

Statement for the Record
On Behalf of the
American Bankers Association
Before the
House Financial Services Committee
February 14, 2024



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The American Bankers Association (ABA) appreciates the opportunity to provide a Statement for the Record for this hearing, Oversight of the Financial Crimes Enforcement Network (FinCEN) and the Office of Terrorism and Financial Intelligence (TFI). The ABA is the voice of the nation’s \$23.4 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2.1 million people, safeguard \$18.6 trillion in deposits and extend \$12.3 trillion in loans.

The Committee plays a critical role in overseeing the TFI and FinCEN, and in particular the Treasury’s ongoing implementation of the Corporate Transparency Act (CTA). We appreciate the efforts of the Committee and FinCEN to address many of the concerns expressed by banks regarding the Notice of Proposed Rulemaking (NPRM) for FinCEN’s “Beneficial Ownership Information Access and Safeguard, and Use of FinCEN Identifiers for Entities (“access rule”).¹ Although implementation of the novel beneficial ownership regulatory regime continues to pose significant challenges, the final access rule published in December 2023² substantially improves the original proposal by incorporating several ABA recommendations to address bank concerns.³

Introduction

While the final access rule is improved for having addressed many of the flaws and concerns banks raised, FinCEN should take the additional actions to improve the implementation of the CTA, including:

¹ [Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities](#), 87 FR 77404 (Dec. 16, 2022)

² [Beneficial Ownership Information Access and Safeguards](#), 88 FR 88732 (Dec. 22, 2023)

³ [Joint Letter by ABA and State Banking Associations re: Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities](#); Docket Number FINCEN-2021-0005 and RIN 1506-AB49/AB59 (Feb. 14, 2023)

- Provide timely guidance necessary to allow reporting companies, including bank trust services, to accurately comply with the final reporting rule.
- Commit to additional education for small businesses about the new reporting requirements and facilitate compliance by providing a paper filing option for those that cannot file electronically.
- Ensure that any revisions to the Customer Due Diligence (CDD) rule reduce rather than increase unnecessary and duplicative burdens on banks.

Provide Timely Guidance

FinCEN must issue important guidance regarding trusts and beneficial ownership.⁴ Given the looming deadlines, FinCEN needs to immediately issue guidance necessary to allow the over 32 million small businesses with new reporting requirements to meet their regulatory obligations by the mandatory deadlines. Companies created on or after January 1 of this year only have 90 days to report their beneficial ownership information (BOI) to FinCEN. These deadlines are rapidly approaching, and without clear guidance, reporting companies cannot fulfil their reporting obligations.

Both Congress and FinCEN have clearly exempted banks (among other highly regulated entities) by definition from being reporting companies, and therefore, from having reporting obligations under the CTA. However, although various arguments can be made that potentially exempt them, FinCEN was less clear about whether banks, and their officers and trust division employees (acting in their capacity as such), may meet the definition of beneficial owners (or company applicants) of reporting companies.

This question primarily arises when a bank provides trust services (namely, acts as a trustee) for their individual and business customers. A bank's trust services typically involve multiple employees across a range of departments (e.g., investment management, trust administration). As valued fiduciaries, bank senior officers may also be appointed, in their capacity as bank officers, to serve as trustees. These bank-administered trusts (as well as trusts where bank employees have been asked to serve as senior officers in reporting companies) may invest in, or otherwise exercise ownership or control over companies, limited liability companies (LLCs), and other entities who now have new reporting obligations to FinCEN.

However, reporting companies cannot typically report bank trusts as beneficial owners, because FinCEN's regulation generally requires beneficial owners to be natural persons.⁵ The reporting rule also mandates companies report the residential address of their beneficial owners. In circumstances where bank trusts (or even bank employees serving as reporting company senior officers) may exercise, directly, or indirectly, ownership or substantial control of reporting

⁴ [ABA Letter on Beneficial Ownership Information Reporting Requirements](#); Docket Number FINCEN-2021-0005 and RIN 1506-AB49 (Feb. 7, 2022)

⁵ See, e.g., FinCEN Beneficial Ownership Information Reporting FAQs ("D. 1. Who is a beneficial owner of a reporting company?"); see also 31 C.F.R. 1010.380(d) and FAQ D.12, describing a limited exception

companies, this reporting requirement to identify and report a single individual at their residential address does not make sense, in light of the reporting rule’s purpose.

Should a reporting company choose to identify one of the bank employees whose services are provided on behalf of the bank, as a “beneficial owner,” that selection would not be the defined type of “beneficial owner” Congress or FinCEN intended reporting companies to identify. To the extent these individual employees are identified by the reporting company as exercising “ownership” or “substantial control,” this reporting would also be inaccurate, because the bank employee is acting only in their capacity as a supervised agent of the bank trust itself, and does not personally meet these criteria. Even in cases where a bank employee is selected as a reporting company senior officer, they are selected in their capacity as an employee or official of the bank.

If this employee were to change positions, responsibilities, or employment with the bank, the reporting company would be obliged to file updated information with FinCEN indicating who replaced that employee as the new beneficial owner. The reporting company, or bank, would also be obliged to monitor for updates to the information the reporting company was previously obliged to report about this individual. Such updates would use valuable bank compliance resources, but they would not help law enforcement, regulators, or FinCEN, because the bank itself would still remain the best source of information about the trust.

In addition to creating a significant and ongoing burden on banks without any corresponding benefit to the users of this database, by focusing on the individual at their residential address, and not the bank itself, this approach would effectively obscure the bank’s role exercising ownership or control over the reporting company. By effectively hiding banks’ possible ownership or control roles with respect to a reporting company, this approach would frustrate the purposes of the CTA, and create challenges for law enforcement officials and regulators, who already have well-established avenues to reach banks.

For all these reasons, where a corporate trustee (that would otherwise be exempt from reporting its BOI) exercises direct or indirect ownership or substantial control over a reporting company through a trust arrangement and therefore may potentially meet the definition of beneficial owner for purposes of the reporting rule, the reporting company should only need to report the name and business address⁶ of the legal entity corporate trustee (e.g. bank trust) as beneficial owner of the reporting company, and need not identify a natural person at a residential address. Additionally, where a corporate trustee employee serves as a named senior officer of a reporting company—due to the reporting company’s ownership by a trust—and their employment with the corporate trustee (e.g. bank), this individual should also not need to be individually reported as a beneficial owner of the reporting company.

With March 31, 2024—the first of many reporting deadlines—fast approaching, it is very important that FinCEN issue guidance, as soon as possible, clarifying that under these circumstances, reporting companies may report bank trusts, at their business addresses.

⁶ Or, in the alternative, a FinCEN identifier, a critical unique identifying number that Congress provided as a filing option, the application for which also requires the reporting of the same information.

Commit to Additional Public Outreach and Provide a Paper Filing Option

FinCEN must commit to additional public education and outreach efforts to inform the public of the new reporting obligations. It should also permit reporting companies who cannot file electronically the option to submit their BOI, and applications for FinCEN identifiers, using paper forms – once they are made aware of their reporting obligations.

ABA strongly supports inclusive banking, including through the Bank On movement, which has already helped drive the unbanked numbers to today’s record lows. As part of the critical services banks provide to their communities, banks have repeatedly pointed out that not all small business customers may be aware of this novel reporting requirement, and even once informed, not all small businesses will be able to access electronic filing. Some banks operate in areas of the U.S. that do not yet have reliable access to the internet. Other banks provide services to small businesses that do not have the resources, or ability, to electronically file. Some reporting companies are owned and operated by individuals with religious beliefs that prohibit them from using electronic filing. Furthermore, some individuals from these affected populations will be foreclosed from electronically applying for a FinCEN identifier, with no avenue to avail themselves of the privacy and efficiency that may result from availing themselves of this option provided by Congress.⁷ There is recent precedent for Treasury to recognize that certain populations need to file paper forms. In 2023, Treasury’s Internal Revenue Service (IRS) recognized the burden imposed by electronic tax filing requirements on certain populations and provided necessary relief by permitting paper filing.⁸

FinCEN, however, prohibits the use of paper forms, and continues to require that all BOI reporting and applications for FinCEN identifiers be accomplished through electronic means.⁹ While efficient, this restriction will not serve all bank customers, and the CTA does not mandate electronic filing. If FinCEN does not provide a paper filing form, once affected reporting companies are made aware of the need to file, they must either pay a third-party service provider, or potentially face civil and criminal penalties for non-compliance with reporting rule requirements. ABA believes that FinCEN should make all forms available in paper format for those that need them.

ABA made additional recommendations to improve the efficiency and utility of the information collection in our comments to the Paperwork Reduction Act (PRA) notices for the Beneficial Ownership Information (BOI) Reports and Individual FinCEN Identifier Application forms, and we urge FinCEN to consider adopting them.¹⁰

⁷ See 31 U.S.C. § 5336(b)(3)

⁸ See [Electronic-Filing Requirements for Specified Returns and Other Documents](#), 88 FR 11754 (Feb. 23, 2023)

⁹ See e.g. FinCEN Beneficial Ownership Information Reporting FAQs. (“B. 5. How will I report my company’s beneficial ownership information? If you are required to report your company’s beneficial ownership information to FinCEN, you will do so *electronically* through a secure filing system available via FinCEN’s BOI E-Filing website (<https://boiefiling.fincen.gov>);”) (emphases added)

¹⁰ [ABA Letter re: Agency Information Collection Activities; Submission for OMB Review; Comment Request; Beneficial Ownership Information \(BOI\) Reports, OMB Control Number 1506-0076, 88 FR 67443 \(September 29, 2023\) and Agency Information Collection Activities; Submission for OMB Review; Comment Request; Individual FinCEN Identifier Application, OMB Control Number 1506-0076, 88 FR 67449 \(September 29, 2023\)](#)

Ensure that Revisions to the Customer Due Diligence Rule Reduce Unnecessary Burdens

FinCEN should ensure that any revisions to the Customer Due Diligence (CDD) rule reduce—rather than increase—burdens on banks, as required by the CTA. There are several improvements that would help deliver on this promise for banks.

Improvements include eliminating duplicative information collection and verification requirements tied to the opening of new accounts. Consistent with Congressional intent in the CTA, FinCEN should reduce any burdens on financial institutions and legal entity customers that are, in light of the enactment of the CTA, unnecessary and duplicative,¹¹ by permitting banks greater flexibility to determine, on a risk basis, when and how to collect BOI on their customers.

Banks must also be permitted to make their own decisions regarding whether to seek access to BOI, and cannot be required, or expected, to access a database of information that FinCEN has not yet even adopted a plan to verify. We continue to request FinCEN establish a process to verify the accuracy of the information submitted by reporting companies.¹²

There are significant differences between the CDD rule definition of beneficial ownership, which limits the number of beneficial owners to five,¹³ and the reporting rule definition of beneficial ownership, which has no numerical limit¹⁴ and therefore permits an unbounded number of possible beneficial owners.¹⁵ Small businesses have become accustomed to providing one control party to their banks, and those subject to the reporting rule must now take a different approach to determining their beneficial owners for purposes of reporting to FinCEN. It would be neither helpful to law enforcement, nor an efficient use of bank compliance resources for banks to identify and verify an unlimited number of beneficial owners for their legal entity customers – especially if banks cannot rely on the accuracy of the information in FinCEN’s database. Furthermore, forcing banks to focus on completing check-the-box compliance paperwork diverts valuable compliance resources away from important priorities such as identifying suspicious activity.¹⁶

¹¹ See 31 U.S.C. § 5336(b)(4)(B)(1)

¹² See [Joint Letter by ABA and State Banking Associations re: Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities](#); Docket Number FINCEN-2021-0005 and RIN 1506-AB49/AB59 (Feb. 14, 2023); see also [Testimony of Pete Selenke on behalf of the ABA before the Subcommittee on National Security, Illicit Finance, and International Financial Institutions of the House Financial Services Committee](#) (July 18, 2023)

¹³ See e.g. [FFIEC BSA/AML Examination Manual](#) (“Therefore, all legal entity customers will have a total of between one and five beneficial owner(s) – one individual under the control prong and zero to four individuals under the ownership prong.”)

¹⁴ See [Small Entity Compliance Guide: Beneficial Ownership Reporting Requirements](#) (“A beneficial owner is **any** individual who, directly or indirectly:

- Exercises **substantial control** over a reporting company; **OR**
- Owns or controls at least 25 percent of the **ownership interests** of a reporting company.”) (Emphases in the original)

¹⁵ Of course, banks always have the option, on a risk basis, to seek further information about other individuals who may exercise various degrees of ownership or control of a legal entity under the current CDD rule – for example, to ensure that no designated person is involved in the company.

¹⁶ Examples of this additional work for banks abound – without benefit to law enforcement, the opposite of the CTA’s intent. To illustrate, hypothetically speaking, even if the access rule right now permitted banks, with their customers’ permission, to seek access to reporting rule information held by FinCEN, banks could not use this information to satisfy existing CDD requirements. As one example, the reporting rule does not require reporting

With the new reporting rule requirements, as Congress intended, law enforcement officers have direct access to BOI held by FinCEN, and no longer need to rely on banks as gatekeepers.

Conclusion

ABA appreciates the work of the Committee and Treasury toward achieving the goal of the CTA to protect the U.S. financial system from the misuse of shell corporations by illicit actors while reducing duplicative and unnecessary burdens on banks. Although the revisions made to the final access rule were helpful, banks believe that FinCEN should take additional steps to ensure that implementation of the CTA is consistent with Congressional intent. This includes providing timely guidance necessary to allow reporting companies, including bank trust services, to accurately comply with the final reporting rule; additional education for small businesses about the new reporting requirements and providing a paper filing option for those that cannot file electronically; and, ensuring that revisions to the Customer Due Diligence (CDD) rule reduce rather than increase duplicative and unnecessary burdens on banks.

We look forward to working with Congress, the Treasury Department, TFI and FinCEN as these efforts continue.

companies to distinguish between their “ownership” and “control” beneficial owners when reporting to FinCEN, a distinction the CDD rule requires banks to make. As another example, the CDD rule requires banks to collect tax identification numbers of legal entity beneficial owners, another category of information the reporting rule does not require. Not all legal entity customers are reporting companies, and vice versa.