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U.S. Department of the Treasury
P.O. Box 39
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Submitted electronically via http://www.regulations.gov

RE: **Proposed Rule on 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:

This letter responds to the request for comment by the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury (Treasury) on the proposed rule to manage access to the beneficial ownership information (BOI) in the registry[1] established by the Corporate Transparency Act (CTA).[2] This proposed rule is the second of three rules intended to implement the CTA.[3]

During my tenure on the U.S. Senate Permanent Subcommittee on Investigations from 1999 to 2014, including over a decade as staff director and chief counsel for Senator Carl Levin, I gained expertise on a wide variety of anti-money laundering and anti-corruption issues, including issues related to beneficial ownership. The Subcommittee's investigations, hearings, and reports frequently dealt with shell companies, trusts, and other entities with hidden owners.[4] In response, Senator Levin became the first member of Congress to introduce a bill to require greater beneficial ownership transparency.[5] I assisted in the development of that bill as well as subsequent legislation to increase beneficial ownership transparency, culminating in enactment of the CTA.

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[1] "Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities," FinCEN, Notice of Proposed Rulemaking, 87 FR 77404 (12/16/2022)(hereinafter "Proposed Rule").
[2] The CTA was enacted into law as Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, P.L. 116-283 (1/1/2021), and is codified at 31 U.S.C. § 5336 et seq.
[3] The first rule, now finalized, is entitled, "Beneficial Ownership Information Reporting Requirements," FinCEN, Final Rule, 87 FR 59498 (9/30/2022)(hereinafter "Final BOI Reporting Rule").
[4] See, e.g., U.S. Senate Permanent Subcommittee on Investigations, "U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History," S.Hrg. 112-597 (7/17/2012); "Keeping Foreign Corruption Out of the United States," S.Hrg. 111-540 (2/4/2010); "Tax Haven Abuses: The Enablers, The Tools and Secrecy," S.Hrg. 109-797 (8/1/2006); Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act," S.Hrg. 108-633 (7/15/2004); "Role of U.S. Correspondent Banking in International Money Laundering," S.Hrg. 107-84 (3/1-2, 6/2001); and "Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities," S.Hrg. 106-428 (11/9-10/1999).
[5] Incorporation Transparency and Law Enforcement Assistance Act, S. 2956, 110th Congr. (5/1/2008)(introduced by Sen. Levin and cosponsored by Sen. Norm Coleman (R-MN) and Sen. Barack Obama (D-IL)).

The Proposed Rule contains many important provisions that would strengthen the ability of U.S. law enforcement, national security, and intelligence agencies to identify the individuals behind entities engaged in illicit finance and other misconduct affecting the United States. At the same time, the Proposed Rule contains problematic provisions that are out of alignment with the law and need to be clarified or amended. It also fails to provide guidance on key issues needed to ensure effective implementation of the law.

Among the Proposed Rule's positive features to ensure the accuracy, completeness, and usefulness of the beneficial ownership database are provisions which:

(1) **Covered Activities:** employ workable, easy to understand, flexible definitions of national security, intelligence, and law enforcement activities, encompassing both civil and criminal law enforcement activities;

(2) **Direct Access:** allow federal, state, local, and tribal agencies direct access to the registry to make iterative requests for BOI on the same topic, eliminating the need for duplicative requests and procedures that would waste time and resources;

(3) **Court of Competent Jurisdiction:** provide a broad, workable definition of the term "court of competent jurisdiction" enabling a wide range of courts to authorize registry requests by state, local, and tribal law enforcement agencies, avoid over-burdening any specific court, and avoid judicial bottlenecks that could impede law enforcement;

(4) **Foreign Access:** create a generally workable set of rules for foreign countries seeking access to registry data, requiring only minor finetuning, and helpfully clarifies that FinCEN will facilitate data requests by non-U.S. financial intelligence units;

(5) **FinCEN Identifiers for Entities:** employ a reasonable and difficult-to-manipulate statutory interpretation that allows reporting companies to use FinCEN identifiers for intermediary entities only when the reporting company and the intermediary entity have exactly the same beneficial owners;

(6) **Refusing Requests:** clarify that FinCEN, in its sole discretion, may refuse any database request that appears unlawful; and

(7) **Suspension and Debarment:** clarify that FinCEN, in its sole discretion, may temporarily suspend or permanently debar any type of registry user to prevent misuse of the database.

Despite its many positive features, the Proposed Rule also contains a number of flawed provisions that need to be amended or clarified and fails to provide guidance needed to clarify several key issues in order to bring the rule into full alignment with the law. To fully comply with the CTA, the final rule should:

(1) **Data Sensitivity, Security, and Privacy:** delete language in the proposed preamble characterizing BOI as "highly sensitive" information and claiming the CTA instructs

FinCEN to implement "privacy protections," since both directly contradict the statute; and clarify that agency audit systems and annual reports should track not only data security and confidentiality, but also data accuracy, completeness, and usefulness;

(2) **State, Local, and Tribal Agency Access:** delete overly burdensome requirements on state, local, and tribal law enforcement agencies requiring them to submit copies of court "orders" and undergo a double approval process by both courts and FinCEN to access BOI in the registry; and supply additional guidance on issues that, if left unclarified, will impede implementation of the CTA;

(3) **Financial Institution Access:** delete overly burdensome restrictions on financial institution (FI) access to the registry and clarify instead that FIs — with customer consent — may access all registry information associated with each beneficial owner named by the customer, and may access BOI to facilitate compliance with all – not just one subset – of the customer due diligence requirements imposed by law;

(4) **Regulatory Agency Access:** delete an overly burdensome restriction on regulatory agency access to the registry and clarify instead that regulatory agencies may access the registry to evaluate a regulated financial institution's compliance with all customer due diligence requirements over which that agency has regulatory authority;

(5) **GAO Access:** clarify that the Government Accountability Office (GAO) will have direct access to registry data to conduct the GAO audits mandated by the CTA;

(6) **Validation Access:** to ensure the accuracy, completeness, and usefulness of the registry, clarify that FinCEN will arrange for all forms intended to be filed with the registry to be computer matched against other records systems to validate the incoming information before it is added to the registry, and bar any filing containing mismatched data;

(7) **Re-disclosure:** revise a key re-disclosure provision to allow authorized registry users – without prior FinCEN permission – to disclose registry information to a U.S. national security, intelligence, law enforcement, or regulatory agency when the disclosure would be in the public interest and help combat illicit finance, and apply a similar standard to certain other requests by registry users to re-disclose registry information;

(8) **Missing Access Guidance:** add guidance to resolve key access issues not now addressed in the Proposed Rule by clarifying that: (a) all authorized registry users will have direct, immediate access to the identifying information associated with every FinCEN identifier; (b) authorized registry users may access the full range of registry records related to a reporting company, including filings initiated or authorized by FinCEN; (c) registry users may make copies of registry records they are authorized to access; and (d) the Treasury Inspector General will have direct access to the registry to analyze the validity of comments and complaints made in connection with the User Complaint Process and, if appropriate, to tag and correct inaccurate BOI in the registry;

(9) **Authentication:** enable federal, state, local, and tribal agencies as well as FinCEN to authenticate documents obtained from the registry for use in legal proceedings and avoid creating a procedural bottleneck that will impede national security, intelligence, and law enforcement activities at home and abroad; and

(10) **Requests to Suspend Entity Charter:** add a new provision clarifying that FinCEN has the authority and will establish electronic procedures to ask a state or tribal agency to suspend the charter of an entity suspected of failing to file required information with the registry or filing incomplete, false, or fraudulent data with the registry, until FinCEN concerns are resolved.

An Accurate, Complete, and Highly Useful Database

The Proposed Rule's shortcomings arise, in part, from its failure to place sufficient focus on Treasury's statutory obligation to create a database that is accurate, complete, and highly useful, three explicit objectives of the CTA.[6] Instead, the Proposed Rule at times seems to elevate creating a secure database over the CTA's other, equally important objectives, an imbalance that can be corrected in the final rule.

For example, in one place the Proposed Rule states that the CTA deems beneficial ownership information (BOI) to be "sensitive information"[7] but then a few pages later recharacterizes BOI as "highly sensitive information," even though the law never uses that phrase.[8] The Proposed Rule also refers to "the confidentiality and privacy protections the CTA

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[6] The CTA repeatedly directs the Treasury Secretary to take steps to ensure the beneficial ownership database and the information in it are accurate, complete and highly useful. See CTA § 6402(8)(C) (requiring Treasury, "in prescribing regulations to provide for the reporting of beneficial ownership information," to "collect information in a form and manner that is reasonably designed to generate a database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators"); 31 U.S.C. § 5336(b)(1)(F) (requiring Treasury, in "promulgating the regulations required" for submitting BOI reports to FinCEN, to "collect information … in a form and manner that ensures the information is highly useful in—(I) facilitating important national security, intelligence, and law enforcement activities; and (II) confirming beneficial ownership information provided to financial institutions 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"); 31 U.S.C. § 5336(b)(4)(B)(ii) (requiring Treasury, when implementing "procedures and standards governing any report" to FinCEN or related to FinCEN identifiers to "ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful"); 31 U.S.C. § 5336(d)(2)(requiring "Federal, State, and Tribal agencies ... to ... cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information"); 31 U.S.C. § 5336(h)(4)(requiring the Treasury Inspector General, in coordination with the Treasury Secretary, to collect complaints "regarding the accuracy, completeness, or timeliness" of the registry's BOI and provide Congress with a report containing recommendations "to ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful"). The importance of the statutory directive to create an accurate, complete, and highly useful database is magnified by its repetition in the law.

[7] See Proposed Rule at 77406, citing CTA § 6402(6) which states that it is the "sense of the Congress " that BOI is "sensitive information." The actual amendments made by the CTA to the U.S. Code do not, however, repeat that characterization, although 31 U.S.C. § 5336(h)(5) requires the Treasury IG to investigate any cybersecurity breach that discloses "sensitive" BOI.

[8] See Proposed Rule at 77408. Describing BOI as "highly sensitive information" is not supported by the statute and so should be deleted from the final rule.

instructs FinCEN to implement"[9] even though the CTA never identifies "privacy" as a statutory objective, nowhere instructs FinCEN to implement "privacy protections," and, in fact, does not even contain the word "privacy." While the CTA does direct FinCEN to build a secure database, ensuring data security is not equivalent to implementing privacy protections for individuals or entities, especially in light of the CTA's overriding purpose of compelling reporting companies to disclose their beneficial owners to an array of government agencies and financial institutions.

At another point, the Proposed Rule requires domestic agencies using the registry to establish systems that will enable both the agency and FinCEN to audit their actions.[10] The Proposed Rule states that the systems should track individual data requests to enable the agency and FinCEN to evaluate access and security issues, but fails to require that the systems also track data related to evaluating the accuracy, completeness, and usefulness of the registry. Similarly, the Proposed Rule requires agencies to provide annual reports to FinCEN discussing procedural issues related to data security and confidentiality, while failing to require those reports also to discuss procedural issues related to the registry's accuracy, completeness, and usefulness.[11]

At still another point, the Proposed Rule states that "FinCEN views safeguarding BOI to be a top priority"[12] without any acknowledgement of the law's equally important objective of creating an accurate, complete, and highly useful database. At its core (and as signified by its name), the Corporate Transparency Act seeks to increase corporate ownership transparency. For that reason, the final rule needs to treat transparency and security as equally important priorities when implementing the CTA. To correct the Proposed Rule's current over-emphasis on security, the final rule should delete or amend the provisions identified above and insert additional references to FinCEN's statutory obligation to create an accurate, complete, and highly useful registry.

Provisions Facilitating the CTA's Successful Implementation

As indicated above, the Proposed Rule contains important provisions that faithfully implement the CTA, would help create an accurate, complete, and highly useful database, and should be retained in the final rule. This comment letter does not attempt to address all of the Proposed Rule's positive features, but highlights instead key provisions critical to the successful implementation of the CTA.

(1) Covered Activities [Questions 2, 3, 5 & 6]

The Proposed Rule includes several key definitions that faithfully adhere to the CTA and will help ensure the law's efficient and effective implementation. Most importantly, the Proposed Rule provides workable definitions of "national security, intelligence, and law enforcement activities" that will support effective CTA implementation, but would also benefit from minor finetuning as suggested below. The Proposed Rule correctly observes that, under the CTA, "Federal agency access is to be based upon the type of activity an agency is conducting

[9] Proposed Rule at 77425.
[10] Proposed Rule § 1010.955(d)(1)(E) and (G) at 77456.
[11] Proposed Rule § 1010.955(d)(1)(I) at 77456.
[12] Proposed Rule at 77419.

rather than the identity of the agency or how it might be categorized."[13] Effective definitions of those covered activities is, thus, central to an effective CTA.

National Security Activities. The Proposed Rule defines "national security activities" as including "activity pertaining to the national defense or foreign relations of the United States, as well as activity to protect against threats to the safety and security of the United States."[14] On its face, the definition offers a common sense, easy to understand interpretation of the phrase. The proposed preamble explains that the definition is modeled after 8 U.S.C. 1189(d)(2) to help ensure implementation of the CTA is consistent with national security operations across the federal government. While the proposed approach is practical, understandable, and flexible, the final rule would also benefit from explicitly referencing in the preamble the Biden Administration's 2021 Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest. That White House Memorandum specifically calls for developing a national strategy to combat "illicit finance" and "robustly implementing Federal law requiring United States companies to report their beneficial owner or owners to the Department of the Treasury."[15] Since the 2021 Memorandum focuses in particular on national security activities related to illicit finance and the beneficial ownership registry, the preamble in the final rule should take note of this Biden Administration initiative when defining covered national security activities under the CTA.

Intelligence Activities. The Proposed Rule defines "intelligence activities" using concepts and wording from Executive Order 12333 on United States Intelligence Activities,[16] again to ensure CTA implementation is consistent with intelligence operations across the federal government. The proposed section states that the term "includes all activities conducted by elements of the United States Intelligence Community that are authorized pursuant to Executive Order 12333, as amended, or any succeeding executive order."[17] That approach is both sensible and workable, but it should also be brought up to date by referencing the 2021 U.S. Strategy on Countering Corruption issued by the Biden Administration. That Strategy is designed to advance the Biden Administration's anti-corruption national security initiative described above, and it explicitly calls for "[f]inalizing effective beneficial ownership regulations," "[i]ncreasing intelligence prioritization, collection and analysis on corruption, corrupt actors, and their networks," and "bolstering information sharing between the Intelligence Community and law enforcement."[18] After citing Executive Order 12333, the final rule should add a reference to the Biden Administration's new intelligence activity directives which are highly relevant to and should inform implementation of the CTA.

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[13] Proposed Rule at 77412.
[14] Proposed Rule § 1010.955(b)(1)(i) at 77454.
[15] Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, White House (6/3/2021), Section 2(b), 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/.
[16] Executive Order 12333 on United States Intelligence Activities, as amended, White House, https://dpcld.defense.gov/Portals/49/Documents/Civil/eo-12333-2008.pdf.
[17] Proposed Rule § 1010.955(b)(1)(ii) at 77454.
[18] U.S. Strategy on Countering Corruption Pursuant to the National Security Study Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, White House (12/2021), at 10-11, https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

Law Enforcement Activities. The Proposed Rule defines "law enforcement activities" to "include 'investigative and enforcement activities relating to civil or criminal violations of law.'"[19] This definition is easy to understand, workable, and flexible, encompassing the wide variety of civil and criminal activities undertaken by agencies charged with enforcing the law. Its broad reach is important, because the phrase "law enforcement" modifies not only U.S. federal, state, local, and tribal agencies, but also foreign agencies authorized to access the registry under certain conditions. By covering both investigative and enforcement activities, the definition will help ensure that agencies can access BOI in the registry at all stages of the law enforcement process.

The Proposed Rule's definition of law enforcement activities excludes "routine supervision and examination of financial institutions by federal regulators." That exclusion makes sense, since another part of the CTA already applies to federal financial regulators. In most cases, federal financial regulators can already use their supervisory and examination authority to obtain BOI when relevant to understanding how a regulated financial institution is meeting its anti-money laundering, anti-fraud, and other obligations. Moreover, the Proposed Rule correctly recognizes that, in addition to routine regulatory responsibilities, federal financial regulators often engage in law enforcement activities that will enable them to request BOI from the registry in connection with those activities.[20]

Civil and Criminal Law Enforcement. The Proposed Rule correctly encompasses both civil and criminal investigative and enforcement activities, thereby ensuring agency access to BOI when pursuing, for example, civil enforcement of securities, commodities, and tax laws, civil trade violations, civil prohibitions against unfair or deceptive practices, civil monetary penalties, civil forfeiture laws, and other civil law enforcement activities. As the Proposed Rule observes, the CTA explicitly empowers state, local, and tribal enforcement agencies to obtain BOI in both criminal and civil investigations,[21] making it logical to provide the same degree of access to their counterparts in federal law enforcement. Also instructive is the statement made on the Senate floor by Sen. Sherrod Brown, one of the chief architects of the CTA, just prior to Senate passage of the CTA:

> "FinCEN should allow federal, state, local, and tribal law enforcement to access the beneficial ownership data for both criminal and civil purposes, including law enforcement activities designed to combat terrorism, money laundering, trafficking, corruption, evasion of sanctions, noncompliance with tax law, fraud, counterfeit goods, market manipulation, insider trading, consumer abuse, cybercrime, election interference, and other types of criminal and civil wrongdoing."[22]

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[19] Proposed 31 CFR 1010.955(b)(1)(iii) at 77454.
[20] Proposed Rule at 77412.
[21] 31 U.S.C. § 5336(c)(2)(B)(i)(II).
[22] Sen. Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (12/9/2020), at S7312, https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf.

Denying BOI for federal civil law enforcement efforts would not only be out of alignment with the purpose, structure, and legislative history of the CTA, it would also hobble federal agencies seeking to carry out a significant aspect of their law enforcement duties.

The Proposed Rule states that, instead of using broad descriptions to define the three types of activities covered by the CTA, it considered trying to devise a long list of specific national security, intelligence, and law enforcement activities warranting BOI access.[23] FinCEN recognized, however, not only the difficulty of that approach – how it might lead to an over- or under-inclusive list that would fall continually out of date – but also that a specific list of activities would be hard pressed to encompass all the national interests served by greater corporate transparency, including U.S. national security, interstate and foreign commerce, tax compliance, and a reduction in illicit conduct.

Treasury Activities. Finally, the Proposed Rule states that the CTA provides BOI access to all Treasury officers and employees who require access to that information to perform their "official duties," including tax administration.[24] The Proposed Rule makes clear that Treasury officers and employees enjoy essentially unfettered access to registry data when needed to carry out their official responsibilities, and do not need to specify the particular national security, intelligence, or law enforcement activities being pursued, an interpretation of the law in full alignment with the CTA. At the same time, the final rule would benefit from clarifying the "official duties" that justify registry access by Treasury personnel, such as by listing Treasury efforts to combat money laundering and terrorist financing, enforce the Bank Secrecy Act and U.S. sanctions laws, oversee nationally-chartered banks, register money service businesses, manage U.S. relationships with foreign financial regulators and financial institutions, work with states and tribes to implement the CTA, perform audits mandated by the CTA, and manage the new User Complaint Process to be administered by the Treasury Inspector General. Clarifying the official Treasury duties justifying registry access will provide fair notice to reporting companies, registry users, and the public, and perhaps reduce questions and litigation over Treasury access issues.

The proposed definitions of national security, intelligence, law enforcement, and Treasury activities are critical to ensuring the efficient and effective implementation of the CTA and should be retained in the final rule. The final rule should also consider adding the clarifying language indicated above to finetune the scope of the proposed definitions.

(2) Direct Access [Questions 2 & 3]

The Proposed Rule states that federal agencies engaged in national security, intelligence, or law enforcement activities, Treasury officers and employees whose official duties require BOI access, and state, local, and tribal law enforcement agencies that meet specified procedural requirements will have direct access to registry data. The Proposed Rule states that they will be able to "query the database directly and iteratively," "run queries using multiple search fields," and review the results "immediately."[25] Providing that type of direct access to the registry is

[23] Proposed Rule at 77413.
[24] Proposed Rule § 1010.955(b)(5) at 77454, and the preamble at 77409, citing 31 U.S.C. § 5336(c)(5).
[25] Proposed Rule at 77409.

critical to creating a database that is highly useful to registry users, and it should be retained in the final rule.

The Proposed Rule also makes clear that covered agencies may make multiple registry queries related to the same matter.[26] For example, if a federal or state investigator were examining a financial fraud involving multiple companies and individuals, that investigator would be able to obtain a single court authorization naming the financial fraud inquiry and then use that authorization to access the registry on multiple occasions to search for BOI related to multiple entities and individuals of interest in connection with that fraud. Agencies would not have to file repetitive BOI requests for information related to the same inquiry, avoiding burdensome and unnecessary red tape that would consume both time and resources.[27] The Proposed Rule also makes clear that this approach could be used not only by specific law enforcement agencies, but also by task forces combining law enforcement agencies from multiple levels or jurisdictions.[28] The final rule could be further clarified by providing examples illustrating for both the courts and law enforcement agencies how to design an authorization to support registry access on multiple occasions to conduct searches related to a single topic.

To address concerns about federal, state, local, or tribal agencies abusing their direct access privileges, the CTA already mandates seven years' of audits by GAO to search for instances of unauthorized access or unauthorized use or disclosure of registry data.[29] The CTA also requires Treasury to audit and report on agency data requests and use of registry data.[30] In addition, the CTA and the Proposed Rule authorize both civil and criminal penalties to deter and punish "unauthorized disclosure or use violations" and empower FinCEN to suspend or debar any agency that violates its access privileges.[31] Together, those audit, penalty, and suspension and debarment authorities create an interconnected oversight process that can safeguard the registry against agency abuse.

(3) Court of Competent Jurisdiction [Question 7]

Although the Proposed Rule imposes overly burdensome procedural requirements on state, local, and tribal law enforcement agencies seeking BOI from the registry as explained below, the Proposed Rule does a good job of defining the term "court of competent jurisdiction." The CTA requires state, local, and tribal law enforcement agencies to obtain authorization from a court of competent jurisdiction before accessing BOI in the registry.[32] The Proposed Rule

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[26] Proposed Rule at 77409.
[27] In the words of Sen. Brown, one of the chief architects of the CTA speaking on the Senate floor just prior to Senate approval of the CTA: "[F]ederal agency heads or their designees … can provide access to the database to appropriate law enforcement authorities once per investigation, so they do not need to keep repeating that authorization for the same investigation." Sen. Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (12/9/2020) at S7312, https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf.
[28] Proposed Rule at 77413.
[29] 31 U.S.C. § 5336(c)(10).
[30] 31 U.S.C. §§ 5336(c)(3)(J) and (c)(9).
[31] 31 U.S.C. §§ 5336(c)(7) and (h)(3)(B).
[32] 31 U.S.C. § 5336(c)(2)(B)(i)(II).

defines the key term as "any court with jurisdiction over the investigation for which a State, local, or Tribal law enforcement agency requests information."[33]

The proposed definition is practical, understandable, and flexible, encompassing a wide array of courts across the country, including federal, regional, state, county, municipal, special, tribal, and territorial courts.[34] By using a definition that distributes the authorization burden among multiple judicial venues nationwide, the Proposed Rule helps to avoid creating judicial bottlenecks that could impede national security, intelligence, and law enforcement activities. The proposed definition will instead empower a judicial network of courts that will make it easier and quicker for state, local, and tribal law enforcement agencies to obtain the authorizations needed to access the registry. Empowering courts with jurisdiction over the particular investigations at issue may also help ensure that those courts are familiar with the prosecutors and other law enforcement personnel submitting the BOI requests and will be better able to identify and halt any improper requests.

(4) Foreign Access [Questions 2, 3, 9 & 10]

The Proposed Rule includes an important set of provisions setting out the circumstances in which foreign countries may obtain information from the registry to advance a foreign national security, intelligence, or law enforcement activity.[35] The provisions closely adhere to the CTA and will help ensure the registry responds efficiently and effectively to requests made by our foreign partners.

Intermediary Federal Agencies. The Proposed Rule faithfully implements the CTA by allowing foreign countries to submit registry information requests to a U.S. federal agency which can then directly obtain the information from the registry and transmit it to the foreign requester. The Proposed Rule states that "FinCEN intends to work with Federal agencies to identify agencies that are well positioned to serve as intermediaries between FinCEN and foreign requesters."[36] It describes FinCEN's expectations for those agencies, which include regular engagement and familiarity with the foreign country, a history of representing the United States in connection with the relevant treaties, agreements, and conventions with that country, and established policies, procedures, and communication channels for interacting with that country's agencies. The Proposed Rule also describes specific policies and procedures that FinCEN will work to ensure are in place at each federal agency serving as an intermediary.[37]

It is surprising, however, that the Proposed Rule does not provide examples of federal agencies that would likely serve as intermediaries for foreign countries. Candidates include the Justice Department which handles foreign information requests under the Mutual Legal Assistance Treaties; the Internal Revenue Service which handles information requests from foreign tax authorities under bilateral and multilateral tax treaties and tax information exchange

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[33] Proposed Rule § 1010.955(b)(2)(i) at 77454.
[34] See also Sen. Brown, "National Defense Authorization Act," Congressional Record 166: 208 (12/9/2020) at S7312, https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf (discussing the decision by lawmakers not to limit the CTA to federal courts or federal judges).
[35] Proposed Rule § 1010.955(b)(3) at 77454.
[36] Proposed Rule at 77410.
[37] Id.

agreements; the Defense Department which handles foreign information requests under a variety of defense, intelligence, and research agreements; and the State Department which handles foreign requests under a plethora of international treaties, agreements, and conventions. The final rule might consider providing those or other examples of likely intermediary federal agencies under the CTA to clarify the scope of the law.

The Proposed Rule does clarify that FinCEN itself can act as an intermediary agency to transmit registry information in response to requests by foreign financial intelligence units (FIUs).[38] This provision aligns with FinCEN's long history of working with foreign FIUs and entering into memoranda of understanding or other agreements with them to exchange information. FinCEN's willingness to act as an intermediary federal agency under the CTA will help ensure efficient use of the registry database by foreign FIUs.

Basic Information and Direct Access. The Proposed Rule establishes procedures that, overall, offer a reasonable, practical way to handle registry requests by foreign countries. It states that federal agencies acting on behalf of a foreign country must provide FinCEN with only "basic information ... about who is requesting the information and the treaty, agreement, or convention under which the request is being made."[39] Upon providing that information, the federal agency would be free to conduct direct searches for registry information and provide responsive information to the foreign requester "in a manner consistent with" the relevant treaty, agreement, or convention.[40] The Proposed Rule explains that this approach enables FinCEN to rely on intermediary federal agencies that are "likely to have ongoing relationships" and points of contact with the foreign country and be more familiar than FinCEN with the relevant "treaty obligations and information exchange channels and processes."[41]

Recordkeeping and Auditability. The Proposed Rule requires intermediary federal agencies to keep sufficient records of the information requested by and provided to foreign agencies under the CTA to ensure FinCEN and designated auditors such as GAO can later "perform appropriate audit and oversight functions" to gauge adherence with the law and uncover any unauthorized access of registry information.[42] Allowing immediate registry searches subject to subsequent oversight and audits complies with the CTA, is equivalent to how federal agencies conducting their own direct registry searches will be treated, and offers an efficient way to handle foreign requests.

Law Enforcement Activities. To clarify the scope of allowable foreign information requests, the Proposed Rule reasonably interprets the phrase "law enforcement investigation or prosecution" – which the CTA uses to describe covered activities by foreign requesters – as essentially equivalent to the phrase "law enforcement activity" describing covered activities by state, local, and tribal agencies.[43] That interpretation will ensure that foreign law enforcement requests will be treated in the same way as requests by domestic law enforcement agencies.

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[38] Id.
[39] Proposed Rule § 1010.955(b)(3) at 77454.
[40] Id.
[41] Proposed Rule at 77415.
[42] Proposed Rule at 77414.
[43] Id.

Accordingly, the Proposed Rule also clarifies that FinCEN will provide information in response to information requests made by foreign agencies engaged in both civil and criminal law enforcement activities, including "actions to impose civil penalties, civil forfeiture actions, and civil enforcement through administrative proceedings."[44] That approach again parallels how FinCEN treats domestic registry requests, aligns with the objectives, structure, and language of the CTA, and should be retained in the final rule.

Trusted Foreign Countries. The Proposed Rule provides a practical approach to the CTA requirement that FinCEN respond to requests for BOI by "trusted foreign countries" even in the absence of an applicable international treaty, agreement, or convention.[45] The Proposed Rule states that FinCEN will address such requests "on a case-by-case basis or pursuant to alternative arrangements with intermediary Federal agencies" that have "ongoing relationships with the foreign requester."[46] FinCEN sensibly declines to develop a prior list of "trusted foreign countries," since such a list would continually change over time depending upon a complex set of facts, international developments, and U.S. interests. Instead, the Proposed Rule states that FinCEN, after consulting "relevant U.S. government agencies," would make the final decision as to whether a specific country qualifies as a "trusted foreign country" for purposes of obtaining registry information.[47]

As currently drafted, the Proposed Rule does not name any of the "relevant U.S. government agencies" that FinCEN must consult prior to making an access decision. Nor does the Proposed Rule offer any principle or standard to guide FinCEN's decisionmaking on the designation of trusted countries. While the proposed approach gives FinCEN maximum flexibility and may expedite its handling of important registry requests by U.S. allies, it also bestows upon FinCEN essentially unfettered power to decide which foreign countries may access the U.S. registry – decisions which may affect U.S. global relationships. The final rule would do better to provide additional guidance in this sensitive area, including by naming the Departments of State and Justice as "relevant" U.S. agencies that must be consulted on designating trusted countries and announcing that, at a minimum, FinCEN will treat members of the North Atlantic Treaty Organization (NATO), the European Union, and the G7 group of nations as trusted foreign countries absent special circumstances.

Training. One technical issue in the Proposed Rule is its requirement that federal agencies provide registry information only to "personnel ... [w]ho have received training pursuant to paragraph (d)(1)(i)(B) of this section or have obtained the information requested directly from persons who both received such training and received the information directly from FinCEN."[48] When applied in the context of foreign information requests, that provision might seem to require every foreign person who wishes to receive registry information to first undergo specialized "training" in procedures to protect the information's "security and confidentiality."[49]

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[44] Id.
[45] 31 U.S.C. § 5336(c)(2)(B)(ii).
[46] Proposed Rule at 77415.
[47] Proposed Rule at 77415 ("The bureau, in consultation with relevant U.S. government agencies, will therefore look to U.S. interests and priorities in determining whether to disclose BOI to foreign requesters when no international treaty, agreement, or convention applies.").
[48] Proposed Rule § 1010.955(d)(1)(F)(3) at 77456.
[49] Proposed Rule § 1010.955(d)(1)(i)(B) at 77455.

That training requirement exceeds what our foreign partners require from U.S. agencies requesting BOI from their registries, and the Proposed Rule does not explain why specialized training is needed or what would be conveyed. In most cases, the training requirement would also be superfluous, since the foreign country requesting the information will already be bound by the security and confidentiality requirements of the relevant international treaty, agreement, or convention or will qualify as a "trusted" foreign country that can be directed or trusted to protect the security of the registry information it receives. To avoid imposing an unnecessary, burdensome, and perhaps unintended training requirement on our foreign partners, the final rule should clarify that the training requirement in proposed § 1010.955(d)(1)(i)(B) must be applied to foreign requesters in a manner that is consistent with the training requirements for domestic registry users and so will not constrain foreign requesters that obtain registry information directly from FinCEN or from federal agency personnel who have already been trained.

Authentication. A second technical issue involves authentication of registry documents for use in foreign legal proceedings. The Proposed Rule states that if a foreign country needs authenticated registry documents for use in a legal proceeding, FinCEN "may establish" a process allowing the intermediary federal agency to provide them or may instead use an arrangement in which FinCEN itself will fetch the documents from the registry, authenticate them, and provide them to the federal agency.[50] The Proposed Rule offers no justification for empowering FinCEN, apparently at its sole discretion, to determine which intermediary federal agencies may provide authentication services to foreign countries. As explained further below, a better approach would be to give all federal agencies transmitting documents to foreign countries the authority to authenticate those documents, unless evidence emerges regarding an agency's incompetence, neglect, or other problematic conduct. A broader, less discretionary approach would be not only more efficient and less bureaucratic, but also recognize that FinCEN does not have the personnel or resources to provide extensive authentication services. The final rule should instead empower all intermediary federal agencies to provide authenticated documents to foreign requesters, with FinCEN serving as a backup authenticator as needed; that approach will help avoid creating a procedural roadblock that may impede civil and criminal legal proceedings worldwide.

Overall, the Proposed Rule creates a reasonable and workable system for handling registry requests by foreign countries, but the final rule would benefit from finetuning the provisions on identifying trusted foreign countries, imposing training requirements on foreign agency personnel, and authenticating registry documents, as indicated above.

(5) FinCEN Identifiers for Entities [Questions 2 & 30]

Another key provision in the Proposed Rule sensibly implements the CTA provisions enabling entities to obtain FinCEN identifiers. FinCEN identifiers are unique numbers assigned by FinCEN to persons requesting them.[51] The purpose of FinCEN identifiers is to increase registry accuracy and efficiency and reduce filing burdens by enabling registry filers to use numbers instead of names to identify individuals and entities, avoiding the transcription

[50] Proposed Rule at 77414-415.
[51] 31 U.S.C. § 5336(a)(6).

problems often associated with naming conventions.[52] FinCEN identifiers are not intended to diminish corporate ownership transparency, make it more difficult to obtain BOI from the registry, or create an ultra vires secrecy mechanism to conceal beneficial owners' names and identifying information from either reporting companies or registry users.

Letters commenting on the first rule implementing the CTA raised concerns that some reporting companies might misuse the FinCEN identifiers assigned to intermediary entities to provide incomplete or misleading disclosures about the reporting company's beneficial owners.[53] Some of those letters explained that the problem was particularly acute for reporting companies with complex ownership structures involving multiple intermediary entities and beneficial owners, which is also the type of reporting company most likely to be involved with suspicious activity.[54] To prevent possible misuse of the registry and avoid over- or under-inclusive reporting of beneficial owners holding interests in reporting companies through intermediary entities, the Proposed Rule takes the conservative, yet sensible approach of allowing reporting companies to use FinCEN identifiers for intermediary entities only when the reporting company and the intermediary entity have exactly the same beneficial owners.[55] The proposed restriction is easy to understand and relatively difficult to manipulate. It would prevent confusion and possible abuse of FinCEN identifiers by reporting companies disclosing their beneficial owners.

The final rule may want to consider clarifying one aspect of the revised provision. Currently, proposed § 1010.380(b)(4)(ii)(B)(3) states: "The beneficial owners of the entity and of the reporting company are the same individuals."[56] To avoid possible gaming by bad actors, the final rule could add the following clarification at the end of that provision: "If a change causes the beneficial owners of the entity and reporting company to differ, the reporting company may no longer use the entity's FinCEN identifier and must file an updated report with the registry providing required beneficial ownership information." This clarification would prevent a bad actor from arranging to have the same beneficial owners at the time a reporting company's initial report is filed, and then changing the beneficial owners of the intermediary entity, while leaving in place that entity's FinCEN identifier in the reporting company's registry report.

The revised provision on reporting company use of FinCEN identifiers assigned to intermediary entities will avoid both good faith confusion and bad faith manipulation of the registry's BOI reporting requirements and should be retained in the final rule. At the same time, as explained further below, the final rule still needs to make clear that all authorized registry users will be able immediately to access BOI associated with every FinCEN identifier to ensure the database is highly useful in identifying a reporting company's beneficial owners.

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[52] Carry-out restaurants, for example, often use customers' telephone numbers to store information about them, not to conceal anyone's identity but simply because using numbers rather than names is more reliable and efficient. See also Sen. Brown, "National Defense Authorization Act," Congressional Record 166: 208, (12/9/2020) at S7311, https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf ("FinCEN identifiers are intended to simplify beneficial ownership disclosure by eliminating spelling and naming issues that can cause confusion or mistakes related to the precise individuals or entities in an ownership chain.").

[53] See, e.g., comment letter by the FACT Coalition (2/7/2022), FINCEN-2021-0005-0421, at 20-26, https://docs.google.com/document/d/1fjb8YQcKeJAG0PZak5FlXADOcnv09j3Q/edit#.

[54] Id. See also Final BOI Reporting Rule, at 59525.

[55] Proposed Rule at § 1010.380(b)(4)(ii)(B) at 77454, and the preamble at 77424-425.

[56] Proposed Rule at 77454.

(6) Refusing Requests

The Proposed Rule faithfully implements the CTA by clarifying when FinCEN "may decline to provide" information requested from the registry.[57] The Proposed Rule states that FinCEN may refuse any database request – whether from an agency or financial institution – if FinCEN finds, in its sole discretion, that the requesting party has failed to meet any requirement of the law, if the request itself appears to be for an "unlawful purpose," or there is "other good cause" to deny the request.[58]

FinCEN logically extends its authority to refuse requests for registry information from agencies, as explicitly provided in the CTA, to encompass financial institutions as well, since financial institutions may also submit improper requests. FinCEN should have the authority needed to protect the registry from improper requests no matter who the requester is. The proposed language is easy to understand and will help protect the integrity of the registry. It should be retained in the final rule.

(7) Suspension and Debarment

The Proposed Rule also faithfully implements the CTA by clarifying that the same grounds that permit FinCEN to deny a request for registry information, would also permit FinCEN, in its sole discretion, to temporarily suspend or permanently debar any agency or financial institution from accessing the database.[59] The Proposed Rule would also allow FinCEN to determine the length of any suspension and allow it to reinstate any party "upon satisfaction of any terms or conditions" that FinCEN, again in its sole discretion, "deems appropriate."[60] FinCEN's suspension and debarment authority[61] is essential to ensuring the security and integrity of the beneficial ownership registry, and the proposed provision will enable FinCEN to take swift action to protect the registry from misuse. The authority to deny access to the database also provides a powerful incentive for registry users to comply with the requirements of the law or lose their ability to access BOI from the registry on a temporary or permanent basis.

The Proposed Rule would be further enhanced, however, if in addition to describing FinCEN's authority to reject requests for information and to suspend or debar certain registry users, the final rule were to add a new subsection § 1010.955(e)(4) describing FinCEN's authority to ask a state or tribe to suspend the charter of an entity suspected of failing to file required BOI with the registry or submitting incomplete, false, or fraudulent information. While FinCEN, like any other person, is already free to contact a state or tribal agency to request that action be taken against an entity formed or registered under that jurisdiction, detailing FinCEN's authority to do so in the final rule would provide an important reminder and incentive for entities to comply with the law and its implementing regulations. This recommendation is described in further detail below.

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[57] 31 U.S.C. § 5336(c)(6)(B).
[58] Proposed Rule at § 1010.955(e)(2)(ii)(B) at 77457, and the preamble at 77423.
[59] Proposed Rule at § 1010.955(e)(3) at 77457, and the preamble at 77423.
[60] Id.
[61] 31 U.S.C. § 5336(c)(7).

The provisions just described, as well as other positive features of the Proposed Rule, will play a critical role in ensuring the operation of a beneficial ownership registry that is accurate, complete, and highly useful, in full compliance with the CTA.

Needed Changes and Clarifications

In contrast to its many positive features, the Proposed Rule contains a few problematic provisions and fails to clarify a few important issues. Correcting those flaws is essential to ensuring effective implementation of the CTA.

(1) Excessive Restrictions on State, Local, and Tribal Access [Questions 2 & 7]

The most critical flaw in the Proposed Rule is its overly burdensome restrictions on state, local, and tribal law enforcement agencies seeking access to BOI in the registry and its failure to provide guidance on key issues that, without resolution, may impede effective implementation of the CTA.[62] The Proposed Rule states that FinCEN "aims to ensure that BOI access at the State, local, and Tribal level is highly useful to law enforcement and has consistent application across jurisdictions,"[63] but the final rule requires several changes and clarifications to achieve those objectives.

State, local, and tribal law enforcement personnel are America's first responders in many critical areas of law enforcement, including efforts to combat crime, tax evasion, human trafficking, counterfeit goods, and other illicit activity that may utilize shell companies or other entities with hidden owners. Estimates are that more than 90 percent of the nation's law enforcement operates at the state and local level.[64] Key agencies include municipal police departments, county-wide sheriff's offices, and a variety of statewide and local civilian law enforcement agencies.

The CTA's requirement that state, local, and tribal law enforcement agencies obtain court authorization prior to accessing information in a FinCEN database is unique in federal law. No similar restriction applies to state, local, or tribal agencies accessing information in FinCEN's Suspicious Activity Report or Currency Transaction Report databases.[65] For that reason, the implementing rule needs to provide ample guidance on establishing a reasonable authorization

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[62] The key CTA provision on state, local, and tribal law enforcement agency access to the registry, 31 U.S.C. § 5336(c)(2)(B)(i)(II), states: "FinCEN may disclose beneficial ownership information ... upon receipt of ... a request ... from a State, local or Tribal law enforcement agency, if a court of competent jurisdiction, including any officer of such court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation."

[63] Proposed Rule at 77413.

[64] See Patrick Yoes, "Another Open Letter to Our Nation's Governors," National Fraternal Order of Police (4/10/2020), https://fop.net/letter/our-nations-governors-urging-them-to-amend-their-state-and-local-workmans-compensation-laws/ ("With more than 90% of law enforcement officers serving at the local and State level ...").

[65] See, e.g., National Association of Attorneys General, comment letter on Advanced Notice of Proposed Rulemaking (5/6/2021), at 3. The comment letter also notes that no state law enforcement agency has ever been prosecuted for making an unauthorized SAR disclosure.

process to ensure efficient access to BOI in the FinCEN registry.[66] As currently configured, however, the Proposed Rule not only provides insufficient guidance, but also distorts the law by requiring state, local, and tribal law enforcement agencies to obtain and provide a copy of a "court order" instead of the court authorization specified in the CTA and to undergo a double approval process by the courts and FinCEN.

Court Order Versus Court Authorization. Like other CTA terms, the statute's use of the term "authorized" was the outcome of extended congressional negotiations which rejected efforts to compel law enforcement agencies to obtain a "court order," "subpoena," or "warrant" to access BOI from the registry.[67] If Congress had wanted to require a court "order" to obtain BOI it could easily have included that requirement in the CTA, but did not. Instead, Congress chose the term "authorized" to establish a quicker, less formal, and more practical procedure for registry requests. By requiring a "court order" instead of the less formal court authorization,[68] the Proposed Rule goes beyond what the law requires and, in doing so, could be seen as encouraging courts to require formal pleadings, evidence-based standards, or a hearing to approve a BOI request – none of which is required by the CTA. To comply with the law, the final rule should delete the requirement for a court "order" and instead use the same language as the CTA – requiring courts to authorize, but not order, a BOI request.

Copy of Court Authorization. Adding insult to injury, the Proposed Rule requires state, local, and tribal agencies to submit to the registry a copy of the court authorization obtained to support a BOI request.[69] All other registry users are permitted to certify in writing that they have met the CTA requirements to obtain BOI; only state, local, and tribal agencies are required to prove it by supplying a copy of a court authorization. The Proposed Rule offers no justification or explanation for treating state, local, and tribal law enforcement agencies differently. Denying state, local, and tribal law enforcement agencies the use of the same certification procedures available to all other requesters -- federal agencies,[70] regulators,[71] and even financial institutions[72] -- is not only unjustified, but also disrespects the comity owed by Treasury and FinCEN to their state, local, and tribal law enforcement partners.

In addition, on a more practical level, requiring submission of court authorizations may require more time and effort from already busy law enforcement and court personnel, consume more registry storage space than certifications, and drive up registry costs.

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[66] See CTA § 6402(8)(C) (requiring Treasury, "in prescribing regulations to provide for the reporting of beneficial ownership information," to "collect information in a form and manner that is reasonably designed to generate a database that is highly useful to ... law enforcement agencies").

[67] For example, the House Financial Services Committee rejected an amendment offered by Representative Warren Davidson seeking to require state, local, and tribal agencies to obtain a "court-issued subpoena or warrant" before accessing the registry. U.S. House Committee on Financial Services, "Markups, H.R. 2513, the 'Corporate Transparency Act of 2019,'" (6/11/2019), https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403829.

[68] Proposed Rule at § 1010.955(d)(2)(ii)(B)(2)(i) at 77456, and the preamble at 77420-421.

[69] Id.

[70] See Proposed Rule at 77420.

[71] See Proposed Rule at 77421.

[72] See Proposed Rule at 77422.

Like the decision to require a court order instead of an authorization, the Proposed Rule's requirement that state, local and tribal agencies submit copies of court documents to the registry is nowhere mentioned in the CTA. In the absence of statutory support and in light of the unnecessary burdens placed on law enforcement and court personnel, the final rule should eliminate the requirement to submit copies of court orders and instead allow state, local, and tribal law enforcement agencies to check a box certifying that they have obtained appropriate authorization from a court of competent jurisdiction and, if more is needed, list the name of the court and court officer who provided the authorization.

Double Approval Process. The Proposed Rule doesn't stop there. It imposes another, even more burdensome set of procedural requirements on state, local, and tribal law enforcement agencies, again with no statutory foundation. The Proposed Rule states that after state, local, and tribal law enforcement agencies submit to the registry a copy of the court authorization supporting a BOI request, the agencies must also provide a "written justification setting forth specific reasons why the requested information was relevant" to their investigation.[73] FinCEN must then review the court authorization and agency justification "for sufficiency" and "approve" the BOI request before an agency can search for registry data.[74] Unlike federal agencies whose "brief justifications" of their data requests enable those agencies to conduct immediate data searches subject to later "oversight and audit" by FinCEN,[75] the Proposed Rule requires state, local, and tribal agencies – which have already obtained court authorization – to provide additional specific justification and undergo a second review and approval process by FinCEN before they can initiate a registry search.

The proposed double approval process will essentially bring state, local, and tribal use of the registry to a halt, since FinCEN does not have the personnel or resources to individually review court authorizations and agency justifications for "sufficiency" and "approve" data requests submitted on a time-sensitive basis by potentially tens of thousands of law enforcement agencies across the country. In addition to the obvious logistics and resource problems, the Proposed Rule fails to provide a standard of review to be used by FinCEN when deciding whether to overrule both the law enforcement agency and the authorizing court to disallow a data request. While the CTA explicitly requires court authorizations, it never mentions a second approval process that empowers FinCEN to overrule court authorizations of state, local, and tribal law enforcement agencies.

In addition, imposing a secondary FinCEN approval process for specific registry requests would inevitably slow down state, local, and tribal access to the registry and thereby impede important investigations, prosecutions, and civil and criminal enforcement proceedings conducted by those agencies. It would also consume significant FinCEN resources better directed to other tasks.

The CTA instructs Treasury and FinCEN no less than five times to create a database that will be "highly useful" to registry users,[76] which includes state, local, and tribal agencies responsible for more than 90 percent of the nation's law enforcement operations. To comply

[73] Proposed Rule at 77420.
[74] Proposed Rule at 77409-410.
[75] Proposed Rule at 77409.
[76] See note 6, supra.

with that repeated statutory directive, the final rule must eliminate the proposed double approval process and treat state, local, and tribal data requests (supported by court authorizations) in the same manner as federal agency requests – allowing immediate searches subject to subsequent oversight and audit by FinCEN, GAO, and others. If FinCEN later determines that a state, local, or tribal agency abused its registry access, the Proposed Rule already permits FinCEN to suspend or debar that agency from future registry use. Civil and criminal penalties are also available. Those penalties, coupled with FinCEN's suspension and debarment authority, provide ample protection of the registry without layering on top a burdensome double approval process with no statutory foundation.

Missing Guidance. In addition to imposing overly burdensome procedures on state, local, and tribal agencies seeking BOI from the registry – beyond what is required by the CTA – the Proposed Rule fails to provide critical guidance on several key issues related to this unique statutory requirement.

Standards and Procedures. First, the Proposed Rule provides no guidance to courts on the standard or procedures they should use to evaluate BOI requests from state, local, and tribal law enforcement agencies. To assist the courts, the final rule should offer a set of guiding principles, such as by directing courts to act with expedition in processing BOI requests, allocate sufficient personnel to review requests on a timely basis and avoid backlogs, and ensure that requesting state, local, and tribal agencies comply with the CTA requirements. The final rule could also explain that courts could require agencies to provide brief descriptions of the investigation or activity at issue and why the BOI is "relevant" to that investigation or activity as well as a written certification (including by marking appropriate checkboxes on a form) that the scope of the request is limited "to the greatest extent practicable" "consistent with the purposes for seeking" the BOI; and that the individual making the request is "directly engaged in the authorized investigation or activity," their "duties or responsibilities require" registry access, and the individual has undergone appropriate training to access the registry or will use appropriately trained staff to do so.[77] In addition, the final rule could instruct courts to presume that a BOI request is valid unless there is reason to suspect that the request or the person making the request is unauthorized or acting improperly; to dispense with formal pleadings, evidentiary showings, or hearings except in unusual circumstances; and to develop a standard form to expedite the authorization process. Providing that kind of guidance would not only assist the courts in carrying out their new responsibility, but also help prevent FinCEN from being deluged with questions from courts about how to authorize BOI requests submitted by state, local, or tribal law enforcement agencies.

Grand Jury Subpoenas. Second, the Proposed Rule fails to provide sufficient guidance on whether prosecutors may design grand jury subpoenas that would "satisfy the CTA's court authorization requirement."[78] The final rule should note that the standard and procedures used to authorize a BOI request differ from those normally used by prosecutors to issue grand jury subpoenas. The CTA requires state, local, and tribal law enforcement agencies to meet certain requirements, certify in writing that their BOI requests comply with the CTA, and obtain explicit court authorization for the BOI request, as explained in the preceding paragraph. By providing

[77] 31 U.S.C. § 5336(c)(3)(E), (F) and (G).
[78] Proposed Rule at 77413.

that type of guidance, the final rule could help resolve questions about how to design a grand jury subpoena that meets the requirements of the CTA and prevent FinCEN from having to respond to multiple inquiries from agencies and courts on that topic.

Court Officers. Third, the Proposed Rule could provide additional guidance on the court "officers" who may authorize a BOI request.[79] The preamble in the Proposed Rule states:

> The proposed rule does not specify which officials qualify as officers of the court because courts have varying practices. FinCEN expects, however, that individuals who may exercise a court's authority and issue authorizations on its behalf would qualify. FinCEN invites comment on whether it should more specifically identify officers of the court for purposes of the rule, and if so, what the potential qualifying criteria might be."[80]

The statutory language, that "any officer" of a court can authorize a BOI request, was the product of extensive congressional negotiations which rejected permitting only "judges" to provide BOI authorizations.[81] Instead, Congress settled on a broader, more flexible phrase to enable a variety of court personnel to issue authorizations and facilitate efficient operation of the registry. The Proposed Rule states that FinCEN "expects" that individuals who "may exercise a court's authority and issue authorizations on its behalf would qualify," but that is not the type of authoritative phrasing needed to resolve this issue and avoid confusion. The final rule should state unequivocally that a court officer qualified to authorize a request for BOI by a state, local, or tribal law enforcement agency includes any individual who exercises a covered court's authority, including a judge, magistrate, clerk, bailiff, sheriff, prosecutor, clerk assistant, or other full or part time personnel designated to perform that duty by the court.[82] Identifying a broad range of court personnel qualified to authorize BOI requests is particularly important if the final rule retains the ill-advised requirement for a court "order," since some courts may interpret that language as necessitating action by a judge, an outcome which would be contrary to the law and clear congressional intent.

The Proposed Rule offers a reasonable interpretation of the statute when it states that FinCEN "does not believe that individual attorneys acting alone would fall within" the definition of a court officer under the CTA.[83] It is reasonable to conclude that the CTA calls for court

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[79] See 31 U.S.C. § 5336(c)(2)(B)(i)(II), quoted in full in note 62, supra.
[80] Proposed Rule at 77414.
[81] See Sen. Brown, "National Defense Authorization Act," Congressional Record 166: 208 (12/9/2020), at S7312, https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf.
[82] See also Black's Law Dictionary which defines an "officer of the court" as "[s]omeone who is charged with upholding the law and administering the judicial system. Typically, officer of the court refers to a judge, clerk, bailiff, sheriff, or the like, but the term also applies to a lawyer, who is obliged to obey court rules and who owes a duty of candor to the court." Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (Thomson Reuters, 11th ed. 2019).
[83] Proposed Rule at 77414. See also U.S. Congress, "Joint Explanatory Statement of the Committee of Conference for H.R. 6395, Division F—Anti-Money Laundering," H.Rept. 116–617, 116th Congress, 2nd Session, (12/3/2020), at 2140, https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf ("'Court of competent jurisdiction,' for purposes of this measure, includes an officer of such a court such as a judge, magistrate, or a Clerk of Courts. This does not include attorneys who are party to a proceeding.").

personnel, not private sector attorneys holding no position with the authorizing court, to qualify as officers of the court capable of issuing BOI authorizations.

Standard Forms. Finally, to minimize burdens on law enforcement, the courts, and the registry, facilitate compliance with statutory requirements, and foster consistent application of the CTA across jurisdictions, FinCEN should propose a recommended standard form for courts processing registry authorizations. The form need not be mandatory but, if well designed, could help courts with quick and effective implementation of the CTA. In particular, the form should be designed to function as a "court order" if the final rule continues to require state, local, and tribal agencies to submit court orders to obtain BOI from the registry. The form should also be designed to facilitate record retention by both the requesting agency and the court as well as electronic submission to the registry with sufficient information to meet CTA requirements.

In terms of content, the form should require the requesting agency to identify itself, name the specific law enforcement officer seeking the registry information, provide a brief description of the authorized investigation or activity underlying the request, provide checkboxes enabling the agency to certify that its request meets the requirements of the CTA,[84] and provide the date on which the authorization request was submitted to the court. Next, the form should provide boxes that can be checked by the court officer to authorize access to the registry, deny it, or seek more information. The form should require the court officer's name, job title, court, and the dates on which the request was processed and returned to the requesting agency, but should not require a signature. In addition, the form should expressly enable courts, in cases where time is of the essence, to employ alternate methods to authorize a registry request, including by allowing a court officer to authorize a request via a handwritten note, email message, telephone conversation, text message, or online chat option, so long as the request is subsequently documented by completing the standard form within a brief period of time.

The final rule should request or require courts to post the standard authorization form on the court website to make it readily accessible to state, local, and tribal law enforcement agencies. The final rule should also request or require courts to establish procedures allowing agencies to submit the form electronically, route it immediately to the appropriate court officer, and enable that court officer promptly to process the form and return it to the relevant law enforcement agency. Requesting or requiring courts to take those steps would align with the CTA provisions enabling Treasury to direct state and tribal agencies to "cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database."[85] To further streamline the process, FinCEN may want to work with the courts and large state, local, and tribal law enforcement agencies to design optional software templates that enable expedited, bulk processing by the courts and bulk submission of authorized requests by agencies to the registry.

The CTA repeatedly directs the Treasury Secretary to take steps to ensure the BOI in the registry is accurate, complete and highly useful for registry users, which necessarily includes state, local, and tribal law enforcement agencies.[86] The final rule needs to make several

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[84] See 31 U.S.C. §§ 5336(c)(3)(E), (F) and (G).
[85] 31 U.S.C. §§ 5336(d)(2) and (3).
[86] See note 6, supra.

adjustments and clarifications to meet that statutory obligation for the state, local, and tribal agencies responsible for more than 90 percent of the nation's law enforcement operations.

(2) Excessive Restrictions on Financial Institution Access [Question 2, 3 & 11-13]

A second critical flaw in the Proposed Rule is its overly burdensome restrictions on financial institutions seeking access to BOI in the registry. The CTA directs Treasury and FinCEN to collect BOI for the registry in a way that ensures the information will be "highly useful" to financial institutions complying with "anti-money laundering, countering the financing of terrorism, and customer due diligence requirements."[87] To meet that directive, the final rule needs to make several changes and clarifications in the provisions governing financial institutions.

Financial institutions have been administering anti-money laundering, counter-terrorism, and anti-corruption programs for decades. Their efforts include sophisticated systems to verify the identity of their customers, avoid sanctioned persons, understand the source of their funds, conduct ongoing monitoring of their accounts, and report suspicious activity to U.S. law enforcement, as required by law.[88] The statutory definition of the term "financial institution" encompasses a wide variety of businesses that handle financial transfers or cash transactions including banks, credit unions, savings and loan associations, financial and bank holding companies, trust companies, securities and commodity broker-dealers, money service businesses, insurance companies, casinos, and more.[89] The CTA limits registry access to a particular subset of financial institutions – those "subject to customer due diligence requirements."[90] Those financial institutions are America's first line of defense against wrongdoers seeking to infiltrate the U.S. financial system, and the CTA is intended to fortify those defenders by granting them access to BOI in the registry.

Accessing Only Customer-Supplied BOI. Right now, the Proposed Rule imposes an overly restrictive limit on financial institution access to the registry by allowing financial institutions to request only BOI filed by their own customers. The Proposed Rule states that FinCEN is:

> 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

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[87] 31 U.S.C. § 5336(b)(1)(F) (requiring Treasury, in "promulgating the regulations required" for submitting BOI reports to FinCEN, to "collect information … in a form and manner that ensures the information is highly useful in—(I) facilitating important national security, intelligence, and law enforcement activities; and (II) confirming beneficial ownership information provided to financial institutions 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"). See also 31 U.S.C. § 5336(c)(2)(B)(iii) (stating "FinCEN may disclose beneficial ownership information ... upon receipt of ... a request made by a financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law.").

[88] See, e.g., 31 U.S.C. §§ 5318(g) and (h), and the implementing regulations in 31 C.F.R. Part 1010.

[89] 31 U.S.C. § 5312(a)(2)(defining "financial institution" as including 26 different types of businesses).

[90] 31 U.S.C. § 5336(c)(2)(B)(iii).

> specific to that reporting company, and receive in return an electronic transcript with that entity's BOI.[91]

FinCEN justifies this severe limitation by explaining that "[t]his more limited information-retrieval process would reduce the overall risk of inappropriate use or unauthorized disclosures of BOI."[92]

The problem with the proposed approach is that it renders the registry of little use to financial institutions with customer due diligence, anti-money laundering, and counter-terrorist financing obligations. Since a financial institution can already obtain a copy of a customer's BOI report directly from the customer, doublechecking that the report was actually filed with the registry and contained the same information is unlikely to deepen the financial institution's understanding of the customer or strengthen its due diligence process. The usefulness of the registry would greatly increase, however, if financial institutions – with customer consent – were allowed instead to search all of the registry's BOI – provided by millions of entities formed or registered to do business in the United States – to find out more about the beneficial owners identified by their customers.

The registry, when operational, will provide a unique, centralized collection of BOI that has never before been assembled for U.S. entities. Its primary purpose is to increase corporate ownership transparency in the United States to help clamp down on illicit finance. Enabling financial institutions – with customer consent – to access the registry's full array of BOI would provide financial institutions with a new and powerful due diligence tool.

Suppose, for example, that Company A, seeking to open an account with Bank B, provides its consent for Bank B to search the registry for all information about its two beneficial owners, John and Jane Smith. Suppose further that Bank B conducts that search and learns that Jane Smith is the beneficial owner of 100 U.S. companies and, in every case, holds her ownership interest through intermediary entities in offshore secrecy jurisdictions and, in some cases, her fellow beneficial owners are sanctioned individuals.[93] That information about Company A's beneficial owners – which Bank B on its own could not obtain – would enable Bank B to conduct a more informed risk analysis of Company A and make a more informed decision about whether to open an account for that company.

In the same way, allowing access to the registry's full collection of BOI – never before available to financial institutions opening accounts for U.S. entities – would provide financial

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[91] Proposed Rule at 77410.

[92] Id.

[93] This example is not far-fetched. Journalists recently discovered that a well-known Luxembourg businessman, Patrick Hansen, held previously hidden ownership interests in 117 companies, including some formed in secrecy havens like Luxembourg, Belize, and the British Virgin Islands. At some companies, his fellow beneficial owners – whose identities had also been hidden – were dubious Russian and Iraqi businessmen. The journalists discovered further that Mr. Hansen and those other beneficial owners had been involved with transfers of millions of dollars, raising questions about possible illicit finance. See "This Luxembourg Businessman Got Europe's Corporate Registries Shut Down. But Whose Privacy Was He Protecting?" (2/10/2023), Organized Crime and Corruption Reporting Project (OCCRP), Dragana Peco, Alina Tsogoeva, Antonio Baquero, Tom Stocks, Luc Caregari, and Carina Huppertz, https://www.occrp.org/en/beneficial-ownership-data-is-critical-in-the-fight-against-corruption/this-luxembourg-businessman-got-europes-corporate-registries-shut-down-but-whose-privacy-was-he-protecting.

institutions with a unique and highly useful due diligence tool that could help them better understand who their customers are, evaluate the risks associated with particular entities, and determine whether to open or maintain accounts for those entities.

Enabling financial institutions – with customer consent – to access the full panoply of registry BOI would not only strengthen their due diligence capabilities, it would also provide an incentive for those financial institutions to ensure their customers file reports with the registry and provide information that is accurate, complete, and up-to-date. Financial institutions, if granted broader registry access, could become strong advocates for an effective registry, because they would benefit from its BOI collection. In contrast, limiting financial institutions to accessing only the BOI filed by their own customers may lead them to view the registry as having little value, ignore its functioning, and exert little pressure on their customers to file useful information. The final rule would do well to incentivize financial institutions to become willing partners in promoting an effective registry.

It is also important to note that the limitation set out in the Proposed Rule is not supported by any statutory language. Rather, it falls short of the statutory directive to Treasury to promulgate regulations ensuring that registry information is "highly useful" in "confirming beneficial ownership information provided to financial institutions 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."[94]

The Proposed Rule justifies taking a narrower approach that reduces the usefulness of the registry for financial institutions by citing the "sensitive nature" of BOI, the "potential number of FI employees who could have access to it," and the need to "reduce the overall risk of inappropriate use or unauthorized disclosures of BOI" by financial institutions.[95] But potential misuse of the registry is already the subject of multiple safeguards. First, the CTA already requires financial institutions to conduct self-audits to ensure compliance with the law, including use and disclosure of registry information.[96] Second, many financial institutions are subject to regulatory supervision which includes special examinations by anti-money laundering specialists who can audit registry use and search for evidence of unauthorize use or disclosures.[97] Third, the CTA already requires annual GAO audits for the first seven years of the registry's operation to detect unauthorized use of the registry or unauthorized disclosures of registry information, including by financial institutions.[98] Treasury has the authority to direct its Inspector General to perform similar audits.[99]

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[94] 31 U.S.C. § 5336(b)(1)(F). See also § 5336(b)(4)(B)(ii).
[95] Proposed Rules at 77410.
[96] 31 U.S.C. § 5336(c)(3)(I). The Bank Secrecy Act and its implementing regulations also require many financial institutions to conduct self-audits, and those audits could easily be expanded to include reviews of the financial institution's use and disclosures of registry information. See, e.g., 31 U.S.C. § 5318(h)(1)(D) and 31 C.F.R. §§ 1020.210(a)(2)(ii) (banks), 1022.210(d)(4)(money services businesses), 1023.210(b)(2)(securities broker-dealers), 1024.210(b)(2)(mutual funds), 1025.210(b)(4)(insurance companies), and 1026.210(b)(2)(futures commission merchants and commodity brokers).
[97] See, e.g., Bank Secrecy Act/Anti-Money Laundering Examination Manual, Federal Financial Institutions Examination Council, https://bsaaml.ffiec.gov/manual.
[98] 31 U.S.C. § 5336(c)(10).
[99] See, e.g., CTA, § 6402(7)(B).

Fourth, if a financial institution were discovered to have abused its registry access, the CTA and Proposed Rule already offer a range of civil and criminal penalties to punish that misconduct and deter other financial institutions from following suit.[100] In addition, the Proposed Rule permits FinCEN to temporarily suspend or permanently debar a delinquent financial institution from future registry use.[101] Together, those audits and examinations, civil and criminal penalties, and suspension and debarment authorities provide ample safeguards against registry misuse without the Proposed Rule's also barring financial institutions from accessing the registry's full spectrum of data to carry out their customer due diligence obligations.

Customer Due Diligence Limitation. The Proposed Rule imposes a second unwarranted restriction on financial institution access as well. In addition to restricting financial institution access to the bulk of registry data, the Proposed Rule limits the allowable purposes that permit financial institutions to request any registry data at all.

The Proposed Rule currently states, in conformance with the CTA, that financial institutions may obtain BOI from the registry to facilitate their compliance with "customer due diligence requirements under applicable law."[102] But the Proposed Rule then unreasonably interprets that phrase as allowing registry searches by a financial institution only to facilitate compliance with "customer due diligence (CDD) regulations at 31 CFR § 1010.230."[103] Section 1010.230 is the code section that FinCEN developed prior to enactment of the CTA to establish customer due diligence requirements for financial institutions.

The problem with the Proposed Rule's cramped interpretation of the key phrase in the CTA is that it permits financial institutions to request BOI to facilitate compliance with only one customer due diligence regulation -- the customer due diligence requirements laid out in § 1010.230. But the CTA never even mentions § 1010.230, much less refers to it as a possible or required limitation on financial institution access to the registry. Nevertheless, the Proposed Rule determines that financial institutions may not request BOI from the registry to facilitate compliance with any other law or regulation requiring customer due diligence. For example, the Proposed Rule states explicitly that financial institutions may not make registry requests to facilitate compliance with the Patriot Act's Customer Identification Program requiring them to conduct customer due diligence, simply because the implementing regulations for that statutory requirement appear in 31 C.F.R. § 1010.220 rather than § 1010.230.[104]

The Proposed Rule fails to acknowledge that the very same phrase, "customer due diligence requirements under applicable law," appears in another key CTA provision – the provision that authorizes Treasury to issue regulations related to BOI in the registry. That provision instructs Treasury to issue regulations that will ensure the collection of registry information is "highly useful" in "confirming beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements

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[100] 31 U.S.C. § 5336(h)(2) and (3)(B).
[101] Proposed Rule at § 1010.955(e)(3) at 77457, and the preamble at 77423.
[102] Proposed Rule at § 1010.955(b)(4)(i) at 77454. Compare with 31 U.S.C. § 5336(c)(2)(B)(iii).
[103] Proposed Rule at § 1010.955(b)(4)(i) at 77454, and the preamble at 77415.
[104] Proposed Rule at 77415.

under applicable law."[105] That expansive provision, which directs Treasury to consider the entire realm of anti-money laundering and counter-terrorist financing laws when issuing regulations affecting financial institution access to BOI in the registry, should logically be interpreted to require Treasury also to consider the full realm of customer due diligence requirements under applicable law obligating action by financial institutions – not just those in § 1010.230.

For example, the CTA implementing regulations should allow financial institutions to access BOI in the registry to facilitate compliance with not only § 1010.230, but also FinCEN regulations implementing due diligence requirements in the Customer Identification Program,[106] special customer due diligence requirements to open certain correspondent and private banking accounts,[107] special customer due diligence requirements to enforce prohibitions against opening correspondent accounts benefiting certain foreign financial institutions,[108] and customer due diligence requirements specially designed to apply to certain types of financial businesses in 31 C.F.R. Chapter X.[109] Yet as currently drafted, the Proposed Rule prohibits financial institutions from accessing the registry for the purpose of facilitating compliance with any of those customer due diligence requirements, simply because they appear in code sections other than § 1010.230.

The Proposed Rule also prohibits financial institutions from accessing the registry to aid compliance with customer due diligence requirements established by state, local, or tribal laws.[110] Some states, such as New York, require financial institutions operating within the state to establish anti-money laundering programs that include customer due diligence and customer identification requirements.[111] But the Proposed Rule denies registry access to facilitate financial institution compliance with such laws.[112] The Proposed Rule even prohibits financial

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[105] 31 U.S.C. § 5336(b)(1)(F). See also § 5336(b)(4)(B)(ii).
[106] See 31 C.F.R. § 1010.220.
[107] See 31 C.F.R. §§ 1010.610, 620, and 630.
[108] See 31 C.F.R. §§ 1010.651 – 661.
[109] See 31 C.F.R. §§ 1020.210(b)(2)(v) (banks), 1023.210(b)(5)(securities broker-dealers), 1024.210(b)(5)(mutual funds), and 1026.210(b)(5)(futures commission merchants and commodity brokers). All of those provisions require the regulated entity to implement "[a]ppropriate risk-based procedures for conducting ongoing customer due diligence" which must include "[u]nderstanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile" and maintaining and updating "customer information" including "information regarding the beneficial owners of legal entity customers."
[110] Proposed Rule at 77415.
[111] See, e.g., 3 CRR-NY 116.2(c) ("Every banking organization ... shall establish and maintain an anti-money laundering program that complies with applicable Federal anti-money laundering laws (31 U.S.C. chapter 53, subchapter II) ... [and] will also be required to demonstrate, as part of their anti-money laundering program, a customer identification program that complies with the applicable Federal anti-money laundering laws and regulations"), https://govt.westlaw.com/nycrr/Document/I4e749d01cd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default); 3 CRR-NY 115.1 (requiring applicants for a New York state banking charter to "demonstrate an anti-money laundering program that complies with applicable Federal anti-money laundering laws, including a required customer identification program" as well as "compliance with applicable regulations issued by" OFAC to implement U.S. sanctions laws), https://govt.westlaw.com/nycrr/Document/I4e747604cd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).
[112] The Proposed Rule does not explicitly address financial institution compliance with customer due diligence requirements imposed by foreign laws but, by analogy, would apparently also prohibit financial institutions from accessing the registry for that purpose, since foreign customer due diligence requirements would necessarily fall outside of § 1010.230.

institutions from accessing the registry to facilitate compliance with U.S. sanctions laws, even though customer due diligence is central to the ability of financial institutions to avoid dealing with sanctioned persons and avoid violating such sanctions laws as the International Emergency Economic Powers Act, the Global Magnitsky Human Rights Accountability Act, and the Suspending Normal Trade Relations with Russia and Belarus Act.

Denying financial institutions the ability to access the registry to facilitate compliance with the full range of customer due diligence obligations that legally bind them, including in connection with U.S. sanctions laws, defies common sense. It is also plainly at odds with the primary purpose of the CTA which is to combat illicit finance and enlist financial institutions in that effort.

At one point, the Proposed Rule explains that FinCEN "considered interpreting the phrase 'customer due diligence requirements under applicable law' more broadly," but decided against it, because "a more tailored approach will be easier to administer, reduce uncertainty about what FIs may access BOI under this provision, and better protect the security and confidentiality of sensitive BOI by limiting the circumstances under which FIs may access BOI."[113] Ease of administration is not, however, a compelling justification for denying financial institution access to a powerful new due diligence tool to combat illicit finance. And as explained earlier, a host of audit and examination practices, civil and criminal penalties, and suspension and debarment authorities already safeguard the registry against unauthorized use and disclosures. In light of the many data security safeguards already planned or in place, it is difficult to justify severely restricting financial institution access to the registry by citing data security needs, especially when that same restriction undermines the registry's usefulness to financial institutions playing a frontline role in the U.S. battle against illicit finance.

The better approach in the final rule would be to make clear that financial institutions may access the registry to facilitate their compliance with all customer due diligence requirements, whether imposed by federal, state, local, tribal, or foreign laws. In addition, to ensure more effective customer due diligence, the final rule should clarify that, with customer consent, financial institutions may search all registry information associated with the beneficial owners identified by their customers. Taking that broader approach would furnish a more reasonable interpretation of the CTA, give financial institutional more appropriate access to the registry, and strengthen the ability of those financial institutions to help combat illicit finance.

(3) Excessive Restriction on Regulatory Agency Access [Questions 2 & 19]

A similar problem with the Proposed Rule is its overly burdensome restriction on federal functional regulators and other regulatory agencies seeking access to the registry to evaluate a regulated financial institution's compliance with customer due diligence obligations imposed by law. As it does with financial institutions, the Proposed Rule allows regulatory agencies to access the registry for the sole purpose of determining financial institution compliance with 31 C.F.R. § 1010.230,[114] rather than compliance with the full range of customer due diligence

[113] Proposed Rule at 77415. See also Proposed Rule at 77410 (supporting the restriction on financial institution access to the registry by citing "the sensitive nature of BOI and the potential number of FI employees who could have access to it").
[114] Proposed Rule at § 1010.955(b)(4)(ii)(B) at 77454, and the preamble at 77410 and 77415.

obligations imposed on financial institutions by federal, state, local, tribal, and foreign laws. As explained above, this approach disregards important customer due diligence obligations, including those imposed by FinCEN outside of § 1010.230, and those central to compliance with U.S. sanctions laws. The Proposed Rule offers no justification for imposing the same severe limitation on regulators as it does for financial institutions seeking access to registry information.

The Proposed Rule does ease the impact of its severe restriction on regulators by correctly observing that, in addition to their supervisory duties, regulators may engage in national security, intelligence, or law enforcement activities and so may take advantage of the broader registry access afforded to agencies engaged in those activities.[115] The Proposed Rule cites the example of the Securities and Exchange Commission (SEC) which supervises securities broker-dealers for compliance with customer due diligence requirements and also "investigates and litigates civil violations of Federal securities laws."[116] The Proposed Rule explains that the SEC "would be able to broadly search the beneficial ownership IT system for BOI for use in furtherance of its law enforcement activity."[117] It is common for other financial regulators, including the Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Commodity Futures Trading Commission, and more, to work with the Department of Justice on criminal and civil enforcement actions aimed at regulated financial institutions.

Recognizing the national security, intelligence, and law enforcement activities of regulatory agencies does not, however, justify the Proposed Rule's overly burdensome restriction on regulators overseeing financial institution compliance with customer due diligence requirements. The final rule should make clear that regulatory agencies may access the registry to evaluate financial institution compliance with any customer due diligence requirement for which that agency has regulatory authority, whether that requirement is imposed by federal, state, local, or tribal law.

(4) Silence on GAO Access [Questions 2 & 3]

One surprising gap in the Proposed Rule is its failure to clarify that the Government Accountability Office (GAO) will have direct and immediate access to registry data to conduct the third party audits mandated by the CTA. The CTA directs Treasury to "take all steps, including regular auditing, to ensure that government authorities accessing [the registry] do so only for authorized purposes."[118] In addition, the CTA assigns four significant auditing responsibilities to GAO, the only auditor outside of the Treasury Department required to conduct independent, third party audits of the registry and report its findings to Congress.

The first audit responsibility assigned by the CTA requires GAO to conduct annual audits for seven years to examine the "procedures and safeguards" established by the final rules, including verification of agency adherence to the law's data security protocols, and whether agencies are "using beneficial ownership information appropriately in a manner consistent" with

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[115] Proposed Rule at 77416.
[116] Id.
[117] Id.
[118] CTA, § 6402(7)(B).

the CTA.[119] The second requires GAO, after the registry has been in operation for two years, to conduct a study "assessing the effectiveness of incorporation practices" in "providing national security, intelligence, and law enforcement agencies with prompt access to reliable, useful, and complete beneficial ownership information" and strengthening the agencies' capability to "combat incorporation abuses and civil and criminal misconduct" and "detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes."[120]

Third, the CTA requires GAO, by January 1, 2026, to conduct a study of the law's long list of exempted entities, including their "regulated status," reporting requirements, quantity, structure, and the extent to which each class of entities poses a significant risk of money laundering, serious tax fraud, or other financial crimes.[121] Finally, the CTA requires GAO, by the same date, to conduct a study of state procedures that authorize the formation or registration of partnerships, trusts, or other legal entities, the extent to which states require disclosure of BOI for those entities, and the extent to which the absence of BOI for those entities raises concerns about their involvement with terrorism, money laundering, tax evasion, or other misconduct and has impeded law enforcement investigations into such misconduct.[122]

To carry out those mandatory audits, GAO will need direct access to a wide array of registry data. For example, GAO will need to get data on Treasury and other agency use of the registry, including which agencies made requests, how often, what types of information were requested, and what types of investigations were involved. GAO will also need to look for any evidence that agencies abused their access privileges. To audit the reliability, completeness, and usefulness of BOI in the registry, GAO will need access to information on data updates and corrections and data allowing GAO to compare the entities formed within each state to the entities from that state that actually filed reports with the registry. GAO will also need to examine registry comments and complaints submitted to the Treasury Inspector General (IG)[123] and the extent to which those complaints led to changes in registry data. To test the registry's effectiveness and usefulness to law enforcement, GAO will need to access data indicating the extent to which registry reports led to the exposure of criminals, sanctioned individuals, tax evaders, or other wrongdoers holding ownership interests in reporting companies. To evaluate issues related to partnerships and trusts, GAO will need access to data indicating the extent to which partnerships and trusts have already filed BOI with the registry.

At one point, the Proposed Rule characterizes "audits, enforcement, and oversight" functions related to "administration of the BOI framework" as providing "appropriate purposes" for accessing BOI in the registry.[124] The Proposed Rule makes those statements when explaining provisions that grant essentially unfettered registry access to Treasury officers and employees, presumably including personnel in the office of the Treasury IG who also is assigned auditing responsibilities by the CTA.[125] But Congress did not limit the CTA auditing functions to the

[119] 31 U.S.C. § 5336(c)(10).
[120] CTA, § 6502(a).
[121] CTA, § 6502(c).
[122] CTA, § 6502(d).
[123] See 31 U.S.C. § 5336(h)(4).
[124] Proposed Rule at 77417.
[125] See 31 U.S.C. §§ 5336(b)(1)(E), (b)(6), (h)(4), and (i)(1); CTA, § 6502(b).

Treasury IG; it also required third party audits by GAO, yet the Proposed Rule is currently silent about whether GAO will be given direct access to registry data.

The final rule should make clear that, due to the mandatory auditing responsibilities imposed on GAO by statute, GAO will have direct, immediate access to the registry to carry out its auditing duties. Denying registry access to GAO would not only prevent GAO from complying with the law, but also block mandatory third party audits of Treasury's performance under the CTA, creating the appearance of – if not an actual – conflict of interest motivating Treasury's actions. Treasury and FinCEN must respect Congress and the law, and afford direct registry access to GAO to carry out its statutorily mandated audit responsibilities.

(5) Silence on Validation Access [Questions 2 & 3]

To ensure the accuracy, completeness, and usefulness of registry data as required by the CTA,[126] the final rule needs to clarify that — prior to accepting a filing into the registry — FinCEN will arrange for information in that filing to be computer matched against other records systems to ensure that the data in the filing matches those records, and prevent any filing with mismatching data from being accepted into the registry database. Multiple parties, including law enforcement, financial institutions, regulators, and public interest groups, have repeatedly called for FinCEN to establish this type of validation process to protect the quality of the data in the registry, yet the Proposed Rule fails to include any provision in the new § 1010.955 authorizing or mandating a validation process to take place prior to acceptance of a filing into the registry.

The CTA requires reporting companies to provide, for each of their beneficial owners, the individual's name, birthdate, address, and an identifying number from an "acceptable identification document," further defined as a nonexpired U.S. passport, a nonexpired identification document issued by a State, local government, or Indian Tribe, a nonexpired driver's license issued by a State; or if none of those is available a nonexpired passport issued by a foreign government.[127] The required information, in many cases, is already included in one or more electronic databases within the United States, making it possible to validate the accuracy and completeness of the information being submitted by a reporting company before it becomes part of the registry.

U.S. Passports. The U.S. Department of State, for example, already maintains a database — known as the Consular Consolidated Database (CCD) — which stores (among other data) the names, birthdates, addresses, passport numbers, and biometric data (including facial images) corresponding to the individual associated with each U.S. passport.[128] FinCEN can and should enter into a partnership with the Department of State to establish a computer matching process with the CCD (or another similar system) as part of a data validation protocol to screen filings before they are submitted to the FinCEN registry. The computer match could focus on data fields containing the names, birthdates, addresses, and passport numbers supplied by a reporting company and match that information against the records on file with the CCD, and do

[126] See note 6, supra.
[127] 31 U.S.C. § 5336(a)(1).
[128] See "Privacy Impact Assessment, Consular Consolidated Database (CCD)," U.S. Department of State, (5/2019), https://www.state.gov/wp-content/uploads/2019/05/Consular-Consolidated-Database-CCD.pdf.

so prior to the filing becoming part of the U.S. registry. Should a reporting company — wittingly or unwittingly — include information that does not match the records in the CCD database, the registry could cause a pop-up message to appear alerting the reporting company to the data mismatch, requiring correction of the data in the filing, and warning that the filing will not be accepted until the information in the filing matches government records.

The Department of State already has partnerships with other federal agencies providing access to the CCD, including the Department of Homeland Security, Department of Commerce, Department of Defense, Department of Justice, and Office of Personnel Management.[129] Software already exists to create a real-time automated validation system to block acceptance of a filing with mismatched data. Those types of systems are already in use in some beneficial ownership registries as well as in U.S. business settings when, for example, a buyer must type in the correct credit card information before being allowed to submit a purchase order.

A FinCEN partnership with the Department of State, as suggested above, could utilize existing federal processes and procedures to ensure accurate and complete BOI is submitted to the registry in line with 31 U.S.C. 5336 (b)(1)(F)(ii).[130] Requesting this level of cooperation from the State Department would also align with requirements for federal agency cooperation in 31 U.S.C. 5336(d)(2). Ensuring the submission of accurate and complete BOI prior to acceptance of a registry filing would also reduce costs for reporting companies — in line with 31 U.S.C. 5336 (b)(1)(F)(iii) — as it should:

- take less time for reporting companies to correct errors when first submitting a registry filing than have to visit the registry a second time to correct or refile prior information; and

- ensure accurate information, thereby speeding up the account opening process when a financial institution cross-checks the registry information.

In addition, using a validation process to ensure accurate and complete BOI prior to the acceptance of a filing into the registry would reduce database errors and noise, reduce time spent by financial institutions and others identifying and seeking data corrections, and help ensure that existing individuals are behind the names of beneficial owners listed in registry filings — helping FinCEN meet the statutory requirements of 31 U.S.C. 5336 (b)(1)(F)(iv).

Identification Cards and Drivers Licenses. Similar validation procedures can be used to ensure the accuracy and completeness of information based on state identification cards and drivers licenses. State, local, and tribal agencies already maintain databases with names, birthdates, addresses, identifying numbers, and photographs corresponding to the individuals associated with the identification documents and drivers licenses they issue. These databases,

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[129] Id.

[130] The Treasury Department already has years of experience administering computer matching programs under federal law. See, e.g., "Computer Matching Programs," Treasury Department (undated), https://home.treasury.gov/footer/privacy-act/computer-matching-programs#:~:text=The%20Computer%20Matching%20and%20Privacy,types%20of%20computerized%20matching%20programs; Computer Matching and Privacy Protection Act, P.L. 100-503 (1988), codified at 5 U.S.C. § 552a.

like the CCD passport database, would help ensure the accuracy and completeness of the BOI in a filing prior to its submission to the registry.

For example, states have already established secure, automated systems — such as Nlets — that can be used to access their databases. According to its website, Nlets:

> "is a private not for profit corporation owned by the States that was created more than 50 years ago by the 50 state law enforcement agencies. The user population is made up of all of the United States and its territories, all Federal agencies with a justice component, selected international agencies, and a variety of strategic partners that serve the law enforcement community-cooperatively exchanging data.
>
> "The types of data being exchanged varies from motor vehicle and drivers' data, to Canadian and Interpol database located in Lyon France, to state criminal history records and driver license and corrections images. Operations consist of more than 1.6 billion transactions a year to over 1 million PC, mobile and handheld devices in the U.S. and Canada at 45,000 user agencies and to 1.3 million individual users."[131]

Among other features, Nlets allows users to securely query data on an automated basis to confirm an individual's name, birthdate, address, and identification number from a driver's license, permit, or identification card issued by a state, the District of Columbia, or a territory of the United States.[132]

FinCEN can and should create a partnership with a state-owned system like Nlets and establish automated software procedures to ensure that the name, birthdate, address, and identification number of a beneficial owner being typed into a registry filing match the record on file for that individual with the relevant Department of Motor Vehicles or similar office. Should a reporting company — wittingly or unwittingly —submit information in a registry filing that does not match the information in the relevant Department of Motor Vehicles (or similar office) database, the registry should send a pop-up message alerting the reporting company to the mismatch, requiring correction of the data in the filing, and warning that the filing will not be accepted until the information in the filing matches government records. In that way, the validation process will help ensure the accuracy and completeness of the data added to the registry, without disclosing any registry information to Nlets or a similar system.

Nlets already has partnerships with multiple federal agencies, including the Department of Defense, Department of Interior, Department of Justice, Department of Veterans Affairs, Immigration and Customs Enforcement, and the Postal Inspection Service.[133] FinCEN should easily be able to establish a similar Nlets partnership.

Establishing partnerships with state, local, and tribal agencies through existing systems like Nlets would meet the statutory requirements of 31 U.S.C. 5336 (b)(1)(F)(i), and would utilize existing state and local processes and procedures to ensure the accuracy and completeness

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[131] "Who We Are," Nlets, (2021), https://www.nlets.org/about/who-we-are.
[132] "Section 13: Driver License Transactions," Nlets Wiki, (2/13/2021), https://wiki.nlets.org/index.php/Section_13:_Driver_License_Transactions.
[133] "Our Members," Nlets, (2021), https://www.nlets.org/our-members/members.

of BOP in line with 31 U.S.C. 5336 (b)(1)(F)(ii). Requesting this level of cooperation from state, local, and tribal agencies would also align with the requirements for agency cooperation in 31 U.S.C. 5336(d)(2). In addition, ensuring the submission of accurate and complete BOI prior to acceptance of a registry filing would reduce costs for reporting companies — as specified by 31 U.S.C. 5336 (b)(1)(F)(iii) — as it should:

- take less time for reporting companies to correct errors when first submitting a registry filing than requiring the company to visit the registry a second time to correct or refile prior information; and

- ensure accurate information, thereby speeding up the account opening process when a financial institution cross-checks the registry information.

Validating data prior to acceptance of a filing in the registry would also reduce database errors and noise, reduce time spent by financial institutions and others identifying and seeking data corrections, and help ensure that existing individuals are behind the names of beneficial owners listed in registry filings — thereby helping FinCEN meet the statutory requirements of 31 U.S.C. 5336(b)(1)(F)(iv).

Foreign Passports. In addition to maintaining data on U.S. passport holders, the U.S. Department of State maintains information on many foreign nationals (such as nonimmigrant and immigrant visa applicants) — including copies of their foreign passport information — in its Consular Consolidated Database (CCD). The CCD stores (among other data) the names, birthdates, addresses, foreign passport numbers, and biometric data (including facial images) corresponding to the individuals associated with each foreign national in the database.[134] The CCD can, thus, provide still another computer matching opportunity to ensure the accuracy and completeness of data submitted to the registry.

To increase the opportunity to validate data using CCD computer matches, the registry could require in its filing forms that any foreign national who holds passports from multiple countries and previously applied for a U.S. visa must utilize the passport used during the U.S. visa application process. That restriction would make it more likely that the individual's foreign passport information is contained in the CCD.

In addition, in collaboration with the Department of State, FinCEN could work to establish partnerships with foreign governments, especially close allies, to establish computer data matching processes to help ensure the accuracy and completeness of the names, birthdates, addresses, foreign passport numbers, and photographs of individuals named by reporting companies as beneficial owners from those countries. If both countries have beneficial ownership registries, FinCEN could work with the Department of State to exchange passport data computer matching services on a reciprocal basis.

Addresses. Because passports, identification documents, and driver's licenses may not contain up-to-date residential or business addresses, they may not provide useful computer matching information for addresses supplied to the registry for some beneficial owners. To

[134] "Privacy Impact Assessment, Consular Consolidated Database (CCD)," U.S. Department of State, (5/2019), https://www.state.gov/wp-content/uploads/2019/05/Consular-Consolidated-Database-CCD.pdf.

reduce address errors, the registry can and should utilize common software options to ensure that addresses submitted to the registry at least exist and comply with U.S. Postal Service standards.

Establishing a partnership with the U.S. Postal Service to help ensure the accuracy and completeness of address information in filings prior to acceptance into the registry would meet the statutory requirements of 31 U.S.C. 5336 (b)(1)(F)(i) and 31 U.S.C. 5336 (b)(1)(F)(ii), as described above. Requesting cooperation from the U.S. Postal Service would align with the requirements for agency cooperation in 31 U.S.C. 5336(d)(2). In addition, validating addresses would reduce reporting company costs as explained earlier as well as reduce database errors and noise, reduce time spent by financial institutions and others identifying and seeking data corrections, and help ensure that registry filings cite addresses that really exist, thereby helping FinCEN meet the statutory requirements of 31 U.S.C. 5336 (b)(1)(F)(iv).

All of the measures just described would help ensure FinCEN compliance with the CTA requirements to collect information that is "highly useful in—

> "(I) facilitating important national security, intelligence, and law enforcement activities; and
>
> "(II) confirming beneficial ownership information provided to financial institutions 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."[135]

In addition to establishing useful computer matching procedures prior to accepting data into the FinCEN registry, FinCEN should use its existing e-filing protocols that prohibit the acceptance of filings with certain blank fields and that automatically format certain fields to ensure information is entered correctly.

The final rule should add a new provision to § 1010.955 to authorize the establishment of computer matching protocols involving pre-registry filings and to clarify all access issues. The final rule should not only explicitly authorize FinCEN to enter into computer matching agreements related to the registry, but also clarify that, for example, the computer matching process will not provide registry access or actual registry data to any outside body, since the purpose of the validation process is to screen filings before they are accepted into the registry and will, in fact, block registry acceptance of filings containing mismatching data. In addition, the final rule should clarify that computer matching will be a mandatory process to validate incoming data and help ensure that the data included in the registry is accurate, complete, and highly useful, as mandated by law.

[135] 31 U.S.C. § 5336 (b)(1)(F)(iv).

(6) Undue Restriction on Re-disclosure of Registry Data [Questions 2, 3, 16 & 18]

As currently drafted, the Proposed Rule contains elaborate restrictions on when recipients of registry data may re-disclose that data to another party.[136] The Proposed Rule states:

> [T]he CTA does not specify the circumstances under which an authorized recipient of BOI may redisclose the BOI to another person or organization. The CTA instead prohibits re-disclosure except as authorized in the protocols promulgated by regulation, thereby leaving it to FinCEN to establish the appropriate re-disclosure rules in the protocols."[137]

The Proposed Rule states that, to carry out that responsibility, FinCEN has designed re-disclosure rules to "further the core underlying national security, intelligence, and law enforcement objectives of the CTA while at the same time ensuring that BOI is disclosed only where appropriate for those purposes."[138]

The Proposed Rule then imposes a series of re-disclosure restrictions on each type of registry user.[139] While many of the provisions make sense, in apparent recognition that the proposed restrictions are not comprehensive and could end up impeding national security, intelligence, and law enforcement activities that the registry is intended to advance, the Proposed Rule also provides a narrow escape hatch under the sole control of FinCEN. That provision bars disclosure of registry information "to any other person for any [other] purpose," unless the authorized registry user obtains "the prior written consent of FinCEN" or can point to "applicable protocols or guidance that FinCEN may issue."[140] The proposed preamble explains further: "This provision would give FinCEN the ability to authorize, either on a case-by-case basis or categorically through written protocols, guidance, or regulations, the re-disclosure of BOI in limited cases to further the purposes of the CTA."[141]

The problem with the proposed approach is that it generally prohibits registry users from re-disclosing registry information even if new information or factual developments indicate that the BOI should be shared to combat illicit finance and even if re-disclosure would be to a U.S. national security, intelligence, or law enforcement agency. In addition, the proposed approach gives FinCEN undue power to determine when a wide arrange of federal, state, local, tribal, regulatory, and foreign agencies may share registry information. It is easy to imagine situations in which FinCEN will lack the expertise, administrative network, diplomatic stature, or security clearance needed to determine whether specific BOI should be shared. On top of that, the proposed approach threatens to create a procedural bottleneck that FinCEN has neither the personnel nor resources to overcome on a timely basis. While the Proposed Rule suggests that FinCEN will issue "protocols, guidance, or regulations" to address common re-disclosure situations, despite more than two years since enactment of the CTA, FinCEN did not propose

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[136] See Proposed Rule at § 1010.955(c) at 77455, and the preamble at 77417.
[137] Proposed Rule at 77417.
[138] Id.
[139] See Proposed Rule at § 1010.955(c)(2) at 77455.
[140] Proposed Rule at § 1010.955(c)(2)(ix) at 77455.
[141] Proposed Rule at 77419.

any such protocols, guidance, or regulations in connection with the Proposed Rule nor did it establish a timeline for getting that work done.

A better approach would be for the final rule to revise the proposed § 1010.955(c)(2)(ix) to create a more workable process allowing authorized registry users – without prior FinCEN permission – to disclose registry information to a U.S. national security, intelligence, law enforcement, or regulatory agency when, in the judgment of the registry user, re-disclosure would be in the public interest and would advance efforts to combat illicit finance. That approach would take FinCEN out of the decisionmaking chain in numerous re-disclosure situations and enable registry users quickly to share registry information with U.S. government agencies battling illicit finance. Similarly, the final rule could broaden § 1010.955(c)(2)(v) to allow federal intermediary agencies to use the same standard to share registry information with relevant foreign countries, again without having to obtain FinCEN's prior permission. The final rule could also insert a new provision authorizing FinCEN to apply the same standard to approve still other re-disclosure requests by registry users, acting on either on a case-by-case basis or through protocols, guidance, or regulation. While assigning that responsibility to FinCEN could lead to a significant administrative bottleneck, at least it would not impede registry users trying to help U.S. agencies combat illicit finance.

(7) Other Missing Access Guidance [Questions 2, 3, 16, 29 & 30]

The Proposed Rule is currently silent on whether authorized database users may access certain types of information in the registry. The final rule could address this problem by providing general guidance that authorized users may access and make copies of all registry information and records absent a specific prohibition. Alternatively, the final rule could provide affirmative guidance to resolve specific access issues, thereby forestalling inquiries that might otherwise overload FinCEN.

FinCEN Identifier Information Access. As mentioned earlier, the Proposed Rule does not currently provide needed guidance on access to BOI associated with FinCEN identifiers. The Final BOI Reporting Rule states in the preamble that FinCEN "believes the statutory text is clear that the underlying BOI [associated with a FinCEN identifier] is available to authorized users,"[142] but it does not identify a corresponding regulatory text communicating that conclusion. The logical place to clarify universal access by authorized registry users to identifying information associated with FinCEN identifiers is this Proposed Rule. But as currently drafted, the Proposed Rule fails to state plainly – in either the preamble or a proposed code provision – that all authorized users can access the identifying information associated with any and every FinCEN identifier. The final rule should do so. In addition, to reinforce the statement in the Final BOI Reporting Rule on the availability of the information, the final access rule should explain that the statutory purpose of the FinCEN identifier system is to make the registry more efficient and less burdensome for reporting companies, beneficial owners, and registry users, but is not intended to make it more difficult to obtain usable beneficial ownership information from

[142] Final BOI Reporting Rule at 59525.

the registry.[143] The final rule should not leave the FinCEN identifier BOI access issue unaddressed and, by its silence, risk both a flood of inquiries and possible litigation.

Accessible Registry Information. The Proposed Rule describes the conditions under which FinCEN may disclose to an authorized registry user "information reported to FinCEN pursuant to § 1010.380."[144] Despite that phrase's appearance in multiple provisions, the Proposed Rule does not provide guidance on exactly what the phrase means and how it relates to the phrase "beneficial ownership information."[145] A related question is whether either or both phrases encompass registry filings that are initiated or authorized by FinCEN. To forestall requests for clarification from registry users and reporting companies alike, the final rule should state explicitly in a new subsection of § 1010.955(b) that, for purposes of that section, the term 'information reported to FinCEN pursuant to § 1010.380' is synonymous with the term 'beneficial ownership information' and includes any notice, filing, or other information initiated or authorized by FinCEN for inclusion in the registry.

In addition to providing that general guidance, the Proposed Rule should consider providing guidance on the specific types of registry information that may be disclosed by FinCEN to an authorized registry user. The final rule could state, for example, that if a registry user is authorized to access BOI for a specific reporting company or a foreign pooled investment vehicle, then that registry user may access the following types of registry information: (1) any initial report related to the reporting company; (2) any corrected or updated report or application related to the reporting company (3) any initial, corrected, or updated application or other filing related to a FinCEN identifier assigned to the reporting company, a company applicant, a beneficial owner, or an intermediary entity holding an ownership interest in or exercising control of the reporting company; (4) any report, certification, or other filing by the reporting company stating that it is no longer subject to the registry's disclosure requirements because it has qualified for an exemption; (5) any certification filed by a foreign pooled investment vehicle (PIV) under 31 U.S.C. § 5336(a)(11)(B)(xviii) disclosing an individual who exercises substantial control over the PIV; (6) any notice, filing, or other registry record with potentially adverse information about the reporting company or foreign pooled investment vehicle, including any notice that the entity is the subject of an alleged data discrepancy or error report, a Treasury IG registry user complaint, a Suspicious Activity Report, a suspension or debarment action by FinCEN, a civil or criminal penalty under the CTA, a sanctions action by OFAC, a criminal indictment or civil enforcement action by a U.S. or foreign law enforcement agency, or a FinCEN recommendation to terminate its charter, should FinCEN authorize the filing of those or

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[143] The rule could also cite Sen. Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (Dec. 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("FinCEN identifiers are intended to simplify beneficial ownership disclosure by eliminating spelling and naming issues that can cause confusion or mistakes related to the precise individuals or entities in an ownership chain.").

[144] 31 C.F.R. § 1010.955. This phrase is used repeatedly throughout § 1010.955. In addition, 31 C.F.R. § 1010.950(a) uses the phrase "information reported pursuant to § 1010.380."

[145] The Final BOI Reporting Rule defines the term "beneficial ownership information" for the purposesof penalizing CTA violations, stating that BOI "includes any information provided to FinCEN" under § 1010.380. 31 C.F.R. § 1010.380(g)(2). That definition suggests that "beneficial ownership information" has the same meaning as "information reported to FinCEN pursuant to § 1010.380," but the Proposed Rule never states plainly that the two phrases share the same definition.

similar registry records; and (7) any other filing or information in registry records related to the reporting company or foreign pooled investment vehicle.

Without the general and specific guidance just described, FinCEN may encounter numerous questions from requesting agencies, financial institutions, and reporting companies about the availability of specific registry records.

Copies of Registry Records. The Proposed Rule details rules governing the use and disclosure of registry information by authorized recipients,[146] but does not address whether registry users may make copies of the registry records they access. To avoid responding to many inquiries about this basic issue, the final rule should state plainly that authorized registry users may make copies of all registry filings and other records they are authorized to access, including by downloading, exporting, excerpting, or using other techniques to copy information, documents, or other records in the registry, and that such copies are subject to the use and re-disclosure limitations in § 1010.955(c).

Treasury IG User Complaint Process. The Proposed Rule is also silent on access issues related to the "User Complaint Process" mandated by the CTA.[147] The CTA requires the Treasury Inspector General (IG), in coordination with the Treasury Secretary, to establish a system to receive from the public "comments or complaints regarding the beneficial ownership information notification and collection process or regarding the accuracy, completeness, or timeliness of such information."[148] The Treasury IG must also provide periodic reports to Congress summarizing those comments and complaints and providing recommendations for improvements to the registry.

What is missing from the Proposed Rule is any acknowledgement of the User Complaint Process, and that the official duties of the Treasury IG and IG staff include accessing the registry to analyze the validity of those public comments and complaints and, if appropriate, correct inaccurate BOI. The Proposed Rule already gives all Treasury officers and employees essentially unfettered access to the registry to carry out their official duties,[149] but the final rule may want to state explicitly that the Treasury IG's User Complaint responsibilities qualify as the type of official duties allowing registry access. That would not only clarify the access issue, but also provide fair notice to reporting companies, registry users, and the public. In addition, if FinCEN and the Treasury IG were to establish a system that tags some reports or reporting companies as the subject of a user comment or complaint (including allegations of incomplete, false, or fraudulent information), the final rule should make clear that authorized registry users would have access to that information.

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[146] Proposed Rule at § 1010.955(c) at 77455.
[147] 31 U.S.C. § 5336 (h)(4).
[148] Id.
[149] See Proposed Rule at 77409, citing 31 U.S.C. § 5336(c)(5), and § 1010.955(b)(5) at 77454.

(8) Overly Restrictive Document Authentication [Questions 2 & 29]

Right now, the Proposed Rule states that if a foreign country needs authenticated registry documents for use in a legal proceeding, FinCEN "may establish" a process allowing the intermediary federal agency to provide them or may instead use an arrangement in which FinCEN itself will fetch the documents from the registry, authenticate them, and provide them to the federal agency for further transmission to the foreign country.[150] FinCEN offers no justification or evidence indicating why FinCEN needs the discretion to decide on an agency-by-agency basis which federal intermediary agencies can provide authentication services to foreign countries. The Proposed Rule is also currently silent on whether the same restriction will apply to federal, state, local, and tribal agencies needing authenticated documents for legal proceedings.

The current proposal is overly restrictive and risks creating a procedural bottleneck that may impede criminal and civil court proceedings around the world. The better approach would be for the final rule to give all federal agencies transmitting documents to foreign countries the authority to authenticate those documents, unless evidence emerges regarding agency incompetence, neglect, or other good cause for FinCEN to take over the authentication process. That approach makes sense, because FinCEN does not have the personnel or resources to provide extensive authentication services, and many federal intermediary agencies such as the Departments of State and Justice will already have a history of dealing with the foreign country and will be better able than FinCEN to determine if authenticated documents are needed for a legal proceeding. In addition, by spreading the authentication duties among multiple agencies, the final rule will help avoid creating a procedural roadblock that could impede civil and criminal legal proceedings worldwide.

A related issue is whether federal, state, local, and tribal agencies that have direct access to the registry will be able to authenticate the documents they obtain from the registry for use in legal proceedings without FinCEN's involvement. For the same reasons just described, the final rule should make clear that federal, state, local, and tribal agencies may authenticate registry documents for use in legal proceedings, not only because FinCEN's involvement is unnecessary, but also because requiring FinCEN's involvement in every authentication request would place an administrative burden on FinCEN and threaten creating an administrative chokepoint for registry users that could impede civil and criminal enforcement actions nationwide. If an audit were later to discover that an agency abused its authentication responsibilities, FinCEN could use its authority to suspend or permanently debar that agency from accessing the registry or condition the agency's registry access on using FinCEN to authenticate registry documents.

(9) Requests to Suspend Entity Charters [Questions 2 & 29]

As explained earlier, the Proposed Rule would be strengthened if, in addition to provisions describing FinCEN's authority to reject requests for information and to suspend or debar certain registry users,[151] the final rule were to add a new § 1010.955(e)(4) describing FinCEN's authority to ask a state or tribe to suspend the charter of an entity suspected of failing

[150] Proposed Rule at 77414-415.
[151] See Proposed Rule at § 1010.955(e)(2) and (3) at 77457, and the preamble at 77423.

to file required BOI with the registry or submitting incomplete, false, or fraudulent information. In addition, FinCEN's ability to enforce compliance with the CTA would be enhanced by establishing an electronic process to send such requests to the appropriate state or tribal office.

The CTA already makes it a violation of law to "willfully fail to report complete or updated beneficial ownership information" or "willfully provide, or attempt to provide, false or fraudulent beneficial ownership information" to FinCEN.[152] Those prohibitions are already included in the new § 1010.380(g) recently finalized by FinCEN. Several measures to enforce those and other prohibitions are also part of the Proposed Rule now under consideration. But registry access won't matter much if key registry data is missing, incomplete, false, or fraudulent, and FinCEN tools are inadequate to compel compliance with the law.

One option to strengthen FinCEN's ability to create the accurate, complete, and useful registry mandated by the CTA is to make it clear that FinCEN can communicate with the states and tribes about entities within their jurisdictions that have either failed to submit required registry reports or supplied incomplete, false, or fraudulent information in a filing. Right now, FinCEN, like any other person, can alert a state or tribe to concerns about a specific business entity formed or registered to do business within their borders and ask the state or tribe to use its existing authority to investigate and, if warranted, take action against that entity. State laws already empower state officials to suspend or dissolve an entity's charter, subject to reinstatement if the entity is cleared of wrongdoing or cures identified problems. States employ a variety of terms for taking that type of action referring, for example, to actions to suspend, dissolve, cancel, annul, forfeit, or terminate an entity's charter, while typically also authorizing reversal of that action if the entity is cleared or takes appropriate steps. State laws also vary on the grounds that must be established to support such an action, such as requiring a finding that the entity violated a statute or engaged in fraud or abuse,[153] filed a document with false information,[154] failed to file a required report,[155] or failed to respond to inquiries posed by the

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[152] 31 U.S.C. § 5336(h)(1).

[153] See, e.g., California Corporations Code § 1801 (Attorney General may bring an action to dissolve a domestic corporation upon receipt of a complaint that the corporation "has seriously offended against any provision of the statutes regulating corporations" or "fraudulently abused or usurped corporate privileges or powers"); 8 Delaware General Corporate Law § 284 (Attorney General may bring an action to revoke or forfeit the charter of any corporation "for abuse, misuse or nonuse of its corporate powers, privileges or franchises"); Florida Business Organizations § 607.1430 (Department of Legal Proceedings may bring an action to dissolve a corporation if the corporation "obtained its articles of incorporation through fraud"); New York Business Corporation Law § 1101(a)(Attorney General may bring an action to dissolve a corporation if the corporation "procured its formation through fraudulent misrepresentation or concealment of a material fact ... transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state").

[154] See, e.g., Mississippi Code § 79-4-14.20 (Secretary of State may administratively dissolve a corporation if an "incorporator, director, officer or agent of the corporation signed a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing").

[155] See, e.g., Texas Business Organizations Code § 11.251(b)(Secretary of State may "terminate a filing entity's existence" if the secretary finds that the entity failed to "file a report within the period required by law").

jurisdiction.[156] Some states also provide officials with general authority to dissolve a business entity "for other causes."[157]

The CTA does not give FinCEN direct authority to order the suspension or dissolution of a state-chartered entity's operations. That authority lies solely with the state or tribe that formed or registered the entity to do business within its borders. What FinCEN can do, however, is establish lines of communication with states and tribes to alert them to entities that appear to have failed to submit a required registry report or appear to have submitted incomplete, false, or fraudulent information, and ask the relevant state or tribe to suspend that entity's charter pending resolution of FinCEN's concerns. The CTA already requires FinCEN to "establish partnerships with State, local, and Tribal government agencies,"[158] and requires states and tribes, "to the extent practicable, and consistent with applicable legal protections, [to] cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information."[159] Those provisions provide ample statutory authority for FinCEN to establish an electronic system for communicating concerns about a specific entity to the appropriate state or tribal office and asking that office to suspend that entity's charter until the concerns are resolved.

By inserting a new provision in the final rule that explicitly details FinCEN's authority to ask a state or tribe to suspend the charter of an entity suspected of violating the CTA until the concerns about that entity are resolved, the final rule would provide fair notice to reporting companies about the existence of that option and would create another incentive for entities to follow the law, work with FinCEN, and avoid risking their ability to do business within the United States. It would also remind FinCEN of its authority to communicate with partner states and tribes about a suspect entity and to solicit state and tribal assistance in the battle against illicit finance and against entities with hidden owners operating within the United States.

Final Word About the New Proposed Registry Intake Form

A final comment looks beyond the Proposed Rule at issue here to a new proposal to implement the CTA. In January, FinCEN proposed the key form to be used to collect and convey identifying information for the registry about beneficial owners, company applicants, and individuals who control certain foreign pooled investment vehicles.[160] FinCEN has separately solicited public comment on that form by March 20, 2023, but it is worth noting here that the

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[156] See, e.g., Florida Business Organizations § 607.1420 (Department of State may administratively dissolve a corporation on certain grounds, including failure "to answer truthfully and fully ... interrogatories propounded by the Department of State"); Illinois Business Organizations § 805 ILCS 5/12.35(g)(similar).

[157] See, e.g., New York Business Corporation Law § 1101(c)(stating that the enumeration of specific grounds for dissolution "shall not exclude actions or special proceedings by the attorney-general or other state officials for the annulment or dissolution of a corporation for other causes as provided in this chapter or in any other statute of this state"); Florida Business Organizations § 607.1420(2) and 1430(b)(similar).

[158] 31 U.S.C. § 5336(b)(1)(F).

[159] 31 U.S.C. § 5336(d)(2).

[160] "Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports," FinCEN, 88 FR 2760 (Docket Number: FINCEN–2023– 0002), (1/17/2023), https://www.govinfo.gov/content/pkg/FR-2023-01-17/pdf/2023-00703.pdf.

proposed form not only violates the requirements of the CTA but also, if finalized as proposed, would enable wrongdoers to provide registry information that is virtually useless to registry users – and do so with FinCEN's permission.

That's because the form proposed by FinCEN allows the individual responding to its questions to declare that the identifying information required by the CTA – such as a beneficial owner's name, birthdate, address, and unique number from an acceptable identification document – is "unknown" or the individual is "unable to obtain" it. The proposal establishes no standard and requires no explanation for selecting those options. The proposal provides no explanation about why Treasury and FinCEN apparently believe reporting companies have no obligation under the CTA to identify and disclose their beneficial owners.

The proposal essentially invites bad actors to thumb their nose at the CTA. For example, a money launderer could form a U.S. company owned 100% by a shell entity in a secrecy jurisdiction with laws prohibiting disclosure of beneficial ownership information, hire a formation company to supply the offshore entity with an executive who could then honestly fill out the registry intake form stating that the identity of the beneficial owner of the offshore entity is unknown to the executive and can't be obtained by that executive due to the secrecy jurisdiction's laws. Despite providing no beneficial ownership information at all to the registry, the reporting company would, according to the proposed form, meet its legal obligations under the CTA. By allowing that outcome, the proposed form would resurrect the exact offshore corporate secrecy problem that the Corporate Transparency Act was designed to overcome.

FinCEN does not explain how the proposed form complies with the CTA which requires reporting companies to know their beneficial owners and supply basic identifying information about them. It cites no other federal form providing precedent for the approach taken in the proposed registry form. It does not explain why FinCEN designed the form in the way that it did. It does not explain how FinCEN can use the form to meet its statutory obligation to construct a registry with beneficial ownership information that is accurate, complete, and highly useful.

The proposed form is simply the worst government form that I have seen in 40 years of public service. It makes we want to throw up my hands and give up on effective implementation of the CTA. I can only hope that Treasury and FinCEN will reconsider their CTA obligations, withdraw the form, and start over.

Thank you for this opportunity to comment on the Proposed Rule.

Sincerely,

Elise Bean
Former staff director and chief counsel
U.S. Senate Permanent Subcommittee on Investigations