ILLICIT CASH Act (S. 2563)

Facts and Fiction on Beneficial Ownership Requirements

American
Bankers
Association®

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The American Bankers Association and state banker associations throughout the country support passage of the ILLICIT CASH Act. This bipartisan legislation makes long overdue changes to the anti-money laundering and Bank Secrecy Act process. The bill also, for the first time, creates a federal beneficial ownership registry. This long-advocated registry would assist law enforcement, the banking industry and small businesses in tracking the true owners of businesses. This is a step that law enforcement agencies have long supported, particularly to combat terrorist activity.

While we believe this registry would indeed be beneficial to all, small business trade groups have made a number of claims about what the proposed beneficial ownership registry would require. These groups suggest that the burden to small business owners is severe, and outweighs the benefits to law enforcement of being able to identify and stop terrorists, human traffickers and other illicit actors. So what kind of burden are we really talking about here?

Claim

The bill would create a crippling compliance burden for the nation's smallest businesses.

Fact

The bill would require certain businesses to provide 4 pieces of information to FinCEN: name, date-of-birth, address, and driver's license or passport number—the same information that businesses are already required to provide to any bank when they open an account. Registered businesses would only be required to update the information when it changes—which for many small business may be never.

Claim

Mom & Pop businesses will struggle to determine who qualifies as a beneficial owner, requiring significant time, resources and even legal help to comply.

Fact

The current form that businesses must complete when opening a bank account is simple and straightforward and explains who qualifies as a small business owner. Mom & Pop businesses should be able to easily identify who controls the operations of their company and who owns more than 25% of the business. There could be some complexity for larger companies, but if a company is sophisticated enough to have completed the paperwork to structure their ownership and control in such a way that determining key players becomes murky, they are sophisticated enough to complete the corresponding paperwork to report it. It is simply inaccurate to suggest that mom & pop businesses will be forced to secure legal counsel in making these straightforward determinations, and even if they make mistakes in the way they report the information, de minimis violations are explicitly waived, and penalties do not attach absent a deliberate attempt to provide false or fraudulent information.

Claim

Small business owners would be subject to draconian penalties for paperwork errors. Errors would constitute a federal crime with civil penalties up to $10,000, criminal penalties of up to 4 years in prison, or both.

Fact

There are no penalties for accidental or even negligent filing errors or omissions. The penalties are limited to deliberate (knowing & willful) violation of the requirements. In fact, this language was strengthened specifically to accommodate small business concerns. A small business owner would not be penalized unless it could be shown that he or she was intentionally breaking the law – seeking to conceal their identity in order to finance illicit activity, like human trafficking or terrorism. The burden of proof is set high specifically to ensure that no legitimate small business owner would ever inadvertently find themselves on the enforcement end of this statute. For example, under similar requirements for Money Services Businesses (MSB), if an MSB has failed to register when they attempt to open a bank account, the bank simply reminds the MSB of the requirement. It's only intentional evasion that is subject to a penalty.

In addition, to help small business owners understand and be aware of the requirement, state registrars can add a line to their standard form to renew or apply for a license to do business in the state with a notice of the requirement to register and a link to the FinCEN website. This would operate the same way as the current reminder to incorporators that they must contact the IRS for a taxpayer identification number (TIN).

Claim

The bill grants broad access to business ownership information, thereby all but eliminating financial privacy in the U.S.

Fact

Ultimately, the benefits of maintaining a system of complete anonymity must be balanced against the advantages that system allows to criminals, terrorists, and other illicit actors. The bill finds that balance by injecting needed transparency into the corporate formation process while also carefully limiting access to that information to law enforcement. Law enforcement agents would have to follow strict protocols, including steps designed to protect the privacy of beneficial owners. They would have to demonstrate a reason to access the data and access would be limited to authorized and registered users who have had appropriate training. The agent accessing the data would have their identity verified, and there would be annual audits of access by both the agency involved and FinCEN. Inappropriate access would be subject to criminal penalties.

Claim

The beneficial ownership registry would do little to help law enforcement combat crime.

Fact

In its ***2020 National Strategy for Combating Terrorist and Other Illicit Financing***, Treasury identified the lack of a requirement to collect beneficial ownership information at the time of company formation and after changes in ownership as one of the most significant vulnerabilities exploited by illicit actors in the United States. In testimony in a number of hearings, law enforcement representatives have pointed out that trying to identify the individuals behind a corporation or other legal entity structure can be a time-consuming process, requiring them to follow any number of different trails to get to the information. They also argue that they frequently encounter brick walls when the information is not available, as currently no U.S. state requires disclosure of beneficial owners at incorporation. This handicaps law enforcement's pursuit of criminals and terrorists, and can be lethal when time is of the essence in an investigation.

Separately, anti-human trafficking organizations have studied the impact of anonymous company ownership in facilitating human trafficking, and report that the laws governing business registration are "almost tailor-made" for traffickers to hide behind. According to a Polaris Project report, ***Hidden in Plain Sight: How Corporate Secrecy Facilitates Human Trafficking in Illicit Massage Parlors***, only 21% of business records for illicit massage parlors specifically name the owner. Those companies generally operate as part of an organized crime network, spreading illicit proceeds across a series of other businesses in the network in order to avoid detection. Since many of the businesses are registered anonymously, the connection between the businesses (and the underlying criminal enterprise), is often missed by law enforcement. The lack of an identifiable human being behind these businesses makes it incredibly difficult and time consuming for law enforcement to track and dismantle these criminal enterprises.