

United States Senate

WASHINGTON, DC 20510-3905

February 7, 2022

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

RE: Docket Number FINCEN-2021-0005 and RIN 1506-AB49

Dear Director Das,

We write in response to the Financial Crimes Enforcement Network's (FinCEN) notice of proposed rulemaking regarding "Beneficial Ownership Information Reporting Requirements." This rulemaking is an important piece of the implementation of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021. On the whole, the proposal goes a long way toward implementing the CTA reporting requirements in line with congressional intent, but we propose a few areas where the rule should be strengthened.

As we noted in our May 2021 comments on your advanced notice of proposed rulemaking,¹ the CTA is the product of a sensitive and painstaking legislative process, and its passage represents perhaps the most important anti-money laundering reform in two decades. Despite the legislative success, this achievement can only be realized if the system works in practice. As such, we commend FinCEN's effort to produce a workable and comprehensive reporting proposal in a short time period, and we appreciate the work you have taken to "minimize loopholes that could dilute the quality of the information collected or allow bad actors to evade reporting."²

We specifically applaud the proposal's comprehensive and clear definitions for beneficial owner and applicant. FinCEN properly interpreted that *each* individual who exerts substantial control, whether directly or indirectly, over an entity should be identified in reports to FinCEN. The proposed list of the types of individuals who may meet such standard provides clarity to reporting companies regarding how to report while minimizing the risk that bad actors could evade disclosure. Additionally, the proposed timelines for reporting and updating beneficial ownership information strike a good balance between ensuring that law enforcement and national security officials have access to timely information without unduly burdening reporting companies with unreasonable expectations.

¹ Sheldon Whitehouse et al., "Letter to the Financial Crimes Enforcement Network," sent May 5, 2021, <https://www.whitehouse.senate.gov/imo/media/doc/Senators%20CTA%20Comment%20Letter%2005.04.2021.pdf>.

² Sheldon Whitehouse et al., "Letter to the Financial Crimes Enforcement Network."

We also appreciate the broad definition of “other similar entities” that are required to report beneficial ownership information. Reports, such as the October 2021 release of the Pandora Papers, continue to demonstrate the widespread abuse of anonymous entities formed in the United States.³ While we understand further legislative action may be necessary to fully capture each type of entity at risk of abuse, we encourage FinCEN to do everything within its statutory power to ensure that complete beneficial ownership information is collected for each entity formed or operating in the United States.

While we are pleased that FinCEN generally interpreted which companies are exempt from reporting consistent with the plain text of the law, there is one notable exception. FinCEN appropriately clarifies that only “wholly owned” subsidiaries of certain exempt entities receive exemption under 31 U.S.C. 5336(a)(11)(B)(xxii).⁴ We are concerned, however, that the rule could be interpreted to open an unintended loophole by merely exempting *partially* “controlled” entities. The current interpretation risks exempting any entity whose ownership interests are even partially owned by a criminal, kleptocrat, or terrorist, so long as some of such entity’s voting rights are controlled by certain other exempt entities. As such, we encourage you to amend the proposed 31 CFR 1010.380(c)(2)(xxii) to clarify that this exemption applies only to entities that are “*wholly* controlled or wholly owned” by certain exempt entities. This revision is consistent with the plain language of the statute, which reads “any corporation, limited liability company, or other similar entity of which the ownership interests are owned or controlled...”⁵. As the proposed rule acknowledges, “the definite article ‘the’ in the quoted statutory text as requiring an entity to be owned entirely by one or more specified exempt entities in order to qualify for it.”⁶ The same definite article “the” which applies to “owned” in 31 U.S.C. 5336(a)(11)(B)(xxii) clearly also applies to “controlled.”

We strongly support FinCEN’s decision to exclude any additional exemptions from the proposal. In crafting the CTA, Congress negotiated many complex policy issues, and each exemption was thoroughly considered and carefully negotiated. We and other drafters of this law sought to strike the proper balance between collecting accurate and useful information and not overburdening businesses with compliance obligations. We are skeptical that additional exemptions are justified and would oppose their inclusion before a data-driven, careful review of their potential risks to national security and the financial system.

Moving forward, we also encourage FinCEN to regularly review the data on the system—and the statutorily-mandated audits of the data—to ensure bad actors have not discovered loopholes in the regulations that could be exploited.

Finally, we know that FinCEN’s work to implement these needed reforms is ongoing. As you turn your attention to proposing a rule around access to the beneficial ownership directory, we remind you that the directory “is only useful if authorized users are able to efficiently access the

³ “The Pandora Papers,” International Consortium of Investigative Journalists, accessed February 7, 2022, <https://www.icij.org/investigations/pandora-papers/>.

⁴ Proposed 31 Code of Federal Regulations § 1010.380(c)(2)(xxii).

⁵ 31 U.S. Code § 5336(a)(11)(B)(xxii).

⁶ “Beneficial Ownership Information Reporting Requirements,” A Proposed Rule by the Financial Crimes Enforcement Network, published December 8, 2021, <https://www.federalregister.gov/d/2021-26548/p-268>.

data.”⁷ Therefore, FinCEN should ensure that authorized users, including law enforcement and national security officials, financial institutions with customer consent, banking supervisors, foreign allies, and the Government Accountability Office, all have early, timely, and full access to beneficial ownership information. The access procedures should build on existing protocols and those provided for in the legislation, and should avoid creating redundant hurdles that would unnecessarily delay access.

Moreover, as you begin working on revisions to the customer due diligence requirements for financial institutions (the “CDD Rule”),⁸ we encourage you to ensure that any new CDD rule (1) adopts the definition of beneficial owner included in the CTA, and (2) requires financial institutions to verify the beneficial ownership information of each legal entity customer, regardless of whether such entity is covered by the CTA’s definition of reporting company.

Again, we commend FinCEN’s work to produce a solid framework. Pending consideration of our feedback, we look forward to the swift implementation of the beneficial ownership reporting system.

Sincerely,



SHELDON WHITEHOUSE
United States Senator



RON WYDEN
United States Senator

CC: The Honorable Janet Yellen, U.S. Secretary of the Treasury

⁷ Sheldon Whitehouse et al., “Letter to the Financial Crimes Enforcement Network.”

⁸ 31 C.F.R. § 1010.230.