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May 5, 2021

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
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Filed Using Federal E-Rulemaking Portal

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

To Whom It May Concern:

We, as state attorneys general write to provide comments about the Beneficial Ownership Information Reporting Requirements, Docket Number FINCEN-2021-0005 and RIN 1506-AB49. Specifically, we address questions 32, 33, 36, and 46 in the Advance Notice of Proposed Rulemaking, and raise one other issue.

Our comments are consistent with the sense of Congress, which requires that regulations “to the greatest extent practicable... collect information in a form and manner that is reasonably designed to generate a database that is highly useful to... law enforcement agencies...” NDAA § 6402(8)(C).

I. Background

a. Corporate Transparency Act

The Corporate Transparency Act (CTA) was passed on January 1, 2021, as part of the National Defense Authorization Act (NDAA). The CTA requires certain entities to disclose their true, or “beneficial,” owners,¹ including the owners’ full legal name, date of

¹ In the CTA, a beneficial owner is any individual who, directly or indirectly, (i) exercises substantial control over the entity or (ii) owns or controls not less

birth, current residential or business street address, and a unique identifying number from an acceptable identification document (such as a driver's license or a passport). NDAA § 6403(2)(A).

FinCEN may then disclose that beneficial ownership information “only upon receipt of a request, through appropriate protocols, . . . from a State,² 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.” NDAA § 6403(c)(2)(B)(i)(II). Federal enforcers, however, are not required to obtain the imprimatur of a court to obtain access to this information. NDAA § 6403(c)(2)(B)(i)(I).

The CTA is a successor to S. 2563, the Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings (ILLICIT CASH) Act, which was the subject of a June 30, 2020, National Association of Attorneys General letter signed by 42 attorneys general.³ The ILLICIT CASH Act, however, placed federal and state enforcers on equal footing to obtain beneficial ownership information.

II. Comments

- **(32) When a state, local, or tribal law enforcement agency requests beneficial ownership information pursuant to an authorization from a court of competent jurisdiction to seek the information in a criminal or civil investigation, how, if at all, should FinCEN authenticate or confirm such authorization?**

FinCEN should develop a portal through which the database can be directly accessed by State, local, or Tribal law enforcement agency (collectively, State Enforcers) who receive the required training. NDAA § 6403(c)(3)(G)(iii). This portal should allow those State Enforcers to immediately obtain responsive documents after affirming under penalty of perjury that “an officer. . . of a court of competent jurisdiction” has authorized them to “seek the information in a criminal or civil investigation.” NDAA § 6403(c)(2)(B)(i)(II). For the reasons set forth below, requiring

than 25 percent of the ownership interests of the entity. NDAA § 6403(a)(3)(A).

² “State” includes the U.S. territories and the District of Columbia. NDAA § 6403(a)(12).

³ Letter from the National Association of Attorneys General to Sens. Michael Crapo & Sherrod Brown (June 30, 2020), <https://www.naag.org/policy-letter/attorneys-general-urge-senate-to-pass-law-to-fight-shell-companies/>. Signatories were from the following state attorney general's offices: AK, AL, AR, CA, CO, CT, DC, DE, GA, HI, IA, ID, IL, IN, KS, KY, MA, MD, ME, MI, MN, MP, MS, NC, ND, NE, NJ, NM, NY, OH, OK, OR, PA, PR, RI, SC, SD, UT, VA, WA, WI, and WV.

State Enforcers to serve FinCEN with a copy of a court order and then have FinCEN manually provide the requested records is unnecessary and inefficient, and would ignore Congress's requirement that the regulations "generate a database that is highly useful to . . . law enforcement agencies . . ." NDAA § 6402(8)(C).

First, the presumption should be that State Enforcers will access and use beneficial ownership data responsibly. For years, State Enforcers have been accessing Suspicious Activity Reports (SARs), which do not require court approval to obtain and are maintained by FinCEN. Misuse of SARs can lead to criminal prosecutions; two recent cases involve unlawful disclosure of SARs by a FinCEN employee and an IRS employee.⁴ Other federal prosecutions for unlawful disclosure have been of an FBI agent and a banker.⁵ We understand there have been *no* prosecutions of state enforcers for unauthorized disclosure of SARs. That State Enforcers are responsibly accessing and using existing FinCEN data should lay to rest any fears about misuse of beneficial ownership data that might warrant requiring FinCEN to be served with a copy of the actual court order.

Second, time is of the essence in many investigations. We understand that FinCEN has no mechanism to accept court process, as State Enforcers have—like federal enforcers—been permitted to directly access to FinCEN data like SARs. Requiring the construction of a new process within FinCEN to accept a court order and then provide the relevant data is inefficient and would likely be used only for State Enforcers—as federal agencies, international enforcers, financial institutions, and federal regulators are not required to obtain court authorization before seeking access to beneficial ownership data. NDAA § 6403(c)(2)(B)(i)(I), (ii), (iii), (iv).

Third, State Enforcers will have every incentive to comply with the law. The penalties for unauthorized disclosure or use are substantial: up to five years in prison and a \$250,000 fine. NDAA § 6403(h)(3)(B)(ii)(I). Lying about a court order to access

⁴ Press Release, U.S. Dep't of Just., U.S. Att'y's Off., S.D.N.Y., Former Senior Fincen Employee Pleads Guilty to Conspiring to Unlawfully Disclose Suspicious Activity Reports (Jan. 13, 2020), <https://www.justice.gov/usao-sdny/pr/former-senior-fincen-employee-pleads-guilty-conspiring-unlawfully-disclose-suspicious>; Press Release, U.S. Dep't of Just., U.S. Att'y's Off., N.D. Ca., IRS Employee Charged with Unlawful Disclosure of Suspicious Activity Reports (Feb. 21, 2019), <https://www.justice.gov/usao-ndca/pr/irs-employee-charged-unlawful-disclosure-suspicious-activity-reports>.

⁵ Press Release, U.S. Dep't of Just., Former FBI Special Agent Sentenced to Five Years in Bribery Scheme (Sept. 14, 2015), <https://www.justice.gov/opa/pr/former-fbi-special-agent-sentenced-five-years-bribery-scheme>; Press Release, U.S. Dep't of Just., U.S. Att'y's Off., C.D. Ca., Former Chase Bank Official Convicted of Taking Bribes and Disclosing Existence of a Suspicious Activity Report (Jan. 11, 2011), <https://archives.fbi.gov/archives/losangeles/press-releases/2011/la011111.htm>.

information in the beneficial ownership database would also likely violate other existing federal statutes that carry significant penalties.⁶

Moreover, the CTA contemplates regular audits—by State Enforcers of the beneficial ownership information their agencies receive, NDAA § 6403(c)(3)(I), and by the Secretary of the Treasury of State Enforcers’ adherence to their own protocols, NDAA § 6403(c)(3)(I). See also NDAA § 6402(7)(B) (“[T]he Secretary of the Treasury shall . . . take all steps, including regular auditing, to ensure that government authorities accessing beneficial ownership information do so only for authorized purposes consistent with this title”). Thus, any unauthorized access or disclosures would likely be discovered.

Finally, FinCEN will also presumably track the identities of those who access these records. FinCEN’s maintenance of that data—coupled with substantial criminal penalties and regular audits—provide more than sufficient deterrence against misuse of the data by State Enforcers. This is particularly true given that Congress is not requiring any other entity who is eligible to obtain access to beneficial ownership data to obtain court authorization.

- **(33) Should FinCEN provide a definition or criteria for determining whether a court has “competent jurisdiction” or has “authorized” such an order? If so, what definition or criteria would be appropriate?**

FinCEN should consider providing a definition or criteria for these terms, but only after discussion with State Enforcers and with state courts to ensure that the definition or criteria is sufficiently elastic to encompass the processes used by courts in every state and territory.

Notably, the statute also provides that “any officer” of a “court of competent jurisdiction” may authorize such an order. This language is clearly intended to include both judges and other courthouse staff and should also be the subject of additional discussion between FinCEN and state authorities.

- **(36) How should FinCEN handle updated reporting for changes in beneficial ownership when beneficial ownership information has**

⁶ See, e.g., 18 U.S.C. § 1030(a)(1), (c)(1)(A) (providing for penalties including 10 years in prison for “exceeding authorized access” to “information that has been determined by the United States Government . . . to require protection against unauthorized disclosure. . .”); 18 U.S.C. § 1621 (providing for up to five years in prison for intentionally lying in a “statement under penalty of perjury” under 28 U.S.C. § 1746).

been previously requested by financial institutions, federal functional regulators, law enforcement, or other appropriate regulatory agencies?

- **a. If a requestor has previously requested and received beneficial ownership information concerning a particular legal entity, should the requester automatically receive notification from FinCEN that an update to the beneficial ownership information was subsequently submitted by the legal entity customer?**
- **b. If so, how should this notification be provided?**
- **c. Should a requesting entity have to opt in to receive such notification of updated reporting?**

State Enforcers that have obtained beneficial ownership information should be automatically updated if there is a change in beneficial ownership, as it could have material bearing on their investigations and enforcement actions. This should include both if a reporting company, NDAA § 6403(a)(11), obtains a new beneficial owner, and if a beneficial owner whose information has been provided to a State Enforcer is associated with a new reporting company.

We understand that the Secretary of the Treasury is required to “conduct a review” of the amount of time reporting companies should have to report changes in beneficial ownership, NDAA § 6403(b)(1)(E)(ii), which is currently one year, NDAA § 6403(b)(1)(D). That review is to weigh the “benefit to law enforcement and national security officials” against the burden to the reporting companies of a shorter time period. NDAA § 6403(b)(1)(E)(ii). We welcome the opportunity for ongoing dialogue about how to weigh the needs of law enforcement to obtain current beneficial ownership information against the burden imposed on reporting companies.

- **(46) How can FinCEN best partner with state, local, and tribal governmental agencies to achieve the purposes of the CTA?**

FinCEN should be in frequent contact with organizations, like the National Association of Attorneys General, that can help facilitate the ongoing conversations to help ensure FinCEN creates regulations consistent with Congress’s goal of creating a beneficial ownership database that is “highly useful” to State Enforcers and other law enforcement entities.

- **One additional issue: Use at trial and compliance with *Brady/ Giglio* and discovery obligations.**

The nondisclosure requirements do not appear to allow beneficial ownership information to be used at trial or provided to a defendant during discovery. Information that cannot be used at trial or which a prosecutor cannot provide to the defendant—particularly if it is exculpatory/ impeaching—is rarely “highly useful” to law enforcement. This is particularly true if that information cannot be used as a lead to obtain the same evidence from a third party through channels that ensure it is admissible at trial and can be provided to the defense.

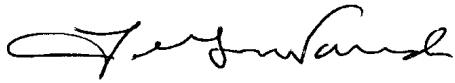
While similar restrictions on SARs do not prevent the underlying information from being used at trial or provided in discovery,⁷ it is unclear how enforcers will be able to use the database information to charge and prove crimes, or discharge their discovery and disclosure obligations, as the beneficial ownership information is provided directly to FinCEN and exists only in the beneficial ownership database. Unlike with SARs, as explained in the footnote below, there appears to be no other source other than the reporting company itself from which the information required by the CTA can be requested. While some secretaries of state may require at least some of that information, Congress found that “most or all States do not require information about the beneficial owners . . . formed under the laws of the State.” NDAA § 6402(1). Accordingly, FinCEN should explore developing regulations that provide guidance about how beneficial ownership information may be used to charge and prove criminal and civil cases, as well as provided to defendants, perhaps pursuant to a protective order.

* * * * *

Finally, we note that the Secretary of the Treasury is required to, to the greatest extent practicable, “establish partnerships with State, local, and Tribal governmental agencies.” NDAA § 6403(b)(1)(F). We welcome ongoing conversation with the Secretary and FinCEN about the CTA and the regulations that will be codified to ensure that the database is “highly useful” to our offices and those of other state, local, and tribal enforcers.

⁷ SARs typically contain information about certain bank records and may include descriptions of bank staff observations. Prosecutors can use the information in the SARs to subpoena the bank records at issue and seek to separately interview the relevant bank staff, and then disclose to the defendant the bank records they subpoenaed and information from their interviews of bank staff. That ensures the information can be used at trial and that prosecutors discharge their discovery and disclosure obligations without sharing the SARs themselves.

Sincerely,



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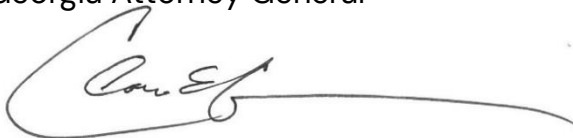
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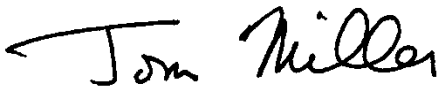
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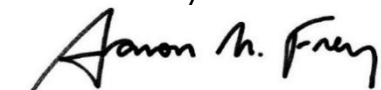
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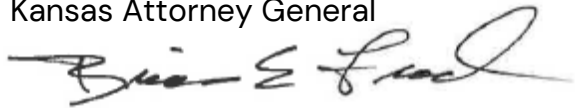
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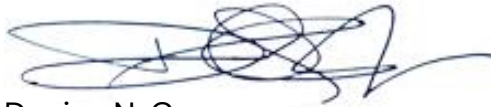
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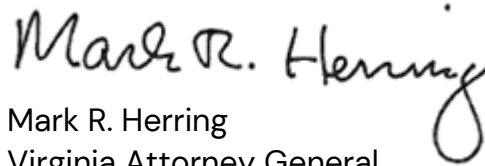
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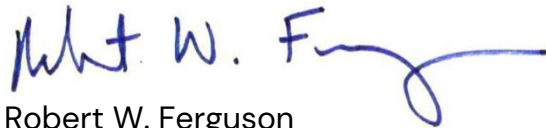
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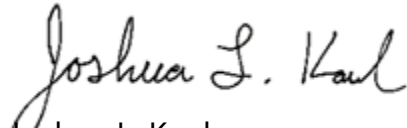
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