

March 28, 2024

By Electronic Transmission

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

Re: Beneficial Ownership Information Requests; Docket Number FINCEN–2024–0002 and OMB Control Number 1506–0077

Dear Ms. Gacki:

The Investment Company Institute (“ICI”)¹ appreciates the opportunity to provide comments on the proposed information collection associated with requests made to the Financial Crimes Enforcement Network (“FinCEN”) for beneficial ownership information (“BOI”), consistent with the requirements of the Beneficial Ownership Information Access and Safeguards final rule (“Access and Safeguards Rule”).² ICI appreciates FinCEN’s consideration of its comments on the proposed Access and Safeguards Rule and the changes made to the final rule in response to those comments. ICI agrees with the information proposed to be collected from those seeking access to FinCEN BOI on behalf of financial institutions. Our comments here address certain characteristics unique to mutual funds and their service providers, and reinforce several concerns discussed in ICI’s comments on the Access and Safeguards Rule.

¹ The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI’s members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$33.4 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$9.2 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

² Beneficial Ownership Information Access and Safeguards, 88 Fed. Reg. 88,732 (Dec. 22, 2023).

A. Certifications from Financial Institutions; Access by Fund Transfer Agents

The Access and Safeguards Rule requires persons accessing FinCEN BOI to make certain certifications to FinCEN.³ ICI believes that the form of such certifications should be comparable to what is required when a financial institution accesses 314(a) information from FinCEN. A person requesting FinCEN 314(a) information is provided with notice of the required certifications at login and agrees that access to the FinCEN system constitutes agreement to the required certifications. This system has worked well in the context of access to FinCEN 314(a) information and ICI believes it similarly will work well when a financial institution or its agents seeks access to FinCEN BOI.

ICI also requests that FinCEN provide a practical mechanism for transfer agents regulated with the U.S. Securities and Exchange Commission (“SEC”) to access FinCEN BOI. FinCEN has recognized that “mutual funds are best understood as a form of financial product rather than an institution providing financial services or investment advice.”⁴ Accordingly, the vast majority of mutual funds delegate the implementation of their anti-money laundering and counter-financing of terrorist activity (“AML/CFT”) programs to transfer agents registered with, and inspected and examined by, the SEC. ICI appreciates FinCEN’s acknowledging, in the preamble to the Access and Safeguards Rule, that the rule “authorizes the disclosure of FinCEN BOI to such service providers provided they and their employees are ‘agents’ or ‘contractors’ of a financial institution with access to BOI and are performing functions on behalf of the financial institution.”⁵ But FinCEN later states that a service provider to a financial institution “will be able to request and access [BOI] through *accounts associated with that financial institution*.”⁶ Certain SEC-registered transfer agents are responsible for implementing the AML/CFT programs for hundreds or even thousands of separate mutual funds. It would be administratively infeasible for such a transfer agent to access FinCEN BOI through an access point provided to each individual mutual fund it serves. Accordingly, ICI requests that FinCEN provide a mechanism for SEC-registered transfer agents to easily access FinCEN BOI in their own name, on behalf of their financial institution clients. ICI believes that limiting such access to transfer agents regulated by the SEC will mitigate any concern about unregulated entities gaining improper access to FinCEN BOI. To further protect the FinCEN BOI data from unauthorized use, FinCEN could consider requiring transfer agents to make attestations that are substantively similar to those that financial institutions are required to make under the Access and Safeguards Rule regarding the access and use of FinCEN BOI data.

³ 31 C.F.R. § 1010.955(d).

⁴ Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,424 (May 11, 2016).

⁵ Access and Safeguards Rule, 88 Fed. Reg. at 88,761.

⁶ *Id.* (emphasis added).

B. Providing Access to BOI Does Not Create New AML/CFT Obligations

ICI appreciates FinCEN's confirmation that "neither the [Corporate Transparency Act] nor the [Access and Safeguards] rule requires financial institutions to access the BOI database."⁷ Moreover, in the preamble to the Access and Safeguards rule FinCEN states that the rule:

... neither creates nor establishes supervisory expectations with respect to whether and the extent to which financial institutions access the BOI database, or report discrepancies between the BOI obtained from the database and the BOI the financial institution may collect through other channels, including, for example, directly from its customer under the 2016 CDD Rule."⁸

The Access and Safeguards Rule adopting release also states the following:

[T]he Access [and Safeguards] Rule does not necessitate changes to BSA/AML compliance programs designed to comply with existing BSA requirements, such as the 2016 CDD Rule, customer identification program requirements, and suspicious activity reporting. [...]

Similarly, on the issue of discrepancies between the BOI that financial institutions obtain from FinCEN and the BOI that they obtain directly from their customers, several commenters asked FinCEN to clearly state in the final rule that financial institutions would not be required to report discrepancies. This final rule does not require financial institutions to access the BOI database, nor does it require them to report discrepancies between information obtained from customers and BOI obtained from FinCEN, if any are discovered.⁹

ICI appreciates these statements. ICI members nevertheless remain concerned that federal examiners, independent AML/CFT reviewers and other parties may assert that a financial institution has an affirmative responsibility to use FinCEN BOI in connection with its AML/CFT obligations. ICI members also remain aware that FinCEN intends to propose and adopt changes to existing CDD Rule requirements. ICI therefore requests that, in addition to the above statements, FinCEN explicitly confirm in any proposed and final amended CDD Rule that a financial institution has no obligation to take into account FinCEN BOI, whether or not accessed by the financial institution, in connection with the financial institution's AML/CFT program.

⁷ Access and Safeguards Rule, 88 Fed. Reg. at 88,732.

⁸ *Id.*

⁹ Access and Safeguards Rule, 88 Fed. Reg. at 88,776.

C. Reporting Entity's Consent Capture Should be Through Electronic Negative Consent

ICI appreciates FinCEN's consideration of comments regarding FinCEN's management of the reporting company consent process; however, ICI urges FinCEN to reconsider its position that "financial institutions are better positioned to obtain and document a reporting company's consent."¹⁰ Upon additional discussion with ICI members, ICI believes that the consent process would be administratively simpler, and would better protect reporting company privacy, if FinCEN managed it as part of the BOI reporting process. For example, FinCEN could require a reporting company, as part of its BOI report, to electronically indicate whether it gives consent for its BOI data to be shared with financial institutions. If the reporting company does not give consent, the FinCEN BOI system could block financial institution access to the reporting company's BOI data entirely. ICI believes that this approach would be less burdensome for both financial institutions and their reporting company clients and would better protect reporting companies' data from improper access and use.

If financial institutions are required to manage the consent process, ICI continues to believe that permitting financial institutions to meet the consent requirement through a negative consent mechanism is a far more practical alternative than requiring affirmative consent. ICI appreciates that the Access and Safeguards Rule does not require "any particular means by which a financial institution must obtain a reporting company's consent" for the financial institution to access the reporting company's FinCEN BOI.¹¹ However, the rule confirms that a reporting company's consent "must be documented," and does not specifically address whether a financial institution may obtain consent through negative consent. Requiring affirmative consent is impracticable, particularly for existing clients of financial institutions, and may discourage ICI members from seeking access to FinCEN's BOI database. Accordingly, ICI encourages FinCEN to confirm that financial institutions accessing FinCEN BOI data may rely on a negative consent provision between the financial institution and its' customers, and such customers' beneficial owners and control persons; provided the financial institution has notified its customer that the financial institution may have access to such data. ICI suggests this is similar to the notification on use of identity data currently provided under the Customer Identification Program Rule, which provides notice to customers, but does not allow them to opt out of such information sharing. ICI is concerned that requiring affirmative consent or providing reporting companies the option to 'opt out' of such information access would be impractical from a recordkeeping standpoint and may limit the ongoing use of such FinCEN BOI data by financial institutions.

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¹⁰ Access and Safeguards Rule, 88 Fed. Reg. at 88,772.

¹¹ *Id.*

ICI appreciates the opportunity to present our comments to FinCEN. If you have any questions about the matters discussed in this letter, please contact Kelly O'Donnell (at 202-326-5980 or kelly.odonnell@ici.org).

Sincerely,

Kelly O'Donnell
Director, Operations and Transfer
Agency, Investment Company
Institute