

The United States Joins the Rest of the World – A Beneficial Ownership Registry for U.S. Corporations and LLCs

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The U.S. has a highly successful international financial service industry that is important to the U.S. economy, exemplified by, firstly, the international financial centers such as Miami and New York of over a half-trillion dollars of foreign deposits of high net wealth individuals whom many experts allege are not tax and exchange control compliant in their home countries. Secondly, over 900,000 Delaware companies registered that do not do business in the state is second to Hong Kong, and ahead of the British Virgin Islands. Thirdly, the U.S. territories' offshore regimes, like the U.S. Virgin Islands and Puerto Rico, reduce the effective U.S. corporate and income tax rates below 3.5 percent. Looking back a decade shortly after the enactment of the U.S. FATCA regime, in 2011, 133,297 businesses incorporated in Delaware. Delaware has more corporate entities than people—945,326 to 897,934. These absentee corporate residents accounted for a quarter of Delaware's total budget, roughly \$860 million in taxes and fees in 2011. Moreover, the economic spillover impact for Delaware includes substantial employment and professional fees to Delaware business participating in the incorporation and advisory industry. Delaware is just behind China's Hong Kong in the number of annual incorporations and overall incorporations, and well ahead of the UK's Virgin Islands (British) both in terms of offshore business and the dollars earned from that offshore business. The State of Delaware does not maintain a corporate registry of beneficial owners.

There has been a lot of noise about the potential giant sucking sound of foreign direct investment (FDI) exiting the U.S. financial markets, like a swirl through a drain, because of the imposition of FATCA withholding or because of the U.S. providing information to foreign governments. But at least the FDI numbers published by the Bureau of Economic Statistics did not bear that exit from the U.S. markets out. Expenditures by foreign direct investors to acquire, establish, or expand U.S. businesses totaled \$420.7 billion in 2015, an increase of 68 percent from 2014 when expenditures were \$250.6 billion. In 2016, total FDI in the U.S. exceeded \$3.1 trillion, its highest level.

Arguably, the U.S. may have received more FDI and its financial markets may have grown faster because FATCA has forced money of American taxpayers to return to the U.S. because of compliance costs while attracting the money of foreign residents seeking anonymity from their national tax authorities or politically repressive regimes. In the context of the U.S. not joining the OECD's Common Reporting Standard for automatic exchange of information with over 100 other countries, the U.S. may be attracting FDI by investors seeking shelter from their governments because the U.S. is the only developed country hold out. For example, FDI from China rose to a record level \$45.6 billion in 2016, albeit before the current administration's trade war. Renown financial crimes attorney Bruce Zagaris states, "... [T]he United States still has not signed the CRS. As a result, money is flooding into the country and foreign trust companies are opening or expanding offices there, especially in South Dakota, Wyoming, Nevada, and Delaware."^[1]

The U.S. Anti-Money Laundering Act of 2020 and Beneficial Ownership Registry

The National Defense Authorization Act for Fiscal Year 2021 bill was passed by Congress on December 11, 2020 and has been sent to the President. However, as of December 15, 2020, the President has not signed the bill and instead threatened to veto it. Yet, the bipartisan bill passed both houses with enough majority to override a veto if exercised. The bill is over 4,500 pages but relevant to this publication are the 150 pages of new money laundering rules. These new rules, called the Anti-Money Laundering Act of 2020, and are divided into four titles:^[2]

LXI: Strengthening Treasury Financial Intelligence, Anti-Money Laundering, and Countering the Financing of Terrorism Programs;

LXII: Modernizing the Anti-Money Laundering and

Countering the Financing of Terrorism System;

LXIII: Improving Anti-Money Laundering and Countering the Financing of Terrorism Communication, Oversight, and Processes; and

LXIV: Establishing Beneficial Ownership Information Reporting Requirements.

Most noteworthy is the fourth title "Establishing Beneficial Ownership Information Reporting Requirements". Federal legislation providing for the collection of beneficial ownership information for corporations, limited liability companies, or other similar entities formed under the laws of the States is needed to bring the U.S. into compliance with international anti-money laundering and countering the financing of terrorism standards. The collected beneficial ownership information will be maintained in a secure, nonpublic database. The term acceptable identification document means, with respect to an individual:^[3]

(A) a nonexpired passport issued by the United States;

(B) a nonexpired identification document issued by a State, local government, or Indian Tribe to the individual acting for the purpose of identification of that individual;

(C) a nonexpired driver's license issued by a State; or

(D) if the individual does not have a document described in subparagraph (A), (B), or (C), a nonexpired passport issued by a foreign government.

The term beneficial owner means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise either exercises substantial control over the entity or owns or controls not less than 25 percent of the ownership interests of the entity.

However, the beneficial owner does not include a minor child if the information of the parent or guardian of the minor child is reported; an individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual; an individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person; an individual whose only interest in a corporation, limited liability company, or other similar entity is through a right of inheritance; or a creditor of a corporation, limited liability company, or other similar entity.

The term reporting company for beneficial ownership means a corporation, limited liability company, or other similar entity that is created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe.^[4] However, several types of licensed businesses, persons, among others, are not reportable companies, including by examples: securities issuers, banks, credit unions, money transmitting business government owned entities, exchanges, commodities brokers, investment companies and advisers, any pooled investment vehicle, insurance companies and producers, retail foreign exchange dealers, and public accounting firms. Each reporting company shall submit to FinCEN a report that contains identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company by:^[5]

1. full legal name;
2. date of birth;
3. current, as of the date on which the report is delivered, residential or business street address; and
4. unique identifying number from an acceptable identification document or FinCEN identifier.

In accordance with Treasury regulations to be developed, any reporting company that has been formed or registered before the effective date of the regulations shall within two years after the effective date of the regulations submit to FinCEN a report that contains the beneficial ownership information.^[6] Any reporting company that has been formed or registered after the effective date of the regulations must at the time of formation or registration submit to FinCEN the beneficial ownership report.^[7] A reporting company shall, within a year after the date on which there is a change with respect to beneficial ownership submit to FinCEN a report that updates the information relating to the change.^[8]

Upon request by an individual who has provided FinCEN with beneficial ownership information, or by an entity that has reported its beneficial ownership information, FinCEN will issue a FinCEN identifier to such individual or entity.^[9] Thereafter, the person required to report beneficial ownership may instead report the FinCEN identifier of the individual.^[10] If an individual is or may be a beneficial owner of a reporting company by an interest held by the individual in an entity that, directly or indirectly, holds an interest in the reporting company, the reporting company may report the FinCEN identifier of the entity in lieu of providing the beneficial ownership information required with respect to the individual.^[11] Beneficial ownership information relating to each reporting company shall be maintained by FinCEN for not fewer than five years after the date on which the reporting company terminates.^[12]

FinCEN may disclose beneficial ownership information reported pursuant to this section only upon receipt of a request from a Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity; or from a State, local, or Tribal law enforcement agency, if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation.^[13] FinCEN may also disclose based on a request from a Federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority, under an international treaty, agreement, convention, or official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries when no treaty, agreement, or convention is available. A financial institution may request beneficial ownership information to meet customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law. A request made by a Federal functional regulator or other appropriate regulatory agency will also be respected. Finally, the IRS may obtain access to beneficial ownership information for tax administration purposes.^[14]

Elimination of U.S. Bearer Shares Going Forward

A corporation, limited liability company, or other similar entity formed under the laws of a State or Indian Tribe may not issue a certificate in bearer form evidencing either a whole or fractional interest in the entity.^[15]

[1] Ethical Questions Regarding Offshore Accounts and Foreign Clients, Bruce Zagaris, Tax Notes Int'l May 22, 2017) at p. 721.

[2] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), Div F.

[3] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336.

- [4] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(a)(11).
- [5] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(b)(2)(A).
- [6] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(b)(1)(B).
- [7] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(b)(1)(C).
- [8] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(b)(1)(D).
- [9] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(b)(3)(A).
- [10] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(b)(3)(B).
- [11] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(b)(3)(C).
- [12] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(c)(1).
- [13] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(c)(2)(B).
- [14] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(c)(5)(B).
- [15] National Defense Authorization Act for Fiscal Year 2021, HR 6395, 116th Cong (2020), §6403, proposing to add 31 USC §5336(f).