



October 2017

NASS Summary: Corporate Transparency Act (S. 1717 | HR3089)

HR 3089: Introduced June 28, 2017 and referred to House Financial Services Committee

S. 1717: Introduced August 2, 2017 and referred to the Committee on Banking, Housing, and Urban Affairs

Sponsors/Co-Sponsors:

S. 1717: Sen. Ron Wyden (OR), Sen. Marco Rubio (R-FL).

HR 3089: Rep. Carolyn Maloney (D-NY), Rep. Peter King (R-NY), Rep. Maxine Waters (D-CA), Rep. Ed Royce (R-CA), Rep. Gwen Moore (D-WI), Rep. Stephen Lynch (D-MA), Rep. Daniel Donovan (R-NY), Rep. Frank LoBiondo (R-NJ)

Effective Date

By FY 2019 (October 1, 2018), the Secretary of the Treasury must issue regulations requiring all corporations and LLCs formed in a state that doesn't collect the beneficial ownership information and other information described in the bill (referred to as a "formation system") to file that information with the Financial Crimes Enforcement Network (FinCEN) at Treasury. Once regulations are written for compliance with collection of beneficial ownership info by states or FinCEN, the Secretary of Treasury can no longer require that this information be provided to IRS (SS4 form).

Collection of Beneficial Ownership Information from Corporations and LLCs by States or FinCEN

States that meet the requirements of the bill are considered to have a "formation system". If a state does not implement a formation system, corporations and LLCs must provide information required under the bill to FinCEN.

Information Provided to the State

Corporations and LLCs that do not meet the definition of "exempt entities" must provide the state with a list of beneficial owners during the formation process. The list must include each beneficial owner's name, address, and unique identifying number from non-expired passport or DL.

Foreign Beneficial Owners

If the list of beneficial owners includes any foreign individuals, the corporation or LLC must have a formation agent verify the individual's name, address, and identity, and obtain a copy of the individual's foreign passport information. The corporation or LLC must provide the state with a certification from the formation agent that carries out these requirements, and the certification must be included in an annual filing with the state.

Updating of Beneficial Ownership Information and Annual Filings

Each corporation or LLC must provide the state with an updated list of beneficial owners within 60 days of a change. Corporation and LLCs must also include the list of beneficial owners in an annual filing with the state. Any formation agent who forms/acquires a corporation or LLCs for the purpose of transferring to someone else must submit an updated list of beneficial owners to include address and identifying info within 10 days of the transfer.

Bearer Shares

No corporations or LLCs can issue certificates in bearer form in whole or in part.

Maintenance of Beneficial Ownership Information

Retention of Information

Each state must retain the beneficial ownership information for 5 years following the date that a corporation or LLC terminates.

Public Access

States have the authority to determine whether to disclose any or all of the beneficial ownership information to the public.

No Verification Duty

States are not required to verify any of the beneficial ownership information, unless Treasury rules ultimately require it.

Release of Beneficial Ownership Information

The state must disclose beneficial ownership information in response to a subpoena or summons from a state or federal agency or congressional committee; a written request from a federal agency on behalf of another country; written request by FinCEN, a written request made by a financial institution, with customer consent, as part of their Customer Due Diligence (CDD) requirements. Any formation agent holding the identification information for foreign beneficial owners must disclose that information in the circumstances outlined above.

The state must disclose “clearly and conspicuously” that the beneficial ownership information may be provided in the manner described above.

Beneficial ownership information filed with FinCEN must be disclosed in response to all the same requests listed above for states.

Option to Use Licensed Formation Agents for Beneficial Ownership Information

Use of a Licensed Formation Agent

A state may permit a corporation or LLC to provide beneficial ownership information to a licensed formation agent residing in the state if the state has a formal system for licensing formation agents. Licensed agents must register with the state, meet fitness and honesty standards, maintain a physical office and records within the state, undergo regular monitoring, and be subject to noncompliance sanctions. If a corporation or LLC is permitted to, and does, utilize a licensed formation agent, the corporation or LLC must provide the state with a certification from the licensed formation agent who will possess and maintain the beneficial ownership information. The certification and contact information must also be included in an annual filing with the state.

Duties of a Licensed Formation Agent

A licensed formation agent must maintain the beneficial ownership information for five years after termination of the LLC or corporation, and must disclose the information under the same circumstances as required for states (e.g. in response to a subpoena or summons).

If the relationship between the licensed formation and the corporation or LLC ends, the licensed formation agent must provide the state with the beneficial ownership information or, if instructed by the corporation or LLC, transmit the information to another licensed formation agent and notify the state.

State Collection of Identification Information from Exempt Entities

Exempt Entity Certification

Any corporation or LLC defined as exempt (e.g. publicly traded corporations) doesn't have to disclose beneficial ownership information, but the person forming the exempt entity must provide the state with a certification that identifies why entity is exempt. The certification must also include the name, address, and state driver's license/identification number or passport number of the person forming the exempt entity or someone who will be an officer, director, or other agent of the exempt entity.

Foreign Identification Information

If the person identified in the exempt entity certification is a foreign individual, the exempt entity must have a formation agent verify the individual's name, address, and identity, and obtain a copy of the individual's foreign passport information. The exempt entity must provide the state with a certification from the formation agent that carries out these requirements.

Exempt Entities with an Ownership Interest

A corporation or LLC will also be considered exempt if an exempt entity has an ownership interest in that corporation or LLC. It must also provide the state with the name of the exempt entities that have the ownership interest.

Filing Requirement for Exempt Entities Created Prior to the Effective Date

Any exempt entity that was created prior to the effective date of the bill has two years from the date the bill goes into effect to provide the state with the exempt entity certification.

Penalties

Prohibits anyone providing or attempting to provide false or fraudulent beneficial ownership information to a state or formation agent; willfully failing to provide complete or updated beneficial ownership information to a state or formation agent or knowingly disclosing the existence of a valid request for beneficial ownership information except to the extent necessary to fulfill the request or as authorized by the entity that issues the request. Formation agents are prohibited from knowingly failing to obtain or maintain, and update the beneficial ownership information

In addition to any state civil or criminal penalties, anyone in violation of the relevant provisions is liable for up to \$10,000, and may face additional fines and/or imprisonment of up to 3 years.

Federal Agency Guidance and Rules

Secretary of the Treasury, in consultation with the Secretary of Homeland Security and the Attorney General may issue guidance or rules to clarify the definitions of the bill, and to specify how to verify beneficial ownership or other identification information, including whether the verification procedures required for foreign beneficial owners should apply to all beneficial owners, or whether the verification process should require the notarization of signatures.

Reports

Report on State Compliance

No later than 42 months after enactment, the Comptroller General must submit a report to Congress identifying which states obtain beneficial ownership information. For states that do not obtain beneficial ownership information, the report must identify whether corporations and LLCs formed in the state are in compliance with the requirement to provide the beneficial ownership information to FinCEN; and whether the Department of the Treasury is in compliance with the Act, and if not, what steps it must take to achieve compliance.

Report on Other Legal Entities

No later than 2 years after the bill is enacted, the Comptroller General must submit a report to Congress that identifies state procedures regarding the formation of partnerships, trusts, and other legal entities. The report must also identify any states that required collection of beneficial ownership information from these entities, and must evaluate whether the lack of beneficial ownership information from these entities raises concerns about the involvement of the entities in illicit conduct, has impeded investigations, or has drawn international criticism.

Report on the Bill's Effectiveness

No later than 5 years after the bill is enacted, the Comptroller General must conduct and submit to Congress a study assessing the effectiveness of incorporation practices implemented under the bill in providing law enforcement agencies with prompt access to reliable, useful, and complete beneficial ownership information; and strengthening the capability of law enforcement agencies to combat incorporation abuses and other, civil and criminal misconduct.

Disclosure by Federal Contractors

The Administrator for Federal Procurement Policy must revise the Federal Acquisition Regulation to require any contractor who is subject to the requirement to disclose beneficial ownership information under this Act to provide the information required to be disclosed to the Federal Government as part of any bid or proposal for a contract with the value threshold in excess of the simplified acquisition threshold.

Formation Agent Anti-Money Laundering Obligations

Bank Secrecy Act definition of Financial Institution is amended to include "any person who, for compensation acts on behalf of another person to form, or assist in formation of, a corporation or limited liability company under the laws of a State; or purchases, sells, or transfers the public records that form a corporation or limited liability company." Bank Secrecy Act definition of Financial Institution is amended to include "any person involved in forming a corporation or limited liability company."

No later than 120 days after the bill is enacted, the Secretary of the Treasury must publish a proposed rule in the Federal Register requiring person persons meeting the amended definition to establish anti-money laundering programs under the Bank Secrecy Act. A final rule must be published no later than 270 days after the bill is enacted.

Any rule promulgated must exclude from the category of persons engaged in the business of forming a corporation or LLC any government agency, and any attorney or law firm that uses a paid formation agent operating within the US to form the corporation or LLC.

Funding

During the three years after the bill is enacted, funds are authorized to be made available to each state to pay reasonable costs relating to compliance with the requirements of this Act. Funds must be provided from Treasury Department asset forfeiture funds and/or Department of Justice asset forfeiture funds.

Upon application by a state, and without further appropriation, the Secretary of the Treasury must make unobligated balances in the Department of Treasury Forfeiture Funds available to the states. This amount may not exceed a total of \$30 million.

Upon application by a state, and without further appropriation, the Attorney General must make excess unobligated balances in the Department of Justice Asset Forfeiture Fund available to the states. This amount may not exceed a total of \$10,000,000.

Funds otherwise available to a state under the Homeland Security Act may not be withheld for failure to comply with the provisions of the bill.

Evaluation of Funding Requests

No later than the end of the 180-day period beginning on the date the bill is enacted, the Secretary of the Treasury and the Attorney General must issue joint guidance setting forth the procedures for states to apply for funds, including determining which state measures should be funded to assess, plan, develop, test, or implement relevant policies, procedures, or system modifications.

Definitions

Beneficial Owner

The term means a natural person who, directly or indirectly, exercises substantial control over a corporation or limited liability company; or “(ii) has a substantial interest in or receives substantial economic benefits from the assets of a corporation or limited liability company.

The term “beneficial owner” does not include any of the following:

- a minor child;
- a person acting as a nominee, intermediary, custodian, or agent on behalf of another person;
- a person acting as an employee of a corporation or limited liability company and whose control over or economic benefit from the company derives solely from employment status of the person;
- a person whose only interest in the corporation or limited liability company is through a right of inheritance, unless the person also meets the of a beneficial owner;
- a creditor of a corporation or limited liability company, unless the creditor also meets the of a beneficial owner

Corporation; Limited Liability Company (LLC)

The terms “corporation” and “LLC” have the meanings as defined by state law. It includes any non-US entity eligible for registration or registered to do business as a corporation or LLC in the state.

After enactment, every entity that files in a state will be considered an LLC or corporation.

The terms “corporation” and “LLC” do not include any of the following:

- any business that has 20 or more full time employee in the US; files income tax returns with more than five million in gross receipts or sales; and has an operating presence or physical office within the U.S and, has more than 100 shareholders.
- a business that issues securities registered or required to file reports under the Securities and Exchange Act
- a business constituted or sponsored by a state, political subdivision of a state, an interstate compact by two or more states, or a federal department or agency [or under S2489, an international organization of which the United States is a member].
- a depository institution
- a credit union
- a bank holding company
- a broker dealer registered under the Securities and Exchange Act
- an exchange or clearing agency registered under the Securities and Exchange Act
- an investment company or investment advisor registered with the SEC
- an insurance company
- a registered entity, futures commission merchant, introducing broker, commodity pool operator, or commodity trading advisor registered with the Commodity Futures Trading Commission
- a public accounting firm registered in accordance with the Sarbanes-Oxley Act
- a public utility
- a church or nonprofit entity (or charity under H4450).
- any corporation or LLC formed and owned in whole or in substantial part by any of the above entities;
- any individual business or class of business which the Secretary of Homeland Security, the Attorney General of the US, and the Secretary of the Treasury jointly determine in writing upon request of a state and through an order, guidance, or rule should be exempt from the because requiring beneficial ownership information from the business would not serve the public interest and would not assist law enforcement efforts to detect, prevent, or punish criminal or civil misconduct.

Formation Agent

A formation agent is any person who, for compensation, acts on behalf of another person to assist in the formation of a corporation or LLC under state law, or purchases, sells, or transfers the public records that form a corporation or limited liability company.