

## Searching for Shells: New Federal Law Requires Privately-Held Companies to Disclose Ownership

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Tucked away in the recently-passed National Defense Authorization Act is the long-expected Anti-Money Laundering Act of 2020 (AMLA). The AMLA is the most significant update to anti-money laundering (AML) laws in the U.S. in the past 20 years and includes a number of reforms, providing additional tools for enforcing financial and money laundering crimes, the enforcement of which is expected to increase under the incoming administration.

One key component of the AMLA is the Corporate Transparency Act (CTA), designed to combat money laundering via shell companies. The CTA for the first time requires “reporting companies” to register their beneficial owners with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN).

In the CTA’s introduction, Congress notes that “a person forming a corporation or limited liability company within the United States typically provides less information at the time of incorporation than is needed to obtain a bank account or driver’s license and typically does not name a single beneficial owner.” In addition, malign actors have “exploited State formation procedures to conceal their identities” when forming these companies in the United States, in turn using these entities to “commit crimes affecting interstate and international commerce.”

Previously, reporting requirements at formation varied by state, many of which did not require any reporting on beneficial ownership. Now, all reporting companies will be required to provide this information to the federal government regardless of the state formation requirements.

The definition of “reporting companies” covers smaller businesses and shell companies, which Congress believes most likely to be the entities most able to take advantage of corporate registration loopholes to hide misconduct. It includes any corporation or limited liability company formed or registered under the laws of the states or Indian Tribes, or formed under the laws of a foreign country and registered to do business in the U.S., but excludes those with more than 20 full-time employees in the U.S., more than \$5 million in gross receipts in the previous year, and a physical office within

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the U.S. The definition of “reporting companies” also exempts numerous broad categories of companies already subject to significant transparency or reporting requirements, including those that are publicly traded, regulated, nonprofit, or governmental entities.

A “beneficial owner” is defined as an individual who, directly or indirectly, (i) exercises substantial control over an entity, or (ii) owns or controls not less than 25% of the ownership interests of the entity, but does not include individuals who profit from the entity but do not own or control it, which had been included in prior drafts of the bill and is often included in the definition of beneficial owner in other laws and regulations.

The definition specifically excludes, among others, agents, intermediaries, and custodians acting on behalf of another individual, as well as employees of a reporting company whose control or economic benefit with respect to the entity is derived solely from their employment. Notably, ownership must be traced back through any entities in the ownership chain to identify the individual or individuals who own, ultimately own, or control the entity. Required information includes each beneficial owner’s name, date of birth, residential or business address, and a unique identifying number from an acceptable identification document (such as a state driver’s license or passport).

The CTA’s reporting obligations will take effect once the Department of Treasury issues implementing regulations, which it is required to do within one year. Once regulations are published, newly-formed reporting companies will be required to file at the time of formation, and existing reporting companies will be required to file within two years of finalization of the regulations. After its initial filing, a reporting company will have an ongoing obligation to file updates to reflect any changes in beneficial ownership not later than one year after the effective date of the change. The CTA does not specify how beneficial owner information is to be filed, but this is expected to be addressed in the regulations.

FinCEN, the agency that will receive these filings, is a small arm of the Treasury Department that serves as the U.S. financial intelligence unit, with the mission of protecting the U.S. financial system from illicit use. FinCEN is responsible for tracking suspicious activity reports (SARs) and currency transaction reports (CTRs) filed by financial institutions.

Under the CTA, FinCEN will maintain beneficial ownership information in a non-public database, subject to disclosure only for specified law enforcement purposes, but they can readily share the information with other law enforcement authorities, both in the U.S. and internationally. Similar registries used by other countries, such as the United Kingdom, have been used heavily by law enforcement in a wide variety of investigations. The CTA also allows FinCEN, with a reporting company’s consent, to disclose beneficial ownership information to a financial institution to facilitate that institution’s compliance with Customer Due Diligence/Know Your Customer anti-money laundering requirements.

The CTA includes independent enforcement provisions, imposing civil and criminal penalties on those who *knowingly* provide or attempt to provide FinCEN with false or fraudulent beneficial ownership information or *willfully* fail to provide complete or updated beneficial ownership information. Violators will be subject to a civil penalty of up to \$10,000 and/or imprisonment of up to three years.

However, a person who *negligently* provides false information or fails to provide complete or updated beneficial ownership information will not be subject to civil or criminal penalties. The CTA also contains a safe harbor provision, protecting a person who provided inaccurate information if that person voluntarily and promptly corrects the report within 90 days of its initial filing.

In addition to the CTA's beneficial ownership reporting requirement, the AMLA also added an AML whistleblower program along with a number of other long-expected financial regulatory updates designed to deter money laundering and other financial crimes. One notable update is the increase in the Department of Justice's authority to subpoena foreign banks that maintain accounts in the U.S. by providing them with the authority to subpoena records related to *any account* – including those wholly outside the U.S. – that fall within the investigative categories.

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