CREW

CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

Policy Division
Financial Crimes Enforcement Network
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Via online portal

Re: Comment of Citizens for Responsibility and Ethics in Washington in response to *Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities*, U.S. Financial Crimes Enforcement Network, RIN 1506–AB59, 87 Fed. Reg. 77404 (February 14, 2023)

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully submits this comment in response to the notice of proposed rulemaking ("NPRM") that the U.S. Financial Crimes Enforcement Network ("FinCEN") issued on December 16, 2022 regarding its proposed regulation implementing the provisions of the Corporate Transparency Act ("CTA") related to access to the information contained in the new beneficial ownership registry. CREW is a nonpartisan anti-corruption and good government watchdog organization and appreciates this opportunity to provide views to FinCEN as you implement Congress's transformative anti-corruption legislation.

I. Introduction

In our previous comment, which we filed in response to FinCEN's ANPRM related to reporting of beneficial ownership,[1] we encouraged FinCEN to take this opportunity--the first in decades--to develop the bold and comprehensive regulatory framework necessary to address our country's disastrously deficient and outdated corporate transparency regime. In service of that goal, today we encourage FinCEN to reconsider aspects of the instant proposed rule.

Below, we outline several aspects that we encourage FinCEN to consider when amending the proposed rule. First, CREW encourages FinCEN to minimize limitations on access to beneficial ownership information that are not contemplated by the CTA. CREW does not believe that the CTA provides FinCEN with the flexibility to artificially narrow the scope of access provided to parties contemplated by the CTA or condition such access on FinCEN approval where such approval was not contemplated by the CTA.

[1] Comment of Citizens for Responsibility and Ethics in Washington in response to Notice and Request for Comments: Beneficial Ownership Reporting Requirements, U.S. Financial Crimes Enforcement Network, 86 Fed. Reg. 17557 (April 5, 2021) ("CREW Comment"), https://www.citizensforethics.org/wp-content/uploads/2021/05/FINAL-FinCEN-CTA-ANPRM-Comment-1.pdf.

In particular, CREW cautions FinCEN against mediating access to beneficial ownership information in a way that may interfere with law enforcement investigations and court proceedings, or make it harder for financial institutions to ensure that their customers are not laundering money into our financial system. We understand that the CTA directs FinCEN to create policies and procedures for ensuring that beneficial ownership information is only disclosed to appropriate recipients for appropriate purposes. However, this reality should not lead FinCEN to abandon the original intent of the CTA, which was to create a legal regime that would enable all American government entities to fight money laundering and other corrupt or illegal cash flows. Artificially narrowing the scope of entities that are allowed to access beneficial ownership information, or creating additional hurdles that are not contemplated by the CTA's plain text, undermine Congress's intent by making it harder for the country to develop a systemic approach to fighting the influx of illegal or corrupt money.

Second, CREW encourages FinCEN to consider the scope of anti-money laundering regimes abroad in order to ensure the final rule does not move the country away from international best practices, including those promulgated by the Financial Action Task Force ("FATF").[2] While the CTA does not adopt some of the most important elements of the FATF recommendations--including, for example, creating a public beneficial ownership registry like those in place in the United Kingdom and the European Union--many of its provisions are in accord with FATF standards. CREW strongly encourages you to keep this in mind when you are amending the proposed rule. As drafted, CREW believes that the proposed rule creates a policy framework that is inconsistent and out of step with our peer countries. CREW previously encouraged FinCEN to consider the successes of the UK and EU regimes; we do so again now. These regimes have demonstrated how effective collaboration between financial regulators, law enforcement, and an engaged public sector can be a critical element in a modern anti-money laundering regime. The FATF regime requires that member states make beneficial ownership information accessible to financial intelligence units without restriction, recommending access to any documents and information necessary to such investigation. The new restrictions and hurdles imposed on law enforcement access to beneficial ownership information directly contravene this principle, imposing new roadblocks not contemplated in the text of the CTA.

CREW understands the limitations placed on FinCEN by the CTA. However, the proposed rule is not only out of step with the transparency regulations abroad, but also, in some parts, directly contravenes the text of the CTA by imposing extratextual approval processes on law enforcement requests and other investigative measures. These proposed processes also create additional barriers to future improvements to the current system. As FinCEN moves through its drafting process, we encourage you to reconsider elements of the proposed rule in order to keep the United States from moving further away from the international standard for anti-money laundering regimes--and, more importantly, to ensure that the final regulations do not undermine the purpose and function of Congress's transformational anti-corruption legislation.

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[2] FATF, "International Standards on the Combatting of Money Laundering and the Financing of Terrorism and Proliferation," (as amended) ("FATF Standards"), Mar. 3, 2022, https://www.fatf-gafi.org/content/dam/recommandations/pdf/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf.

II. Specific Suggestions

CREW offers the following answers to a number of the questions FinCEN raises in its NPRM.

7. Proposed requirements for what constitutes authorization by a state/local/tribal court.

CREW strongly encourages FinCEN to eliminate the proposed rule's requirement that state, local, or tribal law enforcement "submit to FinCEN" a "copy of a court order from a court of competent jurisdiction authorizing the agency to seek the information in a criminal or civil investigation" as well as a "written justification that sets forth specific reasons why the requested information is relevant to the criminal or civil investigation" in order to obtain information from the CTA's beneficial ownership database.[3] The CTA does not grant FinCEN the authority to add these procedural hurdles and barriers to access for state and local officials. These provisions run contrary to Congress's intent in drafting the CTA, and to the Act's plain language.

Specifically, the CTA allows FinCEN to disclose beneficial ownership information to a state, local, or tribal law enforcement agency "if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation."[4] Nowhere in the text is there a requirement that this request comes in the form of a "court order"--in fact, the plain text clearly states that the request can come in the form of an "authorization" from "<u>any</u> officer" of a court. The plain text permits requests for information to come in less restrictive forms; and in doing so it explicitly prohibits FinCEN from requiring that requests come exclusively in the form of court orders. To be clear: if Congress had intended to require state, local, and tribal law enforcement to submit formal court orders to access beneficial ownership information, it would have so stated. It did not. Instead, it said that FinCEN could disclose beneficial ownership information to state, local, and tribal law enforcement upon receipt of a request "authorized" by "any officer" of a "court of competent jurisdiction". Authorization from a court officer was deliberately chosen out of a spectrum of available options because it presents a low barrier to access, which allows state, local, and tribal law enforcement to obtain beneficial ownership information at various points in the investigatory process, and because it creates less of a burden on the relevant court or tribal equivalent.

FinCEN hasn't only overstepped its authority in creating a requirement for a court order: it proposes to condition the release of the information requested <u>in the court order</u> on whether the requesting law enforcement agency makes a compelling "written justification" that sets forth the "specific reasons why the requested information is relevant to the criminal or civil investigation."[5] On its face, this proposed requirement seems to undermine the competency of the judiciary to issue enforceable court orders. Moreover, this additional hurdle is so far beyond FinCEN's authority under the CTA that it beggars belief. The CTA conditions the release of beneficial ownership information to state, local, or tribal law enforcement on the receipt of a request authorized by an officer of a court of competent jurisdiction. Full stop. FinCEN is not even permitted to independently confirm such an

[3] New §§1010.955(d)(1)(ii)(B)(2)(i) and (ii), 87 Fed. Reg. 77404, 77456.
[4] 31 USC § 5336(c)(2)(B)(i)(II).
[5] New §1010.955(d)(1)(ii)(B)(2)(ii).

authorization, much less to judge whether the information sought in an authorized request is sufficiently relevant to the subject of the law enforcement investigation. Yet, FinCEN has inserted itself as the ultimate arbiter of how state, local, and tribal law enforcement conduct their investigations, giving to itself the ability to withhold information that a court has ordered be provided to investigators. This extra-textual authority to overrule a court order not only threatens to undermine the purpose of the CTA—it threatens to undermine key elements of the legal system more generally.

These two hurdles are thus incompatible: if FinCEN wants to require a court order to access information, then it cannot act as the ultimate arbiter of the validity of the information request. If it wants to give itself the authority to overrule duly authorized information requests, it cannot require that those requests be made in the form of a court order.

This argument is, of course, merely theoretical. In reality, neither of these procedural hurdles have any basis in the CTA.

The CTA's text and legislative history do not allow FinCEN to require a court order, much less to require that law enforcement demonstrate the usefulness of the requested information. All the text requires is that a requesting state, local, or tribal law enforcement agency certify that any officer of a court of competent jurisdiction (or its tribal equivalent) has authorized the agency to obtain the information as part of a criminal or civil investigation. These proposed hurdles are pure legal fictions.

Congress passed the CTA to give law enforcement, regulatory agencies, and financial institutions the tools to fight money laundering and corrupt or illegal cash flows. That is the Act's central purpose. It created the centralized beneficial ownership database in order to give law enforcement access to information that might otherwise be hard, if not impossible, to obtain. And while Congress did contemplate certain restrictions on the sharing and storage of this information, it chose not to include those restrictions on law enforcement access to the database. These additional restrictions, including the new procedural hurdles that will practically limit law enforcement access to the database, run contrary to Congressional intent. We strongly encourage FinCEN to return to Congress's intent and to remove these restrictions that have no traceable origin in the CTA's text.

8. Is requiring a foreign central authority or foreign competent authority to be identified as such in an applicable international treaty, agreement, or convention overly restrictive? If so, what is a more appropriate means of identification?

The Department of the Treasury and FinCEN should use their memberships on the inter-governmental FATF and the Egmont Group, respectively, to establish appropriate mechanisms by which countries identify agency(ies) that operate as a "foreign central authority or competent authority"[6] for purposes of the CTA. The Egmont Group is an existing platform by which financial intelligence units, including FinCEN, already exchange financial intelligence to combat money laundering, terrorist financing, and associated offenses and

[6] 31 USC § 5336(c)(2)(B)(ii).

should be used similarly for purposes of identifying agency(ies) that operate as a "foreign central authority or foreign competent authority."[7]

As a member of FATF,[8] the United States has agreed to implement the 40 FATF Recommendations intended to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction, including Recommendation 24 on transparency and beneficial ownership of legal persons and Recommendation 40 on other forms of international cooperation.[9] FATF's Interpretive Notes, which are to be read in conjunction with the Recommendations, call on its members to engage in the the "widest possible range of international cooperation in relation to basic and beneficial ownership information," including "facilitating access by foreign competent authorities to basic information held by company registries; exchanging information on shareholders; and using their powers, in accordance with their domestic law, to obtain beneficial ownership information on behalf of foreign counterparts."[10] The Interpretive Notes also provide for countries to designate and make publicly known the agency(ies) responsible for responding to all international requests for beneficial information and for countries not to prohibit or place unreasonable or unduly restrictive conditions on the provision of exchange of information or assistance.[11]

Because the United States is an existing member of both FATF and the Egmont Group, the proposed rule should make clear that any platform established by FATF and/or the Egmont Group by which countries designate the agency(ies) responsible for serving as a "foreign central authority or foreign competent authority," and which include any appropriate safeguards, would serve as an appropriate means of identification under the CTA.

12. Should FinCEN expressly define "customer due diligence requirements under applicable law" as a larger category of requirements that includes more than identifying and verifying beneficial owners of legal entity customers? If so, what other requirements should the phrase encompass? How should the broader definition be worded?

CREW believes that FinCEN's decision to limit the CTA's definition of "customer due diligence requirements under applicable law"[12] to "compliance with FinCEN's Customer Due Diligence Rule ("CDD Rule") exclusively," runs counter to Congress's intent in drafting the CTA and to the plain text of the legislation.[13]

Congress developed and passed the CTA to, among other things, expand the country's ability to combat money laundering and the movement of corrupt or illegal cash into the US

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[7] The Egmont Group is a body of 166 national financial intelligence units, formed for the purpose of providing a platform to securely exchange expertise and financial intelligence. *See* https://egmontgroup.org/members-by-region/?id=3.

[8] *See* United States Treasury, "Financial Action Task Force," https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/financial-action-task-force.

[9] *See* FATF Standards, Recommendation 24, at 22; *and* Recommendation 40, at 29.

[10] FATF Standards, Recommendation 24 (Interpretive Note 17), at 96.

[11] FATF Standards, Recommendation 40 (Interpretive Note 2), at 112.

[12] 31 USC § 5336(c)(2)(B)(iii).

[13] *See*, FinCEN CDD Final Rule, 81 Fed. Reg. 29398 (May 11, 2016), https://www.govinfo.gov/content/pkg/FR-2016-05-11/pdf/2016-10567.pdf.

financial system. Financial institutions need to be able to access the information in the database to facilitate broader anti-money laundering obligations, including complying with additional due diligence requirements that are part of an effective, risk-based anti-money laundering program. Specifically, for instance, some financial institutions may require access to beneficial ownership information to ensure that they are not allowing individuals on the government's sanctions lists to open accounts or move money. Limiting financial institutions' ability to obtain beneficial ownership information to the specific requirements of compliance with FinCEN's CDD rule could limit financial institutions' ability to ensure it is not facilitating money laundering or other corrupt or illegal cash flows. That result runs counter to the CTA's intent.

It also runs counter to the CTA's plain text. If Congress had wanted to limit access to the federal customer due diligence rule it would have so stated. It did not. Instead, Congress said that financial institutions should be able to access beneficial ownership information to comply with customer due diligence requirements "under applicable law".[14] The phrase "applicable law" contemplates a larger subset of legal requirements than FinCEN's CDD regulation because Congress wanted to give financial institutions the tools to be certain that they were not facilitating money laundering--a process that, in certain circumstances, may require a more searching inquiry than that contemplated by the CDD rule. That is why Congress did not specify that access to beneficial ownership information should be limited to compliance with the federal customer due diligence rule. While FinCEN has some discretion to limit the circumstances in which financial institutions can receive beneficial ownership information, it does not have the discretion to adopt a legislative interpretation that is not in accordance with the underlying statute , and, by so doing, undermine the intent of the CTA.

CREW thus encourages FinCEN to follow the language and intent of the CTA and develop a standard for access that ensures that financial institutions can access beneficial ownership information as part of their broader anti-money laundering programs.

15, FinCEN does not propose to disclose BOI to SROs as "other appropriate regulatory agencies," but does propose to authorize FIs that receive BOI from FinCEN to disclose it to SROs that meet specified qualifying criteria. Is this sufficient to allow SROs to perform duties delegated to them by Federal functional regulators and other appropriate regulatory agencies? Are there reasons why SROs could be included as "other appropriate regulatory agencies" and obtain BOI directly from FinCEN?

CREW has two related comments. In addition to our broader point that the CDD framework is itself too limited to achieve the CTA's goal of combating money laundering and the influx of corrupt or illegal money, we also believe that FinCEN should directly disclose BOI to SROs that meet the three-part test in 31 U.S.C. 5336(c)(2)(C). Certain SROs, including, but not limited to the Financial Industry Regulatory Authority ("FINRA"), likely would qualify as "other appropriate regulatory authorities" due to their crucial role in regulating financial institutions' compliance with the Anti-Money Laundering provisions of the Bank Secrecy

[14] 31 U.S.C. § 5336(c)(2)(B)(iii).

Act.[15] FINRA's regulation expands beyond checking for compliance with customer due diligence requirements--it also includes its own AML compliance regulations.[16] As we have previously discussed, Congress passed the CTA as part of a broader effort to fight money laundering and illicit finance. It created the beneficial ownership registry to provide agencies that regulate compliance with anti-money laundering laws with sufficient beneficial ownership information to ensure that financial institutions are not aiding the flow of illicit cash into the United States financial system. By limiting SRO access to beneficial ownership information, FinCEN runs the risk of undermining Congress's plan to fight money laundering and the influx of corrupt and illegal cash.

III. Conclusion

Over the years since the passage of the CTA, FinCEN has engaged in the immense project of designing a regulatory regime to implement one of the most sweeping reforms to the nation's financial laws in decades. So far, FinCEN has risen to meet this moment. Its rule on the reporting of beneficial ownership information and the structure of the information in the forthcoming registry was a triumphant step towards the creation of a state of the art anti-money laundering regime.[17] Unfortunately, this proposed rule is a significant step back. As we have discussed, its provisions adding hurdles to state, local, and tribal access to beneficial ownership information, limiting foreign government information sharing, and restricting financial institutions ability to obtain information to the strictures of the CDD rule, all serve to undermine Congress's intent in drafting the CTA and run afoul of the Act's plain text. FinCEN can, and must, do better. To adopt the proposed rule as drafted would be tantamount to sabotaging all of the good work that FinCEN has done over the last two years. We strongly encourage you to improve this inadequate and destructive rule and we stand ready and willing to work with you towards that end.

Sincerely,

Gabriel Wofford Lezra
Federal Policy Manager and Senior Counsel

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[15] The Securities Exchange Act of 1934 granted to the Securities Exchange Commission the ability to delegate certain legal compliance functions to appropriately registered self-regulatory organizations. *See* 15 U.S.C. § 78s.

[16] *See*, *e.g.*, FINRA Rule 3310, Anti-Money Laundering Compliance Program, https://www.finra.org/rules-guidance/rulebooks/finra-rules/3310.

[17] Gabe Lezra, "FinCEN's final rule implementing the Corporate Transparency Act is a victory," CREW, Sep. 30, 2022, https://www.citizensforethics.org/news/analysis/fincens-final-rule-implementing-the-corporate-transparency-act-is-a-victory/.