What new US anti-money laundering laws mean for offshore investors

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New regulations clearing up the US's murky offshore banking laws are now in place, but what does this mean for offshore investors? Our legal columnists Rebecca Leon and Terry Gilroy of Baker McKenzie have the lowdown.

The US continues to be a popular destination for offshore investors looking for security and anonymity. However, some critics have argued that the country has become a preferred jurisdiction for establishing corporate vehicles – such as shell companies and special-purpose entities – to facilitate illicit activities all under the cover of anonymity.

Enter the Anti-Money Laundering Act (AMLA), which was introduced earlier this year. The act establishes a federal repository of owners for certain US entities and expands subpoena power over foreign banks that maintain accounts in US financial institutions, including broker-dealers.

The absence of such a registry had been viewed by the international community and many US lawmakers as a significant gap in the US anti-money laundering regulatory framework. The signature AMLA provision, the Corporate Transparency Act (CTA), establishes an ownership registry for certain companies formed in the US to be maintained by the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN).

Is this landmark act bad news for wealthy offshore residents who value anonymity?

FinCEN has not yet published its final rules, but the statute itself provides a good idea of what the registry will look like and what issues may arise. Here is what you can expect..

Who does it affect?

Not all entities will be required to report beneficial ownership to FinCEN. Although the CTA contains several significant exclusions, making clear that the intent of the statute is to discourage the formation of shell companies in the US, the categories of entities not specifically excluded is unclear.

Specific exclusions include:

- public US issuers;
- companies that employ more than 20 full-time employees, operate from a physical US office, and have more than $5m in annual gross sales or receipts;
- companies that are in existence for over one year, are not engaged in active business, are not owned directly or indirectly by a foreign person, and do not hold any type of assets;
- charitable trusts and charitable organizations;
- and pooled investment vehicles.

It is not clear whether trusts or partnerships will be required to report beneficial ownership.

Who can access the registry?

The registry will not be public but will be available to US and foreign law enforcement when requested for international cooperation, such as mutual legal assistance treaties.

US law enforcement has a history of cooperation with foreign counterparts on international corruption and money-laundering activities involving the US financial system. It is very likely that foreign authorities will be provided with information from the registry to support their own investigations, but information will only be provided to them through formal processes in the context of an active investigation.

Offshore investors may find it increasingly difficult to remain anonymous from their local governments if they are under investigation and such governments can make a compelling case for the provision of information.

However, the information in the FinCEN registry will not be available to foreign law enforcement where there is no suspected wrongdoing, which is good news for offshore clients of US broker-dealers who relish privacy for personal safety and other legitimate reasons.

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Who can be subpoenaed?

The expansion of the US law enforcement's subpoena power over foreign banks that hold accounts with US financial institutions, including broker-dealers, is another AMLA provision that puts information in the hands of the US government that could be shared with foreign governments.

AMLA expands the authority to include 'any records relating to the correspondent account or any account at the foreign bank, including records maintained outside the United States.'

This expansion opens to US law enforcement subpoena authority over account records of clients of a foreign bank even where the services provided are wholly unrelated to the foreign bank's account in the US.

Nevertheless, this expanded power may be subject to challenge by foreign banks, and in some cases, they may seek the help of their local governments and courts to scale back such

requests on jurisdictional, data protection and privacy, and other grounds.

In other words, AMLA and the CTA should enhance the ability of US law enforcement to combat money-laundering while also protecting the privacy of registrants in the absence of suspected wrongdoing.

Final word

Has the US struck the right balance for offshore clients? Will the sharing of information with foreign governments be sufficiently restricted and require evidence of suspected wrongdoing? To share or not to share? Time will tell.

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