



February 14, 2023

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
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Submitted electronically via
<https://www.regulations.gov>

RE: Docket Number FINCEN-2021-0005; RIN 1506-AB49/AB59; Proposed rulemaking concerning beneficial ownership information access and safeguards.

To whom it may concern:

The Dakota Credit Union Association (DakCU), which represents state and federally chartered credit unions in the states of North Dakota and South Dakota, appreciates the opportunity to provide comment to the Financial Crimes Enforcement Network (FinCEN) in response to its proposed rulemaking regarding access by authorized recipients to beneficial ownership information.

This rulemaking furthers the implementation of the Corporate Transparency Act (CTA), which was enacted into law as part of the Anti-Money Laundering Act of 2020 (AML Act). The CTA requires reporting companies to report beneficial ownership information (BOI) to FinCEN pursuant to 31 U.S.C. 5336(b). DakCU supports FinCEN's efforts and agrees that "access by authorized recipients to BOI reported under the CTA would significantly aid efforts to protect U.S. national security and safeguard the U.S. financial system from such illicit use." *87 FR 77404, December 16, 2022.*

Due to the sensitive information that BOI encompasses, DakCU appreciates FinCEN's task to balance the interests of information recipients, against the protections and restrictions mandated by the CTA. As summarized in the discussion of the proposed rulemaking, "the CTA authorizes FinCEN to disclose BOI to five categories of recipients." *87 FR 77408, December 16, 2022.* For purposes of DakCU's comments, our focus remains with one of the five categories, namely, "the third authorized recipient category is FIs using BOI to facilitate compliance with CDD requirements under applicable law, provided the FI requesting the BOI has the relevant reporting company's consent for such disclosure." *87 FR 77409, December 16, 2022.*

"The CTA authorizes FinCEN to disclose a reporting company's BOI to an FI only to the extent that such disclosure facilitates the FI's compliance with CDD requirements under applicable law, and only if the reporting company first consents." *87 FR 77410* FinCEN proposes to address the CTA parameters of BOI



disclosure to financial institutions at § 1010.955(b)(4)(i), which would provide, “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, FinCEN may disclose information reported pursuant to § 1010.380 to such financial institution, provided each reporting company that reported such information consents to such disclosure. For purposes of this section, customer due diligence requirements under applicable law are the beneficial ownership requirements for legal entity customers at § 1010.230, as those requirements may be amended or superseded.” 87 FR 77454

DakCU is concerned regarding the narrow scope of “customer due diligence” specifically, limiting “customer due diligence” only to § 1010.230 purposes. This ignores a core requirement of FinCEN’s 2016 CDD Rule. § 1010.230 addresses beneficial ownership requirements for legal entity customers, however, “customer due diligence” requirements are discussed at 31 CFR 1020.210(a)(2)(v), specifically – § 1020.210 “Anti-money laundering program requirements for banks. (a) Anti-money laundering program requirements for banks regulated by a Federal functional regulator, including banks, savings associations, and credit unions. A bank regulated by a Federal functional regulator shall be deemed to satisfy the requirements of 31 U.S.C. 5318(h)(1) if it implements and maintains an anti-money laundering program that:… (2) Includes, at a minimum: (v) Appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to: (A) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and (B) Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. For purposes of this paragraph, customer information shall include information regarding the beneficial owners of legal entity customers (as defined in § 1010.230 of this chapter).”

By limiting the request for BOI information only to compliance with § 1010.230, a credit union would not be able to access the BOI to comply with the requirements of 31 U.S.C. 5318(h)(1), more specifically, the “ongoing” requirement in “conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.” As noted above, “customer information” for purposes of 31 CFR 1020.210(a)(2)(v)(2) includes information regarding the beneficial owners of legal entity customers (as defined in § 1010.230). Financial institutions, such as credit unions, must be able to access the BOI of their legal entity members on an ongoing basis to comply with FinCEN regulations at 31 CFR 1020.210(a)(2)(v).

In response to the ongoing monitoring requirements under FinCEN’s regulations concerning customer due diligence, DakCU requests that the “consent” required from the legal entity, or “reporting company” be ongoing until revoked. Section 1010.955(b)(4) allows FinCEN to disclose BOI to a financial institution, “provided each reporting company that reported such information consents to such disclosure.” Credit unions must be able to obtain consent for as long as the legal entity member remains a member of the credit union – without need to renew consent or notify customers that the credit union accessed the



information. The importance of safeguarding private and confidential information is clear to credit unions, who have already established administrative, technical and physical safeguards to reasonably protect this information.

DakCU requests FinCEN clarify who from the reporting company can provide the consent in order for the credit union to request the reporting company's BOI. DakCU would recommend similar language to what is used for compliance with § 1010.230, namely, that a credit union may rely on the consent provided by the individual opening the account on behalf of the legal entity customer, provided that it has no knowledge of facts that would reasonably call into question the reliability of such consent.

Proposed section 1010.955(c)(1) restricts how the obtaining BOI can be used and who within the organization can have access to it. FinCEN proposes 1010.955(c)(1) to provide, "unless otherwise authorized by FinCEN, any person who receives information disclosed by FinCEN under paragraph (b) of this section shall use such information only for the particular purpose or activity for which such information was disclosed..." With regard to financial institutions, the proposed regulations goes on to state under proposed 1010.955(c)(2)(ii), "any director, officer, employee, contractor, or agent of a financial institution who receives information disclosed by FinCEN pursuant to a request under paragraph (b)(4)(i) of this section may disclose such information to another director, officer, employee, contractor, or agent within the United States of the same financial institution for the particular purpose or activity for which such information was requested, consistent with the requirements of paragraph (d)(2) of this section."

While DakCU understands the purpose of setting parameters for which the obtained BOI can be used, as currently proposed, DakCU is concerned it will create compliance issues with other areas of the Bank Secrecy Act unless FinCEN takes steps to further modify other regulatory requirements and guidance that intersects with beneficial ownership of legal entities requirements. The FFIEC BSA/AML Examination Manual provides, "similar to other customer information that a bank may gather, beneficial ownership information collected under the rule may be relevant to other regulatory requirements. These other regulatory requirements include, but are not limited to, identifying suspicious activity, and determining Office of Foreign Assets Control (OFAC) sanctioned parties. Banks should define in their policies, procedures, and processes how beneficial ownership information will be used to meet other regulatory requirements." *FFIEC BSA/AML Examination Manual, Beneficial Ownership Requirements for Legal Entity Customers – Overview 5/5/2018, page 1.*

Proposed section 1010.955(c)(2)(iii) directs who a financial institution may share the obtained BOI with. The proposed rule limits disclosure to, "any director, officer, employee, contractor, or agent of a financial institution that receives information disclosed by FinCEN pursuant to paragraph (b)(4)(i) of this section may disclose such information to the financial institution's Federal functional regulator, a self-regulatory



organization that is registered with or designated by a Federal functional regulator pursuant to Federal statute, or other appropriate regulatory agency, provided that the Federal functional regulator, self-regulatory organization, or other appropriate regulatory agency meets the requirements identified in paragraphs (b)(4)(ii)(A) through (C) of this section. A financial institution may rely on a Federal functional regulator, self-regulatory organization, or other appropriate regulatory agency's representation that it meets the requirements." 87 FR 77455, December 16, 2022.

The proposed rule does not appear to contemplate and therefore allow disclosure of BOI obtained from FinCEN in suspicious activity reports (SARs) as required 31 CFR 1020.320 or in potential reports to the Office of Foreign Assets Control. If it is FinCEN's direction that the narrative section of a SAR be as thorough and complete as possible, then it appears deference needs to be given to the other regulations credit unions are currently subject to. "A thorough and complete narrative may make the difference in determining whether the described conduct and its possible criminal nature are clearly understood by law enforcement. Because the SAR narrative section is the only area summarizing suspicious activity, the section, as stated on the SAR, is "critical." Thus, a failure to adequately describe the factors making a transaction or activity suspicious undermines the purpose of the SAR." FFIEC BSA/AML Examination manual, Suspicious Activity Reporting – Overview, 2/27/2015.V2, page 71

DakCU urges FinCEN to ensure credit unions, and other financial institutions, have sufficient access to BOI and are allowed to use this information to meet their compliance obligations under existing rules and regulations.

Thank you for this opportunity to share our comments and concerns.

Respectfully,

A handwritten signature in black ink, appearing to read "Jeffrey Olson".

Jeffrey Olson
CEO/President

A handwritten signature in black ink, appearing to read "Amy Kleinschmit".

Amy Kleinschmit
Chief Compliance Officer