American Bankers Association
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Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
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Re: Beneficial Ownership Information Reporting Requirements; Docket Number FINCEN–2021–0005 and RIN 1506–AB49

Dear Sir or Madam:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on the Financial Crimes Enforcement Network's (FinCEN) proposed rule for a beneficial ownership registry that will identify who must report, what must be reported, and when it must be reported.[2] The Corporate Transparency Act (CTA), part of the Anti-Money Laundering Act of 2020 (AMLA),[3] requires FinCEN to create a registry of the beneficial owners of many of the legal entities established under the various state laws in the United States.

This proposal is the first in a series of three regulations designed to establish the registry. The second rule, to be issued in the future, will determine access to the registry while the third regulation will, as required by the statute, update the Customer Due Diligence (CDD) rule that currently requires banks to collect beneficial ownership information on their legal entity customers. Separately, FinCEN also is developing the necessary infrastructure to collect and secure the data.

Background

This proposed rule is part of the Biden Administration's efforts to combat corruption. In drafting the proposal, FinCEN has sought to minimize the burdens on reporting companies, and the agency estimates the average cost for reporting to be $50. Requiring entities to report this information and providing access to authorized users is intended to help combat corruption, money laundering, terrorist financing, and other illicit activity. The ultimate goal is to expose shell companies used to shelter illicit money. The proposal is designed to collect accurate, complete, and highly useful information for law enforcement and other government authorities as well as address deficiencies identified by the Financial Action Task Force (FATF), Congress, law enforcement, and others.

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[1] The American Bankers Association is the voice of the nation's $23.3 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.2 trillion in deposits and extend nearly $11 trillion in loans.
[2] 86 Fed. Reg. 69920 (Dec. 8, 2021.
[3] Public Law No: 116-283 (enacted 1/01/2021), part of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

Since 2000, Treasury, including FinCEN, has been working to raise awareness of threats created by anonymous shell companies. In 2006, FATF issued a mutual evaluation of the United States that criticized the country's lack of a central registry of beneficial ownership information as a serious AML deficiency. In 2010, FinCEN and the banking agencies issued guidance to clarify expectations for collecting beneficial ownership information on certain customers under then-applicable CDD expectations. In 2012, FinCEN initiated a rulemaking that culminated in the 2016 CDD rule which took full effect in May 2018. When FinCEN finalized that rule, Treasury recommended that its companion piece would be the creation of a beneficial ownership registry. Meanwhile, in 2016, a second FATF mutual evaluation again found that lack of a central beneficial ownership registry was one of the fundamental gaps in the U.S. AML system. After much discussion and hearings on Capitol Hill, Congress adopted the AMLA, including the CTA, on January 1, 2021.[4]

While FinCEN has not been able to determine a precise estimate, the number of entities that are likely to have to report numbers is in the tens of millions. Most states do not require beneficial ownership information and little to no control information. Access to that information would enhance the ability of law enforcement and government authorities to protect the financial system from illicit finance and would impede the ability of bad actors to hide the proceeds from their illegal activities.

Summary of the Comment

ABA has long supported the establishment of a beneficial ownership registry. However, since this is only the first of a three-part regulatory scheme to implement the beneficial ownership registry, several banks have pointed out that until the access regulation has been implemented and the CDD rule has been updated, it will be difficult to assess how these reporting requirements fit with bank responsibilities. Therefore, it is difficult, if not impossible, to determine whether this proposal meets the Congressional expectation for FinCEN to take steps to eliminate duplicative requirements and to reduce burden.

Our members note the differences between this proposal and the existing CDD rule and expressed concern about the burden of reconciling those differences. Banks will need to take extensive steps to update systems and procedures – and training – to reflect the new requirements. This will be a major undertaking that will divert resources from other efforts, undermining FinCEN's goal to encourage effectiveness and efficiency.[5]

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[4] TITLE LXIV. Establishing Beneficial Ownership Information Reporting Requirements. of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, adopted January 1, 2021

[5] Remarks of FinCEN Acting Director Him Das at the American Bankers Association/American Bar Association Financial Crimes Enforcement Conference, January 13, 2022.

In addition, we recommend the following:

- ABA recommends that FinCEN take steps to validate the information that is submitted to the registry. This is consistent with international recommendations[6] and will be important to support law enforcement and others using the registry. Without validation, the information becomes less reliable.

- FinCEN should clarify the definition of reporting company, placing the focus on the requirement to file with a state authorities to be chartered or registered to do business. The distinction between domestic and foreign companies should be eliminated as unnecessary.

- We support the current exemptions, although ABA recommends that after the rule has been in effect for a period of time, FinCEN should reassess whether the exemptions are still appropriate, or whether changes should be made to ensure the registry continues to be useful to law enforcement.

- FinCEN should further clarify the information a reporting company must submit, particularly about the company applicant. In addition, the rules governing which address must be submitted should be simplified.

- FinCEN should develop a clear plan for educating reporting companies about the requirements. Also, FinCEN should study whether requiring existing companies to file within one year allows enough time to educate the public.

- The proposed definitions for "substantial control" and "equity ownership" should be consistent with the current definitions for beneficial ownership in the CDD rule to reduce burden and costs. We oppose defining senior officers as individuals with substantial; consistent with the CDD rule, there should only be one person identified as having substantial control. In addition, the definition of equity ownership should be limited to straight equity and not include other factors such as debt or contingent interests.

- The final rule should address situations involving trusts as beneficial owners. There are several unresolved issues regarding trusts, particularly the requirements affecting bank employees when the bank has been designated as the trustee of a beneficial owner, that we urge FinCEN to resolve (as recommended below).

- FinCEN should convene a roundtable of interested parties to explore the pros and cons of the FinCEN Identifier, both for individuals and companies, as well as how it might work in practice.

- FinCEN should adopt uniform filing deadline of 30-days.

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[6]FATF, "Best Practices on Beneficial Ownership for Legal Persons," October2019.

- The effective date for the reporting requirements should match the effective date of the updated CDD rule. Without significant changes to the proposal, there will be critical differences between the current CDD rule and this proposed rule. When FinCEN adopted the CDD rule in 2016, it allowed a two-year transition due to the significant changes. ABA recommends the same timeline due to the significant changes proposed here.

Validation of Information Submitted is Critical

As ABA recommended in the advanced notice of proposed rulemaking, the final rule should include a means to validate the information being submitted, possibly by relying on technology to check other registries. However, the proposal only mentions the concept of validation in passing. ABA believes that ensuring the information is accurate is important for those who access the registry, particularly law enforcement. Moreover, the expectation that the information will be validated is an important part of the FATF recommendations. Without some steps to validate the data, the information becomes less reliable and therefore less useful.

The Definition of Reporting Company Should be Refined

The proposal would define a reporting company as a corporation, a limited liability company, or other entity that is created through a filing with the secretary of state or other appropriate state authority. The focus is on the requirement to file with state authorities, which depends on the laws of the state where the company is formed. The definition is sufficiently broad that FinCEN estimates there are approximately 30 million such entities in existence.

Reporting companies are divided into two types: domestic and foreign. A domestic reporting company is defined as one that files with a secretary of state (or other state authority) to create a legal entity, and a foreign entity is one that is chartered under the laws of another country but registers with a state to do business in that state. It is not clear, however, that the distinction between domestic and foreign legal entities adds anything to the definition, but it has the potential to generate confusion. ABA recommends the distinction be eliminated. Essentially, the reporting requirement for any legal entity is triggered by registration with a state. That registration requirement, whether domestic or foreign, is what matters. Using the registration requirement as the defining factor is simple to follow and easy to understand. To ensure that an entity only submits one report, the final rule should also provide that the registration requirement is triggered only the first time a legal entity registers with any state.

Because state law will determine which entities are covered, coverage will be inconsistent, and there is the potential of forum shopping regarding where a particular type of legal entity should become chartered. For example, while some states require general partnerships to file with the state authorities to become a legal entity, most states do not. However, this has not been an issue under the CDD rule but it is

something FinCEN should consider when it later assesses the effectiveness of the rule and registry.

FinCEN should clarify that Reporting Companies submit the Report for Revocable Trusts. We urge FinCEN to clarify in the final rule is who is responsible for filing a report for a revocable trust when the trust controls a reporting company. Logically, ABA believes it generally would be the reporting company as the control person, though some have suggested that it could be the grantor since the trust is revocable. ABA recommends that FinCEN clarify this question and identify the reporting company as the entity responsible for reporting.[7]

ABA Generally Agrees with the Exemptions from Reporting Company Filing Requirements. The CTA lists 23 types of entities that are exempt from filing, which FinCEN has used as the basis for exemption from reporting in the proposed rule. Generally, the exempt entities are those which are subject to other regulation that requires identification of the beneficial ownership information. Similar to the CDD rule, those listed as exempt include: an issuer of securities registered with the Securities and Exchange Commission, a government entity, a bank or bank holding company, a credit union, a money services business, a securities broker-dealer, an exchange or clearing agency, a registered investment company, a registered investment adviser, an insurance agency or broker, a registered commodities broker, a public utility as defined by the Internal Revenue Code, a pooled investment vehicle, and certain dormant companies. The proposal would also exempt any entity that employs more than 20 full-time employees, filed federal tax returns in the previous year showing over $5 million in gross receipts or sales, and has an operating presence in the United States.

ABA agrees it is appropriate to follow the statutory exemptions, and it is consistent with Congressional intent to interpret the exemptions narrowly to ensure the broadest possible coverage of the registration requirement.[8] However, we recommend that FinCEN reassess the exemptions in the future to ensure the gaps do not handicap law enforcement efforts.

With some minor changes, the list of statutory exemptions match those of the existing CDD rule. ABA supports this consistency as it will minimize the changes that FinCEN will need to make to the CDD rule, which will reduce burden and confusion for banks as they implement the revised rule. One exception from the current CDD rule that we urge FinCEN to add are trusts subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA) since they present very low risk of being used for money laundering purposes due to the constraints under ERISA.

[7] The one exception to this would be instances where the corporate trustee can elect the directors of the reporting company. In that case only, it would be logical for the corporate trustee to be identified as the control person since in that case, the trustee does exercise control. The key, though, is who actually exercises control.

[8] See, e.g., letter November 4, 2021 from Senator Sherrod Brown (D-OH), Representative Maxine Waters (D-CA), and Representative Carolyn Maloney (D-NY) to Treasury Secretary Janet Yellen, which recommended that FinCEN interpret the exemptions as narrowly as possible.

The CTA exempts “large operating companies” which are defined as those which employ more than 20 employees, filed a tax return in the previous year showing over $5 million in gross receipts, and have a presence in the United States. The proposal would clarify that the requirement for a “presence in the U.S.” is satisfied if the company owns or leases a physical office in the United States. It also would clarify that employees are determined using the IRS definition of full-time employees. Calculation of the $5 million in gross receipts would also be determined using IRS rules, and it includes only receipts or sales from U.S. operations. ABA agrees with these clarifications of the statutory exemption, and while we recognize that this exemption was added by statute, ABA urges FinCEN to monitor it to ensure that it does not create too great a gap in the reporting requirements. Ideally, the exemption for large operating companies will carry over into any subsequent changes to the current Beneficial Ownership Rule applicable to banks.

FinCEN has proposed to interpret the “subsidiary exemption” to apply only if a company is entirely owned by one or more exempt entities. However, ABA believes this interpretation may be too strict. If a subsidiary is more than 50% owned by an exempt company, ABA believes that it should also be exempt. Changing to a majority-owned interpretation would be consistent with the approach to subsidiary ownership in most other interpretations of corporate law.[9]

Although not required by the proposal, FinCEN is considering whether to require exempt companies to file an affirmative statement declaring their exemption in order to distinguish between companies that affirmatively claim an exemption and those that failed to satisfy the reporting obligation ABA opposes this requirement. If a company is exempt, there is nothing to report other than the fact that the company falls within one of the exemptions. Moreover, being able to distinguish exempt companies from those that failed to register would not benefit law enforcement investigations or prosecutions. At the same time, imposing this additional reporting requirement increases burden for filers as well as the burdens associated with managing the registry. And, with a registry system sure to be overwhelmed with all the filings being submitted during the first year, adding this extra filing to the system will strain resources. Therefore, ABA recommends that FinCEN omit from the final rule a requirement for exempt entities to file a report in order to claim an exemption.

Minor clarifications to the Exemptions would be Useful. ABA recommends two clarifications to the exemptions. First, state chartered trust companies do not fall within the definition of a “bank” because they are not FDIC-insured entities; nor do they fall within the definition of bank under the Investment Adviser Act of 1940. ABA recommends that the final rule clarify that a “bank” also includes state chartered trust companies to be consistent with the approach the agency has taken to these financial institutions.[10] Second, we recommend that the final rule clarifies that the exemption for

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[9] For example, the Office of Foreign Assets Control (OFAC) applies a majority-owned interpretation to determine whether a subsidiary is also subject to sanctions that apply to the parent company.
[10] FinCEN recently applied AML requirements to state-chartered trust companies, 85 *Federal Register* p. 57129 et.seq., September 15, 2020.

money services businesses (MSBs) applies to all MSBs, even if they are not registered to ensure uniformity since some MSBs are not required to register under state law.

Other Additions to the Exemption List are Not Currently Necessary. The Treasury Secretary, with the written agreement of the Attorney General and the Secretary of Homeland Security, may add to these exemptions by regulation if the collection of beneficial ownership information would not serve the public interest and would not be highly useful. When FinCEN was developing the proposal, a number of commenters offered suggestions for additional exemptions, which FinCEN chose not to include. ABA agrees that additional exemptions are currently unnecessary, particularly since Congress has encouraged FinCEN to apply a narrow interpretation to exemptions to ensure the broadest possible coverage.[11]

Information required is Generally Appropriate

The proposal sets forth the information that a company must report, and requires the filer to attest to the accuracy of the information submitted.

ABA Agrees that the Proposed Information about the Reporting Company is Appropriate. The proposal would require a reporting company to submit information that identifies the reporting company, including the legal name and any alternatives by which the business may be known (such as doing business as). The reporting company must provide its business street address, the jurisdiction of registration or formation, and a unique identifying number. A company name alone is insufficient and could lead to confusion with similarly named entities. FinCEN states that enough information about the company is needed to facilitate searches of the registry. A company would be required to report their TIN or, if the company lacks a TIN, its' LEI or DUNS number. If the reporting company has a FinCEN identifier, it can submit the FinCEN Identifier instead of the other identifying information.

Additional Clarify is needed Regarding Company Applicants. A reporting company must provide information about the "company applicant," which is defined as an individual who files an application or other document that creates a domestic reporting company or who first registers a foreign company. It also includes anyone who directs or controls the filing.

The proposed requirement to identify a company applicant is new. ABA agrees that this may be useful information, but we believe that additional clarity is needed to help reporting companies understand what this means and how it applies. This is particularly important for those companies that have existed for decades. For these companies, information about the person who originally applied to charter or register the company may no longer available. In addition, if the company has existed for more than ten years, it is highly questionable whether that information will be useful to law enforcement since it is likely to be outdated. Therefore, ABA recommends that

[11] See footnote 4.

companies that were established or registered more than ten years ago not be required to submit this information.

When a Directed Trust is Involved, Only the Actual Filer Should be identified as the Company Applicant. A special set of circumstances arise when considering directed trusts. While the trustee in these situations may be administering the trust, a third-party investment adviser is typically the party directing the bank to incorporate an entity that becomes the reporting company. To further complicate the situation, the bank as trustee might hire a service company or law firm to carry out the actual chartering and registration of this new reporting company. Logically, the company applicant would be the third-party service provider or law firm who actually files with the state authorities and the investment advisor would be the person instructing the file. The bank trustee who is merely carrying out instructions should not be considered a company applicant. ABA recommends this distinction be made clear in the final rule.

ABA Supports the Special Rules for Reporting Companies. If a company is owned by another company, which is exempt from reporting, only the name of the exempt company and nothing else would be included. ABA agrees with this interpretation since it ensures that the exemptions are applied uniformly and consistently.

If a reporting company is a foreign pooled investment vehicle, then the report would provide beneficial ownership information of the person with substantial control. This is consistent with the current CDD rule and we support it. However, we recommend that the final rule clarify that there is only one control person for a pooled investment vehicle.

For a deceased company applicant, the reporting company would submit whatever is known about the deceased person. During the initial reporting period, it is highly likely that there will be a significant number of deceased or even unknown company applicants, especially when a reporting company has existed for a long period of time. ABA recommends that FinCEN consider that this information may no longer be relevant if the company has existed for many years. We recommend eliminating the requirement for company applicant information for companies that have existed more than 10 years.

We Recommend a Special Rule for a Bank Serving as Trustee. When an exempt entity has direct or indirect ownership of a reporting company, the registration would list the name of the exempt entity only as the beneficial owner. However, banks are exempt from the reporting requirements. ABA recommends that the final rule clarify that when a bank is acting as trustee and the trust owns or controls a reporting company, then only the name of the bank should be listed and not the grantors or beneficiaries of the trust.

This special rule should also apply to trusts with a single beneficiary receiving income and principal, trusts where a beneficiary has the right to demand or withdraw substantially all of the trust assets, grantors of revocable trusts, and individual or others with fiduciary powers serving as co-trustee with a corporate trustee.

Notice to Reporting Companies will be needed

Notifying the companies that will be required to report their beneficial ownership information is another critical element to ensure the success of the program. FinCEN estimates that there are approximately 30 million existing companies that will be required to report, and yet the agency has not outlined a plan notifying those companies, other than working with appropriate state authorities. ABA urges FinCEN to develop a clear and specific plan on the steps it will take to educate the public and to ensure that companies subject to reporting understand who must report, what must be reported, when it must be reported, and any possible penalties that may come into play for willful failure to report. The outreach plan also should explain how FinCEN will ensure reporting companies understand the definitions and explain how FinCEN will respond to questions from reporting companies. Without a plan to educate the public, it is likely that there will be errors in information submitted to the registry, undermining its usefulness.

As part of its outreach to reporting companies and others, ABA recommends that FinCEN assemble educational materials, possibly in the form of pamphlets, as well as holding webinars which can be recorded and available on the FinCEN website.

Elements of Information Reported for Beneficial Ownership Need Revision

Four pieces of information are required on each beneficial owner: name, address, date of birth, and unique identifying number from an acceptable document along with an image of that document. Alternatively, an individual can obtain a unique FinCEN identifying number instead of the four pieces of information. In addition, the proposal provides that a beneficial owner may voluntarily submit their taxpayer identification number (TIN) as the unique identifier. Since these are all readily available pieces of information, according to FinCEN, the burden to report the information is minimal. However, given the sensitivity of this information, the CTA imposes strict confidentiality, security, and access restrictions.

The Requirements for What Address is Reported Should Be Simplified. FinCEN has proposed to define of the beneficial owner's address as the person's residential address for tax residency purposes. For a company applicant, the address would be the business address if the person is acting as a corporate formation agent or, if not, the person's residential address for tax residency purposes.

ABA recommends simplification. The addition of the term "for tax residency purposes" is a new element that is not readily or widely understood. ABA believes that this is likely to generate many questions from reporting companies and cause unnecessary confusion. Instead, we recommend that FinCEN follow the approach of the CDD rule which permits the address for a beneficial owner to be either the person's residential address (which is simple and readily grasped) or the business address of the company.

While reporting companies might have more than one business location, identifying the company's main office is a straightforward and easy to apply. Therefore, FinCEN should provide in the final rule that the business address is the address of the main office of the reporting company.

ABA further recommends that FinCEN include examples in the final rule to help reporting companies understand. For example, FinCEN could explain that a residential address is the address used by the beneficial owner for filing taxes or voting. Similarly, examples could also be included to help identify the correct business address when a company has more than one location.

When FinCEN was developing this proposal, commenters suggested adding additional requirements, such as percent of ownership, whether ownership is direct or indirect, and so forth, but FinCEN has not expanded the information to be submitted. ABA agrees that adding additional information is unnecessary since it departs from the parameters outlined in the CTA and would only make the rule more complicated and burdensome.

Beneficial Ownership Definitions Need Revision

As defined by the proposal, and consistent with the CDD rule, beneficial owners are defined as those who exercise substantial control over the entity or own or control 25% or more of the ownership interests. The proposal provides standards for determining who exercises substantial control or owns or controls more than 25% of the ownership interests.

The Definitions Should be Consistent with the Existing CDD Rule. In our comments on the advanced notice of proposed rulemaking,[12] ABA encouraged FinCEN to strive for consistency with the existing requirements under the CDD rule. As we pointed out, consistency with the current definitions – with minor clarifications –will minimize the changes that FinCEN will need to make to the CDD rule, which will reduce burden and confusion for banks as they implement the revised rule. In addition, reporting companies are familiar with the existing definitions of beneficial ownership since that is the information they provide to a financial institution when opening an account.[13]

Unfortunately, the proposal does not follow the CDD rule; instead, it greatly expands the definitions for beneficial ownership. ABA urges FinCEN to reconsider.

While the CTA does not explicitly require FinCEN to adhere to the existing rule, it does require FinCEN to "minimize burdens on reporting companies associated with the collection of the information."[14]As discussed below, the complexity of the proposed definitions are likely to increase burden. Second, it is not clear how the current definitions prevent transparency with complex structures or what information is being

[12] ABA letter to FinCEN, May 5, 2021.
[13] At the same time, the current definitions can be easily explained on and included as part of the model *Certification of Beneficial Ownership* form.
[14] National Defense Authorization Act for Fiscal Year 2021 §6403 (b)(1)(F)(iii)

lost. Despite FinCEN's assertions that this will not affect entities with simple structures, we believe that the more complex and detailed definitions will necessitate even small reporting companies to engage attorneys or consultants to ensure that the information they submit meets the requirements, undermining FinCEN's estimate that it will only cost $50 for a reporting company to complete the form. Sadly, these expanded definitions are likely to confirm fears raised by the small business community during hearings on the Corporate Transparency Act.[15]

In addition, unless FinCEN takes steps to make the effective date for the registry and the updated CDD rule identical, there will be a period where legal entities are submitting data to their financial institutions to open an account that is different from the information they must submit to the registry. This disparity will further complicate FinCEN's task of notifying companies about the registration requirement, and, since the proposal is different from the CDD rule, educating the public about the differences will be a significant challenge.

The CDD rule was the product of extensive stakeholder feedback and deliberation. The end product resulted in workable definitions of equity ownership and substantial control For example, the 25% equity ownership requirement is simple to apply, easily understood, and appropriately limits the number of possible beneficial owners to individuals that realistically could play a role in a money laundering scheme. Similarly, identifying a single control person, while not perfect, focuses on the person with the most relevant information. Expanding that to a potentially limitless number of control persons will only make it more difficult to identify the person of greatest interest to law enforcement.

Moreover, potentially requiring the collection of more than one person with substantial control over the reporting company will impose additional operational costs if that requirement carries over to the coming revisions to the current Beneficial Ownership Rule. Banks have borne significant costs in developing systems that record one person with "significant responsibility" over a legal entity customer. Any result from FinCEN's rulemakings that subsequently requires banks to add additional individuals to a bank's operational systems will require fundamental changes to those systems, which increases costs and burden, while introducing unnecessary complexity and regulatory risk.

Whether FinCEN proceeds with the proposed changes or, as ABA recommends, follows the existing definitions, ABA urges FinCEN to provide examples of how the definitions apply through FAQs or additional guidance. Bankers find that examples can often be much more helpful in understanding the application of the rule. At the same time, examples of situations when the rule does not apply can be equally helpful. One particular area where examples would be helpful would be in the area of indirect ownership or control.

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[15] See, e.g., Statement for the Record of Karen Harned, Executive Director, NFIB Small Business Legal Center Before the United States Senate Committee on Banking, Housing, and Urban Affairs Hearing on: "Outside Perspectives on the Collection of Beneficial Ownership Information." Thursday, June 20, 2019.

Additional Consideration is needed for Trusts as Beneficial Owners. There are several unanswered questions under the current CDD rule when trusts are identified as beneficial owners, which would be appropriate to address in the final rule. When a trust is designated as the beneficial owner, the appropriate focus should be the trustee and not a look-through to the trust beneficiaries, particularly since they may not have any influence over trust assets and might not even be aware of their interest. The final rule should specify that it is the trustee who is listed as the control person for a trust identified as the beneficial owner.

If a bank is serving as the trustee, which is not unusual, then the final rule should confirm that the bank, acting in its corporate capacity, is the control person.[16] The final rule should not require the bank employee designated as the person managing the trust be the named trustee nor should their personal information be required for the report.[17] This approach would be consistent with another provision in the proposal where an employee acting in his or her capacity as an employee is not considered a control person. In addition, with staff turnover, it would be misleading and confusing to collect the information on individual employees of the bank since they can change frequently. Rather, the bank, and not the bank employee, should be listed as the control person.[18]

The Proposed Approach to Substantial Control is Too Broad

The proposal anticipates there will be at least one control person for each reporting company. However, in a significant departure from the current CDD rule, there could be more than one control person, which will only add to confusion and burden.

For the proposal, there are three specific indicators of exercising substantial control. First, it would be a “senior officer” of the company, which could encompass a number of individuals. Second, it would be someone with the authority over the appointment or removal of any senior officer or a dominant majority of the board. Third, it would be someone who can direct, determine, or decide substantial matters of the company, or can exercise substantial influence over important matters. While ABA believes the second and third factors are appropriate and consistent with the existing CDD rule, the expansion to include any senior officer should be deleted from the final rule.

Under the proposal, a senior officer is someone who either holds the position or exercises the authority of president, secretary, treasurer, chief financial officer, general counsel, chief operating officer, or anyone with similar authority. While the CDD rule uses these titles as examples, there is only one person deemed to exercise substantial

[16] See footnotes 13 and 14. The bank may be acting as a directed trustee and therefore not exercising “control” over the asset held in trust. The third-party trust director would be the appropriate “control person.”
[17] At the same time, the potential penalties whether civil or criminal should not apply to the bank’s employees, officers or directors who are acting in their official capacity on behalf of the bank as trustee.
[18] For a directed trust, where a third-party investment adviser directs the allocation of the funds of the trust, then the designated control person should be the investment advisor and the investment advisor should be the person responsible for reporting the information on the trust.

control. In contrast under the proposal all senior officers would be listed on the reporting company's registration. This will increase burden for reporting companies, particularly since the personal information of all of these individuals will need to be listed on the registration. This adds to the burden – and security risk – of collecting and reporting all this personal information, but it also greatly expands the information included in any registration. With more individuals listed, the more likely there will be changes to their information. Updating the beneficial ownership information could become a full-time occupation for some reporting companies.

Another step that is important to clarify is what is meant by "substantial influence." This is a vague standard that will be difficult to apply. Examples and greater clarify are needed to better articulate what is meant by substantial influence.

Two other factors militate against the proposed approach to substantial control. Since there can be any number listed, neither FinCEN nor law enforcement would know if all the senior officers of the registering company have been listed. Second, and more important, law enforcement will have to sift through all the listed control persons to identify the one who has the control necessary to be of interest. ABA agrees with FinCEN that the reporting company is most familiar with its own management and, to that end, urges FinCEN to follow the existing CDD rule and limit the identification to a single person with substantial control, as determined by the reporting company.

ABA supports FinCEN's recognition that substantial control does not include ordinary execution of day-to-day management decisions, such as property management. However, ABA recommends adding this qualifier to the definition: in order to be identified as a control person, an individual must have independent control over funds or assets of the company. ABA believes that incorporating this element into the definition would help minimize the burden and provide clarity that If an individual does not control assets or funds, then for the purposes of the rule, they should not be considered as exercising substantial control.

Additional Clarification is needed when a Trust is involved with a Reporting Company. We recommend the final rule address substantial control when the reporting company is part of a directed trust. In this case, it is the investment adviser who exercises control while a bank serving as administrative trustee merely carries out the instructions of the investment adviser. Therefore, the investment adviser, and not the bank trustee, should be listed as the person with substantial control[19]– even though the trustee holds title to the reporting company.

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[19] This distinction becomes especially important when considering the potential civil and criminal penalties associated with failure to report. Banks with a directed trust business have serious concerns with this provision since the bank has no investment discretion over the reporting company and typically does not provide directors or participate in the management of the reporting company. However, because the bank holds legal title to the reporting company in a capacity similar to a custodian, it could be held accountable for filing deficiencies. Therefore, where a bank is serving as a directed trustee of a trust that forms or owns a reporting company and a reporting violation occurs for any reason, the potential penalties (civil or criminal) should not apply to the bank nor the bank's employees, officers and directors who are acting on behalf of the bank as trustee.

The Proposed Ownership or Control of Ownership Interests are Unnecessarily Complicated

When the CDD rule was being developed, a great deal of thought and discussion went into determining that a 25% equity interest in a company would be appropriate. The percentage was consistent with other regulatory approaches used to identify control and it was easy to apply. FinCEN also determined that limiting the number of possible equity owners would limit the need for updating beneficial ownership information, which expands with the number of individuals identified.

ABA Recommends a Simpler and More Straightforward Approach to Ownership Interests. In comments to the ANPR, ABA urged FinCEN to follow the CDD rule and apply a simple method with some additional clarification to determine ownership interests. However, FinCEN has broadened the definition significantly, so that calculation of the 25% interest includes not only equity interests but also capital or other profit interests, convertible instruments, warrants or rights, or other options to acquire equity, or other instruments of control. While the goal is to ensure that complex structures are not used to evade reporting, ABA questions whether the added costs and burdens associated with the expanded definition justify the change.

The additional elements will present challenges and confusion for reporting companies. At a minimum, the final rule should clarify that all ownership interests are to be combined to determine if an individual exceeds the 25% threshold. However, that will not address all of the complexity. It is easy to identify an individual who owns 25% of the equity interests of a legal entity, but if you must include convertible interests, warrants, options, etc. that affects the calculation of the denominator.[20] Moreover, since some of these elements can change in a short period of time (for example, warrants typically have a limited shelf-life), that will affect the calculations. As a result, a reporting company might be compelled to file frequent updates to the beneficial ownership information as an individual ceases to be a beneficial ownership simply because stock warrants have expired. This is but one example. The challenges associated with making these calculations will create a new industry of lawyers, consultants, and accountants needed to interpret the requirements and make the appropriate calculations. To avoid this potential confusion, ABA recommends following the existing CDD rule.[21]

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[20] FinCEN should consider that there are specialists for hire who often are needed to determine the equity ownership of a limited liability company for estate or tax purposes. It is likely similar expenses will be incurred for reporting companies to identify and verify the equity ownership for beneficial ownership reporting as well if the proposal is adopted without change.

[21] Adopting broader, more complicated tests for substantial control and ownership are inconsistent with Congressional intent to, "Seek to minimize burdens on reporting companies associated with the collection of beneficial ownership information" and "Provide clarity to reporting companies concerning the identification of their beneficial owners."

The Exceptions to Beneficial Ownership Definition Also Need Clarification

The exceptions to the beneficial ownership requirements mirror those in the statute with some additional clarifications.

If the beneficial owner is a minor, then the report must also include information on the minor's parent or legal guardian and note the relationship. ABA questions whether this additional information is necessary since it offers little additional assistance to law enforcement. Other laws, particularly fiduciary laws, as well as any governing instrument, control whether and if the parent or guardian has any control over funds that may belong to the minor as a beneficial owner. While it is appropriate to identify the minor as beneficial owner, ABA believes the additional information about the parent or legal guardian is unnecessary.

For a nominee, information must be provided on the individual on whose behalf the nominee is acting. ABA supports this requirement.

For an inheritance, the exception to beneficial ownership applies; once the property has been inherited, the exception would no longer apply. Applying the same logic, ABA believes this exception also should apply to beneficiaries of a trust who only hold a future interest, whether that interest is vested or contingent.

A creditor is not considered a beneficial owner as long as they do not own 25% or more of the company and do not have the rights to convert debt to a 25% or more ownership interest (the debt conversion amount must be a pre-determined sum). Again, ABA believes that this is appropriate.

If a beneficial owner should die, the change is deemed to occur when that person's estate is settled and the ownership interest has been transferred. At that time, the reporting company would file a beneficial ownership change and, if possible, report the new beneficial owner. ABA agrees that this is appropriate and also something readily understandable and easily applied.

FinCEN Identifier Needs Additional Work

The Corporate Transparency Act directs FinCEN to create a special FinCEN Identifier. To implement this requirement, FinCEN proposes that an individual who is a beneficial owner would provide their identifying information directly to FinCEN which would issue a FinCEN Identifier. In that scenario, the reporting company would only list the FinCEN Identifier for that beneficial owner. For a reporting company, the company would submit all its registration information, including information on its beneficial owners, directly to FinCEN, which would issue the company a FinCEN Identifier to be used in lieu of any other information the company would report.

This approach, however, does not explain whether a FinCEN Identifier must be renewed on a regular basis, or whether it would be permanent once issued. Similarly, it

does not address expectations for updating information, as necessary, by the holder of a FinCEN Identifier. And, even if the underlying information changes, it should be made clear that the company retains the same FinCEN Identifier. For example, if a company has a FinCEN Identifier and a beneficial owner who exercises substantial control retires and is replaced by a new beneficial owner, the company should retain the same FinCEN Identifier.

However, one crucial piece that is missing that must be addressed is that banks may be unable to use the FinCEN Identifier and are likely to require collection of the information that goes into a FinCEN Identifier. To begin with, bank systems ae not set up to accept a FinCEN Identifier in lieu of the separate pieces of information, requiring extensive and expensive software changes to bank systems even if they could use the FinCEN Identifier.

The key problem with the FinCEN Identifier for banks is that many of the individual elements, such as date-of-birth, address, and identification number are all needed for other purposes for monitoring and risk analysis. One particular challenge will be sanctions screening where the additional information is needed to ensure a match or to able to clear a possible false positive. And so, ABA urges FinCEN to consult with the industry through BSAAG and other outreach to more fully evaluate the FinCEN Identifier and how it will impact banks.

The Proposed Deadlines for Filing May Need Adjustment

Under the proposal, entities that were created before the effective date of the rule will have one year to report their information to FinCEN, half the time permitted by the CTA, while entities created after the effective date of the rule will have 14 days to submit their data. Reporting companies will have 30 days to report any change (CTA authorizes up to one year), and 14 days to correct any inaccuracies in a report without penalty.

According to FinCEN, the shorter one-year period for existing companies to register is designed to allow sufficient time to provide notice to these companies about the reporting requirement balanced against the importance of collecting this information in the registry as quickly as possible. FinCEN plans to work with state authorities to notify companies of the requirement. However, since FinCEN’s goal is to make the registry available to law enforcement and others as soon as possible, the agency believes the one-year period is appropriate.

ABA questions whether a one-year requirement for existing companies to register is practical. The primary question is whether FinCEN will have the time and resources to notify reporting companies about the new requirement and educate them about reporting, particularly since many smaller companies are unlikely to be familiar with FinCEN as a government agency. FinCEN allowed two-years before the CDD rule became effective due to the many challenges with that rule; ABA urges FinCEN to follow the two-year timeline provided by Congress.

Registering New Companies after the Effective Date Should be 30 Days. Companies that come into existence after the effective date will be required them to report within 14 days of registration. FinCEN believes requiring reporting within 14 days of formation will help make the beneficial ownership registration process integral to company formation, but also wants to know whether 14 days is appropriate.

While ABA understands FinCEN's desire to keep the registry as current as possible, 14 days is an extremely short period of time. There are elements of the beneficial ownership information, particularly personal data on beneficial owners, which may not be readily available but which will need to be collected only for the beneficial ownership registration. ABA recommends that FinCEN allow 30-days for the company to collect the necessary data and that the time does not being to run until the company becomes aware of the change.[22] A 30-day time period also aligns with the timeframe for updates, simplifying compliance by applying a single timeframe for registration, corrections, or updates. ABA also recommends that FinCEN incorporate a provision that allows reporting companies to request additional time for filing when appropriate.

Changes in Status or Information from a Reporting Company Should be 30 Days. If a company loses an exemption, or undergoes another change to the information previously reported, FinCEN proposes allowing the entity 30 days to file a corrected report. This is shorter than the one year authorized by Congress, but FinCEN believes this will ensure the registry stays up to date. At the same time, since the period is shorter, each change would be reported separately (instead of reporting all changes over a 12-month period).

ABA agrees that requiring changes to be reported within 30 days is appropriate and will help to ensure that the information in the database is current. This is important to ensure the information is accurate and complete for users of the database, particularly law enforcement and financial institutions. However, we also recommend that FinCEN include a clear and conspicuous notice on the original registration form to notify reporting companies of this requirement when they first register.

Similarly, to ensure the information is accurate and complete for users of the database, there are a number of other steps in the proposal that ABA supports. For companies that lose an exemption, ensuring they are aware that they have 30 days to report the loss of exemption should be included in any educational efforts. If a company ceases to exist, FinCEN is considering whether to require the company to report that to the registry but this will be difficult to enforce as a practical matter since once a company ceases to exist, there is no incentive for it to file a termination report; therefore, ABA recommends this not be included in the final rule.

When a reporting company subsequently becomes eligible for one of the many exemptions provided in the statute and the proposal, ABA believes that they should be requires to file a short form with FinCEN identifying the company and verifying that it is

[22] For example, it might take some time before a company becomes aware of the change in status of a beneficial owner such as the death of the person.

now exempt and why. However, the necessary form to report should be no longer than one page, identifying the company and its reason for exemption and the date it became exempt.

FinCEN plans to develop a series of forms at a future date. ABA strongly supports this step and encourages FinCEN to work with affected reporting companies to develop the forms and also to make them available as soon as possible, since the forms can often serve as a helpful compliance tool.

ABA Finds the Penalties Appropriate

The CTA provides for penalties if there has been a *willful* violation of the reporting requirements or if a person provides false or incomplete information. The base fine is $500 per day up to $10,000 as well as two years in prison. The proposed rule essentially follows the terms set forth in the statute with some clarification, e.g., a person who directs a filing can be equally liable.

One of the important issues debated when the CTA was being considered was the fact that violations had to be willful and not inadvertent. Since this is such a sensitive issue, ABA recommends that FinCEN include examples in the final rule to clarify what are willful violations and what are inadvertent violations to help the public better understand this distinction.

Effective Dates Should be Consistent

The proposal does not offer a suggested effective date, but FinCEN has requested comment on it. ABA believes that the final effective date should consider when the operating system that will house the beneficial ownership and reporting company information, which FinCEN is calling the Beneficial Ownership Secure System or BOSS, will be ready. Other factors that will come into play in determining the effective date include the finalization of the rules governing access to the registry and the updates to the existing CDD rule.

As noted previously, there will be significant differences between the beneficial ownership registry reporting requirements and current procedures under the CDD rule. Unless the proposal is changed, companies will submit one set of data to the beneficial ownership registry but different information to a financial institution when they open an account. To minimize the impact of the disparities, ABA recommends that FinCEN adopt an effective date for the registry that matches the effective date for the revised CDD rule.

ABA also recommends that FinCEN consider a two-year timeline for making the reporting requirements effective. The changes will require extensive updates to systems as well as procedures and training for bank staff. This matches the timeline permitted for the CDD rule, and this rule will impose similarly extensive changes.

Moreover, there will be challenges to educating reporting companies about the requirements. And, while it is something that should be addressed when the CDD rule is updated, there is a serious question about what banks should do with the beneficial ownership information already on file. All that information will be outdated and inconsistent with the current proposal. The question is what expectations will apply for banks to update that information, something that could be an enormous undertaking.

Conclusion

ABA appreciates the opportunity to comment on the proposed rule and we look forward to working with FinCEN as the rule is further refined to meet the Congressional mandate to minimize burden as well as FinCEN's goals to increase effectiveness and efficiency. ABA is concerned that the proposal has added unnecessary complexity to the reporting process but that, with the recommended adjustments, the final rule could lead to the development of an effective beneficial ownership information registry.

If you have any questions, please contact the undersigned at rrowe@aba.com.

Sincerely,

Robert G. Rowe, III
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