

# UNITED STATES BENEFICIAL OWNERSHIP TRANSPARENCY

---

The US is not fully compliant with any of the G20 Principles. 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. Anti-money laundering rules and requirements to identify the beneficial owner of clients should also be expanded to all relevant DNFBPs, including trusts and corporate service providers and real estate agents. Finally, to avoid the misuse of legal entities and arrangements, stricter rules and disclosure requirements should be adopted in relation to nominee shareholders.

*Please note: In countries with federal systems, where answers could differ across federal units, the responses refer to the state/province where the largest number of legal entities are currently incorporated which in the case of the US is the State of Delaware.*

## 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.

The definition of beneficial ownership is in 31 CFR §1010.605(a). The requirement to identify beneficial ownership occurs in limited circumstances. “Beneficial owner of an account means 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. The ability to fund the account or the entitlement to the funds of the account alone, however, without any corresponding authority to control, manage or direct the account (such as in the case of a minor child beneficiary), does not cause the individual to be a beneficial owner.” (31 CFR §1010.605(a)).

## G20 PRINCIPLE 2: IDENTIFYING AND MITIGATING RISK

Score: 80%

The US conducted an assessment of the national money laundering risks last year. 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.

The assessment finds that the money laundering methods identified usually exploit one or more of the following vulnerabilities: (i) use of cash and monetary instruments in amounts under regulatory recordkeeping and reporting thresholds; (ii) opening bank and brokerage accounts in the names of businesses and nominees to disguise the identity of the individuals who control the accounts; (iii) deficient compliance with AML regulations; (iv) creating legal entities without accurate information about the identity of the beneficial owner; and (v) merchants and financial institutions willingly facilitating illicit activity.

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.

The final assessment was [published](#) in June 2015 and is available to the public.

## G20 PRINCIPLE 3: ACQUIRING ACCURATE BENEFICIAL OWNERSHIP INFORMATION

Score 0%

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 shareholder to declare to the company if they own shares on behalf of a third person.

## G20 PRINCIPLE 4: ACCESS TO BENEFICIAL OWNERSHIP INFORMATION

Score: 18%

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"<sup>1</sup>. 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: 33%

The US has a domestic trust law and also 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, but in order to fulfill their fiduciary duties with regard to U.S. 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

---

<sup>1</sup> 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>

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.

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.

## G20 PRINCIPLE 6: ACCESS TO BENEFICIAL OWNERSHIP OF TRUSTS

Score: 25%

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: 19%

### Financial Institutions

Score: 38%

Current customer due diligence requirements in the US are not in line with the G20 Principle 7 as they do not require the identification and verification of the beneficial owner(s) when establishing a business relationship. Only certain financial institutions offering private banking, namely banks, brokers or dealers in securities, mutual funds and future commission merchants and introducing brokers in commodities, as well as financial institutions that offer correspondent accounts are required to take reasonable steps to identify the nominal and beneficial owner of the accounts. This requirement does not cover legal entity customers.

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.

In 2014, FinCEN started a consultation process to redefine and expand the instances in which beneficial ownership information would be required to be obtained. Its comment period closed on October, 3, 2014 and to date final rules have not been issued.

Several different state, federal, and private entities are responsible for anti-money laundering supervision in the United States. The supervision depends, in part, on the type of financial institution and both state and federal authorities are tasked with the supervision of financial institutions. The federal regulators include:

1. the Treasury Department's Financial Crimes Enforcement Network (FinCEN)
2. the Treasury Department's Office of the Comptroller of the Currency (OCC)
3. the Board of Governors of the Federal Reserve System [Central Bank],
4. the Federal Deposit Insurance Corporation (FDIC)
5. the National Credit Union Association (NCUA) [Federal Agency]
6. the Consumer Financial Protection Bureau (CFPB)
7. the Treasury Department's Office of Terrorism and Financial Intelligence (TFI);
8. the Securities and Exchange Commission (SEC)
9. the Department of Justice (DOJ).

There are also a number of self-regulatory organisations, the most relevant being the Financial Industry Regulatory Authority, FINRA.

Sanctions for non-compliance can be applied to financial institutions and to directors and senior managers. In fact, the Department of Justice (DOJ) has had a long-standing policy of investigating and prosecuting individuals. This policy was recently reaffirmed in DOJ's September 9, 2015, Deputy Attorney General Memorandum, authored by Deputy Attorney General Yates, titled "Individual Accountability for Corporate Wrongdoing" (the "Yates Memo"). The guidance in the memo, lists steps to strengthen DOJ's pursuit of individual corporate wrongdoing. While many individuals outside of the corporate context have been prosecuted for money laundering violations, in the Bank Secrecy AML context, individual criminal prosecutions have been limited. The most notable individual criminal prosecutions have been a series of check cashing cases where individuals, such as the owner or chief compliance officer of the check casher have been criminally prosecuted for failure to file currency transaction reports and failure to have an effective anti-money laundering program.

In several occasions financial institutions have been subject to sanctions related to money laundering. For instance, in March 2015, Commerzbank AG, agreed to a deferred prosecution agreement (DPA) and payments over US\$1.45 billion to separate state and federal entities for violating sanctions and money laundering laws. Commerzbank AG New York Branch admitted criminal conduct in violation of the Bank Secrecy Act (BSA) for "willfully failing to have an effective [AML] program, willfully failing to conduct due diligence on its foreign correspondent accounts, and willfully failing to file suspicious activity reports."<sup>2</sup> US\$300 million of the settlement went to victims of a complex securities fraud scheme enabled by the BSA violations. The New York State Department of Financial Services (DFS) fined the bank US\$610 million and required an independent monitor to oversee reforms. The Federal Reserve System levied at US\$200 million penalty and barred employees involved in the misconduct from employment with the bank.<sup>3</sup>

## DNFBPs

Score: 8%

DNFBPs 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 also not obliged to conduct due diligence and / or identify the beneficial owners of their customers. While persons involved in real estate closings and settlements are considered financial institutions, there is a temporary decision (from 2002) granting exemption to real estate agents, among others, from the PATRIOT Act requirement for implementation of anti-money laundering programs.

The US only scores points under this principle due to provisions that allow for criminal and civil liability of directors and managers if they engage in money laundering or any other illegal activity.

---

<sup>2</sup> "Commerzbank AG Admits to Sanctions and Bank Secrecy Violations, Agrees to Forfeit \$563 Million and Pay \$79 Million Fine", Department of Justice, 12 March 2015.

[www.justice.gov/opa/pr/commerzbank-ag-admits-sanctions-and-bank-secrecy-violations-agrees-forfeit-563-million-and](http://www.justice.gov/opa/pr/commerzbank-ag-admits-sanctions-and-bank-secrecy-violations-agrees-forfeit-563-million-and)

<sup>3</sup> Board of Governors of the Federal Reserve System, Press Release. 12 March 2015.

<http://www.federalreserve.gov/newsevents/press/enforcement/20150312b.htm>

---

## Towers of secrecy

Earlier this year, the New York Times series "Towers of Secrecy",<sup>4</sup> revealed how billions of dollars' worth of luxury real estate in New York City has been purchased using anonymous companies by individuals under investigation for corruption and other crimes. They are able to do so because U.S. law does not require the real estate industry to carry out background checks on the source of purchase funds and determine who is the ultimate ("beneficial") owner.

The real estate industry continues to enjoy a 2002 temporary exemption from the PATRIOT Act requirement for implementation of anti-money laundering programs. To remedy the situation, Transparency International USA and its partners sent a letter to the U.S. Department of Treasury demanding prompt action to require due diligence by professionals in the real estate sector, and extending due diligence requirements by financial institutions to encompass companies and other legal entities.

## 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

---

<sup>4</sup> "Tower of Secrecy: Stream of Foreign Wealth Flows to Elite New York Real Estate" Story, L. & Saul, 7 February 2015, New York Times.

<http://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html?action=click&contentCollection=N.Y.%20%2F%20Region&module=Kicker&ion=Header&pgtype=article>

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.