

March 20, 2023

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

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

Re: Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports

Docket No.: FINCEN-2023-0002 and OMB Control No.: 1506-0076

Dear Acting Director Das,

This letter responds to a notice and request for comment regarding the Intake Form proposed by Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of Treasury (Treasury) to collect Beneficial Ownership Information (BOI) from reporting entities, pursuant to the Corporate Transparency Act (CTA).

This letter was drafted by the FACT Coalition, a non-partisan alliance of more than 100 state, national, and international organizations promoting policies to build a fair and transparent global tax system that limits abusive tax avoidance and to curb the harmful impacts of corrupt financial practices.¹ The FACT Coalition submits this letter in conjunction with 15 anti-corruption, human rights, foreign policy, anti-human trafficking, and housing groups concerned about how gaps in U.S. anti-money laundering law threaten U.S. national and economic security, global democracy, and our world.

This comment letter urges Treasury to amend the Proposed BOI Intake Form to remove any field that allows filers to declare that certain information is “unknown” or that filers are “unable to obtain” such information, and to ensure that the form is consistent with best data practices.² The Proposed Intake Form, as written, would effectively make the CTA an *optional* reporting regime for affected filers, which would be an absurd outcome and contrary to the clear statutory requirement of the CTA. We urge Treasury to reverse course on the unprecedented reporting optionality FinCEN proposes offering under the CTA.

In light of the January 1, 2024 reporting date created by the first final rule implementing the CTA – a reporting date strongly supported by the signatories of this letter – it is imperative that Treasury not delay in clarifying the affirmative and clear obligation under the CTA for

¹ To learn more about the FACT Coalition and its members, see <https://thefactcoalition.org/about-us/>.

² See Proposed BOI Intake Form *supra* note 5.

reporting companies to identify and report their beneficial owners and company applicants. If this form is allowed to stand, it would run afoul of the clear statutory language of the CTA and undermine U.S. global leadership on anti-corruption and anti-money laundering.

Proposed BOI Intake Form Contradicts the Letter and Spirit of the CTA

Treasury Has No Authority to Introduce Non-Reporting, an Approach that was Never Contemplated by the Statute

Allowing reporting companies to simply declare that they do not know information required under the CTA has no basis in the law and conflicts with the CTA's plain meaning. The CTA is clear. It requires reporting companies to identify their beneficial owners and company applicants in light of the evident and growing threat anonymous companies pose to our national security, interstate and foreign commerce, and, ultimately, our democratic institutions.³ There is no language in the CTA that contemplates that a reporting company may simply state that it does not know the statutorily required details to be reported regarding beneficial owners. Quite the opposite: the statute states clearly throughout that reporting entities “shall” provide the requisite information unless otherwise exempted.⁴ The CTA does contemplate circumstances pursuant to which an individual beneficial owner may provide a FinCEN identifier in lieu of portions of its personal identifying information; however, in this case the beneficial owner must report all personal identifying information required under the statute to FinCEN.⁵ Entities would then use that identifier in their reporting. Under no circumstances did Congress contemplate or give FinCEN the authority to allow reporting companies to simply refuse to comply with the CTA.

The Proposed Intake Form Conflicts with the Statute in Ways that Put Small Businesses at Risk

The proposed form allows reporting companies to report “unable to obtain” or “unknown” with respect to each relevant detail regarding a given beneficial owner's identity – including whether the company is even able to identify its beneficial owners in the first place.⁶ **There is no conceivable scenario in which a legitimate reporting company does not know or cannot otherwise identify its beneficial owners.**

Moreover, the Proposed BOI Intake Form, by conflicting with the statute, creates a legal gray area for businesses seeking to comply with the law: whereas the CTA holds liable any entity willingly failing to report complete and update BOI, the Intake Form would explicitly condone a willful incomplete filing by reporting companies.⁷ The possible daylight between what

³ 31 U.S.C. § 5336(b); Public Law 116-283 (116th Cong.), § 6402.

⁴ 31 U.S.C. § 5336(b)(2)(A).

⁵ 31 U.S.C. § 5336(b)(2)(A)(iv)(II), (b)(3).

⁶ See Proposed BOI Intake Form *supra* note 5. The Proposed BOI Intake Form also allows a similar level of voluntary reporting regarding applicants in a way that has no tie to the final first rule implementing the CTA and that also has no basis under the CTA. See *id.*

⁷ See § 5336(h)(1). Under the CTA, “willful” means the “voluntary, intentional violation of a known legal duty.” 31 U.S.C. § 5336(h)(6). The definition of willful is not predicated on the ability to determine whether or not information is incorrect under the CTA, though its use of voluntary does imply a level of reasonable care must be exercised by reporting companies in their reporting. Nonetheless, by clear Congressional definition, the knowing reporting of “unknown” about a particular beneficial owner's identifying information

the form allows and the statute penalizes creates questions that entities may have trouble navigating. Further, it may create scenarios in which even legitimate entities seeking to comply with the law may choose to report “unable” or “unknown” as a means to hedge and avoid risks of penalty, even if there is little doubt as to the identity of the beneficial owners. To increase business certainty, reduce compliance cost, and encourage data reporting, Treasury should rescind and repropose the Intake Form. In doing so, it must make explicit that each field is required, to obviate unnecessary questions around legal liability stemming from the inclusion of “unable” or “unknown” fields in the form.

The Proposed BOI Intake Form Undermines Statute’s Requirement that Information be Accurate, Complete, and Highly Useful

The CTA requires that beneficial ownership information be “accurate, complete, and highly useful” to law enforcement, financial institutions, and other authorized users.⁸ In creating a reporting regime that is effectively optional, Treasury lays the groundwork, at worst, for certain entities to abstain from reporting identifying and other information entirely, or at best, for data to be reported in a piecemeal fashion. This outcome falls short of modern standards on data comparability, and has huge implications for law enforcement, financial institutions, and other authorized users.⁹ These users include federal offices with other crucial roles to play in implementing the CTA, including the Government Accountability Office, which is tasked by the statute with auditing and overseeing the database for its accuracy and utility. The Proposed Form again contradicts the statutory purpose and requirements of the CTA.

Further, the Proposed Intake Form fails to include a certification field that FinCEN had indicated would be included. In the first Notice of Proposed Rulemaking (NPRM) defining reporting requirements, FinCEN stated that entities, as part of the Intake Form, would need to “certify that reporting is true, correct, and complete.”¹⁰ Yet the Proposed BOI Intake Form has no field for this type of certification. **FinCEN should institute affirmative certification within the form, and should – next to the certification itself – clearly post penalties as outlined in the CTA.**

The Proposed Form is an Absurd Result and May Violate the Administrative Procedures Act if Not Amended

is the “willful” filing of incomplete information. It would be an unreasonable read of the CTA to allow reporting companies to report in a manner that is explicitly against the law.

⁸ See 31 U.S.C. § 5336(d).

⁹ See FACT’s comment in response to the Notice of Proposed Rulemaking (NPRM) on Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, <https://www.regulations.gov/comment/FINCEN-2021-0005-0526>. See also the comment from Open Ownership in response to the same NPRM <https://www.regulations.gov/comment/FINCEN-2021-0005-0504>.

¹⁰ FinCEN, Notice of Proposed Rulemaking (NPRM) on Beneficial Ownership Information Reporting Requirements, <https://www.federalregister.gov/documents/2021/12/08/2021-26548/beneficial-ownership-information-reporting-requirements>.

The above is not an exhaustive list. It is not an exaggeration to say that **the Proposed BOI Intake Form effectively makes the CTA an optional reporting regime**. As the agency responsible for implementing the CTA, Congress did not give Treasury the authority to declare the CTA as an optional law. That is an absurd result that Treasury must avoid in promulgating any final BOI Intake Form.¹¹

The Optional Nature of the BOI Intake Form Has Little, if Any, Federal Precedent

The BOI Intake Form is also inconsistent with other federal information reporting precedent, including for third parties.¹² Congress has historically relied on mandatory third-party information reporting regimes to enhance compliance with a variety of laws, including AML/CFT laws, securities laws, tax laws, and others.¹³ Failing to require this information for the CTA would undercut the purpose of the law and federal information reporting regimes, generally. It may likewise, potentially, lead to a slippery slope in which federal agencies would face pressure to amend other mandatory reporting regimes to introduce similar features to avoid reporting. In the interest of time, **we urge the Treasury to amend the proposed BOI Intake Form and expediently reissue it without the option to declare “unknown” or “unable to obtain” required information under the CTA.**

The BOI Intake Form Undermines U.S. Global Leadership on Fighting Money Laundering and Tax Evasion

The BOI Intake Form undermines the global push to advance beneficial ownership transparency internationally, as well. The United States exercises significant influence in establishing global norms. The form – making the U.S. directory essentially voluntary – would be inconsistent with recent FATF guidance and also render hypocritical any positions the U.S. might take to advance reform internationally. This would also undermine our own AML/CFT and tax evasion efforts, which rely heavily on international collaboration. Such outcomes and positioning undermine U.S. national security and efforts to support global democracy, as well as tax justice.

Conclusion

Allowing reporting companies to declare that they simply do not know information required under the CTA has no basis in the CTA, earlier final regulations issued under the

¹¹ See supra note 70 and accompanying text.

¹² Consider, for instance, the reporting regimes – for immigration, tax, and other purposes – required of employers about their employees. These fields in this form are mandatory as part of federal reporting. For more comparative analysis, see Elise Bean’s comment in response to the NPRM Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, <https://www.regulations.gov/comment/FINCEN-2021-0005-0508>. See also Sophia Yan, “Purpose Unknown: Proposed Forms Would Undermine Corporate Transparency Act’s Ownership Reporting Regime,” Just Security, February 2022, <https://www.justsecurity.org/85142/purpose-unknown-proposed-forms-would-undermine-corporate-transparency-acts-ownership-reporting-regime/>.

¹³ See, e.g., IRS Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business), <https://www.irs.gov/forms-pubs/about-form-5472>.

CTA, or based on any other federal information reporting precedent. Failing to require such information would undercut the purpose of the law and federal information reporting regimes, generally.

Thank you for the opportunity to comment. If you have questions, you may contact Erica Hanichak (ehanichak@thefactcoalition.org).

Signed,

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Endorsing Organizations:

- Anti-Corruption Data Collective
- California Reinvestment Coalition
- Coalition for Integrity
- Demand Progress Educational Fund
- Friends of Angola
- Global Financial Integrity
- Government Accountability Project
- Joint Baltic American National Committee
- ONE Campaign
- Open Contracting Partnership
- Open The Government
- Polaris Project
- Project On Government Oversight
- Never Again Coalition
- The Sentry