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Four Takeaways from the Proposed Rule on Access to the Beneficial Ownership Database

While parts of the proposed rule provide appropriate access, other parts impose new barriers unimagined by the drafters of the law, punt on key issues, and illustrate the need for FinCEN to proactively help potential database users overcome burdensome "access protocols"

On December 15, 2022, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") proposed the second of three rules to implement the Corporate Transparency Act ("CTA"), a landmark anti-money laundering ("AML") law to collect the beneficial ownership information of covered U.S. companies and similar entities. This proposed rule details the methods by which authorized users (including law enforcement officials, national security officials, and financial institutions with AML obligations) may access the database.

1. **The proposed rule invents significant new barriers to access by state, local, and tribal law enforcement that have no basis in the CTA.**

As we stated in our written comment on the implementation of the CTA, when it comes to investigations into foreign corruption and other crimes, "restricted access to beneficial ownership information or other unnecessary hurdles would mean cases cannot move forward and criminals may escape justice." In order to ensure effective access *in practice*, we stressed, the CTA's implementing rules must reflect the plain language and clear intent of the enacting law. Unfortunately, FinCEN's proposed rule regarding access to the database by state, local, and tribal law enforcement deviates from the clear, precise, legislatively-historied language of the CTA.

The CTA's language itself is relatively straightforward: it permits FinCEN to disclose beneficial ownership information upon receipt of a request from a state, local, or tribal law enforcement agency "if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation."

FinCEN's proposed rule, however, adds two highly consequential requirements to this framework. A requesting agency must also "submit to FinCEN" a "copy of a court order from a court of competent jurisdiction authorizing the agency to seek the information in a criminal or civil investigation" as well as a "written justification that sets forth specific reasons why the requested information is relevant to the criminal or civil investigation."

As we wrote in our comment, the CTA does not permit FinCEN to independently confirm such an authorization, let alone to condition release of the requested information on an actual demonstration or evidencing of such an authorization. In debating the precise language at issue here, Congress considered, and rejected, the requirement that a requesting agency first obtain a court order or subpoena (as well as the requirement that a requesting agency's request be reasonably relevant and material to an investigation, among other formulations). Instead, *authorization* from a *court officer* was deliberately chosen out of a spectrum of available options because of its relatively low barrier to usage and lack of judicial formalism, as well as to allow for a wide range of practical access options that required minimum involvement from the relevant court or tribal equivalent. For example, during negotiations of the CTA, it was expressly discussed and understood that the authorization requirement could be satisfied via a front-window court employee, such as a clerk, "authorizing" an agency's request in person or via email, phone, or online messaging function (among other options).

The proposed rule's requirements that an agency obtain and submit documentation of a court order, as well as submit (i) written (ii) justification that sets forth (iii) specific (iv) reasons why the requested information is relevant to an investigation, are pure legal fictions of FinCEN's creating. They have zero traceable origin to the text of the CTA or its legislative history. At bottom, all that the CTA requires is that a requesting agency aver or certify that an officer of a court of competent jurisdiction (or its tribal equivalent) has authorized the agency to seek the information in a criminal or civil investigation. The inquiry stops there. To require anything more is to construct wholly unsubstantiated legal artifices that will serve as serious practical barriers to the effective use and utility of the database.

2. **The proposed rule's reiteration of the CTA's "access protocols" makes especially clear the need for FinCEN to proactively design and make available standardized, templated forms and other processes that can streamline user access.**

The CTA outlines a number of "access protocols" that are somewhat burdensome and could serve as barriers to those seeking to use the database. State, local, or tribal law enforcement agencies, for example, must satisfy an intimidating list of requirements, including that they establish and maintain a secure system in which beneficial ownership information will be stored; establish and maintain a permanent, auditable system of standardized records for requests that includes—*for each request*—the date of the request,

the name of the requesting individual, the reason for the request, whether any information was disclosed, and information sufficient to "reconstruct the justification for the request"; and that they conduct an annual audit to verify that the information obtained has been accessed and used appropriately and in accordance with the standards and procedures the agency has established; among other requirements.

The proposed rule's restatement of these requirements provides a sobering reminder that FinCEN must do everything it can to standardize and streamline the process of accessing the database for the tens of thousands of agencies that may seek to use it. FinCEN itself acknowledges the need for such work, discussing in its accompanying explanation of the proposed rule, for example, how it is developing draft memoranda of understanding ("MOUs") based on similar agreements it uses to share Bank Secrecy Act ("BSA") data. We encourage FinCEN to think holistically and seriously in anticipating barriers to usage, and to design pre-populated forms, templates, guidance, statements, and other components of a truly user-friendly "access toolkit" that proactively identifies, resolves, and serves as a shortcut for as many potential database users, in as many ways, as possible.

3. **The proposed rule leaves ambiguous a number of key access issues, including whether the database will be able to automatically verify the information provided to it by covered companies.**

The information collected in the database will only be as useful as it is accurate. As we wrote in our comment, FinCEN can and should use existing government information to verify the beneficial ownership information that covered companies report to the database. It can do so, for example, by creating partnerships with the U.S. State Department (to electronically check names and passport numbers), the National Law Enforcement Telecommunications System (to check state drivers' licenses and state identification numbers), and the U.S. Postal Service (to check up-to-date addresses), among other agencies and entities. Such automated, real-time checks, we wrote, "will provide a minimum level of assurance that the beneficial ownership data matches other existing data sources" and will "have the additional and important benefit of making the process easier for businesses to correct inadvertent errors in the data."

Unfortunately, FinCEN is unable to provide any insight into this critical issue; the proposed rule's accompanying explanation instead relates that while a number of comments have "affirmed the importance" of verifying information, "FinCEN continues to review the options available" for doing so "within the legal constraints in the CTA." We encourage FinCEN to overcome beliefs that the CTA itself could serve as a barrier to verification, and to work diligently and quickly with partners in government, private industry, and civil society to ensure the delivery of an integrated database that is highly useful and capable of operating with integrity.

4. **There remain important outstanding questions regarding how certain foreign requesters, and financial institutions, will be able to access information.**

Greater explanation is needed as to why the personnel of certain foreign requesters (a foreign law enforcement agency, judge, or prosecutor, via a request made by a law enforcement, judicial, or prosecutorial authority of a "trusted" foreign country when no relevant international treaty, agreement, or convention is available) would have different access standards than their U.S. counterparts. For such foreign personnel, information can only be accessed by those who have "undergone training on the appropriate handling and safeguarding of information," whereas information can be accessed by U.S. state, local, or tribal agency personnel who have undergone training *or* who obtain the information from someone who has.

Finally, the proposed rule suggests a distinct, "more limited" information-retrieval process for financial institutions such as banks, without providing much practical clarity on how this system will operate. FinCEN states that it is not planning to permit such institutions to run "broad or open-ended queries" in the database, or to receive multiple search results, but rather to send to the database "information specific to [a] reporting company" and then receive an "electronic transcript" with the company's information. More information and explanation are needed on how this approach can maintain pace with the anticipated number of requests and engender industry confidence and reliability.

For questions or comments, please contact:

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