

January 6, 2023

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

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

Re: Request for Comments, Docket Number FINCEN-2022-27031 – Notice of Proposed Rulemaking Regarding Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities - Comments of James Richards, Principal and Founder of RegTech Consulting LLC.

Dear Acting Director Das:

On December 24, 2022 I submitted comments on the Notice of Proposed Rulemaking Regarding Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, or the proposed BOI Access Rule (as it is commonly called).¹ I have also commented on the Advance Notice of Proposed Rulemaking Regarding Beneficial Ownership Information Reporting Requirements, which included both reporting and access issues and questions.²

I am submitting these supplemental comments to address two issues that relate to both the registration of BOI and access to BOI that I did not address in my previous comments and, in my view, remain unresolved but are certainly resolvable. Those issues relate to the Corporate Transparency Act's treatment of money services businesses (MSBs) as exempt reporting companies, and (i) the time MSBs must submit initial and updated MSB registration statements, and (ii) the beneficial ownership information that MSBs must provide.

¹ <https://www.regulations.gov/comment/FINCEN-2021-0005-0464>

² <https://www.regulations.gov/comment/FINCEN-2021-0005-0209>

MSBs Pose Elevated AML/CFT and Proliferation Risks

MSBs have long been seen as posing elevated risks for money laundering, terrorist financing, and proliferation financing. I won't belabor the point with historical examples. More currently, though, virtual currency exchanges are MSBs, and recent FinCEN enforcement actions have shown that these MSBs pose considerable risks to the financial system and national security generally.³

MSBs Must Register With FinCEN Within 180 Days

31 USC s. 5330 requires MSBs to complete and submit a registration form with FinCEN. For newly established MSBs, the implementing regulations provide that "the registration form for the initial registration period must be filed on or before the end of the 180-day period beginning on the day following the date the business is established." (31 CFR s. 1010.380(b)(3)). Certain changes with the MSB must also be reported within 180 days: a change in ownership or control that requires the business to be re-registered under State law, a transfer of more than 10 percent of the voting power or equity interests of a money services business, and if a money services business experiences a more than 50-per cent increase in the number of its agents during any registration period. (31 CFR s. 1010.380(b)(4)).

MSB Registration Exempts Them as "Reporting Companies" Under the CTA

Money Services Businesses (MSBs) do not have to report BOI to FinCEN. The CTA exempts MSBs from the definition of reporting company.⁴ The Congressional Record suggests that MSBs were exempted because they are already required to register with FinCEN (using Form 107) and as part of that registration, disclose their ownership. Some of those who have commented on this, such as the pre-eminent law firm Sullivan & Cromwell, have noted that money transmitters "are already required to disclose beneficial ownership information publicly or to federal regulators ...

³ In the last five calendar years (2018-2022), FinCEN has brought twelve enforcement actions. Three of those involved crypto exchanges or mixers that failed to register as MSBs. See the Bittrex action (2022-03), Helix (2020-02), and Eric Powers (2019-01). Also, see the Prepared Remarks of Himamauli Das, Acting Director of FinCEN at the ABA/ABA Financial Crimes Enforcement Conference on December 6, 2022, where he referred to convertible virtual currency exchanges. <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-acting-director-himamauli-das-during-abaaba-financial-crimes>

⁴ AMLA section 6403, adding 31 USC s. 5336(a) definitions, (a)(11) "reporting company", (a)(11)(B) listing twenty-four exemptions, including (vi) "Money services business. Any money transmitting business registered with FinCEN under 31 U.S.C. 5330, and any money services business registered with FinCEN under 31 CFR 1022.380."

and exempting them from the reporting requirement does not appear to represent a gap in coverage."⁵

MSBs Currently Provide the Name of Only One Owner or Controlling Person

As I noted in my comments to the ANPRM, I disagree with Sullivan & Cromwell's statement. First, there is nothing in the CTA that ties the ownership information contained in the Form 107 (MSB registration form) to the new beneficial ownership information. Second, the Form 107 ownership information is not available to financial institutions, so they won't be able to obtain it as part of their CDD obligations, or otherwise. Third, MSBs do not have to disclose up to four legal owners and as many control persons as they may have: they only need to disclose one owner or controlling person, so FinCEN will not have complete beneficial ownership information on one of the highest risk business types.

Reporting Companies Must Register with FinCEN within 30 Days

The final BOI Reporting rule provides that a reporting company created on or after January 1, 2024 "shall file a[n initial] report within 30 calendar days of the earlier of the date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the domestic reporting company has been created." (31 CFR s. 1010.380(a)(1))

Any changes must also be filed by an updated report made within 30 days. The final BOI reporting rule provides that "if there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner, the reporting company shall file an updated report in the form and manner specified in paragraph (b)(3) of this section within 30 calendar days after the date on which such change occurs." (31 CFR s. 1010.380(a)(2))

Recommendation – Reconcile the 180- and 30-Day Reporting Periods for MSBs and Reporting Companies, Respectively

Money Services Businesses (MSBs) made out like bandits in the CTA and final BOI reporting rule. Reporting companies must submit initial and updated BOI reports disclosing *all* of their beneficial

⁵ See <https://www.sullcrom.com/files/upload/sc-publication-anti-money-laundering-act-2020.pdf> at page 7.

owners within 30 days, yet MSBs, being exempt, do not have to disclose any of their beneficial owners. MSBs must register with FinCEN, and in doing so only must disclose one person who has either ownership or control. And where reporting companies are given only 30 days, or one month, to submit their BOI reports, MSBs have 180 days, or 6 months, to file similar reports.

There was much discussion in the supplementary notes in the final BOI Reporting rule about the length of time that reporting companies should have to file initial and updated reports. In arriving at 30 days for both initial and updated BOI, FinCEN wrote that it “considers that keeping the database current and accurate is essential to keeping it highly useful, and that allowing reporting companies to wait to update beneficial ownership information for more than 30 days—or allowing them to report updates on only an annual basis—could cause a significant degradation in accuracy and usefulness of the database.”

Allowing exempt MSBs to file their initial and updated registration reports 180 days after their formation or material change, instead of the 30 days allowed for reporting companies, makes no difference to financial institutions, which have no access to MSB registration reports in any case. Financial institutions are on their own when it comes to determining the beneficial owners of MSBs: the BOI database has no information from MSBs, and the FinCEN MSB database is inaccessible.

But if FinCEN and law enforcement agencies have access to those registration reports, and would be using them in lieu of BOI reports, it makes sense that they are as accurate, current, and useful as BOI reports. The solution is to revise the current MSB registration requirement in 31 CFR s. 1022.380(c) to reconcile the 180- and 30-day reporting periods, and have MSBs submit registration reports within 30 days.

This change can be made without changing the underlying law, 31 USC s. 5330(a)(1). This section provides that:

“Any person who owns or controls a money transmitting business shall register the business (whether or not the business is licensed as a money transmitting business in any State) with the Secretary of the Treasury not later than the end of the 180-day period beginning on the later of - (A) the date of enactment of the Money Laundering Suppression Act of 1994; or (B) the date on which the business is established.”

The statutory language “not later than the end of the 180-day period” allows FinCEN to promulgate a rule to require registration within 30 days. FinCEN did something similar in promulgating the final BOI registration rule by requiring existing reporting companies to submit BOI reports within one year of the date of the implementation of the final rule, where the CTA requires the reports to be filed “in a timely manner, and not later than 2 years after the effective date”.

Recommendation – Require MSBs to Report All Beneficial Owners

Being exempt from the BOI reporting requirements gives MSBs a pass from disclosing their beneficial owners. And the current MSB regulations only require that MSBs disclose the name of one person with ownership or control.

But the statutory language allows FinCEN to collect beneficial information. 31 USC s. 5330(b) provides that the registration of a money transmitting business shall include: “(2) The name and address of each person who - (A) owns or controls the business; (B) is a director or officer of the business; or (C) otherwise participates in the conduct of the affairs of the business” and “(5) such other information as the Secretary of the Treasury may require.”

The implementing regulations speak to who must file the registration form – a single person who owns or controls the MSB⁶ - but what is reported on that registration form is left to the form itself: “a money services business must be registered by filing such form as FinCEN may specify with FinCEN (or such other location as the form may specify).”⁷ And the form currently does *not* include the names and addresses of each person who owns or controls the business, is a director or officer, or otherwise participates in the conduct of the affairs of the business.⁸

FinCEN need only change the Form 107 to solve the problem of incomplete, inaccurate, and not particularly useful beneficial ownership information for money services businesses.

Thank you for your consideration of these recommendations.

s/

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⁶ 31 CFR s. 1022.380(c)

⁷ 31 CFR s. 1022.380(b)(1)(i)

⁸ The form is available at https://www.irs.gov/pub/irs-tege/fin107_msbreg.pdf