FINANCIAL &
INTERNATIONAL
BUSINESS
ASSOCIATION

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UPLOADED VIA FEDERAL E-RULEMAKING PORTAL

Policy Division
Financial Crimes Enforcement Network
U.S. Department of The Treasury
P.O. Box 39
Vienna, VA 22183

Re: Docket No. FinCEN-2021-0005/RIN 1506-AB49/AB59 – *Comment Letter of the Financial and International Business Association, Inc.*

Ladies and Gentlemen:

The Financial Crimes Enforcement Network of the U.S. Department of the Treasury ("**FinCEN**") has proposed regulations regarding access by authorized persons to legal-entity beneficial-ownership information ("**BOI**") that will be reported to FinCEN pursuant to section 6403 of the Corporate Transparency Act (the "**CTA**"), enacted into law as part of the Anti-Money Laundering Act of 2020. *See* FinCEN, *Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities*, Notice of Proposed Rulemaking, 87 Fed. Reg. 77,404 (Dec. 16, 2022) (the "**Access NPRM**"). The proposed regulations set forth in the Access NPRM would implement the standards set forth in the CTA on access over, and the security and confidentiality of, BOI reported to FinCEN. The Access NPRM explains the limited circumstances in which specified recipients (such as financial institutions) would have access to legal-entity BOI.

The Financial and International Business Association, Inc. ("**FIBA**"), a not-for-profit Florida corporation, appreciates the opportunity to provide these comments to FinCEN in response to the Access NPRM. Founded in 1979, FIBA is a trade association and international center for financial excellence whose membership includes the largest financial institutions from the United States, Latin America, Europe, and the Caribbean.

FIBA's members are principally cross-border bankers (consisting of U.S. and non-U.S. depository institutions, trust companies, securities broker-dealers, and investment advisers, among others) with internationally active businesses. As such, FIBA's members have unique risk-exposure to money laundering and terrorism financing, and maintain risk-based controls to combat the same. FIBA has had the privilege of enjoying a long history of collaboration with FinCEN and other U.S. federal financial regulators in those regulators' efforts to adopt and implement federal Anti-Money Laundering ("**AML**") policy objectives.

FIBA supports Congress' and FinCEN's goal of corporate transparency and sees the implementation of the proposed BOI registry as another step forward in the fight against financial crime, money laundering, and terrorism financing that can contribute to more-effective AML programs.

By way of these comments, FIBA wishes to raise three key issues arising out of the Access NPRM that FIBA believes should be addressed in the final access rules that FinCEN is considering (the "**Final Access Rule**"). These three issues are: (1) the increased compliance risks financial institutions will be saddled with as a result of the proposed access rules under the Access NPRM; (2) the need for third parties to receive notice from a financial institution that they will decline to respond to any requests for the BOI of a reporting company; and (3) the need to permit U.S. banks, and U.S. branches and agencies of foreign banks, to share BOI with their head office or controlling companies (whether domestic or foreign) and their U.S. affiliates. FIBA addresses each of these issues in turn.

1. The Proposed Rules in the Access NPRM Create New Compliance Risks for Financial Institutions, and FinCEN Should Take the Opportunity Now To Clarify Its Compliance Expectations So That Institutions Know What To Do

Before passage of the CTA, it was anticipated that the creation of a centralized, FinCEN-maintained BOI registry would ease compliance burdens on financial institutions by permitting them as they deemed appropriate, and in their reasonable compliance discretion, to corroborate BOI on file against BOI filed with FinCEN. It has become apparent, however, that financial institutions' compliance obligations will increase further – and, more problematic, institutions' compliance risk will increase given the uncertainty created by the CTA reporting regime. This is because the CTA directs FinCEN to revise

the customer-due-diligence rule published at 31 C.F.R. § 1010.230 (the "**CDD Rule**") to, among other things,

> account for the access of financial institutions to [BOI] filed by reporting companies under section 5336 . . . in order [for financial institutions] to confirm the [BOI] provided directly to the financial institutions to facilitate the compliance of those financial institutions with the anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law.

CTA § 6403(d)(1)(B) (emphasis added). In fact, FinCEN referenced this provision in the preamble adopting its *Beneficial Ownership Reporting Requirements*, Final Rule, 87 Fed. Reg. 59,498, 59,507 (Sept. 30, 2022).

The above-excerpted underscored language appears to suggest that financial institutions will be expected to (i) affirmatively request, in every instance, BOI from each reporting company that maintains an account with a financial institution and (ii) corroborate FinCEN-provided BOI against information the institution already has on file for the reporting-company customer as part of the institution's CDD Rule obligations. If that is the case, the following compliance questions arise:

- *Mandatory Use of BOI? Or is Usage Discretionary Based on Risk?* FinCEN should clarify whether financial institutions, based on the above-excerpted language from the CTA, are now expected to corroborate FinCEN-provided BOI against information the institution already has as part of their account opening process for any (applicable) U.S. entity account that they open -- or do financial institutions have the option in their reasonable compliance discretion exercising a risk-based approach?
- *Frequency of Access*. If access to BOI is required in every instance, FinCEN should clarify how often a financial institution must request BOI access from FinCEN in respect of a customer relationship. On a discretionary, risk-based basis? One time only? Annually? Less often? More often? Financial institutions need clarity and certainty in this area so that their examiners and auditors do not later criticize them for not having engaged in enough access of BOI for corroboration purposes. Accordingly, FinCEN should specify the frequency of BOI corroboration in the Final Access Rule. FIBA suggests that the corroboration should be on or about the time of the account opening and then

thereafter only once every three years, unless a risk-based approach suggests more frequent corroboration is required.

- *Memorialization of Reporting Company Consent*. The Access NPRM requires a financial institution to "obtain and document the consent of the reporting company to request [BOI]" from FinCEN.[1] 87 Fed. Reg. at 77,457. The most efficient way to implement this prior written customer consent requirement is for financial institutions to document that consent – once for the lifetime of a customer relationship – in account-opening agreements (or supplements thereto) signed by the customer. If the customer is not the reporting company (because it is exempt from reporting or otherwise), but its parent company is a reporting company, the customer should be able to grant its consent on behalf of its parent without the institution separately having to obtain prior written consent from the reporting company-parent. FinCEN should specify this in the Final Access Rule.

- *Accessing the Reporting Company's Filing Directly From the Customer*. Will FinCEN expect financial institutions to request from their reporting company customers a copy of the reporting company's BOI that the reporting-company customer filed with FinCEN, assuming customer consent is obtained? FIBA believes that the answer is "yes", *i.e.*, a financial institution should obtain from its customer a copy of the FinCEN BOI filing. Will financial institutions be expected to report to FinCEN (and/or to terminate or refuse to provide services to) any reporting company who refuses to consent or objects to the financial institution obtaining the company's BOI from FinCEN? FIBA would also expect the answer to be yes to this question. FinCEN should clarify this in the Final Access Rule.

- *What If There is a Discrepancy Between Reported BOI and the Customer File BOI*? If there is a material discrepancy between, on the one hand, the BOI provided by FinCEN and, on the other hand, the reporting-company customer's

[1] In an effort to minimize the paperchase required for positive consent in this regard, it would be helpful for the Final Access Rule to allow for negative consent in the form of a notice to customers which would allow customers to object to this sharing of information. This approach has consistency, for example, with the beneficial ownership rules used in connection with proxy requests where customers are informed that BOI will be shared with issuers of securities, unless the equity holder objects. See Securities Exchange Act §14(b) and SEC Rule 14(b)-1 *et seq*.

completed BOI form, what does the financial institution do? Discuss with the customer and give them an opportunity to amend their filing? We would think so. Or do something more drastic, such as file a suspicious-activity report or close the account relationship? FIBA would think not, absent extraordinary circumstances. FinCEN should specify this in the Final Access Rule.

- *Cost of Compliance*. It would be helpful for financial institutions and reporting company-customer for FinCEN to acknowledge the increased cost of compliance created by the rules that will result from the BOI Access NPRM, provide an estimate of what those costs are expected to be per account (presumably at least a few hours of additional work per account to access the BOI, corroborate the BOI, address any remediation of erroneous BOI, and supervise the BOI access process) which could cost and would merit an additional $100-$200 per account opening in maintenance fees (assuming, at a minimum, an operations specialist is making $50 an hour to do the work required).

2. Financial Institution-Affiliated Parties Should Be Obligated to Decline to Reveal to Third Parties Whether It Maintains Any FinCEN-Provided BOI of a Reporting Company

The Bank Secrecy Act (the "**BSA**") and FinCEN rules state that whenever an officer, director, employee, or agent of a financial institution (each an "**IAP**") is subpoenaed to disclose or otherwise reveal the existence of a suspicious activity report ("**SAR**"), the BSA and FinCEN require the IAP to "decline to produce the SAR or such information [revealing the existence of a SAR]," cite the applicable FinCEN rule and 31 U.S.C. § 5318(g)(2)(A)(i), and notify FinCEN of any request and the response thereto. *See* 31 C.F.R. § 1020.320(e)(1)(i). This disclosure obligation serves to put a litigant or other requestor on notice that accessing SAR information from the financial institution is off limits, and that at least one federal agency (*i.e.*, FinCEN) will receive notice of a litigant's or other requestor's SAR-related records request.

The same obligation should extend to financial institutions that request access to BOI from FinCEN, such that if and when a litigant or other requestor serves the institution or any of its IAPs with compulsory legal process or other request to produce information regarding BOI records from FinCEN, an institution and its IAPs should be obligated to tell the litigant or other requestor that the institution is required to decline the request for

BOI records from FinCEN, citing the applicable FinCEN rule, and to notify FinCEN of the request for BOI records. This obligation would inherently provide a protection to financial institutions by dissuading litigants and other requestors from seeking BOI records in the first instance. Such an obligation would also serve to strengthen the sanctity of the confidential nature of BOI, such that it is on a par with SARs. Accordingly, FinCEN should include this in the Final Access Rule.

3. U.S. Banks, U.S. Branches and Agencies of Foreign Banks Should Be Able to Share BOI With Their Head Office or Controlling Company (Whether Domestic or Foreign) and Their U.S. Affiliates

In 2006, FinCEN – together with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the now-abolished Office of Thrift Supervision – determined that a U.S. branch or agency of a foreign bank may share a SAR with its head office. *See Interagency Guidance, Sharing Suspicious Activity Reports with Head Offices and Controlling Companies* (Jan. 20, 2006) (the "**2006 Guidance**"). The 2006 Guidance also stated that a U.S. bank may share a SAR with its controlling company (whether domestic or foreign). FinCEN concluded that the 2006 Guidance comported with its SAR rules, and determined that the sharing of a SAR or, more broadly, any information that would reveal the existence of a SAR with a head office or controlling company (including overseas) promotes compliance with the applicable requirements of the BSA by enabling the head office or controlling company to discharge its oversight responsibilities with respect to enterprise-wide risk management, including oversight of a depository institution's compliance with applicable laws and regulations.

Four years later, in 2010, FinCEN determined that a depository institution that has filed a SAR may share the SAR, or any information that would reveal the existence of the SAR, with an affiliate, as defined herein, provided the affiliate is subject to a SAR regulation. *See* FinCEN, *Sharing SARs by Depository Institutions with Certain U.S. Affiliates*, FIN-2-1—G006 (Nov. 23, 2010) (the "**2010 Guidance**"). The sharing of SARs with such affiliates, FinCEN found, facilitates the identification of suspicious transactions taking place through the depository institution's affiliates that are subject to a SAR rule. FinCEN concluded that such sharing within the depository institution's corporate organizational structure is consistent with the purposes of the BSA.

The Access NPRM recognizes that there are circumstances in which a financial institution's employees may have a need to share BOI with counterparts (*e.g.*, if they are working together to onboard a new customer). However, FinCEN proposes to expressly limit financial institutions to disclosing BOI received from FinCEN ***only to officers, employees, contractors, and agents of the financial institution physically present in the United States.*** *See* Access NPRM at 77418. FinCEN explains that this limitation is necessary to provide appropriate protection to BOI against disclosures to foreign governments outside of the framework established by the CTA. *See Id.*

The Access NPRM redisclosure provisions for financial institutions, however, do not consider the 2006 Guidance and 2010 Guidance, or the fact that customer information (including, in some cases, BOI information currently being collected under the CDD Rule) can already be shared with U.S. affiliates, controlling companies and head offices (including those located overseas) when involving SARs. Accordingly, for purposes of consistency with, and for the reasons articulated in, the 2006 Guidance and 2010 Guidance, FIBA believes that the sharing of BOI provided by FinCEN with U.S. affiliates, head offices or controlling companies (whether domestic or foreign) should be permissible and specifically articulated in the Final Access Rule.

The sharing of BOI information with a U.S. affiliate, head office or controlling company (including one located overseas) would further the purpose of the CTA and would promote the bank's compliance with AML requirements. Head offices and controlling companies have oversight responsibilities with respect to enterprise-wide risk management, including oversight over a bank's compliance with BSA requirements (which will now include the CTA). AML and other compliance personnel of U.S. branches and agencies of foreign banks often work closely with their counterparts at the head office, and in fact report to a chief compliance officer of the parent foreign bank. These frameworks allow for ongoing sharing of data related to customers to make judgments regarding whether a particular customer presents risk. Sharing of BOI for AML compliance purposes with affiliates that are subject to a SAR regulation is also critical to facilitate overall AML compliance, especially where the affiliate maintains accounts for the same customers. The sharing of BOI provided by FinCEN with U.S. affiliates, head offices and controlling companies (domestic or foreign) will further protect the U.S. financial system from illicit use and will be necessary to ensure that oversight responsibilities are executed judiciously and efficiently.

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FIBA hopes that FinCEN finds these comments helpful to the dialogue between the industry and its regulators. As always, we welcome the opportunity to further discuss these points at FinCEN's convenience.

Very truly yours,

David Schwartz
President & CEO
Financial and International Business Association, Inc.