Credit Union National Association
CUNA

WASHINGTON, D.C.
99 M Street SE
Suite 300
Washington, D.C. 20003-3799
Phone: 202-638-5777
Fax: 202-638-7734

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Policy Division
Financial Crimes Enforcement Network
PO Box 39
Vienna, VA 22183

Re: Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities (RIN 1506-AB49/AB59 / Docket No. FINCEN-2021-0005)

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their more than 130 million members. On behalf of our members, we are writing regarding the Financial Crimes Enforcement Network's (FinCEN's) recent notice of proposed rulemaking regarding beneficial ownership information (BOI) access and safeguards (BOI Access Proposal).[1] As previously expressed,[2] credit unions are highly supportive of the creation of the beneficial ownership database and hope it will greatly ease meeting customer due diligence obligations[3] under the Bank Secrecy Act (BSA) and its implementing regulations. However, CUNA is greatly concerned that FinCEN has narrowed the permissible use of BOI obtained from the database beyond what is permissible under the text of *The Corporate Transparency Act* (CTA)[4] and the clear intentions of Congress, and such that that the efficiencies and burden relief the database is intended to create will be wholly lost.

Background

Since 2000, the Department of Treasury, including FinCEN has raised concerns about the role of shell companies in enabling the movement of billions of dollars across border by unknown beneficial owners, facilitating money laundering or terrorist financing. In an effort to improve transparency into these beneficial owners, FinCEN issued a final rule establishing explicit rules

[1] Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Federal Register 77404 (Dec. 16, 2022) (BOI Access Proposal).
[2] *See* CUNA Comment Letters, Comment ID FINCEN-2021-0005-0385 (Feb. 7, 2022), available at https://downloads.regulations.gov/FINCEN-2021-0005-0385/attachment_1.pdf and Comment ID FINCEN-2021-0005-0082 (May 5, 2021), available at https://www.regulations.gov/comment/FINCEN-2021-0005-0082.
[3] *See* 31 C.F.R. § 1010.230.
[4] *The Anti-Money Laundering Act of 2020* (AML Act) was enacted as Division F, §§ 6001-6511, of the *William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*, Public Law 116-283 (2021). *The Corporate Transparency Act* (CTA) was enacted as Title LXIV, §§ 6401-6403 of the same.

for customer due diligence (CDD) requirements (CDD Final Rule) for financial institutions subject to the BSA and its AML requirements (BSA/AML).[5]

The CDD Final Rule established four elements necessary for a sufficient CDD component in a BSA/AML program: (1) Customer identification and verification, (2) beneficial ownership identification and verification, (3) understanding the nature and purpose of customer relationships to develop a customer risk profile, and (4) ongoing monitoring for reporting suspicious transactions and, on a risk-basis, maintaining and updating customer information.[6] The first element had been well established and the third and fourth were implicitly required through examiner expectations for BSA/AML programs.[7] The second requirement, beneficial ownership identification and verification, was therefore the most significant change for credit unions.

Under the CDD Final Rule, reporting financial institutions helped increase transparency of beneficial ownership information; however, both the Treasury and Congress have continued to identify significant existing gaps that persist, allowing bad actors to continue to shield their identities while accessing and using the U.S. financial system to engage in money laundering and terrorist financing.[8] In order to close some of these gaps and relieve the burden of reporting for financial institutions, Congress enacted the CTA as part of the *Anti-Money Laundering Act of 2020* (the AML Act) on January 1, 2021.[9]

The CTA requires that certain entities report beneficial owner and company application information directly to FinCEN, will maintain that information in a confidential, secure, and non-public database.[10] This database will be accessible to U.S. Government departments and agencies, law enforcement, tax authorities, and financial institutions subject to BSA/AML requirements.[11] Once implemented, the CTA directs FinCEN to revise the CDD Final Rule, in part to account for financial institutions access to the database and to reduce unnecessary or duplicative burdens on financial institutions.[12] FinCEN's BOI Access Proposal is the second of three rulemakings necessary to fully implement the CTA.[13] This rulemaking addresses the circumstances in which specified recipients would have access to BOI and outlines data protection protocols and oversight mechanisms applicable to each recipient category.[14]

General Comment

CUNA strongly supports FinCEN's efforts to track and investigate financial crimes involving money laundering and terrorist financing. Credit unions are not-for-profit financial cooperatives

[5] Customer Due Diligence Requirements for Financial Institutions (CDD Final Rule), 81 Fed. Reg. 29397 (May 11, 2016).
[6] CDD Final Rule at 29397.
[7] *Id.*
[8] Beneficial Ownership Information Reporting Requirements (BOI Reporting Proposal), 86 Fed. Reg. 69920, 69925 Dec. 8, 2021).
[9] Public Law 116-283, Title LXIV (CTA), §§ 6401-6403 (2021).
[10] BOI Reporting Proposal at 69921.
[11] *Id.*
[12] *Id.* at 69929.
[13] *Id.* at 69921.
[14] *Id.* at 69920.

with a statutory mission to promote thrift and provide access to credit for provident purposes. Unlike other financial institutions, credit unions do not issue stock or pay dividends to outside stockholders. Instead, earnings are returned to members in the form of lower interest rates on loans, higher interest on deposits, and lower fees. Credit unions exist only to serve their members, and as a result, credit unions' interest in their members' financial well-being and advancing the communities they serve takes on paramount importance.

BSA/AML compliance is expensive and places a tremendous burden on credit unions. While larger banks and non-bank mortgage lenders can afford to absorb the significant regulatory and compliance costs from the AML/CFT framework, it has made it significantly more difficult for credit unions to provide the affordable financial services credit union members depend on and deserve. Credit unions hope the database envisioned in the CTA will provide significant and important relief from the burden created by the CDD Final Rule. However, the regulatory framework established in the BOI Access Proposal is not designed to create that relief for credit unions.

FinCEN Has Drawn Permissible Use Too Narrowly to Meet Its Legal Obligations Under the CTA

The text of the CTA indicates that Congress authorized the Secretary of Treasury to prescribe regulations to implement the legislation, in part to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law.[15] Congress also instructed Treasury to seek to, to the greatest extent practicable, minimize burdens on reporting companies associated with the collection of beneficial ownership information in prescribing regulations, consistent with the purposes of the CTA.[16]

FinCEN's Legal Interpretation of the CTA is Unsupported

The CTA permits disclosure of BOI in response to a request made by a financial institution subject to customer due diligence requirements to facilitate the compliance with customer due diligence requirements under applicable law.[17] The BOI Access Proposal acknowledges that the CTA is somewhat vague as to "the meaning of the term customer due diligence requirements *under applicable law*".[18] The BOI Access Proposal discusses FinCEN's consideration of a broader interpretation of this phrase, and provides examples of other regulatory frameworks/requirements that could be applicable, including FinCEN's Customer Identification Program (CIP) regulations and State, local and Tribal customer due diligence requirements substantially similar to FinCEN's CDD regulations.

However, FinCEN ultimately resolves this issue by taking the narrow approach that this requirement should be interpreted to mean FinCEN's customer due diligence regulations set forth

[15] CTA, *supra* 9, § 6402 (Sense of Congress).
[16] *Id.*
[17] 31 U.S.C. § 5336(c)(2)(B)(iii).
[18] BOI Access Proposal at 77410.

at 31 CFR 1010.230.[19] While FinCEN cites the stated Sense of Congress in the CTA, which provides that access to BOI data is to be used for "…compliance with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law",[20] the BOI Access Proposal interprets the separation between references to customer due diligence (CDD) requirements and anti-money laundering/countering financing of terrorism in the provision as evidence that Congress intended the term customer due diligence requirements to be different and not include requirements covered under anti-money laundering/countering financing of terrorism rules and regulations.[21]

FinCEN states that "the CTA identifies '[CDD] requirements under applicable law' as distinct from broader AML/CFT requirements suggests that Congress intended that phrase not to include other AML/CFT obligations."[22] It is unclear how FinCEN arrived at this conclusion. As previously referenced, in the CDD Final Rule, FinCEN stated:

> FinCEN believes that there are four core elements of customer due diligence (CDD), and that they should be explicit requirements in the anti-money laundering (AML) program for all covered financial institutions, in order to ensure clarity and consistency across sectors: (1) Customer identification and verification, (2) beneficial ownership identification and verification, (3) understanding the nature and purpose of customer relationships to develop a customer risk profile, and (4) ongoing monitoring for reporting suspicious transactions and, on a risk-basis, maintaining and updating customer information.[23]

In order for FinCEN to interpret Congress's intentions so narrowly, FinCEN is ignoring the plain meaning of the text of the CTA which clearly states its purpose is to facilitate compliance with a series of BSA/AML requirements separated by commas: "with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law." FinCEN also must assume that Congress did not rely on FinCEN's own guidance about what CDD means. This is simply not supportable, and it will result in the frustration of Congress's intentions for the act.

FinCEN's Approach Would Negate the Purposes of the CTA and Congressional Intentions in Practice

FinCEN's approach also contradicts the overall approach of the BSA/AML framework. FinCEN's expectations to obtain BOI information has never been a discrete box to be checked. FinCEN has established a complex, risk-based framework that charges financial institutions with performing a substantial amount of information verifications, monitoring, and reporting requirements under which they must exercise a significant level of contextual analysis and discretion. The purpose of the CDD Rule was to provide financial institutions and law enforcement agencies with additional context regarding the beneficial interests involved with legal entities to improve financial

[19] *Id.* at 77415.
[20] CTA, *supra* 9, § 6403(d)(1)(B).
[21] BOI Access Proposal at FN 111.
[22] BOI Access Proposal at FN 111.
[23] CDD Final Rule at 29397.

institutions' ability to assess risk and report suspicious activity.[24] By defining the use of information so narrowly, FinCEN essentially prohibits financial institutions from considering the information as context, directly contradicting its own guidance and expectations for financial institutions.

If the BOI that financial institutions obtain from the database cannot be used in developing a customer risk profile, performing ongoing monitoring for reporting suspicious transactions, or maintaining and updating customer information, financial institutions will have not option except to obtain BOI from a separate source without the legal limitations on its use that FinCEN has proposed.

At that point, the database itself is entirely duplicative. Assuming use of the database is not mandatory to meet the beneficial ownership identification and verification requirements, why would they access it at all. If legal entity customers must continue to provide BOI to each financial institution to aid in the financial institution's customer risk profile and transaction monitoring, the database only provides burden to these entities. FinCEN rationalizes its decision to take a narrow interpretation by stating "[t]he bureau believes a more tailored approach will be easier to administer, reduce uncertainty about what [financial institutions] may access BOI under this provision, and better protect the security and confidentiality of sensitive BOI by limiting the circumstances under which [financial institutions] may access BOI".[25]

Ultimately, FinCEN's adoption of this narrow approach negates Congress's intentions to facilitate compliance of financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law. It also negates the instruction from Congress to minimize burdens on reporting companies. FinCEN's explanation that this would be cheaper, easier to understand, and less risky is wholly unconvincing in the face of this reality.

At an absolute minimum, in order to meet the intentions of Congress, accomplish the goals of the CTA, and avoid frustrating its own purposes, FinCEN must generally permit financial institutions to use BOI information for activities related to BSA/AML compliance. Anything short of that represents a failure to meaningfully implement the CTA and a waste of taxpayer dollars. If FinCEN needs additional funding or time in order to accomplish this goal, CUNA supports FinCEN obtaining that necessary support from Congress.

Use of BOI and Consent

Financial institution access to beneficial ownership information should be as simple and streamlined as possible. CUNA concurs with FinCEN that financial institutions are best situated to obtain and document reporting companies' consent and to track the revocation of consent.[26] CUNA also agrees that examinations conducted by the Federal functional regulators are a sufficient incentive to appropriately obtain and retain evidence of consent.[27]

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[24] *Id.*
[25] BOI Access Proposal at 77415.
[26] *See* BOI Access Proposal at 77415 and 77422.
[27] *Id*. at 77442.

These same policy considerations also inform the solution with regard to the use of BOI. When a reporting company seeks to open an account with a financial institution, it should have the option to provide that financial institution with consent to obtain the beneficial ownership information directly from FinCEN, and to define the scope of use of the information within the boundaries permitted by the law and regulation. Reporting companies should be permitted to further define the scope of the information at their option. For example, a reporting company might agree for the information to be used to determine field of membership qualification at a credit union. This consent should be voluntary, defined in scope, and able to be withdrawn from the financial institution at any time.

The Federal functional regulators are just as able to determine that a financial institutions have sufficient policies and controls to ensure information is used in accordance with the consent of the reporting company as they do to determine that consent was obtained and documented. Examinations regarding these controls are already regularly performed with regard to compliance with the *Fair Credit Reporting Act*[28] and use of consumer credit reporting information in line with statutory and regulatory permissible purposes, including purposes to which the consumer consents.

Updated Information

In its Reporting Final Rule establishing requirements for reporting companies, FinCEN established a 30 calendar day timeframe to file updated reports when there was a change to a company's BOI.[29] FinCEN stated in the Reporting Final Rule that "FinCEN considers that keeping the database current and accurate is essential to keeping it highly useful."[30] In the Reporting Proposal, it also stated that "FinCEN also believes that a 30-calendar-day deadline is necessary to limit the possible abuse of shelf companies—i.e., entities formed as generic corporations without assets and then effectively assigned to new owners."[31]

Despite these strong policy arguments for requiring timely notification of the updated information to FinCEN, it is notable that FinCEN does not address in any way how the updates to BOI information will reach financial institutions. Indeed, FinCEN ties its estimate of the maximum amount of requests on the database to account openings, indicating that FinCEN believes that financial institutions will only access the database at account opening. It is true that there is no categorical requirement that financial institutions update customer information on a regular schedule. However, financial institutions are required to update BOI information when it becomes aware of a potential change as a result of its ongoing monitoring that may alter the risk posed by the consumer.[32] Further, financial institutions may make a risk-based decision to review BOI on a periodic basis.[33]

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[28] 12 U.S.C. §§ 1681, *et seq*.
[29] Beneficial Ownership Information Reporting Requirements (Reporting Final Rule), 87 Fed. Reg. 59498, 59512 (Sept. 30, 2022).
[30] Reporting Final Rule at 59512.
[31] BOI Reporting Proposal at 69943.
[32] FIN-2020-G002, Frequently Asked Questions Regarding Customer Due Diligence (CDD) Requirements for Covered Financial Institutions, III.Q3. (Aug. 3, 2020).
[33] *Id.*

This is especially critical for those reporting companies that require federal or stated licenses, such as Money Service Business or Marijuana Related Businesses. A change in ownership may be a triggering event requiring a new risk assessment and increased monitoring. For example, at account opening and initial review a reporting business may be assessed as low risk; however, if a new beneficial owner lives in a high risk geographic area and runs another company involved with the sale of cannabis products, the financial institution may assess the reporting company as a higher risk for AML activities and as such, would need to be monitored more often.

Financial institutions share FinCEN's concern about having current and accurate information on file and is surprised at FinCEN's willingness to accept that financial institution BOI data will likely remain stagnant. Having current and accurate BOI improves financial institutions understanding of the BSA/AML risk posed by reporting companies, enriches the context in which the reporting company's transaction activity occurs, and ensures the accuracy of the financial institution's risk-assessments regarding its customer. FinCEN's concerns regarding abuse of shelf companies is also served when financial institutions have accurate and timely information in making suspicious activity determinations and providing helpful narrative information in SARs.

When a financial institution pulls information from the database in connection with an account opening, that inquiry is a notification to FinCEN that the financial institution has an ongoing relationship with the reporting company. The database should save that inquiry history and when there has been a notification of change in beneficial ownership statuses pulled from the database, that update should automatically be reported to financial institutions.[34] Ideally, once a record is queried and pulled, financial institutions should be permitted to opt in to automatic updates through the portal.[35] If that type of interface is not possible, in the alternative, if a financial institution no longer wishes to receive updates on the reporting company, it should be able to affirmatively remove the inquiry from its list. Financial institutions should have an affirmative obligation to decline automatic updates in the event the reporting company's consent has been revoked or they have closed their account(s) with the financial institution.

Request and Disclosure of BOI Information

Regarding the process of requesting and obtaining BOI from the database, FinCEN provides little detail. It states that a financial institution will "submit to the system identifying information specific to that reporting company, and receive in return an electronic transcript with that entity's BOI."[36] It provides that trivial data-entry errors should not prevent receipt of information unless FinCEN is unable to determine the reporting company identified in the requires, resulting in risk of disclosing information about the wrong organization. [37] This leaves open many critical questions pertaining to the BOI disclosures. It is not clear whether the request and return will happen instantaneously through automation or whether requests will be manually reviewed. FinCEN makes mention of manual review of requests elsewhere in the proposal,[38] raising concerns that there could be a significant delay between the request and receipt of BOI information.

[34] *Id.*, Question 36(a).
[35] *Id.*, Question 36(b)-(c).
[36] BOI Access Proposal at 77410.
[37] *Id.*
[38] *Id.* at 77418.

Further, credit unions desire more information about the provision of the "electronic transcript" containing BOI information. Information should be provided in a format that is both easy to read, machine readable, and retainable for recordkeeping purposes. Information should be provided in a manner that easily lends itself to the creation of an application programming interface (API) that will allow third-party BSA/AML software to easily incorporate the appropriate names into the credit union's systems for performing OFAC checks, transactional monitoring, and other BSA/AML compliance activities.

Security and Confidentiality Requirements for Financial Institutions

CUNA strongly supports FinCEN's approach regarding security and confidentiality requirements for financial institutions and deeming the application of section 501 of *The Gramm-Leach-Bliley Act* (GLBA)[39] sufficient to satisfy its requirements. Stringent information security and privacy practices have long been part of credit unions' business practices and are necessary as financial institutions are entrusted with consumers' personal information. This responsibility is reflected in the strong information security and privacy regime that governs data practices for the financial services industry as set forth in the GLBA.

For financial institutions, the GLBA's protection requirements are strengthened by federal and state regulators' examinations for compliance with the GLBA's requirements and robust enforcement for violations. NCUA's regulatory expectations for credit unions to implement a security program in compliance with the GLBA can be found in Part 748 of NCUA's regulations.[40] several of these significant regulatory requirements and internal safeguards include:

- Federal Requirements to Protect Information: Title V of the GLBA and its implementing rules and regulations require credit unions to protect the security, integrity, and confidentiality of consumer information.
- Federal Requirements to Notify Consumers: Credit unions are required to notify their members whenever there is a data breach where the misuse of member information has occurred or where it is reasonably likely that misuse will occur.
- Strong Federal Oversight and Examination: Under their broad-based statutory supervisory and examination authority, the National Credit Union Administration and the Consumer Financial Protection Bureau regularly examine credit unions for compliance with data protection, privacy, and notice requirements.
- Strong Federal Sanction Authority: Under numerous provisions of federal law, credit unions are subject to substantial sanctions and monetary penalties for failure to comply with statutory and regulatory requirements.

This extensive legal, regulatory examination and enforcement framework ensures that credit unions robustly protect consumers' personal financial information and makes clear that credit unions, and the broader financial services industry, should be exempt from this FTC rulemaking. Financial institutions comply with a rigorous, comprehensive data security and privacy framework

[39] 15 U.S.C. §§ 6801 *et seq*.
[40] 12 C.F.R. Part 784.

and, in fact, compliance is an element of fundamental safety and soundness for the overall banking system. Additionally, it must not be overlooked that the financial industry is the only sector subject to ongoing examination to ensure compliance with these security and privacy standards.

Financial institutions range in size from banks with over $2 trillion in assets to credit unions with less than $1 million in assets and not even a single full-time employee. Financial institutions of all sizes are subject to the same standards under the GLBA, as they do regarding obligations under the BSA. That includes strict regulatory oversight by federal and state regulators. Relying on the GLBA standards to ensure security and confidentiality of BOI information is the most efficient and effective standard, and FinCEN's approach is spot-on.

Conclusion

On behalf of America's credit unions and their more than 130 million members, thank you for your consideration. The BOI database represents a significant opportunity to improve the quality and timeliness of BOI information for law enforcement and financial institutions, but only if FinCEN designs the use of information in a manner that honors the spirit of the CTA and Congress's intentions. We urge FinCEN to reconsider its position in the proposal in line with the above. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 503-7184 or esullivan@cuna.coop.

Sincerely,

Elizabeth M. Sullivan
Senior Director of Advocacy & Counsel