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February 14, 2023

Financial Crimes Enforcement Network

Global Investigations Division

Attn: RIN 1506-AB49/AB59, Docket No. FINCEN-2021-0005

P.O. Box 39

Vienna, VA 22183

Re: Comments on Beneficial Ownership Information Access and Safeguards

To Whom it May Concern:

Enclosed are comments on the Notice of Proposed Rulemaking from the U.S. Financial Crimes Enforcement Network to implement the beneficial ownership information access requirements of the Corporate Transparency Act. These comments are submitted on behalf of the Section of Taxation and have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

C. Wells Hall, III
Chair, Section of Taxation

Enclosure

cc: Hon. Lily Batchelder, Assistant Secretary (Tax Policy), Department of the Treasury
Thomas West, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Jarrett Jacinto, Attorney-Advisor, Department of the Treasury
Douglas O'Donnell, Acting Commissioner, Internal Revenue Service
William M. Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service
Drita Tonuzi, Deputy Chief Counsel (Operations), Internal Revenue Service
Kathryn Zuba, Associate Chief Counsel (Procedure & Administration), Internal Revenue Service

**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**Comments on Notice of Proposed Rulemaking – Beneficial Ownership
Information Access and Safeguards**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been reviewed or approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.¹

Principal responsibility for preparing these Comments was exercised by Rochelle Hodes and Karl Kurzatkowski. Substantial contributions were made by Stephen Dunn, Jeffrey M. Glassman, Matthew Johnson, and Brian McManus. These Comments have been reviewed by John M. Colvin of the Committee on Government Submissions, Michael J. Desmond, Chair of the Committee on Government Submissions, and Lisa M. Zarlenga, Vice-Chair for Government Relations for the Section.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: February 14, 2023

¹ In addition to these comments submitted by the ABA Section of Taxation that express the views of the Section only, the ABA has submitted separate comments in response to the Notice of Proposed Rulemaking that express the views of the ABA. The ABA’s comments are available at: https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-comment-letter-to-fincen-nprm-on-boi-access-and-safeguards-february-13-2023.pdf.

EXECUTIVE SUMMARY

On December 16, 2022, the U.S. Financial Crimes Enforcement Network (“FinCEN”) published a Notice of Proposed Rulemaking (the “NPRM”)² to implement the beneficial ownership information (“BOI”) access requirements of the Corporate Transparency Act (“CTA”)³ and proposed 31 C.F.R. § 1010.380 thereunder. FinCEN notes that the disclosure of BOI to authorized recipients in accordance with appropriate protocols and oversight would help law enforcement and national security agencies protect national security and prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity.

Proposed 31 C.F.R. § 1010.955 addresses a number of important items related to the implementation of the CTA, including (1) use of FinCEN identifiers by reporting companies; (2) access of reported BOI by officers and employees of the United States Treasury Department; and (3) use and disclosure of BOI by Treasury officers and employees.

FinCEN is considering several proposed regulations to implement the provisions in the CTA and authorize certain recipients to receive disclosures of BOI associated with reporting companies, their beneficial owners, and certain other individual applicants of reporting companies. FinCEN states that these proposed regulations aim to ensure that:

- (1) only authorized recipients have access to BOI;
- (2) authorized recipients use that access only for purposes permitted by the CTA; and
- (3) authorized recipients only re-disclose BOI 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.

In the NPRM, FinCEN seeks comment on various specific questions concerning such controls, protections, and oversight measures. We look forward to working with FinCEN through the implementation process to help structure appropriate protocols, protections, and oversight measures. To that end, we offer the following comments on proposed 31 C.F.R. § 1010.955. In addition, we recommend that proposed regulations be promulgated under the CTA and 26 U.S.C. § 6103 to ensure protection of BOI accessed by officers and employees of the Department of Treasury (“Treasury”) and the Internal Revenue Service (“Service”), similar to proposed 31 C.F.R. § 1010.955(c) and (d).

² Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. 77,404 (Dec. 16, 2022).

³ Enacted as Title LXIV of Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6403, 134 Stat. 3388.

BACKGROUND

The CTA is part of the Anti-Money Laundering Act of 2020⁴ and generally establishes beneficial ownership information reporting requirements for certain entities created in or registered to do business in the United States. The CTA enacted new 31 U.S.C. § 5336 to address the broader objective of enhancing beneficial ownership transparency while minimizing the burden on the regulated community.

Section 5336 requires certain types of domestic and foreign entities (called “reporting companies”) to submit specified BOI to FinCEN. In turn, FinCEN is authorized to share this BOI with certain government agencies, financial institutions, and regulators, subject to protocols on security and confidentiality intended to meet requirements articulated in the CTA. Given the sensitivity of the reportable BOI, the CTA imposes strict confidentiality and security restrictions on the storage, access, and use of BOI. The CTA establishes that BOI is “sensitive information” and provides that the Secretary of the Treasury shall maintain BOI in a “secure, nonpublic database, using information security methods and techniques that are appropriate to protect non-classified information systems at the highest security level.” The CTA further provides that BOI is only to be used by specified parties for specified purposes. Access to and disclosure of BOI is the focus of the NPRM.

To that end, FinCEN proposes 31 C.F.R. § 1010.955 to meet the goals of the CTA and ensure that BOI reported to FinCEN and disclosed to authorized officers and employees of Treasury is subjected to appropriately strict cybersecurity controls, confidentiality protections and restrictions, and audit and oversight measures.

FinCEN proposes an effective date of January 1, 2024 for proposed 31 C.F.R. § 1010.955, to comport with the effective date of BOI reporting by companies under proposed 31 C.F.R. § 1010.380.

DISCUSSION

I. Access-to-Information Provisions Under the CTA and the Proposed Regulations

Congress’s general statement of intent with respect to the dissemination of BOI, expressed in CTA section 6402(6), provides that information will be disclosed only to authorized governmental authorities, and subject to strict safeguards and controls:

beneficial ownership information collected under the amendments made by this title is sensitive information and

⁴ Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

will be directly available only to authorized government authorities, subject to effective safeguards and controls⁵

Proposed 31 C.F.R. § 1010.955 posits stringent rules regarding Treasury's disclosure of BOI to non-Treasury governmental parties, including other federal agencies. According to the preamble to proposed 31 C.F.R. § 1010.955, FinCEN, as part of Treasury, regards its authority to share BOI with Treasury officers and employees under proposed 31 C.F.R. § 1010.955(b)(5) as separate from FinCEN's authority to share BOI with non-Treasury parties, including other federal agencies.⁶

Because FinCEN is part of Treasury, the Proposed Regulations do not restrict FinCEN's disclosure of BOI to Treasury *as an agency*. Instead, the preamble to the proposed 31 C.F.R. § 1010.955 addresses the disclosure of BOI to "*officers and employees of the Department of the Treasury*."⁷ Reported BOI may be accessed by Treasury Department officers or employees "whose official duties require" inspection of BOI or "for tax administration as defined in 26 U.S.C. 6103(b)(4)."⁸

FinCEN in its transmittal suggests that the forthcoming rules governing the sharing of BOI with Treasury officers and employees will incorporate the security protocols for the sharing of BOI with non-Treasury parties set forth in proposed 31 C.F.R. § 1010.955(d)(1):

FinCEN will work with other Treasury components to establish internal policies and procedures governing Treasury officer and employee access to BOI. These policies and procedures will ensure that FinCEN discloses BOI only to Treasury officers or employees with official duties requiring BOI access, or for tax administration. FinCEN anticipates that the security and confidentiality protocols in those policies and procedures will include elements of the protocols described in proposed 31 CFR 1010.955(d)(1) as applicable to Treasury activities and organization."⁹

Proposed 31 C.F.R. § 1010.955(c)(1) provides that any person (including an officer or employee of Treasury or the Service) may use BOI only for the purpose or activity for which it was disclosed in the first instance. Proposed 31 C.F.R. § 1010.955(c)(2), governing a recipient's further disclosure of BOI, provides that recipients may only

⁵ Further, section 6402(7)(B) of the CTA expresses the sense of Congress that the Secretary of the Treasury "take all steps, including regular auditing, to ensure that government authorities accessing beneficial ownership information do so only for authorized purposes consistent with this title."

⁶ NPRM Preamble, 87 Fed. Reg. at 77,416 ("The CTA includes separate, Treasury specific provisions for accessing BOI.").

⁷ *Id.* at 77,417 (emphasis added).

⁸ *Id.* at 77,416 – 77,417.

⁹ *Id.* at 77,417.

disclose to other agents of the same agency for the particular purpose for which the BOI was initially requested (and subject to protocols of proposed 31 C.F.R. § 1010.955(d)). However, this rule does not extend to disclosures to Treasury and Service personnel. Instead, proposed 31 C.F.R. § 1010.955(c)(2)(i) provides that an officer, employee, contractor, or agent of the Treasury who receives information pursuant to a request under proposed 31 C.F.R. § 1010.955(b)(5) “may disclose such information to another Treasury officer, employee, contractor, or agent for the particular purpose or activity for which such information was requested consistent with internal Treasury policies, procedures, orders or directives.”

II. Confidentiality and Disclosure Provisions of 26 U.S.C. § 6103

Title 26 U.S.C. § 6103 places strict confidentiality requirements around “return[s]” and “return information” in the hands of the Service. “Return information” is broadly defined to include the taxpayer’s identity and the nature, source, or amount of the taxpayer’s income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, and tax payments.¹⁰ It also includes information on whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing by the Service and any data collected by or submitted to the Service from any source in connection with such inquiries and activities.

Various provisions of 26 U.S.C. § 6103 authorize disclosure of otherwise protected returns and return information to other federal and state agencies, subject to the safeguard protections set forth in 26 U.S.C. § 6103(p), and as described in IRS Publication 1075. Violations of the confidentiality rules in 26 U.S.C. § 6103 are subject to civil and criminal sanctions.¹¹

III. Treasury Should Issue Coordinating Regulations under the CTA and 26 U.S.C. § 6103 to Ensure that BOI Disclosed to Officers and Employees of the Service is Protected to the Same or Similar Degree as Under the Proposed Regulations

Although the rules set out in proposed 31 C.F.R. § 1010.955(c) and (d) do not extend to Treasury or Service recipients of BOI, any BOI information provided to the Service for tax administration purposes should be covered by the broad confidentiality protections set forth in 26 U.S.C. § 6103 and the regulations thereunder. Whether the Service obtains BOI directly under proposed 31 C.F.R. § 1010.955(b)(5), or via one of the other permissive disclosures under proposed 31 C.F.R. § 1010.955(b) (for instance, under proposed 31 C.F.R. § 1010.955(b)(1) as a federal agency making a law enforcement request, or under proposed 31 C.F.R. § 1010.955(b)(3) as a federal agency making a request on behalf of a foreign law enforcement agency), or indirectly from another

¹⁰ See 26 U.S.C. § 6103(b)(2)(A).

¹¹ See, e.g., 26 U.S.C. §§ 7431 (civil damages for unauthorized inspection or disclosure of returns and return information); 7213 (criminal sanction for unauthorized disclosure of information).

authorized recipient that shares the BOI with the Service (for example as part of a task force), BOI in the hands of Service personnel should be protected as “return information” and subject to 26 U.S.C. § 6103. Accordingly, we recommend that Treasury propose regulations confirming that BOI provided to the Service is covered by 26 U.S.C. § 6103 and providing coordinating rules to ensure that BOI disclosed to Treasury and the Service is protected to at least the same degree as BOI submitted to other agencies is protected by proposed 31 C.F.R. § 1010.955(c) and (d)

Proposed 31 C.F.R. § 1010.955(b)(5) provides that, consistent with procedures and safeguards established by the Secretary--

- (i) BOI reported pursuant to proposed 31 C.F.R. § 1010.380 shall be accessible for inspection or disclosure to Treasury officers or employees whose official duties the Secretary determines require such inspection and disclosure; and
- (ii) Treasury officers and employees may obtain BOI reported pursuant to proposed 31 C.F.R. § 1010.380 for tax administration as defined in 26 U.S.C. [§] 6103(b)(4).

This language anticipates that Treasury will have procedures and safeguards with respect to FinCEN disclosures of BOI by officers or employees of the Treasury Department. This language also anticipates that there will be rules that will set forth those individuals whose official duties require inspection and disclosure of BOI. We believe this can be achieved through rules coordinating the confidentiality provisions of the CTA with existing confidentiality and safeguard protections afforded to returns and return information under 26 U.S.C. § 6103.

Proposed 31 C.F.R. § 1010.955(b)(5) allows access of reported BOI for “tax administration” as that term is defined in 26 U.S.C. § 6103(b)(4). This includes administration not only of the federal tax laws, but also of “related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party.”¹² If BOI obtained by Treasury and the Service is to be shared with state tax administrators or foreign treaty partners, it is incumbent that Treasury have procedures in place imposing the equivalent of the 31 U.S.C. § 5336(c)(3) and proposed 31 C.F.R. § 1010.955(d) protocols on any subsequent transfer of BOI to state tax administrators or treaty partners. We believe that regulations coordinating the CTA with the safeguard rules set forth in 26 U.S.C. § 6103(p) should be able to achieve this objective.

In addition, given the high bar for governmental authorities outside of Treasury to obtain access to BOI from FinCEN,¹³ Treasury rules governing redisclosure of BOI should endeavor to ensure that states or foreign countries do not use or employ their tax authorities to make a request to Treasury under the guise of “tax administration purposes,” when the true intent is to obtain the BOI for other, non-tax administration purposes.

¹² 26 U.S.C. § 6103(b)(4)(A)(i).

¹³ Prop. 31 C.F.R. § 1010.955(c) and (d).

Finally, we recommend that the public be apprised of internal Treasury procedures that currently exist, or that Treasury is planning to implement, regarding the confidentiality and security of BOI that FinCEN discloses to Treasury and Service officials and employees under proposed 31 C.F.R. § 1010.955(b)(5).

IV. Conclusion

The Section urges FinCEN to consider the foregoing comments and recommendations to ensure that appropriate protocols and measures are put into place to ensure the security and confidentiality of information reported to FinCEN.

Please let us know if you have any question with the foregoing. Thank you for considering our views.