

U.S. Addresses Long-Standing Gap in its AML Compliance Regime

December 14,
2020

One of the biggest gaps in the U.S. anti-money laundering (AML) regime is about to be closed, moving the United States toward compliance with international AML and countering the financing of terrorism (CFT) standards related to beneficial ownership.

Attempts to conceal ownership of corporations, limited liability companies or similar entities to facilitate illicit activity, including money laundering, the financing of terrorism, financial fraud and a host of other activities, have endured over time. Nearly 30 years ago, the Financial Action Task Force (FATF) issued its first recommendations on beneficial ownership. While other countries and jurisdictions moved to close gaps in their AML regimes by addressing both the roles of financial institutions and governments, the United States' response to date has only dealt with the industry's obligations to provide "timely access to adequate, accurate and current beneficial ownership information."¹ This has led to ongoing criticisms of the U.S. AML regime, most recently in FATF's 2016 Mutual Evaluation Report of the United States.

Decades-long opposition to lifting the corporate veil of incorporation has been led by small business groups and the U.S. Chamber of Commerce, the world's largest business group, with concerns including privacy and potentially overly burdensome and complex requirements for small businesses. However, in a move forward, the chamber dropped its opposition and now supports the measure as lawmakers moved to address the group's concerns.

The new legislation, the Anti-Money Laundering Act of 2020, found an unlikely home in the National Defense Authorization Act for Fiscal Year 2021. Facing the threat of a presidential veto (for reasons unrelated to either defense funding or the AML provisions), both the House and the Senate passed the bill last week by a veto-proof two-thirds majority.

¹ Anti-money laundering and counter-terrorist financing measures United States Mutual Evaluation Report, Financial Action Task Force, December 2016: www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf.

Under the new legislation, U.S. corporations and other entities will have to register the identity of their beneficial owners – an individual who exercises significant control over an entity or owns a 25% or more equity interest in the entity – in a database managed by the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) upon formation or registration of the entity and within one year of any change in beneficial ownership. This substantially transfers the responsibility of identifying beneficial owners from financial institutions to FinCEN. Exceptions to this requirement include public companies, certain financial institutions, and companies that employ more than 20 full-time-equivalent employees, report more than \$5 million in gross annual revenues to the IRS and have a physical presence in the United States. This new database will not be public and will only be available to authorized government authorities and to financial institutions, with the consent of a company, for purposes of complying with customer due diligence requirements.

To populate the database, secretaries of state or other responsible parties will notify filers, on behalf of the Treasury Department, at initial formation, registration or renewal of a license of their requirements as reporting companies to provide four pieces of information for each beneficial owner:

- Full legal name
- Date of birth
- Current residential or business address
- Unique identifying number from an acceptable identification document or FinCEN identifier

Existing companies have two years to report the required information. Failure to report accurately and appropriately may result in both civil and criminal penalties, with harsher sanctions if part of a pattern of illegal activity.

The Treasury Department will need to promulgate regulations to implement the beneficial ownership requirements and align them with FinCEN’s Customer Due Diligence Requirements for Financial Institutions. The Treasury Department will also have ongoing obligations to report to the Congress on the utility of the ownership database.

As with any new regulatory framework, there are questions about how it will be implemented and how effective it will be. These include:

- How long will it take for FinCEN to operationalize the beneficial ownership database?

- Will the financial services industry have an opportunity to influence and contribute to the design of the database?
- Are there process automation opportunities to link to the FinCEN database to populate KYC information?
- What obligations will the industry have if it concludes information available from the FinCEN registry is inaccurate?
- How significant will the time and cost savings be to the industry?
- Will enforcement of civil and criminal consequences for non-compliance prove to be an effective deterrent to potential wrongdoers?

Though the beneficial ownership database is the lynchpin of the legislation, the Anti-Money Laundering Act of 2020 includes a number of other provisions aimed at strengthening the United States' AML regime. These include, among others, steps to:

- Improve coordination and information sharing among the agencies tasked with administering AML/CFT requirements, the agencies that examine financial institutions for compliance with those requirements, federal law enforcement agencies, national security agencies, the intelligence community, and financial institutions.
- Modernize AML/CFT laws by encouraging innovation and addressing the government and private sector response to new and emerging threats.
- Reinforce personal accountability for non-compliance.
- Review reporting requirements and thresholds.
- Enhance examiner training.
- Update whistleblower rewards and protections.
- Apply AML program standards to dealers in antiquities and consider application to dealers in art.

Notwithstanding all the open questions about the implementation of the legislation, the Anti-Money Laundering Act of 2020 is the most significant update of the U.S. AML regime since 2011 when the USA PATRIOT Act was passed. It represents a big step forward for a country that has prided itself in being a global leader in the fight against money laundering and terrorist financing.

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