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February 7, 2022

Via Electronic Submission

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

RE: Docket Number FINCEN-2021-0005 and RIN 1506-AB49 - Beneficial Ownership Information Reporting Requirements

Dear Sir or Madam:

The Independent Community Bankers of America (“ICBA”)¹ appreciates the opportunity to respond to the Financial Crimes Enforcement Network’s (“FinCEN’s”) notice of proposed rulemaking (“NPRM” or “Proposed Rule”) to solicit feedback on questions pertaining to the beneficial ownership rule. The Proposed Rule would implement Section 6403 of the Corporate Transparency Act (“CTA”), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021, and describes who must file a report of beneficial ownership, what information must be provided, and when a report is due.

Background

On May 5, 2016, FinCEN amended the Bank Secrecy Act (“BSA”) regulations to require covered financial institutions (“FIs”) to conduct and document customer due diligence on all beneficial owners of certain legal entity customers that open new accounts no later than

¹*The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly \$5.9 trillion in assets, over \$4.9 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org

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May 11, 2018. This amendment is known as the Customer Due Diligence Final Rule (“CDD Rule”).

On January 1, 2021, the CTA was enacted and amended the BSA by imposing new beneficial ownership requirements to impede the use of U.S.-based shell corporations for illicit financial activity and called for the creation of a FinCEN registry. The CTA requires FinCEN to issue rules requiring reporting companies to submit certain information to FinCEN about their beneficial owners;² requires FinCEN to maintain this information in a confidential, secure, and non-public database;³ and authorizes FinCEN to disclose the information to FIs to facilitate compliance with CDD requirements.⁴ The CTA also provides for the issuance and use of identifiers assigned by FinCEN that persons may submit to FIs to satisfy certain beneficial ownership reporting requirements.⁵ The CTA requires the promulgation of regulations prescribing procedures and standards for beneficial ownership reporting and FinCEN identifiers by January 1, 2022. The CTA also requires the Treasury to revise its existing CDD rules to reduce any burdens on FIs and legal entity customers that are unnecessary or duplicative.⁶

On April 1, 2021, FinCEN issued an Advance Notice of Proposed Rulemaking (“ANPRM”) to solicit public comment on questions related to the implementation of the beneficial ownership information (“BOI”) reporting provisions of the CTA. This was the first in a series of regulatory actions that FinCEN took to implement the CTA.

On December 8, 2021, the current NPRM was issued by FinCEN and seeks public input on who must file a report of beneficial ownership, what information must be provided, and when a report is due. This NPRM is the first of three to implement the requirements of Section 6403. The second rulemaking will implement protocols for access to and disclosure of BOI. The third rulemaking will revise the existing CDD Rule.

ICBA’s General Position

Community bankers are committed to supporting balanced, effective measures that will prevent the financial system from being used to fund criminal activities and preventing money launderers from hiding the proceeds of criminal activities. However, BSA compliance has increasingly burdened community banks with outdated requirements for identifying, investigating, policing, and reporting potential criminal activities in a manner in which its effectiveness and efficiencies are doubted.

Because FinCEN is mandated to collect BOI directly from reporting companies, ICBA strongly urges FinCEN to amend its CDD rules to withdraw its requirement that banks also collect BOI

² CTA § 6403 (b)(1)(C)

³ CTA § 6402(7)

⁴ CTA § 6403(b)(1)

⁵ CTA § 6403 (b)(3)

⁶ CTA § 6403 (d)(1)(C)

and rely instead on their risk-based monitoring procedures. Although this NPRM is not seeking comment on banks' collection of BOI, ICBA would be remiss not to state that from the onset of the CDD Rule's development, our position has been and continues to be consistent: if the government has an interest in collecting and maintaining records of the beneficial owners of private legal entities, such information should be collected and verified at the time a legal entity is formed, rather than requiring FIs to collect this information. ICBA's position also calls for FIs to have access to that information to assist them in performing customer due diligence.

Comments

Expanded Definition of Beneficial Owner

The Proposed Rule implements the CTA and defines a beneficial owner as any individual who exercises "substantial control" over a reporting company or who owns or controls at least 25% of the ownership interest.⁷ Individuals with substantial control include those able to make significant decisions over important matters on behalf of the company, those in senior officer positions, and/or those with authority over the appointment or removal of any senior officer or the majority of board members.⁸ Under the current CDD Rule, a legal entity customer must identify only one individual who exercises a "significant degree of control over the entity." The Proposed Rule requires reporting companies to disclose to FinCEN *all* individuals with substantial control over the entity.

As proposed, FinCEN's definition of "substantial control" will likely result in capturing a broad group of individuals (as acknowledged in the NPRM);⁹ lead to confusion and logistical challenges for smaller reporting companies; cause reporting companies to question whether they have correctly reported their beneficial owners; likely result in the reporting of individuals who are not beneficial owners; and likely result in mistakes and unreliable information which can expose them to penalties.

The CTA enables FinCEN to disclose BOI, with consent of the reporting company, to FIs to facilitate compliance with customer due diligence. However, with an overly broad definition, the adage, "junk going in, junk going out" looms over the usefulness and reliability of BOI submitted to FinCEN. The domino effect of reporting companies incorrectly submitting unreliable and/or inaccurate BOI, will negatively impact FIs' efforts to fulfill their beneficial owner due diligence obligations.

Timing of BOI Reports

ICBA is fully aware of the added burden that providing and updating BOI will be on reporting companies – a burden also felt by community banks. Hence, we assert that FinCEN's proposed deadlines for submitting initial, updated, and corrected BOI reports are unreasonable and do not

⁷ NPRM at 69933

⁸ NPRM at 69934

⁹ Ibid

heed the Regulatory Flexibility Act (“RFA”) which mandates federal agencies to consider the challenges of small businesses.

Under the proposal, FinCEN will require a domestic reporting company, formed on or after the effective date of the regulation, to file a report within 14 calendar days of the formation as specified by a secretary of state or similar office. For this initial report,¹⁰ the following information would be required for the reporting company:

1. Full name;
2. Any trade or DBA name;
3. Business street address;
4. State or tribal jurisdiction of formation (or registration for a foreign company); and
5. Taxpayer Identification Number (“TIN”), including an Employer Identification Number (“EIN”). A reporting company that has not been issued a TIN may submit either a: (a) Dun & Bradstreet Data Universal Numbering System Number, or (b) a Legal Entity Identifier.

Further, the report is required to include the following information from each beneficial owner or company applicant:¹¹

1. Full legal name;
2. Date of birth;
3. Complete current address:
 - a. For a company applicant acting in the course of his business as a corporate or formation agent, the business street address of such business; or
 - b. In all other cases, the residential street address that the individual uses for tax residency purposes;
 - c. A unique identifying number from one of the following:
 - i. A non-expired U.S. passport;
 - ii. A non-expired identification document issued to the individual by a State,
 - iii. local government, or Indian tribe;
 - iv. A non-expired state driver’s license; or
 - v. Where the individual does not have one of the aforementioned documents, a
 - vi. non-expired passport issued by a foreign government; and

¹⁰ 31 CFR 1010.380(b)(1)

¹¹ Ibid.

- d. An image of the document from which the unique identifying number provided was obtained, which includes both the unique identifying number and a photograph, which are, respectively, legible, and recognizable.

The proposal would also require any entity that becomes a foreign reporting company on or after the effective date of the regulation to file a report within 14 calendar days of the date it became a foreign reporting company. FinCEN believes that allowing just 14 days for such initial reporting to FinCEN will provide newly formed reporting companies reasonable time to collect the proposed information specified in 31 CFR 1010.380(b)(1) from their beneficial owners and company applicants and to enter the required information about the company, its beneficial owners, and its company applicants into a form provided by FinCEN.¹² Because the entity will be newly formed or registered, FinCEN anticipates that much of the required information will be readily available to the reporting company, and that the burden on the reporting company to collect and provide this information within 14 calendar days will be minimal.¹³ However, this notion assumes that each state would require the exact same items required by FinCEN; assumes each state has rules to accommodate FinCEN’s timeframe; assumes that each reporting entity, especially new and small reporting entities, would be properly trained on FinCEN’s requirements; and assumes that each state requires entities to register their business.

FinCEN also believes that requiring initial reports to be filed relatively quickly will help make the BOI reporting process a natural part of the formation or registration process, furthering the CTA’s objective to “set a clear, Federal standard for incorporation practices.”¹⁴ ICBA supports a clear standard process but cautions that filing “quickly” can lead to mistakes or presumptions that a reporting company willfully submitted inaccurate or false BOI thus exposing them to potential penalties.¹⁵

Under the proposal, FinCEN will require a reporting company to file an updated report within 30 calendar days of a change in BOI. ICBA is concerned about the significant challenges associated with this requirement, such as a reporting company not knowing of a change in BOI in time. Other challenges to a reporting company include the failure of a beneficial owner to communicate a change in their information; the increased resources required to monitor for changes in BOI; and the lack of clarity as to whether a reporting company will be penalized if they do not learn of BOI changes within 30 days.

The proposal would also require reporting companies to file a report to correct inaccurately filed information within 14 calendar days after the date the reporting company becomes aware or has reason to know that any required information was inaccurate when filed and remains inaccurate. The reporting company would then have 30 calendar days to update with FinCEN information that has changed after filing. Again, ICBA considers these timeframes to be unreasonable and

¹² NPRM at 69941

¹³ Ibid.

¹⁴ Ibid

¹⁵ CTA § 6403(h)(3)

perhaps impossible for many entities to meet. There are both reasonable and unforeseen circumstances that could render what was thought to be accurate at the time of filing, inaccurate. The proposal is silent as to who will be responsible for notifying the reporting company of inaccurate information if there is no other means for them to discover the inaccuracy.

FinCEN's proposal provides a list of entities that are not considered "reporting companies" and therefore exempt from the reporting requirements.¹⁶ However, if an entity loses its exemption status, an initial report to FinCEN will be required within 30 calendar days after the date the entity no longer qualifies for an exemption.¹⁷ An entity could unknowingly lose its exemption and may not become aware of its new status until after 30 days has passed, following the date of the actual loss of its exemption. Circumstances such as this warrant a more flexible approach to filing an initial report and one that protects the entity from penalties.

Interestingly, the proposal takes a more reasonable and practicable approach for reporting entities in existence *before* the effective date by allowing them to file a report no later than one year after the effective date of the regulation. FinCEN states, "***This approach balances the need for effective outreach and notice to preexisting companies with the need to collect beneficial information in a timely manner and ensure a level playing field between all legal entities that constitute reporting companies. A one-year reporting deadline is designed to provide reporting companies sufficient time to receive notice of the reporting requirement, conduct appropriate due diligence to determine the company applicant and beneficial owners, collect the required information from the beneficial owners and company applicants, and provide the required information about the company, its beneficial owners, and its company applicants to FinCEN.***"¹⁸ ICBA supports this timeframe and applauds FinCEN for its thoughtful rationale. Yet, this same reasonable-based approach is not applied to reporting companies that are created *after* the effective date, those that have lost their exempt status, nor those that are updating or correcting BOI. Newly formed entities, previously exempt, and those updating or correcting information, need the same consideration and time to conduct appropriate due diligence to determine the company applicant and beneficial owners, to collect the required information from the beneficial owners and company applicants, and to provide the required information about the company, its beneficial owners, and its company applicants to FinCEN.

ICBA considers the timeframes for filing initial, updated, and corrected reports unreasonable and impractical. Most small business owners are focused on the day-to-day functions of simply running their businesses – and staying in business. Many are not able to afford lawyers, accountants, or other professionals to consult with on regulatory matters and advise them on potential regulatory land mines. Some are not even aware of the myriad regulations requiring compliance. The challenges of being a small business and understanding their crucial role in the U.S. economy should warrant a more delicate approach to timing requirements. ICBA urges

¹⁶ NPRM at 69939

¹⁷ NPRM at 69942

¹⁸ NPRM at 69941- 69942

FinCEN to demonstrate an appreciation for small businesses, honor the RFA, and establish timeframes that do not set small businesses up for failure to comply, by allowing:

- Sixty (60) business days for newly formed reporting companies to file an initial report;
- Twenty-one (21) business days to correct any inaccurate information filed with FinCEN from the date on which the inaccuracy is discovered and 30 business days to update with FinCEN information that has changed after filing;
- Ninety (90) business days to file an updated report when the entity becomes aware of a change, instead of 30 calendar days after the date on which there is any change to previously submitted to FinCEN; and
- Sixty (60) business days for a previously exempt entity to file an initial report from the date on which the entity learned of its reporting status.

ICBA's recommendations for additional time respects the day-to-day requirements of running a business but allows the reporting companies to build in time to prepare for their submissions to FinCEN.

Certifying Reports

FinCEN's proposal would require those filing BOI reports to certify that the report is accurate and complete.¹⁹ Having accurate reports will allow community banks to update risk assessments more efficiently and enhance on-going monitoring efforts. Therefore, while ICBA supports requiring reporting companies to confirm the continuing accuracy of previously submitted BOI, we do not believe that each person should be required to certify that the report is "accurate and complete"²⁰, as written. There are both reasonable and unforeseen circumstances that could render what was thought to be accurate at the time of filing, inaccurate. ICBA recommends that, each person filing such report shall certify that the report is accurate and complete to the "***best of their knowledge.***"

Responsibility for Training Reporting Companies

The proposal implies and assumes FinCEN will commence a robust campaign that thoroughly educates and provides notices to all reporting companies of FinCEN's requirements. FinCEN does indicate its "**intent**"²¹ to conduct ongoing outreach with stakeholders, including secretaries of state and Indian Tribes, but given the stakes and the year that has passed since the passage of CTA, FinCEN's approach to educating reporting companies should be more defined. The proposal does not address how reporting companies will be trained or notified on new requirements, nor does the proposal address how requirements and training will be communicated. That said, ICBA strongly urges against any rulemaking that will require FIs to train, notify, or execute any requirements between reporting companies and FinCEN.

¹⁹ NPRM at 69930

²⁰ Ibid.

²¹ NPRM at 69945. Emphasis added.

Conclusion

FinCEN must be careful to adhere to the burden-reduction mandate of the CTA, and its duty under the RFA while undergoing this rulemaking process. ICBA appreciates the opportunity to provide comments in response to this request. If you have any questions, please do not hesitate to contact me at Rhonda.Thomas-Whitley@icba.org or (202) 659-8111.

Sincerely,

/s/

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