U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

February 14, 2023

Himamauli Das
Acting Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Proposed Rule, Financial Crimes Enforcement Network; Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities (87 Fed. Reg. 77,404-77,457, December 16, 2022)

Dear Acting Director Das:

The U.S. Chamber of Commerce ("the Chamber") appreciates the opportunity to share our views in response to the Financial Crimes Enforcement Network's ("FinCEN") notice of proposed rulemaking ("NPRM") on "Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities" ("Proposed Rule") under the Corporate Transparency Act ("CTA" or "Act"). The Proposed Rule is the second of three rulemakings and "would implement the provisions in the CTA, codified at 31 U.S.C. 5336(c), that authorize certain recipients to receive disclosures of identifying information associated with reporting companies, their beneficial owners, and their company applicants (together, BOI)."[1] It follows FinCEN's rule on Beneficial Ownership Information Reporting Requirements, which was finalized on September 30, 2022 and focuses exclusively on the Act's beneficial ownership reporting requirements. The third and final rulemaking will seek to revise the existing Customer Due Diligence Rule (CDD) as needed.

The CTA modified the United States anti-money laundering regulatory regime significantly by establishing a new requirement for small businesses to file reports (and updates) containing certain information about their beneficial owners to FinCEN directly, and for FinCEN to maintain a database of these reports. As we have noted previously, we stand "shoulder-to-shoulder with FinCEN in its mission to protect national security by preventing and punishing money laundering, terrorist financing, and other illicit activities."[2] We also stand with the millions of small, law-abiding American businesses who need clear, appropriately tailored requirements so that they can continue to build generational wealth and a brighter future for their families and

[1] 87 Federal Register 77404 (Dec. 16, 2022).
[2] U.S. Chamber comment letter on Beneficial Ownership Information Reporting Requirements (February 7, 2022). Found at: http://www.centerforcapitalmarkets.com/wp-content/uploads/2022/02/220207_Comments_Corporate-TransparencyAct_FinCEN.pdf?#

the United States as a whole. Our comments are designed and intended to help FinCEN enact a final rule that is carefully calibrated to reflect the Act's mandate to "minimize the burden on reporting companies and to ensure that the information collected is accurate, complete, and highly useful."[3]

The Chamber supported Congressional efforts in December 2020 to modernize the United States anti-money laundering requirements via the CTA and appreciated Congress's intent to "enable financial institutions to better assist law enforcement with preventing criminal activity."[4] However, we have concerns that the rule as proposed may unnecessarily burden financial institutions without providing meaningful information to law enforcement. In light of our shared goals and the clear directive of the CTA, we urge FinCEN to refine various aspects of the Proposed Rule as described in more detail below.

Access to the Beneficial Ownership Registry

The Chamber appreciates the NPRM's stated goals of ensuring that only authorized recipients can access BOI and that they use and redisclose it "in ways that balance protection of the security and confidentiality of the BOI with furtherance of the CTA's objective of making BOI available to a range of users for purposes specified in the CTA."[5] The Proposed Rule recognizes the current lack of a beneficial ownership repository, noting that information collected by financial institutions on legal entity accounts pursuant to their CDD or broader Customer Identification Program (CIP) obligations is generally the only access law enforcement and national security agencies have to this information.[6] The Proposed Rule would create a central database for the first time, where BOI will be collected and systematically reported, and the NPRM sets out parameters on the access and use of the information in the repository.

The Chamber is concerned that without a clear understanding of beneficial ownership obligations for financial institutions, feedback on the access requirements will be limited and incomplete. The BOI reporting requirements have only been finalized for a few months and will not go into effect until January 1, 2024. For instance, it is unclear whether financial institutions will have an affirmative obligation (and a regulatory expectation) to download BOI from the system, or if they will be free to not use the system. Financial institutions should not be mandated to download BOI

---

[3] 15 U.S.C. § 5336(b)(1)(F)(iii).
[4] Letter to the Members of the FY21 National Defense Authorization Act Conference Committee, US CHAMBER OF COMMERCE (Dec. 3, 2020), available at https://www.uschamber.com/assets/documents/201203_fy21ndaa_conferees.pdf.
[5] 87 Federal Register at 77404.
[6] Ibid. at 77405.

from the database, but if they choose to, they should be allowed to rely on the information and not have to perform additional verification of BOI.

We are also concerned that that both financial institutions and small businesses could be burdened significantly without any meaningful information being provided to law enforcement. This is before the CDD rule has even been proposed, which could add another layer of complexity. A primary concern of the Chamber from the outset of the passage of the CTA was that there would be duplicative reporting, with financial institutions being required to collect and verify the same information that businesses are required to report under the CTA and a resulting process of reporting and accessing information that may not be easier for anyone involved and that may do little if anything to prevent illicit activity.

Beneficial Ownership Information Retention and Disclosure Requirements

As the NPRM notes, the CTA authorizes FinCEN to disclose BOI to five categories of recipients: 1) Federal, State, local, and tribal government agencies, 2) certain foreign requesters, 3) Financial institutions using BOI to facilitate compliance with CDD requirements under applicable law, provided the financial institution requesting the BOI has the relevant reporting company's consent for such disclosure, 4) Federal functional regulators and certain other appropriate regulatory agencies, and 5) the U.S. Department of the Treasury (Treasury).

Financial institutions have significant obligations under the Proposed Rule, but their access to the information in the database is more limited than that of federal agencies engaged in national security. Financial institutions would not be allowed to run direct searches of the repository, and they will be provided a different view than law enforcement when they search the database. A financial institution "would submit to the system identifying information specific to that reporting company and receive in return an electronic transcript with that entity's BOI."[7] For instance, financial institutions will not see an actual driver's license for a beneficial owner but would instead see an electronic transcript of information. This will create discrepancies in the type of information that financial institutions are able to access.

Disclosure of BOI to Financial Institutions Subject to CDD Requirements

FinCEN should further clarify how financial institutions obtain consent from reporting companies to access information in the database. FinCEN can disclose a reporting company's BOI "only to the extent that such disclosure facilitates the FI's compliance with CDD requirements under applicable law, and only if the reporting company first consents."[8] The CTA does not state how consent should be registered, but the Proposed Rule places the responsibility for obtaining consent on the financial

[7] 87 Federal Register at 77410.
[8] Ibid.

institutions, stating that they "are best positioned to obtain and manage consent through existing processes and by virtue of having direct contact with the reporting company as a customer."[9] In addition, financial institutions are not required to submit proof of reporting company consent when the request for BOI is made in order to reduce delays in the onboarding of customers but would be incentivized to retain evidence of consent for future safety and soundness examinations by federal functional regulators.[10]

FinCEN should seek to further reduce burdens on financial institutions and reporting companies when it promulgates the CDD rule. Obligations under the CDD rule are the primary concern of financial institutions, and FinCEN is required under the CTA to bring the CDD rule in line with the Act and has stated that a rule is forthcoming. In promulgating that rule, the CTA requires FinCEN to "reduce any burdens on financial institutions and legal entity customers that are, in light of the enactment of this division and the amendments made by this division, unnecessary or duplicative."[11] While issuing the updates to the CDD rule first would have been optimal for banks, in the forthcoming CDD rule update the Chamber reminds FinCEN of its statutory obligation and encourages the agency to put forth updates that eliminate unnecessary and burdensome steps and that make is easier for financial institutions to meet their CDD obligations. The banking industry invested untold millions of dollars to implement the CDD rule in 2018. To expand the obligations under the CDD rule would amount to a waste of resources, add additional burdens to financial institutions, and is contrary to the intent of the Anti-Money Laundering Act (AMLA) of 2020.

Uncertainty about updates to the CDD rule also make meaningful comment on the current Proposed Rule difficult or nearly impossible. For example, the Proposed Rule attempts to define "customer due diligence requirements under applicable law'"[12] since the term is not defined in the CTA. FinCEN uses the definition in 31 CFR 1010.230, which requires covered financial institutions to identify and verify beneficial owners of legal entity customers. The current CDD rule defines a beneficial owner using two prongs: the ownership prong and the control prong. The ownership prong includes each individual who controls up to 25% of the equity interests of a legal entity customer (up to four individuals), and the control prong is "a single individual with significant responsibility to control, manage, or direct a legal entity customer."[13] The Proposed Rule broadens the definition of beneficial owner and does not limit the number of beneficial owners. Regarding the control prong, the broader definition of substantial control that was included in the final rule on reporting requirements is

[9] Ibid. at 77415.
[10] Ibid. at 77422.
[11] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, § 6403(d)(1)(C).
[12] 87 Federal Register at 77415.
[13] 31 CFR 1010.203(d)

problematic because it does not align with the CDD rule and is too amorphous to be applied reasonably, consistently, and in a cost-effective manner that will provide decision-useful information to FinCEN. If this definition is applied to the CDD rule updates, financial institutions would bear significant costs to comply, and compliance would still be uncertain as financial institutions are even less well positioned than reporting companies to make determinations of who exercises substantial control over a business. Financial institutions already encounter significant hurdles implementing the less complex definition in the CDD rule, and that will be compounded if FinCEN applies the expanded definition in the CDD rule update. FinCEN should make consistent conforming definitions to the CDD Rule as financial institutions would be unable to comply effectively if this definition of substantial control were adopted.

Use of Information by Authorized Recipients

The Chamber is also concerned with restrictions placed on the sharing of information within the same financial institution, such as requiring financial institutions to limit sharing of information to employees physically present in the U.S. This will negatively impact enterprise programs for financial institutions with an international presence or consisting of more than one legal entity. Restrictions are similar to Suspicious Activity Report (SAR) information, and AMLA created a pilot program to allow for cross-border sharing to provide for better risk management. Financial institutions must be able to share this information within and across the enterprise regardless of the location or legal entity, and the Chamber encourages FinCEN to allow for this in a final rule.

Given the geographic and use restrictions on BOI from the database, financial institutions may be better off simply using BOI and CDD information collected directly from customers. Additionally, restrictions placed on the sharing of information create operational complexities. Financial institutions would have to flag where BOI came from FinCEN versus the customer, which could potentially require serious system/technology updates to implement the controls needed to protect this information.

While the Proposed Rule rightfully notes that anyone who receives BOI from FinCEN can only use the information for the particular purpose or activity for which it was disclosed and not some unrelated purpose,[14] employees at financial institutions will encounter situations in which they need to share information with colleagues during the onboarding of a customer. This is of utmost concern because there will be a direct impact on the customer onboarding process if there is no direct access and financial institutions have to make individual requests to FinCEN. One-off manual searches may be acceptable if financial institutions are not required to obtain or verify BOI prior to opening an account or establishing a new customer relationship, but one-

[14] 87 Federal Register at 77417.

off manual searches would create an extreme burden if there is any expectation of accessing the database or using BOI from the database when opening an account or establishing a new customer relationship. Lack of direct access and the ability to share information with coworkers will cause significant delays for financial institutions in providing services to new customers, as well as disruptions for existing customers, especially if financial institutions are expected to resolve discrepancies. We urge FinCEN to provide consistency and to allow for more direct access and broader information sharing for financial institutions to reduce burdens and inefficiencies in providing customer service.

Concerns with Regulatory Analysis

Costs, Training, and Time Estimates

FinCEN significantly underestimates the costs that financial institutions will incur in updating processes and IT systems to comply with the Proposed Rule. Financial institutions would need to reengineer their due diligence processes and technology to appropriately segregate information with the sharing restrictions FinCEN has placed on the BOI registry information. BOI registry information would have to be segregated from standard customer documentation, which is a significant undertaking.

The cost estimates for financial institutions to establish administrative and physical safeguards and to submit written certification for each request that it meets certain requirements are significantly underestimated. For instance, an estimated cost of $7,310-8,904 for Year 1 and each subsequent year to submit written certification for each request that it meets certain requirements is well below what most banks estimate. The analysis in the proposed rule does not account for many of the costs that banks will incur when implementing this rule as proposed. For example, each step of the process will have to go through internal legal review at a financial institution, which will require significant hours of work that FinCEN does not consider.

FinCEN also underestimates the cost of training employees who will access BOI. FinCEN's assumptions that a minimum of one financial institution employee and a maximum of six financial institution employees would undergo annual BOI training is low; the estimated cost of $95-570 per year for this training is extremely low. The estimates themselves are low because there are hard and soft costs to financial institutions who will have to implement these training programs. Additionally, FinCEN's estimates do not account for the lost productivity to the institution while employees are attending training sessions.

Conclusion

The CTA was intended to prevent money laundering, terrorist financing, and other illicit activities and to assist law enforcement in protecting our national security.

As mentioned, the Chamber shares these noble goals but believes that there is still work to do to ensure that reporting companies and financial institutions do not provide redundant information to FinCEN that is not useful in achieving these ends. We encourage FinCEN to make amendments to the Proposed Rule and to update the CDD rule in a way that promotes consistency and minimizes compliance burdens.

We look forward to further constructive engagement on this issue.

Sincerely,

Will Gardner
Director
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce