

LIFTING THE VEIL OF SECRECY: INVESTIGATING SHELL COMPANIES AND THEIR AGENTS

By Barbara Yu Levy

Due to recent anti-money-laundering initiatives in the EU and the US, interested parties now have expanded access to crucial information about any hidden assets their business partners or adversaries might hold, thereby providing them a more complete understanding of the associated risks of a given transaction or litigation strategy. These initiatives aim to eliminate the protections afforded to shell companies — including those incorporated in opaque jurisdictions such as the British Virgin Islands and Cayman Islands — that have long allowed illicit funds to move anonymously through the international financial system.

As authorities worldwide target the shell companies that shelter illicit funds, more jurisdictions will likely be expected to implement changes in how beneficial ownership information is collected and reported — namely in centralized databases accessible to law enforcement and other interested parties. This will not only help compliance professionals and legal teams more effectively conduct their investigations — whether for due diligence, litigation, or asset tracing purposes — but also reduce the time it takes to identify evidence of wrongdoing. Moreover, these efforts are likely to spotlight the range of actors who are involved in setting up and operating shell companies, enabling investigators to expand their inquiries beyond the ultimate beneficial owners.

REMOVING EXISTING BARRIERS

The European Union’s 4th Anti-Money Laundering Directive, which took effect in June 2015, obligates member countries to establish central registers of beneficial ownership data accessible by law enforcement and relevant government bodies, as well as other interested parties. In the wake of the EU Directive and subsequent pressure from the UK, the British Virgin Islands (BVI), a favored destination for shell companies, announced that beginning in 2016, existing and newly incorporated companies would be required to file the names, dates of birth, residential addresses, and nationalities of their directors with the BVI Companies Registry. The Cayman Islands, another historically opaque jurisdiction, has also committed to passing legislation requiring that corporate service providers avail beneficial ownership information to tax, regulatory, and law enforcement agencies within 24 hours of an official request.

Authorities in the US have taken similar steps. In January, the US Department of the Treasury announced a pilot program that would require real estate companies to disclose to the federal government the beneficial ownership information of shell companies used to make all-cash purchases of luxury real estate in Manhattan and Miami-Dade County, defined as those properties valued in excess of US\$3 million and US\$1 million, respectively. Shell companies are increasingly ubiquitous in the US high-end real estate sector, making transparency a priority for the government. Indeed, a major unfolding corruption scandal involving shell companies used to purchase several properties in Manhattan’s Time Warner Center, a billionaire financier

Key Benefits

- ▶ Expanded access to crucial information about hidden assets
- ▶ Reduced time to identify evidence of wrongdoing
- ▶ Increased attention to the variety of actors associated with shell companies
- ▶ Potential access to information disclosed to law enforcement authorities that may be relevant to private investigations

with ties to Western elites, and the Malaysian prime minister is currently being investigated in five different countries, including the US.

Moreover, the pilot program could well be replicated in other cities, providing indirect access to shell companies that are used to purchase luxury real estate outside of New York and Miami-Dade County. While access to this information appears to be primarily limited to federal authorities for the time being, the general trend toward transparency suggests that public access may be forthcoming.

CLOSING THE INFORMATION GAP

Some argue that the proposed measures need to go further — for instance, that all beneficial ownership information should be centralized and publicly accessible — while others believe that even incremental changes will harm business and add burdensome compliance costs. The initiatives described above suggest that both sets of concerns will be given fair consideration, with an emphasis on coordinated enforcement. For instance, by requiring real estate agents to detect and report the identities of certain all-cash purchasers in New York and Florida, the US government is effectively deputizing the agents as monitors of suspicious activity, and holding them accountable for failing to do so. In fact, current trends suggest that the “facilitators” of shell companies will likely be scrutinized more closely going forward.

In addition, these measures – both current and proposed – stand to benefit anyone seeking clarity on whether potential business partners and/or adversaries have been involved in illicit dealings through their various affiliations, but have until now faced a wall of secrecy due to limited disclosure requirements. Under the EU Directive, specifically, the public may have access to ownership registers as long as they can demonstrate a “legitimate interest” in the information. And in the BVI, beneficial ownership information will be available to parties with a court order, in addition to relevant law enforcement authorities.

EMPHASIZING TRANSPARENCY

Although many shell companies are set up for legitimate purposes, the level of secrecy they are afforded has made them a useful vehicle for criminals to maneuver ill-gotten gains without detection. By requiring agents to collect and share information regarding hidden ownership, authorities in the EU and the US are recognizing that financial crimes involving shell companies tend to cover multiple jurisdictions, involve several layers of obfuscation, and require coordinated enforcement on many levels. Private-sector parties who wish to obtain a better understanding of their partners’ and adversaries’ activities also stand to benefit from this new era of transparency.