

United States Senate

WASHINGTON, DC 20510

March 15, 2023

Himamauli Das
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

RE: Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities

Docket Number: FINCEN-2021-0005; RIN: 1506-AB49/AB59; Document Number: 2022-27031

Dear Director Das,

We write in response to the Financial Crimes Enforcement Network’s (FinCEN) notice of proposed rulemaking regarding “Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities.” This rulemaking is an important step in implementing the bipartisan Corporate Transparency Act (CTA),¹ part of the Anti-Money Laundering Act of 2020 (AML Act), which was enacted into law as a piece of the National Defense Authorization Act for Fiscal Year 2021.² While we appreciate the time and effort you have put into the implementation of this critical law, we have concerns that this proposed rule strays from congressional intent and erects unnecessary and costly barriers to accessing beneficial ownership information (BOI) that risk undermining the utility of the beneficial ownership directory. We encourage you to revise the rule to ensure it tracks closer to the text of the statute, remove excessive barriers to accessing the directory by authorized recipients, and enhance the utility of the directory.

Enacted at the end of the 116th Congress, the CTA is the product of a sensitive and painstaking legislative process, and its passage represents perhaps the most important anti-money laundering reform in two decades. “For years, experts routinely ranked anonymous shell companies—where the true, ‘beneficial’ owners are unknown—as the biggest weakness in our anti-money laundering safeguards.”³ The CTA directly tackled this problem by requiring FinCEN to create a national directory of beneficial owners of companies within the United States,⁴ bolstering our nation’s efforts to combat “money laundering, the financing of terrorism, proliferation finance,

¹ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 6401-6403, 134 Stat. 3388, 4604-4625.

² §§ 6001-6511, 134 Stat. at 4547-4633.

³ Press Release, Ian Gary, Executive Director, FACT Coalition, Landmark Bill Ending Anonymous U.S. Companies Is Enacted (Jan. 1, 2021), <https://thefactcoalition.org/landmark-bill-ending-anonymous-u-s-companies-is-enacted>.

⁴ § 6403, 134 Stat. at 4605-4625.

tax evasion, human and drug trafficking, sanctions evasion, and other financial crimes.”⁵ Despite its legislative success, this achievement can only be realized if the system works in practice. To that end, we offer the following recommendations.

Access and Use

State, Local, and Tribal Law Enforcement

While we appreciate that the proposed rule aligns with congressional intent by ensuring that law enforcement is defined to include the enforcement of both civil and criminal law,⁶ we have concerns that the proposed access procedures for State, local, and Tribal (SLT) law enforcement create excessive and costly barriers that were considered and rejected by Congress before enactment of the CTA. As drafted, the proposed rule would require SLT law enforcement to obtain “a court order” before requesting BOI from FinCEN.⁷ Lawmakers debated such a requirement,⁸ but Congress ultimately rejected that language in favor of granting access to any “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.”⁹ Legislators were clear that, while approval from a “‘Court of competent jurisdiction,’ for purposes of this measure,” required sign-off from a lawyer, it was not limited to a court order from a judge—but rather encompassed authorization from “an officer of such a court such as a judge, magistrate, or a Clerk of Courts.”¹⁰ The final rule should hew to congressional intent in this regard.

We also have concerns that the proposed rule deviates from congressional intent by requiring SLT law enforcement agencies to file additional information with FinCEN after obtaining authorization from a court of competent jurisdiction that needlessly risks complicating and slowing investigations.¹¹ Moreover, asking FinCEN to collect and manually review extra information from SLT law enforcement agencies that was not mandated by the statute is likely to overwhelm FinCEN’s capacities, thereby undermining the usefulness of the directory and conflicting with the clear purpose of the CTA. As such, we request that the final rule remove these additional barriers to accessing the directory.

⁵ H.R. REP. NO. 116-617, at 2139 (2020) (Conf. Rep.).

⁶ See Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. 77404, 77454 (proposed Dec. 16, 2022) (to be codified at 31 C.F.R. pt. 1010).

⁷ 87 Fed. Reg. at 77456.

⁸ For example, the House Financial Services Committee considered and rejected an amendment seeking to require State, local, and Tribal agencies to obtain a “court-issued subpoena or warrant” before accessing the beneficial ownership directory. *Corporate Transparency Act of 2019: Markup of H.R. 2513 Before the H. Comm. on Fin. Servs.*, 116th Cong. (June 11, 2019) (“An amendment offered by Mr. Davidson, [no. 2d](#), was NOT AGREED TO by a record vote of 25 ayes and 29 nays.”), <https://democrats-financialservices.house.gov/events/eventsingle.aspx?EventID=403829>.

⁹ 31 U.S.C. § 5336(c)(2)(B)(i)(II). Congress’ decision to allow clerks to approve access should be viewed as a one-off, due to the relative insensitivity of this business data, and should not be viewed as Congressional approval for court clerks to be able to authorize access to more intrusive surveillance authorities for which authorization has been traditionally entrusted to judges.

¹⁰ H.R. REP. NO. 116-617, at 2140 (2020) (Conf. Rep.).

¹¹ 87 Fed. Reg. at 77456.

Additionally, we recommend amending the proposed 31 C.F.R. § 1010.955(b)(2) to ensure the ability to use BOI in court cases following the conclusion of any related investigation.¹²

Financial Institutions

As drafted, this proposed rule risks impeding financial institutions' timely access to the beneficial ownership directory. Once the database is live, financial institutions across the country will immediately begin requesting access to BOI for the 32 million reporting companies in the country.¹³ It is essential that FinCEN establish an automated process (ideally one that integrates with existing compliance systems at financial institutions) for fielding and responding to these requests. If FinCEN manually reviews every request from each financial institution, it risks overwhelming the capacity of the agency, generating major delays in the financial system, and undermining the utility of the directory.

We also urge FinCEN to clarify in the final rule that financial institutions are not expected to affirmatively obtain new consent from an existing reporting company customer each time a financial institution needs to query the directory for information on such customer—assuming the customer previously provided the financial institution with its consent to request BOI from FinCEN.

Finally, the proposed rule deviates from congressional intent by inappropriately restricting financial institution access to and use of BOI.¹⁴ The current proposal could be read to forbid financial institutions from accessing the directory to assist with most of their Bank Secrecy Act, anti-fraud, and sanctions screening requirements. Congress intended that the directory be “highly useful” to financial institutions, among other authorized users, and the CTA explicitly contemplates that financial institutions will incorporate BOI into their AML/CFT programs.¹⁵ Further, Congress was clear that the purpose of the legislation was to combat the abuse of anonymous companies writ-large, including their use in sanctions evasion, financial fraud, and myriad other illicit activity.¹⁶ Since enactment, Vladimir Putin's invasion of Ukraine has only amplified the importance of the CTA, especially with regards to sanctions enforcement. While this proposed rule would provide national security, law enforcement, and intelligence agencies with critical information to aid federal implementation of sanctions against Putin and his oligarchs, financial institutions may continue to struggle to screen customers against sanctions lists if they are forbidden from accessing the BOI directory for that purpose. This undermines the law and should be changed.

Treasury OIG and GAO

The draft rule drifts from the statute by failing to provide explicit access to two key bodies tasked with conducting congressionally-mandated audits, studies, and investigations regarding

¹² 87 Fed. Reg. at 77454.

¹³ See 87 Fed. Reg. at 77408.

¹⁴ See 87 Fed. Reg. at 77415.

¹⁵ §§ 6402(6)(B), 6402(8)(C), 6403(d)(1)(B), 134 Stat. at 4605, 4624.

¹⁶ § 6402, 134 Stat. at 4604-4605; H.R. REP. NO. 116-617, at 2139 (2020) (Conf. Rep.).

the beneficial ownership directory: the Department of the Treasury's Office of Inspector General (OIG) and the Comptroller General of the United States.

The Inspector General and OIG staff are mandated with "official duties" by the CTA to field complaints and comments regarding the beneficial ownership directory, conduct investigations related to such complaints and comments or with regard to any cybersecurity breaches of the directory, and submit reports to Congress summarizing such complaints and comments, detailing the findings of such investigations, and providing critical policy recommendations.¹⁷ The proposed 31 C.F.R. § 1010.955(b)(5) would authorize the Secretary of the Treasury to provide access to any "officers and employees of the Department of the Treasury whose official duties the Secretary determines require such inspection or disclosure."¹⁸ However, the proposed rule does not explicitly address the unique role of the Inspector General, potentially causing confusion. As such, we encourage you to update the rule to provide explicit access for OIG in accordance with the statute.

Further, the AML Act instructs the Comptroller General of the United States and employees of the Government Accountability Office (GAO) with conducting multiple audits and studies related to the beneficial ownership directory.¹⁹ Congress clearly intended for Treasury to grant the Comptroller General and GAO employees access to the directory for their official duties related to these audits and studies, but the proposed rule includes no mention of either the Comptroller General or GAO. We urge you to clarify appropriate Comptroller General and GAO access in the final rule.

Verification

We are concerned that the proposed rule does not implement the congressional mandate that FinCEN ensure that beneficial ownership information reported to FinCEN be accurate, complete, and highly useful by implementing appropriate verification mechanisms. We urge you to ensure any final rule and the processes pursuant to which BOI is collected and maintained include verification.

In drafting the CTA, Congress was aware of deficiencies limiting the utility of the information collected by certain foreign beneficial ownership directories which did not verify reported information.²⁰ As such, Congress explicitly stated that one of the purposes of the CTA was to "bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards;"²¹ such standards define "accurate" BOI as "information, which has been verified to confirm its accuracy by verifying the identity and status of the beneficial owner using reliable, independently sourced/obtained documents, data or

¹⁷ 31 U.S.C. § 5336(c)(5)(A), 5336(h)(4)-(5).

¹⁸ 87 Fed. Reg. at 77454.

¹⁹ See 31 U.S.C. § 5336(c)(10); § 6502, 134 Stat. at 4626-4628.

²⁰ See, e.g., *Curbing Corruption Through Corporate Transparency and Collaboration: The British Model: Briefing of the Comm'n on Sec. & Coop. in Europe*, 116th Cong. (May 29, 2019).

²¹ § 6402(5)(E), 134 Stat. at 4604-4605.

information.”²² Accordingly, the statute requires Treasury, on its own and coordinating with other relevant federal, state, and tribal agencies, to implement BOI verification mechanisms.²³

Moreover, it is critical that this verification process be automated and built into the BOI reporting process. If FinCEN were to manually verify every submission of BOI, it risks overwhelming the capacity of the agency, generating major inefficiencies for reporting companies, and delaying access to accurate, complete, and highly useful BOI for authorized recipients.

Outreach, Templates, and Step-by-Step Guides

As you move forward with the implementation of the CTA, we urge you to create clear, concise templates and forms for requesting and accessing the BOI directory tailored to each type of authorized recipient. We also encourage FinCEN to create clear and concise training videos and step-by-step guides tailored to each type of authorized recipient of BOI explaining in plain language how to go about requesting and accessing BOI information from FinCEN. The CTA will only achieve its goals if appropriate users know how to access BOI and feel confident in their ability to access the directory within the confines of the law.

We commend FinCEN for your work to implement this historic legislation. Pending consideration of our feedback, we look forward to the swift implementation of the beneficial ownership information directory.

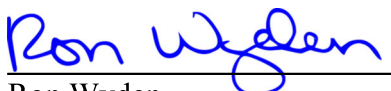
Sincerely,



Sheldon Whitehouse
United States Senator



Charles E. Grassley
United States Senator



Ron Wyden
United States Senator



Marco Rubio
U.S. Senator

²² FATF, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION, at 94 (2023), <https://www.fatf-gafi.org/content/dam/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf>.

²³ 31 U.S.C. §§ 5336(d)(1)-(2).



Elizabeth Warren
United States Senator

CC: The Honorable Janet Yellen, U.S. Secretary of the Treasury