

March 18, 2023

Himamauli Das
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Submitted electronically via <http://www.regulations.gov>

RE: **Proposed Beneficial Ownership Information Reports**
Docket No. FINCEN-2023-0002 and OMB 1506-0076

Dear Acting Director Das:

This letter responds to the request for comment by the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury (Treasury) on the format and content of the proposed report¹ to be filed with the beneficial ownership registry established by the Corporate Transparency Act (CTA)² and its key implementing regulation.³ The Proposed Report is supposed to serve as the primary intake form for the registry. While it has positive elements, it also contains a grave flaw that subverts the law and would severely curtail the usefulness of the registry. To remedy that flaw, the final report must remove ill-advised options enabling reporting companies to avoid providing legally required information by claiming to be “unable” to obtain it or that the required information is “unknown.”

These comments are based on work I performed for the U.S. Senate Permanent Subcommittee on Investigations from 1999 to 2014, including over a decade as staff director and chief counsel for Senator Carl Levin. During my tenure with the subcommittee, I gained expertise on a wide variety of anti-money laundering and anti-corruption issues, including issues related to beneficial ownership. The subcommittee’s investigations, hearings, and reports frequently dealt with shell companies, trusts, and other entities with hidden owners.⁴ In response, Senator Levin became the first member of Congress to introduce a bill to require

¹ The proposed report is described in “Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports,” FinCEN, 88 FR 2760 (Docket Number: FINCEN-2023-0002), (1/17/2023), <https://www.govinfo.gov/content/pkg/FR-2023-01-17/pdf/2023-00703.pdf> (hereinafter “Proposed Report”).

² The CTA was enacted into law as Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, P.L. 116-283 (1/1/2021), and is codified at 31 U.S.C. § 5336 et seq.

³ “Beneficial Ownership Information Reporting Requirements,” FinCEN, Final Rule, 87 FR 59498 (9/30/2022).

⁴ See, e.g., U.S. Senate Permanent Subcommittee on Investigations, “U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History,” S.Hrg. 112-597 (7/17/2012); “Keeping Foreign Corruption Out of the United States,” S.Hrg. 111-540 (2/4/2010); “Tax Haven Abuses: The Enablers, The Tools and Secrecy,” S.Hrg. 109-797 (8/1/2006); Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act,” S.Hrg. 108-633 (7/15/2004); “Role of U.S. Correspondent Banking in International Money Laundering,” S.Hrg. 107-84 (3/1-2, 6/2001); and “Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities,” S.Hrg. 106-428 (11/9-10/1999).

greater beneficial ownership transparency.⁵ I assisted in the development of that bill as well as subsequent legislation to increase beneficial ownership transparency, culminating in enactment of the CTA.

The Proposed Report is supposed to collect and store identifying information in the registry about beneficial owners, company applicants, and individuals who control certain foreign pooled investment vehicles (hereinafter “PIV controllers”). If finalized as proposed, however, the Proposed Report would not only violate the law, but also waste tens of millions of taxpayer dollars by creating a beneficial ownership registry that will be incomplete and of little or no use to national security, intelligence, and law enforcement agencies, financial institutions, and regulators.

Statutory and Regulatory Requirements. The primary purpose of the Corporate Transparency Act is to increase ownership transparency for certain entities formed or registered to do business in the United States and to prevent entities with hidden owners from engaging in illicit finance and other wrongdoing within U.S. borders. To increase ownership transparency, the CTA imposes mandatory disclosure requirements on reporting companies subject to the Act. Section 5336(b)(1)(A) of title 31, United States Code, states:

In accordance with regulations prescribed by the Secretary of the Treasury, each reporting company *shall* submit to FinCEN a report that contains the information described in paragraph (2). (Emphasis added.)

Section 5336(b)(2) states, in turn, that a report delivered under paragraph (1) “*shall*” identify “each beneficial owner of the applicable reporting company and each applicant” by providing their full legal name, birthdate, address, and a unique number from an acceptable identification document. (Emphasis added.)⁶

The key regulation issued by Treasury to implement the CTA faithfully transcribes its mandatory disclosure requirements in a new 31 C.F.R. § 1010.380. In particular, Section 1010.380(a) states that “[e]ach reporting company *shall* file an initial report in the form and manner specified in paragraph (b).” (Emphasis added.) Section 1010.380(b)(1) states that the “initial report of a reporting company *shall* include the following information.” (Emphasis added.) The regulation then describes the required information, stating that the initial report *shall* include, for each reporting company, its full legal name, any trade name, address, the jurisdiction where the company was formed, and a U.S. or foreign taxpayer identification number.⁷ In addition, the regulation states that the initial report *shall* include for “every individual who is a beneficial owner of such reporting company, and every individual who is a

⁵ Incorporation Transparency and Law Enforcement Assistance Act, S. 2956, 110th Congr. (5/1/2008)(introduced by Sen. Levin and cosponsored by Sen. Norm Coleman (R-MN) and Sen. Barack Obama (D-IL)).

⁶ Those mandatory disclosure requirements are in line with international best practice. Earlier this month, the Financial Action Task Force (FATF) on money laundering issued new guidance on “Beneficial Ownership of Legal Persons,” advocating the establishment of beneficial ownership registries and requiring companies “to provide basic and beneficial ownership information to the company registry upon registration.” FATF, “Beneficial Ownership of Legal Persons” (3/10/2023), at 89(i), <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html>.

⁷ 31 C.F.R. § 1010.380(b)(1)(i).

company applicant with respect to such reporting company,” that individual’s full legal name, birthdate, address, a unique number from an acceptable identification document, and an image of the identification document.⁸ In the special case of certain pooled investment vehicles (PIVs) formed in foreign countries, Section 1010.380(b)(2) states that the foreign PIV is deemed to be a reporting company subject to the same disclosure requirements as other reporting companies, except that the information required for individuals applies to only one individual “who exercises substantial control over the entity.”⁹

The statutory and regulatory disclosure requirements imposed on reporting companies are clearcut and mandatory. They require reporting companies to disclose specified information in the reports filed with the registry. They contain no provisions allowing filers to skip some or all of the mandatory disclosures. Yet that is exactly what the Proposed Report would allow.

Proposed Report. According to its preamble, the Proposed Report is designed “to collect beneficial ownership information, as required by” the CTA, 31 U.S.C. § 5336, and its implementing regulation, Section 1010.380.¹⁰ The proposed form is composed of three parts. After indicating whether the filing is an initial, corrected, or updated report, Part I requires the reporting company to provide information about itself. In compliance with the law and its implementing regulation, the Proposed Report requires the reporting company to disclose its full legal name, any alternate name, its tax identification number, the jurisdiction where it was formed or first registered to do business in the United States, and its current U.S. address.¹¹

Part II of the Proposed Report requires reporting companies to provide information about their company applicants, and Part III requires reporting companies to provide information about their beneficial owners.¹² Again, in compliance with the law and its implementing regulation, the Proposed Report requires the reporting company to provide specified information for each of those individuals, including the individual’s first, last and any middle name; any suffix; a birthdate; an address; a unique number from an acceptable identification document; and an image of the identifying document.¹³

Technical Issues. The proposed form as currently worded has a number of technical issues that could be easily corrected. The problems are accurately described in the comment letter submitted by Carol Clein, No. FINCEN-2023-0002-0007, who also suggests practical solutions for resolving the problems and improving the final form. This letter endorses the analysis and technical corrections proposed in the Clein comment letter.

In addition, three other technical suggestions are respectfully submitted for your consideration. First, Part I of the final report should add a new data field, using a checkbox format, to disclose the type of entity submitting the report. Requiring reporting companies to

⁸ 31 C.F.R. § 1010.380(b)(1)(ii).

⁹ 31 C.F.R. § 1010.380(b)(2)(iii).

¹⁰ Proposed Report, 88 FR at 2760.

¹¹ See “Filing Information” and “Part I. Reporting Company Information,” Proposed Report, 88 FR at 2763.

¹² See “Part II. Company Applicant Information” and “Part III. Beneficial Owner Information,” Proposed Report, 88 FR at 2763-2764.

¹³ The proposed form also states, in Item 16, that companies formed before January 1, 2024, do not have to provide any identifying information for their company applicants.

identify themselves as a corporation, limited liability company, partnership, trust, or other entity (with a data field requiring them to specify what type of entity) would help clarify their status as a covered entity and help confirm their identity; enable registry users to search for reporting companies by type of entity for law enforcement purposes; help federal and state auditors analyze the types of entities that may be failing to register, providing corrected or updated reports, or supplying false or incomplete information; help analyze issues related to FinCEN identifiers; and help GAO perform the analysis required by the CTA¹⁴ to evaluate the extent to which partnerships, trusts, and other legal entities already file with the registry or should be added to the types of entities subject to the CTA due to illicit finance risks.

Second, the final report should specify that a foreign PIV required to file a registry report to identify an individual exercising substantial control over the PIV should complete Part III of the report on beneficial owners (rather than Part II on company applicants). Third, the preamble to the Proposed Report states that “[t]he reporting company must certify that the report is true, correct, and complete,”¹⁵ however, that certification does not appear in the Appendix describing the report’s proposed data fields. In the final report, that certification, as well as data fields requiring the individual submitting the form to provide their full legal name, job title, contact information, and an electronic signature, should be included in the Appendix.

Removal of Unable and Unknown Options. In addition, as indicated at the beginning of this comment letter, the Proposed Report contains a grave flaw that must be addressed: its inclusion of options in Parts II and III allowing reporting companies to omit statutorily required information by claiming that the reporting company is either “[u]nable” to provide the required information¹⁶ or that the required information is “[u]known.”¹⁷ The Proposed Report provides the “unable” and “unknown” options as possible responses to 31 provisions seeking information mandated by the CTA and its implementing regulation; all of those answer options should be excised from the final report. If those options are not removed, the final report will not only violate the plain language of the CTA and its implementing regulation, but also waste tens of millions of taxpayer dollars creating a beneficial ownership registry that will be incomplete and of little or no use.

The CTA states plainly that reporting companies “*shall* submit to FinCEN a report that contains” certain specified information, and that the report “*shall*” identify each beneficial owner and company applicant by providing four pieces of information – their full legal name, birthdate, address, and a unique identifying number from an acceptable identification document.¹⁸ The law nowhere states that reporting companies can avoid providing the required information by claiming to be “unable” to obtain it or that the information is “unknown.” Similarly, the regulation implementing the law never mentions allowing reporting companies to claim that they

¹⁴ See CTA, § 6502(d).

¹⁵ Proposed Report, 88 FR at 2761.

¹⁶ See Items 17 (“Unable to identify all Company Applicants (check if you are unable to obtain any required information about one or more Company Applicants)”) and 34 (“Unable to identify all Beneficial Owners (check if you are unable to obtain any required information on one or more Beneficial Owners”), 88 FR at 2763-2764.

¹⁷ See for “Company Applicants,” Items 19(z), 20(z), 23(z), 24(z), 25(z), 26(z), 27(z), 28(z), 29(z), 30(z), 31(z), 32(a-z, b-z, c-z), and 33(a); and for “Beneficial Owners,” 38(z), 39(z), 42(z), 43(z), 44(z), 45(z), 46(z), 47(z), 48(z), 49(z), 50(a-z, b-z, c-z), and 51(z), Proposed Report, 88 FR at 2763-2764.

¹⁸ 31 U.S.C. §§ 5336(b)(1)(A) and (b)(2).

are “unable” to submit the required information or that the information is “unknown.” To the contrary, both the law and its implementing regulation are clear that they impose mandatory disclosure requirements on reporting companies backed by civil and criminal penalties for willfully submitting false, fraudulent, incomplete, or outdated information.¹⁹

In addition to its mandatory disclosure requirements, the CTA repeatedly directs the Treasury Secretary to take steps to ensure the beneficial ownership registry and the information in it are accurate, complete and highly useful to registry users.²⁰ The importance of that statutory directive is magnified by its repetition in the law, yet the Proposed Report contradicts and undercuts that directive by explicitly permitting reporting companies to omit vital information from their registry filings. The “unable” and “unknown” answer options permit reporting companies not only to omit the names of their beneficial owners, company applicants, and PIV controllers, but also information on those individuals’ birthdates, addresses, identifying numbers, and images of the identifying documents.

The reporting companies required to provide beneficial ownership information are not third parties that have no right to the specified information. Reporting companies inherently depend upon human beings to take action and so, at a minimum, always know who controls them. At the same time, if reporting companies are given the option to dodge the work required to collect and disclose specific information about their beneficial owners, company applicants, and PIV controllers, it is common sense that many reporting companies will take advantage of that option and omit the required information from their reports. Common sense also dictates that reporting companies controlled by terrorists, criminals, tax evaders, or other wrongdoers will routinely select the “unable” and “unknown” answer options in order to hide their identities – exactly the reporting companies of most interest to registry users. The resulting registry will not only be riddled with incomplete registry reports missing vital ownership information, but will also produce a beneficial ownership database of little or no use to national security, intelligence, and law enforcement agencies trying to stop illicit finance.

¹⁹ 31 U.S.C. § 5336(h).

²⁰ See CTA, § 6402(8)(C) (requiring Treasury, “in prescribing regulations to provide for the reporting of beneficial ownership information,” to “collect information in a form and manner that is reasonably designed to generate a database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators”); 31 U.S.C. § 5336(b)(1)(F) (requiring Treasury, in “promulgating the regulations required” for submitting BOI reports to FinCEN, to “collect information … in a form and manner that ensures the information is highly useful in—(I) facilitating important national security, intelligence, and law enforcement activities; and (II) confirming beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law”); 31 U.S.C. § 5336(b)(4)(B)(ii) (requiring Treasury, when implementing “procedures and standards governing any report” to FinCEN or related to FinCEN identifiers to “ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful”); 31 U.S.C. § 5336(d)(2) (requiring “Federal, State, and Tribal agencies … to … cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information”); 31 U.S.C. § 5336(h)(4) (requiring the Treasury Inspector General, in coordination with the Treasury Secretary, to collect complaints “regarding the accuracy, completeness, or timeliness” of the registry’s information and provide Congress with a report containing recommendations “to ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful”).

Shockingly, the preamble to the Proposed Report does not even attempt to explain how the “unable” and “unknown” answer options comply with the CTA and its implementing regulation. The preamble also fails to explain the reasons for deciding to include those options in the registry intake form when the CTA and its implementing regulation never even hint at that course of action. Nor does the preamble cite as precedent any other federal disclosure form with similar answer options. The preamble, in fact, fails to provide any justification at all for the “unable” and “unknown” answer options, yet sets a dangerous precedent for including those options in federal disclosure forms.

An obvious analogy is to the federal anti-money laundering laws and regulations that currently require financial institutions to “know their customers” and collect KYC information for their accounts, including accounts opened by legal entities.²¹ Those laws and regulations do not permit a financial institution to dispense with its KYC obligations when opening an account by claiming that it is “unable” to collect beneficial ownership information for a legal entity, or that such information is “unknown” to the financial institution. Instead the laws and regulations flatly require financial institutions to obtain the information, and use bank examinations and audits to ensure they meet their KYC responsibilities. As a result, financial institutions collect the required KYC information.

In the same way, the CTA requires reporting companies to know their owners. By explicitly requiring reporting companies to provide identifying information for each of their beneficial owners and disclose it to the government through the reports filed with the registry, the CTA compels them to obtain what could be called “know your owners” or “KYO” information. The law effectively puts an end to the days in which reporting companies can willfully ignore, set up barriers against learning, or pretend that they do not know the human beings who own or control them – implausible claims that have nonetheless made it difficult for national security, intelligence, and law enforcement agencies to fight illicit finance. The CTA instead imposes mandatory disclosure requirements on reporting companies backed by civil and criminal penalties. And it directs Treasury and FinCEN to impose those penalties on reporting companies that willfully refuse to provide the mandatory beneficial ownership information. What the CTA does not empower Treasury or FinCEN to do is to design registry reports that, by offering the “unable” and “unknown” answer options, essentially eliminate the mandatory nature of the law’s disclosure requirements.

Still another problem with the proposed approach is that the preamble to the Proposed Report fails to establish any standards or principles governing when a reporting company may select the “unable” or “unknown” option when completing the proposed form. The preamble imposes no due diligence or best efforts standard nor sets any minimum steps that must be taken by a reporting company before claiming that it is “unable” to obtain the required information or that the information is “unknown.”

Instead, the proposed form essentially invites bad actors to select the “unable” or “unknown” options whenever they please while thumbing their nose at the CTA’s mandatory disclosures. Consider, for example, a money launderer who forms a U.S. corporation owned 100% by a shell company in a secrecy jurisdiction with laws prohibiting disclosure of the shell

²¹ See 31 U.S.C. §§ 5318(h) - (l); 31 C.F.R. Chapter X.

company's beneficial owners. Suppose further that the money launderer causes the shell company to hire a U.S. individual to manage the U.S. corporation. That manager could fill out the proposed registry intake form stating that the identity of the beneficial owner of the offshore shell company is "unknown" to the manager and can't be obtained by the manager due to the jurisdiction's secrecy laws. By allowing the U.S. company to select the "unable" and "unknown" answer options instead of requiring the company to find out and disclose its beneficial owners, the proposed form allows the reporting company to submit a registry report containing no beneficial ownership information at all, the exact opposite of what the CTA requires and FinCEN's statement that every reporting company should identify at least one beneficial owner in its registry report.²² Allowing reporting companies to file registry reports without naming any beneficial owner at all would resurrect the offshore corporate secrecy problem that the Corporate Transparency Act was designed to overcome. It would also make a mockery of the law, producing an absurd result contrary to both the CTA and its implementing regulation.

Some have pointed out that the CTA does not empower FinCEN or Treasury to sue a reporting company to compel it to obtain the information required by the law. That is true. But the CTA does require FinCEN and Treasury to establish a registry with beneficial ownership information that is accurate, complete, and highly useful and to impose civil and criminal penalties on reporting companies that willfully refuse to provide required information. Treasury and FinCEN must not attempt to evade those legal obligations by inserting "unable" and "unknown" answer options into the registry intake form to make it easy for reporting companies to bypass the CTA's mandatory disclosure requirements.

Conclusion. The Proposed Report is the worst designed government form that I have seen in 40 years of public service. As currently worded, the Proposed Report violates the CTA and its implementing regulation. The proposal provides no justification, precedent, standards, or principles for allowing reporting companies to circumvent the law's mandatory disclosure requirements by creating a form that enables them simply to opt out of the required disclosures. I can only hope that Treasury and FinCEN will reconsider their legal obligations under the CTA and delete from the proposed form the 31 "unable" and "unknown" answer options enabling reporting companies to continue to hide their beneficial owners. Treasury and FinCEN should also improve the form by making the technical changes described earlier.

Thank you for this opportunity to comment on the Proposed Report.

Sincerely,

Elise Bean
Former staff director and chief counsel
U.S. Senate Permanent Subcommittee on Investigations

²² See "Beneficial Ownership Information Reporting Requirements," FinCEN, Final Rule, 87 FR 59498, 59525 (9/30/2022) ("FinCEN expects that a reporting company will always identify at least one beneficial owner" in its registry form, since every company is under the substantial control of at least one human being.)