

November 6, 2019

The Honorable Michael Crapo
Chairman
U.S. Senate Committee on
Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Sherrod Brown
Ranking Member
U.S. Senate Committee on
Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, DC 20510

RE:

Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings (ILLICIT CASH) Act, S. 2563, Senator Mark Warner and Senator Tom Cotton, et al.

True Incorporation Transparency for Law Enforcement (TITLE) Act, S. 1889, Senator Whitehouse and Senator Grassley

Corporate Transparency Act, H.R. 2513, Representative Carolyn Maloney

Corporate Transparency Act, S. 1978, Senator Ron Wyden and Senator Marco Rubio

The undersigned real estate organizations are writing to express concerns with recent legislative efforts meant to aid law enforcement in investigation of shell companies engaged in money laundering, tax evasion and terrorism financing. While well-intentioned, we believe the proposals currently under consideration that are designed to increase the transparency of the ownership structure of limited liability companies (LLCs) and real estate transactions would have negative, unintended consequences on the broader real estate market. Several of these bills would place a significant compliance burden on owners of small businesses classified as corporations and LLCs, subject these businesses to potentially harmful privacy breaches and expose them to excessive and punitive damages.

While we appreciate and support the broad goal of preventing the use of LLCs or any form of real estate to finance illicit acts or terrorism, Congress should proceed cautiously to not harm real estate capital flows in the process. Neither Congressional leaders nor the U.S. Department of the Treasury (Treasury) have offered a reasoned case that the parameters outlined in the proposed bills meet Treasury's goals for collecting such data and are structured so as to not unduly burden legitimate American businesses of all sizes. Without this assessment, legislators cannot be certain that the new reporting regime will be effective.

The desire for enhanced transparency comes at the expense of a significant compliance burden for small entities. Corporations and LLCs are not necessarily owned by a single

owner. Entities may be owned by other corporations, joint ventures, partnerships, trusts, etc. Identifying these entities as beneficial owners quickly becomes a complicated process – and may be duplicative if the owner is another reporting company. Congress should aim to balance the value of increased transparency with the resource burden on small businesses and limit the ability of Treasury to misinterpret or dismiss Congressional intent through any rule making process.

We offer the following broad concerns with several of the bills that have been introduced:

Unreasonable Lookback Reporting. Corporations and LLCs are created for many reasons. For instance, many business owners create numerous corporations or LLCs to deal with different aspects of their businesses; families set up corporations or LLCs to deal with estates and family business. Requiring all corporations and LLCs to meet the bills' beneficial ownership reporting requirement within two years of enactment of a bill would be almost impossible to implement and sets up corporations and LLCs to fail, leaving them open to severe penalties, even in cases of inadvertent noncompliance.

The “look-back” provisions in each of the bills are excessive when considering how many existing corporations and LLCs have been created and possibly are dormant. It is unclear why proposed legislation undertakes such a broad registration process that will serve only to place a significant burden on the millions of legitimate businesses while likely not incenting the bad actors to comply. Legislators should work closely with Treasury and law enforcement agencies to determine how this information will be collected and used, how the process will incent bad actors to comply, produce a detailed assessment of the cost to legitimate businesses to comply with the reporting requirements and finally, determine alternative methods to identify existing entities set up to shield illicit activities.

Duplicative Reporting. As noted, depositories are well equipped and are presently required to analyze, identify, retain and/or report the exact information that is being required of these bills.

The Existing Customer Due Diligence (CDD) rule effective in May 2018 requires each depository to:

1. identify and verify the identity of customers
2. identify and verify the identity of the beneficial owners of companies opening accounts
3. understand the nature and purpose of customer relationships to develop customer risk profiles
4. conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information

Since this rule is in effect, the proposals would impose a duplicative and unnecessary reporting requirement that would impact many small businesses across the country.

Unclear Guidance. Each bill outlines the definitional framework to identify individuals or entities that derive beneficial ownership from any LLC that has been or is newly formed. However, the proposed definition of beneficial owner is unclear, and it appears that Treasury officials have been unable to provide clear guidance on what parameters they would like to see in this regard. In fact, through the Financial Crimes Enforcement Network (FinCEN), Treasury has an existing definition of beneficial ownership that it established in the CDD rule for all depositories that became effective in May 2018.

CDD defines beneficial ownership in the first two lines shown below, but the bills add a third part that will likely lead to confusion and error of interpretation, called substantial economic benefit. The bills propose the following definition of a beneficial owner as a natural person who directly or indirectly, through any contract, arrangement, understanding relationship, or otherwise:

- (i) exercises substantial control over such entity; or
- (ii) owns 25 percent or more of the equity interests of such entity; or
- (iii) receives substantial economic benefits from the assets of such entity

The concept of substantial economic benefit is introduced but is not defined. Further, the reason to define beneficial ownership differently when used for, essentially, the same purpose is not supported in any argument. Lacking a reason and a clear definition leaves this term open to interpretation and could result in errors carrying fines or incarceration for noncriminal behavior.

In addition, Treasury has not provided clear guidance on what parameters should be used for determining beneficial ownership based on the size of each entity. Each bill requires that any LLC with 20 or fewer employees, \$5 million or less in gross receipts or sales, and an operating presence at a physical office within the United States (reporting companies) be subject to the reporting; however, there have been conflicting requirements provided by Treasury in discussions with legislators as to how to define the entity size requirement. Without clear guidance it appears that Treasury is unsure just what type and size entities it wants to track. Rather than rushing forward with legislation that would have a significant impact on the millions of small businesses that are legitimate, there should be time given to step back to evaluate more effective ways to identify the bad actors.

Access and Disclosure Raises Privacy Concerns. Access to and disclosure of the information reported to FinCEN is another major concern. While the bills address who may have access to the information and under what circumstances it would be disclosed, protocols for the protection of the information are addressed in a very general way. There is some acknowledgement that protocols must exist for protection of the information, i.e. an audit trail of requests for the information, verification that it has been used appropriately, and penalties for failure to follow the protocols. However, given the significant amount of personal information submitted to FinCEN, Congress should be very clear that the information would be protected.

Notification and Process for Compliance Untested. Given the number of American businesses impacted by any of these legislative proposals, we must raise concerns with how small businesses would be notified of the requirements for submitting the beneficial ownership information to FinCEN and the specific process or processes by which the information would be submitted. The notification and process procedures for submitting information for new corporations, existing corporations and providing updated information must be designed and tested before the requirements of the bills can be implemented and penalties assigned.

Severe and Punitive Penalties. The penalties for noncompliance that are under consideration are extremely punitive and are generally imposed regardless of the circumstances for the noncompliance. Some of the legislation under consideration imposes fines as high as \$1 million or three years in jail. This is unnecessarily harsh for what may be an oversight of very small businesses or investors. Congress should work to identify possible repercussions for willful non-compliance without imposing crushing penalties on millions of American businesses who are good actors and positive forces in our economy.

Conclusion. Again, the real estate industry supports giving the law enforcement community the tools necessary to stop money laundering, terrorism financing or other crimes. However, we believe any legislation that moves forward must strike a balance that does not harm small businesses in order to catch a small number of bad actors. As drafted, the proposals would do more to complicate the business operations of legitimate, small business owners than help law enforcement agencies identify illegitimate ones.

Signed,

International Council of Shopping Centers

NAIOP, the Commercial Real Estate Development Association

National Apartment Association

National Association of Home Builders

National Multifamily Housing Council

The Real Estate Roundtable

CC: Majority Leader Mitch McConnell, Minority Leader Chuck Schumer
Senate Judiciary Committee
Senate Finance Committee