

New Law Requires Federal Registration and Ownership Disclosure for LLCs and Corporations

Article By:

Jeffrey K. Cassin

Peter D. Hutcheon

On New Year's Day, January 1, 2021, the U.S. Senate voted 81 to 13 to override President Trump's veto, thus joining the House of Representatives, which had taken similar action four days earlier 322 to 87, and so making the National Defense Authorization Act ("NDAA") law.

The NDAA substantially revises U.S. anti-money laundering ("AML") provisions from those extant under the Bank Secrecy Act of 1970, as strengthened by the USA PATRIOT Act of 2001 in the aftermath of 9/11, discussed further [here](#). Perhaps of most immediate significance to entities involved in the American financial system, the NDAA imports from the Corporate Transparency Act passed by the House of Representatives on October 22, 2019, [previously discussed here](#), a systematic federal filing requirement. Both aspects of these innovations in financial system regulation are overseen by the [Financial Crime Enforcement Network \("FinCEN"\)](#), a special Bureau of the [Department of Treasury](#) dealing with financial intelligence and investigation of "crimes against the realm."

New Federal Disclosure Requirement Means Corporations and LLCs Will No Longer Protect the Identities of Ownership for Some Purposes

In an effort to curtail the use of business entities to enable money-laundering or finance terrorism, the House of Representatives, on October 22, 2019, passed the [Corporate Transparency Act of 2019](#) (the "Act"), which was essentially incorporated into the NDAA for Fiscal Year 2021. Despite the veto by President Trump, the Act became law on January 1, 2021, [due to a congressional override of the President's veto](#). This means new businesses and existing businesses will have significant new disclosure requirements that ownership will need to be aware of.

The Act requires each newly-formed corporation and each newly-formed limited liability company, unless specifically exempt, to file a disclosure report with FinCEN of the beneficial ownership and related information of those entities.

The Act applies to corporations and LLCs formed under the law of any state or of any Indian Tribe, and the states are required under the Act to notify incorporators of businesses of the requirement to file these reports.

Existing corporations and LLC's have two years after final regulations are issued to become subject to the Act's reporting requirements.

During this time, businesses and their owners, together with legal representation, should engage in careful consideration of the requirements to avoid a misstep that can lead to significant consequences.

Who Is a “Beneficial Owner” for the Corporate Transparency Act?

- Under the Act, each of the following is a “beneficial owner:”
 - A natural person
 - Who directly or indirectly (through any contract, arrangement, understanding, relationship, or otherwise)
 - Exercises substantial control over the entity
 - Owns 25% or more of the equity
 - Receives “substantial economic benefits” from the assets of the entity

What Information Is Required for Each “Beneficial Owner?”

- Full legal name
- Date of birth
- Current residential or business address
- The unique identifying number from a valid U.S. passport, personal identification card, or state driver's license; if a beneficial owner does not have a U.S. passport, ID card, or state driver's license, the report must contain the identifying number from a valid foreign passport together with a legible and credible copy of the pages of that passport having a photo of the person, date of birth and a unique identifying number for the person – all of which must be certified as valid by a person residing in the state or tribal territory where the entity is formed

What Are the Consequences of a Failure to Comply?

A person who knowingly provides false or fraudulent information or willfully fails to provide complete or updated information shall be liable for a civil penalty of up to \$10,000 and may be fined under criminal provisions in the U.S. Code and/or imprisoned up to three years. The Act does provide that civil or criminal penalties shall not apply in the case of negligent non-compliance, although it remains to be seen how “negligence” will be interpreted.

Who Is Exempt?

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- Not a “beneficial owner”
 - A minor child
 - A nominee, custodian, or agent
 - An employee “whose control over or economic benefits” from the entity “derives solely from” employment status
 - A person whose interest is through inheritance
 - A creditor (unless that gives the creditor control)
 - Excluded entities
 - An entity whose securities are registered with the SEC
 - An entity chartered under an interstate compact
 - An FDIC depository institution
 - A credit union
 - A bank holding company
 - An SEC-registered broker/dealer
 - A securities exchange or clearing agency
 - An investment company or an investment advisor registered under the 1940 Acts or described in one of the Acts
 - An insurance company
 - An entity registered with the [Commodity Futures Trading Commission \(“CFTC”\)](#)
 - A public accounting firm registered with the [Public Company Accounting Oversight Board \(“PCAOB”\)](#)
 - A public utility
 - A church, charity, or non-profit with tax-exempt status
 - A financial market utility designated by the [Financial Stability Oversight Council \(“FSOC”\)](#)
 - An insurance producer
 - Certain pooled investment vehicles

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- A business concern with
 - 20 or more full-time employees in the U.S.
 - \$5 million in gross receipts or sales as shown on U.S. tax filings
 - An operating physical presence at an office in the U.S.
 - Any corporation or LLC formed and owned by an excluded entity

FinCEN has express authority to remove types of entities from the excluded list or to add new exclusions. In relation to that authority, FinCEN is charged with continuing to study “beneficial owner” issues.

When Must the Federal Registration and Ownership Disclosure Be Updated?

The corporate or LLC entity must annually file a report that reflects changes. The Act provides that FinCEN may by regulation require updates within a specified time after a change occurs.

Our Observations

Although the Act essentially brings the U.S. in line with ownership disclosure regimes in Europe and elsewhere, this is an extra reporting requirement for entity formation that will increase the burdens of forming new entities and operating existing entities (after the end of the two-year grace period). It may also make the use of these entities to purchase real estate, etc., somewhat less useful. In any event, clarifying regulatory action by FinCEN will be essential to effectively implement these NDAA provisions. The Act does contain a directive to the Secretary of the Treasury to end existing Know Your Customer due diligence regulations that are unnecessary or duplicative given the passage of the Act. The beneficial owner rules under the NDAA will, in any event, add a significant new layer to the process of business formation.

The disclosure requirements under the Act strengthen the power and scope of federal jurisdiction to collect information on business entities – typically state-driven – for purposes of curtailing money laundering and terrorist financing but will, as a result, limit the privacy protections that had been afforded to business ownership for legitimate privacy concerns.

In addition to being attentive to these requirements, LLCs and corporations will need to maintain in place (even in their governing documents) the authority, policies, and procedures to collect and maintain, for each owner, the full legal name; date of birth; current residential or business street address; and identification information, that was not previously required to be collected in the case of most business entity stock/equity ownership rules.

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