

UNITED STATES

BENEFICIAL OWNERSHIP TRANSPARENCY

The US is not fully compliant with any of the G20 Principles and has only improved on three since the 2015 assessment. The US lacks an adequate definition of beneficial ownership and anti-money laundering laws have key loopholes such as with respect to the real estate industry and corporate service providers. Finally, to avoid the misuse of legal entities and arrangements, stricter rules and disclosure requirements should be adopted in relation to nominee shareholders.

G20 PRINCIPLE 1: BENEFICIAL OWNERSHIP DEFINITION

Score: 25%

The US does not clearly define beneficial ownership and it cannot be considered compliant with the G20 Principle 1.

In compliance with the 2001 USA PATRIOT Act, Treasury issued a definition of beneficial that applies to financial institutions with certain types of accounts, such as correspondent accounts for foreign financial institutions or private banking for wealthy individuals. It does not apply to customers who are legal entities, for example. Within this framework, beneficial owner of an account is defined an individual who has a level of control over, or entitlement to, the funds or assets in the account that, as a practical matter, enables the individual, directly or indirectly, to control, manage or direct the account.

In 2016, the US Department of Treasury issued a broader due diligence regulation that provides for a new beneficial ownership definition to be applied also to legal entity customers. Beneficial owner is now defined as each natural person that owns 25 per cent or more of the shares of a corporation. As for the control element, the new definition simply states that the beneficial owner may be a single individual with significant responsibility to control, manage or direct a legal entity customer, including (i) an executive officer or senior manager or (ii) any other individual who regularly performs similar functions. By permitting an officer, manager, or "other individual" to be named as the beneficial owner of an entity, even if that person has no ownership interest in the entity or entitlement to its assets, the definition confuses and weakens the meaning of the term beneficial owner.

The U.S. Congress is currently considering several bills that contain a stronger definition of "beneficial owner" than in either of the regulations above. They include the Corporate Transparency Act (S. 1717 and H.R. 3089) and the True Incorporation Transparency for Law Enforcement (TITLE) Act (S. 1454), among others. The bills have bipartisan sponsors and the support of law enforcement, financial institutions, and public interest groups, but no concrete action has yet been taken to enact any of them into law.

G20 PRINCIPLE 2: IDENTIFYING AND MITIGATING RISK

Score: 80%

The US conducted an assessment of the national money laundering risks which was [published](#) in June 2015. The assessment includes a section analysing the specific risks related to the use of nominees and the misuse of legal entities.

It highlights that there are several ways through which legal entities can be used for money laundering, including the use of front, shell and shelf companies. It also notes that in the US "(w)hen a legal entity is registered with state authorities there is no requirement in any state to provide beneficial ownership information (i.e. the natural person or persons who own or control the company). Financial institutions are required to identify the beneficial owner of an account in limited circumstances," making it possible for individuals who own or control a legal entity to hide behind nominees.

External stakeholders were not consulted during the assessment, but according to the government their input was incorporated through analysis conducted by FinCEN of Bank Secrecy Act reporting, including suspicious activity reports and currency transaction reports.

G20 PRINCIPLE 3: ACQUIRING ACCURATE BENEFICIAL OWNERSHIP INFORMATION

Score 0%

There has been no improvement on this Principle since 2015.

The US has no federal law generally requiring legal entities to maintain beneficial ownership information.

Current laws and regulations do not require legal entities to maintain information on beneficial ownership. Consequently, there is also no requirement that the beneficial ownership information is maintained within the US. There is also no requirement for nominee shareholders to declare to the company if they own shares on behalf of a third person.

In the United States, legal entities such as corporations, limited liability corporations (LLCs), partnerships and trusts are generally formed on the state level¹. The 50 states have different laws and regulations with respect to the entities formed within their borders. No state explicitly requires those entities to collect and maintain information on their beneficial owners. The states that do require legal entities to maintain some information on their owners of record do not require that information to be maintained in the US.

The U.S. Internal Revenue Service (IRS) does not request, collect, or maintain beneficial ownership information for any category of entities in the United States. Instead, the IRS requests entities that complete IRS Form SS-4 seeking to obtain an Employer Identification Number to provide the name and contact information for a “responsible party” who can answer questions about the entity.

G20 PRINCIPLE 4: ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Score: 18%

There have been no improvements to this score since 2015. Timely access to beneficial ownership information by competent authorities in the US is restricted. Currently, there are no state or federal requirements for legal entities to disclose the identity of the beneficial owners at the time of creation.

The US also does not have a beneficial ownership registry and authorities have thus to rely on the information recorded in state company registries and the information collected by certain financial institutions.

Authorities may also be able to access other types of information relevant to identify the beneficial owner such as shareholder/membership information, bank account information or payment records, but this requires a subpoena for records.

Law enforcement authorities may also have access to information recorded by the Internal Revenue Service. Certain legal entities are required to obtain an Employer Identification Number (EIN) and as part of the process

identify a so-called “responsible party”². However, this information can only be accessed with a court order and for non-tax related investigations.

There is no central company registry in the US and rules on company incorporation are defined at the state level. As such, each US state has a separate company registry and requires different information from legal entities. In some of the registries (for example, Delaware), not even information on shareholders or directors is recorded, making the identification of the beneficial owner more difficult. The information is not verified by the registry authorities and in some states there is no requirement to update the information provided upon registration.

G20 PRINCIPLE 5: TRUSTS

Score: 25%

The US has a domestic trust law and allows the administration of foreign trusts. However, the current legal framework is still not fully in line with the G20 Principle.

There is no specific law requiring trustees to maintain beneficial ownership information. Nevertheless, to fulfill their fiduciary duties with regard to US law, a trustee must know and maintain current information on the identity of any other trustee, of the settlor(s), and of all beneficiaries. They may also be required under state law to retain information regarding the settlor, trustee, and beneficiaries for at least several years after the termination of the trust. This however does not necessarily mean the real identities of the final beneficiaries behind trusts is identified.

The 2016 due diligence regulation issued by Treasury also failed to address shortcomings related to trusts. According to the new rule, only legal entities created by the filing of a public document with a Secretary of State or similar office.” In the United States, private trusts generally are not created by filing public documents with a Secretary of State, which means none of the disclosure requirements apply to the vast majority of U.S. private trusts.

¹ For the purpose of this assessment, legal entities refer to private, non-listed companies.

² Responsible party is defined as: “For entities with shares or interests traded on a public exchange, or which are registered with the Securities and Exchange Commission, “responsible party” is (a) the principal officer, if the business is a corporation, (b) a general partner, if a partnership, (c) the owner of an entity that is disregarded as separate from its owner (disregarded entities owned by a corporation enter the corporation’s name and EIN), or (d) a grantor, owner, or trustor if a trust. For all other entities, “responsible party” is the person who has a level of control over, or entitlement to, the funds or assets in the entity that, as a practical

matter, enables the individual, directly or indirectly, to control, manage or direct the entity and the disposition of its funds and assets. The ability to fund the entity or the entitlement to the property of the entity alone, however, without any corresponding authority to control, manage, or direct the entity (such as in the case of a minor child beneficiary), does not cause the individual to be a responsible party. <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Responsible-Parties-and-Nominees>

Trusts are private agreements and therefore there is no requirement that it should be registered. Information about beneficiaries of a trust is not publicly available or otherwise recorded in a state registry.

There is no requirement that a trustee of a domestic or foreign trust should disclose its status upon starting a business relationship with a financial institution or DNFBPs. Neither there are obligations to financial institutions and DNFBPs to consistently identify the beneficial owner of customers that are trusts.

G20 PRINCIPLE 6: ACCESS TO BENEFICIAL OWNERSHIP OF TRUSTS

Score: 42%

The law does not specify which competent authorities should have timely access to beneficial ownership information of trusts. Nevertheless, law enforcement authorities are able to subpoena information relating to trusts from the trustee, a financial institution, or another source.

G20 PRINCIPLE 7: DUTIES OF BUSINESS AND PROFESSIONS

Score: 29%

Financial Institutions

Score: 47%

In 2016, Treasury finalised a new due diligence regulation that requires all US financial institutions to “establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of legal entity customers and to include such procedures in their anti-money laundering compliance program.” 31 CFR § 1010.230. While that requirement is a clear step forward, the regulation also contains a weak definition of beneficial owner. The new due diligence requirements become effective in May 2018.

U.S. law requires covered financial institutions to verify only the *existence* of the individual purported to be the beneficial owner of a legal entity customer but not the *status* of the individual as a beneficial owner of the legal entity customer.

Financial institutions can ask US federal agencies or law enforcement to share beneficial ownership information to help them comply with AML requirements and prevent money laundering. In addition, they can use civil legal proceedings to try to subpoena or discover the beneficial ownership information that law enforcement agencies have in their possession, but such suits are rarely successful.

Financial institutions are expected to conduct enhanced customer due diligence in cases where a customer is a foreign politically exposed person (PEP) or a close associate. The requirement to verify whether the beneficial owner is a PEP however only apply to the covered financial institutions mentioned above. Moreover, domestic PEPs are not covered by the law.

The law also does not mandate that a financial institution should not proceed with a business transaction if the beneficial owner has not been identified. Equally, financial institutions are not statutorily required to submit a suspicious activity report if the beneficial owner has not been identified. There are no bright-line rules as to when a SAR must be filed. In practice, FinCEN and financial institutions apply a broad test as to when SARs should be filed and it may include lack of transparency around the transaction (including lack of beneficial ownership transparency). Existing regulations require covered financial institutions to implement some procedures when due diligence or enhance due diligence cannot be performed. These procedures include filing suspicious activity reports.

Sanctions for non-compliance can be applied to financial institutions and to directors and senior managers. The Department of Justice (DOJ) has had a long-standing policy of investigating and prosecuting individuals.

DNFBPs

Score: 17%

DNFBPs, such as TCSPs, lawyers, accountants and luxury goods dealers are not required to identify the beneficial owner of their customers. Some businesses and professions are required to submit suspicious activity report and implement an effective anti-money laundering program (i.e. casinos and dealers in precious metal and stones), but they are not required to identify the beneficial owner.

Real estate agents are subject to some AML reporting requirements. Some specific [Geographical Targeting Orders](#) require some title companies to report information on some real estate transactions to FinCEN.

When a DNFBP is covered by U.S. AML laws, they are required to know their customer, which includes identifying the beneficial owner of a legal entity, but there is no federal or state law that prohibits a DNFBP from engaging in a transaction even if the beneficial owner is unidentified. The new 2016 due diligence regulation allows financial institutions to skip identifying any party other than the trustee in the case of a trust or any beneficial owner in the case of a legal entity with more than four beneficial owners.

Sanctions can be applied by law enforcement to DNFBPs covered by US AML laws.

G20 PRINCIPLE 8: DOMESTIC AND INTERNATIONAL COOPERATION

Score: 71%

Investigations into corruption and money laundering require that authorities have access to relevant information, including regarding beneficial ownership. In the US, there is no centralised database that can be used by domestic or foreign authorities to consult information on legal ownership and control. Domestic authorities usually are required to obtain an administrative subpoena or a judicially-authorized warrant before obtaining information.

Some domestic authorities maintain online databases with information that may be used in investigations, such as the FinCEN data access service with a range of financial transactions information, or the Department of Justice Law Enforcement Enterprise Portal, but they do not include information on beneficial ownership.

US authorities usually share beneficial ownership or other relevant information through mutual legal assistance requests and letter rogatory, although informal consultations are also possible. The US has more than 100 mutual legal assistance treaties with countries around the world and under those activities such as information exchange, evidence gathering on bank records or corporate formation documents, obtaining testimony, execution of searches and seizures and investigative steps are possible.

The US is also a member of the Egmont Group and relevant information to identify beneficial ownership of legal entities can be shared between FinCEN (US' financial intelligence unit) and other foreign financial intelligence units. The US is also an active member of CARIN, the Camden Asset Recovery Interagency Network, an informal network consisting of practitioners from 53 jurisdictions and 9 international organizations concerned with all aspects of confiscating the proceeds of crime. U.S. officials welcome informal inquiries and the United States has numerous law enforcement agency and Department of Justice attachés posted abroad who can facilitate assistance in support of foreign investigations.

Information on tax gathered by law enforcement or other federal agency through court order or subpoena cannot however be shared with foreign government officials, except for tax purposes pursuant to a treaty, convention, or information exchange agreement.

G20 PRINCIPLE 9: BENEFICIAL OWNERSHIP INFORMATION AND TAX EVASION

Score: 75%

Tax information is treated with the highest degree of confidentiality within the US government. Tax information can only be shared between the Internal Revenue Service and federal, state and municipal government agencies under information sharing programs aimed at enhancing voluntary compliance with tax laws.

The Foreign Account Tax Compliance Act (FATCA) allows for information sharing between US tax authorities and foreign counterparts. More than 100 bilateral agreements between individual countries and the US establish the framework for information sharing.

G20 PRINCIPLE 10: BEARER SHARES AND NOMINEES

Score: 50%

Bearer shares

Score: 100%

Bearer shares are prohibited in the US

Nominee shareholders and directors

Score: 0%

Nominee shareholders are allowed in the US and there is currently no requirement that they should disclose upon registering the company the identity of the beneficial owner(s). There is also no requirement for professional nominees to be licensed or keep records of the persons who nominated them.