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Via Electronic Mail

February 14, 2023

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

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

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") to solicit feedback on access by authorized recipients to beneficial ownership information ("BOI") that will be reported to FinCEN pursuant to Section 6403 of the Corporate Transparency Act ("CTA"), enacted into law as part of the Anti-Money Laundering Act of 2020 ("AML Act"), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 ("NDAA").[2]

Background

On May 5, 2016, the 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 May 11, 2018. This amendment is known as the Customer Due Diligence Final Rule ("CDD Rule").

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[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 more than $5.8 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.

[2] 31 U.S.C. § 5336

On January 1, 2021, the NDAA 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;[3] requires FinCEN to maintain this information in a confidential, secure, and non-public database;[4] and authorizes FinCEN to disclose the information to FIs to facilitate compliance with CDD requirements.[5] The CTA also provides for the issuance and use of FinCEN identifiers—unique identifying numbers assigned by FinCEN – that persons may submit to FIs to satisfy certain beneficial ownership reporting requirements.[6] The NDAA also requires the Treasury to revise its existing CDD rules to reduce any burdens on financial institutions and legal entity customers that are unnecessary or duplicative.[7]

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 BOI reporting provisions of the CTA. This was the first in a series of regulatory actions that FinCEN took to implement the CTA.

The ANPRM was followed by an NPRM, issued on December 8, 2021, seeking public input on who must file a report of beneficial ownership, what information must be provided, and when a report is due. This NPRM was the first of three to implement the requirements of Section 6403. FinCEN issued a final rule on reporting requirements and FinCEN identifiers on September 30, 2022.[8]

The current NPRM, for which this letter relates to, is the second rulemaking and addresses protocols for access to BOI.

ICBA's Comments

From the onset of the CDD Rule's development, ICBA's position has been and continues to be that if the government has an interest in collecting and maintaining records of beneficial ownerships 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.

[3] CTA § 6403 (b)(1)(C)
[4] CTA § 6402(7)
[5] CTA § 6403(b)(1)
[6] CTA § 6403 (b)(3)
[7] CTA § 6403 (d)(1)(C) [emphasis added]
[8] 31 CFR 1010. The regulations go into effect on January 1, 2024. BOI will not be accepted prior to January 1, 2024

Access to BOI For Ongoing Due Diligence

FinCEN proposes to define "customer due diligence requirements under applicable law" to mean the Bureau's 2016 CDD Rule, as it may be amended or superseded pursuant to the AML Act. The 2016 Rule requires covered FIs to identify and verify beneficial owners of legal entity customers. FinCEN asks, through this NPRM, whether it should expressly define "customer due diligence requirements under applicable law," more broadly, to cover a range of activities beyond compliance obligations pertaining to identifying and verifying beneficial owners of legal entity customers.

While we continue to maintain that FIs should not be required to collect BOI from their business customers, ICBA has consistently advocated for our members to have access to the BOI in order to "conduct ongoing monitoring to identify and report suspicious transactions, and on a risk basis, to maintain and update customer information,"[9] which was called for in the CDD Rule. Broader access to this information to facilitate compliance functions is a value-add and should be encouraged by FinCEN. To limit that access to identifying and verifying the beneficial ownership of their customers contradicts the goal of the CTA and ignores a core requirement of the 2016 CDD Rule that FIs must be able to access the BOI of their customers on an ongoing basis.

FinCEN asserts in its proposal that the consequences of a broader definition of "customer due diligence requirements under applicable law" would include greater pressure on the demand for the security and confidentiality of BOI. ICBA disagrees. We do not foresee "greater pressure" for the security and confidentiality by community banks having access to BOI for purposes beyond identifying and verifying the beneficial ownership of their customers. Safeguarding private and confidential customer information is central to community banks maintaining public trust and retaining customers. Community banks have an impeccable reputation and established processes for protecting customer information; executing the same levels of privacy and confidentiality measures for BOI will be no different. Community banks are well prepared to secure BOI efficiently and effectively. The proposed rule would require FIs to develop and implement administrative, technical, and physical safeguards to protect BOI as a precondition to receiving access. The proposed rule would also establish a safe harbor by allowing the security and information handling procedures necessary to comply with section 501 of the Gramm-Leach-Bliley Act[10] pertaining to non-public customer personal information would satisfy this requirement. ICBA supports this safe harbor and FinCEN's understanding that stringent security and confidentiality requirements would make the information inaccessible or useless to FIs.[11] This approach also prevents duplicative or inconsistent requirements for community banks. Thus, it is clear to ICBA that FinCEN's proposals for protecting BOI, to which community banks already adhere, addresses its concern that broader access will result in more pressure on the demand of security and confidentiality of BOI."

[9] https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule
[10] Public Law 106–102, 113 Stat. 1338, 1436–37 (1999).
[11] 2022-27031.pdf (govinfo.gov), p. 774121

Consent Requirement

FinCEN proposes that FIs be required to obtain the reporting company's consent in order to request the reporting company's BOI from FinCEN. Under the proposed rule, an FI would be responsible for obtaining a reporting company's consent which reflects FinCEN's assessment that FIs are best positioned to obtain and manage consent through existing processes and due to having direct contact with the reporting company as a customer.

Although the CTA requires that an FI obtain consent from a reporting company before accessing BOI from the FinCEN registry, ICBA would be remised not to register our opposition to this consent requirement. We strongly believe that this information should be accessible to all federally regulated institutions upon request, without the consent of the reporting company. Nevertheless, the CTA urges FinCEN to craft a rule that is least burdensome, not duplicative, and effective. This gives FinCEN permission to craft a non-prescriptive rule that provides community banks the greatest level of flexibility in how they elicit, obtain, and document consent. That said, an example of such flexibility would be to allow FIs to obtain such consent at the time an account is opened, or via customer notice or account agreement mechanisms.

FinCEN considered the alternative approach of FinCEN obtaining consent directly from the reporting company, but rejected the approach given potential delays and the lack of any direct relationship with the reporting company.[12] ICBA believes FinCEN obtaining consent provides the least burdensome and most effective path for both community banks, and their reporting company customers. In its 2021 ANPRM, FinCEN asked whether it should make access more efficient by permitting reporting companies to pre-authorize their specific FIs access to their BOI?[13] In our response, ICBA argued that pre-authorization would eliminate the need for reporting companies to ensure their consent is captured in time for account opening. Additionally, by permitting reporting companies to pre-authorize insured FIs, of their choosing, access to their BOI, the process for business entities becomes more efficient and less redundant since it removes the additional consent requirement each time an entity opens a new account. Small business owners are focused on maintaining and operating their businesses and many do not have the time or resources to provide records or specific consent to their bank every time they open a new account, obtain a loan, or open a secondary account. Pre-authorizing the disclosure of their information to their designated and insured FIs will save valuable resources and will not require small businesses to provide redundant information repeatedly.

Allowing reporting companies to pre-authorize FIs to access their BOI carries significant compliance related benefits. One benefit is the possible instant access to BOI information. Instant access will enable FIs to complete ownership validation quickly, help them determine whether to move forward with the relationship or account opening, and help them to quickly risk weigh the customer. FIs must be able to access the BOI of their customers on an ongoing basis without having to renew consent. Pre-authorizations would help enable this process without a

[12] 2022-27031.pdf (govinfo.gov), p.77422

[13] Docket Number FINCEN-2021-0005 and RIN 1506-AB49 - Beneficial Ownership Information Reporting Requirements

delay or gap in the process. Another benefit to having pre-authorized access is that it shields FIs from potentially alerting a reporting company, when seeking new consents beyond account opening or change in beneficial owners, that they are the target of a potential investigation or the subject of a suspicious activity report.

While pre-authorization for specific institutions is a favorable approach, in many cases an entity may not know with which FI they may do business at the time the entity is established. For these cases, ICBA recommends that FinCEN include an option for reporting companies to pre-authorize the availability of their information to any insured FI.

Conclusion

ICBA cannot emphasize enough our strong objection to withdraw the requirement that entities provide their BOI to banks as well as FinCEN. Yet, we applaud the CTA and urge FinCEN to issue regulations that allow community banks broad access to BOI in a manner that enhances their due diligence and overall compliance efforts. 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/

Rhonda Thomas-Whitley
Vice President and Regulatory Counsel