INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

February 13, 2023

By Electronic Transmission

Himamauli Das
Acting Director, Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities; Docket Number FINCEN-2021-0005 and RIN 1506-AB49/AB59

Dear Mr. Das:

The Investment Company Institute ("ICI")[1] appreciates the opportunity to provide comments in response to the notice of proposed rulemaking[2] ("NPRM") issued by the Financial Crimes Enforcement Network ("FinCEN") to implement provisions of the Corporate Transparency Act ("CTA")[3] that govern the access to and protection of beneficial ownership information ("BOI").

As an initial matter, ICI appreciates FinCEN's proposed amendment to the final BOI reporting rule[4] clarifying the conditions in which a reporting entity may report a FinCEN identifier. ICI believes it is crucial to the overall process for implementing the CTA for FinCEN to be able to adjust rulemakings promulgated in earlier phases of the three-phase process. Given the interconnected nature of all three phases, particularly the effects the first two phases will have on the CTA's mandate to re-write a substantial portion of FinCEN's current beneficial ownership requirements applicable to financial institutions, ICI urges FinCEN to accept and consider comments on all three phases throughout the process. This will allow FinCEN and all stakeholders to build a wholistic approach to the CTA's mandate, rather than building three interconnected rules constructed in

---

1 The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $28.3 trillion in the United States, serving more than 100 million investors, and an additional $7.4 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

2 Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, Notice of Proposed Rulemaking, 87 FR 77404 (Dec. 16, 2022).

3 The CTA is codified at 31 U.S.C. 5336 et seq.

4 Beneficial Ownership Information Reporting Requirements, Final Rule, 87 FR 59498 (Sep. 30, 2022).

isolation. ICI also believes that it is important that FinCEN consider the effects the first two phases of the implementation process will have on the third phase and the resulting obligations on financial institutions to effectively implement the re-written customer due diligence ("CDD") requirements with respect to collecting beneficial ownership information set forth in 31 C.F.R. § 1010.230(b).

To reiterate ICI's comments on other recent rulemaking and information gathering initiatives undertaken by FinCEN, ICI applauds FinCEN's efforts to consistently engage with relevant stakeholders to modernize the U.S. anti-money laundering regulatory regime. As FinCEN has acknowledged in prior rulemakings, "mutual funds are best understood as a form of financial product rather than as an institution providing financial services or investment advice."[5] FinCEN should take the same approach for the CTA rulemakings and consider the unique structural differences between open-end investment companies registered under the Investment Company Act of 1940 ("mutual funds") and other financial institutions, including (among other things) that mutual funds are externally managed financial products and do not provide ongoing banking or financial services. In this regard, ICI continues to urge FinCEN to appropriately tailor any rulemakings and guidance relevant to mutual funds with these unique characteristics in mind. ICI offers the following comments in response to the NPRM that uniquely affect mutual funds:

A. Use of the BOI Database by Financial Institutions Should be Voluntary

Access to the BOI database may serve as a useful tool for financial institutions in meeting existing anti-money laundering ("AML") program obligations, including the obligation to have in place CDD, customer identification, and beneficial ownership procedures. The NPRM does not explicitly address whether financial institutions will be required to access the BOI database or whether use of the BOI database will be voluntary; however, based upon the language of the NPRM, it appears use of the BOI database by financial institutions will be voluntary. If this is indeed FinCEN's intention, ICI agrees with this aspect of the proposal and urges FinCEN to provide explicit guidance clarifying that financial institutions may, but will not be required to, use BOI from the database to satisfy AML obligations.[6] In addition, if FinCEN intends to make financial institution use of the BOI database voluntary, ICI also urges FinCEN to revise the beneficial ownership requirements under the current CDD Rule[7] with this potential guidance in mind and ensure financial institutions will not be forced to accept FinCEN identifiers in lieu of other BOI during the CDD process.

---

5 Customer Due Diligence Requirements for Financial Institutions, Final Rule, 81 FR 29398, 29424 (May 11, 2016).

6 Moreover, the report FinCEN recently proposed to collect BOI includes several "unknown" fields, which would support voluntary use by financial institutions. See Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports, Notice and request for comments, 88 FR 2760, 2763 (January 17, 2023).

7 The current CDD rule may be found at Customer Due Diligence Requirements for Financial Institutions, 31 C.F.R. §§ 1010, 1020, 1023, and 1026 (the "CDD Rule"). ICI understands FinCEN plans to revise the beneficial ownership requirements under the CDD Rule in phase three of its efforts to implement the CTA and looks forward to reviewing FinCEN's proposed revisions. ICI understands that the CTA and NPRM refer to "customer due diligence requirements," but the statutory requirement only refers to the beneficial ownership requirements currently set forth in 31 C.F.R. § 1010.230(b), and not other aspects of the CDD rule (e.g., the requirement to understand the nature and purpose of customer relationships and to update customer information on a risk-basis).

B. FinCEN Verification of Submitted Data Should be Required

ICI appreciates the potential benefits for government agencies and financial institutions provided by access to the BOI database. Indeed, the CTA requires FinCEN, in part, to promulgate rules to collect BOI "in a form and manner that ensures the information is highly useful in . . . confirming beneficial ownership information provided to financial institutions in order to facilitate financial institutions' compliance with anti-money laundering, countering the financing of terrorism, and [CDD] requirements under applicable law."[8] However, access to the BOI database is only useful to financial institutions if the information is reliable. Accordingly, ICI urges FinCEN to include language in the final rule requiring FinCEN to verify data submitted to the BOI database.[9]

Given our members' current CDD requirements, ICI believes BOI retrieved from the BOI database will only be valuable, and thus meet the requirements of the CTA, if FinCEN validates the relationship between the reporting company and the reported beneficial owner. If BOI is pre-validated by FinCEN, FinCEN should take this into consideration in phase three of the CTA implementation process and permit financial institutions that choose to access the BOI database to rely on FinCEN's validation process in meeting their own beneficial ownership verification requirements. In the alternative, if validating BOI is not feasible for FinCEN, ICI requests that FinCEN permit financial institutions to rely on the certification required by 31 C.F.R. § 1010.380(b) that all information submitted to the BOI database is true, accurate, and complete when meeting their CDD requirements (as revised in phase three of the CTA implementation).

C. Proposed Limitations on Financial Institution Access and Use of Information are Impractical and Burdensome

ICI believes the NPRM's methods of access to the BOI database and restrictions on use of BOI by financial institutions would not be useful as currently proposed and, with respect to the limitations on use of BOI, are contrary to the statutory language of the CTA.

The NPRM would permit financial institutions to access the BOI database with the consent of the reporting company, "upon receipt of a request from a financial institution subject to customer due diligence requirements under applicable law for information to be used in facilitating such compliance."[10] The NPRM would also restrict a financial institution's use of such BOI for the "particular purpose or activity for which such information was disclosed."[11]

The CTA does not define "customer due diligence requirements under applicable law" for purposes of when a financial institution may access the BOI database. The NPRM proposes to define

---

8 31 U.S.C. 5336(b)(F)(iv)(II).

9 As part of the verification process, ICI expects FinCEN would also collect and verify the role of the company applicant (e.g., control person, director, or simply, filer). ICI also proposes that FinCEN validate FinCEN identifiers to mitigate the risk of FinCEN identifier misuse and fraud. Finally, if FinCEN chooses to adopt requirements mandating validation of information provided to the BOI database, ICI urges FinCEN to minimize any additional burdens on reporting companies as part of the validation process.

10 Proposed 31 CFR § 1010.955(b)(4)(i).

11 Proposed 31 CFR § 1010.955(c).

"customer due diligence requirements under applicable law" to mean the beneficial ownership requirements for legal entity customers set forth in 31 C.F.R. § 1010.230. The ICI supports this proposition and believes it is consistent with the intent of the CTA.

However, ICI disagrees with the limitations placed on the use of BOI by financial institutions. FinCEN is proposing that ***any*** person who receives BOI may use the BOI ***only*** for the "particular purpose or activity for which such information was disclosed." If interpreted conservatively, it appears the proposed rule would only allow a financial institution to use BOI received from FinCEN for purposes of facilitating CDD compliance, as defined by the rule (i.e., only to collect and verify BOI). This restriction limits the usefulness of BOI. If this restriction was relaxed, the information retrieved from the BOI database could assist additional efforts, such as compliance with the Office of Foreign Assets Control's ("OFAC") sanctions regime, or for purposes of Sections 314 (a) and (b) of the USA PATRIOT ACT.[12] Thus, ICI recommends that financial institutions be permitted to use BOI for other financial crimes, AML and sanctions compliance purposes.

In this regard, ICI notes that this limitation is inconsistent with the CTA. ICI recognizes that the CTA explicitly limits the use of BOI by a federal agency for use "in furtherance of" national security, intelligence, or law enforcement activity. ICI also notes that the CTA prohibits disclosure of BOI to a law enforcement agency, prosecutor, or judge of another country unless such request is made by a federal agency on behalf of such foreign agency or person and there is a treaty in place that "limits the use of the information for any purpose other than the authorized investigation or national security or intelligence activity."[13] The CTA does not, however, prescribe any such limitations on how a financial institution may use BOI once it has accessed the BOI. Rather, the statutory limitation applicable to financial institutions concerns only their ability to access BOI – i.e., a financial institution may only access BOI if such access is to facilitate meeting beneficial ownership requirements for legal entity customers[14], regardless of how the BOI may be used by that financial institution afterward.

The absence of any post-access restriction in the CTA for financial institutions makes practical sense. Under the current CDD Rule and customer identification ("CIP") rules, financial institutions must keep customer information, including BOI, in their records for a period of five years. These records are often relied upon in assessing customer risk and attendant ongoing CDD obligations, as well as negative news screens and other AML and sanctions-related compliance functions. In addition, financial institutions may use the information on hand to meet their CDD and CIP obligations for existing customers that open new accounts. It would seem counterintuitive, and a waste of financial institution and FinCEN resources, for a financial institution to have to go back to the BOI database on multiple occasions for the same customer simply because the financial institution is prohibited from reusing the BOI. Moreover, the financial institution is going to be required under the CDD and CIP rules to obtain the same information directly from the customer if the customer does not consent to the financial institution accessing the customer's BOI.

---

12 *See* Section 314(b) Fact Sheet (December 2020).

13 31 U.S.C. 5336(c)(2)(B)(ii)(II)(bb).

14 For purposes of this comment letter, customer due diligence procedures for legal entity customers are as defined by 31 CFR § 1010.230(b) – Beneficial ownership requirements for legal entity customers.

In light of these issues, ICI urges FinCEN to relax the post-access restrictions to permit financial institutions to use BOI from the BOI database for any purpose that is consistent with a financial institution's anti-financial crimes program, including (but not limited to) AML, sanctions, anti-bribery, and anti-corruption procedures.

Regarding the methods for accessing BOI, FinCEN is currently proposing that financial institution access queries would be manual, and as proposed, individualized.[15] ICI believes this process will heavily burden its members, especially larger members. For example, given the multitude of customers some of ICI's larger members must account for, it would be impossible from a resources perspective to enter individual queries for each beneficial owner and/or control person. To alleviate this burden, mutual funds and their delegates currently send daily batch queries to service providers to run various AML and OFAC/sanctions screens against relevant lists. Therefore, in addition to manual access, ICI urges FinCEN to allow for batch or application program interface for accessing BOI to promote practicality, efficiency, and ease of use. In addition, ICI urges FinCEN to clarify what identification elements should be contained with each query or submission to FinCEN, and to provide guidance regarding what elements will be in the "return result" from the BOI database, such as a "Pass/Fail" receipt or a FinCEN Identifier result match to name.[16]

D. Reporting Entity's Consent Capture Should be Through Electronic Negative Consent

Under the NPRM, financial institutions would be responsible for obtaining a reporting company's consent[17], which reflects FinCEN's view that financial institutions are "best positioned to obtain and manage consent through existing processes and by virtue of having direct contact with the reporting company as a customer."[18] ICI believes consent capture through affirmative consent will be impracticable and severely burden the resources of members and thus discourage members from seeking to access the BOI database. Therefore, ICI urges FinCEN to authorize consent capture through negative consent, or "opting out."[19] ICI also urges FinCEN to clarify that any consent capture may be collected through electronic means to minimize the use of paper and physical recordkeeping.

---

15 NPRM Preamble at 77415 ("FinCEN is therefore not planning to permit FIs to run broad or open-ended queries in the beneficial ownership IT system or to receive multiple search results. Rather, FinCEN anticipates that a FI, with a reporting company's consent, would submit to the system identifying information specific to that reporting company, and receive in return an electronic transcript with that entity's BOI"). FinCEN should also explore additional formats for which BOI can be queried and the formats for the related outputs.

16 For example, FinCEN should also consider whether using Boolean logic or similar type queries are feasible as such capabilities would help decrease the number of failed searches because the information provided to FinCEN and the financial institutions may not always be an exact match.

17 Proposed 31 C.F.R. § 1010.955(b)(4).

18 NPRM Preamble at 77415.

19 ICI also urges FinCEN to clarify a financial institution's obligations under the CDD Rule (as re-written) when a customer does not provide their consent for the financial institution to access the customer's BOI from the BOI database. ICI assumes that the financial institution will have to use its manual CDD procedures under the CDD Rule, but guidance on this point would be helpful.

E. Foreign Access, Disclosure and Re-Disclosure should be Permitted for Certain Personnel not Physically Present in the United States

Under the NPRM, financial institutions must restrict access to information obtained from the BOI database to "directors, officers, employees, contractors, and agents within the United States."[20] The preamble to the NPRM specifies that redisclosure may only be to those "officers, employees, contractors, and agents of the financial institution *physically present in the United States*."[21] The ICI urges FinCEN to reassess this express limitation. Many members use offshore capabilities to conduct anti-money laundering-related tasks. For example, many members utilize offshore capabilities to conduct information searches related to investigations. Prohibiting such personnel from using BOI would severely burden financial institutions that have extended resources to non-U.S. jurisdictions.

The ICI acknowledges the CTA's requirement that foreign governments only obtain BOI through intermediary federal agencies, and the concern that re-disclosure of BOI outside of the United States potentially exposes the BOI to the judicial functions of the foreign jurisdiction. However, as a practical matter, members currently retain BOI data in databases shared by foreign offices, employees, and agents for purposes of existing CDD requirements. Therefore, while the ICI supports limiting access to the BOI database to those physically present in the United States, the ICI asks that the same express limitation not be applied to disclosure and re-disclosure of BOI. As an alternative, the ICI proposes that FinCEN extend the permissible access to directors, officers, employees, contractors, agents, affiliates, and contractual parties in "trusted foreign countries" that are otherwise permitted under the redisclosure proposal, and instead restrict access, disclosure, and redisclosure to jurisdictions already restricted due to anti-money laundering, combating the financing of terrorism, and sanction concerns.

F. Scope of Individuals with Access Should Include Non-Employee Agents

As previously discussed, FinCEN currently proposes to limit access obligations to directors, officers, employees, contractors, and agents of the financial institution. The ICI urges FinCEN to broaden the scope of access obligations to any individual under contract or under the remit of the requesting entity. Examples of these individuals include auditors, third-party service providers, and consultants.

G. Security and Confidentiality Requirements Should Not Add Additional Burdens

ICI supports FinCEN's proposal to align the privacy safeguards with those of the existing Graham Leach Bliley Regulations, Section 501(b).[22] ICI asks FinCEN to confirm that the proposed requirement to maintain "current" background checks on government agency personnel accessing the database does not apply to financial institutions who are required to perform background checks on certain personnel under other regulatory requirements, including existing requirements under Graham Leach Bliley regulations.[23] Members may have at-hire, background check, and fingerprinting

---

[20] Proposed 31 CFR § 1010.955(d)(2)(i).

[21] Preamble at 77418.

[22] Codified at 15 U.S.C. 6801.

[23] Preamble at 77419. See also Rule 17f-2 under the Exchange Act, which requires certain transfer agent personnel to be fingerprinted.

policies, but may not perform ongoing checks or checks during role changes. Members also have existing obligations for personnel to maintain information securely.

H. BOI Query Trend Data Should be Available to Financial Institutions

ICI urges FinCEN to clarify how BOI query trends, statistics, and other information regarding BOI database usage will be made available to financial institutions. Similar to the system FinCEN currently utilizes for suspicious activity reports[24], ICI recommends that FinCEN develop an interactive database which discloses generic BOI database query trends. Financial institutions utilize trends to assess and compare their programs to peers, and such a system would allow members to strengthen their respective anti-money laundering programs.

* * * * *

ICI appreciates the opportunity to present our comments in response to the NPRM. If you have any questions about the matters discussed in this letter, please contact Joanne Kane (at 202-326-5850 or joanne.kane@ici.org) or Kelly O'Donnell (at 202-326-5980 or kelly.odonnell@ici.org).

Sincerely,

/s/ Joanne Kane

Joanne Kane
Chief Industry Operations Officer, Investment Company Institute

/s/ Susan Olson

Susan Olson
General Counsel, Investment Company Institute

[24] The suspicious activity report database may be found here.