

**USA Response: Collection of Information Regarding  
Implementation of Resolution 7/2 of the Conference of States Parties to the  
UN Convention against Corruption**

In response to the Secretariat's request for information contained in note verbale CU 2018/78/DTA/CEB/CSS, the United States is pleased to provide the following information:

**Experiences and best practices on criminal and civil measures and remedies to enhance international cooperation and asset recovery related to corruption when it involves vast quantities of assets.**

The United States does not have a legal definition for what constitutes "corruption involving vast quantities of assets," and notes that there is no legal definition of this term within the Convention. With regard to U.S. asset recovery practices, the United States' primary aim is to deter corruption and to ensure that those who engage in corrupt conduct are deprived of the fruits of their crimes. U.S. asset recovery and international cooperation efforts are enhanced in a number of ways, particularly through recovery tools such as non-conviction based confiscation and through flexible and robust channels for mutual legal assistance in criminal matters.

Under U.S. law, the Department of Justice can initiate non-conviction (NCB) confiscation proceedings against corruption proceeds and instrumentalities, including against both property located in and outside of the United States, if the property is traceable to criminal acts in the United States or to criminal conduct occurring in part in the United States. Non-conviction based confiscation is a practice that is both encouraged by UN conventions and by certain recommendations of the Financial Action Task Force. The implementation and use of NCB confiscation proceedings is particularly useful in instances where an offender cannot be prosecuted for reasons of death, flight, or official immunity. In the event that requests for assistance seek the NCB confiscation of criminal property, the United States will need from foreign law enforcement authorities all available evidence establishing the connection between the property and the foreign criminal activity, such as financial records, witness interviews, relevant laws establishing the criminal acts, charging documents, and other pertinent information upon request. Additionally, under U.S. law, in certain circumstances the United States can petition a U.S. court to execute a final order of confiscation entered by a foreign court.

**Best practices in the identification of legal and natural persons, involved in the establishment of corporate entities, including shell companies, trusts and other similar arrangements which may be abused to commit or conceal crimes of corruption or to hide, disguise or transfer their proceeds of corruption to countries that provide safety to the corrupt and/or their proceeds.**

In the U.S. Federal system, responsibility for the formation and governance of legal entities is held by the states. Accordingly, each of the 50 states and the District of Columbia has its own laws concerning these matters. All legal or business entities created in the United States must be registered in a state's company registry. The company registry is the Secretary of State (or other designated office) in each state. These offices are responsible for overseeing and administering the company formation process in each state, including the registration and filing of information

that is required to create and maintain the types of legal entities permitted. These offices also maintain the records and provide information to the public relating to these entities. Information about the types and basic features, as well as the process for creation and for recording and obtaining information about legal entities, is available on the relevant websites of each state. As described below, the United States has recently instituted due diligence requirements that require covered financial institutions to collect and verify beneficial ownership information regarding companies that open accounts.

### **How is beneficial ownership information on legal entities obtained and recorded in the United States?**

Currently, there are not any federal or state requirements for legal entities to disclose the identity of the beneficial owners at the time of creation. However, legal entities that have employees, operate a business, or are otherwise required to file with the Internal Revenue Service (IRS) are required to obtain an Employer Identification Number (EIN), and identify a so-called “responsible party.” An EIN is also a requirement under the Bank Secrecy Act (BSA) for a business entity to open accounts with banks, securities and futures firms. The definition of “responsible party” is very similar to the definition of beneficial owner in the Financial Action Task Force (FATF) Glossary. Thus, the vast majority of legal entities formed in the United States are required to disclose beneficial ownership information to the IRS for tax administration purposes. This information is only available to law enforcement for use in non-tax investigations with a court order. A tax return or return information obtained via court order cannot be disclosed to foreign government officials, except for tax administration purposes pursuant to a treaty, convention, or information exchange agreement.

Beginning on May 11, 2018, banks, mutual funds, broker-dealers, futures commission merchants, and introducing brokers in commodities (“covered financial institutions”) must obtain beneficial ownership information from legal entity customers when a legal entity opens a new account. Specifically, covered financial institutions must identify, verify, and maintain records on the identity of each individual owner of a legal entity with 25 percent or more equity interests in and one individual with managerial responsibility for the legal entity. Although not yet legally mandated (see below discussion of the “Customer Due Diligence Rule”), except in certain circumstances (e.g. foreign private banking accounts), many financial institutions do gather beneficial ownership information for legal entities as part of their customer due diligence programs, which is intended to mitigate money laundering and terrorist financing risks when establishing accounts for, and conducting occasional transactions on behalf of, a legal entity. Such information can be compelled by law enforcement and foreign competent authorities can seek and obtain these financial records through mutual legal assistance requests.

### **How are legal arrangements (express trusts and trust-like agreements) formed in the United States?**

Unlike legal entities, a trust is a contractual arrangement between the person who provides the funds or other assets and specifies the terms (called the settlor or grantor) and the person with control over the funds or other assets (the trustee) for the benefit of those who benefit from the trust (the beneficiaries). In some situations the grantor, trustee, and beneficiary are all the same

person. Because a trust is essentially a private contractual agreement between the settlor and the trustee (whether individual or corporate), the effect is that, unlike a corporation or LLC, there is no state registration requirement. Under state laws, trusts may own or control most types of assets.

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. A class of beneficiaries (such as the descendants of the grantor) will expand and contract as beneficiaries die and others are born. In addition, a trustee has an obligation to maintain adequate records, which is implicit in the duty to act with prudence and the duty to report to beneficiaries.

All domestic trusts (with a few limited exceptions, such as a grantor trust using the grantor's Social Security number as its taxpayer identification number), and all foreign trusts that earn income that is effectively connected with a U.S. trade or business, or that otherwise are required to file a U.S. tax return, are required to obtain an EIN by filing an application with the IRS that identifies the trust, the trustee, and the trustee's address. This EIN must be provided to each bank, broker, or other entity when opening an account or purchasing property in the name of the trust.

Because trusts are essentially private contracts, information about beneficiaries of a trust is not publicly available or otherwise recorded in a state registry. U.S. law enforcement may subpoena information relating to trusts from the trustee, a financial institution, a lawyer, or another source. Trust information can be shared with foreign counterparts pursuant to mutual legal assistance requests.

### **Requests for Information**

The United States strives to provide timely cooperation in all asset recovery matters, and is able to do so in circumstances where no "formal" request has yet been made, and in response to mutual legal assistance treaty requests. Informal investigative assistance can often be obtained through a number of investigative agency attachés located at U.S. Embassies abroad who are able to liaise with their counterparts for investigative and prosecutorial assistance needs.

The United States' financial intelligence unit (FIU), FinCEN, is a member of the Egmont Group, a worldwide network of 155 FIUs that provides a secure framework for exchange of financial intelligence to combat money laundering, predicate offenses and terrorist financing. FIUs can facilitate international exchange of financial intelligence for the benefit of third parties, including law enforcement agencies. FIUs rely upon suspicious transactions reports, and, if available, cash transaction reports, cross-border cash transportation forms, and other information to develop financial intelligence that they share with domestic and international partner agencies.

The United States is also a member of several practitioner networks related to the recovery of the proceeds of crime, including the Camden Asset Recovery Inter-Agency Network and the Asset Recovery Focal Point Initiative (supported by STAR and Interpol). Recently, the United States' involvement in the Global Forum on Asset Recovery with the participating countries of Nigeria, Tunisia, Sri Lanka, and Ukraine has facilitated ongoing efforts to identify and locate illicitly

derived assets. Through this forum, the United States was not only able to provide technical expertise to other forum participants on asset recovery matters, but it was also able to engage bilaterally with countries pursuing asset recovery investigations that have a nexus to the United States.

Through more formal mechanisms, the United States can provide a wide array of assistance not prohibited by domestic law, including but not limited to: information exchange, evidence gathering, obtaining testimony, service of process, restraint and forfeiture of assets, transferring persons in custody for testimony or other purposes, executing searches and seizures, and investigative steps such as undercover investigations, controlled deliveries, and communication interception, etc. The United States is also a party to numerous international conventions that may be useful in corruption investigations, including the UN Convention against Transnational Organized Crime (UNTOC), UN Convention against Corruption (UNCAC), Inter-American Convention on Mutual Legal Assistance in Criminal Matters, and the UN Convention for the Suppression of the Financing of Terrorism. The full range of MLA can be provided in accordance with the United States' international obligations under these conventions. Requests may be prioritized based on factors including the seriousness of the offense involved; the value of any assets involved; the stage of the requesting jurisdiction's investigation (e.g., whether indictments/charges will be immediately forthcoming); and the impact of any case on the public interest. Before resorting to the formal MLAT process, the United States encourages foreign authorities to use police-to-police or other informal channels, especially if the information requested is intended to be used as intelligence in the course of investigation, not as evidence in court (at least initially).

Mutual legal assistance requests in criminal matters (including conviction and non-conviction based confiscation proceedings) are processed through the Department of Justice (DOJ) Office of International Affairs (OIA). OIA serves as the U.S. central authority for mutual legal assistance treaties (MLATs) and multilateral conventions to which the United States is party. OIA coordinates all incoming and outgoing requests for evidence, including records and testimony, as well as extradition requests. Requests for assistance in civil cases are transmitted by the DOJ Civil Division's Office of Foreign Litigation. MLAT requests made pursuant to bilateral or multilateral instruments are the best method for obtaining evidence related to beneficial ownership, such as bank records or corporate formation documents. Such requests are necessary when compulsory process is required.

Under Section 314(a) of the USA PATRIOT Act, FinCEN, in significant investigations and upon the certified request of U.S. law enforcement agencies, has the ability to canvas the U.S. financial system (more than 15,000 financial institutions) for accounts or transactions of specified individuals, entities, and organizations engaged in, or reasonably suspected of engaging in, terrorist activity or significant money laundering activity. The 314(a) Program may potentially provide law enforcement agencies with previously unknown lead information. Foreign law enforcement, through FinCEN, may utilize the 314(a) Program after all available investigative alternatives have been exhausted, so long as the foreign law enforcement agency is from a jurisdiction that FinCEN determines provides U.S. law enforcement with reciprocal access to comparable information. Such requests through FinCEN should be made by a U.S. law enforcement agency on behalf of foreign investigators if the criteria for using 314(a) are met. The U.S. financial institutions respond only if they have responsive information; follow-up by

U.S. law enforcement occurs via the appropriate legal avenues to obtain all relevant information related to the positive match.

### **New Customer Due Diligence Rule**

In May 2018, the United States Department of Treasury will begin enforcing a new Customer Due Diligence (CDD) Rule that requires certain financial institutions – including banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities – to establish and maintain written procedures that are reasonably designed to identify and verify the beneficial owners of legal entity customers. These procedures must enable the institution to identify the beneficial owners of each such customer at the time a new account is opened, unless the customer is otherwise excluded or the account is exempted, and to verify the identity of each beneficial owner. The Rule also amends existing Bank Secrecy Act (BSA) regulations to clarify and strengthen customer due diligence obligations of these entities.