TRANSPARENCY INTERNATIONAL U.S.
fighting corruption, promoting democracy

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By electronic submission (via the Federal E-rulemaking Portal)

February 14, 2023

Mr. 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 No. FINCEN-2021-0005 and RIN 1506-AB49/AB59

Dear Acting Director Das,

Transparency International U.S. ("TI-US") commends the Financial Crimes Enforcement Network ("FinCEN") for completing this second Notice of Proposed Rulemaking ("NPRM" or "Draft Rule") to further the implementation of the Corporate Transparency Act ("CTA")—the landmark anti-money laundering ("AML") law to collect the beneficial ownership information ("BOI") of companies and similar entities formed or registered in the United States—which details the methods by which authorized users may access the BOI database. We worked closely with Congress to help inform and generate key support for the CTA, and we welcome the Draft Rule as a milestone in the implementation of a law that holds so much promise for the fight against global corruption.

TI-US is part of the largest global coalition dedicated to fighting corruption. With over 115 national chapters worldwide, Transparency International ("TI") partners with businesses, governments, and citizens to promote transparency and to develop and implement effective measures to tackle and deter corruption, including by working around the world on the creation of robust, accurate, efficient, and easily accessible beneficial ownership databases.[1]

Background

Corruption, defined by TI as the abuse of entrusted power for personal gain, poses a unique and highly consequential threat to democracy, human rights, and the rule of law.[2] In particular, the abuse of anonymous shell companies by corrupt foreign officials, oligarchs, kleptocrats,

[1] For more information, please visit www.us.transparency.org (TI-US) and www.transparency.org (TI).
[2] Acknowledging the raw power, scale, and consequence of corruption, the Biden Administration has designated the fight against foreign corruption as a core U.S. national security interest. *See* The White House, "Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest," June 3, 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/.

terrorists, and other criminals in order to move and hide their dirty money is especially notorious, pernicious, and destructive.[3] As the Biden Administration recognized in its United States Strategy for Countering Corruption:

> [B]y leaving their financial systems vulnerable to illicit assets….[including] through anonymous shell companies….rule-of-law-based societies continue to provide entry points for corrupt actors to launder their funds and their reputations. Such activity negatively impacts average citizens in the United States, tilting the economic playing field against working Americans, enabling criminals to flourish and foreign adversaries to subversively peddle their influence, perpetuating growth-dampening inequality, and contributing to pricing out families from home ownership through real estate purchases.[4]

The Strategy pinpoints how "In the U.S. anti-money laundering (AML) regime, the lack of timely access to adequate, accurate, and current beneficial ownership information has been identified as a gap."[5]

The United States has long played a leading role in the global fight against corruption.[6] Yet in December 2021, Secretary of the U.S. Department of the Treasury Janet Yellen was nevertheless able to conclude that "there's a good argument that, right now, the best place to hide and launder ill-gotten gains is actually the United States. And that's because of the way we allow people to establish shell companies."[7] This unfortunate distinction, paired with the facts that the U.S. dollar is the world's reserve currency, the U.S. economy the largest in the world, and the U.S. financial system the "backbone of the world economy,"[8] means that the United States also plays a leading, outsized role in facilitating transnational corruption schemes.

For these reasons, the forthcoming U.S. beneficial ownership database holds the promise of not only reducing the U.S.'s role as a repository for the proceeds of corruption, but of achieving truly global reach and resonance in the fight against it.

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[3] Examples of such behavior are now well known, but one data point is particularly illustrative: According to the World Bank and the United Nations Office on Drugs and Crime, anonymous companies were used in over 70 percent of grand corruption cases they reviewed to either carry out the corrupt activity or to hide the proceeds of it. *See* Emile van der Does de Willebois et al., "The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It," World Bank, 2011, available at https://openknowledge.worldbank.org/handle/10986/2363. *See also*, Transparency International, "Panama Papers Four Years On: Anonymous Companies and Global Wealth," Apr. 9, 2020, available at https//www.tansparency.org/en/news/panama-papers-four-years-on-anonymous-companies-and-global-wealth.

[4] *See* The White House, "United States Strategy on Countering Corruption," 7, December 2021, available at https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

[5] *Id.* at 20.

[6] This includes high-profile prosecutions and other actions that have uncovered corruption in countries all over the world. For example, the U.S. led the exposure of the widespread corruption at the Fédération Internationale De Football Association ("FIFA"), and through the Foreign Corrupt Practices Act ("FCPA") has taken the lead in revealing massive private and public corruptions across the world.

[7] *See* Secretary of the U.S. Department of the Treasury Janet Yellen, "Remarks by Secretary of the Treasury Janet L. Yellen at the Summit for Democracy," Dec. 9, 2021, available at https://home.treasury.gov/news/press-releases/jy0524.

[8] *Id.*

The first CTA rulemaking laid the infrastructure for a beneficial ownership reporting regime that will bring genuine transparency to anonymous shell companies that are formed or registered in the U.S.[9] But without timely, efficient, effective, and above all else, *practical* access to the database that will house this BOI, the 12-plus years of congressional labor, civil society advocacy, media revelations, and industry and government collaborations that went into accomplishing the CTA will have been in vain. This NPRM, therefore, presents a critical crossroads for the future of the global fight against corruption. FinCEN must adopt the following amendments to the Draft Rule—all of which are supported by the language, intent, purpose, and spirit of the CTA—in order to faithfully fulfill its role in securing the promise of this powerful new global tool.

1. <u>Access by State, Local, and Tribal Law Enforcement</u>

Out of the entire Draft Rule, the most alarming and obstructive provision—by far—is the imposition of multiple new barriers to access by state, local, and tribal law enforcement agencies. **FinCEN must remove these barriers in its final rule.**

As we stated in our comment in response to the Advance Notice of Proposed Rulemaking ("ANPRM") for the CTA, when it comes to investigations into foreign corruption and other crimes, "restricted access to beneficial ownership information or other unnecessary hurdles would mean cases cannot move forward and criminals may escape justice."[10] To ensure effective access *in practice*, we stressed, the CTA's implementing rules must reflect the carefully considered, plain language of the enacting law. Unfortunately, FinCEN's proposed provision regarding access to the database by state, local, and tribal law enforcement agencies deviates enormously from the clear, precise, carefully negotiated and crafted language of the CTA.

The CTA reads:

> FinCEN may disclose beneficial ownership information reported pursuant to this section only upon receipt of….a request, through appropriate protocols….from 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.[11]

To this language FinCEN adds multiple burdensome requirements—including that an agency must also submit to FinCEN a "copy of a court order" from a court of competent jurisdiction[12] as well as a "written justification that sets forth specific reasons why the requested information is relevant to the criminal or civil investigation."[13]

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[9] *See* Beneficial Ownership Information Reporting Requirements, Docket No.: FINCEN-2021-0005 and RIN 1506-AB49, published at 87 Fed. Reg. No. 189, Sept. 30, 2022.
[10] *See* Transparency International U.S., "TI-US Comment: ANPRM on Corporate Transparency Act Implementation," May 5, 2021, available at https://us.transparency.org/resource/anprm-cta/.
[11] 31 U.S.C. § 5336(c)(B)(i)(II).
[12] Proposed 31 CFR § 1010.955 (B)((i), Fed. Reg. Vol. 87 No. 241 77404 at 77456.
[13] Proposed 31 CFR § 1010.955 (G)(B)(2)(i) and (ii).

To be clear: These additional requirements—that an agency (i) obtain and (ii) submit (iii) documentation of a (iv) court order, as well as (v) submit a (vi) written (vii) justification that sets forth (viii) specific (iv) reasons why the requested information is relevant to the investigation—have *zero* traceability to the text or legislative history of the CTA. These words appear nowhere in the statute or the legislative record. They are pure legal fictions of FinCEN's creation.[14]

In particular, the Draft Rule's imposition of the requirement of a court order contradicts the plain reading of the CTA and violates congressional intent for a streamlined and informal court authorization process. The drafters of the CTA committed a substantial amount of time and effort to negotiating and crafting the precise language used in the CTA. They researched, evaluated, discussed, and debated a broad spectrum of options that would require a modicum of judicial-branch review and approval, while making such a requirement as practical and manageable as possible for the average local, tribal, or state law enforcement agency, and while preserving judicial economy.

In that deliberative process, the CTA drafters specifically considered, and specifically rejected, the requirement that an agency obtain a court order. They also expressly considered, and expressly rejected, any requirement that an agency document, demonstrate, justify, or *satisfy any evidentiary threshold* regarding how the requested BOI is relevant, material, reasonably related, etc., to an investigation.

Instead, from a wide spectrum of options, the drafters reached consensus on the specific requirement that a court of competent jurisdiction (or its tribal equivalent), including *any officer* of said court, *authorize* the agency to seek the BOI. To this end, one particular example of such a process was communicated to, and accepted by, parties involved in and privy to the negotiations: The "authorization" requirement could be satisfied by a "front-window" court employee authorizing an agency request either in person or via email, phone, or even online messaging. **This hypothetical scenario was shared among negotiators prior to agreeing to the final text.** FinCEN must comply with the clear and deliberate language of the CTA in this regard. To do otherwise would severely burden the tens of thousands of law enforcement agencies across the country who could use the database in pursuit of protecting American communities.

Instead, FinCEN should allow for more timely and practical ways for the court authorization requirement to be satisfied, consistent with plain text of the law. This includes ministerial approval by any employee of the court who is permitted to provide such authorization on behalf of the court, or by the issuance of a subpoena or request for documents by any officer of the court, including any appropriately licensed attorney or any law enforcement professional (including a prosecutor) who shares relevant jurisdiction with the court.[15]

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[14] While FinCEN's expansion of the term "authorized" into a requirement for a "court order" likely serves as the most consequential unjustified barrier to timely, efficient, effective, and practical access for state, local, and tribal law enforcement agencies, the phrasing of the proposed 31 CFR § 1010.955 (G)(B)(2)(ii) appears to be regulatory inventions without any textual basis whatsoever.

[15] The rules and procedures regarding the issuance and limitation of subpoenas have a long history of developed law in the United States. *See e.g.*, "Criminal Investigative Subpoenas: How to get them, How to Fight Them," 54 J. Mo. B. 15, 15 (1998) ("Grand jury subpoena power dates back to the twelfth century England and has led to a large body of law setting the parameters of the power to subpoena.").

The CTA clearly states that the necessary court authorization can be provided by "any officer" of a court of competent jurisdiction.[16] In analyzing this language, FinCEN states that it "does not believe that individual attorneys acting alone would fall within the definition of 'court officer'".[17] Yet such a conclusion runs contrary to the approach of nearly every state, as well as federal civil procedure, wherein attorneys, acting alone yet under the auspices of the relevant court, can issue subpoenas, initiate lawsuits, and issue requests for documents. In federal court, for example, an attorney is authorized to issue a subpoena under the auspices of a court of competent jurisdiction as an officer of the court without a court order or the involvement of the clerk of court.[18] In addition, most jurisdictions in the United States allow law enforcement professionals, including prosecutors, to issue subpoenas as officers of the court[19] compelling witness testimony or production of documents, with the involvement of the clerk of court only required in certain jurisdictions.[20]

FinCEN seems to agree that the issuance of a subpoena will serve as sufficient authorization from a court for purposes of the CTA, yet also seems to suggest that a subpoena would be sufficient only if "approved" by a court. But as explained herein, for nearly all state systems, as well as the federal system, it is not required that a subpoena be "approved" by a court.[21] Indeed, unless the subpoena is objected to, *there is no judicial review of the subpoena*, and no court order is required to serve it.[22] Similarly, after the initiation of a lawsuit in federal court, any attorney may, as an officer of the court, serve a request for the production of documents without court order or approval.[23]

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[16] 31 U.S.C. § 5336(c)(B)(i)(II).

[17] Fed. Reg. Vol. 87 No. 241 at 77414. The Draft Rule provides that "FinCEN recognizes that State practices are likely to be varied with respect to how law enforcement agencies may be authorized by a court to seek information in connection with an investigation or prosecution." This fails to recognize that nearly every state allows an attorney of record to issue subpoenas without court intervention. *See e.g.*, Cal. Civ. Prac. Code § 1985(c) (California) and McKinney's CPLR § 2302 ("(a) Without court order. Subpoenas may be issued without a court order by….an attorney of record for a party to an action.…").

[18] *See* Fed. R. Civ. Proc. 45. *See also* Fed. R. Civ. Proc. 45(d)(3), Fed. R. Crim. Proc. 17, and *U.S. v. Van Allen*, 28 F.R.D. 329, 334 (S.D. N.Y. 1961) ("Permission of the court is not needed to serve a subpoena pursuant to Rule 17(c)").

[19] Rule 45 of the Federal Rules of Civil Procedure was amended in 1991 to allow attorneys to issue subpoenas without the involvement of the clerk of a court of competent jurisdiction.

[20] *See e.g., Kupritz v. Savannah College of Art & Design*, 155 F.R.D. 84, 86-87 (E.D. Penn. 1994) ("Although the Clerk of Court shall issue a subpoena 'signed but otherwise in blank, to a party requesting it,' an attorney as an officer of the court may also issue and sign a subpoena on behalf of the court.") (internal citations omitted).

[21] *See* Fed. Reg. Vol. 87 No. 241 at 77413 ("At a minimum, the proposed rule would allow a State, local or Tribal law enforcement agency (including a prosecutor) to access BOI where a court specifically authorizes access in the context of a criminal or civil proceeding, for example, through a court's issuance of an order or approval of a subpoena.").

[22] *See e.g.,* Fed. R. Crim. Proc. 17(C)(2) and Fed. R. Civ. Proc. 45.

[23] *See* Fed. R. Civ. Proc. 34. Importantly, the issuance of a subpoena does not constitute a legal proceeding:

> The issuance of a subpoena duces tecum pursuant to an applicable statute is purely a ministerial act and does not constitute legal process in the sense that it entitles a person on whose behalf it is issued to obtain access to records described therein until a judicial determination has been made that the person is legally entitled to receive them….A prosecutor may have the

The CTA also does not permit FinCEN to condition access to BOI on confirmation or evidencing of the required court authorization (that an agency submit to FinCEN a "copy of a court order").[24] Instead, all that the text of the CTA can be read to require is that the agency aver, declare, or certify that an officer of a court of competent jurisdiction *has authorized* the agency to seek the BOI in a criminal or civil investigation. The inquiry stops there.[25]

Finally, FinCEN's largest batch of new requirements for state, local, and tribal agencies—that a requesting agency submit a written justification that sets forth specific reasons why the requested BOI is relevant to its investigation—has absolutely no discernable foundation in the text of the CTA or its legislative record. In fact. the CTA clearly identifies the only authorized users upon which such requirements *are* to be imposed:

> The Secretary of the Treasury shall establish by regulation protocols described in paragraph (2)(A) that....require a written certification for each authorized investigation or other activity described in paragraph (2) from the head *of an agency described in paragraph (2)(B)(i)(I)* ["from a *Federal agency* engaged in national security, intelligence, or law enforcement activity...."], or their designee, that....at a minimum, sets forth the specific reason or reasons why the beneficial ownership information is relevant to an authorized investigation or other activity described in paragraph (2)[.][26]

This requirement does not appear in the CTA's provision regarding state, local, and tribal law enforcement access because it was presumed that its unique requirement for court authorization would be sufficient to guard against "fishing expeditions." In addition, as FinCEN itself recognizes, granting access at the investigative stage may help state, local, and tribal law enforcement agencies combat crime and accomplish other statutory objectives of the CTA.[27] In this way, an investigating agency may not yet have developed a set of "specific reasons" why the requested BOI is "relevant" to the investigation. Indeed, BOI might often be required to advance a nascent investigation. This open-ended requirement may well prevent these types of investigations from moving forward.

To maintain these wholly unsubstantiated regulatory requirements in the final rule will only serve to create serious additional barriers to the usefulness and utility of the database, and would open the door for future administrations to introduce additional roadblocks to usage by law enforcement that are also not found in the text of the CTA. They must be removed.

> discretion to issue subpoenas duces tecum without notice to the defendant or the sanction of the court.

98 Corpus Juris Secundum § 36, November 2022.

[24] Proposed 31 CFR § 1010.955 (B)((i), Fed. Reg. Vol. 87 No. 241 77404 at 77456.

[25] Requiring a copy of court order for each request, across tens of thousands of potential requesting state, local, and tribal law enforcement agencies, also introduces significant data storage questions, security risks, and costs for the database.

[26] 31 U.S.C. § 5336(c)(3)(E)(ii).

[27] *See* Proposed Rules 87 Fed. Reg. at 77413 ("FinCEN agrees that providing BOI at the investigative stage may further the CTA's statutory objective of helping State, local and Tribal authorities uncover links between criminals and entities they may be using to conceal illicit activities" (citing CTA, Section 6402(3), (4), (5)(D)).

These elements of FinCEN's proposed access framework for state, local, and tribal law enforcement agencies would not only fail to comply with the text of the CTA, they would fail to reflect congressional intent for the law. For example, Senator Sherrod Brown, then-Ranking Member of the Senate Committee on Banking, Housing, and Urban Affairs and one of the primary authors and champions of the CTA, encouraged FinCEN to "ensure that federal, state, local and tribal law enforcement can access the beneficial ownership database without excessive delays or red tape"[28] and stressed the need for a relatively informal process for such access:

> For state, local or tribal law enforcement, they must get **approval** by a tribal, local or state court of competent jurisdiction, which need not be a judge—it can include an officer of the court like a magistrate, court clerk **or other administrative officer**. It is far more workable than the scheme some had pushed, to require approval by a federal **judge** each time law enforcement wanted to access the database—an approach which would have gutted the bill, tied up our federal courts, and **effectively rendered it inaccessible to state and local law enforcement**….[29]

Considering the text of the law, congressional intent, the need for practical and timely access to BOI, and the CTA's overarching requirement to ensure that the BOI is "highly useful," we strongly urge FinCEN to adopt an access framework for state, local, and tribal law enforcement agencies in its final rule that requires only that an agency aver, declare, or certify that it has been authorized to seek the BOI in a criminal or civil investigation by a court of competent jurisdiction, and where this requisite authorization includes, but is not limited to, ministerial approval by any employee of the court who is permitted to provide such authorization on behalf of the court, or the issuance of a subpoena or request for documents by any officer of the court, including any appropriately licensed attorney or law enforcement professional (including a prosecutor) who shares relevant jurisdiction with the court.

2. Verification of BOI

FinCEN states in its Draft Rule that while a number of commenters to the ANPRM and Reporting NPRM[30] have "affirmed the importance of verifying BOI to support authorized activities that rely on the information" the bureau "continues to review the options available to verify BOI within the legal constraints in the CTA."[31]

It is self-evident that the database will only be as useful as it is accurate. For this obvious yet essential reason, Congress included the following language in the CTA:

> The Secretary of the Treasury shall, to the greatest extent practicable, update the information described in subsection (b) [BOI] by working collaboratively with

[28] Fed. Reg. Vol 87, No. 241 at 77408 (internal citation omitted).
[29] Senator Sherrod Brown, National Defense Authorization Act for Fiscal Year 2022, Congressional Record, Dec. 9, 2020, S7312 (emphasis added).[29]
[30] *See* Beneficial Ownership Information Reporting Requirements, Docket No.: FINCEN-2021-0005 and RIN 1506-AB49, published at 87 Fed. Reg. No. 189, Sept. 30, 2022.
[31] Fed. Reg. Vol. 87 No. 241 at 77408.

> other relevant Federal, State, and Tribal agencies….Relevant Federal, State, and Tribal agencies, as determined by the Secretary of the Treasury, shall, to the extent practicable, and consistent with applicable legal protections, cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information.[32]

We strongly encourage FinCEN to revisit its belief that the CTA limits its ability to verify BOI, and to instead employ the above language as clear legal justification for incorporating verification mechanisms that utilize existing government information into the database. The only potential limiting language in the above provision—"consistent with applicable legal protections"—is unspecific and outweighed by the amount and bandwidth of the surrounding language supportive of such verification, and, if interpreted as a limitation on verification, would sharply contrast with the broader intent of the law. In this original interpretive environment, with no known case law or other interpretations to serve as limitations, the full purpose of the CTA must be realized by a final rule that permits verification.

FinCEN can incorporate verification mechanisms into the database, for example, by relying on information collected by the U.S. Department of State (to electronically check reported names and passport numbers), the National Law Enforcement Telecommunications System (to check state drivers' licenses and identification numbers), and the U.S. Postal Service (to check addresses), among other government agencies and entities. Such automated, real-time verification of BOI would provide a minimum level of assurance that reported information is accurate and reliable, and thus highly useful.

Verification of BOI is also necessary for the United States to be compliant with the relevant Financial Action Task Force ("FATF") recommendation,[33] which the U.S. was instrumental in FATF adopting. Such mechanisms would also reflect the legal requirements and positive practices of other countries with beneficial ownership databases.

For example, the European Union's ("EU's") corollary AML directive includes the requirement that member states have verification mechanisms in place, and that those mechanisms be accurate and reliable.[34] In 2022, TI conducted a survey on verification across the EU, reviewing the legal frameworks of 24 of 27 EU member states and sharing a questionnaire with beneficial ownership database authorities in order to confirm the mechanisms they had in place. Of the 18 member states that responded, 16 (of the 24 that TI assessed) included verification requirements

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32 31 U.S.C. § 5336(d)(1)-(2).

33 *See* Financial Action Task Force, "The FATF Recommendations," March 2022, 91, 93, available at https://www.fatf-gafi.org/content/dam/recommandations/pdf/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf ("Competent authorities should be able to obtain, or have access in a timely fashion to, adequate, accurate and up-to-date information on the beneficial ownership and control of companies and other legal persons….Accurate information is information, which has been verified to confirm its accuracy by verifying the identity and status of the beneficial owner using reliable, independently sourced/obtained documents, data or information. The extent of verification measures may vary according to the specific level of risk.").

34 *See* EU Directive 2018/843, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018L0843.

in their respective legislation, and 18 of the 24 required beneficial ownership ID or passport checks by law. Furthermore, 11 member states undertook additional verification on a risk-based approach, and 24 had reporting mechanisms that required obliged entities to report to the database any discrepancies in the information.

These requirements and practices drive home how verification is not only a best practice among other national databases, but an absolute necessity for ensuring the integrity of BOI. One need only look to the experience of the United Kingdom ("UK"), where a database without adequate verification mechanisms led to high-profile reports of clearly bogus entries,[35] to see the consequences of unverified BOI. The UK is now moving to verify reported information, and the U.S. must learn from their experience by doing the same at this juncture.

The CTA mandates that the Secretary of the Treasury promulgate regulations that "ensur[e] the [beneficial ownership] information is highly useful…."[36] And to be useful at all, this information must be accurate.

3. <u>Access by Foreign Requesters</u>

With the U.S. financial system serving as the backbone of the world economy and corporate infrastructure operating on a truly global basis, timely, efficient, effective, and practical foreign access to U.S. BOI is vital to achieving the CTA's stated purposes.

As such, the CTA states that FinCEN may disclose BOI upon receipt of a request from a federal agency on behalf of:

> [A] law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation), under an international treaty, agreement, convention, or official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries when no treaty, agreement, or convention is available.[37]

First, we commend the Draft Rule for following the CTA directive that *any* federal agency—as opposed to FinCEN alone—be permitted to serve as an intermediary for foreign requests. Permitting foreign agencies to engage with U.S. counterparts with similar responsibilities, authorities, and expertise will help maximize appropriate access to BOI. We also agree with the Draft Rule's conclusion that foreign access to BOI should not be limited to law enforcement agencies, but also available to foreign national security and intelligence agencies.[38]

However, FinCEN must remove the Draft Rule's separate, more-demanding training requirement for foreign requesters. For personnel of certain foreign requesters (a foreign law

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[35] *See* Global Witness, "The Companies We Keep," July 2018, available at file:///Users/ti-us/Desktop/Briefing_The_Companies_We_Keep.pdf (revealing that thousands of companies are filing suspicious entries or not complying with the rules).
[36] 31 U.S.C. § 5336 (a)(1)(F)(iv).
[37] 31 U.S.C. § 5336(c)(B)(i)(ii).
[38] *See* Fed. Reg. Vol. 87 No. 241 at 77414 ("FinCEN believes the proposed rule best resolves this discrepancy by clarifying that authorized national security could be a basis for a BOI request, in addition to a law enforcement investigation or prosecution.")

enforcement agency, judge, or prosecutor, via a request made by a law enforcement, judicial, or prosecutorial authority of a "trusted" foreign country when no relevant international treaty, agreement, or convention is available), BOI can only be accessed by those who have "undergone training on the appropriate handling and safeguarding of information."[39] This requirement clashes with the corollary requirement for personnel of U.S. state, local, or tribal law enforcement agencies, who can access BOI if they have either undergone training *or obtained the information from someone who has*.[40] This discrepancy has no basis in the text of the CTA, creates an unnecessary double standard, and will result in significant, practical barriers for foreign requestors. It must be removed.

In addition, the database's access framework for foreign agencies would be well-served by clear criteria for determining which foreign countries are "trusted" countries. In the Draft Rule, FinCEN proposes that this determination be conducted on a "case-by-case basis", noting that the CTA "does not provide criteria for determining whether a particular foreign country is 'trusted,' but rather, provides FinCEN with considerable discretion to make this determination."[41] Leaving such a consequential determination to the discretion of FinCEN and FinCEN alone, however, could allow for disparate determinations or actions from the bureau, and, writ large, does not provide sufficient notice or guidance as to which foreign countries will have access to BOI—thus delaying a pivotal decision that risks creating significant confusion and diminished utility for the database.

Clear, baseline criteria would avoid these risks, and could include a country's membership in or alliance with any international body that is friendly to the foreign policies of the United States, such as the North Atlantic Treaty Organization, the EU, or the Group of Seven.

Lastly, inherent legal and cultural differences among the United States and foreign requestors means that requesting access to and accessing the database will be more complex and challenging for foreign requestors. To help offset these realities, FinCEN must take the initiative in providing awareness-raising and educational materials regarding the availability and useability of the database, and should design a discrete, user-friendly "foreign access toolkit," available in as many languages as feasible, that includes guidance, examples, templates, forms, and other materials that can streamline the foreign access process as much as possible.

4. <u>Access by Financial Institutions</u>

The CTA provides that financial institutions ("FIs") may use BOI obtained from the database "to facilitate the compliance of [the FI] with customer due diligence requirements under applicable law" and only if the relevant reporting company consents to the inquiry.[42]

We believe that this language—"customer due diligence requirements [note: not Customer Due Diligence] under applicable law"—is unique in federal law, and was deliberately chosen to encompass and reflect a much larger category of requirements than identifying and verifying

[39] *Id*. at 77457.
[40] *Id*. at 77456.
[41] *Id*. at 77415.
[42] *See* 31 U.S.C. § 5336(c)(2)(B)(iii).

beneficial owners of legal entity customers.[43] This reading is supported by other relevant provisions in the CTA, including language addressing how the Customer Due Diligence ("CDD") Rule will be revised as appropriate:

> [T]o confirm the beneficial ownership information provided directly to the financial institutions to facilitate the compliance of those financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law.[44]

Cabining the language "customer due diligence requirements under applicable law" to formal CDD Rule compliance could very likely exclude FIs from being permitted to use BOI provided by the database for related processes such as sanctions screening, instead necessitating that such processes be conducted separately, and somewhat redundantly.

FinCEN should reject such an impractical, forced interpretation. FIs should instead be allowed to use BOI for the entire range of AML, countering the financing of terrorism ("CFT"), and other related program activities for which they currently use BOI (including anti-bribery, identification and reporting of suspicious activity, anti-fraud, and sanctions and tax transparency activities), throughout the life cycle of the customer account. Otherwise, the database as a whole may prove simply nonfunctional to the thousands of FIs across the United States.

Furthermore, the Draft Rule provides that access by FIs will be "limited,"[45] with FinCEN stating that it is not planning to permit FIs to run "broad or open-ended queries" in the database or to receive multiple search results, but rather to permit FIs to send to the database "information specific to [a] reporting company" and then receive an "electronic transcript" with the reporting company's information.[46] This approach appears to be much more restrictive than the plain language of the CTA.[47] More information and greater explanations are needed regarding how this approach can maintain pace with the anticipated number of FI requests, instill industry and regulator confidence, and maximize database utility.[48]

5. <u>Standardization and Guidance</u>

On a practical level, the CTA includes a litany of somewhat burdensome access "protocols" that could serve as everyday, realistic obstacles to those seeking access to the database.[49] The CTA demands that state, local, and trial agencies,[50] in particular, satisfy an intimidating list of specific requirements, including that they establish and maintain a secure system in which BOI will be stored; establish and maintain "standards and procedures" to ensure compliance with the confidentiality provisions of the CTA;[51] establish and maintain a permanent, auditable system of

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[43] Should this interpretation be seen as inadequate, FinCEN could instead interpret the relevant language to restrict only the actual *transcript* of BOI disclosed by FinCEN, and not the information contained in that transcript.
[44] 31 U.S.C. 5336(d)(1)(B).
[45] Fed. Reg. Vol. 87 No. 241 at 77410.
[46] *Id.*
[47] 31 U.S.C. §5336(c)(B)(iii) and (iv).
[48] In particular, the access process for FIs should not necessitate the involvement of a human intermediary on FinCEN's end, and the final rule should make this clear.
[49] *See* 31 U.S.C. § 5336 (c)(3).
[50] 31 U.S.C. § 5336(c)(3)((H).
[51] 31 U.S.C. § 5536(c)(3)(B).

standardized records for requests that includes—*for each request*—the date of the request, the name of the requesting individual, the reason for the request, whether any information was disclosed, and information sufficient to "reconstruct the justification for the request"; and that they conduct an annual audit to verify that the information obtained has been accessed and used appropriately and in accordance with the standards and procedures the agency has established; among other requirements.

The Draft Rule's restatement of these requirements[52] provides a sobering reminder that FinCEN must do everything it can to standardize and streamline the process of accessing the database for the tens of thousands of authorized users that may seek to request information from it.

To this end, it is imperative that FinCEN think holistically, proactively, and most important, *practically*, in anticipating barriers to usage. This could include designing and providing pre-populated forms, templates, "Frequently Asked Questions" documents, guidelines, guidance statements, and other components of a truly user-friendly "access toolkit" that identify and address potential issues or uncertainties, and that can provide plain-English ease and assistance for as many potential database users, in as many ways, as possible. FinCEN itself acknowledges the need for such work, discussing, for example, how it is developing draft memoranda of understanding ("MOUs") based on similar agreements it uses to share Bank Secrecy Act ("BSA") data. We commend this line of effort and encourage the bureau to do as much as practicable in this regard to ensure timely, efficient, effective, and practical access to the database.

6. Additional Analysis

Finally, we commend FinCEN for faithfully following the CTA in its development of proposed regulations regarding federal agency access to BOI. The Draft Rule appropriately follows the clear statutory language of the CTA.[53] We also commend FinCEN for drafting the proposed regulations in such a way as to ensure that use of FinCEN identifiers will not create a loophole that could ultimately obscure BOI: The limitation on the use of entity FinCEN identifiers in lieu of individual BOI[54] will help prevent individual BOI from being concealed.

We also applaud FinCEN for taking a "very deliberative" approach to designing and building the database, especially as it has engaged with other governments that have designed BOI databases. The international community, particularly countries in Europe, have engaged TI and its chapters in the creation and improvement of their databases, and given that so many investigations involving anonymous shell companies are global in nature, it is key that the U.S. database be compatible with as many other countries' databases as possible.

Conclusion

The forthcoming U.S. database holds the promise of making the United States a global linchpin in the fight against transnational corruption, and of providing allies of integrity across the globe with a powerful new tool for uncovering, deterring, and holding accountable those who plunder their citizens' resources for personal gain. By incorporating the above recommendations into its

[52] *See e.g.*, Fed. Reg. Vol. 87 No. 241 at 77408 *et seq.*
[53] *Compare* CTA § 6403 and proposed 31 CFR § 1010.955 (b)(ii).
[54] *See* proposed 31 CFR § 1010.308(b)(4)(ii)(B).

final rule, FinCEN can ensure that access to BOI is granted to domestic and foreign authorized users in a timely, efficient, effective, and practical manner—mirroring the text, intent, purpose, and spirit of the CTA.

Thank you for the opportunity to present these comments. If you have any questions, or for additional information on TI-US's work in this regard, please contact Scott Greytak, Director of Advocacy for TI-US, at sgreytak@transprency.org.

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