



NATIONAL DISTRICT ATTORNEYS ASSOCIATION

February 7th, 2022

Financial Crimes Enforcement Network
U.S. Department of Treasury
P.O. Box 39

Submitted via <http://www.regulations.gov>
Docket Number: FINCEN-2021-0005

RE: NPRM Beneficial Ownership Reporting Requirements

I am reaching out on behalf of the National District Attorneys Association (NDAA), the oldest and largest national organization representing state and local prosecutors in the country. NDAA is a national, non-partisan, non-profit membership association providing training, technical assistance and services to prosecutors across the country. With more than 5,000 members nationwide, NDAA is recognized as the leading source of national expertise on the prosecution function and is a valuable resource for the media, academia, government, and community leaders. Today, I write in response to the Notice of Proposed Rulemaking (NPRM), “Beneficial Ownership Information Reporting Requirements,” as the Department of Treasury’s Financial Crimes Enforcement Network (FinCEN) begins to implement the Corporate Transparency Act by accepting comments through February 7th, 2022.

Prosecutors have long recognized the need for the collection of beneficial ownership information to hold organized transnational criminal operations, terrorism financing, and other unlawful activity accountable.¹ As end users of evidence collected throughout the investigative process, it is imperative that prosecutors have as much information as possible in order to determine the best course of action for prosecuting an individual or entity that has committed a crime. Beneficial ownership data collection is vital to this effort, and law enforcement and prosecutors must have lawful access to that information. Therefore, our membership has a unique interest in the implementation of the Corporate Transparency Act as law enforcement and prosecutors throughout the country advocated for new tools to end the use of anonymous companies to circumvent the criminal code and civil penalties.

NDAA applauds our partners at FinCEN, as the rulemaking thus far hews closely to the statute and congressional intent. Law enforcement and prosecutors must have lawful access to beneficial ownership data. One of the most vital pieces of FinCEN’s implementation of the Corporate Transparency Act is the effort to include State, local, and tribal partners in the development and implementation of the new beneficial ownership database, which will collect basic identifying information for the owners of reporting companies to provide our members with a point of contact for a corporation that was previously anonymous. Fostering new relationships with these units of government and law enforcement, while strengthening existing bonds, will play a significant role in the success of the new tool.

The Nation’s prosecutors are committed to assisting FinCEN in its work to implement the Corporate Transparency Act. Our members offer specific answers to the questions posed by the agency as it works to follow Congress’s

¹Duffie Stone, *NDAA Letter to Congress on Corporate Transparency Act* (Jul. 20, 2020), https://ndaa.org/wp-content/uploads/NDAA-CTA_7.20.pdf; See also Michael Freeman, *NDAA Letter to Congress on Beneficial Ownership* (Jun. 5, 2018), <https://ndaa.org/wp-content/uploads/NDAA-Letter-on-Beneficial-Ownership-Info-Combating-Terrorism-and-Illicit-Finance-Act-May-2018.pdf>.

intent in enacting the new beneficial ownership database. In the following answers, NDAA focuses specifically on the topics and questions that are relevant to our membership and the role prosecutors will play within the new structure of the FinCEN beneficial ownership reporting requirements.

NDAA Support for NPRM's Adoptions of Legislative Intent

Our membership has identified key areas where FinCEN has successfully adhered to the Congressional mandates of the Corporate Transparency Act, while ensuring the application of the new beneficial ownership database will provide law enforcement with highly useful information on potential criminal actors in the United States financial system. NDAA points to the broad nature of the legislation to capture anonymous entities and ensure they are providing accurate information that could assist law enforcement in an ongoing criminal or civil investigation.

Specifically, our organization supports FinCEN's written proposal's definition of "beneficial owner" and treatment of "reporting companies." For instance, the FinCEN rule communicates the expectation that every company must report at least one beneficial owner, leaving the door open to name more. Further, FinCEN define "substantial control" of a beneficial owner broadly, accounting for the multiple ways in which an individual could direct or otherwise influence an entity. We appreciate the faithful interpretation of the definition of "reporting company" based on the process by which an entity forms or registers to do business in the United States. Doing so means that requirements will cover multiple types of entities that could be abused for financial secrecy purposes. Under the same standard, the rule's flexibility when it comes to updates is also commendable. Reporting companies can file a new report to correct any of the changed or mistaken information within the time required under the law. Any reporting company that does not provide a full updated filing should be considered no longer in compliance and therefore in violation of Federal law. For the information reported to FinCEN to be valuable to law enforcement in the context of ongoing investigations, covered entities should complete full new filings each time information has been changed under the conditions highlighted in the law. FinCEN should clarify that this includes changes in indirect beneficial ownership stakes for entities owned through intermediary entities. This also allows for the most updated and accurate information to be accessible to law enforcement and prosecutors.

The draft rule's consistency with legislative intent is further realized in its data reporting requirements. Most notably, the requirement that entities provide scanned, digitized documents that include an image verifying the identity of their beneficial owner(s) is in line with our hope that the information provided through the database will be useful for ongoing investigations. We support recommendations that this scanned document include a photo ID for further use in verifying information about the beneficial owner. In compliance with the legislative purpose, FinCEN should ensure that reporting companies are providing accurate, complete, and highly useful information for the Beneficial Ownership Database. This verification process allows companies to avoid abuse of the BO database while providing useful information for law enforcement's ongoing investigations.

Furthermore, FinCEN should take appropriate steps in the draft rule to clarify what information is required of the reporting entity itself, and should require each reporting entity to provide a legal entity identifier (LEI). By requiring information, FinCEN would be able to break down the barriers that currently prevent law enforcement from moving forward with ongoing investigations and partnering with law enforcement in other jurisdictions.

The safeguards ensuring the database provides timely and accurate information is further supported by FinCEN's rule to require the residential address of beneficial owners that is used for tax purposes. By requiring the residential address of the beneficial owner, FinCEN is taking an additional step to authenticate the reporting party and to give law enforcement a real street address with which to pursue investigations and other activities. This process helps FinCEN to ensure that the information is coming from a reputable and verified source, which allows for this legislation to serve its intended purpose of providing accurate information for law enforcement and financial institutions.

Finally, NDAA is strongly aligned with FinCEN's requirements that legal entities provide a street address for their business. This domestic address will provide important information to law enforcement in the rare instance where they are unable to reach a point of contact, and we highly encourage the rule to contemplate such an address being the company's principal place of business. Overall, we are confident the rule takes important steps to provide law enforcement with lawful access to relevant information that will assist as a building block in a criminal or civil investigation to root out crime in our country.

Our membership, in its review of the rule, has some additional suggestions to strengthen FinCEN's adoption of the legislation, on top of the great strides the agency has made in its initial draft.

Recommended Additions & Changes to Strengthen FinCEN Rulemaking

NDAA is confident the proposed rule is a step in the right direction as the Department of the Treasury continues to enact the Corporate Transparency Act. However, our membership, in its review, identified key areas of improvement that would ensure law enforcement and prosecutors are able to effectively use the beneficial ownership database. These changes will limit the exempted entities from the database, improve data collection and sharing, ease burdens on the law enforcement community, and improve identifiers used by FinCEN in the establishment of the database.

Exemptions

Prosecutors expect criminal actors to adapt to this new database in an attempt to circumvent the transparency measures outlined in FinCEN's rule and the application of the Corporate Transparency Act. To prevent this potential abuse, the agency should follow the legislative exemptions as written and limit exceptions to those companies to narrow circumstances as outlined in the legislation. Congress chose a broad spectrum of corporations and entities that would be covered by this new rule to ensure law enforcement can access legitimate records of currently anonymous organizations. To preserve the legislative intent of the bill, the agency should limit exceptions to those corporations that fit all of the factors outlined in the legislation.

Our members identified a key area of concern in the proposed rule that requires FinCEN's attention. Presently, investigations that deal with company ownership can become complicated for law enforcement and prosecutors when the owner of one company is another company or entity. This web of corporate ownership creates a veil that law enforcement is currently unable to pierce, and this legislation is intended to break down barriers to identify actual owners of a covered entity to create transparency in investigation. To combat such an issue, our members suggest addressing and closing the inadvertent loophole on the "Subsidiary Exemption" which allows entities that are "owned" or "wholly controlled" by a parent entity to be exempt from reporting. We recommend that this should instead be read as "wholly owned" or "wholly controlled." Making this addition prevents the creation of a major loophole within subsidiary ownership and ensures that law enforcement and prosecutors are provided with the appropriate information to continue lawful investigations into criminal activity or civil violations.

Data Collection

In the data collection process, FinCEN should take measure that reporting entities are meeting the full spectrum of requirements which will ensure the information provided to law enforcement is useful in the course of an ongoing investigation. For example, the agency should ensure reporting companies report their full legal name in addition to any names under which they do business, as provided on any identification documents, and provide accurate information required by the legislative text to not only assist law enforcement in contacting and reviewing details on a potential target of a criminal or civil investigation, but to also minimize confusion about entities that may share similar names.

Further, FinCEN should incorporate software into the database that standardizes addresses within the system to

ensure data quality. Such incorporation facilitates and simplifies law enforcements access to necessary information needed to continue an investigation.

To continue the theme of assisting law enforcement in accessing useful information, FinCEN should also require reporting companies to input the jurisdiction of formation. This creates clarity about the entity while opening opportunities for resource collaboration with law enforcement in that jurisdiction. Federal courts often lack the awareness of ongoing State and local investigations and may not have sufficient information to make a fully informed decision on whether to authorize the agency to move forward with accessing the beneficial ownership database.

Additionally, as our first comment on the ANPRM for Beneficial Ownership Information noted, FinCEN should require an applicant to report, in addition to the standard data on the beneficial owner, the reason they are being reported to clarify that person's relationship with the organization to ensure that law enforcement has accurate information on the applicant. FinCEN should verify this information to ensure it includes accurate addresses and identifying information upon receipt from a covered entity. This information should include any additional details that a reporting company is willing to provide that would assist law enforcement in contacting and reviewing details on a potential target of a criminal or civil investigation.

To be specific, NDAA suggests FinCEN take steps to ensure beneficial owners are not hiding their identities from law enforcement accessing the database. These include deleting inappropriate passages in the preamble allowing FinCEN identifiers to be used by beneficial owners to hide their identities from reporting companies; providing all registry users access to identifying information about the person assigned to each FinCEN identifier; and clarifying that entities applying for a FinCEN identifier must disclose all of their direct and indirect beneficial owners in the application submitted to FinCEN. By mandating these small changes, the agency will ensure that the information accessible by law enforcement remains valuable to ongoing investigations into illegal activity.

Law Enforcement Access

NDAA encourages FinCEN to take into consideration the needs of law enforcement in this draft rule and future rulemakings. As such, we recommend the following as FinCEN considers next steps for the implementation process for the Corporate Transparency Act.

FinCEN in its next rulemaking should made clear that access will be uncomplicated for law enforcement and other authorized users, including financial institutions, in order for the information collected to be useful in protecting our Nation's financial system. To ensure this goal is met, certifications should be filed electronically, and filing should be consistent with the beneficial ownership filings set up within the new FinCEN database. Information should be set up directly within the new FinCEN database with a mechanism for appropriate and timely e-filing to ensure contact information is widely available to the agency and any appropriate parties. The certifications should be established and reported in the same manner as the beneficial ownership information and accessed by database users in the exact manner as the beneficial ownership information.

NDAA stated in its first comment that there is a need for real-time verification software to ensure data is accurate, complete, and highly useful. Information should include a known point of contact with a legitimate means of contact including email, phone number(s), address(es), and any other details the certifying entity can provide to allow authorities to directly contact the organization to update a false or mistaken piece of information. The agency can accomplish this by ensuring reporting companies submit copies of an acceptable identification document to assist FinCEN in certifying that all beneficial owners are reporting accurate information. This requirement ensures that when law enforcement requests information, FinCEN is able to confirm that the database includes accurate and legitimate contact information for each and every beneficial owner. FinCEN should also take steps to require companies to certify the accuracy of the information as this will assist reporting entities in ensuring there are no mistakes in the report and provide additional notice that inaccurate information may not fall under the safe harbor. This verification should be done, for example, by pinging passport numbers in the


Consolidated Consular Database or checking driver licenses through the appropriate Department of Motor Vehicles database. As previously noted, requiring copies of any required documents and requiring a reporting entity to certify the information entered into the system would assist in ensuring the information is accurate and complete. FinCEN should also provide reminders through the system that misreporting of the information is a criminal violation punishable under Federal law.

Enactment

Our members are thrilled FinCEN has put together a strong rule to combat illicit financing of criminal activities throughout the United States. For years, State and local law enforcement have found that these investigations into financial crimes involve complex webs of criminal behavior that involve actors that may expand beyond our borders.² NDAA greatly appreciates your willingness to consider our input and ideas as the agency moves forward with the rulemaking process.

Congress intended for the legislation to provide law enforcement access to beneficial ownership during “ongoing” investigations, intentionally leaving the language broad to allow officers and prosecutors to access the database throughout the course of a criminal or civil investigation.³ Therefore, FinCEN should provide law enforcement, when requested through the appropriate protocols, access to the beneficial ownership database during all stages of the criminal or civil investigatory process. Prosecutors continue to work alongside our Federal, State, local, and tribal partners to root out criminal misuse of our country’s banking systems and our members are confident that the successful implementation of the Corporate Transparency Act will further this shared goal.⁴ We appreciate your commitment to enacting this historic legislation and look forward to working alongside your agency to preserve the integrity of the Nation’s financial system while upholding the rule of law.

Sincerely,



Billy West
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² See Max de Haldevang, *Why Iran got away with using a \$500 mln New York skyscraper as a secret slush fund for 22 years*, Quartz (Jun. 30, 2017), <https://qz.com/1019253/iran-used-shell-companies-to-hide-its-sanctions-busting-ownership-of-new-york-skyscraper-650-fifth-avenue/>.

³ See Cy Vance & Carolyn B. Maloney, *Opinion: True corporate transparency now: A new legislative tool will help fight fraud and terrorism*, New York Daily News (Jan. 27, 2021), <https://maloney.house.gov/media-center/in-the-news/opinion-true-corporate-transparency-now-a-new-legislative-tool-will-help>. See also Carolyn B. Maloney, *Maloney and Vance call on Congress to stop anonymous terrorist and criminal shell corporation money laundering in New York City*, (Mar. 7, 2016), <https://maloney.house.gov/media-center/press-releases/maloney-and-vance-call-on-congress-to-stop-anonymous-terrorist-and-0>.

⁴ See *Prosecutor Pushes on Beneficial Ownership In Fight Against Financing of Terrorists*, Bloomberg (Jun. 25, 2015), <https://news.bloomberglaw.com/banking-law/prosecutor-pushes-on-beneficial-ownership-in-fight-against-financing-of-terrorists>.