Overview on recent developments for the legislation, regulatory and anti-money laundering US update

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Abstract

This article addresses recent legislative and regulatory developments on anti-money laundering (AML) from the US perspective, including the beneficial ownership rule, geographic targeting orders, the American Bar Association position, and the impact of the fifth AML Directive. It also looks at the impact on the legal profession.

Introduction

The principles of confidentiality and privacy are eroding as they come under attack in many jurisdictions outside the USA through implementation of certain anti-money laundering (AML) laws imposed on the legal profession and through public beneficial ownership registries. Jurisdictions are using these tools for the noble purpose of fighting against money laundering, terrorist financing, and tax evasion. While the USA is focused on combating tax evasion and US tax non-compliance with its Foreign Account Tax Compliance Act (FATCA), governments in many other countries, with the encouragement of international organizations, have gone much further in implementing legislation and regulations that make it much more difficult for lawyers to advise their clients and make use of the financial system (be it in basic structuring of one's affairs or even in opening a bank account).

In the USA, there are no public registers of beneficial owners. There is no suspicious activity report (SAR) filing requirement for lawyers. Financial Crimes Enforcement Network (FinCEN) has not renewed publicly the geographic targeting orders (GTOs) luxury real estate purchases. In addition, the USA still has no legislation regulating lawyers. However, covered financial institutions now must identify beneficial owners of entities. Despite the efforts of the Financial Action Task Force (FATF), the USA does not require lawyers to be 'gatekeepers'. To date, the legal profession regulates itself and is not subject to federal legislation as is found in Canada and in the European Union. US lawyers do not have an official role in the AML system although they may not engage in or aid in money laundering. Lawyers also may not provide legal services to or receive money from certain foreign nationals on the Treasury Department's Office of Foreign Asset Control (OFAC) specially designated Nationals and Blocked Persons List. US lawyers continue to be guided by the American Bar Association (ABA) Task Force publication released in 2010, entitled the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing. The ABA followed up with the issuance of the Good Practices Guidance with a 2013

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Ethics Opinion that took the view that following the risk-based approach (RBA) outlined in the guidance was consistent with the Model Rules of Professional Conduct.[1] In December 2016, the FATF mutual evaluation of the USA reported that US lawyers often act as financial gatekeepers and participate in establishing legal entities that can be used to disguise ultimate beneficial ownership. The report recommended more robust rules governing disclosure of beneficial ownership of legal entities. FATF recommended that US lawyers be required to conduct more extensive customer due diligence and file SARs on clients as necessary. To date, this has not happened yet in the USA.

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This short white paper provides an update on US legislative and regulatory initiatives, the US legal profession's push back, and how practitioners and their clients must grapple with the transparent global environment.

Legislative update

There are three bills and one draft bill in congress dealing with beneficial ownership. The ABA is neutral on HR 2426 (Secure Government Buildings from Espionage Act of 2017). Under the Maloney/Whitehouse Bill HR 3089/S 1354 (Corporate Transparency Act of 2017/True Incorporation Transparency for Law Enforcement Act), the states would collect beneficial ownership information. The ABA opposes this bill. The Wyden/Rubio Bill S 1717 (Corporate Transparency Act of 2017) is identical to the Maloney/Whitehouse Bill. The proposed Pearce Bill (Counter Terrorism and Illicit Finance Act), which is yet to be introduced, suspends the Customer Due Diligence (CDD) rule and eliminates the formation agent concept, but requires applicants to file beneficial ownership information. The ABA would oppose this bill because lawyers could be applicants within the meaning of the draft bill. Similar proposed legislation was introduced in the summer of 2017 called the 'True Incorporation Transparency for Law Enforcement Act' or 'TITLE Act' (section 1454). The bills have been referred to the appropriate committees, and the Senate Judiciary Committee held a hearing on the subject on 6 February 2018.

Regulatory update

To date, the legal profession in the USA is the only category of financial institution under the Bank Secrecy Act for which FinCEN has not issued AML regulations. This is due to the significant opposition to the regulatory effort by the legal profession and the real estate industry. FinCEN had issued an Advance Notice of Proposed Rulemaking on 10 April 2003 for 'persons involved in real estate closings and settlements'. To date, however, this category is not subject to regulations. The ABA and other legal professional groups (eg the American College of Trust and Estate Law) have opposed regulatory efforts on various grounds; including the adverse impact, the regulations could have on the attorney–client privilege, client work product, the duty of client confidentiality, and the fact that the state bars already regulate the legal profession.

Beneficial ownership rule

In May 2016 and amended on 29 September 2017, FinCEN published the CDD rule requiring financial institutions to identify and verify the identity of any beneficial owner. It became effective on 11 July 2016 with mandatory compliance as of 11 May 2018. On 3 April 2018, FinCEN issued 37 frequently asked questions (FAQs) regarding the CDD rule. The CDD rule requires financial institutions to implement risk-

1. ABA Formal Opinion 463 (23 May 2013). <https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf> accessed 11 November 2018.

based procedures for conducting due diligence. It has two prongs: an 'ownership prong', which requires the institution to identify and verify the identity of any beneficial owner who directly or indirectly owns $\geq$25 per cent of the equity interest in a legal entity, and a 'control prong' which requires identifying and verifying a single individual who exercises control over the legal entity customer at the time of account opening, eg an executive officer, treasurer, or Chief Executive Officer (CEO). A beneficial owner may fall under either or both prongs. Under the CDD best practices, there is to be customer identification and verification, beneficial ownership identification and verification, understanding the nature and purpose of the customer relationship to develop a customer risk profile, ongoing monitoring for reporting suspicious transactions, and maintaining and updating customer information on a risk basis.

Effective as of 11 May 2018, FinCEN regulations require US financial institutions to determine the natural persons who are the direct or indirect 'beneficial owners' of entities that open new accounts. This rule is known as the 'Beneficial Ownership Rule' ('Rule') and imposes mandatory compliance.[2] The regulations have a definition of 'beneficial owner' similar to the one that appears in the AML Directive. The Rule creates the 'fifth pillar' of Bank Secrecy Act/AML Compliance, requiring banks to have a risk-based customer due diligence procedure and the ability to identify and verify the identity of beneficial owners of their legal entity customers. There will always be a control person, so there will always be a minimum of one beneficial owner and a maximum of five if one uses the 25 per cent benchmark, which the Rule requires. The Customer Identification Program (CIP) verification has a higher standard than the CDD. The procedures one will use are similar to the CIP procedures, but the beneficial owner is not necessarily a customer, and therefore there will be limitations on what information the bank can verify the identity of the beneficial owner. For example, a bank can run a credit report on a customer for CIP verification, but it cannot do that for a beneficial owner who is not a bank customer. Under the Rule, bankers are not required to determine the identities of a legal entity's beneficial owner, rather they may use information provided by the person opening the account. At a 25 per cent threshold, a legal entity customer would have a maximum of five beneficial owners (four beneficial owners with a 25 per cent equity stake plus one control person), using 10 per cent, there could be as many as 11.

The regulations require financial institutions to obtain beneficial ownership information and verify the identity of the beneficial owners. The financial institutions to whom this requirement applies are banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities.[3] Financial institutions, however, are not required to verify that the natural persons held out as the beneficial owners are in fact the beneficial owners, provided the financial institution has 'no knowledge of facts that would reasonably call into question the reliability of such information'.[4] Instead, financial institutions may rely on a self-certification of beneficial owners provided by the entity although the financial institution must verify the identity of each alleged beneficial owner.[5]

On 3 April 2018, FinCEN issued guidance including FAQs on the CDD requirements for financial institutions. These were issued to assist covered financial institutions in understanding the scope of the CDD requirements. One of the important FAQs clarifies that the beneficial ownership threshold, while 25 per cent, can be more stringent if a covered financial institution so chooses. The CDD rule sets forth the

2. See Customer Due Diligence Requirements for Financial Institutions, 81 Fed reg 29,397 (11 May 2016) (the 'Final Regulations') <https://www.gpo.gov/fdsys/pkg/FR-2016-05-11/pdf/2016-10567.pdf> accessed 11 November 2018.

3. See 31 CFR 1010.230(f)(2016) (referring to 31 CFR s 1010.605(e)(1)) <https://www.gpo.gov/fdsys/pkg/CFR-2016-title31-vol3/pdf/CFR-2016-title31-vol3-sec1010-230.pdf> accessed 11 November 2018.

4. 31 CFR s 1010.230(b)(2) <https://www.gpo.gov/fdsys/pkg/CFR-2016-title31-vol3/pdf/CFR-2016-title31-vol3-sec1010-230.pdf> accessed 11 November 2018.

5. ibid.

standard for collecting valuable information at 25 per cent of beneficial ownership. There may be circumstances where a financial institution may determine that collection and verification of beneficial ownership information at a lower threshold may be warranted based on the financial institution's own risk assessment relating to its customer. All covered financial institutions should establish and maintain written procedures that are reasonably designed to identify and verify the identity of beneficial owners of legal entity customers and to include such procedures in their AML Compliance Program. When a legal entity is identified as owning ≥25 per cent of a legal entity customer that is opening an account, the covered financial institution must obtain from their legal entity customers the identities either of individuals who satisfy the definition of beneficial owner directly or indirectly through multiple corporate structures. A covered financial institution need not independently investigate the legal entity customer's ownership structure and may accept and reasonably rely on the information regarding the status of beneficial owners presented to the financial institution by the legal entity customer's representative, if the institution has no knowledge of facts that would reasonably call into question the reliability of the information. There are differences between the CIP and the CDD rule. The CDD rule expressly authorizes covered financial institutions to use photocopies or other reproduction documents for documentary verification where the CIP rule does not.

Transparency update from US perspective

The USA still has not made the collection and centralization of beneficial ownership information a priority. While FinCEN has taken a step towards requiring banks to collect beneficial owner information as part of the account opening process, corporate formation agencies and states are now required to collect beneficial owner information with respect to companies organized in the USA. In addition, while there are central registries of business entities in the USA that can be reviewed by the public, those registries do not contain beneficial ownership information.

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Effective 1 January 2017, limited liability companies (LLCs) formed in any state of the USA or the District of Columbia, which are wholly owned by foreign persons and do not elect to be treated as corporations for tax purposes, are subject to Internal Revenue Service (IRS) reporting requirements. New and existing LLCs must obtain an Employee Identification Number (EIN) after formation, and in doing so must designate a responsible person. The LLC is required to maintain adequate books and records of transactions to track any payments or transfers of money, property, or other reportable transactions between the disregarded entity and its sole member, whether such transactions are direct or indirect. These records must be available for inspection by the IRS upon demand.

Also, starting with tax year 2017, single-member LLCs, the sole member of which is a non-resident alien are required to disclose their beneficial owner to the IRS on IRS Form 5472 *Information Return of a 25 Percent Foreign Owned US Corporation Engaged in a US Trade or Business.*[6] Disclosure of this kind is already required for corporations, which must disclose the persons who beneficially own >25 per cent of the shares of the corporation. Notably, only the IRS will have this information, which may or may not make the information easily available to other law enforcement authorities in the USA.

The USA still has not implemented the Common Reporting Standard (CRS). Given FATCA's success and the US network of intergovernmental agreements (IGAs), there is little incentive for the USA to participate in CRS as it receives the information it needs under its IGAs and from reporting foreign financial

6. IRC s 6038A; Treas Reg s 1.6038A-1(c)(1); Treas Reg s 301.7701-2(c)(2)(vi).

institutions. Meanwhile, the compliance costs of complying with FATCA have caused many foreign banks to continue to turn away US citizen (or resident) clients that wish to open foreign bank accounts for legitimate purposes. While this has been normal in the days since FATCA's implementation, with the growth and implementation of CRS, perhaps business decisions by foreign banks of this kind will become less frequent due to those financial institutions being required to do CRS due diligence anyway to disclose information about their CRS country resident customers. Only time will tell.

GTOs

While there still has been no action at the federal Congressional level, there have been some federal regulatory developments as well as some state and local developments in the USA that aimed are at promoting collection of beneficial ownership information for companies and LLCs. For example, FinCEN had renewed and expanded the GTOs requiring title insurance companies to identify and to report to FinCEN individual beneficial owners of entities engaged in high-value cash purchases of residential real estate. The targeting order requires a title company to file a report if some or all of the consideration for covered real estate is paid in cash, cashier's check, personal check, a business check, a certified check, or a wire transfer. The August 2017 renewal of the GTOs expired on 30 March 2018 and as of this date, FinCEN has not publicly renewed the targeting order. FinCEN adopted the GTOs to identify high-end cash buyers of residential properties through shell companies in the following major US geographical areas: (i) all burrows of New York City; (ii) Miami Dade County and the two counties immediately north (Broward and Palm Beach); (iii) Los Angeles County; (iv) three counties comprising part of the San Francisco area (San Francisco, San Mateo, and Santa Clara counties); (v) San Diego County; (vi) the county that includes San Antonio, Texas (Bexar County), and (vii) Honolulu, Hawaii. Each geographical area has a different monetary threshold triggering reporting. The title insurance company is required to identify the natural persons behind shell companies used to pay 'all cash' for high-end residential real estate in the Metropolitan areas noted. FinCEN found that about 30 per cent of the transactions covered by the GTOs involve a beneficial owner or purchaser representative that is also the subject of a previous SAR. FinCEN was concerned about the use of shell companies to buy luxury real estate in all cash transactions and the results seem to reinforce that concern. Initially, the GTOs did not include wire transfers, but were later expanded to include wire transfers. The GTOs covered through 20 March 2018 residential real estate involving purchase prices in excess of varying amounts based on the location. However, it does not appear that FinCEN extended the GTOs after 20 March 2018 although some practitioners think the GTOs were extended publicly 'quietly'. Although FinCEN's efforts have been focused on residential real estate, money laundering can involve commercial real estate transactions according to FinCEN. Thus, the GTOs may be expanded in the future to include commercial real estate.

SAR

Currently, only financial institutions in the USA are required to file a SAR with FinCEN following a suspected incident of money laundering. Voluntary reporting of suspicious activities is not required for lawyers or persons involved in real estate closings and settlements although the report encourages this group to file voluntarily a SAR with FinCEN. Missing from the list of 'other real estate professionals' are lawyers. The advisory fails to mention lawyers or the legal profession, which may reflect the difficulty that lawyers cannot ethically file a SAR on a client because of the attorney–client privilege and the duty of client confidentiality.[7]

Treasury update

The new CDD rule for financial institutions was effective on 11 May 2018 (see discussion below). Treasury is focusing on Fintech, Regtech, and data analysis issues. Virtual currency is a growing area of regulatory focus. Treasury views virtual currency as a key vulnerability that few jurisdictions regulate. Treasury is working with law enforcement to determine whether any additional jurisdictions should come within the GTOs. At the FATF meeting in Vienna in April 2018, there was an entire afternoon devoted to Fintech and Regtech issues, virtual currencies, digital IDs, and the like.

FATF update

FATF is updating the RBA guidance for Legal Professionals and will include professional intermediaries such as accountants and trust company service providers. There are three subcommittees created for this effort. Marshall Billingslea of the USA became the President of FATF on 1 July 2018. His term ends on 30 June 2019. In 2020, the FATF presidency will be a 2-year term. Although beneficial ownership is a standard plenary agenda item, at the April 2018 meeting, it was not discussed and taken off the agenda. FATF continues to look at Fintech and Regtech issues, virtual currency, and its work on financial inclusion since 'derisking' continues to be a problem.

FATF is currently working on a legal sector affinity group AML guidance, termed AML guidance for the legal sector. It includes who should read the guidance, what is at issue, what is the definition of money laundering, the legal framework and other requirements, the RBA, system, policies, procedures and controls, customer due diligence, beneficial ownership information, money laundering offences, legal professional privilege, terrorist property offences, disclosures, enforcement, civil liability, money laundering warning signs, offences, and reporting practical examples. While it is not clear when this will be finalized and published, it is going to be a cornerstone in how practitioners, particularly lawyers, around the globe will be conducting AML requirements.

ABA-related issues

Legal profession's position

The primary vulnerability in the legal sector seems to be the unwitting involvement of lawyers in facilitating money laundering and terrorist financing. The legal profession has focused on educational efforts, to emphasize the importance of spotting red flags, particularly during client intake/onboarding. The US legal profession believes it is important to engage with regulatory and legislative officials to discuss AML/countering financing of terrorism (AML/CFT) issues so that they can better understand the unique concerns related to imposing a rigid AML/CFT regime on the legal profession. Creating a new model rule of professional responsibility dealing with client due diligence would add an enforcement component to the Model Rules framework. The challenge for the legal profession is the uncertainty of the next regulatory/legislative push. The legal profession values more engagement opportunities with regulators and legislators. There seems to be an ongoing effort to regulate the legal profession as if it were a traditional financial institution. Some regulators and legislators have a dismissive attitude towards the important role and function of the attorney–client privilege and the duty of client confidentiality. FATF appears equally dismissive of the role of educational efforts. Rather than consider alternatives that could accomplish the same goal, such as educational efforts, FATF seems to be focused on having a better letter rule governing AML/CFT.

7. Kevin Shepherd, *Real Estate Industry in Anti-Money Laundering Crosshairs* (24 August 2017). <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/gatekeeperregandtheprofessiontf(shepherdarticleonrealestateindustryinamlcrosshairslaw360august2017).authcheckdam.pdf> accessed 11 November 2018.

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Opposition to revising Model Rules

The ABA Gatekeeper Taskforce had proposed revisions to Rules 1.2 and 1.16 of the Model Rules of Professional Conduct. However, the ABA Standing Committee on Professional Discipline essentially rejected those suggested modifications in a letter on 31 July 2017. The Gatekeeper Task Force's goals were to continue the dialogue about the draft proposed amendments to the Model Rules, in order to continue the work of the FATF and the 2016 Mutual Evaluation Report (MER) for the USA. The reason for the ABA's resistance was that it found:

> a lack of empirical evidence cited to show the nature and extent to which lawyers and the legal profession actually engage in or facilitate money laundering and terrorist financing.

The ABA went on to say:

> the MER also does not include evidence to show that the Voluntary Guidance, ABA Formal Opinion 463, and other ongoing efforts by the ABA to engage, and educate lawyers and regulators of the legal profession on these issues have failed or been ineffective.

The committee stated that for the committee to adopt steps as 'severe as those urged by the FATF and the MER could negatively impact the client-lawyer relationship and possibly other rights of clients. The Discipline Committee believed that proposed new language would be unenforceable due to its vagueness, paying particular attention to such terms as 'appropriate level of due diligence' and 'client's risk profile'. The Discipline Committee questioned whether requiring such a 'deep dive into a client's affairs' could risk limiting that individual's right to counsel. It also perceives risks of conflating the goals of law enforcement with the purposes of the legal ethics rules, as embodied by the Model Rules of Professional Conduct and the enforceable versions adopted by state supreme courts. It concluded that expanding mandatory continuing legal education requirements to include course work on the subject of money laundering might be worthwhile.

Oppositions to searches of lawyers' laptops at US border

In a letter dated 5 May 2017, the ABA wrote to General John F Kelly, Secretary of Homeland Security, and John B Maher, Acting General Counsel, Department of Homeland Security, regarding the preservation of attorney–client privilege and client confidentiality for US lawyers and their clients during border searches of electronic devices. The ABA wrote to express its serious concerns regarding the standards that permit US Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) officers to search and review the content of lawyers' laptop computers, cell phones, and other electronic devices at US border crossings without any showing of reasonable suspicion. While the ABA supports border security, the principle of client confidentiality is fundamental to the American legal system. The ABA stated that a cornerstone of the US legal system is the confidential lawyer–client relationship, which includes the lawyer's strict ethical duty to preserve the confidentiality of communications with the client.[8] The ABA Model Rule of Professional Conduct 1.6(a) states, 'A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . .' The lawyer's duty to preserve client confidentiality is broad and encompasses material that is protected by the attorney–client privilege and the work product doctrine, as well as any other non-

8. *Upjohn Co v United States* (1981) 449 US 383.

privileged information that the client wishes to keep confidential. The attorney–client privilege and client confidentiality are crucial to permit clients to communicate with their lawyers in confidence, which is essential in preserving the client's right to effective counsel. Both the CBP and ICE directives have resulted in CBP officers and ICE special agents exercising sweeping powers to search electronic devices at the border, with or without reasonable suspicion of any wrongdoing. Section 6.1 of the ICE directive states that:

> ICE special agents acting under border search authority may search, detain, cease, retain, and share electronic devices, or information contained therein, with or without individualized suspicion, consistent with the guidelines and applicable laws set forth herein.

Global tax transparency push

Parallel to the push for AML and anti-terrorist financing, there is a push for global tax transparency. The USA passed the FATCA as part of the Hiring Incentives to Restore Employment of 2010 ('Hire Act'),[9] but the USA has not participated in the CRS. The USA eliminated bearer shares and has required the reporting of foreign bank accounts on the Foreign Bank Account Report (FBAR) and disclosure on the Form 1040 for many years. The US system relied on the self-reporting/honor system. The USA engaged in a number of unilateral initiatives to improve tax compliance of US taxpayers, including the Qualified Intermediary or QI initiative. When these efforts did not live up to expectations, FATCA emerged. The USA has several IGAs as an alternative to compliance with FATCA under its statutory provisions. FATCA is a fact of life and now other countries have followed the trend for automatic information exchange of tax information as found in CRS.

Although FATCA had its origins in combatting tax evasion in the USA, it is only more recently that FATF recognized that efforts to prevent money laundering and terrorist financing also could result in better tax enforcement. In the 2012 version of FATF's 40 recommendations, it recommended that countries include tax crimes as a predicate offence for money laundering. The result of a country adopting tax crimes as a predicate offence means that the proceeds of any tax-related crime would be considered to be proceeds of crime and therefore trigger suspicious activity reporting. This could include tax crimes that occur outside the jurisdiction in which tax crimes are a predicate offence. Financial institutions and other persons are required to assist the government in its AML efforts and report suspicions of tax evasions by customers. Several countries consider tax crimes as a predicate offence, including Argentina, Korea, New Zealand, and Turkey. The USA has not taken the position that a tax crime is a predicate offence. In 2015, fourth AML Directive directed EU Member Countries to begin including tax evasion as a predicate offence for money laundering. Such offences must be punishable by deprivation of liberty or a detention order for a maximum of more than one year or a minimum of more than six months. As of 2016, even Swiss law includes tax evasion as a predicate offence for money laundering. However, such tax offence is very limited and generally must require tax fraud.

The Fifth AML Directive, dated 30 May 2018 (the '2018 Directive'), was issued on 19 June 2018 by the European Parliament and Council of the European Union in the aftermath of terrorist attacks across the EU.[10] The goals of the 2018 Directive, as stated by the European Commission, are to improve transparency on the real owners of companies and trusts by establishing beneficial ownership registers, interconnect beneficial ownership registers at the EU level, lift the anonymity on electronic money products

9. Pub L 111–47, 124 Stat 71. <https://www.congress.gov/111/plaws/publ47/PLAW-111publ47.pdf> accessed 11 November 2018.

10. Directive (EU) 2018/843 Of the European Parliament and Of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018L0843> accessed 11 November 2018.

(prepaid cards) in particular when used online, extend AML and counter terrorism financing rules to virtual currencies, tax-related services, and traders in works of art, broaden the criteria for assessing high-risk third countries and improve checks on transactions involving such countries, set up centralized bank account registers or retrieval systems, enhance the powers of the EU Financial Intelligence Units and facilitate their cooperation, and enhance cooperation between financial supervisory authorities. Beneficial ownership registers for legal entities, such as companies, will be public in order to enhance public scrutiny and prevent misuse of legal entities. Access to data on the beneficial owners of trusts will be accessible without any restrictions to competent authorities, Financial Intelligence Units, and professional sectors subject to AML rules (including banks and lawyers), will be accessible to other persons who can demonstrate a legitimate interest.[11] Member States are required to implement these new rules into their national legislation by 10 January 2020, although the commission urges them to do so as soon as possible.[12]

In March 2018, the Organisation for Economic Co-operation and Development (OECD) issued model disclosure rules imposing reporting requirements upon lawyers, accountants, financial advisors, banks, among other service providers to report schemes they put in place for their clients to the corresponding tax authorities.[13] The Model Mandatory Disclosure Rules impose reporting requirements with respect to certain arrangements that circumvent CRS reporting (ie CRS Avoidance Arrangements) and structures that avoid the reporting of beneficial owners of offshore passive entities (ie Opaque Offshore Structures). These disclosure requirements generally apply to intermediaries, which are defined as the persons responsible for the design or marketing of such arrangements/structures, and those persons that provide assistance or advice with respect to the design, marketing, implementation, or organization of such arrangements/structures where such persons could reasonably be expected to know that the arrangements/structures are CRS Avoidance Arrangements or Opaque Offshore Structures. Although countries are not obligated to adopt the Mandatory Disclosure Rules, it appears likely, that, over time, many countries will adopt them and that they will become part of the international norms.

In June 2018, the European Commission published an amendment to the Directive on Administrative Co-operation. The update imposed mandatory reporting for certain cross-border arrangements upon accountants, lawyers, tax advisers, and potentially the ultimate taxpayer. They must report certain cross-border arrangements to the respective tax authorities of the Member States. These new rules will apply to reportable arrangements occurring on or after 25 June 2018. Member States (including the UK) must adopt these rules into their respective domestic legislation by 31 December 2019. The newly amended directive (2018/882/EU) updates the prior directive, referred to as 'DAC 6', formally known as the 2011 Directive on Administrative Cooperation in the field of taxation (2011/16/EU). This new update represents a marked increase in the degree of reporting imposed upon advisers and their clients.

Although the USA introduced FATCA to require foreign financial institutions worldwide to identify each of their account holders who have US indicia and provide information to the US government, the OECD thereafter created the CRS to provide similar information on a multi-country basis. The primary purpose of the CRS is the prevention of tax evasion. The USA did not sign onto the CRS system and is now emerged as a leading tax haven for foreign individuals. The USA has taken the position that it does not need to sign up for CRS because it has FATCA

11. European Commission, 'Strengthened EU Rules to Prevent Money Laundering and Terrorism Financing' (Fact Sheet, 9 July 2018) <http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48935> accessed 11 November 2018.

12. ibid.

13. See OECD, *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures* (9 March 2018) <http://www.oecd.org/tax/-exchange-of-tax-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf> accessed 11 November 2018.

and bilateral IGAs. Even though IGAs require disclosure to the IRS of information relating to accounts held by US persons and non-US entities controlled by US persons, the USA is unable to disclose the same sort of information for US entities controlled by residents of an IGA partner. Until now, the USA had no legislation requiring financial institutions to collect information with respect to the beneficial owners of companies and trusts. As a result, some consider the USA as a preferred jurisdiction to avoid CRS, particularly given the USA lack of entity transparency and no reporting of beneficial ownership. Hence, anonymous ownership still prevails. Thus, the USA after chastising other countries for helping Americans hide their money offshore, the USA is now the destination of choice for wealthy foreigners because it is not a signatory to CRS with its automatic exchange of information. Even under the IGAs, there is not full reciprocity of exchange of information, there is lack of financial transparency, and it is easy to establish anonymous shell companies.

Lawyers as AML enforcers

While FATF and other countries believe lawyers in some circumstances should be 'gatekeepers' to the financial system, no federal or state legislation or regulations in the USA requires lawyers to be gatekeepers. In the USA, lawyers may not engage in money laundering or aid or abet money laundering.[14] Lawyers may also not provide legal services to or receive money from certain foreign nationals on the Treasury Department's OFAC 'Specially Designated Nationals and Blocked Persons List'. While there are some rules that prevent lawyers from representing certain clients, lawyers are not key players in the US AML system. The issue of lawyers' roles regarding AML initiatives has been subject to debate and has seen sustained efforts by legal professional organizations. Nevertheless, the federal government has allowed the legal profession to regulate itself in this area.

There is discussion in the European Parliament that the USA should be named a blacklist tax haven country, or at the bare minimum, a grey list country, because it does not meet EU transparency and corporate tax standards.

On 9 March 2018, the OECD, responding to a request of the G7, has issued new model disclosure rules that require lawyers, accountants, financial advisors, banks, and other service providers to inform tax authorities of any schemes they put in place for their clients to avoid reporting under the OECD/G20 CRS or prevent the identification of the beneficial owners of entities or trusts.[15]

As the reporting and automatic exchange of information relating to offshore financial accounts pursuant to CRS become a reality in over 100 jurisdictions this year, many taxpayers that held undeclared financial assets offshore have come clean to their tax authorities in recent years, which has already led to over $85 billion of additional tax revenue.

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At the same time, there are still persons who, often with the help of advisors and financial intermediaries, continue to try hiding their offshore assets and fly under the radar of CRS reporting. The new rules released target these persons and their advisers, by introducing an obligation on a wide range of intermediaries to disclose the schemes to circumvent CRS reporting to the tax authorities. The new rules also

14. See eg Laundering of Monetary Instruments (2016) 18 USC s 1956. <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/18usc1956.pdf> accessed 11 November 2018.

15. *Game Over for CRS Avoidance! OECD Adopts Tax Disclosure Rules for Advisors* <http://www.oecd.org/tax/game-over-for-crs-avoidance-oecd-adopts-tax-disclosure-rules-for-advisors.htm> accessed 11 November 2018.

require the reporting of structures that hide beneficial owners of offshore assets, companies, and trusts.

These model disclosure rules will be submitted to the G7 presidency and are part of the OECD's wider strategy to monitor and act upon tendencies in the market which try to avoid CRS reporting and hide assets offshore. As part of this work, the OECD is also addressing cases of abuse of golden visas and similar schemes to circumvent CRS reporting.

The USA had efforts to combat facilitation of offshore tax evasion including the Department of Justice (DOJ) Offshore Compliance Initiative, commenced in 2008 with the investigation of UBS AG. Since then, it has investigated and prosecuted foreign financial institutions and facilitators around the world. As part of its overall initiative, DOJ unveiled the 'Swiss Bank Program' in August 2013, which provided a path for Swiss banks to resolve potential US criminal liabilities within parameters of both Swiss and US laws. Because of the Swiss bank programme, the DOJ collected almost $1.37 billion in penalties. Over 35 000 US-related accounts from 2008 to 2013 were disclosed. This programme ended in 2016.

In the USA under the 'Revenue Rule', the tax laws of another country will not be enforced. In *Pasquantino v United States*,[16] the US Supreme Court held that a scheme in the USA to defraud a foreign government (Canada) of tax revenue violates the Wire Fraud Statute. The court further held that the Revenue Rule does not preclude prosecutions for wire fraud violations arising from such type of activity. The court affirmed the convictions of three men who had been prosecuted under the Wire Fraud Statute for a scheme to evade Canadian excise taxes through smuggling alcohol into Canada from the USA. Many have interpreted this case to conclude that a scheme conducted within the USA to evade foreign taxes can be prosecuted under the Wire Fraud Statutes and is not barred by the Revenue Rule. If the activities that constitute foreign tax evasion occur in the USA through the use of interstate wires, then foreign tax evasion may constitute a violation of the Federal Wire Fraud Statute. The court stated that it was aware of no common law Revenue Rule case decided that held or clearly implied that the Revenue Rule barred the USA from prosecuting a fraudulent scheme to evade foreign taxes.

Conclusion

The USA is slowly exploring implementation of AML and transparency initiatives. While the overwhelming majority of these to date have not been implemented as in other parts of the world, the USA has been discussing and considering them. Only time will tell what the USA will do, and until then the legal profession seeks to continue its mission of protecting privacy and confidentiality of clients.

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16. (2005) 544 US 349.