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*Via Electronic Mail*

May 5, 2021

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”)<sup>1</sup> appreciates the opportunity to respond to the Financial Crimes Enforcement Network’s (“FinCEN’s”) advance notice of proposed rulemaking (“ANPRM”) to solicit feedback on questions pertaining to the implementation of the Corporate Transparency Act (“CTA”), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”).<sup>2</sup> This ANPRM seeks input on procedures and standards for reporting companies to submit information to FinCEN about their beneficial owners pursuant to the CTA. This ANPRM also seeks input on FinCEN's implementation of the related provisions of the CTA that govern FinCEN's maintenance and disclosure of beneficial ownership information.

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<sup>1</sup>*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 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5 trillion in assets, over \$4.4 trillion in deposits, and more than \$3.4 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](http://www.icba.org).*

<sup>2</sup> 31 U.S.C. § 5336

*The Nation’s Voice for Community Banks.®*

WASHINGTON, DC  
1615 L Street NW  
Suite 900  
Washington, DC 20036

SAUK CENTRE, MN  
518 Lincoln Road  
P.O. Box 267  
Sauk Centre, MN 56378

866-843-4222  
[www.icba.org](http://www.icba.org)

## 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”).

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<sup>3</sup>; requires FinCEN to maintain this information in a confidential, secure, and non-public database;<sup>4</sup> and authorizes FinCEN to disclose the information to FIs to facilitate compliance with CDD requirements.<sup>5</sup> 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.<sup>6</sup> The CTA requires the promulgation of regulations prescribing procedures and standards for beneficial ownership reporting and FinCEN identifiers by January 1, 2022. 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.<sup>7</sup>

This ANPRM seeks initial public input on those procedures and standards, as well as on FinCEN’s implementation of the related provisions governing its maintenance and disclosure of beneficial ownership information

## Summary of ICBA’s 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 activity in a manner in which its effectiveness and efficiencies are doubted.

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<sup>3</sup> NDAA § 6403 (b)(1)(C)

<sup>4</sup> NDAA § 6402(7)

<sup>5</sup> NDAA § 6403(b)(1)

<sup>6</sup> NDAA § 6403 (b)(3)

<sup>7</sup> NDAA § 6403 (d)(1)(C)

Because FinCEN is mandated to collect beneficial ownership information directly from reporting companies, ICBA strongly urges FinCEN to amend its CDD rules to withdraw its requirement that banks also collect beneficial ownership information and rely instead on their risk-based monitoring procedures.

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.

According to FinCEN, entities are at times used to obfuscate ownership interests and used to engage in illegal activities such as money laundering, corruption, fraud, terrorist financing, and sanctions evasion. Criminals have exploited the anonymity that legal entity ownership can provide to engage in a variety of crimes, and often take advantage of shell and front companies to conduct such activity. Making legal entities more transparent by requiring identifying information of natural person owners would likely hinder such abuses. However, placing the responsibility and oversight of collecting this information to the private sector, specifically FIs, is misguided and ineffective.

The NDAA requires Treasury to ensure its new CDD rules reduce burdens on FIs. Obtaining beneficial ownership on all legal entity customers, and verifying their identity on certain business accounts, is an onerous task. While the ownership interest and management responsibility of a business may be straightforward in certain cases and specified in a legal organizational document in other cases, certain legal structures make determining ownership equity extremely difficult, at best.

Additionally, the current rule requires banks to confirm the beneficial ownership information each time a customer opens an additional account. This is duplicative and extremely burdensome to both legal entities and banks because the onerous task of confirming the beneficial ownership information has already taken place and is on file. To do so each time a new account is opened adds no benefit whatsoever to law enforcement.

Collection and verification of the identity of all-natural person owners of each entity by FinCEN would provide uniformity and consistency across the United States. Requiring both FinCEN and FIs to collect the same information on the same entities is ineffective, duplicative, unnecessary, and costly. It is important to ensure that this rulemaking maintains a balanced approach that promotes transparency without duplicative reporting requirements on legal entities by

requiring them to report beneficial owners to FinCEN as well as to each bank holding their account.

These additional requirements are repetitive and excessive once a legal entity has provided the same information to FinCEN. ICBA strongly urges FinCEN to amend its CDD rules to withdraw the requirement for banks to collect beneficial ownership information on legal entities.

It is important to ensure that this rulemaking does not pile on additional requirements, taps into agency discretion to reduce the burden on community banks, and maintains a balanced approach that promotes the purposes of BSA but recognizes the limited and already strained resources of community banks. The current CDD Rule does not do that, and the CTA did not go far enough in achieving that balance. The drafters of the CTA mandated the Secretary of the Treasury to revise the final CDD rule to “reduce any burdens on financial institutions and legal entity customers that are, in light of the enactment of this division and the amendments made by this division, unnecessary or duplicative.”<sup>8</sup>

ICBA strongly urges FinCEN to execute its directive from Congress by withdrawing the requirement that legal entities provide to FIs, and FIs collect, beneficial ownership information, as we believe it is the only way to best implement the reporting, maintenance, and disclosure requirements of the CTA.

### **ICBA’s Responses**

**Should reporting companies be required to affirmatively confirm the continuing accuracy of previously submitted beneficial ownership information on a periodic basis (e.g., annually)? How should such confirmation be communicated to FinCEN?**

Reporting companies should be required to affirmatively confirm the continuing accuracy of previously submitted information on a periodic basis. This will allow community banks to update risk assessments more efficiently and accurately and enhance on-going monitoring efforts. Information should be communicated via the same portal designed for initial submissions.

**What steps should FinCEN take to ensure that beneficial ownership information being reported is accurate and complete?**

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<sup>8</sup> Ibid

Beneficial ownership information that is submitted to FinCEN should be verified by FinCEN by the same methods FIs currently must use, such as reviewing photocopies of driver's license of legal entity customer; obtaining a tax identification number; contacting a beneficial owner; independently verifying the beneficial owner's identity through the comparison with information obtained from other sources; checking references with other financial institutions; and obtaining a financial statement. Otherwise, FIs depending on such information in furtherance of their CDD obligations will not be able to rely on the information, defeating the purpose of being "highly useful."

Verification by FinCEN would not only remove an unnecessary and duplicative burden from FIs and legal entities but could also prove valuable in the agency's efforts to streamline its information sharing with law enforcement or other agencies.

**How can FinCEN make beneficial ownership information available to financial institutions with CDD obligations so as to make that information most useful to those financial institutions?**

ICBA has consistently advocated that beneficial ownership information be collected by the appropriate government agency, such as FinCEN, at the time an entity is formed rather than requiring FIs to assume this burden. ICBA has also consistently advocated for FIs to have access to that information to assist them in performing customer due diligence and enhanced customer due diligence as appropriate.

The CTA instructs FinCEN to maintain the reported beneficial ownership information in a confidential, secure, and non-public database.<sup>9</sup> Furthermore, the CTA authorizes FinCEN to disclose beneficial ownership information to FIs subject to appropriate protocols and for specific purposes.<sup>10</sup>

ICBA suggests the creation of or utilization of an existing secure central database or portal that would allow FIs log-in access to the beneficial ownership information. The central database should allow registered users to search these records by individual names and business names.

ICBA also urges FinCEN to ensure that FIs have no obligations with the upkeep, maintenance, or accuracy of the database. FIs should not be expected to: verify beneficial ownership

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<sup>9</sup> NDAA § 6402(7)

<sup>10</sup> NDAA § 6403(c)(2)(B)(iii)

information housed by FinCEN; review submitted information for accuracy; confirm that information exists; or educate customers about FinCEN’s requirements. Furthermore, rulemaking must not result in FinCEN broadening the scope of the law nor making the beneficial ownership rules more onerous for banks and legal entities.

Additionally, FIs should be granted a safe harbor for reliance on information retrieved from the database. Entities will be required to submit their information to FinCEN at the time of formation and change in ownership and will be subject to state and federal laws pertaining to perjury, false information, and false statements. Therefore, there is a reasonable expectation that beneficial ownership information in the FinCEN database will be accurate and verified. As such, FIs should be able to rely on the information submitted to FinCEN and not bear any responsibility or be subject to any consequences for such reliance. Since FIs are permitted to rely on information obtained by another FI regarding the beneficial ownership rule,<sup>11</sup> surely the same reliance can be extended to FIs relying on information obtained by FinCEN.

**Please describe whether financial institutions should be able to use the information for other customer identification purposes, including verification of customer information program information, with the consent of the reporting company?**

The CTA requires FinCEN to collect the required information in a form and manner that ensures the information is highly useful in confirming beneficial ownership information provided to FIs in order to facilitate compliance with CDD rules.<sup>12</sup> Given the intent of the CTA is to gain more transparency of potential bad actors, the spirit of the CTA would be realized by providing access to FIs. FIs should be able to use the information shared by FinCEN for customer identification purposes as well as for their risk assessment.

Allowing banks to use this information as part of the Customer Identification Program (“CIP”) process would not only be highly useful but would also make an FI’s CIP and verification process more efficient by having all information in one place. Further, allowing FIs to use this information for CIP purposes allows FIs to reallocate resources for use in other BSA related areas, an initiative currently under evaluation by FinCEN.

<sup>11</sup> [Beneficial Ownership Requirements for Legal Entity Customers – Overview \(ffiec.gov\)](https://www.ffc.gov/ffiec.gov) May 5, 2018 p.4

<sup>12</sup>NDA § 6403(b)(1)(F)(iv)

While we support such use, ICBA urges FinCEN to issue rules that: provide a safe harbor for FIs that use the information; do not require FIs to correct discrepancies in FinCEN's database; and do not hold FIs responsible for FinCEN's adherence to the CTA.

**Please describe whether FinCEN should make financial institution access more efficient by permitting reporting companies to pre-authorize specific financial institutions to which such information should be made available?**

Pre-authorization would be helpful to business customers as it 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 specific FIs access to their information, 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. 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 designated FIs will save valuable resources and will not require small businesses to provide redundant information repeatedly.

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. ICBA recommends that FinCEN include an option for reporting companies to pre-authorize the availability of their information to any insured financial institution.

**In response to requests from financial institutions for beneficial ownership information, what is a reasonable period within which FinCEN should provide a response? Please also describe what specific information should be provided.**

This rulemaking must ensure that the process does not delay account opening, but rather streamlines and makes it more efficient as mandated by the statute. Community bank account opening procedures and those pertaining to gathering beneficial ownership information varies from institution to institution. ICBA recommends that FIs have access to the FinCEN database of all beneficial ownership information so that they could access the information immediately. In lieu of granting access, ICBA suggests a reasonable time period to provide a response is immediately, upon request, or no longer than one (1) business day which would accommodate these varying procedures by allowing FIs to meet their specific practices. Any longer would jeopardize the viability of using this information for account opening.

Specific information provided to the FI should include the percent of ownership for each beneficial owner and all identifying information required by the existing CDD rule (U.S. person or non-U.S. person, name, address, date of birth, tax identification number, and description of identifying document) for each beneficial owner with 25% or more ownership interest.

**How should FinCEN handle updated reporting for changes in beneficial ownership when beneficial ownership information has been previously requested by financial institutions, federal functional regulators, law enforcement, or other appropriate regulatory agencies?**

FIs are required to update beneficial ownership information when they become aware of a change or at the time a new account is opened, but do not have an obligation to solicit updated information, absent specific risk-based concerns. FIs should have access to search the database for updated information when appropriate to do so, such as when a customer requests a new account to be opened, in accordance with their periodic or risk-based monitoring procedures, or when they suspect suspicious activity.

A requestor that opts-in to receiving updated information should be notified of changes to the beneficial ownership information. However, a bank that opts-in should rely on their existing processes and risk assessments to determine whether an update should be made to that customer's profile. Providing an opt-in approach to receiving updates should solely be used for FIs to operate in accordance to their risk-based monitoring procedures.

Notification should occur via a secure email or through an email with a link to a secure site such as the Secure Information Sharing System ("SISS"). However, auto-generated notices should be accompanied by a reminder informing the requestor to follow their risk-based process. Notice should be provided to the BSA Officer or designated BSA contact or "users."

**In what circumstances should applicant information be accessible on the same terms as beneficial ownership information?**

The CTA requires a reporting company—in accordance with rules to be issued by FinCEN—to submit to FinCEN information that identifies the beneficial owner(s) and applicant(s) of the reporting company. All collected information should be made available to FIs in cases in which additional identification verification is required at account opening, for ongoing due diligence, monitoring, efficiency, and an overall effective process. Applicant information should be accessible on the same terms as the beneficial ownership information.

**How can FinCEN best reach out to financial institutions to ensure the efficiency and effectiveness of the process by which financial institutions could potentially access the beneficial ownership information held by FinCEN?**



FinCEN could best reach out to FIs through secure email or notification sent by FinCEN to FIs, similar to the communication sent by the SISS or via an already existing communication system. FinCEN could also conduct outreach by conducting webinars to review new procedures and websites that will be used to access the information. Feedback can also be obtained by giving FIs the ability to comment directly to FinCEN, such as through a questionnaire via a web portal (FinCEN SISS, etc.).

### **Conclusion**

Because FinCEN is mandated to collect beneficial ownership information directly from reporting companies, ICBA strongly urges FinCEN to amend its CDD rules to withdraw its requirement that banks collect beneficial ownership information and allow banks instead to rely on their risk-based monitoring procedures. FinCEN should not use this opportunity to propose and finalize rules that would limit its duties, shift burden onto banks, and make FIs de facto regulators.

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](mailto:Rhonda.Thomas-Whitley@icba.org) or (202) 659-8111.

Sincerely,

/s/

Rhonda Thomas-Whitley  
Vice President and Regulatory Counsel