

# The US Corporate Transparency Act: critiquing beneficial ownership disclosure requirements in the United States

**Paul Michael Gilmour\***

The United States is one of the world's most significant providers of secretive shell entities.<sup>1</sup> States such as Delaware, Wyoming and Nevada have operated for decades as "offshore" tax havens and secrecy jurisdictions to attract business clients from across the globe wishing to conceal their assets. Foreign clients have been able to enjoy state laws that support lower taxation and impose stricter client confidentiality relative to the clients' home jurisdictions.<sup>2</sup> However, such offshore jurisdictions have come under increased scrutiny for supporting anonymous shell entities and complex corporate structures that obscure companies' beneficial owners.<sup>3</sup> A lack of beneficial ownership transparency helps to hide illicit assets by

---

\* Lecturer in Criminal Justice and Policing, Institute of Criminal Justice Studies, Faculty of Humanities and Social Sciences, University of Portsmouth, Portsmouth, UK; e-mail: paul.gilmour@port.ac.uk.

<sup>1</sup> The United States has often been ranked high on the Tax Justice Network's Financial Secrecy Index. See Carl Pacini et al., "An Analysis of Money Laundering, Shell Entities, and No Ownership Transparency That Washes off and on Many Shores: A Building Tidal Wave of Policy Responses" (2020) 30(1) Kan. J.L. & Pub. Pol'y, 14.

<sup>2</sup> Paul Michael Gilmour, "Lifting the veil on beneficial ownership: challenges of implementing the UK's registers of beneficial owners" (2020) 23(4), J Money Laundering Control, 719.

<sup>3</sup> The Financial Action Task Force (FATF) defines a "beneficial owner" as the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also

challenging authorities' efforts to identify the real person behind companies used to launder money and circumvent tax.<sup>4</sup> Notably, the amount of money laundered through the United States is estimated to be about US\$300 billion per year<sup>5</sup>, although, how much of this originates offshore is unknown.

The United States remains a favoured destination for many individuals to hide illicit assets due to its lax rules concerning beneficial ownership disclosure.<sup>6</sup> Although the United States has strengthened AML regulations in recent decades since the Bank Secrecy Act was enacted, such regulations have been largely ineffective in combatting global money laundering.<sup>7</sup> Until recently, there have been no means to register beneficial ownership information to ensure better transparency of corporate activities, curb the abuse of anonymous shell entities, and to combat money laundering.

The newly enacted Corporate Transparency Act (CTA), part of the National Defense Authorization Act for Fiscal Year 2021 (H.R. 6395) aims to tighten beneficial ownership disclosure requirements. It brings the United States some way towards complying with the

---

includes those persons who exercise ultimate effective control over a legal person or arrangement (see FATF, "FATF Guidance. Transparency and Beneficial Ownership", (2014) <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> [Accessed 19 June 2021], p. 8).

<sup>4</sup> Transparency International UK (2017) "Hiding in plain sight: how UK companies are used to launder corrupt wealth", <https://www.transparency.org.uk/publications/hiding-in-plain-sight> [Accessed 19 June 2021].

<sup>5</sup> Scott Rothstein, "They're Watching You: An Examination of Whether the United States Should Impose Anti-Money Laundering Regulations onto US Lawyers" (2020) 43(5) Fordham Int'l L.J., 1398.

<sup>6</sup> Peter D Hardy, Scott Michel and Fred Murray, "Is the United States Still a Tax Haven? The Government Acts on Tax Compliance and Money Laundering Risks" (2016) 18 J Tax Prac & Proc, 49.

<sup>7</sup> (n 5).

Financial Action Task Force’s Recommendations 24 and 25 with regards beneficial ownership transparency<sup>8</sup>, and the AML standards like those of European Union Member States, and the United Kingdom. The Act requires beneficial ownership information of certain corporates to be reported to the US Treasury Department’s Financial Crimes Enforcement Network (FinCEN) towards maintaining a central registry. This allows law-enforcement authorities to access information on beneficial owners in their fight against money laundering. According to the CTA, the beneficial owner of a legal entity is a person who exerts ‘substantial control’ over the entity, or who directly or indirectly, owns or controls more than 25 percent of the ownership interest in it.<sup>9</sup> Although, the Act falls short of clarifying what is meant by ‘substantial control’.

The information on beneficial owners required to be disclosed to FinCEN includes beneficial owners’ full name, date of birth, residential or business address, and an identification number gained from an official source, or unique identifier assigned by FinCEN.<sup>10</sup> However, such information is deemed sensitive information, so only authorised governmental authorities can access the information, and the information must be maintained by the Secretary of the Treasury “in a secure, nonpublic database, using information security methods and techniques that are appropriate to protect nonclassified information systems at

---

<sup>8</sup> (n 3).

<sup>9</sup> Scott Greytak, “Explained: The Corporate Transparency Act - What does the landmark anti-corruption measure – passed by U.S. Congress on 1 January – do and does not do?” (25 January 2021) <https://www.transparency.org/en/blog/explained-the-corporate-transparency-act> [Accessed 19 June 2021].

<sup>10</sup> William J. Kambas, David Guin and Eva Farkas-DiNardo, “The Corporate Transparency Act: A new US federal reporting requirement for beneficial owners of US entities” (4 January 2021) <https://www.withersworldwide.com/en-gb/insight/Corporate-transparency-and-beneficial-owners-The-US-Bank-Secrecy-Act-expanded-to-create-new-AML-requirements> [Accessed 19 June 2021].

the highest security level”.<sup>11</sup> This understandably raises doubts as to whether the new measures introduced through the CTA are truly transparent.

Apart from law enforcement, only certain “covered financial institutions”<sup>12</sup> specified by FinCEN customer due diligence requirements can access beneficial ownership information. Furthermore, beneficial ownership information can only be accessed by covered financial institutions with their clients’ permission. Financial institutions do not have open access to the registry. Additionally, organisations that otherwise fall under by FinCEN’s AML Programme Rule, such as money service businesses, insurance companies, residential mortgage loan originators, dealers in precious stones and metals, or casinos, are not covered financial institutions.<sup>13</sup> Access to information can also only be gained to enable compliance with customer due diligence requirements (under the CDD rule), so would not enable disclosure of information relating to third-party entities linked to clients’ own transactions, even if identified through investigations into suspicious transactions.

---

<sup>11</sup> Section 6204(6) and (7) of the CTA; see also Andrius R. Kontrimas et al., “Corporate Transparency Act: New beneficial ownership reporting requirements for all entities with US operations” (January 2021) <https://www.nortonrosefulbright.com/en-mh/knowledge/publications/f99c2d40/corporate-transparency-act> [Accessed 19 June 2021].

<sup>12</sup> Customer Due Diligence Requirements for Financial Institutions (Final Rule 2016). The term “covered financial institution” refers to: (i) Banks; (ii) brokers or dealers in securities; (iii) mutual funds; and (iv) futures commission merchants and introducing brokers in commodities. (See the Federal Register, Volume 81 Number 91 (11 May 2016) Rules and Regulations <https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule> [Accessed 19 June 2021].

<sup>13</sup> See 31 U.S.C § 5318(h) and 31 CFR § 1010.210 for anti-money laundering program requirements.

There are also many exemptions to disclosure requirement.<sup>14</sup> Companies having over twenty full-time employees, those publicly listed on the stock exchange, or having a tangible office within the United States, are not required to divulge their ownership. Many private entities and limited liability companies, or any dormant companies holding no ownership interest in any other company, or assets, are also exempt.<sup>15</sup> These exemptions are likely to include anonymous shell entities created for the specific purpose of concealing beneficial ownership.

It should also be noted that the sanctions for violating the Corporate Transparency Act seem to discourage a truly transparent regime, in which the sanctions imposed for illegally disclosing beneficial ownership information far outweigh those imposed for noncompliance. It is unlawful for anyone to knowingly disclose or use beneficial ownership information without authority, and those found guilty are liable for civil sanctions of US\$500 per day and criminal penalties including imprisonment of up to 10 years and fines of up to US\$500,000. It is also unlawful for any person failing to report complete and current beneficial ownership information to FinCEN, or to willfully provide, or attempt to provide, false beneficial ownership information to FinCEN. Yet, those found guilty of falsely declaring or not filing at all, are only liable for civil sanctions limited to US\$500 per day and criminal sanctions of two years' maximum imprisonment and fines of up to US\$10,000.<sup>16</sup>

---

<sup>14</sup> Quinlivan (2020) provides a comprehensive list of exemptions. See Steve Quinlivan, "Exceptions to Beneficial Ownership Disclosure of Private Companies in Corporate Transparency Act" (15 December 2020) <http://dodd-frank.com/2020/12/15/exceptions-to-beneficial-ownership-disclosure-of-private-companies-in-corporate-transparency-act> [Accessed 19 June 2021].

<sup>15</sup> (n 14).

<sup>16</sup> Robert W. Downes, et al., "The Corporate Transparency Act – Preparing for the Federal Database of Beneficial Ownership Information" (16 April 2021) <https://businesslawtoday.org/2021/04/corporate->

Although the new Corporate Transparency Act seems a progressive step towards strengthening beneficial ownership disclosure in the United States, it remains to be seen to what extent its introduction will effectively combat money laundering. It seems unlikely the United States will soon achieve a federal register of beneficial ownership that is fully public because of privacy concerns and legal discord within its fragmented state laws. An effective beneficial ownership regime also requires the political determination to truly enhance corporate transparency as opposed to the perfunctory measures that the new Act currently presents.

---

*transparency-act-preparing-federal-database-beneficial-ownership-information/#The\_Corporate\_Transparency\_Act\_Included\_in\_the\_NDAA* [Accessed 20 June 2021].