

May 28, 2024

Director Shalanda Young
Office of Management and Budget
725 17th St. NW
Washington, D.C. 20503
www.reginfo.gov/public/do/PRAMain

RE: **Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Financial Crimes Enforcement Network (FinCEN) Information Collection Requests: Beneficial Ownership Requirements for Legal Entity Customers (31 CFR 1010.230), OMB Control Number: 1506–0070, Form Number: Appendix A to § 1010.230—Certification Regarding Beneficial Owners of Legal Entity Customers. 89 Fed. Reg. 33467 (April 29, 2024)**

Dear Director Young:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on the Paperwork Reduction Act (PRA)² requests for comment published by the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). FinCEN seeks renewal, without change, of the existing information collection requirements relating four separate information collections,³ including FinCEN's beneficial ownership requirements for legal entity customers.⁴ In particular, FinCEN seeks reapproval of Appendix A, the Certification Regarding Beneficial Owners of Legal Entity Customers form⁵ published by FinCEN that banks may use to comply with FinCEN's 2016 customer due diligence (CDD) rule.⁶

¹ The American Bankers Association is the voice of the nation's \$23.7 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2.1 million people, safeguard \$18.8 trillion in deposits and extend \$12.5 trillion in loans.

² 44 U.S.C. § 3501 *et seq.*

³ Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Financial Crimes Enforcement Network (FinCEN) Information Collection Requests; 89 Fed. Reg. 33467 (April 29, 2024). The other three information collections FinCEN seeks to renew without change are: Reports Relating to Currency in Excess of \$10,000 Received in a Trade or Business or Received as Bail by Court Clerks; Form 8300 (31 CFR § 1010.330 and 31 CFR § 1010.331); OMB Control Number: 1506–0018; Form Number 8300; FinCEN's administrative ruling regulations; and FinCEN Geographic Targeting Orders (GTOs).

⁴ The 60-day notice for this information collection: Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Reports of Beneficial Ownership Requirements for Legal Entity Customers, Docket Number FINCEN–2024–0008 and OMB Control Number 1506–0070, 89 Fed. Reg. 14148 (February 26, 2024); <https://www.federalregister.gov/documents/2024/02/26/2024-03965/agency-information-collection-activities-proposed-renewal-comment-request-renewal-without-change-of>.

⁵ 31 C.F.R. § 1010.230, Appendix A.

⁶ See generally 31 C.F.R. § 1010.230.

I. Summary of the Comment

The PRA requires federal agencies to seek approval (or as here, reapproval) from the Office of Management and Budget (OMB) before collecting information from the public. In pursuit of OMB approval, an agency must demonstrate that it has accurately assessed the costs of each information collection, balanced these costs and benefits, considered the need for and utility of each individual paperwork requirement, and minimized the collection burden of the information collection request.

ABA supports the goals of the PRA—we believe that accurately quantifying an information collection burden is an important predicate to an agency’s assessment of regulatory burden—as well as FinCEN’s work to achieve the goals of the Anti-Money Laundering Act of 2020 and its Corporate Transparency Act.⁷ Accordingly, on April 26, 2024, ABA submitted comments to FinCEN regarding FinCEN’s massive underestimate of the PRA burden associated with legal entity beneficial ownership certification under the CDD rule, in an effort to help FinCEN understand the current burdens associated with the CDD Rule, a letter attached to this submission.⁸

We were, therefore, disappointed to learn that FinCEN took steps to publish the 30-day PRA notice in the Federal Register prior to the expiration of the 60-day PRA comment deadline, conduct that shows little regard for either the spirit or letter of its obligations under the PRA. Consequently, we urge OMB to condition re-approval⁹ of this information collection on FinCEN reassessing and revising this PRA burden estimate upward and engaging in further discussions regarding burdens associated with CDD rule compliance with ABA.

II. Timeline of Events

The following represents a brief timeline of the relevant events:

- February 26, 2024 FinCEN publishes a 60-day notice under the PRA seeking public comment, with respect to the Appendix A beneficial ownership certification form, establishing a due date of April 26, 2024.

⁷ Pub. L. 116-283, 134 Stat. 4584, Section 6216 (Jan. 1, 2021).

⁸ ABA Letter to FinCEN Director Gacki on April 26, 2024; Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Reports of Beneficial Ownership Requirements for Legal Entity Customers, Docket Number FINCEN-2024-0008 and OMB Control Number 1506-0070, 89 Fed. Reg. 14148 (February 26, 2024); <https://www.aba.com/advocacy/policy-analysis/ltr-to-fincen-cdd-pra-2024-apr>.

⁹ Although this letter focuses on the Appendix A legal entity beneficial ownership certification form previously addressed by ABA, we note there are other procedural irregularities with respect to this notice. For example, although the 30-day notice published in the Federal Register states it seeks to renew, without change, FinCEN’s administrative ruling regulations, in FinCEN’s supporting statement to the administrative ruling regulations, FinCEN states that in response to another commenter recommending specific revisions to the administrative ruling regulations to make it clearer that the regulations apply to requests for administrative rulings related to beneficial ownership information (BOI) reporting requirements, in the supporting statement, *but not the Federal Register notice*, FinCEN states it is “clarifying here that the administrative ruling regulations cover requests for administrative ruling regarding the interpretation of the BOI reporting requirements, which are part of 31 CFR Chapter X.” FinCEN Supporting Statement, OMB Control Number 1506-0050, Administrative Ruling Regulations (Subpart G – 31 CFR 1010.710 through 31 CFR 1010.717); https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202404-1506-002.

- April 26, 2024 Due date for public comment on FinCEN’s 60-day notice under the PRA.

ABA submits public comment to FinCEN, advising FinCEN that its PRA burden estimate massively underestimates the time banks must spend obtaining beneficial ownership certification under the CDD rule. ABA explains that FinCEN’s 2016 estimate of the number of new accounts opened by legal entities, which the agency continues to rely on, vastly understates the number of new accounts opened each day. ABA advises FinCEN that even the smallest community bank opens “tens” of new legal entity business accounts per day.

- April 29, 2024 FinCEN publishes the 30-day notice in the Federal Register seeking OMB approval. This notice does not adjust the PRA burden estimate in response to information submitted by ABA.

Based on Federal Register publication processes, publication on April 29 means that FinCEN must have taken steps to submit the 30-day notice for publication on or before April 26, 2024, the previous business day.

- April 30, 2024 A day after publication of the 30-day notice in the Federal Register, FinCEN publishes a supporting statement, which addresses ABA’s comment, describing it as the only relevant public comment received in response to FinCEN’s 60-day notice.

The supporting statement notes that FinCEN did not adjust the PRA burden estimate in response to ABA’s comment on the grounds that ABA “did not...provide an estimate of the frequency of the collection of information under the regulations,” notwithstanding ABA’s letter of April 26 informing FinCEN that at a minimum, even the smallest community bank opened “tens” of new legal entity accounts per day.

III. FinCEN Failed to Comply with the Mandatory PRA Process

The PRA states that an agency shall not sponsor the collection of information unless in advance of the adoption or revision of the collection of information, certain criteria are met. For example, the agency must certify—*in advance of the adoption or revision*— that it has: 1) conducted a review under section 3506(c)(1); 2) evaluated the public comments received under section 3506(c)(2); 3) submitted the required certification to OMB under section 3506(c)(3), and 4) published a notice in the Federal Register with the required criteria.¹⁰ For extensions of currently approved collections of

¹⁰ See 44 U.S.C. § 3507(a)(1) (specifically, “[a]n agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information...the agency has...evaluated the public comments received under section 3506(c)(2)”).

information, the agency is required to “conduct the review established under section 3506(c), including the seeking of comment from the public on the continued need for, and burden imposed by the collection of information”¹¹ *prior* to submitting the information collection to OMB for review and approval, which again should occur only “after having made a reasonable effort to seek public comment.”¹² Under the review process established in section 3506(c), each agency is required to “review each collection *before submission to the Director for review*...including...a specific, *objectively supported* estimate of burden”¹³ as well as “provide *60-day notice* in the Federal Register, and *otherwise consult with members* of the public and affected agencies concerning each proposed collection of information, to solicit comment to...*evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information*”¹⁴ among other evaluation requirements.

FinCEN’s 30-day notice published in the Federal Register on April 29 does not comply with these requirements, as it met neither the spirit nor letter of the PRA, and it does not improve the accuracy of FinCEN’s massive underestimate of the PRA burden associated with Appendix A and CDD rule requirements—even after the agency was put on notice of the inaccuracy by ABA. The Federal Register notice itself does adjust the PRA burden estimate upward, in response to ABA’s comment. Only *after* publishing the 30-day notice in the Federal Register did FinCEN subsequently produce a supporting statement referencing ABA’s letter, as the single relevant public comment it received.¹⁵ Furthermore, as discussed below, even when belatedly addressing ABA’s comment in the supporting statement, FinCEN also failed to acknowledge ABA’s estimate that showed, even at the lowest possible end of the range, FinCEN’s PRA burden estimate should be *nearly seven times higher*.

IV. FinCEN Did Not Meet Its Timing Obligations Under the PRA

First, as a matter of timing, FinCEN did not meet the spirit or letter of the PRA. The PRA and OMB implementing guidance directs agencies to first develop an information collection request, then publish a 60-day Federal Register notice. Only when those steps are completed, “[a]fter conclusion of the 60-day comment period and the agency’s internal consideration of the public’s comments, the agency submits the collection to OMB and publishes a second Federal Register notice to announce the start of OMB review.”¹⁶

The 60-day comment period of the PRA review process is “intended to facilitate a dialogue between an agency and the public, enabling the agency to better craft its information collection plan.”¹⁷ In this case, FinCEN did not engage in that dialogue; instead, FinCEN, by effectively skipping a PRA-required step, and taking steps to initiate OMB review before the end of the 60-day

¹¹ *Id.* at § 3507(h)(1)(A).

¹² *Id.* at § 3507(h)(1)(B).

¹³ 44 U.S.C. § 3506(c)(1)(A)(iv) (emphases added).

¹⁴ *Id.* at § 3507(c)(2)(A)(ii) (emphases added).

¹⁵ Supporting Statement, OMB Control Number 1506-0070, Beneficial Ownership Requirements for Legal Entity Customers at 4; <https://www.reginfo.gov/public/do/DownloadDocument?objectID=142294000>.

¹⁶ 44 U.S.C. § 3507(a)(1)(D); *see also* Executive Office of the President, Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies at 4 (April 7, 2020) (emphasis added); https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/inforeg/PRAPrimer_04072010.pdf.

¹⁷ Administrative Conference of the United States, Paperwork Reduction Act Recommendation (June 15, 2012); <https://www.acus.gov/document/paperwork-reduction-act>.

comment period. All of this was done apparently before reviewing and considering ABA's comment identifying significant flaws in its PRA burden estimate, primarily the number of times per day banks must collect information to comply with the CDD rule.

Specifically, on February 26, 2024, FinCEN published a 60-day notice under the PRA seeking public comment, with respect to the Appendix A beneficial ownership certification form, with a due date of Friday, April 26, 2024. ABA offered written feedback on FinCEN's initial estimates based on information and poll data collected in April 2024 from 143 our member banks of all sizes, nationwide, from the smallest community banks to large banks with international operation, in a letter submitted to FinCEN by the deadline on Friday, April 26, 2024.¹⁸ In our letter, we noted that 97% of 141 respondents disagreed with FinCEN's estimates respectively, of 20 minutes to update and maintain beneficial ownership identification procedures, and between 40-120 minutes—with an average of 80 minutes—to engage in legal entity customer identification, verification, and review and recordkeeping of the beneficial ownership information, considering them both too low.¹⁹

V. ABA Advised FinCEN That Its PRA Burden Estimate is Inaccurate, Based on Facts Submitted to FinCEN by the ABA

Second, FinCEN was on notice its PRA burden estimate is incorrect, primarily because it massively underestimated the number of times legal entities open new accounts. As stated in our letter, ABA's survey data indicates the most significant problem with this burden estimate was FinCEN's massive undercount of the number of times per day banks were required to collect this information. Eight years later, FinCEN continued to rely on its 2016 estimate²⁰ that banks would open, "at most," 1.5 new legal entity business accounts a day, "and probably fewer."²¹ ABA's letter placed, or should have placed, FinCEN on notice that this number is inaccurate, based on a flawed premise. As discussed in our letter to FinCEN, 92% of 141 poll respondents disagreed with this estimate, with 94% of those respondents describing FinCEN's estimate of 1.5 account openings a day as "very low."²² We reported instead that "[e]ven the smallest community banks open tens of new accounts for legal entity customers a day, depending on the nature of their customers, and larger banks can open hundreds of such accounts a day."²³

With this information, FinCEN was (or should have been) on notice that its burden estimate was incorrect. Even without following our other recommendations to improve burden estimate,

¹⁸ ABA Letter to FinCEN Director Gacki on Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Reports of Beneficial Ownership Requirements for Legal Entity Customers, Docket Number FINCEN-2024-0008 and OMB Control Number 1506-0070, 89 Fed. Reg. 14148 (February 26, 2024) (April 26, 2024); <https://www.aba.com/advocacy/policy-analysis/ltr-to-fincen-cdd-pra-2024-apr>.

¹⁹ *Id.* at 5.

²⁰ FinCEN Customer Due Diligence Requirements for Financial Institutions Final Rule, 81 Fed. Reg. 29398, 29448 (May 11, 2016) ("FinCEN estimated that small institutions would open at most 1.5 new accounts for legal entities per day, and probably fewer.")

²¹ 89 Fed. Reg. 14148, 14149, fn.16.

²² ABA Letter to FinCEN Director Gacki on Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Reports of Beneficial Ownership Requirements for Legal Entity Customers, Docket Number FINCEN-2024-0008 and OMB Control Number 1506-0070, 89 Fed. Reg. 14148 (February 26, 2024) at 5 (April 26, 2024); <https://www.aba.com/advocacy/policy-analysis/ltr-to-fincen-cdd-pra-2024-apr>.

²³ *Id.*

FinCEN could have used the lowest estimate from the smallest community banks —of 10 new accounts per day— to calculate that opening 10 new legal entity customer accounts a day would result in 50,736,667 burden hours to identify and verify beneficial owners of new legal entity accounts per year.²⁴ This lowest possible burden estimate of 50,736,667 burden hours just to identify and verify beneficial owners —which to be clear, does not take into account the mid or upper range of the number of new account openings by the full range of our member banks nationwide— is nearly 7 *times* FinCEN’s inaccurate estimate of 7,610,500 burden hours.

VI. FinCEN Appears to Have Taken Steps to Commence OMB Review Before the End of the 60-Day Review Period, And Without Addressing Public Comment, in Contravention of PRA Requirements

However, instead of complying with the PRA and considering ABA’s comments, on Monday, April 29, 2024, FinCEN published in the Federal Register the 30-day notice to which this letter responds, which retains the same, erroneous burden estimate. As a practical matter, in order to publish in the Federal Register by Monday, April 29, FinCEN would have had to submit the 30-day notice to the Federal Register on or before the previous business day of Friday, April 26. Given these facts, FinCEN would have needed to take steps to publish the 30-day notice prior to the end of the 60-day comment period. This timing discrepancy, at variance with PRA intent and requirements, precluded FinCEN from internally considering and revising the PRA estimate in response to ABA’s public comment prior to commencing OMB review.

Instead, rather than revising the burden estimate and then initiating OMB review, it appears that *after* publishing the 30 day notice in the Federal Register, FinCEN chose to address ABA’s comment letter by subsequently publishing a supporting statement on Reginfo.gov, uploaded on “04/30/2024,” with a naming convention that also suggested it was finalized on April 30, 2024.²⁵ In this submission, FinCEN retroactively justified its failure to respond to ABA’s comment by stating ABA “did not...provide an estimate of the frequency of the collection of information under the regulations.”²⁶ We disagree; ABA informed FinCEN that even the smallest community bank opens “tens of new accounts” a day, and larger banks can open “hundreds of such accounts a day.”²⁷ At a minimum, FinCEN was on notice that its estimate of 1.5 new accounts a day was incorrect, and that its burden estimate was nearly 7 times below the very lowest end of a possible burden estimate range.

²⁴ Specifically, this number is calculated according to the formula outlined in FinCEN’s 60-day PRA notice, based on 15,221 covered financial institutions multiplied by 10 accounts per day multiplied by 250 business days per year = 38,052,500 legal entity accounts opened per year, multiplied by FinCEN’s (low) estimate of 80 minutes per account, and divided by 60 minutes per hour. *See* 89 Fed. Reg. 14148, 14149, fn. 16-17 (Feb. 26, 2024); <https://www.govinfo.gov/content/pkg/FR-2024-02-26/pdf/2024-03965.pdf>. This number does not include FinCEN’s (low) estimate of 20 minutes per year to update procedures.

²⁵ ICR Documents for Docket 1506-0070; https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202404-1506-004 (accessed on May 19, 2024).

²⁶ Supporting Statement, OMB Control Number 1506-0070, Beneficial Ownership Requirements for Legal Entity Customers at 4; <https://www.reginfo.gov/public/do/DownloadDocument?objectID=142294000>.

²⁷ ABA Letter to FinCEN Director Gacki on Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Reports of Beneficial Ownership Requirements for Legal Entity Customers, Docket Number FINCEN–2024–0008 and OMB Control Number 1506–0070, 89 Fed. Reg. 14148 (February 26, 2024) at 5 (April 26, 2024); <https://www.aba.com/advocacy/policy-analysis/ltr-to-fincen-cdd-pra-2024-apr>.

VII. FinCEN's CDD Rule Revisions Should Take Into Consideration Lessons Learned From Banks' Experiences Implementing the CDD Rule

Finally, in ABA's letter of April 26, we noted our comments have a broader objective: to inform FinCEN's anticipated revision of the CDD rule, which is required as part of the sweeping reforms of the Anti-Money Laundering Act of 2020 (AMLA).²⁸ Before FinCEN proposes revisions to the CDD rule, it must accurately understand how—and how often—banks are compelled to collect beneficial ownership information on legal entity customers; how FinCEN's beneficial ownership reporting rule renders certain CDD information collection by banks unnecessarily duplicative; and what works about the CDD rule and what does not.

We thank FinCEN for its statement it “appreciates the feedback provided by this commenter [ABA] and will take these recommendations into consideration as part of the future rulemaking.”²⁹ We also appreciate FinCEN's commitment to further assess the PRA burden associated with the revised CDD rule as part of FinCEN's planned revision of that rule to bring it into conformance with the Corporate Transparency Act and address other considerations that FinCEN is required to take into account.³⁰

VIII. Conclusion

To this end, we encourage OMB to condition re-approval of this information collection on FinCEN reassessing and revising the PRA burden estimate upward and engaging in further discussions with ABA. We stand ready to help FinCEN work with banks to create a more accurate burden estimate and to help FinCEN use it to make important revisions to the CDD rule. Please contact Heather Trew at (202) 663-5151 or htrew@aba.com.

Sincerely,

s//Heather Trew

Heather Trew

Senior Vice President & Counsel

Bank Secrecy Act, Anti-Money Laundering & Sanctions

Regulatory Compliance and Policy

²⁸ Pub. L. 116-283, 134 Stat. 4584, Section 6216 (Jan. 1, 2021).

²⁹ Supporting Statement, OMB Control Number 1506-0070, Beneficial Ownership Requirements for Legal Entity Customers at 4; <https://www.reginfo.gov/public/do/DownloadDocument?objectID=142294000>.

³⁰ *Id.*