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February 7, 2022

Policy Division
Financial Crimes Enforcement Network
PO Box 39
Vienna, VA 22183

Re: Beneficial Ownership Information Reporting Requirements (RIN 1506-AB49 / Docket No. FINCEN-2021-0005)

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their more than 130 million members. On behalf of our members, we are writing regarding the Financial Crimes Enforcement Network's (FinCEN's) recent notice of proposed rulemaking regarding beneficial ownership information reporting requirements (BOI Reporting Proposal).¹ As previously expressed,² credit unions are highly supportive of the creation of the beneficial ownership database and hope it will greatly ease meeting customer due diligence obligations³ under the Bank Secrecy Act (BSA) and its implementing regulations. CUNA urges FinCEN to design reporting requirements with this goal in mind, and, at a minimum, align all reporting requirements with the BSA and anti-money laundering/countering the financing of terrorism (AML/CFT) regimes under which credit unions operate. Anything less will only create confusion and inefficiencies.

Background

Since 2000, the Department of Treasury, including FinCEN has raised concerns about the role of shell companies in enabling the movement of billions of dollars across border by unknown beneficial owners, facilitating money laundering or terrorist financing. In an effort to improve transparency into these beneficial owners, FinCEN issued a final rule establishing explicit rules for customer due diligence (CDD) requirements (CDD Final Rule) for financial institutions subject to the BSA and its AML requirements (BSA/AML).⁴

The CDD Final Rule established four elements necessary for a sufficient CDD component in a BSA/AML program: (1) Customer identification and verification, (2) beneficial ownership identification and verification, (3) understanding the nature and purpose of customer relationships to develop a customer risk profile, and (4) ongoing monitoring for reporting suspicious transactions and, on a risk-basis, maintaining and updating customer information.⁵ The first element had been well established and the third and fourth

¹ Beneficial Ownership Information Reporting Requirements, 86 Federal Register 69920 (Dec. 8, 2021) (BOI Reporting Proposal).

² See CUNA Comment Letter, Comment ID FINCEN-2021-0005-0082 (May 5, 2021), available at <https://www.regulations.gov/comment/FINCEN-2021-0005-0082>.

³ See 31 CFR §1010.230.

⁴ Customer Due Diligence Requirements for Financial Institutions, 81 FR 29397 (May 11, 2016) (CDD Final Rule).

⁵ *Id.*

were implicitly required through examiner expectations for BSA/AML programs.⁶ The second requirement, beneficial ownership identification and verification, was therefore the most significant change for credit unions.

Under the CDD Final Rule, reporting financial institutions helped increase transparency of beneficial ownership information; however, both the Treasury and Congress have continued to identify significant existing gaps that persist, allowing bad actors to continue to shield their identities while accessing and using the U.S. financial system to engage in money laundering and terrorist financing.⁷ In order to close some of these gaps and relieve the burden of reporting for financial institutions, Congress enacted *The Corporate Transparency Act (CTA)* as part of the *Anti-Money Laundering Act of 2020* (the AML Act).⁸

The CTA requires that certain entities report beneficial owner and company application information directly to FinCEN, will maintain that information in a confidential, secure, and non-public database.⁹ This database will be accessible to U.S. Government departments and agencies, law enforcement, tax authorities, and financial institutions subject to BSA/AML requirements.¹⁰ Once implemented, the CTA directs FinCEN to revise the CDD Final Rule, in part to account for financial institutions access to the database and to reduce unnecessary or duplicative burdens on financial institutions.¹¹ FinCEN's BOI Reporting Proposal is the first of multiple rulemakings necessary to fully implement the CTA.¹² This rulemaking focuses on which entities must file, when they must file, and what information they must provide.¹³

General Comment

CUNA strongly supports FinCEN's efforts to track and investigate financial crimes involving money laundering and terrorist financing. Credit unions are not-for-profit financial cooperatives with a statutory mission to promote thrift and provide access to credit for provident purposes. Unlike other financial institutions, credit unions do not issue stock or pay dividends to outside stockholders. Instead, earnings are returned to members in the form of lower interest rates on loans, higher interest on deposits, and lower fees. Credit unions exist only to serve their members, and as a result, credit unions' interest in their members' financial well-being and advancing the communities they serve takes on paramount importance.

BSA/AML compliance is expensive and places a tremendous burden on credit unions. While larger banks and non-bank mortgage lenders can afford to absorb the significant regulatory and compliance costs from the AML/CFT framework, it has made it significantly more difficult for credit unions to provide the affordable financial services credit union members depend on and deserve. Credit unions hope the database envisioned in the CTA will provide significant and important relief from the burden created by the CDD Final Rule. The likelihood of that outcome is dependent on FinCEN establishing a database that aligns with CDD requirements and a framework that includes appropriate safe harbors to ensure financial institutions that access it are both obtaining accurate and useful information more efficiently.

⁶ *Id.*

⁷ BOI Reporting Proposal at 69925.

⁸ *The Anti-Money Laundering Act of 2020 (AML Act)* was enacted as Division F, §§ 6001-6511, of the *William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*, Public Law 116-283 (2021). *The Corporate Transparency Act (CTA)* was enacted as Title LXIV, §§ 6401-6403 of the same.

⁹ BOI Reporting Proposal at 69921.

¹⁰ *Id.*

¹¹ *Id.* at 69929.

¹² *Id.* at 69921.

¹³ *Id.* at 69920.

Definitional Alignment

Given the opportunity for efficiency and efficacy posed by the CTA, it is concerning that the shared definitions between the existing CDD requirements and the proposed requirements are not parallel. For example, existing CDD requirements define the “legal entity customer” for which a financial institution must obtain beneficial ownership information to include general partnerships.¹⁴ In the BOI Reporting Proposal, FinCEN does not require these entities to report. FinCEN states that it understands that state law differs on whether these entities are created by a filing and therefore does not include them.¹⁵ No explanation in the proposal was offered as to why this state-to-state difference means the beneficial ownership information for these entities is significant enough to burden credit unions with requirements to obtain the information, but not significant enough to burden these general partnerships to provide the information to FinCEN.

More concerning, the construction of the control prong of the definition of “beneficial ownership” differs, and FinCEN’s explanations do not fully address this misalignment. Current CDD requirements describe the person meeting the control prong as having “significant responsibility to control, manage or direct” the entity¹⁶ whereas the BOI Reporting Proposal defines describes it with respect to exercising “substantial control over the entity.”¹⁷ While FinCEN clarifies that the CDD requirements identify a single individual with “significant responsibility to control...” whereas the CTA does not expressly limit the definition to a single individual, the BOI Reporting Proposal does not offer further discussion on the difference in the application of the phrases significant responsibility to control and exercising substantial control over the entity.¹⁸

In the absence of FinCEN’s interpretations of the new wording or expectations for credit unions regarding this change, it is unclear as to whether the beneficial ownership information reported to FinCEN by an entity can be used to satisfy their obligations. As the CDD requirements currently stand, it may require credit unions to perform additional work in order to identify the appropriate reported individual, creating unnecessary inefficiency. Further, colloquially, the changed terms don’t make intuitive sense in relation to the expanded application to multiple individuals. Many individuals have “significant responsibility to control, manage or direct” a legal entity, whereas the number of people who are able to “exercise substantial control over the entity” is likely far smaller. In the absence of new requirements for credit unions, it would be far clearer and more efficient for FinCEN to use the same phrasing to identify beneficial owners who satisfy the control prong of the definition, and simply require reporting entities to identify multiple individuals who may meet that definition, while selecting one of these individuals as the “primary” individual with control, which would then clarify the appropriate party for reporting financial institutions.

FinCEN Should Promulgate Amendments to the CDD Requirements Before Finalizing the Reporting Requirements in the BOI Reporting Proposal

The CTA requires that FinCEN revise the beneficial ownership information CDD requirements for financial institutions to bring them in line with requirements under the CTA.¹⁹ Much of this definitional misalignment may be addressed through these revisions. Presumably, FinCEN’s experience with CDD information since the rule was finalized in 2016 should clarify what information is helpful to law enforcement and what information is not ultimately necessary. As an example, if FinCEN has made a determination that obtaining

¹⁴ 31 CFR §1010.230(e)(1).

¹⁵ BOI Reporting Proposal at 69939.

¹⁶ 31 CFR §1010.230(d)(2).

¹⁷ BOI Reporting Proposal at 69973.

¹⁸ *Id.* at 69934, FN 108.

¹⁹ CTA, *supra* 8, §6403(d).

beneficial ownership information on general partnerships is not necessary, then these entities should also be eliminated from the requirement for obtaining and verifying beneficial ownership information for financial institutions as well. Without clarity that these misalignments are intentional, FinCEN's policy position on the topic has been updated, and that FinCEN is considering revising the CDD rule to be in alignment with the proposal, credit unions are limited in their ability to provide meaningful comment on the BOI Reporting Proposal.

FinCEN does identify that description of the control prong of the beneficial owner definition is misaligned with current requirements and states that it may rescind and revise the CDD Rule to bring these into alignment.²⁰ However, FinCEN does not offer any discussion regarding the language's significance, its application for financial institutions, or how expectations may differ as a result. If the altered language is finalized in conjunction with the reporting requirements, this arguably should dictate the language of later amendments to the CDD requirements, and FinCEN appears to admit as much by referencing the need to rescind and revise the CDD requirements due to the misalignment.²¹

However, this leaves credit unions in the position of having to comment on implied revisions to the CDD requirements, with no supporting discussion on the change's implications for financial institutions that must implement it. If there are unexpected operational consequences to these changes that are not apparent until revised regulations are proposed for financial institutions, credit unions lose the opportunity for meaningful comment as the alternative is to argue for a misalignment between the CDD requirements and the beneficial ownership information reporting requirements.

CUNA recognizes that the CTA statutorily required FinCEN to promulgate regulations to implement reporting no later than January 1, 2022.²² Having met that obligation, CUNA strongly urges FinCEN to wait to finalize the language for these reporting requirements until it has first promulgated revisions to the CDD regulations to bring both rules into alignment. FinCEN should wait until the comment period on that proposal has run, and FinCEN has thoroughly digested comments from affected financial institutions. Only once FinCEN has considered the implications from the perspective of both reporting entities and financial institutions subject to CDD requirements can it be confidently create a functional, cohesive framework that will operate efficiently and effectively.

Wherever the scope of entities subject to report to FinCEN and subject to the CDD requirements differ, confusion, frustration, and inefficiency will abound. Legal entities and financial institutions will attribute purpose and meaning between every single gap between the two rules. Therefore, it is most efficient and effective for FinCEN to ensure that they are in complete alignment. As it finalizes both rules, in tandem, FinCEN should carefully identify and explain every linguistic difference between the CDD Final Rule and the revised beneficial ownership information CDD requirements. Where FinCEN makes a purposeful decision to interrupt alignment between these requirements, it should clearly address and explain the policy considerations that informed that misalignment and provide clarity on the requirements for the entities and financial institutions involved.

²⁰ BOI Reporting Proposal at 69935.

²¹ *Id.*

²² 31 USC §5336(b)(5).

Conclusion

On behalf of America's credit unions and their more than 130 million members, thank you for your consideration. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 503-7184 or esullivan@cuna.coop.

Sincerely,

A handwritten signature in black ink that reads "E. Sullivan". The signature is written in a cursive style with a large, prominent initial "E".

Elizabeth M. Sullivan
Senior Director of Advocacy & Counsel