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PERSPECTIVE

New federal anti-money laundering law could affect your company

By M. Kendall Day and Chris Jones

What do a Chinese businessman providing support to Iran's ballistic missile program, individuals running a $168 million Ponzi scheme, and the co-conspirators in the 1MDB scandal who purchased luxury real estate in Beverly Hills have in common? All allegedly relied heavily on the use of shell companies to obscure the flow of their money, thereby making it significantly harder for U.S. law enforcement to conduct investigations into these activities.

For many years, companies in the United States were not required to report who actually owns a particular company (the "beneficial owners" of a company). The lack of such a requirement in the United States has long been seen by law enforcement as a loophole that criminals could exploit. For instance, in 2016, the Financial Action Task Force, (an international body that sets anti-money laundering, known as AML, standards) recommended that the United States "[t]ake steps to ensure that adequate, accurate and current [beneficial owner] information of U.S. legal persons is available to competent authorities in a timely manner, by requiring that such information is obtained at the Federal level."

In response to these perceived AML weaknesses, on Jan. 1, 2021, Congress passed the Anti-Money Laundering Act of 2020, known as AMLA, as part of the National Defense Authorization Act. The AMLA is the most comprehensive set of reforms to the anti-money laundering laws in the United States since the USA PATRIOT Act was passed in 2001.

One of the most notable provisions of the AMLA is that it requires many smaller corporations to disclose beneficial ownership information to the Financial Crimes Enforcement Network, known as FinCEN, the office within the U.S. Department of Treasury that is tasked with setting U.S. government policies to combat money laundering and terrorist financing. The disclosure requirement applies to corporations, limited liability companies, or other similar entities that were created under the laws of U.S. or foreign corporations registered to do business in the U.S. Unlike many anti-money laundering legal requirements, the beneficial ownership provision in the AMLA is not limited to financial institutions or similar business.

But the AMLA explicitly excludes certain types of companies from this requirement, including U.S. public companies, financial institutions, government entities, insurance companies, and their subsidiaries (entities owned or controlled directly or indirectly by the exempted entity). One of the most notable exemptions is for larger U.S.-based operating companies which have (1) more than 20 full time employees in the United States, (2) with gross receipts or sales in excess of $5 million in the previous tax year based on the entity's prior year's federal tax return, and (3) which maintain an "operating presence at a physical office in the United States." Despite these exemptions, there will still be many corporations and LLCs in the United States required to provide beneficial ownership information under the AMLA.

It will take some time before beneficial ownership reporting requirements are in place. Under the AMLA, the Treasury Department is required to promulgate regulations within one year (i.e., by Jan. 1, 2022) regarding the reporting of this information. And once those regulations come into effect, corporations that were already in existence on the date those regulations become effective will have two years from that date to provide FinCEN with beneficial ownership information. Thus, it will be a number of years before companies are required to provide beneficial ownership information to FinCEN. But once they are, the AMLA provides penalties for failing to disclose beneficial ownership information, including civil monetary penalties of $500 per day and a fine up to $10,000 and/or imprisonment of up to two years. These penalties can add up quickly, particularly for smaller corporations.

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In addition to the beneficial ownership provision, the AMLA contains a host of other provisions intended to equip U.S. enforcers with more tools to investigate and deter money laundering. For example, it contains a provision substantially expanding incentives for whistleblowers to report alleged violations of the Bank Secrecy Act to the government. Specifically, in the event that an anti-money laundering enforcement action brought by DOJ or the U.S. Treasury Department results in monetary sanctions over $1 million, the AMLA provides that the Secretary of the Treasury "shall" pay an award of up to 30% of what was collected to whistleblowers who "voluntarily provided original information" that led to a successful enforcement action. This may result in a wave of tips to the government, even if few of them pan out.

Taken together and in combination with other enforcement provisions, the AMLA illustrates that the government continues to increase its focus and sophistication in fighting illicit finance. Accordingly, it will be critical for companies of all shapes and sizes to understand and monitor their anti-money laundering obligations, including if and when they are required to disclose beneficial ownership information to the government. ■

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