Oct. 30, 2023

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U.S. Department of the Treasury
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Submitted electronically via
https://www.reginfo.gov/public/do/PRA/icrPublicCommentRequest?ref_nbr=202309-1506-001

RE: **Notice of Individual FinCEN Identifier Application**
OMB No. 1506-0076; Federal Register Document No. 2023-21325

Dear Director Gacki:

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 proposed Individual FinCEN Identifier Application[1] to be filed with the beneficial ownership registry established by the Corporate Transparency Act (CTA)[2] and its key implementing regulation.[3] The proposed Application faithfully implements the law and will play a key role in ensuring the submission of accurate and complete information to the registry, but would also benefit from three technical improvements to: (1) clarify the certification; (2) notify filers that each individual is entitled to only one FinCEN Identifier; and (3) notify filers that all registry users will have access to information linking a specific FinCEN Identifier to a particular individual.

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

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[1] The proposed Application is described in a Notice entitled, "Agency Information Collection Activities; Submission for OMB Review; Comment Request; Individual FinCEN Identifier Application," FinCEN, 88 FR 67449 (9/29/2023), https://www.govinfo.gov/content/pkg/FR-2023-09-29/pdf/2023-21325.pdf (hereinafter "Notice").
[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.

Faithful Implementation of the Law

The primary purpose of the Corporate Transparency Act is to increase the transparency of certain entities formed or registered to do business in the United States and to prevent those entities from engaging in illicit finance or other wrongdoing within U.S. borders under the direction of concealed individuals. In essence, the CTA seeks to enable national security, intelligence, and law enforcement agencies, regulators, financial institutions, and others to understand exactly who is directing legal entities operating inside the United States.

At the same time, to reduce filing burdens and increase administrative efficiency, one part of the CTA registry system allows individuals, upon request and after meeting certain requirements, to obtain a unique identifying number from FinCEN and use that "FinCEN Identifier" as a substitute for certain required information in some registry filings.[6] The proposed Application makes clear that FinCEN will assign a FinCEN identifier to an individual only after that individual has supplied the same personal identifying information that the CTA and its primary implementing regulation require for every individual serving or seeking to serve as a reporting company's beneficial owner, company applicant, or person exercising control over a certain type of foreign pooled investment vehicle.[7]

Accordingly, as the law specifies, the proposed Individual FinCEN Identifier Application would require an individual requesting a FinCEN Identifier first to supply to the registry the individual's full legal name, birthdate, address, a unique number from an acceptable identification document, and an image of the identification document.[8] The proposed Application presents those information requirements in a straightforward, easy to understand format, without any suggestion that an individual may skip some or all of the specified items.[9] In addition, to incentivize careful submissions, the proposed Application includes a proposed certification which not only requires filers to certify that the information submitted is "true, correct, and complete," but also informs them that the "willful provision to FinCEN of false or fraudulent information in this application may result in civil or criminal penalties."[10]

Also important is that the preamble explaining the proposed Application identifies only two reasons that individuals might wish to request a FinCEN Identifier:

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[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] See 31 U.S.C. § 5336(b)(3); 31 C.F.R. § 1010.380(b)(4).
[7] See also 31 C.F.R. § 1010.380(b)(4)(i)(A).
[8] See proposed Items 3-17, 88 FR 67450-451.
[9] This approach contrasts with an early version of the Beneficial Ownership Information Report which proposed answer options – later deleted – allowing registry filers to omit key identifying information mandated by the CTA. See "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.
[10] See proposed Item 18, 88 FR at 67451. See also 31 U.S.C. § 5336(h).

> "data security (where an individual may see less risk in submitting personal identifiable information to FinCEN directly, compared with doing so indirectly through one or more reporting companies) and administrative efficiency (where an individual is likely to be identified as a beneficial owner of numerous reporting companies)."[11]

That explanation represents a significant and welcome improvement over earlier regulatory explanations which sometimes described a desire for "anonymity" as a third reason to secure a FinCEN Identifier.[12] The Notice accepts instead that FinCEN Identifiers are intended to reduce reporting burdens and increase registry accuracy, completeness, and usefulness, but were never intended to facilitate anonymity.[13] Achieving reduced filing burdens and increased registry accuracy and efficiency is possible, because FinCEN Identifiers use numbers rather than names to identify individuals, and numbers are less vulnerable to the spelling and formatting problems that often plague the transcription of individual names. By avoiding those transcription problems, FinCEN Identifiers make the registry more reliable and useful to registry users. By enabling individuals to file directly with FinCEN rather than through reporting companies, the FinCEN Identifier system also offers filing individuals increased data security. In addition, FinCEN Identifiers lessen the reporting burden on individuals who change their names or addresses by enabling them to update a single FinCEN form rather than having to track down and revise multiple registry company reports. Moreover, FinCEN Identifiers increase the usefulness of the registry for national security, intelligence and law enforcement personnel, regulators, financial institutions, auditors, and others by enabling them to easily determine if a person of interest has a FinCEN Identifier and, if so, use that number to quickly locate and view all relevant registry filings, again avoiding the transcription problems associated with naming conventions. Those scenarios together explain how FinCEN Identifiers reduce the registry's filing burdens while increasing its accuracy and usefulness, and do so without advancing the type of registry "anonymity" that runs contrary to a law designed to enhance, not diminish, ownership transparency.

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[11] Notice at 88 FR 67450.

[12] See Notice of Proposed Rulemaking, "Beneficial Ownership Information Reporting Requirements," 86 FR 69920-74, 69964-65 (Docket Number: FINCEN-2021-0005, RIN: 1506-AB49), (12/8/2021), https://www.govinfo.gov/content/pkg/FR-2021-12-08/pdf/2021-26548.pdf ("the primary incentives for individual beneficial owners to apply for a FinCEN identifier are likely data security ... administrative efficiency ... and anonymity from reporting companies that are not directly owned, but are indirectly owned through another entity, by the individual").

[13] The CTA states that the regulation implementing FinCEN Identifiers must ensure registry information is "accurate, complete, and highly useful," but nowhere states that "anonymity" or even "privacy" is a permissible regulatory objective when implementing the FinCEN Identifier system. See 31 U.S.C. 5336(b)(4):

> "(4) Regulations.—The Secretary of the Treasury shall—
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> > "(A) by regulation prescribe procedures and standards governing ... any FinCEN identifier under paragraph (3); and
> >
> > "(B) in promulgating the regulations under subparagraph (A) to the extent practicable, consistent with the purposes of this section—
> >
> > > "(i) minimize burdens on reporting companies associated with the collection of beneficial ownership information, including by eliminating duplicative requirements; and
> > >
> > > "(ii) ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful."

Finally, the proposed Application requires filers to submit the Individual FinCEN Identifier Application "electronically,"[14] ensuring that the forms will immediately become part of the registry's electronic records and accessible to FinCEN and other registry users. FinCEN has estimated that only about 1 percent of registry users will request a FinCEN Identifier, suggesting that likely requesters will be individuals who file multiple Beneficial Owner Information Reports or act as beneficial owners in multiple entities.[15] Such individuals are likely to be sophisticated actors with ready access to the Internet. While some claim that small business owners seeking FinCEN Identifiers may lack access to the Internet, that assertion is not supported by any research or other data. Moreover, if non-electronic filing were allowed, common sense indicates that wrongdoers would take advantage of that option to submit paper filings that would delay access to their registry filings. Paper filings would also divert FinCEN personnel from other needed registry services. The proposed approach mandating electronic filing is, therefore, the better option to minimize wrongdoing, conserve FinCEN resources, and ensure registry records are up to date, complete, and highly useful.

For those reasons, the proposed Individual FinCEN Identifier Application as currently configured faithfully implements the law and presents the best way forward.

Three Technical Improvements

At the same time, the proposed Application would benefit from at least three technical improvements.

Better Certification. First, the proposed certification in the proposed Application should be clarified by stating that civil or criminal penalties may be imposed for the willful provision of not only "false or fraudulent information" to FinCEN, but also "incomplete or outdated" information. The current wording implements one key penalty provision in the CTA making it unlawful to "willfully provide, or attempt to provide, false or fraudulent beneficial ownership information" to FinCEN,[16] but fails to implement a second penalty provision making it unlawful to "willfully fail to report complete or updated beneficial ownership information" to FinCEN.[17] A broader certification – warning against submitting "false, fraudulent, incomplete, or outdated information" to FinCEN – would not only more accurately implement the law, but also give fair notice to individual filers that submitting incomplete or outdated information could trigger civil or criminal liability.

Single Identifier Notice. Second, the proposed Application would be strengthened if, in Item 1, it stated that "Each individual may obtain only one FinCEN Identifier; individuals may not share or use more than one Identifier." Currently, the proposed Application nowhere indicates that each individual is entitled to one and only one FinCEN Identifier, even though that principle is explicitly mandated in the law[18] and is essential to preventing the types of frauds and misinformation experienced by other federal databases that have issued more than one

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[14] Notice at 88 FR 67450.
[15] Id.
[16] See 31 U.S.C. § 5336(h)(1)(A).
[17] See 31 U.S.C. § 5336(h)(1)(B).
[18] 31 U.S.C. § 5336(b)(3)(A)(iii); 31 C.F.R. § 1010.380(b)(4)(i)(C).

identification number to the same individual. Such a statement would provide important notice to law-abiding individuals who might not otherwise realize they are limited to a single identifier from FinCEN, help prevent inadvertent data problems, and help protect the integrity of the registry. In addition, the inclusion of such a clear, easily understood statement in the proposed Application would help FinCEN and other law enforcement agencies identify suspicious activity and prosecute wrongdoers who might otherwise claim ignorance of the law.

Access Notice. Third, the proposed Application would be improved if it included notice that all registry users will have access to the identifying information linking a specific FinCEN Identifier to a particular individual. As indicated earlier, the FinCEN Identifier system is designed to reduce registry filing burdens and increase registry efficiency, but not to provide any person with anonymity. If registry users were unable to identify the individual behind a specific FinCEN Identifier, the registry would impede rather than enhance the ability of registry users to understand the human beings directing a specific entity. It would also interfere with the ability of national security, intelligence, and law enforcement personnel, regulators, financial institutions, and others to evaluate the activities and risk profiles of particular individuals. To prevent those and related problems, the final Application should include a new Item 19 stating: "Filers are on notice that all registry users encountering a FinCEN Identifier in a registry filing will be able to view information identifying the individual assigned to that FinCEN Identifier." Adding that type of notice would not only make clear that FinCEN Identifiers may not be misused to conceal information from registry users, but also provide fair notice that all registry users will have access to the identifying information associated with specific Individual FinCEN Identifiers.

In addition to notice in the proposed Application, the preamble to the final Application may want to explain that completed, corrected, and updated Applications will be combined, on an automated basis, to generate a directory of FinCEN Identifiers that will permit registry users to see the identifying information for each individual or entity assigned to a specific FinCEN Identifier. As explained earlier, making that information available to all registry users is critical to preventing FinCEN Identifiers from being turned into secrecy devices used to conceal information about individuals directing entities operating within U.S. borders and to ensuring registry filings are highly useful. A preamble explanation would also help ensure that individuals contemplating requesting a FinCEN Identifier would understand who would have access to their identifying information.

Verification Measures and Structured Data. Finally, whether or not any notice is included in the final Application or any explanation in the preamble to the final Application, FinCEN should ensure that the final Application is formatted in such a way that it: (a) utilizes automated verification measures to screen Application data before it is included in the registry; and (b) facilitates the collection and use of structured data. Automated verification measures help ensure that information submitted to the registry matches the information held in other government databases, conforms to a specified range of data, or uses a preferred format.[19] It improves the accuracy and usefulness of the registry. Structured data is critical to running data queries and bulk analyses; automating data and analytical processes; increasing data and system

[19] For more information about verification measures, see, e.g., "Beneficial Ownership: Taking the Extra Step to Data Accuracy," (10/2023), ACAMS, https://www.acams.org/en/media/document/36425.

flexibility and usability; reducing the costs to link to other systems and datasets; and reducing costs caused by expected system changes over time. In addition, structured data facilitates the design of software that can produce the automated audit reports needed to carry out the CTA's many mandatory audits. Providing potential FinCEN Identifier applicants and all other registry users with information about plans for verification measures and structured data will help ensure registry users have comprehensive information about how the registry will function.

Conclusion

The proposed Individual FinCEN Identifier Application faithfully implements the CTA and its implementing regulation but would benefit from additional technical improvements. Thank you for this opportunity to comment on the proposed Application.

Sincerely,

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U.S. Senate Permanent Subcommittee on Investigations