INTERNATIONAL BANCSHARES
CORPORATION

March 20, 2023

Via electronic submission:

Financial Crimes Enforcement Network
Policy Division
Docket No. FINCEN-2023-0002; OMB 1506-0076
P.O. Box 39
Vienna, VA 22183
https://regulations.gov

Re: Comments on Agency Information Collection Activities; Proposals, Submissions, and Approvals: Beneficial Ownership Information Reports: Docket No. FINCEN-2023-0002; OMB 1506-0076

Dear Sirs and Madams:

The following comments are submitted by International Bancshares Corporation ("IBC"), a publicly-traded, multi-bank financial holding company headquartered in Laredo, Texas. IBC maintains 167 facilities and 257 ATMs, serving 75 communities in Texas and Oklahoma through five separately chartered banks ("IBC Banks") ranging in size from approximately $450 million to $8.75 billion, with consolidated assets totaling approximately $15.5 billion. IBC is one of the largest independent commercial bank holding companies headquartered in Texas.

This letter responds to the latest notice and request for comment ("Notice") by the Financial Crimes Enforcement Network ("FinCEN") related to certain new beneficial owner regulations and reporting requirements. [Notice at 2760] The Corporate Transparency Act ("CTA") authorizes FinCEN to obtain a reporting company's beneficial ownership information ("BOI") in a centralized database ("Database") and disclose BOI to authorized individuals and entities for certain permissible purposes, including to financial institutions to assist in meeting the institutions' obligations under the customer due diligence rule ("CDD Rule"). FinCEN has requested comment on the proposed application that will be used to collect information from beneficial owners of reporting companies and, in certain circumstances, individuals who file the reporting company information with FinCEN under the BOI reporting rule ("BOI Rule") that was published on September 30, 2022. The BOI Rule,

> requires certain legal entities to file with FinCEN reports that identify the beneficial owners of the entity.

> Entities created or registered to do business on or after January 1, 2024, must also identify the individual who directly filed the document with specified governmental authorities that created the entity or registered it to do business, as well as the individual who was primarily responsible for directing or controlling such filing if more than one individual was involved in the filing of the document. Further, the 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. The rule also sets out various requirements for individuals and entities that seek to obtain a FinCEN identifier, which can be used in certain circumstances to substitute for other information required to be reported. [Notice at 2761]

The Notice provides the proposed BOI Rule application for both company and beneficial owner applicants. The Notice lists several general and specific requests for information and comment. IBC has provided its general comments and recommendations below.

General Comments

IBC is primarily concerned about the proposed BOI application's options that allow both company and beneficial owner applicants to state they are unable to identify/obtain/provide certain legally-required reporting information. Overwhelmingly, and certainly in the case of the CDD Rule, banks cannot simply state they are not able to obtain certain information required to be collected and reviewed. The primary purpose of the CTA is to shine a light on legal entity structures and ownership, and it *requires* reporting companies to provide specific information.[1] By allowing reporting companies and company applicants to baldly state they cannot obtain the required information, FinCEN's proposed BOI application wholly undermines the purpose and clear language of the CTA.

IBC notes that the phrase "not able to obtain" appears, in the context of the BOI Rule, for the first time in the proposed application. That language is not in the CTA, nor is it in any of the previous notices of the proposed rules. The only other use of the phrase "not able to obtain" in the context of the BOI Rule is in the final rule, but not in the context of whether a reporting company can simply refuse to include any BOI.[2] Both Congress and, up until the Notice and proposed application, FinCEN have *required* reporting companies to provide their beneficial ownership information. The CTA uses the term "shall" repeatedly when setting out what is required of reporting companies. The word "shall" is unequivocal, and its import has been settled in the legal context under English common law. Its usage and meaning are fundamental axioms taught to first year law students.

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[1] See, e.g., 31 U.S.C. 5336(b)(2).

[2] The final rule states that "[i]n the event that unusual situations arise in which a foreign reporting company is not able to obtain a foreign tax identification number, FinCEN will consider appropriate guidance or relief depending on the circumstances." 87 Fed. Reg. 59592.

"Shall" indicates a requirement, not an option.

Under the CTA, reporting companies *shall* provide, for each identified beneficial owner and company applicant, the following information: (i) full legal name; (ii) date of birth; (iii) current residential or business street address; and (iv) a unique identifying number from an acceptable identification document or the individual's FinCEN identifier. IBC notes that FinCEN is able to gather much of this information through tax return filings. For example, most beneficial owners of pass-through entities, such as partnerships, are required to disclose their ownership status and identifying information. This identifying information overlaps greatly with the BOI required under the CTA. IBC highly recommends that FinCEN focus on gathering the required BOI from these official alternative sources instead of relying on direct reporting from the legal entities to FinCEN.

FinCEN has echoed the CTA and its reporting "musts" in the proposed rule published on December 8, 2021.[3] Moreover, FinCEN consistently used "shall" in the final rule when describing what information reporting companies must provide. Candidly, the proposed application is shocking because prior to this, FinCEN appeared completely aligned with the clear requirements of the CTA. Neither the CTA nor the final BOI Rule would allow a reporting company to not provide the BOI simply because a reporting company was not "able" to obtain it. In the proposed application, over half of the required information has an "unable to obtain" response option. Again, this is shocking given the previous lack of "inability to obtain" options for reporting. Moreover, FinCEN fails to even provide an explanation for the concept of a reporting company submitting incomplete BOI because it was unable to obtain the required information.

IBC certainly understands that there will be situations where reporting companies are truly and legitimately unable to obtain and provide the required BOI. However, the plain language of the CTA does not currently provide for such situations. Thus it is Congress, not FinCEN, that should address those situations with an amendment to the CTA. FinCEN does not have the authority to provide for situations via regulation that contradict the requirements of the CTA. Moreover, two years after the passage of the CTA and multiple Federal Register notices later is not the time to introduce wholly novel concepts to the BOI requirements. FinCEN has introduced the ability of reporting companies to provide BOI on a "best efforts" basis (i.e.. potentially not at all), which was not contemplated by Congress or by FinCEN. The eleventh hour before implementation of the final rule is certainly not the time for such introduction, especially without additional comprehensive guidance.

Despite FinCEN's mandate, as provided through the CTA, to obtain BOI of beneficial owners and company applicants of reporting companies, the proposed BOI application allows both parties to not provide such information and simply check the box that it is "not able to obtain this information about the Beneficial Owner" and/or "Company Applicant"

[3] Under the heading "Information To Be Reported on Beneficial Owners and Company Applicants", FinCEN stated "[p]roposed 31 CFR 1010.380(b)(1)(ii) sets forth the specific items of information that a reporting company *must* report about each individual beneficial owner and each individual company applicant." (emphasis added).

and "Unable to identify all Beneficial Owners." [Notice at 2763] The proposed application allows the reporting company and company applicant to select "unknown" in myriad areas of the application. Per the plain language of the CTA, Congress has mandated that a reporting company "shall" provide the name, date of birth, address, and an identifying number for all of its beneficial owners and company applicants. In complete contravention of the statutory language, the proposed application makes this *required* information merely optional by allowing a reporting company to utilize the "Ostrich Rule" by sticking its head in the sand and refusing to provide the statutorily required information. While one would hope that responsible, legitimate businesses will provide the information, the proposed application provides a loophole large enough to drive a stolen Brinks truck through for bad actors, including money launderers and sophisticated criminals. The proposed application offers a painless way to facially "comply" with the CTA while still masking the true owners of money laundering and other illicit businesses. This should be especially concerning to FinCEN because registration in the BOI Database will almost certainly provide these bad actors with the necessary imprimatur of respectability to aid them in obtaining banking and financial services. It is IBC's strong belief that the "not able to obtain" and "unknown" options should be removed from the proposed application.

If FinCEN does not remove those options, it absolutely must be prepared to provide sufficient additional guidance regarding the use of those options. For example, what does "unable to obtain" mean for each specific context? What actions and review are necessary before a reporting company is authorized to select those options? What, if any, proof or additional evidence will FinCEN require a reporting company to provide to show it has complied with the required review and was authorized to make such a selection? Since the BOI information will be placed in the Database to be accessed by financial institutions as part of meeting their CDD obligations, what is a bank supposed to do when a reporting company provides BOI to the bank, but has not provided it to FinCEN for inclusion in the Database? Will there be penalties for reporting companies that choose the unable/unknown options? These outstanding issues are all of FinCEN's own making due to the inclusion of the "unknown" and "unable to obtain" BOI options. FinCEN could just as easily avoid having to provide guidance on these issues if it removes the options and mandates that reporting companies act as responsible corporate entities.

While it would normally be laudable that FinCEN is providing flexibility in its reporting regime, it is quite astonishing that now is the time for such flexibility. FinCEN has made a habit of placing onerous collection and reporting requirements on banks for decades, practically deputizing banks as agents of FinCEN obligated to identify, prevent, and completely end money laundering and financial crime in this country. Banks are not allowed to state that their customer information is "unknown" or "unable to be obtained." They are legally required to know and obtain exactly this information. Now that FinCEN finally has a Congressional mandate via the CTA to collect and manage the relevant information of the actual legal entities engaging in this bad behavior, it has crafted the implementing regulation in such a way as to be useless. The quality of BOI data is critical to the effectiveness and usefulness of the BOI Database. This is especially frustrating considering the context. It should be absolutely unacceptable for a legal entity to state that it cannot identify its beneficial owners or provide their identifying information. That is the *sin qua non* of the CTA.

Not having that information is corporate malfeasance of the highest degree. At some point, someone needs to be responsible, and it is an appropriate burden to place on a legal entity that has taken advantage of all the corporate protection offered under our legal system. With those advantages, there comes just a modicum of responsibility, and it is FinCEN's duty to force these reporting companies to step up to the plate.

Specific Requests for Comment

The Notice invites specific comments regarding the following:

1. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.

2. The accuracy of the agency's estimate of the burden of the collection of information.

3. Ways to enhance the quality, utility, and clarity of the information to be collected.

4. Ways to minimize the burden of the collection of information on respondents, including through the use of technology.

5. Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Thank you for the opportunity to share IBCs views on these matters.

Sincerely,

Dennis E. Nixon, President and CEO
International Bancshares Corporation