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March 20, 2023

Via Electronic Mail

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

RE: Docket Number FINCEN-2023-0002 - Beneficial Ownership Information Reports

Dear Sir or Madam:

The Independent Community Bankers of America (“ICBA”)¹ appreciates the opportunity to respond to the Financial Crimes Enforcement Network’s (“FinCEN’s”) request for comment on the report that will be used to collect beneficial ownership information (“BOI”) that will be reported to FinCEN pursuant to Section 6403 of the Corporate Transparency Act (“CTA”), enacted into law as part of the Anti-Money Laundering Act of 2020 (“AML Act”), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”).²

Background

On May 5, 2016, the FinCEN amended the Bank Secrecy Act (“BSA”) regulations to require covered financial institutions (“FIs”) to conduct and document customer due diligence on all beneficial owners of certain legal entity customers that open new accounts no later than May 11, 2018. This amendment is known as the Customer Due Diligence Final Rule (“CDD Rule”).

¹*The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5.9 trillion in assets, over \$4.9 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

² 31 U.S.C. § 5336

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On January 1, 2021, the CTA was enacted and amended the BSA by imposing new beneficial ownership requirements to impede the use of U.S.-based shell corporations for illicit financial activity and called for the creation of a FinCEN registry. The CTA requires FinCEN to issue rules requiring reporting companies to submit certain information to FinCEN about their beneficial owners;³ requires FinCEN to maintain this information in a confidential, secure, and non-public database;⁴ and authorizes FinCEN to disclose the information to FIs to facilitate compliance with CDD requirements.⁵ The CTA also provides for the issuance and use of FinCEN identifiers—unique identifying numbers assigned by FinCEN – that persons may submit to FIs to satisfy certain beneficial ownership reporting requirements.⁶ The NDAA also requires the Treasury to revise its existing CDD rules *to reduce any burdens on financial institutions and legal entity customers that are unnecessary or duplicative.*⁷

On April 1, 2021, FinCEN issued an Advance Notice of Proposed Rulemaking (“ANPRM”) to solicit public comment on questions related to the implementation of the BOI reporting provisions of the CTA. This was the first in a series of regulatory actions that FinCEN took to implement the CTA.

The ANPRM was followed by a Notice of Proposed Rulemaking (“NPRM”), issued on December 8, 2021, seeking public input on who must file a report of beneficial ownership, what information must be provided, and when a report is due. This NPRM was the first of three to implement the requirements of Section 6403. FinCEN issued a final rule on reporting requirements and FinCEN identifiers on September 30, 2022.⁸ The current comment request seeks input on the reporting form and is made pursuant to the Paperwork Reduction Act of 1995.

ICBA’s Comments

ICBA’s position has been and continues to be that if the government has an interest in collecting and maintaining records of beneficial owners of private legal entities, such information should be collected and verified at the time a legal entity is formed, rather than requiring FIs to collect this information. ICBA’s position also calls for FIs to have access to that information to assist them in performing customer due diligence.

ICBA does not advocate for access, for access’ sake. But rather, access that furthers along and strengthens the customer due diligence process for community banks, with information that is complete, accurate, and reliable. That said, we strongly oppose FinCEN’s decision to propose a

³ CTA § 6403 (b)(1)(C)

⁴ CTA § 6402(7)

⁵ CTA § 6403(c)(2)(B)(iii)

⁶ CTA § 6403 (b)(3)

⁷ CTA § 6403 (d)(1)(C) [emphasis added]

⁸ 31 CFR 1010. The regulations go into effect on January 1, 2024. BOI will not be accepted prior to January 1, 2024

form that would allow a reporting company the option to not provide information that is required by the CTA. The proposed form allows reporting companies to check a box if they are not able to obtain information pertaining to beneficial owners, the reporting company, or company applicant. In fact, there are 29 places on the form that allows a reporting company to forego providing required BOI, such as full legal names, birthdays, addresses, tax identification numbers, and types of identifying documentation. The purpose of the form and CTA is to collect BOI on entities. FinCEN's newly created option counters the requirements laid out by the CTA which makes clear that reporting companies **must** report, for each identified beneficial owner and applicant, the full legal name; date of birth; current residential or business street address; and a unique identifying number from an acceptable identification document or the individual's FinCEN identifier.⁹

According to FinCEN, entities are at times used to obfuscate ownership interests and used to engage in illegal activities such as money laundering, corruption, fraud, terrorist financing, and sanctions evasion. Criminals have exploited the anonymity that legal entity ownership can provide to engage in a variety of crimes, and often take advantage of shell and front companies to conduct such activity. Making legal entities more transparent by requiring identifying information of natural person owners would likely hinder such abuses. Yet, as proposed, the form that FinCEN is considering would aid in the same criminal behaviors and activities that the agency seeks to curtail. The proposed form would also result in additional criminal behavior by enabling the evasion of reporting requirements.

The CTA also authorizes FinCEN to disclose collected BOI to FIs to facilitate compliance with CDD requirements.¹⁰ The proposed form completely defeats the purpose of the CTA and renders the information accessible by community banks, useless. Requiring community banks to collect the same BOI that FinCEN collects is already a redundant and burdensome task. Having access to BOI submitted to FinCEN may help mitigate this futile exercise. However, if FinCEN decides to use this form allowing for incomplete submission of BOI, the onerous task for community banks will be compounded.

ICBA urges FinCEN to remove all 29 references to "check if you are not able to obtain" required information from the reporting form. Current rules require FIs to collect all required information without an option for customers to opt out of providing information. It would be wholly prejudicial to allow reporting companies to skip providing required BOI to FinCEN, while currently requiring banks to collect all required information.

⁹ CTA § 6403 (b)(2)(B)

¹⁰ CTA § 6403(c)(2)(B)(iii)

FinCEN must not encourage reporting companies the option of not providing required BOI, pursuant to the CTA. Perhaps FinCEN's rationale is one based on reducing burdens on reporting companies that may have difficulty obtaining certain information. However, Congress did not give FinCEN the authority to allow reporting companies to bypass reporting requirements. FinCEN must follow the CTA and establish a reporting regime that ensures submitted BOI is complete and accurate.

If FinCEN chooses to maintain this reporting form as proposed, it will be imperative for the agency to grant a safe harbor for reliance on information retrieved from the database, as is. FIs should not be required to "chase down" BOI, as is currently required, to assist FinCEN in fulfilling its specific CTA obligations. FIs should be able to rely on the information submitted to FinCEN and not bear any responsibility or be subject to any consequences for such reliance.

ICBA appreciates the opportunity to provide comments in response to this request. If you have any questions, please do not hesitate to contact me at Rhonda.Thomas-Whitley@icba.org or (202) 659-8111.

Sincerely,

/s/

Rhonda Thomas-Whitley
Vice President and Regulatory Counsel