



NATIONAL DISTRICT ATTORNEYS ASSOCIATION

February 14th, 2023

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

Submitted via <http://www.regulations.gov>
Docket No.: FINCEN-2021-0005
RIN: 1506-AB49/AB59

RE: Beneficial Ownership Reporting Requirements

I am reaching out on behalf of the National District Attorneys Association (NDAA), the oldest and largest national organization representing state and local prosecutors in the country. NDAA is a national, non-partisan, non-profit membership association providing training, technical assistance and services to prosecutors across the country. With more than 5,000 members nationwide, NDAA is recognized as the leading source of national expertise on the prosecution function and is a valuable resource for the media, academia, government, and community leaders. Today, I write to comment on a notice of proposed rulemaking (NPRM) regarding access by authorized recipients to beneficial ownership information (BOI) that will be reported pursuant to section 6403 of the Corporate Transparency Act (CTA).

Prosecutors have long recognized the need for the collection of beneficial ownership information to hold organized transnational criminal operations, terrorism financing, and other unlawful activity accountable.¹ As end users of evidence collected throughout the investigative process, it is imperative that prosecutors have as much information as possible in order to determine the best course of action for prosecuting an individual or entity that has committed a crime. Beneficial ownership data collection is vital to this effort, and law enforcement and prosecutors must have lawful access to that information. Therefore, our membership has a unique interest in the implementation of the Corporate Transparency Act as law enforcement and prosecutors throughout the country advocated for new tools to end the use of anonymous companies to circumvent the criminal code and civil penalties.

NDAA applauds our partners at FinCEN for their hard work at implementing this vital program, however, we have concerns about the limitations placed on prosecutors and our partners as we attempt to access this vital database. Law enforcement and prosecutors must have lawful access to beneficial ownership data. One of the most vital pieces of FinCEN's implementation of the Corporate Transparency Act is the effort to include State, local, and tribal partners in the development and implementation of the new beneficial ownership database, which

¹Duffie Stone, *NDAA Letter to Congress on Corporate Transparency Act* (Jul. 20, 2020), https://ndaa.org/wp-content/uploads/NDAA-CTA_7.20.pdf; See also Michael Freeman, *NDAA Letter to Congress on Beneficial Ownership* (Jun. 5, 2018), <https://ndaa.org/wp-content/uploads/NDAA-Letter-on-Beneficial-Ownership-Info-Combating-Terrorism-and-Illicit-Finance-Act-May-2018.pdf>.

will collect basic identifying information for the owners of reporting companies to provide our members with a point of contact for a corporation that was previously anonymous. Fostering new relationships with these units of government and law enforcement, while strengthening existing bonds, will play a significant role in the success of the new tool.

The Nation's prosecutors are committed to assisting FinCEN in its work to implement the Corporate Transparency Act. Our members offer specific answers to the questions posed by the agency as it works to follow Congress's intent in enacting the new beneficial ownership database. In the following answers, NDAA focuses specifically on the topics and questions that are relevant to our membership and the role prosecutors will play within the new structure of the FinCEN beneficial ownership reporting requirements.

NDAA Concerns on Limiting Access to the Database through Restrictive Language

Our membership has identified key areas where FinCEN has yet to adhere to the Congressional mandates of the Corporate Transparency Act, while ensuring the application of the new beneficial ownership database will provide law enforcement with highly useful information on potential criminal actors in the United States financial system. NDAA points to the broad nature of the legislation to capture anonymous entities and ensure they are providing accurate information that could assist law enforcement in an ongoing criminal or civil investigation.

Specifically, the final rule should be made clear that access will be uncomplicated for law enforcement and other authorized users, including financial institutions, in order for the information collected to be useful in protecting our Nation's financial system. To ensure this goal is met, certifications should be filed electronically, and filing should be consistent with the beneficial ownership filings set up within the new FinCEN database. Information should be set up directly within the new FinCEN database with a mechanism for appropriate and timely e-filing to ensure contact information is widely available to the agency and any appropriate parties. The certifications should be established and reported in the same manner as the beneficial ownership information and accessed by database users in the exact manner as the beneficial ownership information.

Therefore, the current draft of the rule fails to accommodate the flexibility that was considered in the statutory language of the CTA. The language specifically states that 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 a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation." Effective implementation of the CTA requires that FinCEN not impede this access by limiting the scope of the court of competent jurisdiction; the definition of an "officer of a court", and what authorization is required by a court, including any officer of such a court. Unfortunately, the rule restricts these principals by requiring a "court order" and not expanding upon which court personnel are eligible to grant access. FinCEN also adds an entirely new burden to the concept of authorization relating to the requirement to "upload" such authorization, which is not otherwise contemplated by the CTA.

FinCEN can solve this problem by turning back to the statutory language that is clearly broad to ensure each jurisdiction attempting to access the lawful information on the database can identify the appropriate authorized individual in a court to provide sign off. It is clear from the plain language and legislative history of the CTA that Congress specifically chose not to require a court order issued by a judge in connection with granting State, local and Tribal access to the directory. The "court order" language provided in the updated rule limits the ability of courts and their law enforcement partners to establish procedures that best fit the needs of the specific requesting agency. Instead, this language would impose significant burdens on law enforcement by requiring them to work around the specific hours and procedures of "court orders" as defined by FinCEN, rather than other existing procedures such as Clerk of the Court sign-off, Municipal Court sign-off, or written permission granted by a presiding judge.

As is stated in the updated rule, there are many forms of court authorization, yet the language restricts those additional methods, as noted above, from providing law enforcement with access to the database. If Congress had meant to limit access to a “court order”, they would have explicitly done so. The court order could be read and litigated as implying authorization must come from a judge. As you know, that would be in direct conflict with the statutory text that clearly states “any” authorized officer of the court may grant access. Therefore, FinCEN should consider redrafting this provision to allow each jurisdiction to define who the appropriate “officer of the court” is to provide sign-off, in lieu of a “court order” and ensure that the agency is able to identify and contact that authorized officer if any questions arise to the nature of the request. The burden is already placed on State, local, and Tribal law enforcement to be properly trained on the database, provide evidence of an ongoing investigation, and track, in detail, the access to the database and any information use in the course of a criminal or civil investigation. These requirements alone place more protections on the beneficial ownership database than other existing Federal data provided to prosecutors and police. This is before receiving sign-off from the authorized court officer and our members look forward to protecting privacy by cooperating with each of these requirements.

However, FinCEN will limit the ability of the prosecutor and law enforcement community to access the database by further restricting access through these new, unfounded burdensome requirements that were not included in the statutory text. We know that FinCEN understands the resource and staffing challenges facing law enforcement across the country and our members appreciate the agency’s willingness to broaden the definition of an authorized “officer of the court” and remove the unnecessary “court order” language for the actual sign-off language contemplated by Corporate Transparency Act.

Datal Collection Improvement to Strengthen FinCEN Rulemaking

In the data collection process, FinCEN should take measure that reporting entities are meeting the full spectrum of requirements which will ensure the information provided to law enforcement is useful in the course of an ongoing investigation. For example, the agency should ensure reporting companies report their full legal name in addition to any names under which they do business, as provided on any identification documents, and provide accurate information required by the legislative text to not only assist law enforcement in contacting and reviewing details on a potential target of a criminal or civil investigation, but to also minimize confusion about entities that may share similar names.

Further, FinCEN should incorporate software into the database that standardizes addresses within the system to ensure data quality. Such incorporation facilitates and simplifies law enforcements access to necessary information needed to continue an investigation.

To continue the theme of assisting law enforcement in accessing useful information, FinCEN should also require reporting companies to input the jurisdiction of formation. This creates clarity about the entity while opening opportunities for resource collaboration with law enforcement in that jurisdiction. Federal courts often lack the awareness of ongoing State and local investigations and may not have sufficient information to make a fully informed decision on whether to authorize the agency to move forward with accessing the beneficial ownership database.

NDAA stated in its first comment that there is a need for real-time verification software to ensure data is accurate, complete, and highly useful. Information should include a known point of contact with a legitimate means of contact including email, phone number(s), address(es), and any other details the certifying entity can provide to allow authorities to directly contact the organization to update a false or mistaken piece of information. The agency can accomplish this by ensuring reporting companies submit copies of an acceptable identification document to assist FinCEN in certifying that all beneficial owners are reporting accurate information. This requirement ensures that when law enforcement requests information, FinCEN is able to confirm that the database includes accurate and legitimate contact information for each and every beneficial owner. FinCEN should also

take steps to require companies to certify the accuracy of the information as this will assist reporting entities in ensuring there are no mistakes in the report and provide additional notice that inaccurate information may not fall under the safe harbor. This verification should be done, for example, by pinging passport numbers in the Consolidated Consular Database or checking driver licenses through the appropriate Department of Motor Vehicles database. As previously noted, requiring copies of any required documents and requiring a reporting entity to certify the information entered into the system would assist in ensuring the information is accurate and complete. FinCEN should also provide reminders through the system that misreporting of the information is a criminal violation punishable under Federal law.

Additionally, as our first comment on the ANPRM for Beneficial Ownership Information noted, FinCEN should require an applicant to report, in addition to the standard data on the beneficial owner, the reason they are being reported to clarify that person's relationship with the organization to ensure that law enforcement has accurate information on the applicant. FinCEN should verify this information to ensure it includes accurate addresses and identifying information upon receipt from a covered entity. This information should include any additional details that a reporting company is willing to provide that would assist law enforcement in contacting and reviewing details on a potential target of a criminal or civil investigation.

To be specific, NDAA suggests FinCEN take steps to ensure beneficial owners are not hiding their identities from law enforcement accessing the database. These include deleting inappropriate passages in the preamble allowing FinCEN identifiers to be used by beneficial owners to hide their identities from reporting companies; providing all registry users access to identifying information about the person assigned to each FinCEN identifier; and clarifying that entities applying for a FinCEN identifier must disclose all of their direct and indirect beneficial owners in the application submitted to FinCEN. By mandating these small changes, the agency will ensure that the information accessible by law enforcement remains valuable to ongoing investigations into illegal activity.

Ensuring Effective Enactment

Our members continue to support our partners at FinCEN for dedicating their work to ensuring this new tool assists law enforcement in holding bad actors accountable. For years, State and local law enforcement have found that these investigations into financial crimes involve complex webs of criminal behavior that involve actors that may expand beyond our borders.² NDAA greatly appreciates your willingness to consider our input and ideas as the agency moves forward with the rulemaking process.

Congress intended for the legislation to provide law enforcement access to beneficial ownership during "ongoing" investigations, intentionally leaving the language broad to allow officers and prosecutors to access the database throughout the course of a criminal or civil investigation.³ Therefore, FinCEN should provide law enforcement, when requested through the appropriate protocols, access to the beneficial ownership database during all stages of the criminal or civil investigatory process. Prosecutors continue to work alongside our Federal, State, local, and tribal partners to root out criminal misuse of our country's banking systems and our members are confident that the successful implementation of the Corporate Transparency Act will further this shared goal.⁴ We

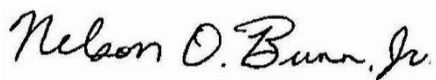
² See Max de Haldevang, *Why Iran got away with using a \$500 mln New York skyscraper as a secret slush fund for 22 years*, Quartz (Jun. 30, 2017), <https://qz.com/1019253/iran-used-shell-companies-to-hide-its-sanctions-busting-ownership-of-new-york-skyscraper-650-fifth-avenue/>.

³ See Cy Vance & Carolyn B. Maloney, *Opinion: True corporate transparency now: A new legislative tool will help fight fraud and terrorism*, New York Daily News (Jan. 27, 2021), <https://maloney.house.gov/media-center/in-the-news/opinion-true-corporate-transparency-now-a-new-legislative-tool-will-help>. See also Carolyn B. Maloney, *Maloney and Vance call on Congress to stop anonymous terrorist and criminal shell corporation money laundering in New York City*, (Mar. 7, 2016), <https://maloney.house.gov/media-center/press-releases/maloney-and-vance-call-on-congress-to-stop-anonymous-terrorist-and-0>.

⁴ See *Prosecutor Pushes on Beneficial Ownership In Fight Against Financing of Terrorists*, Bloomberg (Jun. 25, 2015), <https://news.bloomberglaw.com/banking-law/prosecutor-pushes-on-beneficial-ownership-in-fight-against-financing-of-terrorists>.

appreciate your commitment to enacting this historic legislation and look forward to working alongside your agency to preserve the integrity of the Nation's financial system while upholding the rule of law.

Sincerely,

A handwritten signature in black ink that reads "Nelson O. Bunn, Jr." The signature is written in a cursive, flowing style.

Nelson Bunn
NDAA Executive Director

Staff Contacts: Nelson Bunn, Executive Director, National District Attorneys Association,
nbunn@ndaajustice.org