

By electronic submission (via the Federal E-rulemaking Portal)

February 14, 2023

Mr. Himamauli Das
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Beneficial Ownership Information Access and Safeguards and Use of FinCEN Identifiers for Entities, Docket No. FINCEN-2021-0005 and RIN 1506-AB49/AB59

Dear Acting Director Das,

Transparency International (“TI”) and the undersigned TI chapters appreciate the opportunity to provide comments on the Financial Crimes Enforcement Network’s (“FinCEN’s”) Notice of Proposed Rulemaking (“NPRM” or “Proposed Rule”) to further the implementation of the Corporate Transparency Act (“CTA”), the landmark anti-money laundering (“AML”) law to collect the beneficial ownership information (“BOI”) of companies and similar entities formed or registered in the United States, which details the methods by which authorized users may access the BOI database, including, for purposes of this letter, foreign requesters of such BOI.

TI is an independent, non-governmental not-for-profit and global movement leading the global fight against corruption. Through chapters in countries worldwide and an international secretariat in Berlin, TI works to raise awareness of the destructive effects of corruption and engages with partners in government, business, and civil society to develop and implement effective measures to tackle and deter corruption, including working around the world on the creation of robust, accurate, efficient, and easily accessible beneficial ownership databases.¹

Background

The United States has long played a leading role in combating global corruption, including through high-profile prosecutions and other actions that have uncovered corruption in countries all over the world.² Yet in December 2021, Secretary of the U.S. Department of the Treasury Janet Yellen concluded that “there’s a good argument that, right now, the best place to hide and launder ill-gotten gains is actually the United States. And that’s because of the way we allow

¹ For more information, please visit www.transparency.org.

² For example, the U.S. led the exposure of the widespread corruption at the Fédération Internationale De Football Association, and through the Foreign Corrupt Practices Act it has taken the lead in fighting global corruption and revealing massive private and public corruptions and fraud around the world.

people to establish shell companies.”³ Such distinction, combined with the fact that the U.S. is the world’s largest economy, the U.S. dollar the world’s reserve currency, and the U.S. financial system the “backbone of the world economy,”⁴ mean that **a U.S. beneficial ownership database that is highly useful—including to foreign requesters—would not only help repair the U.S.’s role in transnational corruption, but have truly global reach and resonance in the larger fight against it.**

Analysis of Specific Provisions

The CTA, in relevant part, states that FinCEN may disclose BOI upon receipt of a request from a federal agency on behalf of:

[A] law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation),⁵ under an international treaty, agreement, convention, or official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries when no treaty, agreement, or convention is available.⁶

First, we commend FinCEN for following the CTA directive that *any* federal agency—as opposed to FinCEN and FinCEN alone—be permitted to serve as an intermediary for foreign requests.⁷ Permitting foreign agencies to engage with U.S. counterparts with similar responsibilities and expertise will help maximize efficient access to BOI. We also agree with the Proposed Rule’s conclusion that foreign access to BOI should not be limited to law enforcement agencies but also available to foreign national security and intelligence agencies.

Second, we strongly encourage FinCEN to utilize existing government information to verify the accuracy of reported BOI. Real-time, automated verification of BOI will provide a minimum level of assurance that BOI is accurate and reliable, is necessary for the U.S. to be compliant with the relevant Financial Action Task Force (“FATF”) recommendations—which the U.S. was instrumental in FATF adopting—and would reflect the legal requirements and positive practices in other countries with nationwide databases.

For example, the European Union’s (“EU’s”) corollary AML directive includes the requirement that member states ensure that their ultimate beneficial ownership verification mechanisms are accurate and reliable, and, to that end, member states are expected to have verification

³ See Secretary of the U.S. Department of the Treasury Janet Yellen, “Remarks by Secretary of the Treasury Janet L. Yellen at the Summit for Democracy,” Dec. 9, 2021, available at <https://home.treasury.gov/news/press-releases/jy0524>. Acknowledging the raw power, scale, and consequence of corruption, the Biden Administration has designated the fight against foreign corruption as a core U.S. national security interest. See The White House, “Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest,” June 3, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

⁴ *Id.*

⁵ Note that this includes a foreign financial intelligence unit. See Fed. Reg. Vol. 87, No. 241 at 77406 (“Given its longstanding relationships and relevant experience as the financial intelligence unit of the United States, FinCEN proposes to directly receive, evaluate, and respond to requests for BOI from foreign financial intelligence units.”).

⁶ 31 U.S.C. § 5336(c)(B)(i)(ii).

⁷ See proposed 31 CFR § 1010.955 (b)(3).

mechanisms in place. In 2022, TI conducted a survey on verification across the EU, reviewing the legal frameworks of 24 of 27 member states, and sharing a questionnaire with beneficial ownership database authorities in order to confirm the mechanisms they have in place. Of the 18 member states that responded, 16 (of the 24 that TI had assessed) included verification requirements in their respective legislation, and 18 out of the 24 required beneficial ownership ID or passport checks by law. Furthermore, 11 member states undertook additional verification on a risk-based approach, and 24 had reporting mechanisms that required obliged entities to report to the database any discrepancies in the information. Such requirements and practices drive home how verification is not only a best practice among other comparable national databases, but an absolute necessity for ensuring the integrity of BOI. One need only look to the experience of the United Kingdom (“UK”), where a database without verification mechanisms led to high-profile reports of clearly bogus entries,⁸ to see the consequences of unverified BOI. The UK is now moving to verify reported information, and the U.S. must learn from their experience by doing the same.

Third, FinCEN must remove its separate, more-demanding training requirement for foreign requestors. For personnel of certain foreign requestors (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),⁹ BOI can only be accessed by those who have “undergone training on the appropriate handling and safeguarding of information.”¹⁰ This requirement clashes with the corollary requirement for personnel of U.S. state, local, or tribal law enforcement agencies, who can access BOI if they have either undergone training *or obtained the information from someone who has*. This discrepancy has no basis in the text of the CTA and will result in significant, practical barriers for foreign requestors. It must be removed.

Fourth, the final rule should provide clear criteria for determining which countries are “trusted” foreign countries. FinCEN has proposed that such a determination be conducted on a “case-by-case basis.”¹¹ Yet leaving such a consequential determination to the discretion of FinCEN could lead to disparate agency actions and does not provide the public with sufficient notice and guidance. Instead, clear criteria, such as a country’s membership in any international body friendly to the foreign policies of the United States, such as the North Atlantic Treaty Organization, the European Union, or the Group of Seven, should be used.

Fifth, inherent legal and cultural differences among the United States and foreign requestors means that the access process will be more complex and challenging for foreign requestors. To help offset these realities, we encourage FinCEN to provide awareness-raising and educational materials regarding the availability and useability of the database, and to design a user-friendly “foreign access toolkit”, available in as many languages as feasible, that includes guidance, examples, templates, forms, and other materials to streamline access as much as possible.

⁸ See Global Witness, “The Companies We Keep,” July 2018, available at file:///Users/ti-us/Desktop/Briefing_The_Companies_We_Keep.pdf (revealing that thousands of companies are filing suspicious entries or not complying with the rules).

⁹ Presumably, however, corruption investigations will be able to rely on the United Nations Convention Against Corruption or the United Nations Treaty Against Organized Crime.

¹⁰ See proposed 31 CFR § 1010.955 (d)(3)(i)(D)(3).

¹¹ See Fed. Reg. Vol. 87, No. 241 at 77415.

The new U.S. database can make the United States a global linchpin in the fight against transnational corruption and provide allies of integrity across the globe with a powerful new tool for uncovering, deterring, and holding accountable those who plunder their citizens' resources for personal gain. But only if the final rule provides broad, practical, and effective access for foreign requestors.

Thank you for the opportunity to present these comments. If you have any questions, or for additional information on TI's work in this regard, please contact Maira Martini, Research and Policy Expert on Corrupt Money Flows for TI, at mmartini@transparency.org.

Respectfully submitted,

Civil Society Legislative Advocacy Center (CISLAC)

Integrity Fiji

Transparency Institute Guyana Inc. (TIGI)

Transparency International

Transparency International Armenia

Transparency International Australia

Transparency International Brazil

Transparency International Canada

Transparency International Colombia

Transparency International Czech Republic

Transparency International Denmark

Transparency International El Salvador

Transparency International Estonia

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