

TIMELY ACCESS TO BENEFICIAL OWNERSHIP DATABASE IS ESSENTIAL

SUMMARY

- + Investigating cases involving corrupt officials and other wrongdoers requires timely access to basic information, including the identities of hidden owners of legal entities. Drug cartels, human traffickers, illegal weapons dealers, kleptocrats, and others often have sophisticated financial networks in which time is critical to uncover, stop, and punish wrongdoing. Delayed or restricted access to beneficial ownership information or other unnecessary hurdles would mean cases cannot move forward and criminals may escape justice.
- + The Corporate Transparency Act (CTA) employs precise language enabling law enforcement and financial institutions to access beneficial ownership data. In order to ensure effective access in practice, the CTA's implementing rules, in turn, must reflect the plain language and intent of the law.
- + Ensuring timely access to beneficial ownership information is also required by the international standards promulgated by the Financial Action Task Force of which the U.S. is a founding member.

CTA PROVISIONS ARE WRITTEN TO ENSURE ACCESS IS, IN PRACTICE, STRAIGHTFORWARD AND EFFECTIVE.

The CTA states that the Financial Crimes Enforcement Network (FinCEN) may provide beneficial ownership information upon request from the following five categories of requesters:

- 1.** a federal agency engaged in using appropriate protocols;¹
- 2.** a state, local, or tribal law enforcement agency using appropriate protocols, if a court of competent jurisdiction, including through any court officer, has authorized the agency to seek the information in a criminal or civil investigation;
- 3.** a federal agency acting on behalf of a law enforcement agency, prosecutor, or judge from another country, including a foreign central authority or competent authority, citing either an official request or an existing agreement;
- 4.** a financial institution which is subject to customer due diligence requirements and whose request would facilitate its compliance with those requirements; and
- 5.** a federal functional regulator or other appropriate regulatory agency.

¹The "appropriate protocols" required for federal agencies, and for state, local, and tribal law enforcement agencies, to access the beneficial ownership data essentially mandate that:

- Agency heads approve the agency standards and procedures used to access the database, and certify semi-annually those *standards and procedures* meet legal requirements;
- Agencies *establish and maintain* a secure system to store ownership information;
- Agencies *restrict database* access to agency users who are directly engaged in an authorized investigation or activity, whose responsibilities require such access, who have undergone appropriate training or use trained staff to access the database, who use appropriate identity verification mechanisms to access the information, and who are authorized by an agreement with the Treasury Secretary to access the information;
- Agencies maintain a permanent *system of standardized records* providing an auditable trail for every agency information request, and conduct *annual audits* to verify the information received was accessed and used appropriately; and
- Certain *federal* agencies provide certifications with each request that the request involves an authorized investigation or activity, applicable requirements were met, and explains why the beneficial ownership information is relevant to the authorized investigation or activity.



TO CARRY OUT THAT STATUTORY OBLIGATION, THE IMPLEMENTING RULES SHOULD MAKE CLEAR THAT:

FEDERAL AGENCIES:

need not be formally or informally deemed national security, intelligence, or law enforcement agencies; they need only be “engaged in” those activities.

- + “Law enforcement” activities include criminal, civil, and administrative enforcement duties.
- + Agencies need not have opened a formal investigation to access the database, but only an authorized investigation “or activity.”

- + Agency heads may delegate written certification requirements to subordinates and delegate certification-making authority to entire agency departments, subgroups, or classes of employees.
- + To avoid duplicative and unnecessary requests and certifications, agency heads and delegees may submit one request and certification *per investigation*.

STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT:

access procedures should be modeled after existing state, local, and tribal procedures used to engage with FinCEN and other federal law enforcement agencies (such as the FBI, DEA, ATF, SEC, and FTC) to access information on secure federal databases with sensitive information, including FinCEN’s currency transaction report (CTR) and suspicious activity report (SAR) databases.

- + The CTA rejected more restrictive schemes which, for example, would have required state, local, and tribal agencies to first obtain a court order from a federal judge.
- + The CTA instead allows them to obtain authorization from *any* state, local, or tribal “court officer.” Each jurisdiction, within these parameters, must establish the procedure(s) it will follow. Importantly, negotiators of the CTA were in fact aware that Black’s Law Dictionary defines “officer of the court” as “[s]omeone who is charged with upholding the law and administering the judicial system. Typically, officer of the court refers to a

judge, clerk, bailiff, sheriff, or the like, but the term also applies to a lawyer, who is obliged to obey court rules and who owes a duty of candor to the court.”

- + A “court of competent jurisdiction” should encompass the federal, state, local, or tribal court that in both proximity and jurisdiction is the best fit for the ongoing investigation and subsequent prosecution of a particular case.
- + As with federal agencies, state, local, and tribal agencies may be engaged in criminal, civil, or administrative enforcement investigations or activities.
- + To avoid duplicative and unnecessary requests and certifications, agency heads and delegees may submit one request and certification *per investigation*.



TO CARRY OUT THAT STATUTORY OBLIGATION, THE IMPLEMENTING RULES SHOULD MAKE CLEAR THAT:

FOREIGN LAW ENFORCEMENT AGENCIES AND OFFICIALS:

may access the database in furtherance of either *general* investigations or *specific* criminal, civil, or administrative proceedings.

- + Foreign agencies and officials may utilize an existing agreement, such as a mutual legal assistance treaty, extradition treaty, or international tax agreement, or may simply initiate a new official request.

- + The implementing rule should acknowledge and instruct federal agencies to assist foreign law enforcement information requests in order to facilitate similar information requests by U.S. law enforcement to their foreign counterparts.

FINANCIAL INSTITUTIONS:

including banks, security firms, insurance companies, money service businesses, and more, must be granted appropriate and timely access to the database to fulfill their customer due diligence (CDD) obligations under law.

- + Financial institutions may designate frontline or back office personnel to obtain training and certification, and to meet access requirements established by FinCEN.

- + Financial institutions should have access to the full records of prospective clients, including any data on other companies or affiliations these clients may have in the database. This can be accomplished by giving bank personnel access to the FinCEN-generated identification number for those individuals associated with multiple entities.

Federal agencies, state, local, tribal and foreign law enforcement agencies, and financial institutions should all have access to the full record of ownership information for entities, including a list of all previous owners of an entity dating back to the first filing.