

SEND LAWYERS, GUNS AND MONEY

The late singer-songwriter, Warren Zevon, used this phrase as a way to point out that reinforcements were necessary to get out of a seemingly impossible situation. While a tad over the top, it struck me that the pending push to address the lack of transparency with corporate formation is about to fall mainly on the financial industry in the call for determining beneficial ownership.

A correct identification by the international Financial Action Task Force, Congress, and many other experts that company formation requirements in the United States are minimal at best—and an embarrassment at worst—means that something must be done.

Is there a will to push the states to improve their information-gathering requirements?

Or can we expect, yet again, that financial institutions will bear the brunt of the recordkeeping and reporting burden?

It all depends on us.

Criticisms of U.S. approach mounting

FATF has criticized the United States, in a 2006 mutual evaluation, for its approach to company formation when it stated:

“... the information available within the jurisdiction is often minimal with respect to beneficial ownership. In the case of the states whose procedures were reviewed in the course of this evaluation (Delaware and Nevada), the company formation procedures and reporting requirements are such that the information on beneficial ownership may not, in most instances, be adequate, accurate or available on a timely basis. This is vulnerability for the U.S. AML/CTF system.” (To read this in its entirety, click here. To learn more about FATF, see my earlier blog, “Who are those guys?”)

To add additional pressure, in June of this year, Assistant District Attorney Adam Kaufmann, of the N.Y. County District Attorney’s Office, pulled no punches when he told a Senate subcommittee considering legislation (S. 569) that would change the company formation process:

“It is difficult to speak with moral authority in criticizing offshore bank secrecy jurisdictions when they can point an accusing finger back at us. The British Virgin Islands is a well-known (in law-enforcement circles) bastion for dirty shell companies, but even the British Virgin Islands can level criticism at the lack of transparency in the incorporation processes in our states. That we were deemed “non-compliant” by the Financial Action Task Force is an embarrassment. That we have made no progress in the three years since then is absurd. [Emphasis added]

“Simply put, we lag behind many other countries in the world in this regard, and it makes our statements concerning transparency and tax evasion ring hollow and hypocritical.”

Earlier this month, Treasury Assistant Secretary David Cohen testified in favor of changing the current system of corporate formation that, he said, “creates a pathway for criminal actors to gain access to the international financial system, and creates significant obstacles in our [Treasury’s] ability to investigate financial crime.”

Cohen added that “information on the true beneficial ownership of a legal entity— at the time a business is formed, as ownership changes during its lifespan, and when it seeks to open accounts at financial institutions—is critical to stopping the exploitation of legal entities by criminal actors.”

There is hope that the Treasury Department recognizes the potential for burden that will harm the financial system. When he told the same committee that any changes should not “create unnecessary impediments to accessing the financial system for the vast majority of new and existing businesses that pose no threat whatsoever,” Cohen put that on the record. ([Click here](#) for his full statement.)

Challenges don’t stop at U.S. border

Assistant Secretary Cohen also reiterated the need to address FATF’s evaluation of beneficial ownership information, but cautioned that there are implementation challenges in certain jurisdictions so that domestic change may not be sufficient.

However, the following paragraph from Cohen’s testimony concerns me:

“Clarify and strengthen customer due diligence requirements for U.S. financial institutions with respect to the beneficial ownership of legal entity account holders: Treasury is currently working with the federal financial regulatory agencies to consider guidance for U.S. financial institutions that will clarify when and how financial institutions should identify and verify beneficial ownership as a component of conducting customer due diligence of account holders that are legal entities. We are also working with the regulatory and law enforcement communities, and consulting with the private sector, to determine whether and, if so, how such due diligence requirements should be strengthened through rulemaking or otherwise.”

You may remember an earlier blog posting when I cautioned that “guidance” and “regulations” are, at times, indistinguishable.

Well, with the statement that Treasury is working on guidance, I think it is essential that trade and industry groups offer their time and experience to any process that may result in exam or other regulatory criticism.

Without any changes to how states capture information, focusing primarily on financial institutions will not change the

status quo. I applaud Treasury for pointing out their concern regarding the need for a comprehensive approach. It is important that any obligations on financial institutions come only with that same complete approach.

This Week's Kicker: Real information sharing?

On another front, the Financial Crime Enforcement Network (FinCEN) is proposing to add foreign agencies to Patriot Act 314 (a) implementing regulations as yet another entity that can use the 314 process to receive information from the financial sector.

My question is this:

As someone involved in the creation and debate on the need for information sharing after 9/11, where is the proverbial "two-way street" that we all hoped for? Maybe it's time to re-read the statute (see below):

Subsection 314(a) of the Patriot Act states in part that:

[t]he Secretary shall . . . adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities. (To read more, [click here.](#))

Please send me your thoughts and comments, or post them below.

About John Byrne, CAMS

Byrne leads Condor Consulting LLC, a Washington, D.C., area financial services consulting firm specializing in regulatory management, AML, privacy, and a vast array of financial institution compliance related issues. He has written extensively on AML issues for 25 years and has appeared on television and testified before many congressional committees on AML-related policy issues. Prior to the creation of his firm, John was the Global Regulatory Relations Executive at Bank of America. Previously, he worked for the American Bankers Association for 22 years and was responsible for ABA's lobbying, regulatory, and educational efforts on money laundering, and other compliance issues. He received the ABA's Distinguished Services Award and was also the first private sector recipient of the "Director's Medal for Exceptional Service" from the Treasury Department's Financial Crimes Enforcement Network (FinCEN). Byrne can be e-mailed at jbyrne@thecondorconsultingllc.com.

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