

The Fight against Shell Corporations in the US

One of the critical areas in due diligence for foreign business partners is determining who are the true owners of an entity. Unfortunately this is not always possible to determine as many countries do not require the names, addresses and other identifying information of shell company owners or limited liability partners. Many people think of the Cayman Islands or other traditional tax havens when such issues arise.

However, a surprising number of allegedly low risk countries also have this problem. New Zealand is generally recognized as one of the lowest risk countries in the annual Transparency International Corruption Perceptions Index, nevertheless this rating may not be all it seems. In an article by Michael Field on the Stuff.co.nz website, entitled “*NZ firms linked to money laundering*”, Field reported that one individual was listed as a Director of over 300 New Zealand formed companies. Another person, listed as the Director of the New Zealand Company alleged to have been involved with the shipment of arms to North Korea, was “convicted of 75 breaches of the Companies Act for giving false addresses on registration forms”.

New Zealand is not be the only country with a low corruption perception which may not be completely accurate. In a Reuters article, entitled “*Special Report: A little house of secrets on the Great Plains*”, authors Kelly Carr and Brian Grow reported on one house in Cheyenne, Wyoming which the authors claim “serves as a little Cayman Island on the Great Plains” as it is home to the registration of over 2,000 entities. The article claims that Wyoming allows “the real owners of corporations to hide behind “nominee” officers and directors with no direct role in the business, often executives of the mass incorporator.” Carr and Grow also quote Jason Sharman, a professor at Griffith University in Nathan, Australia, who states that “Somalia has slightly higher standards [for business incorporation] than Wyoming and Nevada.”

One of the anomalies in the ongoing HP investigation, for alleged bribery and corruption violations in its German subsidiary, was the German authorities’ investigation of activities in and through the state of Wyoming. The article by Carr and Grow may help explain why the German authorities needed to investigate matters relating to Wyoming where the allegations were that bribes were paid by a HP German subsidiary for a sale into Russia.

However, perhaps there is legislation on the way to close this loophole in the US. In another Reuters article, entitled “*House bill targets anonymous shell corporations*”, Patrick Temple-West reports on US legislations, introduced in the House of Representatives, which would require stricter disclosure laws. The author notes that “This is at least the third time lawmakers have considered proposals to crack down on shell company incorporation.” The legislation has bipartisan support, the bill was introduced by a Democrat in the House and jointly introduced by a Democrat and Republican in the Senate. It is reported to have “wide support by law enforcement” and support from the US Departments of Treasury and Justice.

So you ask who would be opposed to bringing the US standards for business incorporation up to that of at least Somalia. Temple-West reports that “Some state government group[s] remain opposed. In the past, resistance has also come from business groups and lawyers.” I am also somewhat chagrined to report that an organization that I belong to, the American Bar Association, has opposed prior legislation to provide greater disclosure for shell companies. However, it is now reported to be “reviewing the latest bills.”

How does all of this relate due diligence as the US problem would not seem to impact a company covered by the Foreign Corrupt Practices Act (FCPA)? First of all, a company should know with whom they are doing business, and more pointedly a US company which is subject to the UK Bribery Act needs to recognize that any agent, distributor or other type of representative here in the US, is a foreign entity under the Bribery Act and needs full due diligence. While the jurisdictional scope of the Bribery Act has yet to be fully fleshed out, such a US company needs to consider its due diligence here in the US and may need to strengthen its investigations and background checks on such parties to comply with the Bribery Act.

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