



THE FUTURE OF BENEFICIAL OWNERSHIP
IN THE UNITED STATES: TRADE,
TRANSPORTATION, AND NATIONAL
SECURITY IMPLICATIONS

LAKSHMI KUMAR AND JULIA YANSURA

December 2020



This policy insight was produced through the membership of Global Financial Integrity with the Financial Transparency Coalition (FTC). The FTC is a global civil society network working to curtail illicit financial flows through the promotion of a transparent, accountable, and sustainable financial system that works for everyone. This document reflects the views of Global Financial Integrity and is not intended to represent the positions of other members of the FTC.

Acknowledgements

This document was originally produced as part of a Chapter in a book titled “*Registros de beneficiarios finales*” to assess US policy priorities on beneficial ownership, but also to explore how they relate to issues within the Western Hemisphere.

The authors would also like to thank Daniela Jallath for her invaluable research assistance.

Table of Contents

Introduction	1
The Context for Beneficial Ownership in the US	1
Beneficial Ownership and US Policy Priorities	3
The Future of Beneficial Ownership in the United States: Trade and Transportation	5
1. <i>The Case for Beneficial Ownership Transparency Surrounding Aircraft</i>	6
2. <i>The Case for Beneficial Ownership Transparency Surrounding Boats</i>	9
3. <i>Trade Based Money Laundering and Customs</i>	11
4. <i>Foreign Trade Zones in the United States</i>	13
5. <i>U.S Trade Agreements and Beneficial Ownership</i>	17
Conclusion	20

Introduction¹

As one of the world's largest economies, the US is a major hub for business, trade, and financial services. Unfortunately, weaknesses in the US system make it vulnerable to abuse by both US and international actors, with far-reaching security impacts. One such weakness pertains to beneficial ownership.² Under current US law, bad actors can hide their connections to companies, assets and legal structures since there is no requirement to disclose of the real or "beneficial" owner, that is, the person who truly controls and benefits from the entity.

Beneficial ownership transparency is critically needed. Fundamentally, it empowers citizens, private sector leaders, journalists and law enforcement with access to information regarding the real people behind a company, legal structure or asset. Knowing the "beneficial owners" is a key to preventing corruption, money laundering, terrorism financing, and a whole host of other crimes that hurt the United States – and its neighbors in the Western Hemisphere.

This chapter begins by assessing where the US is in terms of beneficial ownership, noting that some progress has been made but much remains to be done. Next, it analyzes how beneficial ownership is seen in the United States, and where it fits within existing policy priorities. Beneficial ownership requirements currently cover bank accounts, and are likely to expand to corporations, limited liability companies and other similar entities next. Looking to the future, this chapter considers ways that the US could strengthen beneficial ownership going forward. It concludes by arguing the future of beneficial ownership in the US must contemplate trade and transportation, two areas that are critical to US and hemispheric security.

The Context for Beneficial Ownership in the US

Beneficial ownership has been under discussion in the US for the past decade, but legislative progress has been slow. As early as 2006, a report by the Government Accountability Office (GAO) noted that "minimal ownership information is collected and available," raising concerns among law enforcement and policymakers alike.³

Even as the US implemented some changes, such as requiring beneficial ownership information from all legal entities that hold bank accounts,⁴ progress in other areas,

¹This 'Policy Insight' was originally as part of a Chapter in a book titled "Adrian Falco, Juan Argibay and Maria Eugenia (Editors), Registros de beneficiarios finales" to assess US policy priorities on beneficial ownership, but also to explore how they relate to issues within the Western Hemisphere.

²"Beneficial Ownership Secrecy" in Corruptionary A- Z," Transparency International. Available at: <https://www.transparency.org/en/corruptionary/beneficial-ownership-secrecy>

³"Company Formations: Minimal Ownership Information Is Collected and Available," United States Government Accountability Office, April 2006. Available at: <https://www.gao.gov/new.items/d06376.pdf>

⁴This is required as per the 2016 Customer Due Diligence Requirements for Financial Institutions (CDD Rule), issued by the Financial Crimes Enforcement Network (FinCEN). See <https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-12.html>

such as requiring the same beneficial ownership for all legal entities at the time of formation or registration, irrespective of whether they are customers of financial institutions, has been laboriously slow. As the previously mentioned GAO report noted, “states typically require basic information on company formation documents, such as the name of the company and the name and address of a contact where tax and other legal notices for the company should be sent;” however, most “do not require companies to provide ownership information at formation or in periodic reports.”⁵ Thirteen years later, a 2019 report by Global Financial Integrity came to similar conclusions. It showed that, at a state by state level, more information is required to apply for a public library card than to register a corporation.⁶ At the same time, requirements are uneven from state to state, creating a troubling dynamic where illicit actors exploit weaknesses in certain state requirements.⁷ For example, 1 million businesses have made Delaware,⁸ a state with a population of less than 1 million residents,⁹ their legal home. While many of these businesses are legitimate, some are not.¹⁰

At the legislative level, many efforts have been made to address these weaknesses. A number of bills have been introduced to either the House or the Senate but have not yet been made it into law. They have included the Incorporation Transparency and Law Enforcement Assistance Act of 2008,¹¹ which was subsequently re-introduced in 2009, 2010, 2011 and 2016.¹² They have also included the Corporate Transparency and Accountability Act of 2014 and 2016,¹³ the Corporate Transparency Act of 2017,¹⁴ the Incorporation Transparency for Law Enforcement (TITLE) Act of 2017,¹⁵ the ILLICIT Cash Act of 2019,¹⁶ the Corporate Transparency Act of 2019,¹⁷ and the Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform

⁵ “Company Formations: Minimal Ownership Information Is Collected and Available,” United States Government Accountability Office, April 2006. Available at: <https://www.gao.gov/new.items/d06376.pdf>

⁶ “The Library Card Project: The Ease of Forming Anonymous Companies in the United States,” Global Financial Integrity, March 2019. Available at: <https://gfintegrity.org/report/the-library-card-project/>

⁷ Ibid.

⁸ “About the Division of Corporations,” Delaware Division of Corporations. Available at: <https://corp.delaware.gov/aboutagency/>

⁹ 2019 Population estimates in “Quick Facts: Delaware,” The United States Census. Available at: <https://www.census.gov/quickfacts/DE>

¹⁰ See, for example, Casey Michel, “The U.S. is a Good Place for Bad People to Stash Their Money,” The Atlantic, July 13, 2017. Available at: <https://www.theatlantic.com/business/archive/2017/07/us-anonymous-shell-companies/531996/>

¹¹ See <https://www.congress.gov/bill/110th-congress/senate-bill/2956>

¹² See

<https://www.congress.gov/search?q={%22source%22:%22legislation%22,%22search%22:%22%22Incorporation%20Transparency%20and%20Law%20Enforcement%20Assistance%20Act%22%22}&searchResultViewType=expanded>

¹³ See

<https://www.congress.gov/search?q={%22source%22:%22legislation%22,%22search%22:%22%22Corporate%20Transparency%20and%20Accountability%20Act%22%22}&searchResultViewType=expanded>

¹⁴ See <https://www.congress.gov/bill/115th-congress/house-bill/3089> and <https://www.congress.gov/bill/115th-congress/senate-bill/1717>

¹⁵ See <https://www.congress.gov/bill/115th-congress/senate-bill/1454>

¹⁶ See <https://www.congress.gov/bill/116th-congress/senate-bill/2563>

¹⁷ See <https://www.congress.gov/bill/116th-congress/house-bill/2513>

(COUNTER) Act of 2019,¹⁸ and most recently the Anti-Money Laundering Act of 2020¹⁹ As this long list indicates, pressure for greater beneficial ownership transparency in the United States has been growing for over a decade.

Opposition to beneficial ownership legislation in the US has generally focused on costs of implementation, compliance difficulties for small businesses, increased bureaucracy or paperwork, and infringements on privacy.²⁰ While all of these concerns are valid, the topic of privacy merits special discussion. Americans value privacy very highly, with a recent survey showing that 64% are at least somewhat concerned about the government collecting data, and 66% believe that government data collection has more risks than rewards.²¹ For many Americans, national security is the only thing important enough to come close to justifying loss of privacy, though many still have serious reservations.²² Therefore, beneficial ownership information collection is often framed in this light by US policymakers. The following section provides more details on how beneficial ownership fits within US policy priorities.

Beneficial Ownership and US Policy Priorities

In the United States, as in other countries, beneficial ownership brings together different constituencies with diverse perspectives and objectives. Among those who have advocated for beneficial ownership in the US are transparency groups, anti-human trafficking groups, private sector leaders (including large corporations like Dow Chemicals, Unilever, and Allianz), as well as the US Chamber of Commerce, law enforcement groups, bankers' associations, and religious organizations.²³

However, the US differs from many other countries in viewing beneficial ownership primarily through the national security lens, rather than as a matter of tax justice or corporate transparency. For example, in 2019 the White House released a statement noting that beneficial ownership legislation would “help prevent malign actors from leveraging anonymity to exploit (...) entities for criminal gain. It would also assist law enforcement in detecting and preventing illicit activity such as terrorist financing and

¹⁸ See <https://www.congress.gov/bill/116th-congress/house-bill/2514>

¹⁹ See <https://www.banking.senate.gov/newsroom/record/minority/brown-urges-senate-action-on-bipartisan-anti-money-laundering-amendment-to-ndaa>

²⁰ For an example, see “Hearing on Outside Perspectives on the Collection of Beneficial Ownership Information,” United States Senate Committee on Banking, Housing and Urban Affairs, June 20, 2019. Available at: <https://www.banking.senate.gov/imo/media/doc/Harned%20Testimony%206-20-19.pdf>

²¹ Brooke Auxier and Lee Rainie, “Key Takeaways about Americans’ Views about Privacy, Surveillance and Data Sharing,” Pew Research Center FactTank, November 15, 2019. Available at: <https://www.pewresearch.org/fact-tank/2019/11/15/key-takeaways-on-americans-views-about-privacy-surveillance-and-data-sharing/>

²² George Gao, “What Americans Think about NSA Surveillance, National Security and Privacy,” Pew Research Center FactTank, May 29, 2015. Available at: <https://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/>

²³ See “Endorsements for Beneficial Ownership Transparency,” the Financial Accountability and Corporate Transparency (FACT) Coalition, July 16, 2020. Available at: <https://thefactcoalition.org/endorsements-beneficial-ownership-transparency/>

money laundering.”²⁴ To cite another example, in 2020 a major endorsement for beneficial ownership legislation came from the US National Strategy for Combatting Terrorist and Other Illicit Finance, a US government report which “is organized around the principle that a strong and transparent financial system, one that denies criminals and malign actors access to the funds and resources they need to carry out nefarious activities or to profit from their crimes, strengthens U.S. national security and protects Americans.”²⁵ The Strategy Report identifies “The lack of a requirement to collect beneficial ownership information at the time of company formation and after changes in ownership” as one of “the most significant vulnerabilities in the United States.”²⁶

The language used in these reports and statements reflects the US policy context. While other countries, civil society groups, and even international organizations advocate for beneficial ownership implementation to incentivize business, attract foreign investment, or combat tax evasion or tax avoidance, such statements are relatively rare within the US policy sphere. For example, of an analysis of 30 proposed congressional bills by the 116th United States Congress over the period January 2019 – August 2020 (See Graphic 1) showed that one of the most frequently mentioned terms was security. In fact, security issues were mentioned more than twice as often as tax issues.

Graphic 1: Analysis of 30 US Bills Mentioning Beneficial Ownership, 2019-2020



Source: Word Frequency Analysis of 30 bills introduced to the 116th US Congress, TagCrowd, Top terms. Excludes the following terms: beneficial, ownership, owner, United States, entity, act, title, subsection.

²⁴ “Statement of Administration Policy,” Executive Office of the President, October 22, 2019. Available at: https://www.whitehouse.gov/wp-content/uploads/2019/10/SAP_HR-2513.pdf

²⁵ “National Strategy for Combatting Terrorist and Other Illicit Financing,” United States Treasury, 2020. Available at: <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>

²⁶ “National Strategy for Combatting Terrorist and Other Illicit Financing,” United States Treasury, 2020. Available at: <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>

Moreover, US bills regarding beneficial ownership have often been outwardly focused, targeting foreign entities operating in the United States, as opposed to tax leakages from US entities operating abroad or general transparency among US corporate entities. Bills introduced in the 116th United States Congress, for example, leveraged beneficial ownership as a defense against foreign espionage;²⁷ perceived national security threats from countries like Iran,²⁸ North Korea,²⁹ Turkey,³⁰ China³¹ and Russia;³² and terrorist organization like ISIS,³³ and the Taliban³⁴. As these examples suggest, the approach that US policymakers have often taken is to utilize beneficial ownership against specific foreign actors, rather than to apply it more broadly across the US system.

The Future of Beneficial Ownership in the United States: Trade and Transportation

As of September 2020, the beneficial ownership information that is collected in the United States is generally limited to legal entities that are customers of financial institutions.³⁵ It also covers certain other areas, but in a limited sense: for example, coverage of boat ownership is limited only to large, recreational vessels registered at the federal level.³⁶ If current legislative efforts succeed, beneficial ownership information will be available not just for legal entities that set up a bank account but for all corporations, limited liability companies and other similar entities that are formed in the United States or registered to do business in the in the United States.³⁷ While this legislation will undoubtedly be an important step forward for both security and transparency, much more needs to be done on trade and transportation.

²⁷ See H.R. 392, "Secure Government Buildings from Espionage Act," 2019. Available at: <https://www.congress.gov/bill/116th-congress/house-bill/392>

²⁸ See H.R. 1441, "Stop Corrupt Iranian Oligarchs and Entities Act," 2019. Available at: <https://www.congress.gov/bill/116th-congress/house-bill/1441>

²⁹ See S. 667, "Otto Warmbier Banking Restrictions Regarding North Korea Act of 2019." Available at: <https://www.congress.gov/bill/116th-congress/senate-bill/667>

³⁰ See S. 2644, "Countering Turkish Aggression Act of 2019." Available at: <https://www.congress.gov/bill/116th-congress/senate-bill/2644>

³¹ See S.5506, "Anti-Money Laundering Act of 2020" Available at: <https://aboutblaw.com/RHP;https://www.hudson.org/research/14805-how-to-fight-china-s-financial-abuses-crack-down-on-anonymous-companies;https://www.hudson.org/research/16185-money-laundering-loophole-allows-china-s-shell-companies-to-attack-and-steal-from-u-s;https://www.hudson.org/research/15573-countering-chinese-communist-party-threats-with-corporate-transparency>

³² See H.R. 1404, "Vladimir Putin Transparency Act," 2019. Available at: <https://www.congress.gov/bill/116th-congress/house-bill/1404>

³³ See S. 2641, "Promoting American National Security and Preventing the Resurgence of ISIS Act of 2019." Available at: <https://www.congress.gov/bill/116th-congress/senate-bill/2641>

³⁴ See S.847, "National Defence Authorization Act, 2020" available at <https://www.congress.gov/bill/116th-congress/senate-bill/1790;https://www.wired.com/2010/10/taliban-allies-warlord-flunkies-guard-u-s-bases/>; <https://www.globalwitness.org/en/press-releases/secret-company-owners-defrauding-us-taxpayers-putting-troops-risk-providing-support-terrorists-report-reveals/>

³⁵ This is required as per the 2016 Customer Due Diligence Requirements for Financial Institutions (CDD Rule), issued by the Financial Crimes Enforcement Network (FinCEN). See <https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-12.html>

³⁶ See <https://www.acq.osd.mil/eie/Downloads/IE/NDAA%2019%20BILLS-115hr5515enr.pdf> and <https://www.law.cornell.edu/uscode/text/46/12103>

³⁷ See, "Anti-Money Laundering Act of 2020" Available at: <https://aboutblaw.com/RHP>;

1. The Case for Beneficial Ownership Transparency Surrounding Aircraft

In addition to legitimate uses for business and tourism, private aircraft are frequently used for illicit purposes such as drug trafficking,³⁸ corruption,³⁹ the illicit gold trade⁴⁰ or money laundering.⁴¹ Consider, for example, that in 2016, “El Chapo” Guzmán reportedly had more aircraft than the largest airline in Mexico.⁴² Numerous examples of illicit aircrafts can be found in Central America, as well. There is evidence of “daily”⁴³ drug flights across Guatemala and Honduras, according to officials.⁴⁴ In 2019 alone, 47 drug-related private aircrafts were seized by Guatemalan authorities.⁴⁵

Unfortunately, many of these aircraft can be traced back to the United States. According to a US official interviewed about narcojets in Central America, “Tail-fin markings on nearly all the planes (...) show they originated in the US,” noting that “dozens of planes had been bought at US auctions by shell companies and then shipped south.”⁴⁶ In another example, the Boston Globe found that two Colombian drug kingpins used planes whose ownership could be traced, “to a company incorporated in Delaware, a state that often requires minimal public disclosure about the owners of a business. FAA records showed that the cocaine-packed plane was owned by Dinama Aircorp Inc., formed in Delaware less than two weeks before it purchased the airplane in 2013. According to FAA records, the president and sole officer of the firm was (a) Fort Lauderdale attorney who, a few years earlier, sent an e-mail to the FAA opposing efforts to make plane ownership more transparent.”⁴⁷

³⁸ See, for example, Kevin Sieff, “The Guatemalan Rainforest: Lush Jungle, Mayan Ruins and Narco Jets Full of Cocaine,” The Washington Post, July 5, 2020. Available at <https://www.washingtonpost.com/world/2020/07/05/guatemala-cocaine-trafficking-laguna-del-tigre/?arc404=true> See also Charles Parkinson, “LatAm Drug Traffickers Set Up in Guinea Bissau, Expand in Africa,” August 29, 2013. Available at: <https://www.insightcrime.org/news/analysis/latam-drug-traffickers-set-up-in-guinea-bissau-expand-in-africa/>

³⁹ Kelly Carr and Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at: <https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

⁴⁰ See, for example, Nicholas Nehamas, “Venezuelans Arrested with \$5 Million Worth of Smuggled Gold at Broward Airport, Feds Say,” Miami Herald, September 24, 2019. Available at: <https://www.miamiherald.com/news/local/article235417622.html>

⁴¹ “Passaic County Private Jet Pilot Sentenced to 13 Years in Prison for Cocaine Trafficking, Money Laundering and Structuring,” United States Attorney’s Office, District of New Jersey, September 27, 2019. Available at: <https://www.justice.gov/usao-nj/pr/passaic-county-private-jet-pilot-sentenced-13-years-prison-cocaine-trafficking-money>

⁴² Christopher Woody, “‘El Chapo’ Guzmán Had More Airplanes than the Biggest Airline in Mexico,” Business Insider, May 4, 2016. Available at: <https://www.businessinsider.com/el-chapo-guzman-mexico-drug-trafficking-airplanes-2016-5>

⁴³ Nick Paton Walsh, Natalie Gallón and Diana Castrillon, “Corruption in Venezuela Has Created a Cocaine Superhighway to the US,” CNN, April 17, 2019. Available at: <https://edition.cnn.com/2019/04/17/americas/venezuela-drug-cocaine-trafficking-intl/index.html>

⁴⁴ Ibid.

⁴⁵ Miguel Barrientos Castañeda, “Ejército rastrea cuatro avionetas y tres ya han sido localizadas en tierra,” Prensa Libre, December 15, 2019. Available at: <https://www.prensalibre.com/guatemala/justicia/ejercito-rastrea-cuatro-narcoavionetas-y-dos-ya-han-sido-localizadas-en-tierra/>

⁴⁶ Nick Paton Walsh, Natalie Gallón and Diana Castrillon, “Corruption in Venezuela Has Created a Cocaine Superhighway to the US,” CNN, April 17, 2019. Available at: <https://edition.cnn.com/2019/04/17/americas/venezuela-drug-cocaine-trafficking-intl/index.html>

⁴⁷ Kelly Carr and Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at: <https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

The Federal Aviation Administration (FAA) is the regulatory agency responsible for aircraft registration in the United States. The FAA, which maintains a registry of approximately 300,000 aircraft,⁴⁸ allows a plane can be registered in the US under the name of a person (who must be a US citizen) or a US-based corporation.⁴⁹ In 2019, for example, 34% of registrations were under LLCs and 9% under trusts.⁵⁰ These include registrations by domestic as well as international owners. According to an estimate by Corporate Jet Investor, two thirds of business jet owners worldwide choose to register their planes in the US,⁵¹ due to the low costs (just US\$5),⁵² perceived reputational benefits, and no requirements to disclose the beneficial owner.

Unfortunately, beneficial ownership information is not required to register an aircraft in the United States⁵³ – and thus, the real person behind the purchase of the aircraft is not known. In this context, unscrupulous actors have taken advantage of the US system, registering planes in states such as Florida or Delaware, and subsequently using them to move illicit products and illicit funds.

For example, a 2018 investigation by the Miami New Times “reviewed news reports, court documents, and FAA records for approximately 150 planes implicated in drug smuggling since 2000 and found 24 Florida companies that might have sold aircraft directly to traffickers.”⁵⁴ A 2018 article by the New York Times Magazine came to similar conclusions. They noted that companies who are in the business of buying and selling private planes “begin with an industry-standard subscription database, but its information — serial number, registration information, sales history, whatever is known of the ownership and any publicly listed current prices — is almost always incomplete or unreliable, as the most sensitive data is concealed underneath layers of shell companies incorporated in places like Delaware, Panama or the British Virgin Islands.”⁵⁵ Moreover, an investigation by the Boston Globe found that “the United States remains an easy mark for drug dealers, terrorists and others who prize anonymity when registering aircraft or getting licensed to fly. So much for the lessons

⁴⁸ “Aircraft Registration: Releasable Aircraft Database Download,” Federal Aviation Administration. Available at: https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/releasable_aircraft_download/

⁴⁹ “Aviation: FAA Needs to Better Prevent, Detect, and Respond to Fraud and Abuse Risks in Aircraft Registration,” United States Government Accountability Office, March 2020. Available at: <https://www.gao.gov/assets/710/705505.pdf>

⁵⁰ Authors’ own review of plane registration data, available at https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/releasable_aircraft_download/ (Accessed September 2020).

⁵¹ Kelly Carr and Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at: <https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

⁵² See Kelly Carr and Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at: <https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

⁵³ See “Aircraft Registration: Register an Aircraft,” Federal Aviation Administration. Available at: https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/register_aircraft/

⁵⁴ Penn Bullock, “New Times Investigation: Drug Traffickers are Buying Up Planes in South Florida,” the Miami New Times, April 10, 2018. Available at: <https://www.miaminewtimes.com/news/drug-traffickers-buying-up-planes-in-south-florida-new-times-investigation-finds-10249767>

⁵⁵ Gideon Lewis-Kraus, “Selling Airborne Opulence to the Upper Upper Upper Class,” The New York Times Magazine, January 23, 2018. Available at: <https://www.nytimes.com/2018/01/23/magazine/selling-airborne-opulence-to-the-upper-upper-upper-class.html>

of 9/11.”⁵⁶ According to a recent report by the US Government Accountability Office (GAO), the FAA “generally relies on self-certification of registrants’ eligibility and does not verify key information.”⁵⁷ The report subsequently notes that “the registry is further vulnerable to fraud and abuse when applicants register aircraft using opaque ownership structures that afford limited transparency into who is the actual beneficial owner.”⁵⁸ This includes aircraft that are registered by nominees,⁵⁹ trusts, or incorporation agents, particularly in US States with low levels of corporate transparency. For example, the Boston Globe’s analysis found that approximately 3,500 aircraft were registered to a single office building in Wilmington, Delaware.⁶⁰

The passage of any of the various bills tabled before Congress and the Senate would ensure that any aircraft registered through a US-based corporation or LLC would now be required disclose their beneficial owner. However, there is a risk that a policy measure that places the burden of compliance only on certain types of legal structures will see criminal actors and illicit activity migrate to legal structures -- like trusts -- that do not fall under the purview of the law. Currently, trusts that would be utilized to purchase an asset are not covered by the beneficial ownership bills on the table. Additionally, nested structures, which start with a US trust and involve foreign anonymous shell companies, would also not be covered under the legislation. Using a US trust with a foreign shell company behind it lengthens the chain of ownership, making it harder for US law enforcement to accurately identify the true owners.

Evidence from both the GAO report as well as the Boston Globe’s investigation lend credence to this assertion. According to the GAO report, “as of June 2019, according to FAA data, there were 11,364 trusts in the aircraft registry”. The Boston Globe’s review highlights real life examples of trusts being used to hide identity. In 2015, for example, “federal authorities broke up a scheme to deliver US airplanes registered through trusts to an Iranian airline that US officials say help[ed] transport troops and materiel to the brutal regime of Bashar Assad in Syria.”⁶¹ Similarly, the Department of Transportation Inspector General audit “estimated that records for more than half the aircraft registered to non-US citizens through trusts were incomplete”⁶² and that the

⁵⁶ Kelly Carr and Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at: <https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

⁵⁷ “Aviation: FAA Needs to Better Prevent, Detect, and Respond to Fraud and Abuse Risks in Aircraft Registration,” United States Government Accountability Office, March 2020. Available at: <https://www.gao.gov/assets/710/705505.pdf>

⁵⁸ “Aviation: FAA Needs to Better Prevent, Detect, and Respond to Fraud and Abuse Risks in Aircraft Registration,” United States Government Accountability Office, March 2020. Available at: <https://www.gao.gov/assets/710/705505.pdf>

⁵⁹ <https://federalnewsnetwork.com/agency-oversight/2020/04/faa-needs-tighter-restrictions-on-private-planes-to-combat-trafficking/>

⁶⁰ Kelly Carr and Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at: <https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

⁶¹ Kelly Carr and Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at: <https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

⁶² FAA’s Civil Aviation Registry Lacks Information Needed For Aviation Safety And Security Measures, Report Number: FI-2013-101, Office of the Inspector General, June 27, 2013 at p.4. Available at <https://www.oig.dot.gov/sites/default/files/FAA%20Civil%20Aviation%20Registry%20Report%5E06-27-2013.pdf>; Kelly Carr and

FAA did not bother to “verify that the trust information [was] accurate, nor [we]re they required to under the law”.⁶³ The same audit revealed that when the Department of Transportation inspector general tried “to get the names of the real owners directly from trust companies in 2013, investigators said some trustees either refused to provide the information or took months instead of the two days allowed by the FAA to turn over the names.”⁶⁴ As for using trusts to nest foreign anonymous shell companies, the former Guatemalan vice president, Roxana Baldetti, indicted on federal drug charges and currently jailed in Guatemala, was known to travel on a private aircraft that was registered through a trust on behalf of a Panamanian company.⁶⁵

2. The Case for Beneficial Ownership Transparency Surrounding Boats

Similar issues arise with boats. The United States has been identified as one of the prime destinations for boat registration worldwide, alongside the Marshall Islands, the Cayman Islands, and the British Virgin Islands.⁶⁶ Yet the lack of transparency surrounding boat registration in the United States translates into opaque ownership structures that benefit illicit actors and exacerbate security issues.

While such boats have many legitimate uses for tourism, fishing, trade and even transportation, they are also sometimes used for criminal purposes, including drug trafficking.⁶⁷ As noted in a report by the United Nations Office on Drugs and Crime (UNODC), with speedboats and aircraft, narcotics, “can be moved northward in an endless series of combinations, touching down in areas the police rarely visit.”⁶⁸

As highlighted in a 2020 report by Global Financial Integrity, “in many jurisdictions, including the United States, it can be difficult to determine the true owner of a private airplane or a speedboat.”⁶⁹ The report goes on to note that “they are often registered

Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at: <https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

⁶³ Ibid at p.5-6

⁶⁴ Ibid at p 5-6

⁶⁵ Kelly Carr and Jaimi Dowdell, “Secrets in the Sky,” the Boston Globe. Available at:

<https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one/>

⁶⁶ Danielle Cutler, “Yacht Registration Basics,” Yachts International, last updated July 30, 2018. Available at: <https://www.yachtsinternational.com/owners-lounge/yacht-registration-basics>

⁶⁷ See, for example, “‘El Chapo’ Guzmán usaba las FARC para traficar cocaína,” El Economista, December 13, 2018. Available at: <https://www.eleconomista.com.mx/internacionales/El-Chapo-Guzman-usaba-a-las-FARC-para-traficar-cocaina--20181213-0063.html> . See also “Extraditan a tres colombianos a Estados Unidos y España,” El Espectador, February 4, 2011. Available at:

<https://www.elespectador.com/noticias/judicial/extraditan-a-tres-colombianos-a-estados-unidos-y-espana/>. Josh Saul, “Drug Trafficking: How a Cartel Speedboat with 5,000 Pounds of Cocaine Was Stopped,” Newsweek, August 7, 2017. Available at:

<https://www.newsweek.com/coast-guard-dea-navy-stop-cartel-drug-smugglers-cocaine-647578>. In addition, see “Shipping Vessel Crew Member Pleads Guilty to Drug Trafficking,” United States Immigration and Customs Enforcement June 15, 2020. Available at:

<https://www.ice.gov/news/releases/shipping-vessel-crew-member-pleads-guilty-drug-trafficking>.

⁶⁸ “Cocaine from South America to the United States,” United Nations Office on Drugs and Crime. Available at: https://www.unodc.org/documents/toc/Reports/TOCTASouthAmerica/English/TOCTA_CACaribb_cocaine_SAmerica_US.pdf

⁶⁹ See Julia Yansura and Lakshmi Kumar, “Narcotics Proceeds in the Western Hemisphere: Narcotics-Related Illicit Financial Flows in the United States, Colombia and Mexico,” Global Financial Integrity, September 2020. Available at:

<https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2020/09/GFI-WHDPC-Narcotics-IFF-Final-pdf.pdf?time=1600123004> . See also Cocaine from South America to the United States, UNODC, 2011). Available at:

in the name of a trust, LLC or another legal entity that obscures the origins of the owner.”⁷⁰

In the United States, boats are either registered at the state or federal level. At the state level, requirements vary by state,⁷¹ with some states considered “more favorable”⁷² or “advantageous”⁷³ because of ease of registration. It is generally permitted to register a boat under an anonymous company, such as an LLC,⁷⁴ which is problematic since it enables the beneficial owner to hide their identity. As is noted on one website, a “tangible benefit of corporate ownership may be the privacy of the ownership records (...) The Coast Guard maintains a database of American-flagged vessels, and the name of the owner of any boat is readily available on the Internet.”⁷⁵ It goes on to say that “some states (such as Delaware) do not include the names of a corporation’s directors or officers in the public record of a corporation. If a boat is owned by a Delaware corporation, only the name of the corporation is made public. This may be an attractive option....”⁷⁶

Americans are not the only ones looking for so-called attractive locations to register boats. According to the Colombian government, for example, many Colombian boat owners keep these boats in Cartagena but register them outside the country, in other jurisdictions where costs are lower and requirements less stringent.⁷⁷ Even when it comes to larger ships, a report by the United Nations Conference on Trade and Development (UNCTAD) found that the majority of merchant ships are not registered to the same country as the nationality of their owner.⁷⁸

US Federal registration, often called “documentation,” is required for certain types of boats, including larger vessels, those that are involved in commercial fishing and trade, and those that enter international waters.⁷⁹ Currently, the federal registration process requires disclosure of beneficial ownership information for certain types of

https://www.unodc.org/documents/toc/Reports/TOCTASouthAmerica/English/TOCTA_CACaribb_cocaine_SAmerica_US.pdf and https://www.faa.gov/licenses_certificates/aircraft_certification/aircraft_registry/register_aircraft/

⁷⁰ Ibid.

⁷¹ “Register Your Boat Online,” TakeMeFishing.Org. Available at: <https://www.takemefishing.org/register-a-boat/#stateList>

⁷² “Vessel Ownership/Purchase by a Limited Liability Company or Corporation,” The Maritime Law Center, 2016. Available at: https://maritimelawcenter.com/USE_Tax_and_VESSEL_OWNERSHIP_.pdf

⁷³ “Thinking About Chartering Your Boat? Consider Forming a Limited Liability Company,” Gruff Law, January 1, 2017. Available at: <https://grufflaw.com/thinking-about-chartering-your-boat-consider-forming-a-limited-liability-company/>

⁷⁴ “Why Form a Delaware Corporation for Boat Ownership Purposes?” Delaware Registry Ltd. Available at: <https://www.delreg.com/yadv.cfm>

⁷⁵ David Weil, Esq., “Should I Form a Corporation or LLC to ‘Own’ My Boat?” The Log: California’s Boating & Fishing News, April 3, 2008. Available at: <https://www.thelog.com/ask-the-attorney/should-i-form-a-corporation-or-llc-to-own-my-boat/>

⁷⁶ Ibid.

⁷⁷ “Venta de botes y yates crece contra la corriente en Colombia,” Dinero, April 27, 2017. Available at: <https://www.dinero.com/edicion-impresa/negocios/articulo/venta-de-botes-y-yates-en-colombia-en-2017/244535>

⁷⁸ “Informe sobre el transporte marítimo,” United Nations Conference on Trade and Development, 2018. Available at: https://unctad.org/es/PublicationsLibrary/rmt2018_es.pdf See pg 36

⁷⁹ Peter d’Anjou, “Yacht Registration vs. Documentation,” Yacht World. Available at: <https://www.yachtworld.com/research/yacht-registration-vs-documentation/> See also <https://www.law.cornell.edu/uscode/text/46/12103>.

large, recreational vessels, at the federal level,⁸⁰ but does not cover some of the smaller vessels often associated with illicit activities, such as drug trafficking. Often, federal registration determines ownership based on a state title or foreign registration,⁸¹ which is not particularly robust. Only large boats, over 5 net tons, may be registered at the federal level;⁸² anything smaller is excluded from federal documentation.⁸³ In practice, what this means is that many of the boats used in illicit activities, particularly drug trafficking, are only registered at the state level, where substantial loopholes exist.

Additionally, much like private aircraft, there is a concern that those seeking to hide their identity will find ways to avoid beneficial ownership disclosures. For example, it is concerning is the fact that many vessels that operate within the United States can also be registered outside the United States in places like the Cayman Islands. For beneficial ownership to be truly effective, it must cover vessels registered in the United States as well as those vessels that fly a different flag but operate through US territorial waters.

3. Trade Based Money Laundering and Customs

Post 9/11, the uptake of anti-money laundering and counter terrorism financing (AML/CFT) norms globally has been phenomenal and the AML/CFT compliance industry is worth several billions of dollars.⁸⁴ At the same time, illicit actors globally are migrating to other forms of criminal activity to legitimize their ill-gotten gains. In recent years, trade-based money laundering (TBML) has received increasing attention due to its association with drug traffickers⁸⁵, armed groups⁸⁶ and sanctioned governments⁸⁷ which present as direct national security risks to the US government.⁸⁸

⁸⁰ See <https://www.acq.osd.mil/eie/Downloads/IE/NDA%2019%20BILLS-115hr5515enr.pdf> and <https://www.law.cornell.edu/uscode/text/46/12103>

⁸¹ "Initial Vessel Documentation," United States Coast Guard. Available at: <https://www.dco.uscg.mil/Portals/9/DCO%20Documents/NVDC/INITIAL.pdf?ver=2018-12-28-130935-913><https://www.dco.uscg.mil/Portals/9/DCO%20Documents/NVDC/INITIAL.pdf?ver=2018-12-28-130935-913>

⁸² "Frequently Asked Questions/ General Information," National Vessel Documentation Center," US Coast Guard. Available at: https://www.dco.uscg.mil/Portals/9/DCO%20Documents/NVDC/GENERAL_INFO.pdf

⁸³ "Documentation and Tonnage of Smaller Commercial Vehicles," US Coast Guard Marine Safety Center, January 20, 2015. Available at: <https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Marine%20Safety%20Center/Tonnage/Tonnage%20Guide%20%20-%20Documentation%20and%20Tonnage%20of%20Smaller%20Commercial%20Vessels.pdf?ver=2017-06-09-123758-943>

⁸⁴ Global \$1.77 Bn Anti Money Laundering (AML) Software Market to 2023 - Compliance Requirement with International Regulatory Bodies Driving Market Growth, May 01, 2019. Available at <https://www.prnewswire.com/news-releases/global-1-77-bn-anti-money-laundering-aml-software-market-to-2023---compliance-requirement-with-international-regulatory-bodies-driving-market-growth-300841876.html>

⁸⁵ Julia Yansura and Lakshmi Kumar, Narcotics Proceeds in the Western Hemisphere: Analysis of Narcotics Related Illicit Financial Flows between the United States, Mexico, and Colombia Global Financial Integrity (2020)

⁸⁶ Lakshmi Kumar, Illicit Gold Trade and Using Trade Data and Financial Tools to Fight Money Laundering and Transnational Organized Crime, ACFCS, July 2020. Available at <https://www.acfcs.org/webinars/illicit-gold-trade-and-using-trade-data-and-financial-tools-to-fight-money-laundering-and-transnational-organized-crime/>

⁸⁷ Ibid

⁸⁸ Ibid

TBML is defined as the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their illicit origin.⁸⁹ Though the risks and dangers from one of the most lucrative forms of money laundering has been acknowledged as early as 2006, extraordinarily little has been done in the way of broad based international and domestic efforts to establish a substantive TBML policy. In some quarters, there was consensus that the existing standards were ill-equipped to deal with the intricacies and challenges of TBML.⁹⁰ The Asia Pacific Group on Money Laundering in 2012 indicated that a major obstacle to tackling TBML has been the lack of reliable statistics. Trade related data, while available, is collected to serve purposes other than those of detecting TBML. However, in what has been a gradual shift in attitude, there is increased attention to the subject and growing calls to establish benchmarks and strong regulatory procedures to mitigate against risks.⁹¹

In light of these risks, it is important to consider whether existing and proposed beneficial ownership requirements would be adequate to address TBML. Current Customer Due Diligence (CDD) measures in the United States require only entities categorized as “financial institutions” to collect beneficial ownership information.⁹² As the Wolfsberg Group and others have noted, globally 80% of trade transactions passing through the financial system are open account transactions.⁹³ This means that a vast majority of the world’s transactions are not dependent on trade finance documents such as a letter of credit, bonds and guarantees to make payment, which would necessitate additional due diligence on the part of the financial institution. As such, beneficial ownership information must necessarily sit with and be collected by both trade and financial intermediaries for beneficial ownership information to be an effective check against TBML.

Therefore, future beneficial ownership efforts should address trade, including freight forwarders, shipping agents, importer, exporters amongst others.⁹⁴ The proposed law on beneficial ownership in the US requires beneficial ownership information for all entities formed in the United States as well as all legal entities registered to do business in the United States.⁹⁵ This classification necessarily covers all domestic

⁸⁹Trade Based Money Laundering, FATF, June 23, 2006. Available at <https://www.fatf-gafi.org/media/fatf/documents/reports/Trade%20Based%20Money%20Laundering.pdf> at p.5

⁹⁰ https://www.fatf-gafi.org/media/fatf/documents/reports/Trade_Based_ML_APGReport.pdf

⁹¹ Trade Based Money Laundering, APG, July 20, 2012. Available at https://www.fatf-gafi.org/media/fatf/documents/reports/Trade_Based_ML_APGReport.pdf

⁹² This is required as per the 2016 Customer Due Diligence Requirements for Financial Institutions (CDD Rule), issued by the Financial Crimes Enforcement Network (FinCEN). See <https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-12.html>

⁹³ The Wolfsberg Group, ICC and BAFT Trade Finance Principles, 2019. Available at <https://www.wolfsberg-principles.com/sites/default/files/wb/Trade%20Finance%20Principles%202019.pdf>

⁹⁴ Lakshmi Kumar, Dubai: Free Trade or Free-For-All, Dubai’s Role in Facilitating Corruption and Global Illicit Financial Flows, July 07, 2020, pp. 23- 35. Available at https://carnegieendowment.org/files/PageVittori_DubaiCorruption_final.pdf

⁹⁵ S.5336, Anti-Money Laundering Act of 2020. Available at <https://aboutblaw.com/RHP>

entities as well as some foreign entities that are ‘registered to do business in the United States.’⁹⁶ But the bulk of international trade also involves small to medium sized enterprises that do not register themselves in a US State nor are they formed in the United States, and current processes do not require them to provide any identifying information about the individual behind the legal entity.⁹⁷ In 2019, the total value of US trade with foreign countries was US\$ 5.6 trillion.⁹⁸ Moreover, the US has trade relationships with over 75 countries.⁹⁹ It is not a huge leap of imagination to say that the US does not have beneficial ownership information on every private sector business that has an import-export relationship with a US business.

It is also important consider who is responsible for addressing TBML. If one were to draw a parallel with the current AML/CFT supervisory and regulatory architecture, the weight of responsibility and collection of valuable due diligence information is spread across the financial system – with the banks as the front-line soldiers of anti-money laundering. Casting the responsibility on just Treasury or the Federal Reserve would seem impractical given the size and scale of the financial system and not to mention the resources and staffing constraints. Therefore, extending this obligation across the trade chain will substantially reduce risk.

4. Foreign Trade Zones in the United States

At present, “the US has 298 registered ‘foreign trade zones’, with majority of them concentrated along the eastern shoreline.”¹⁰⁰ According to a 2016 OECD survey, “the US has the largest proportion of ‘foreign trade zones’ or free zones amongst OECD member countries”¹⁰¹. These zones, along with the 400 plus sub-zones, have close to US\$1 Trillion in merchandise moving through them.¹⁰² The business-friendly advantages coupled with immense value and volume of goods moving through zones raises the risk of illicit activity.

⁹⁶ Ibid

⁹⁷ <https://www.usa.gov/import-export>

⁹⁸ U.S Census: Foreign Trade Press Release. Available at https://www.census.gov/foreign-trade/Press-Release/current_press_release/exh1.pdf

⁹⁹ <https://ustr.gov/countries-regions>

¹⁰⁰ Julia Yansura and Lakshmi Kumar, *Narcotics Proceeds in the Western Hemisphere: Analysis of Narcotics Related Illicit Financial Flows between the United States, Mexico, and Colombia Global Financial Integrity (2020)* at p.48

¹⁰¹ Ibid

¹⁰² 80th Annual Report of the Foreign-Trade Zones Board to the Congress of the United States, November 2019. Available at <https://enforcement.trade.gov/ftzpage/annualreport/ar-2018.pdf>

In recent years, there has been renewed interests through the reports and findings from the OECD¹⁰³, the WCO¹⁰⁴, RUSI¹⁰⁵, GFI¹⁰⁶ and journalists¹⁰⁷ about the heightened risks for money laundering, criminal activity and illicit financial flows emanating from these zones.

Acknowledging these risks, it is vital to note that ongoing legislative efforts in the US to capture beneficial ownership information do not address the businesses operating in US foreign trade zones or seaports. Even after the passage of the proposed bill, US Customs and Border Protection will not have immediate access to adequate and verified beneficial ownership behind the millions of overseas entities carrying out trade transactions.

Despite these obvious risks, information surrounding FTZs is conflicting and inadequate. This can make understanding and addressing risks very difficult. A table below captures some of these conflicting statements:

¹⁰³Piotr Stryskowski and Bill Below, Free Trade Zones: A Free Ride for Counterfeiters?. Available at <https://www.oecd.org/gov/risk/blog-free-trade-zones-a-free-ride-for-counterfeiters.pdf>

¹⁰⁴ WCO releases research paper on Free Zones, September 30, 2019. Available at <http://www.wcoomd.org/en/media/newsroom/2019/september/wco-releases-research-paper-on-free-zones.aspx>

¹⁰⁵ Anton Moiseienko, Alexandria Reid and Isabella Chase, Free Ports, Not Safe Havens: Preventing Crime in the UK's Future Freeports, April 27, 2020. Available at <https://rusi.org/publication/briefing-papers/free-ports-not-safe-havens-preventing-crime-uks-future-freeports>

¹⁰⁶ Julia Yansura and Lakshmi Kumar, Narcotics Proceeds in the Western Hemisphere: Analysis of Narcotics Related Illicit Financial Flows between the United States, Mexico, and Colombia Global Financial Integrity (2020) at p.48

¹⁰⁷Silke Koltrowitz, Paul Arnold, Freeports boom highlights risks of shady activities, September 22, 2016 available at <https://www.reuters.com/article/us-swiss-freeports/freeports-boom-highlights-risks-of-shady-activities-idUSKCN11S1OL>

Table 1: Adequacy of Procedures within US Foreign Trade Zones

Adequate Procedures within US FTZs	Inadequate Procedures within US FTZs
<p>US Foreign Trade Zones: Background and Issues for Congress, December 19, 2019</p>	<p>Money Laundering Threat Assessment (2005) U.S Treasury</p>
<ul style="list-style-type: none"> • “FTZs incorporate additional screening and security measures. Once the FTZ status has been approved by the FTZ Board, all companies are required to apply to the CBP before they can begin operations in a zone. This application process includes a background check on key employees, a review of the security of the facility, and assessing the integrity of the inventory control and recordkeeping system.” • “A company is also required to produce a detailed procedures manual explaining how all merchandise is handled at every stage of its movement through the zone.” • “In contrast to many other countries, good that pass-through US FTZs are meant for domestic import and do not simply pass through US FTZs for export or re-export. This reduces risks because there is a greater oversight over goods enter the country as opposed to those goods that are exported or re-exported from the country. The total exports originating from U.S. FTZs account for roughly 5% of total U.S. exports.” • “Law enforcement officials in the US have access to US Foreign Trade Zones. This contrasts with many other free zones in the world where customs officers are often not physically present within these zones nor does the law vest customs officials with adequate powers of enforcement.” 	<ul style="list-style-type: none"> • “False documentation involving fabricated Bills of Lading and fictitious names and addresses are used to misrepresent imports and ex-ports, often with a customs broker who is in collusion with the criminals, “brokering” the documents with CBP.” • “FTZs are vulnerable to money launderers due to a lack of connectivity and automation. When items are shipped through private sector package delivery services, they can be tracked electronically from pick up to drop off, but no similar system exists for U.S. Customs to track commercial goods in real-time moving into or out of FTZs.” • “In a case involving money leaving the United States, more than \$100,000 was sent to a bank in Cyprus for merchandise due to be imported into a North Carolina FTZ.” • “In a case involving money coming into the United States, the FTZ in Los Angeles indicated cargo that had come in from the FTZ in Miami had left the country following receipt of payment from the importer. Law enforcement, however, later found the paperwork to be fraudulent and the cargo diverted to Kentucky.”

Table 1: Adequacy of Procedures within US Foreign Trade Zones Cont.

Adequate Procedures within US FTZs	Inadequate Procedures within US FTZs
US Foreign Trade Zones: Background and Issues for Congress, December 19, 2019	US Foreign Trade Zones: Background and Issues for Congress, December 19, 2019
<ul style="list-style-type: none"> “According to the FTZ Board, the costs of FTZ use, and the “red tape” required to take advantage of zone opportunities, can be substantial, particularly for small and medium-sized enterprises (SMEs). There are startup costs and maintenance costs. Because of this, according to an FTZ trade interest group, FTZs work best when a company can potentially see a return of 100%to 200% on investment in zone use. If the investment return is smaller, it may not be worth the startup and continuing costs.” 	<ul style="list-style-type: none"> “Two cases from the FATF report identified instances of smuggling and tax evasion activities involving a U.S. company and a U.S. FTZ, respectively.”

Sources: US Foreign Trade Zones: Background and Issues for Congress, December 19, 2019. Available at: <https://fas.org/sgp/crs/misc/R42686.pdf> ; Money Laundering Threat Assessment, U.S Treasury, 2005. Available at: <https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/mlta.pdf>

While procedures appear to have been modified within FTZs to better account for money laundering risks¹⁰⁸, criminal activity within US seaports is not a new problem.¹⁰⁹ Therefore, it is a little concerning that outside of references made in the 2005 National Money Laundering Risk Assessment document produced by the US Treasury, the FATF report on Money Laundering Vulnerabilities within Free Zones in 2010, there has been no follow up discussion of the risks within foreign trade zones in Treasury’s annual “Combating Illicit Finance and Terrorist Financing Strategy Report” or within the US FATF Mutual evaluation of 2016 and any subsequent follow up reports. The 2019 GAO report, when drawing on the positive steps taken to mitigate risk, highlights evidence that illicit activity has taken place within US FTZs and with the complicity of US companies. However, there is little in the report about whether these cases typify illicit activity within these zones nor is there commentary from CBP on how this position has changed within US FTZs. The value of beneficial ownership in addressing and targeting crimes such as human and weapons trafficking, sanctions evasion, real

¹⁰⁸ Foreign Trade Zones: CBP Should Strengthen Its Ability to Assess and Respond to Compliance Risks across the Program, July 2017 available at <https://www.gao.gov/assets/690/686218.pdf>; US Foreign Trade Zones: Background and Issues for Congress, December 19, 2019 available at <https://fas.org/sgp/crs/misc/R42686.pdf>

¹⁰⁹Report of The Interagency Commission on Crime And Security In U.S. Seaports, 2000. Available at <https://www.hsdl.org/?view&did=437742>

estate money laundering, corruption, TBML, and natural resource theft have been well-established. But for the US to adequately utilize this information within the context of US FTZs, a preliminary and fundamental step is to ensure – a) collection of beneficial ownership information for companies operating out of or trading through FTZs b) analysis of the most common forms of criminal activity that takes places within foreign trade zones c) inclusion in future national risk assessment of risks within foreign trade zones, d) exploration of policy options for extending beneficial ownership requirements to FTZs, ensuring that Customs and Border Protection and Homeland Security Investigations can access information.

5. U.S Trade Agreements and Beneficial Ownership

The World Customs Organization estimates that its 180 member countries lose at least US \$2 billion in customs revenues each year due to corruption.¹¹⁰ Despite this, in the United States only 5% of all containers are actually physically inspected,¹¹¹ thus raising the risk of and ease through illicit activity can take place. As identified earlier in this chapter, US trade with foreign countries was valued at US\$ 5.6 trillion annually in 2019,¹¹² with trading relationships with over 75 countries.¹¹³ As of 2017, the 30 largest trade partners of the United States represented 87.9% of U.S. exports, and 87.4% of U.S. imports.¹¹⁴ Despite the immense volumes and values, only recently has the US government started utilizing trade agreements as tools to address corruption (directly) and illicit financial flows (indirectly). The United States at present has 14 Free Trade Agreements (FTA) with 20 countries.¹¹⁵

The U.S. first began introducing anti-corruption provisions into its trade deals in the early 2000s.¹¹⁶ The 2003 Singapore FTA stated that the countries will “undertake best efforts to associate themselves with appropriate international anti-corruption instruments and to encourage and support appropriate anti-corruption initiatives and activities in relevant international fora” and the agreement also mandates transparency in process and publications of rules and regulations.¹¹⁷ The trade deal

¹¹⁰ Fighting the Hidden Tariff: Global Trade without Corruption. Available at <http://www.oecd.org/cleangovbiz/2016-Integrity-Forum-Background-Report.pdf> (OECD 2016)

¹¹¹ Scanning and Imaging Shipping Containers Overseas: Costs and Alternatives, Congressional Budget Office (June 2016). Available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51478-Shipping-Containers-OneCol.pdf>

¹¹² U.S. Census: Foreign Trade Press Release. Available at https://www.census.gov/foreign-trade/Press-Release/current_press_release/exh1.pdf

¹¹³ <https://ustr.gov/countries-regions>

¹¹⁴ Top U.S. Trade Partners Ranked by 2017 U.S. Total Export Value for Goods (in millions of U.S. dollars). Available at https://web.archive.org/web/20180713173752/https://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf

¹¹⁵ <https://www.trade.gov/free-trade-agreements>

¹¹⁶ UNITED STATES – SINGAPORE FREE TRADE AGREEMENT May 06, 2003. Available at https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf

¹¹⁷ *Ibid*

with Chile in 2003 included anti-corruption provisions related to government procurement that were termed as ‘integrity’ provisions in the FTA.¹¹⁸

Since then, anti-corruption commitments have become progressively stronger, and the agreements signed with Morocco and the Dominican Republic and Central American countries (DR-CAFTA) contain provisions which require “governments to establish debarment procedures to disqualify suppliers that engage in fraudulent or illegal activities”.¹¹⁹ Similarly, the North American trade deal requires countries “to pass anticorruption laws prohibiting corporate off-the-book records, inadequately or fraudulently identified transactions, or the use of false documents”.¹²⁰ While these provisions are clearly designed to target corruption, the clauses also target common methods of TBML; improved procedures can mean more accurate identification of illicit behavior. In 2013, the United States went one step further when it signed a trade agreement with Mongolia, the first time including a “stand-alone transparency agreement.... independently of broader trade deals”.¹²¹ Additionally, the agreement also contained dedicated provisions on transparency in financial services and separate anti-corruptions measures addressing that.¹²² Finally, the US also incentivizes the implementation of anti-corruption measures through trade related development aid schemes. One such example is the African Growth and Opportunity Act which ties preferential market access for certain 38 Sub-Saharan African countries to improvements in governance such as the implementation of the OECD Anti-Bribery Convention.¹²³

Admittedly, the desire to use trade agreements to deal with corruption is both a way to protect US business interests but is also seen as a foreign policy tool to deal anti-competitive practices from countries that are perceived as a growing threat to US National security.

¹¹⁸ Art.9.12 United States – Chile Free Trade Agreement, June 06, 2003. Available at <https://ustr.gov/sites/default/files/files/agreements/chile/Chile%20GP%202017.pdf>

¹¹⁹ <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/may/cafta-dr-government-procurement-provisions>

¹²⁰ Robert Thomason, Trade deals increasingly taking corruption into account, 01 Jul 2019, Available at <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/anti-bribery-and-corruption/trade-deals-increasingly-taking-corruption-into-account>

¹²¹ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2017/january/united-states-mongolia>

¹²² <https://ustr.gov/sites/default/files/US-Mongolia%20Transparency%20Agreement-English-Final-As%20Posted.pdf>

¹²³ <https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa>

"It is an unfair trade practice to go in and take market share by bribing people," Graham said after accusing Chinese firms from extensive bribery in Africa. "Is there anything we can do on the trading side? Everybody think about that for a moment."

– Senator Lindsay Graham¹²⁴

These pressure points nevertheless present a valuable opportunity to advance financial transparency and mitigate the negative developmental effects of illicit financial flows. They can enhance trade facilitation but also improve due diligence processes around money laundering and target certain types of transnational criminal activity. For instance, the US-Peru trade agreement requires Peru to "develop and implement an anticorruption plan for officials charged with the administration and control of forest resources."¹²⁵ The clause was inserted to address the significant issues of deforestation and illegal logging facing the country. As per the terms of the Annex, the Peruvian government is required to "conduct audits of particular timber producers and exporters, and upon request from the United States, perform verifications of particular shipments of wood products from Peru".¹²⁶ Additionally, the Agreement provides a list of actions that the US may undertake as regards the shipment or the business entity that is the subject of the verification.¹²⁷ By contrast, China and Mexico, countries that are also significant trading partners for Peruvian timber do not mandate these requirements in their trade agreements. The Peruvian agreement is noteworthy because it has very detailed provisions to tackle transnational criminal activity and this template can open the door to utilize other creative approaches to tackle the plethora of crimes, enablers, structures and facilitators that exacerbate illicit financial flows. But as always there are very clear dangers with the US imposing its extra-territorial jurisdiction or rather for one country to extra-territorially legislate another country that has unequal bargaining power and lesser resources. In order to mitigate against this, it is critical that these provisions be supplemented with adequate technical and technological assistance and mutual co-operation.

¹²⁴ Robert Thomason, Trade deals increasingly taking corruption into account, 01 Jul 2019, Available at <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/anti-bribery-and-corruption/trade-deals-increasingly-taking-corruption-into-account>

¹²⁵ Peru's Forest Sector: Ready for the New International Landscape, Environment Impact Agency March 20, 2013 available at https://issuu.com/eia-global/docs/eia_peru_report_eng_p03_web

¹²⁶ United States-Peru Trade Promotion Agreement – Strengthening Forest Sector Governance <https://ustr.gov/sites/default/files/UNITED-STATES-PERU-TRADE-PROMOTION-AGREEMENT-strengthening-forest-sector-governance.pdf>

¹²⁷ USTR Announces Enforcement Action to Block Illegal Timber Imports from Peru Available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-announces-enforcement-action>

The United States has proven itself to be a world leader in incorporating anti-corruption provisions into trade agreements. The US anti-corruption provisions are considered some of the most stringent and ambitious in the world.¹²⁸ However, conceptually there is still room for USG to push the boat out further. Nearly all trade agreements, including the WTO rules and the FTAs discussed within this chapter, treat transparency as ‘openness in process and publication’ as opposed to meaningful disclosure that would enhance financial transparency.¹²⁹ For instance, the US has since the 1970s has included government procurement clauses in nearly all free trade agreements. These clauses require national treatment for US companies and the appropriate, timely and full disclosure of all necessary information. But they do not require that verification/disclosure of Politically Exposed Person or Beneficial Ownership in the process.

For the US to continue to lead the way on this, the next step would be to take a leaf out of the Peru-US agreement and expand the transparency and integrity provisions to include the collection of beneficial ownership information. It would also be important to establish data exchanges for certain commodities and market segments that are high risk or that may receive preferential treatment under these agreements. This would ensure a cooperative approach to trade integrity and trade facilitation.

Conclusion

The US is a major hub for business, trade, and financial services worldwide. As such, strengthening financial transparency within the US system is critically important. Beneficial ownership is key to this process: knowing the real owner behind an entity or asset can help to address corruption, money laundering, and a whole host of other issues.

The current policy focus in the United States is on expanding beneficial ownership transparency from bank accounts to cover corporations, limited liability companies and other similar entities next. Yet even this will leave important loopholes. Looking forward, the future of beneficial ownership in the US must do more to address trade and transportation, two areas that are critical to hemispheric security.

¹²⁸ Matthew Jenkins, ANTI-CORRUPTION AND TRANSPARENCY PROVISIONS IN TRADE AGREEMENTS, Transparency International, July 30, 2018 at p.8. Available at <https://knowledgehub.transparency.org/assets/uploads/helpdesk/Anti-corruption-and-transparency-provisions-in-trade-agreements-2018.pdf>

¹²⁹ https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file766_3926.pdf