement, such Reporting Company will be required to file an updated ownership statement if there are any changes to the beneficial ownership statement within one year after such change. Changes to the information of the beneficial owners (such as name or address) or the beneficial owners themselves will be considered changes that require updating. Although it is not explicitly stated in the Act, the language in the Act seems to suggest that a change in the percentage interests of the beneficial owners is not considered a change that would require an ownership statement to be updated, provided that the list of persons comprising the beneficial owners remains unchanged.
- The Act defines a beneficial owner as an individual who directly or indirectly through any contract, arrangement, understanding, relationship or otherwise:
  - exercises substantial control over the Reporting Company (note: “substantial control” is not defined in the Act); or
  - owns or controls no less than 25 percent of the ownership interests of the Reporting Company.
  - A beneficial owner does not include:
    - a minor child (the information of the parent or guardian must be reported instead);
    - an individual acting as a nominee, intermediary, custodian or agent on behalf of another individual;
    - an individual acting solely as an employee of a Reporting Company;
    - an individual whose only interest in the Reporting Company is through inheritance; or
    - a creditor of a Reporting Company.
- The following entities are not considered Reporting Companies and will either not be required to submit such ownership statements to FinCEN or will otherwise be exempt under the Act:
  - Entities that are already closely regulated (e.g. credit unions, bank holding companies, a registered money transmitting business, broker-dealers, exchanges and clearing agencies, investment advisors, private funds, banks, insurance companies, and utility companies or telecommunications service companies);
  - Publicly traded companies;
  - Dormant entities described in the Act;
  - Tax-exempt entities;
  - Taxable entities that have (1) more than 20 full-time US employees, (2) a physical office in the United States, and (3) more than \$5 million in gross receipts or sales (including income or sales by other entities that are (a) owned by such entity, and (b) through which such entity operates);
  - Any entity owned or controlled, directly or indirectly, by an entity that is otherwise exempt; and
  - Additional entities that the FinCEN may determine on an ongoing basis.

- Under the Act, the beneficial ownership statements submitted to the FinCEN disclosing personal information will be stored and maintained solely with the FinCEN and will not be made publicly available nor will such ownership statements be made generally available to the states. The Act expressly states that the information may only be used for (1) national security, intelligence and law enforcement activities, intelligence or national security purposes, and (2) confirming beneficial information provided to financial institutions to facilitate the compliance of such financial institutions with anti-money laundering laws, provided the consent of the Reporting Company is obtained.
- The FinCEN will hold all information contained on the ownership statement until the date that is five years after the termination of the Reporting Company. The FinCEN may, upon request, disclose such information to:
  - A federal agency engaged in national security intelligence or other law enforcement activity for use in furtherance of the activity;
  - a state, local or tribal law enforcement agency, if a court of competent jurisdiction, including any officer of such court, has authorized the law enforcement agency to seek the information for criminal or civil investigation;
  - a federal agency on behalf of a law enforcement agency, prosecutor or judge of another country, including a foreign central authority of competent authority, under an international treaty, agreement or convention, or an official request made by law enforcement, judicial or prosecutorial authorities in a foreign country when no treaty, agreement or convention is available;
  - a financial institution subject to customer due diligence requirements, with the consent of the Reporting Company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law; or
  - a Federal functional regulator or other appropriate regulatory agency consistent with agencies expressly permitted to receive such information under the Act.
- FinCEN will be required to provide any person that submits an ownership statement with a FinCEN ID number upon request from such person. It is not expressly clear from the text of the Act that issuance of a FinCEN ID number will act as confirmation of compliance under the Act from FinCEN. There is no separate requirement that FinCEN provide a certification that a Reporting Company has complied with the requirements of the Act and has properly submitted a beneficial ownership statement.
- Finally, the Act prohibits the issuance of a certificate in bearer form evidencing either whole or fractional interest in any corporation, limited liability company, or other similar entity formed under the laws of any state or Indian tribe.

### **Penalties for Non-Compliance/Safe Harbor**

- Any party that files an application for the formation of a Reporting Company that intentionally fails to comply with the Act will be liable for fines of no more than \$500 for each day that there is a willful failure to report complete beneficial ownership information, and such parties may be subject to aggregate fines of up to \$10,000 or a prison term of up to two years. The Washington Post has reported that attorneys helping with corporate-registration paperwork on behalf of a client shall be included as parties subject to penalty, if they violate the Act. Negligent violations, however, will not be subject to any civil or criminal penalties, and there is no indication in the language of the Act that the federal government will consider any actions taken by a non-complying Reporting Company to be null and void based solely on such Reporting Company's non-compliance with the Act. Thus, the failure to comply with reporting requirements will not vitiate the formation of the applicable entity or prohibit a non-complying Reporting Company from conducting business or commencing an action in a federal court. In addition, any party that unlawfully discloses any beneficial information shall be liable for fines of up to \$500 per day and up to \$250,000 in the aggregate, and up to 10 years in prison.

- The Act has included safe harbor rules for any person that submits inaccurate beneficial ownership information provided that such person (1) had no knowledge of the inaccuracy, (2) was not trying to evade the reporting requirement, and (3) corrects the information no later than 90 days after the initial report was submitted.
- Although not explicitly stated in the Act, partnerships and trusts that are formed and registered within the United States are likely to be considered “similar entities,” as described in the definition of a Reporting Company, and, thus, such entities are likely to be subject to the requirements of the Act. An earlier version of the Act had explicitly excluded limited partnerships and trusts from the definition of a Reporting Company, but all such language has been omitted from the current version of the Act that is part of the Bill. The Act does not provide any other clarity as to what is intended by “other similar entities.”

## Effective Date

- The Act will become effective on the date that the regulations of the Act are prescribed and issued by the US Secretary of the Treasury, which shall be no later than one year after the enactment of the Act. The Act provides a framework, but there are still a lot of missing details regarding how the Act will be administered and applied. Presumably, these details will be fleshed out in the regulations, and the large amount of currently open questions will be answered.

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01/04/21