

FATF Reviews AML / CFT Regime

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On December 1, 2016, the Financial Action Task Force ("FATF") [released a peer assessment](#) of the United States' anti-money laundering and combatting the financing of terrorism ("AML/CFT") regime. This is the first peer assessment of the United States since June 2006.

The FATF assessment found that the U.S. AML/CFT framework is "well developed and robust" and that "domestic coordination and cooperation on AML/CFT issues is sophisticated and has matured" since the FATF's 2006 assessment. The FATF assessment specifically commended the United States for adopting the inter-agency task force model, which improves cooperation among law enforcement agencies. The report cited the United States for "good coordination" at the supervisory level, including quarterly meetings among the Financial Crimes Enforcement Network ("FinCEN"), Office of Foreign Assets Control, Consumer Financial Protection Bureau, Securities and Exchange Commission and Commodities Futures Trading Commission, as well as the Federal Reserve and Office of the Comptroller of the Currency.

At the same time, the FATF assessment found two significant gaps in the U.S. AML/CFT regime:

- The AML/CFT regime has minimal coverage of investment advisers, lawyers, accountants, real estate agents, and trust and company service providers (other than trust companies). The assessment also found that minimal AML/CFT measures are imposed on non-financial businesses, other than casinos and dealers in precious metals and stones.
- Regulators and law enforcement lack timely access to current and accurate beneficial ownership information. There is no central mechanism to collect beneficial ownership information at the time legal entities are formed, and law enforcement and regulator reliance on the beneficial ownership information that is collected by the individual U.S. states is hampered because the states generally do not verify the information they collect on legal persons.

The first perceived shortcoming, especially as it would affect lawyers' trust accounts and reporting obligations, has attracted considerable press attention, whereas U.S. government responses have focused on efforts to make beneficial ownership more transparent. For its part, the FATF assessment recommended that the United States should:

- Directly apply AML/CFT obligations to investment advisers that do not already have such obligations due to their association with an AML/CFT regulated entity such as a bank or bank holding company.
- Apply AML/CFT obligations to lawyers, accountants, trust and company service providers (other than trust companies) on the basis of a specific vulnerability analysis.
- Require collection and verification of beneficial ownership information at the federal level.

Responding for the Department of Justice ("DOJ") in a [blog post](#), Assistant Attorney General Leslie Caldwell of the Criminal Division and Acting Assistant Attorney General Mary McCord of the National Security Division highlighted the assessment's praise of the overall effectiveness of the U.S. AML/CFT regime, while also acknowledging some of the deficiencies highlighted in the assessment. The post specifically mentioned DOJ's ongoing support for legislation that would require companies formed within the United States to file beneficial ownership information with the Treasury Department. The Department of Treasury published a similar [blog post](#), noting that FinCEN issued a [final rule](#) to clarify and strengthen customer due diligence requirements earlier in 2016. As some in the industry have observed, the FATF assessment summarizes the state of the U.S. AML/CFT framework as of January/February 2016, while the FinCEN final rule on customer due diligence and beneficial ownership was issued in May 2016.

The issue of AML/CFT obligations for investment advisers has also been on FinCEN's agenda. On September 1, 2015, FinCEN issued a [notice of proposed rulemaking](#) that would extend to certain investment advisers [the requirement to](#)

[establish AML programs](#) and report suspicious activity to FinCEN under the Bank Secrecy Act. A final rule has not yet been issued, and it is possible that FinCEN may further delay the rule as it digests the FATF report.

The legal profession has consistently resisted the application of AML/CFT obligations that could impair attorney-client confidentiality. The FATF assessment itself acknowledges, “the [American Bar Association is] strongly of the view that mandatory [Suspicious Activity Reporting] should not apply to attorneys because of the breadth of legal professional privilege and because of the ability of attorneys to withdraw from a relationship where illegal activity is apparent.” A [Wall Street Journal article](#) recently quoted American Bar Association President Linda A. Klein as describing additional financial reporting requirements for lawyers as “unnecessary and burdensome,” while another attorney called the prospect of imposing AML/CFT obligations on lawyers “the single most alarming threat to attorney-client privilege anyone has seen in a long time.”

Although this does not seem like a “first 100 days” issue for the incoming Trump administration, we expect no reduction in AML enforcement activity and, accordingly, little chance that pressure for broader AML/CFT reporting requirements will significantly abate.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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