February 14, 2023

Himamauli Das
Acting Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183.

Submitted via www.regulations.gov

Re: Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities Number [Docket Number FINCEN–2021–0005; RIN 1506–AB49/AB59]

Dear Mr. Das:

I am pleased to provide these comments regarding the proposed rule entitled "Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities Number."[1]

Introduction

This rule is the second in a contemplated trio of rules implementing the Corporate Transparency Act (CTA).

It is a substantial improvement over the first rule. The first rule, in both its proposed and final forms, suffers from serious deficiencies.[2] If properly administered, this proposed rule appears to take privacy seriously.

I have a number of recommendations under the heading "Financial Institutions and BOI." Otherwise, my comments below are in response to specific numbered requests for comment made by FinCEN.

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[1] "Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities Number," Financial Crimes Enforcement Network, Proposed Rule, *Federal Register*, Vol. 87, No. 241, December 16, 2022, pp. 77404-77457 https://www.govinfo.gov/content/pkg/FR-2022-12-16/pdf/2022-27031.pdf.

[2] Beneficial Ownership Information Reporting Requirements, Final Rule, Financial Crimes Enforcement Network, Department of Treasury, *Federal Register*, Vol. 87, No. 189, September 30, 2022, pp. 59498-59596 https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf; Beneficial Ownership Information Reporting Requirements, Notice of Proposed Rulemaking, Financial Crimes Enforcement Network, Department of Treasury, *Federal Register*, Vol. 86, No. 233, December 8, 2021, pp. 69920-69974. See also Comment Letter of David R. Burton regarding Beneficial Ownership Information Reporting Requirements, May 5, 2021 http://thf_media.s3.amazonaws.com/2022/Regulatory_Comments/FINCEN-2021-0005-0132_attachment_1.pdf; Comment Letter of David R. Burton regarding Beneficial Ownership Information Reporting Requirements, February 7, 2022 http://thf_media.s3.amazonaws.com/2022/Regulatory_Comments/FINCEN-2021-0005-0438_attachment_1.pdf.

Financial Institutions and BOI

First, FinCEN should make it explicitly clear that financial institutions may, but will not be required to, use beneficial ownership information (BOI) from the database to satisfy AML-CFT,[3] KYC[4] or CDD[5] obligations.

Second, FinCEN should make it clear either in this rule or a revised CDD rule how financial institutions should respond if the BOI database information is either inconsistent with the information obtained in the CDD process or the BOI information does not exist. The latter problem is likely to be commonplace since many (probably millions) of the roughly 12 million small businesses that are being subjected to the beneficial ownership reporting requirement curtesy of the CTA will be unaware of the beneficial ownership reporting requirement once the requirement is imposed on existing entities.

Finally, assuming use of the BOI database is voluntary, unless FinCEN implements some kind of safe harbor for financial institutions that rely on the database in good faith, it is doubtful that very many will use the database. There will little upside and significant downside in using it if financial institutions are held responsible for the reliability or accuracy of FinCEN's database when they use it.

Specific Requests for Comment

Request 3. Does the proposed rule provide sufficient guidance to stakeholders and the public regarding the scope and requirements for access to BOI?

Response 3. In general, yes, but there is a need to provide better guidance and more detailed rules for financial institutions. See above.

Request 4. The CTA prohibits officers and employees of (1) the United States, (2) State, local, and Tribal agencies, and (3) FIs and regulatory agencies from disclosing BOI reported under the statute. FinCEN proposes to extend the prohibition to agents, contractors, and, in the case of FIs, directors as well. FinCEN invites comments on the proposed scope.

Response 4. This extension in the proposed rule furthers the purpose of the CTA. Those who are contracting with law enforcement or financial institutions or those who are directors of financial institutions should not be exempt from its privacy requirements. The absence of this provision in the rule would create a massive loophole enabling those so inclined to evade the requirement through the simple expedient of using a contractor or agent in lieu of an employee to disclose the information.

Request 5. Are FinCEN's proposed interpretations of "national security," "intelligence," and "law enforcement" clear enough to be useful without being overly prescriptive? If not, what

[3] Anti-Money Laundering-Countering (Combatting) the Financing Terrorism.
[4] Know Your Customer.
[5] Customer Due Diligence.

should be different? Commenters are invited to suggest alternative interpretations or sources for reference.

Response 5. The proposed rule at §1010.955(b)(1)(i)-(iii) should be changed by substituting the word "means" for "includes." The definitions are fine. Using the word includes implies logically that the category is meaningfully broader. It should not be.

Request 10. Should FinCEN define the term ''trusted foreign country'' in the rule, and if so, what considerations should be included in such a definition?

Response 10. Yes, or drop the provision entirely and require a treaty.

Proposed §1010.955 (b)(3)(ii)(B) reads:

> When no such treaty, agreement, or convention is available, is an official request by a law enforcement, judicial, or prosecutorial authority of a trusted foreign country.

Few, if any, appropriately "trusted countries" will not have a treaty or convention in place with the United States.

The term "trusted foreign country" should be defined. The bulk of this list will be countries with whom we have a security relationship or, in other words, a military alliance. That would include NATO countries, Korea, Japan, Australia and New Zealand. FinCEN may want to include non-NATO European Union countries. The core elements of "trusted foreign country" category should be (1) geopolitically aligned (and perhaps neutral – e.g. Switzerland, Sweden and Finland (until they join NATO)), (2) a serious commitment to the rule of law and (3) a general lack of corruption.

Request 11. FinCEN proposes that FIs be required to obtain the reporting company's consent in order to request the reporting company's BOI from FinCEN. FinCEN invites commenters to indicate what barriers or challenges FIs may face in fulfilling such a requirement, as well as any other
considerations.

Response 11. 31 U.S. Code § 5336(c)(2)(B)(iii) provides:

> FinCEN may disclose beneficial ownership information reported pursuant to this section only upon receipt of — a request made by a financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law.

Ergo, consent is required. The question is what constitutes consent. Congress meant actual consent not some sentence buried in a long legal form that few read and fewer understand, signed when opening an account. It should be a stand-alone document, signed. Having the

consent be non-expiring or indefinite in the absence of revocation would reduce the compliance burden on financial institutions.

Request 22. Because security protocol details may vary based on each agency's particular circumstances and capabilities, FinCEN believes individual MOUs are preferable to a one-size-fits all approach of specifying particular requirements by regulation. FinCEN invites comment on this MOU-based approach, and on whether additional requirements should be incorporated into the regulations or into FinCEN's MOUs.

Response 22. I do not think that this request for comment gets it quite right. It is not so much that each agency's particular circumstances and capabilities vary as each **type** of agency's particular circumstances and capabilities vary.

Thus, FinCEN could address this problem by developing a series of model MOUs. One could be for local police, another for state police, another for federal law enforcement agencies, another for financial regulators and so on.

Sincerely,

David R. Burton
Senior Fellow in Economic Policy
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002

David.Burton@heritage.org