

NASS Summary of S.2563, the Illicit Cash Act (beneficial ownership provisions)

Introduced in Senate on 9/26/19 by Sen. Mark Warner (D-VA) and referred to Senate Banking Committee

Co-Sponsors: Senators Cotton (R-AR), Jones (D-AL), Rounds (R-SD), Menendez (D-NJ), Kennedy (R-LA), Cortez Masto (D-NV), Moran (R-KS)

Submitting Beneficial Ownership Information Reports to FinCEN

A reporting company (corporation, LLC, or similar entity) must submit to FinCEN, at the time of incorporation, a report that includes beneficial ownership information.

A reporting company formed prior to enactment must submit the report to FinCEN no later than two years after enactment.

A reporting company must submit an updated report to FinCEN within 90 days of any changes in the actual beneficial owners of the reporting company.

A reporting company must submit an updated report to FinCEN not later than 1 year after any changes to the information (e.g. address) in the report submitted to FinCEN.

Treasury must develop regulations for submitting the reports to FinCEN. Treasury must try (to the extent practicable) to:

- collect information through existing federal, state and local processes and procedures;
- minimize burdens on reporting companies associated with the collection of the information in light of the costs placed on legitimate businesses;
- collect the information, including any updates in changes to beneficial ownership, to ensure the usefulness of beneficial ownership information for law enforcement and national security purposes;
- establish partnerships with state, local and tribal governmental agencies;
- permit any entity that is not a reporting company to demand and receive from FinCEN written confirmation that the entity is not subject to the reporting requirements.

The report submitted to Treasury by a reporting company must identify each beneficial owner of the reporting company by:

- full legal name
- date of birth
- current residential or business street address as of the date the report is delivered
- unique identifying number with respect to the beneficial owner from a nonexpired U.S. passport, a nonexpired personal ID card, or a nonexpired driver's license.
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The reporting requirements take effect on the effective date of the regulations prescribed by Treasury, which must be no earlier than 1 year after the date of enactment.

FinCEN must issue an ID number to any individual who requests it and provides FinCEN with the information required to be included in the reports. Any person required to submit the information in the reports may instead report the FinCEN ID number of the individual. **(NASS has questions about FinCEN number and its uses, we will follow up for clarity.)**

Retention and disclosure of beneficial ownership information by FinCEN

FinCEN must maintain the beneficial ownership information until 5 years after a corporation or LLC terminates.

Beneficial ownership information reported to FinCEN must be provided by FinCEN only upon receipt of:

- a request through appropriate protocols by a local, tribal, state, or federal law enforcement, national security, or intelligence agency;
- a request from a federal agency on behalf of a law enforcement agency of another country;
- a request made by a financial institution or other entity or person with CDD requirements, with consent of the reporting company, to facility compliance with CDD requirements.

The appropriate protocols for requesting beneficial ownership information from FinCEN must:

- protect the privacy of any beneficial ownership information provided by FinCEN to a local, tribal, state, or federal law enforcement, national security, or intelligence agency;
- ensure that a local, tribal, state, or federal law enforcement, national security, or intelligence agency requesting beneficial ownership information has an existing investigatory basis for requesting such information and that basis is not in violation of a local, or city ordinance;
- ensure that access to beneficial ownership information is limited to authorized users at a local, Tribal, State, or Federal law enforcement, national security, or intelligence agency who have undergone appropriate training, and that the identity of such authorized users is verified through appropriate mechanisms such as 2-factor authentication;
- include an audit trail of requests for beneficial ownership information by a local, Tribal, State, or Federal law enforcement, national security, or intelligence agency, including, as necessary, information concerning queries made by authorized users at a local, Tribal, State, or Federal law enforcement, national security, or intelligence agency;
- require that every local, Tribal, State, or Federal law enforcement, national security, or intelligence agency that receives beneficial ownership information from FinCEN conducts an annual audit to verify that the beneficial ownership information received from FinCEN has been accessed and used appropriately, and consistent with these requirements;
- require FinCEN to conduct an annual audit of every local, Tribal, State, or Federal law enforcement, national security, or intelligence agency that has received beneficial ownership information to ensure that such agency has requested beneficial ownership information and has used any beneficial ownership information received from FinCEN appropriately and consistent with these requirements.

A request that violates the protocols shall subject the requesting agency to criminal penalties. The information provided by FinCEN to a local, tribal, state, or federal law enforcement agency may only be used for law enforcement, anti-money laundering, terrorist financing, national security, or intelligence purposes.

Agency Coordination

Treasury must endeavor to the extent practicable to update the beneficial ownership information reports submitted to FinCEN by working collaboratively with other federal agencies.

Information from Relevant Federal Agencies

Relevant federal agencies must to the extent practicable and consistent with privacy protection provide such required information to FinCEN for purposes of maintaining an accurate beneficial ownership database. Treasury may promulgate regulations to carry out this provision.

Financial Institution Customer Due Diligence (CDD) Obligations

A financial institution subject to CDD requirements that has knowledge the information contained in the FinCEN database conflicts with any information the financial institution has must report the discrepancy to FinCEN and inform the relevant customer of their obligations under the Act.

Each financial institution (subject to customer due diligence requirements) must periodically send a customer that is a reporting company the list of beneficial owners maintained by FinCEN and associated with the company and require that the customer verify that the list is accurate and inform the customer of their obligations under the Act.

State Notification of Federal Obligations

No later than 2 years after enactment, in each state that receives funding under the Act, the Secretary of State or similar office responsible for the formation of entities must take the following actions:

- periodically, including at the time of any renewal of any license to do business in the state and in connection with state corporate tax renewals, notify filers of their requirements as reporting companies under the Act and provide them with a copy of the reporting company form created by Treasury or an internet link to the form.
- update its websites, forms relating to incorporation and physical premises to notify filers of their requirements as reporting companies, including providing an internet link to the reporting company form created by Treasury.

A notification must explicitly state that it is on behalf of the Treasury for the purpose of supporting a nonpublic registry of business entities in the U.S.

Prohibition on Bearer Shares

Prohibits corporations or LLC from issuing a certificate in bearer form evidencing a whole or fractional interest in the corporation or LLC.

Penalties

Prohibits providing or attempting to provide false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph, to FinCEN; willfully failing to provide complete or update beneficial ownership information; or knowingly disclosing the content of any report filed with FinCEN except to the extent necessary to fulfill an authorized request for beneficial ownership information. Knowingly using the contents of any report filed with FinCEN for an unauthorized purpose.

A person who violates certain provisions is liable for up to \$500 for each day the violation continues and may be fined up to \$10,000 and may face additional fines and/or imprisonment of up to 4 years.

A person who violated certain other provision is liable for a civil penalty of up to \$500 per day of the violation and criminal penalties also apply.

A person who negligently violates the provisions is not subject to civil or criminal penalties.

De Minimis Violation Waiver

A de minimis violation includes any changes to the beneficial ownership reporting information that is due to a change in an address or the expiration of an identification document. FinCEN must provide assistance to, and may not impose any penalty on any person seeking to remedy a de minimis violation of paragraph and come into compliance. Treasury shall waive the penalty if the Secretary determines that the violation was de minimis and the reporting company took reasonable steps to update the information.

Treasury IG Investigation of Cybersecurity Breach

In the event of a cybersecurity breach that results in substantial unauthorized access and disclosure of sensitive beneficial ownership information, the inspector general of Treasury must conduct an investigation into FinCEN cybersecurity practices that, to the extent possible, determines any vulnerabilities within FinCEN privacy security protocols and provide recommendations for fixing the deficiencies. The inspector general must submit a report to the Secretary of the Treasury on the investigation. The Secretary must determine whether FinCEN had any responsibility for the cybersecurity breach or whether policies, practices, or procedures implemented at the direction of the Director of FinCEN led to the cybersecurity breach. The Secretary must submit a report to Congress with the Secretary's findings and a determination on whether to retain or dismiss the Director of FinCEN.

User Complaint Process

The inspector general of Treasury must provide contact information to receive external comments or complaints regarding the beneficial ownership information collection process. The inspector general must submit a periodic report to Congress summarizing external complaints and inspector general investigations related to the collection of beneficial ownership information.

Funding Authorization

During the three years after the bill is enacted, funds are authorized to be made available to FinCEN and to states to pay reasonable costs relating to compliance with the bill. Upon application by FinCEN or a state, and without further appropriation, Treasury must make unobligated balances in the Department of Treasury Forfeiture Funds available to FinCEN or the state. The amount may not exceed a total of \$30 million to FinCEN, and no more than \$5 million to states. Upon application by FinCEN or a state, and without further appropriation, the Attorney General must make excess unobligated balances in the

Department of Justice Asset Forfeiture Fund available to FinCEN or the state. The amount may not exceed a total of \$10 million to FinCEN, and \$5 million to states.

Federal Contractors

No later than 1 year after enactment, 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 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.

Revised Due Diligence Rulemaking

No later than 1 year after enactment Treasury must revise the final rule “Due Diligence Requirements for Financial Institutions” to bring the rule into conformance with this Act; account for financial institutions’ access to comprehensive beneficial ownership information filed by corporations and limited liability companies under threat of civil and criminal penalties under this Act; and reduce any burdens on financial institutions that are, in light of the enactment of this Act unnecessary or duplicative.

Expansion of Geographic Targeting Orders (GTO)

Treasury must issue a GTO similar to the order issued by FinCEN that applies to commercial real estate and establishes a specific threshold for commercial real estate.

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 each state that has procedures that enable a person to form or register under the laws of the state, partnerships, trusts, or other legal entities; identifies each state that requires persons seeking to form or register partnerships, trusts, or other legal entities to provide beneficial owners or beneficiaries of the entities, and the nature of the required information; evaluates whether the lack of available beneficial ownership information for partnerships, trusts, or other legal entities raises concerns about the involvement of such entities in terrorism, money laundering, tax evasion, securities fraud, or other misconduct and has impeded investigations into entities suspected of such misconduct; and evaluates whether the failure of the U.S. to require beneficial ownership information for partnerships and trusts formed or registered in the U.S. has elicited international criticism and what steps, if any, the U.S. has taken or is planning to take in response.

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 detect, prevent, or punish terrorism, money laundering, tax evasion, or other misconduct.

Using Technology to Avoid Duplicative Reporting

Treasury must conduct a study to evaluate:

- the feasibility of adopting FinCEN identifying numbers or other simplified reporting methods in order to facilitate a simplified beneficial ownership regime for reporting companies;

- whether a reporting regime whereby only company shareholders are reported within the ownership chain of a reporting company could effectively track beneficial ownership information and increase information to law enforcement;
- the costs associated with imposing any new verification requirements on FinCEN; and
- the resources necessary to implement any such changes.

The Secretary must present the findings to the relevant committees of jurisdiction and provide recommendations for carrying out the findings.

Definitions

The term beneficial owner means a natural person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise:

- exercises substantial control over the entity, or;
- owns 25 percent or more of the equity interests of the entity or receives substantial economic benefits from the assets of the entity.

A person receives substantial economic benefits if the person has access to 25 percent or more of the funds and assets of the entity. The Secretary of the Treasury must seek to provide clarity to entities with respect to the identification and disclosure of an individual who receives substantial economic benefits from the funds and assets of an entity.

The term beneficial owner does not include:

- a minor child;
- a person acting as a nominee, intermediary, custodian, or agent on behalf of another person
- a person acting solely 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 a corporation or limited liability company is through a right of inheritance
- a creditor of a corporation or limited liability company, unless the creditor also meets the definition of a beneficial owner

Defines a reporting company as a corporation, LLC, or other similar entity created by filing a document with the Secretary of State (or similar entity) or Indian tribe, or a foreign entity registered to do business in a state by filing with the Secretary of State. A reporting company does not include any of the following:

- a business that issues securities registered or required to file reports under the Securities and Exchange Act
- a business concern constituted or sponsored by a state, political subdivision of a state, under an interstate compact by two or more states, a federal department or agency, or under U.S. law.
- 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
- an insurance producer
- 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, charity or nonprofit entity (that has not been denied exempt status or failed to file returns)
- any business that has 20 or more full time employee in the US; files income tax returns with more than \$5 million in gross receipts or sales; and has an operating presence or physical office within the U.S
- any corporation or LLC formed and owned by any of the above entities
- any pooled investment vehicle operated or advised by the above entities
- any business concern or class of business concerns which the Secretary of the Treasury, with the concurrence of the Attorney General and the Secretary of Homeland Security, has determined should be exempt from the reporting requirements 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 terrorism, money laundering, tax evasion, or other misconduct.