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U.S. Anti-Money Laundering

Disclosure of Corporate Beneficial Ownership May Soon Be Required in the United States

If the U.S. House of Representatives has its way, some corporations will soon be required to report information on their beneficial owners to the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). On Monday, July 20, 2020, the House adopted into its version of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 ("NDAA") provisions amending the Bank Secrecy Act that would require most small, privately-held businesses to disclose the names, dates of birth, addresses, and passport, driver's license, or other government-issued identification number of the entity's beneficial owners. This development is being seen as a major victory for anti-money laundering and anti-corruption advocates. Should it be enacted, the provisions will be a departure from the United States' historical reticence to require the disclosure of such beneficial ownership information to the government.

As the measure currently stands and with limited exceptions, any business concern with twenty employees or less, \$5 million or less in gross receipts or sales, and an operating presence in the United States must annually file the required beneficial ownership information with FinCEN, and update FinCEN within a reasonable time of any changes to beneficial owners' information. Among other entities, public companies, banks, and insurance companies, along with their respective subsidiaries, will not be required to file their beneficial ownership information with FinCEN. Beneficial ownership information will only be required from individuals who exercise substantial control over a business, own 25 percent or more of the equity, or receive substantial economic benefits from the assets of the business. The House legislation also would impose civil and criminal penalties on persons who knowingly provide FinCEN with false beneficial ownership information or willfully fail to provide complete or updated information. In addition to the beneficial ownership disclosure requirements of the amendment, the bill prohibits a corporation



or a limited liability company from issuing bearer certificates evidencing either a whole or a fractional share in the entity.

As written, this bill takes aim at shell corporations, but will also increase the administrative demands on small businesses.

FinCEN Director Kenneth Blanco has pointed to the use of anonymous shell companies as one of the biggest gaps in the United States' BSA/AML regime and commented that it is time that a system for establishing beneficial ownership information at the time of incorporation be instituted.¹ In 2016, FinCEN finalized the Customer Due Diligence ("CDD") Rule, which became effective May 11, 2018, to strengthen the due diligence obligations for certain types of financial institutions with respect to who owns and controls its customers/clients.² Director Blanco has stressed on many occasions that, while the CDD rule requires financial institutions to "verify" certain identifying information upon opening an account at a financial institution, it does not require disclosure of "who really owns and controls a business and its assets."³

For more than a decade, the leading international anti-money laundering standard-setting body, the Financial Action Task Force on Money Laundering ("FATF"), has urged the United States to collect corporate beneficial ownership information and prohibit the issuance of bearer shares.⁴ FATF rates the United States as "non-compliant" with some of its recommendations, stating that the United States had, "no measures in place to ensure that there is adequate, accurate, and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities."⁵

In 2006, FATF recommended that the United States urgently determine ways in which, "adequate and accurate information on beneficial ownership may be available on a timely basis to law enforcement authorities."⁶ In 2016, FATF noted that the "[l]ack of timely access to adequate, accurate and current beneficial ownership information (BO) remains one of the fundamental gaps in the U.S. context."⁷

A beneficial ownership disclosure amendment was not included in the Senate's version of the must-pass NDAA, but a similar Crapo-Brown amendment (despite some technical and substantive differences with the House version), entitled the Anti-Money Laundering Act of 2020, was offered and enjoys bipartisan backing among several influential Senators.⁸ Senate Democrats broadly support a requirement that certain companies disclose their beneficial owners to the Federal government, as do many Republican Senators and key Republican leaders including Banking Committee Chairman Michael Crapo, Judiciary Committee Chairman Lindsey Graham, Finance Committee Chairman Charles Grassley, and Small Business and Entrepreneurship Chairman Marco Rubio.⁹ Such broad-based support, along with support from the Trump Administration, leads many to believe that the disclosure requirements will substantially survive the reconciliation process and be enacted into law. More than fourteen years later, FATF's recommendations may become a reality in the United States, as it may finally join other advanced economies in requiring the disclosure of beneficial ownership information.

¹ See <https://www.banking.senate.gov/hearings/10/24/2018/combating-money-laundering-and-other-forms-of-illicit-finance-regulator-and-law-enforcement-perspectives-on-reform>.

² <https://www.govinfo.gov/content/pkg/FR-2016-05-11/pdf/2016-10567.pdf>.

³ <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-american-bankers>.



⁴ See e.g., “Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism for the United States of America” (June 23, 2006), FATF, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf>.

⁵ *Id.* at 304.

⁶ *Id.* at 308.

⁷ “Mutual Evaluation Report of Anti-Money Laundering and Counter-Terrorist Financing Measures of the United States” (December 2016), FATF, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>.

⁸ Neil Haggerty, “House Passes AML Reforms in Defense Spending Bill” (July 22, 2020), American Banker, available at: <https://www.americanbanker.com/news/house-passes-aml-reforms-in-defense-spending-bill>.

⁹ Jim Saksa, “House Votes to Attach Anti-Money Laundering Provision to Defense Bill” (July 20, 2020), CQ.

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