TRANSPARENCY INTERNATIONAL U.S.
fighting corruption, promoting democracy

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By electronic submission (via the Federal E-rulemaking Portal)

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

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,

Transparency International U.S. ("TI-US") commends the U.S. Department of the Treasury ("Treasury") and the Financial Crimes Enforcement Network ("FinCEN") for completing this Notice and Request for Comment ("Draft Form") to further the implementation of the Corporate Transparency Act ("CTA"). As the means through which millions of covered legal entities, applicants, and individuals who exercise substantial control over foreign-formed pooled investment vehicles will report their beneficial ownership information ("BOI") to Treasury, the BOI report is without question the single most consequential document connected to the successful implementation of this landmark law. We worked closely with Congress to help inform and generate key support for the CTA, and while we welcome the Draft Form as a significant step toward the implementation of a law that holds so much promise for so many across the world, we write to share our sincere and urgent concerns with its current design.

TI-US is part of the largest global coalition dedicated to fighting corruption. With over 115 national chapters worldwide, Transparency International ("TI") partners with businesses, governments, and citizens to promote transparency and to develop and implement effective measures to tackle and deter corruption, including by working around the world on the creation and implementation of accurate and effective beneficial ownership databases.[1]

The exploitation of anonymous shell companies by corrupt foreign officials, oligarchs, kleptocrats, and other criminals across the world to move and hide their dirty money—including into the United States—is one of the most durable and destructive obstacles to the fight against

[1] For more information, please visit www.us.transparency.org (TI-US) and www.transparency.org (TI).

corruption worldwide.[2] As the Biden Administration recognized in its United States Strategy for Countering Corruption:

> Corrupt actors frequently use opaque legal structures—such as shell companies—to hide and launder the proceeds of their crimes. In the U.S. anti-money laundering (AML) regime, the lack of timely access to adequate, accurate, and current beneficial ownership information has been identified as a gap…We will therefore address deficiencies in the U.S. anti-money laundering regime…by effectively collecting beneficial ownership information on those who control anonymous shell companies[.][3]

The first CTA rulemaking, completed last September, laid the infrastructure for a BOI reporting regime that would bring genuine transparency to companies and other similar entities that are formed or registered in the U.S.[4] Yet the Draft Form now threatens to undercut this progress and, in truth, the CTA writ large by allowing those subject to it to duck the law's core reporting requirements. Those who supported and contributed to the construction of the CTA for over a decade—Congress, civil society, media, law enforcement, and private industry, among others—now face the very real possibility of Treasury pulling out its foundation. **Treasury must honor the text of the law by making the following changes to the Draft Form.**

1. **Treasury must remove the inexplicable "Unknown" and "Unable" options.**

The CTA states that "each reporting company shall submit to FinCEN a report *that contains* [BOI]"[5] and that "a report delivered…*shall*…identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company[.]"[6]

The CTA also states that in "promulgating the regulations required…the Secretary of the Treasury shall, to the greatest extent practicable…*collect* [BOI] *in a form and manner that ensures the information is highly useful*"[7] and in promulgating the regulations "ensure the beneficial ownership information reported to FinCEN is *accurate, complete, and highly useful*."[8]

Lastly, the CTA states that it is unlawful for any person to "willfully provide, or attempt to provide"—where "willfully" means a voluntary, intentional violation of a known legal duty[9]—

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[2] One data point is particularly illustrative: According to the World Bank and the United Nations Office on Drugs and Crime, anonymous companies were used in over 70 percent of grand corruption cases they reviewed to either carry out the corrupt activity or to hide the proceeds of it. *See* Emile van der Does de Willebois et al., "The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It," World Bank, 2011, available at https://openknowledge.worldbank.org/handle/10986/2363.
[3] The White House, "United States Strategy on Countering Corruption," 20, 11, December 2021, available at https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.
[4] *See* Beneficial Ownership Information Reporting Requirements, Docket No.: FINCEN-2021-0005 and RIN 1506-AB49, published at 87 Fed. Reg. No. 189, Sept. 30, 2022.
[5] 31 U.S.C. 5336(b)(1)(A)(emphasis added).
[6] 31 U.S.C. 5336(b)(2)(A)(emphasis added).
[7] 31 U.S.C. 5336(b)(1)(F)(emphasis added).
[8] 31 U.S.C. 5336(b)(4)(B)(ii)(emphasis added).
[9] *See* 31 U.S.C. 5336(h)(6).

"false or fraudulent" BOI, as well as to "willfully fail to report complete" BOI.[10] Any person that does so will be liable for a civil penalty of up to $500 for each day that the violation continues or has not been remedied, and may be fined up to $10,000 and/or imprisoned for up to two years.[11]

Nevertheless, Part II of the Draft Form provides the following options: "Unable to identify all Company Applicants (check if you are unable to obtain any required information about one or more Company Applicants)" (Part II, Question 17) and "Unknown (check the box if you are not able to obtain this information about the Company Applicant)" (Part II, Question 19).[12] Identical options appear with regard to the applicant's last name, first name, date of birth, address type, address (number, street, and apartment or suite number), address (city), country/jurisdiction, state, zip/foreign postal code, identifying document, identifying document number, identifying document jurisdiction, and identifying document image. Similar options appear in Part III of the Draft Form regarding the reporting company's beneficial owners (e.g., "Unknown (check the box if you are not able to obtain this information about the Beneficial Owner)"). Nowhere does the Draft Form request or require explanation for selecting such options.

The text of the CTA is unambiguous: Reporting companies "shall" submit a report that contains BOI[13] and each report "shall" identify each beneficial owner and each applicant with respect to that reporting company.[14] **The CTA does not envision, let alone allow for, any other options.**

Furthermore, throughout the entire 10+ years of Congress's work and civil society's support of legislation to establish a U.S. beneficial ownership database, not a single example, or hypothetical, emerged where a legitimate reporting company would ever be incapable of identifying its beneficial owners. Put another way—no structure, arrangement, network, or constellation of ownership has ever been conceived, in nearly one dozen years, where a legitimate reporting company would not be able to identify, and thus report, its BOI. It is difficult to imagine—especially on the eve of the U.S.-led Summit for Democracy—that it is the policy of the United States Government that owners of a U.S. company could legally, even if inadvertently, co-own that company with sanctioned individuals simply because they were "unable" to identify to whom they had sold a controlling interest. If Treasury has somehow conceived of a scenario, undisclosed and undiscussed in its Draft Form, where the clear language of the CTA is inadequate, unworkable, or unkind to an otherwise fluid and consistent reporting scheme, **such is a matter for Congress**, not Treasury. Only Congress can establish such "Unknown" or "Unable" options, through appropriate legislation. **Treasury lacks authority to do so on its own.**

While the CTA does authorize Treasury to create new exemptions, the law clearly spells out the sole process by which Treasury may do so:

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[10] 31 U.S.C. 5336(h)(1).
[11] *See* 31 U.S.C. 5336(h)(3).
[12] Note that Question 16 of Part II appropriately states that reporting companies will not be required to report applicant BOI if the reporting company was, essentially, formed or registered in the United States prior to January 1, 2024.
[13] *See* 31 U.S.C. 5336(b)(1)(A).
[14] *See* 31 U.S.C. 5336(b)(2)(A).

> The term "reporting company"…does not include…any entity or class of entities that the Secretary of the Treasury*, with the written concurrence of the Attorney General and the Secretary of Homeland Security, has, by regulation, determined* should be exempt from the requirements of subsection (b) because requiring beneficial ownership information from the entity or class of entities…would not serve the public interest and…would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.[15]

The "Unknown" and "Unable" options, in real terms, are far too sweeping and consequential to be properly viewed as mere exemptions (especially as reporting companies that are "unable to obtain" their BOI may be particularly higher risk, and thus their BOI particularly "highly useful"), yet even if they were, Treasury here has operated outside of the CTA's provided means of creating new exemptions via this Draft Form, and as such is acting squarely in violation of the CTA.

Treasury should instead abide by the fundamental, implicit determination made by Congress in its drafting of the CTA: In order for a reporting company to take advantage of the benefits and protections provided by formation or registration in the United States, that reporting company must report its BOI. Period. In other words, the CTA reflects a clear congressional determination—the price of establishing a reporting company in the U.S. is BOI transparency. Treasury's "Unknown" and "Unable" options negate that core bargain.

Finally, the practical implications of the "Unknown" and "Unable" options will be foreseeably disastrous for both those subject to the law and those who stand to benefit from it. For honest actors who must comply with the CTA, the inclusion of these options will create confusion and uncertainty around what the CTA requires of them. What inquiry, or standard, has Treasury created that they must now employ before checking "Unknown" or "Unable"? What is the distance between intentionally failing to report complete BOI and not being "able" to obtain it? Such vast ambiguity may very well expose tens of millions of persons and entities subject to the CTA to not only considerable confusion and uncertainty but potential criminal and civil liability.[16]

Bad actors, on the other hand, will have been gifted a clear path for evading the law: So long as they have a hint of doubt as to the accuracy or completeness of the required BOI, so long as they do not intentionally fail to report "known," complete BOI, they will argue, they can properly check "Unknown" and "Unable" and continue their course of business as if the CTA had never been given the force of law.

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[15] 31 U.S.C. 5336(a)(11)(xxiv)(emphasis added).

[16] The qualification in Question 16 of Part II that reporting companies formed or registered prior to January 1, 2024, need not report their applicant BOI is precise. The inclusion of additional "Unknown" or "Unable" options will only compound the confusion and uncertainty over what is required. The stated qualification should be the *only* situation—given that the information is in fact time-specific—where applicant or any other information requested on the form is possibly unknowable and thus unreportable.

Perhaps most acutely, for users of the database—from the U.S. national security, defense, and intelligence communities to the tens of thousands of state, local, and tribal law enforcement agencies across the country, from the thousands of financial institutions with customer due diligence and related obligations to the foreign governments across the world working to bring corrupt officials to justice—a U.S. database that accepts "Unknown" and "Unable" will be a U.S. database that serves zero practical purpose to their work. Our database will only be as effective as it is accurate, and exceptions that swallow the rule leave no room for either.

We can think of no other legal duty, be it in the laws of Tax, Corporations, Campaign Finance, Labor, Ethics, Immigration, Real Estate, or the entirety of federal Criminal Law, where a legal requirement to affirmatively report or disclose information is simultaneously blunted by an accompanying option that translates to "if you're able to." The consequences of Treasury's error are clear and critical. The "Unknown" and "Unable" options must be stricken from the form.

2. Treasury should add an express certification requirement at the end of the form.

As FinCEN writes in the Draft Form's supplementary information section: "[T]he regulations describe who must file a report, what information must be provided, and when a report is due. Entities must certify that the report is true, correct, and complete."[17]

Yet the Draft Form does not include such a certification. To ensure the reporting of accurate and complete information, and to reduce the likelihood of confusion and uncertainty among persons and entities subject to the law, Treasury should include an express certification at the end of the form; that certification should expressly reference the penalties outlined in the CTA. This language could read:

> It is unlawful for any person to willfully provide or attempt to provide false or fraudulent beneficial ownership information, or to willfully fail to report complete beneficial ownership information. Any person that does so will be liable for a civil penalty of up to $500 for each day that the violation continues or has not been remedied, and may be fined up to $10,000 and/or imprisoned up to two years.
>
> I certify that the information provided above is true, correct, and complete.

The U.S. database holds the promise of making the United States a global linchpin in the fight against corruption, and we commend Treasury for its work thus far toward its implementation. By incorporating the above changes into the final BOI report, Treasury can ensure an accurate and effective reporting regime that reflects the text of the CTA.

Thank you for the opportunity to present these comments. If you have any questions, or for additional information on TI-US's work in this regard, please contact Scott Greytak, Director of Advocacy for TI-US, at sgreytak@transprency.org.

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[17] FinCEN, "Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports," 2761, available at https://www.federalregister.gov/documents/2023/01/17/2023-00703/agency-information-collection-activities-proposed-collection-comment-request-beneficial-ownership.

Respectfully submitted,

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