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Financial Accountability & Corporate Transparency

December 6, 2017

The Honorable Steve Pearce
Chairman, Subcommittee on Terrorism and
Illicit Finance
U.S. House Financial Services Committee
2432 Rayburn House Office Building
Washington, DC 20515

The Honorable Blaine Luetkemeyer
Chairman, Subcommittee on Financial
Institutions and Consumer Credit
U.S. House Financial Services Committee
2230 Rayburn House Office Building
Washington, DC 20515

The Honorable Ed Perlmutter
Ranking Member, Subcommittee on Terrorism
and Illicit Finance
U.S. House Financial Services Committee
1410 Longworth House Office Building
Washington, DC 20515

The Honorable Lacy Clay
Ranking Member, Subcommittee on Financial
Institutions and Consumer Credit
U.S. House Financial Services Committee
2428 Rayburn House Office Building
Washington, DC 20515

RE: November 29, 2017 Joint Hearing Entitled “Legislative Proposals to Counter Terrorism and Illicit Finance”

Dear Chairmen Pearce and Luetkemeyer and Ranking Members Perlmutter and Clay,

We write on behalf of the Financial Accountability and Corporate Transparency (FACT) Coalition to thank the Committee members for holding the recent hearing on “Legislative Proposals to Counter Terrorism and Illicit Finance.” We were specifically appreciative of the recognition by all the expert witnesses of the threats posed by anonymous shell companies and the need to collect and make available to law enforcement beneficial ownership information.

The FACT Coalition is a non-partisan alliance of more than 100 state, national, and international organizations working to combat the harmful impacts of corrupt financial practices.¹

These comments focus on Section 9 of the discussion draft of the “Counter Terrorism and Illicit Finance Act.”²

Anonymous shell companies have been shown to represent an important nexus of corruption, money laundering, transnational organized crime, and terrorism, all of which directly harm U.S. foreign policy interests. Such companies have been used to divert U.S. security and overseas development funds from their intended purposes into the hands of those who seek to do the United States harm, and they can help fund the very insurgents and terrorists U.S. troops are fighting.

¹ For a list of FACT Coalition members, visit <https://thefactcoalition.org/about/coalition-members-and-supporters/>.

² U.S. House. 115th Congress, 1st Session. *H.R. _____, Counter Terrorism and Illicit Finance Act: Discussion Draft dated November 14, 2017.* <https://financialservices.house.gov/uploadedfiles/bills-115hr-pih-ctifa.pdf>.

In addition, anonymous companies are the vehicle of choice to move dirty money for human trafficking operations, drug cartels, and tax evaders. As has been noted by Chairman Pearce, these shell companies disrupt local business and economies.³ Anonymous companies used to purchase real estate have been implicated in distorting housing markets, hollowing out neighborhoods, hurting local businesses, and pushing families to live farther away from their jobs.

This is a very important issue and the cost of inaction is high. Thankfully, it is an issue that continues to enjoy bipartisan support.

Notable Changes Needed to the Discussion Draft

Regarding the discussion draft, we support the full testimony presented by Stefanie Ostfeld of Global Witness, a member of the FACT Coalition, at the November 29th hearing.⁴ Of particular concern are issues in Section 9 of the discussion draft. As she noted:

1. Ensure that domestic law enforcement has access, including federal, state, tribal, and local, to the Financial Crime Enforcement Network's (FinCEN) database of beneficial ownership information. This shouldn't require a subpoena.
2. Ensure that foreign law enforcement has access to beneficial ownership information so that it can be used in criminal and civil prosecutions.
3. Require foreign nationals to file their beneficial ownership information with FinCEN, including submitting a scanned copy of the relevant pages of their non-expired passport to FinCEN and define the term "applicant."
4. Add an enforcement mechanism to the discussion draft. This could be done by making the state incorporation process dependent on beneficial ownership information being provided to FinCEN. It could potentially be done by ensuring FinCEN has the authority to regulate in this area in order to have current listings from the states about all of the corporations and LLCs that are active.
5. Allow identification for beneficial owners to include non-expired state issued identification to meet the requirement if they do not have a non-expired U.S. driver's license or passport.

Important Provisions to Keep in the Discussion Draft

Definition of Beneficial Owner

We strongly support the wording of the definition of "beneficial owner" in the discussion draft. This is of prime importance. The 2016 revelations in the Panama Papers drew a clear picture of the dangers of loopholes in the law. A single staff person working for the Panamanian law firm Mossack Fonseca served as the director of more than 10,000 companies.⁵ Her ability to serve as the legal contact for the

³ U.S. House. Committee on Financial Services. *Legislative Proposals to Counter Terrorism and Illicit Finance: Testimony before the Subcommittees on Financial Institutions and Consumer Credit and Terrorism and Illicit Finance*, 115th Cong. (2017) (Statement of Stefanie Ostfeld, Deputy Head of U.S. Office, Global Witness), <https://financialservices.house.gov/uploadedfiles/hhrg-115-ba15-wstate-sostfeld-20171129.pdf>.

⁴ U.S. House. Committee on Financial Services. *Meeting to approve the Authorization and Oversight Plan of the Committee on Financial Services for the 115th Congress Hearing*, 7 February 2017 (Statement of Rep. Steven Pearce), <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=401456>.

⁵ Tim Johnson, "Did this Panama Papers housekeeper really direct a North Korean arms deal?" McClatchy, May 10,

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corporations demonstrates the lack of accountability if the law allows managers or other stand-ins to be named on behalf of the true, natural person(s) who own and control the company.

For these reasons, we continue to voice concerns about the definition in the Customer Due Diligence rule issued last year by the U.S. Department of the Treasury.⁶ Prong one of the definition only requires identification of beneficial owners with a 25 percent or greater ownership interest; if no person meets this threshold, no one is named. This means that bad actors need only find four strawmen to avoid disclosures. Prong two allows for the identification of a manager. Managers may exercise day-to-day control over a business, but it is the beneficial owners who can ultimately control the business. Managers can be fired; beneficial owners cannot.

Also of concern is the use of the “responsible party” definition for the IRS Form SS-4. A responsible party is someone who can answer questions about the tax return. It does not require that the person be the beneficial owner of the company.

Neither of the above definitions ensures that the true, human owner will be listed. Incorporating either of those definitions into Section 9 of the “Counter Terrorism and Illicit Finance Act” would render this effort into little more than an administrative exercise.

The definition of beneficial owner in the discussion draft is strong and meaningful. The information will prevent bad actors from hiding behind a veil of corporate secrecy. The definition has been slightly modified from that in the bipartisan Corporate Transparency Act of 2017 (H.R.3089). While the definition in H.R.3089 is preferable, the updated definition in the discussion draft is a comprehensive definition that maintains the integrity of the information.

The definition of beneficial ownership, as it is written in the discussion draft, is also clear and easy to follow according to business owners. Small businesses are small; they already know who their owners are because they are mostly running the businesses themselves. Larger businesses have been exempted because (1) they are already subject to reporting requirements, as in the case of publicly-traded companies, or (2) they are large enough to have actual business operations and are at lower risk of abuse. The bill is designed to address paper, fly-by-night companies that form on Monday and launder money through bank accounts on Tuesday.

Small Business Majority and Main Street Alliance have both sent letters extending their support for the collection of this information and noting that their member businesses see no problems with compliance. In fact, both organizations explain the dangers posed by anonymous companies in terms of unfair competition, subcontractor fraud, and the security of knowing who is doing business in your community. According to their letters, small businesses do not have complex ownership structures.

There are no examples or evidence to suggest that the definition of beneficial owner is unworkable. To the extent that there were legitimate concerns raised by the business community, reasonable

2016, <http://www.mcclatchydc.com/news/nation-world/national/article76635047.html>.

⁶ Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29397 (May 11, 2016). *Federal Register: The Daily Journal of the United States*. Web. 5 Dec 2017 (accessible at <https://www.federalregister.gov/d/2016-10567>).

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accommodations have been made during a decade of debate over this measure. As mentioned above, anyone owning more than 5 percent of a publicly-traded company already files beneficial ownership information with the Securities and Exchange Commission. Those companies are exempt from the bill. Other accommodations have been made to focus this bill on the shell companies that are used to launder illicit finance.

Intentionality

Additionally, the discussion draft appropriately ensures that only an intentional violation will trigger a penalty. The draft limits liability to those who “knowingly” provide false information or “willfully” fail to provide information. Both terms are well understood in case law and will prevent those with no intent to violate the law from facing any unwarranted penalties. Those are proper guardrails and should be kept in the bill.

Updating Information

Concerns about the 60-day requirement to update the information are misplaced. The businesses covered by this bill are not complex enterprises; they know their owners and they know when ownership changes. The types of ownership changes that this critique contemplates occur in large, complex enterprises, not in the companies covered in the legislation.

We appreciate your consideration of our views and look forward to working with you on this legislation. For questions or additional information, please contact Clark Gascoigne at cgascoigne@thefactcoalition.org or +1 (202) 810-1334.

Sincerely,

Gary Kalman
Executive Director
The FACT Coalition

Clark Gascoigne
Deputy Director
The FACT Coalition

cc The Honorable Jeb Hensarling, Chairman, U.S. House Financial Services Committee
 The Honorable Maxine Waters, Ranking Member, U.S. House Financial Services Committee

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