BANK POLICY INSTITUTE

May 5, 2021

Via Electronic Mail

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Request for Comments Regarding Beneficial Ownership Information Reporting Requirements (Docket No. FINCEN-2021-0005; RIN 1506-AB49)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the Financial Crimes Enforcement Network's advance notice of proposed rulemaking related to the implementation of the Corporate Transparency Act (the "CTA"),[2] a statute enacted into law as part of the Anti-Money Laundering Act of 2020 (the "AMLA"). BPI has been and remains a strong supporter of ending the use of anonymous shell companies and modernizing the U.S. anti-money laundering/countering the financing of terrorism ("AML/CFT") regime. Accordingly, BPI strongly supports the AMLA, including the CTA, and Congress's recognition that uniform federal beneficial ownership reporting requirements are needed to more effectively combat illicit finance and bring the United States into compliance with international standards for AML/CFT.

BPI encourages FinCEN, in implementing the uniform beneficial ownership reporting requirements and the related secure, non-public database of reported information (the "FinCEN

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1 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

2 Financial Crimes Enforcement Network, Beneficial Ownership Information Reporting Requirements, Advance Notice of Proposed Rulemaking, 86 Fed. Reg. 17,557 (Apr. 5, 2021) (the "ANPRM").

Database") under Section 6403 of the CTA,[3] to promulgate rules that enable accurate and reliable beneficial ownership information to be available to national security, intelligence, and law enforcement agencies, as well as to financial institutions subject to customer due diligence requirements and to federal functional regulators. At the same time, BPI encourages the Treasury Department, including FinCEN, to remain alert to Congress's instruction that the implementation of the CTA and its required revisions to FinCEN's Customer Due Diligence rule (the "CDD rule")[4] should "reduce any burdens on financial institutions . . . that are, in light of the enactment of [the AMLA] and the amendments made by [the AMLA], unnecessary or duplicative."[5]

This letter addresses several points that we recommend FinCEN take into account in developing proposed regulations implementing the CTA. As an overarching principle, we believe that the FinCEN Database should provide a centralized source of beneficial ownership information about reporting companies, and that financial institutions should not be subject to a duplicative requirement to separately collect and verify beneficial ownership information from all customers. Below, we describe three points that we believe would facilitate this principle in line with the purposes of the AMLA and CTA:

- *First*, to make the FinCEN Database an effective tool for national security, intelligence, and law enforcement agencies, as well as financial institutions and federal functional regulators, FinCEN should, among other steps, ensure that the information in the new beneficial ownership registry is reliable as a centralized source of beneficial ownership information about reporting companies and that financial institutions may rely on that information if they choose to do so.

- *Second*, to create a clear, consistent framework for how financial institutions mitigate relevant illicit finance risks, FinCEN should implement the CTA in a manner that would enable the CDD rule, future revisions to the CDD rule, and related requirements under the Customer Identification Program ("CIP") rule to be harmonized with the CTA.[6]

- *Third*, to increase the usefulness of the FinCEN Database, FinCEN should interpret the CTA to, among other things, require reporting from the broadest possible array of legal entities.

We believe the points discussed in this letter would improve the usefulness of reported beneficial ownership information for all users of the FinCEN Database, including law enforcement,

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3 31 U.S.C. § 5336.

4 31 C.F.R. § 1010.230; *see* Financial Crimes Enforcement Network, Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016).

5 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 ("NDAA 2021"), § 6403(d)(1)(C).

6 *See* 31 C.F.R. §§ 1010.230(b)(2), 1020.220, 1023.220, 1024.220, 1026.220.

intelligence, and national security agencies, financial institutions, and federal functional regulators. As contemplated by the CTA, these points would also reduce unnecessary or duplicative burdens on financial institutions and minimize burdens on the reporting companies that are subject to required submission of beneficial ownership information.[7] As the FinCEN Database continues to take shape, BPI looks forward to continuing to work with FinCEN to facilitate the design that achieves the goals and observes the mandates described by Congress in the CTA.

I. FinCEN should take steps to ensure that the information in the FinCEN Database is reliable for all users, that financial institutions may rely on the information in the database, and that the database is structured to optimize the usefulness of the information in the database for AML activities.

We believe that the utility of the FinCEN Database would be optimized if the information provided by reporting companies is subject to verification by FinCEN. Such verification could be automated, in whole or in substantial part, and would improve the accuracy of the information in the database, while also reducing the aggregate burden that would otherwise be imposed on database users, including national security, intelligence, and law enforcement agencies, as well as financial institutions and federal functional regulators, who may otherwise undertake steps in order to reasonably rely on the information.

Further, FinCEN should expressly permit, though not require, financial institutions to rely on the information in the database to satisfy their obligations under the CDD rule, including any revised rule, to identify and verify the identity of beneficial owners of legal entity customers. In addition, to increase the usefulness of the FinCEN Database, FinCEN should enable full, immediate access by financial institutions to information in the database for customers for which the institution has consent, provide flexibility for financial institutions in obtaining that consent, implement a helpful system of identifiers that complements other beneficial ownership information, and clarify the permissible uses of information in the database. The ability to rely on information in the FinCEN Database will also reduce the burden on financial institution customers, who might otherwise have to provide information regarding beneficial owners to multiple sources.

A. The identities of reported beneficial owners should be verified.

The CTA mandates the creation of a centralized source of beneficial ownership information intended to, among other things, mitigate the illicit finance risks associated with, for example, anonymous shell companies and the use of multiple entities to hide an entity's ownership.[8] In our view, it is critical that, in connection with establishing the database and in line with practices adopted in other jurisdictions, FinCEN implement mechanisms to verify, to the extent feasible, the identity of beneficial

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7 31 U.S.C. § 5336(b)(1)(F)(iii), (b)(4)(B)(i), (d)(1)(c).

8 *See* NDAA 2021, § 6402(4), (5).

owners reported by reporting companies and included in the FinCEN Database.[9] Unless verification efforts are undertaken, users of the FinCEN Database will have little reason to trust or rely on information from the database. Reliance by national security, intelligence, and law enforcement agencies on the information is vital to further the CTA's purpose of collecting beneficial ownership information "in a form and manner that is reasonably designed to generate a database that is highly useful to [these] agencies and federal functional regulators."[10] The ability of financial institutions to rely on the FinCEN Database, to the extent they choose to do so, is also important for the reasons discussed in the following subsection. In addition to improving the accuracy of information in the database, FinCEN verification of reported beneficial owners would also significantly reduce burdens across users of the database. Instead of each user undertaking any separate, duplicative verification it deems necessary or appropriate, FinCEN would provide a baseline for information included in the database. Further, to the extent FinCEN identifies an inconsistency in reported information, it could work with appropriate federal, state, and tribal agencies to develop mechanisms to notify reporting companies or otherwise address the inconsistency.

We believe that verification of reported beneficial owners could be completed by FinCEN, in whole or in substantial part, through the use of automated non-documentary tools, with human intervention, if undertaken, limited to addressing material inconsistencies that result from non-documentary verification. FinCEN could, for example, use commercially available tools, such as those already used by individual financial institutions to verify the identity of beneficial owners. FinCEN could also consider implementing an application programming interface ("API") to interface with systems or databases maintained by other federal agencies, secretaries of state, or similar offices. To aid in documentary verification, if undertaken, FinCEN could also consider requiring or requesting that reporting companies and their beneficial owners, either in connection with issuing a FinCEN Identifier or at the time of entity formation or registration, provide a copy of an acceptable identification document.[11]

B. FinCEN should expressly permit, but not require, financial institutions to rely on the information in the FinCEN Database.

Although the CTA mandates revisions to the CDD rule, it is important that the FinCEN Database be designed and implemented in such a way that financial institutions may satisfy any obligation to

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9 *See* Financial Action Task Force, Best Practices on Beneficial Ownership for Legal Persons, at ¶ 83 (Oct. 2019), *available at* https://www.fatf-gafi.org/media/fatf/documents/best-practices-beneficial-ownership-legal-persons.pdf.

10 NDAA 2021, § 6402(8)(C).

11 Under the CTA, an "acceptable identification document" includes (1) a nonexpired U.S. passport; (2) a nonexpired identification document issued by a State, local government, or Indian Tribe to the individual acting for the purpose of identification of that individual; (3) a nonexpired driver's license issued by a State; or (4) if an individual does not have these documents, a nonexpired passport issued by a foreign government. 31 U.S.C. § 5336(a)(1).

identify and verify the beneficial owners of a legal entity customer by relying on information available in the database, both at the time a customer relationship is established and thereafter. FinCEN should also expressly permit financial institutions to rely on the information in the database, including by providing a safe harbor for institutions that do so. Such a safe harbor could, for example, provide that institutions will be deemed to comply with any obligations under the CDD rule to identify and verify a legal entity customer's beneficial owners if they retrieve that customer's reported information in the FinCEN Database.

Reliance by financial institutions on the FinCEN Database to satisfy any CDD rule obligations would be consistent with the creation of the database as a centralized source of information about the beneficial owners of those legal entities for which Congress determined it was necessary to require such information. In line with the purpose of the AMLA, any additional beneficial ownership information collection or verification performed by an institution would be completed as it deems appropriate, solely on the basis of the institution's assessment of the relevant risks, not pursuant to a regulatory mandate such as the CDD rule.[12]

Below, we address (i) the relationship between permitted reliance on the FinCEN database and know your customer ("KYC") and other customer monitoring activities; (ii) the importance of verification in facilitating reliance by financial institutions on the FinCEN Database; (iii) the potential consequences if reliance is not permitted and institutions are instead required to separately collect and verify beneficial ownership information for legal entity customers; and (iv) issues related to how institutions address discrepancies that may arise with respect to information in the FinCEN Database.

1. *Relationship between reliance on the database and other KYC activities*

Permitting financial institutions to rely on information in the FinCEN database to satisfy any obligations under the CDD rule and future revisions to the CDD rule would *not* affect the obligations of institutions, as part of their Bank Secrecy Act ("BSA")/AML programs, to know their customers and undertake appropriate risk-based customer monitoring. Rather, those activities could be informed by information from the FinCEN Database. Based on information in the database, a financial institution may determine, for example, that it is appropriate under its risk-based BSA/AML program to collect additional customer due diligence-related information.

Further, to assist financial institutions with ongoing monitoring of customer relationships, FinCEN should design the FinCEN Database so that a financial institution may—with respect to each customer that has provided consent to the institution to access database information—receive automated notifications of any material updates provided to FinCEN by the customer of its beneficial ownership information. Such automated notifications would provide an additional data point that institutions could consider to the extent appropriate under their overall risk-based decision-making

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[12] *See* NDAA 2021 § 6002(4) ("reinforc[ing] that the [AML/CFT] policies, procedures, and controls of financial institutions shall be risk-based").

processes. At the same time, FinCEN, together with the federal functional regulators, should confirm that any such updates to beneficial ownership information do not, on their own, necessitate specific actions under an institution's BSA/AML program, such as a reassessment of customer risk. Financial institutions should have the flexibility to determine the circumstances in which an update should be reviewed, how an update impacts the customer's risk-profile, and, on the basis of risk, what actions, if any, the institution should take.

2. *Importance of verification of reported information by FinCEN for reasonable reliance on the database*

As described in Section I.A above, we believe that FinCEN verification of the identity of reported beneficial owners is critical to the ability of financial institutions, as well as national security, intelligence, and law enforcement agencies, to reasonably rely on the information in the database. Of course, FinCEN could permit financial institutions to rely on the FinCEN Database for the purpose of satisfying any CDD rule-related obligations, even if the information in the database is not verified, based, for example, on the civil and criminal penalties to which reporting companies may be subject if they fail to report required information to FinCEN. However, we expect that the usefulness of the database for financial institutions will be substantially reduced absent FinCEN verification or, alternatively, the availability of a safe harbor. Among other reasons for such a reduction in usefulness, regulators and law enforcement may, in hindsight, view reliance on unverified information as unreasonable or inappropriate. Further, absent FinCEN verification, institutions would almost certainly undertake additional, burdensome measures along the lines described below, making any decision to secure information from the database primarily a paperwork exercise that provides little added value to financial institutions' AML/CFT efforts.

3. *Potential consequences if reliance on the database is not permitted*

In a similar vein, even the mere ability of financial institutions to access information in the FinCEN Database, absent the ability to also reasonably rely on that information, raises significant concerns. In particular, if financial institutions are required under a revised CDD rule to separately identify and verify the identity of the beneficial owners of legal entity customers that also must report to FinCEN under the CTA—a requirement that we firmly believe FinCEN should not impose—institutions could be put in a position where they expend enormous resources resolving discrepancies identified between the beneficial ownership information they collect under the rule and the information in the FinCEN Database.

We expect that such discrepancies will be pervasive, which we understand has been the case in other jurisdictions that have implemented beneficial ownership registries. Even information accurately reported to the FinCEN Database would only need to be accurate as of the time it was reported, and changes to beneficial ownership information that would not be immediately reportable to FinCEN are likely to occur with some degree of frequency. Discrepancies between the database and the information collected by financial institutions could arise for numerous legitimate reasons. For example,

the individual at a reporting company who reports beneficial ownership information to FinCEN could differ from the individual who interacts with and provides beneficial ownership information to a financial institution.[13] As another example, an individual may use a maiden name or a passport in providing beneficial ownership information to FinCEN, but a married name or a driver's license in providing beneficial ownership information to the institution. Moreover, the information in the database may differ from the information available from a commercial service used by an institution for verification. Discrepancies such as these may, and we expect often will, result from reasons wholly unrelated to illicit finance risks. Financial institutions should not be required or expected to reconcile discrepancies, thus necessitating the diversion of time and resources away from efforts to identify true illicit financial activity.

Implementing the CTA, including the FinCEN Database, and an amended CDD rule in a manner that would lead institutions to devote significant resources to chasing down discrepancies would be inconsistent with Congress's instruction to amend the CDD rule to *reduce* burdens on financial institutions that are unnecessary or duplicative as a result of the CTA. Further, expending resources for these tasks, which are more clearly directed at data reconciliation than mitigation of illicit finance risk, would be inconsistent with the purposes described in FinCEN's recent advance notice of proposed rulemaking on AML program effectiveness, which stated that core principles of AML modernization were to enable institutions to, among other things, "discard inefficient and unnecessary practices, and focus resources on fulfilling the BSA's stated purpose of providing information with a high degree of usefulness to government authorities."[14] Further, the resources dedicated by financial institutions to resolving discrepancies would impose corresponding burdens on reporting companies, which would have to work separately with each relevant institution to resolve any identified discrepancies. The resulting costs for reporting companies would run counter to Congress's mandate in the CTA that the implementation of the statute "seek to minimize burdens on reporting companies associated with the collection of the information . . . in light of the private compliance costs placed on legitimate businesses."[15]

Accordingly, if, pursuant to a revised CDD rule or otherwise, financial institutions are required to separately identify and verify the identity of beneficial owners of legal entity customers that also must report to FinCEN under the CTA, institutions may reasonably conclude that the FinCEN Database does not provide meaningful information that outweighs the substantial burdens associated with reconciling information discrepancies. Especially if FinCEN also does not verify the information in the database, institutions would have no basis for determining whether that information is any more (or less) reliable

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[13] Similarly, at least one BPI member has reported that, with respect to the CDD rule, different individuals at a single legal entity customer may provide different beneficial ownership information.

[14] Financial Crimes Enforcement Network, Anti-Money Laundering Program Effectiveness, Advance Notice of Proposed Rulemaking, 85 Fed. Reg. 58,023, 58,024 (Sept. 17, 2020).

[15] 31 U.S.C. § 5336(b)(1)(F)(iii).

than the information they collect and may reasonably opt not to use the FinCEN Database, at least not in the ordinary course.

For these reasons, FinCEN should craft a rule pertaining to the FinCEN Database that contemplates that financial institutions will not, and will not be expected to, *both* obtain or otherwise access beneficial ownership information in the database for legal entity customers who must report to FinCEN under the CTA *and* separately identify and verify the beneficial owners of those same customers. A requirement or expectation to do both would be inconsistent with the AMLA by adding burdens and limiting institutions' ability to make their BSA/AML programs more effective and risk-based.[16]

4. *Addressing inconsistencies and discrepancies that may arise in the database*

FinCEN should work with the industry to clarify the steps a financial institution is expected to take, if any, in the event an institution accesses the database and identifies a discrepancy between the beneficial ownership information in the FinCEN Database and the institution's information. We respectfully submit that any such steps should only apply to "material" discrepancies, and FinCEN should carefully limit both the circumstances in which a discrepancy will be considered material and the burden that any such steps would impose on an institution. Circumscribing the types of discrepancies that are considered material will preserve institutions' flexibility to determine based on an assessment of relevant risks, what (if any) actions should be taken and resources should be expended with respect to non-material discrepancies.

Additionally, FinCEN, together with the federal banking agencies, should clarify that a discrepancy, including a material discrepancy, between the institution's information and information in the FinCEN Database does *not*, on its own, require the filing of a suspicious activity report ("SAR"), which would instead continue to be required only if the institution identifies a transaction that otherwise satisfies a trigger requiring the filing of a SAR. In the case of a material discrepancy, an institution should be permitted to report the discrepancy to FinCEN and FinCEN should provide any available information to the institution relevant to resolving the issue prior to the deadline for filing a SAR.

C. Financial institutions that decide to use the FinCEN Database should have immediate access and flexibility in obtaining the customer consent necessary to receive such access.

The CTA provides that a financial institution may access beneficial ownership information in the FinCEN Database only by making a request to FinCEN "with the consent of a reporting company."[17] Provided that the information in the database is verified or institutions may otherwise reasonably rely on the information in the database, as described above, in implementing this aspect of the CTA, FinCEN

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16 NDAA 2021, § 6002(3)-(4).

17 *Id*.

should permit an institution to have full and immediate access to the database with respect to the reporting companies for which the institution has consent.

Such real-time data access, for example through an API, live user interface, or other secure interface, would increase the database's usefulness for, and the efficiency of, customer due diligence-related efforts. Full access to search across the database, solely with respect to customers for which the institution has consent, would further increase the usefulness of the FinCEN Database for customer due diligence-related activities.

FinCEN should also provide institutions with flexibility in how they obtain the consent of reporting companies to access their information in the FinCEN Database, and reporting companies should be able to provide that consent either to FinCEN or to a financial institution. For the former, FinCEN should consider permitting reporting companies, at the time of initial reporting and in connection with any subsequent updates or modification, to provide a universal consent allowing *all* financial institutions to access their information in the FinCEN Database for purposes permitted under the CTA. Universal consent would minimize burdens on reporting companies, which would otherwise need to provide consent to each institution at which they seek to open an account, and on financial institutions, which would otherwise each have to document that consent. Even if reporting companies choose not to provide a universal consent, they should still be able to provide consent directly to FinCEN that would permit one or more specified institutions to access their reported beneficial ownership information. Any such consent pertaining to a specific financial institution should also encompass that institution's parents, subsidiaries, and affiliates, so as to avoid situations in which a reporting company accidentally provides consent for the wrong institution (*e.g.*, to a broker-dealer instead of for the affiliated and similarly-named bank at which they seek to open an account).

Financial institutions also should have flexibility in how they seek and obtain consent from customers that do not provide consent directly to FinCEN. Institutions should be able, for example, to obtain affirmative consent at customer onboarding, to include the consent in applicable terms and conditions, subject to an opt-out, or to develop alternative procedures.

Further, and again provided that the information in the database is verified or financial institutions may otherwise reasonably rely on the information in the database, as described above, institutions should be permitted to obtain consent from, and access any information reported to FinCEN by, legal entities that determine they are exempt from the definition of the "reporting company" under the CTA. In the ANPRM, FinCEN raises the possibility that companies eligible for an exemption under the CTA could be required to provide information to FinCEN, for example, to support their initial or continued eligibility for an exemption.[18] Institutions currently expend considerable resources to prove and document the application of exclusions from the CDD rule. Information about exempt entities

[18] ANPRM, 86 Fed. Reg. at 17,563.

made available to FinCEN would be useful to institutions in conducting their customer due diligence-related activities.

D. FinCEN should structure the FinCEN identifier to provide useful information that complements other beneficial ownership information.

The CTA directs FinCEN to provide identifiers (i) for individuals that have provided beneficial ownership information to FinCEN and (ii) to reporting companies that have reported beneficial ownership information to FinCEN.[19] In constructing a system for these identifiers, we believe FinCEN may wish to consider whether it would increase the usefulness of the identifiers if they contain additional information about the individual or entity, such as a location and country code, as are incorporated in Bank Identification Codes (BICs) and International Bank Account Numbers (IBANs).

FinCEN should also clarify that a legal entity customer may not provide its and its beneficial owners' FinCEN identifiers to a financial institution as a *substitute* for providing any sought-after beneficial ownership information, including through access to the entity's information in the FinCEN Database. Rather, provided the database is designed and implemented in such a way that institutions may reasonably rely on the information in the database, as described above, FinCEN should supply institutions with full access to the reported beneficial ownership information in the database for the customers with respect to which they have consent. The identifier should merely facilitate the institution's access to the information in the database. Moreover, access should be afforded regardless of whether a customer that has provided the institution with consent to access the database information also provides the institution with a FinCEN identifier.

E. FinCEN should clarify the permissible uses by financial institutions of information from the FinCEN database.

Under the CTA, FinCEN may disclose information in the FinCEN Database to a financial institution subject to customer due diligence requirements only based on a request that would "facilitate the compliance of the financial institution with customer due diligence requirements under applicable law."[20] FinCEN should clarify that this limitation does not require that database information be used solely for CDD rule compliance, but instead that it may be used, to the extent a customer has provided consent, for the broader range of customer due diligence activities that an institution may undertake in understanding the nature and purpose of its relationship with the customer. These activities could include, among others, suspicious activity reporting and resolution of sanctions hits. By confirming that institutions may access the database for these and other specified due diligence-related purposes (provided they have consent of the relevant entity), FinCEN would facilitate broader

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19 12 U.S.C. § 5336(b)(3)(A).

20 *Id*. § 5336(c)(2)(B)(iii).

usefulness of the FinCEN Database in mitigating relevant illicit finance risks and improving the efficiency of relevant AML processes.

F. FinCEN should set a clear implementation timeline.

In any rule flowing from the ANPRM, FinCEN should set a clear implementation timeline that takes into account when the FinCEN Database is expected to be functional and have available data. We believe that FinCEN should consider deploying the database in stages, for example, setting different dates when reporting companies are required to start providing beneficial ownership information to FinCEN and when financial institutions may begin to access the database, if they choose to do so and have customer consent.

II. FinCEN should implement the CTA so that the CDD and future amendments to the CDD rule are harmonized with the CTA.

In crafting any rule flowing from the ANPRM, it is critical that FinCEN implement the CTA so that beneficial ownership requirements imposed on financial institutions under the CDD rule and future revisions to the CDD rule are harmonized with beneficial ownership reporting required under the CTA. Ensuring consistency between these requirements will create a clear, coherent framework for mitigating relevant illicit finance risks and prevent financial institutions and reporting companies from facing unnecessary and duplicative burdens. In this section, we address several recommendations that we believe would facilitate this harmonization. We also address harmonization with the CIP rule.

A. The scope of required beneficial ownership collection under a revised CDD rule should be aligned with reporting under the CTA.

As described in Section I.B above, provided that the information in the FinCEN Database is verified or financial institutions may otherwise reasonably rely on the information in the database, institutions should be permitted to rely on the information to satisfy their obligations under the CDD rule and any revised rule to identify and verify beneficial owners of legal entity customers. To maximize the utility of the FinCEN Database to users, we believe it is critical that certain key terms be aligned; namely, (i) the definition of "reporting company" under the CTA and the definition of "legal entity customer" under the CDD rule and (ii) the definitions of "beneficial owner" under the CTA and the CDD rule.

As to the former, there may be a significant number of "legal entity customers" under the current CDD rule for which beneficial ownership information would be unavailable from the FinCEN Database because these customers are not "reporting companies" under the CTA. For example, the current definition of "legal entity customer" under the CDD rule expressly includes general partnerships formed under the law of a U.S. jurisdiction, including those created other than by the filing of a document with a secretary of state or similar office. In contrast, as discussed further in Section III.A below, for entities formed under the law of a U.S. jurisdiction, only entities created by the filing of a

document with a secretary of state or similar office may be "reporting companies" under the CTA.[21] The CTA also includes certain exemptions from the term "reporting company"—such as for medium- to large-sized operating companies—that are not currently exemptions from the term "legal entity customer" under the CDD rule.[22]

As to the latter, the "beneficial owners" that currently must be identified and verified by financial institutions under the CDD rule may differ from the "beneficial owners" reported to FinCEN because of differences in how the term "beneficial owner" is defined. For example, the CDD rule includes as a beneficial owner any *single* individual "with significant responsibility to control, manage, or direct" a legal entity, including an executive officer or senior manager. Under the CTA, a beneficial owner includes, among others, any person that, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise "exercises substantial control over the entity," but *not* a person that acts solely as an employee of an entity and whose control over the entity is derived solely from his or her employment status.[23]

A lack of definitional alignment between the FinCEN Database and the CDD rule would impose duplicative and unnecessary burdens on both institutions and their customers. Moreover, we believe that revising the CDD rule to align with the definitions in the CTA will not substantially affect illicit finance risks. As an initial matter, the CTA reflects Congress's view of the circumstances, and the extent to which, required collection of beneficial ownership information best promotes, among other things, the mitigation of illicit finance risks. Failing to align definitions would likely target activities that Congress apparently viewed as having a lower priority for AML efforts. In addition, in the experience of BPI members, beneficial ownership information has not generated significant suspicious activity reporting or law enforcement inquiries, and the operational burden of dealing with inconsistent definitions appears unlikely to be outweighed by any associated benefits. Moreover, practices in other jurisdictions demonstrate the burden, without corresponding benefits, that may result from definitional inconsistencies. BPI members with operations in the United Kingdom note that "control" is defined differently in that jurisdiction for the purpose of beneficial ownership reporting and applicable AML regulations. As a result, institutions may expend resources in identifying discrepancies between persons deemed to control an entity, but are unable to easily obtain information, including from the beneficial ownership registry, that would assist in reconciling the discrepancies.

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21 *Compare* 12 C.F.R. § 1010.230(e)(1) (CDD rule), *with* 12 U.S.C. § 5336(a)(11)(A) (CTA).

22 12 U.S.C. § 5336(a)(11)(B)(xxi) (exempting from the definition of "reporting company" under the CTA any entity that employs more than 20 employees on a full-time basis in the United States, filed tax returns in the United States demonstrating more than $5 million in annual gross receipts/sales (including through subsidiaries and other entities through which they operate) and has an operating presence in the United States); *see* 12 C.F.R. § 1010.230(e)(2)-(3) (exemptions from the term "legal entity customer" under the CDD rule).

23 *Compare* 12 C.F.R. § 1010.230(d)(2) (CDD rule), *with* 12 U.S.C. § 5336(a)(3) (CTA).

Because definitional inconsistencies between the CTA and CDD rule would impose burdens on financial institutions and their customers without meaningfully reducing illicit finance risks, revisions to the CDD rule should ensure that beneficial ownership identification and verification requirements are fully consistent with the scope of beneficial ownership reporting under the CTA. As indicated above, institutions would continue to be required, notwithstanding reliance on the FinCEN Database or revisions to the CDD rule, to know their customers and undertake customer monitoring on the basis of risk. This would continue to be the case even if the CDD rule no longer requires beneficial ownership information to be collected for certain entities or no longer treats certain individuals as controlling an entity.

B. FinCEN should provide additional clarity to facilitate a consistent application of "control" under the CTA and the CDD rule.

Under the CTA, a beneficial owner is defined as an individual who ''exercises substantial control over the entity'' or ''owns or controls not less than 25 percent of the ownership interests of the entity."[24] However, the CTA does not define "substantial control" and, unlike the CDD rule, does not expressly limit to one the number of individuals that may be considered beneficial owners on the basis of substantial control.[25] Accordingly, we believe that businesses that are required to report under the CTA may reach inconsistent conclusions concerning the individuals who exercise "substantial control" and about whom they must report beneficial ownership information. We recommend that, in its regulations implementing the CTA, FinCEN interpret the term "control" for the purposes of assessing "substantial control" as including, among other things, the power to vote, direct votes, appoint and replace board members or members of a similar governing body, decide on the sale or termination of the entity, and direct who takes possession of entity funds or assets. The definition also should take into account differences in how various entity types are structured and governed. We believe that both legal entity customers and financial institutions have become familiar with the "control prong" of the CDD rule, and we therefore recommend FinCEN consider defining "control" for the purpose of assessing "substantial control" under the CTA to align with that aspect of the CDD rule, as currently in effect.[26] Regardless of how FinCEN interprets "control" under the CTA, however, it is critical that the application to reporting companies is clear. For the reasons described above, this interpretation under the CTA should also apply under a revised CDD rule.

C. Required updates to beneficial ownership information should be linked to processes under the CTA and not the CDD rule's expectation that such information is updated whenever a customer opens a new account.

Under the CTA, reporting companies must report any changes in their beneficial ownership information to FinCEN within a year of the change or such shorter period as is required pursuant to

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[24] *Id*. § 5336(a)(3)(A),

[25] *See* 12 C.F.R. § 1010.230(d)(2).

[26] *Id.*

implementing regulations.[27] In the ANPRM, FinCEN raises the possibility that reporting companies also could be required to affirmatively confirm, on a periodic basis, the continued accuracy of their previously reported beneficial ownership information.[28] We believe that such confirmations may assist in improving the continued accuracy and reliability of the FinCEN Database. To minimize the burdens, including on small businesses, associated with providing such confirmations, we recommend that, if such confirmations are implemented, FinCEN affirmatively send notices, or leverage other outreach avenues utilized by other federal or state agencies, to covered companies requesting that they confirm their reported information remains correct or provide any corrections within a specified amount of time. FinCEN may also further reduce associated burdens by aligning the timing for sending such notices with other applicable requirements, such as a requirement under state law to submit an annual report.

We believe that, in light of the CTA's mandate that reporting companies update beneficial ownership information provided to FinCEN, and potentially an additional requirement that reporting companies provide periodic certifications of previously reported information, new account openings should no longer serve as the trigger for identification and verification of beneficial owners.[29] Continuing to also require identification and verification at account opening would be unnecessarily duplicative and needlessly burdensome, especially if entities must also periodically confirm that such information remains accurate.

Eliminating requirements tied to new account opening under the CDD rule would also, in line with the purposes of the AMLA, enable institutions to allocate BSA/AML program resources to more effective activities. The CDD rule requirements are, in practice, extremely burdensome, particularly in situations where financial institutions routinely open multiple customer accounts on the same day or within a short period of time.[30] Moreover, the cost of complying with these requirements does not appear to come with any corresponding benefit. There is no reason to believe that opening a new account, in and of itself, is an indication of changed beneficial ownership information. BPI members also are not aware of any feedback from law enforcement that re-collection on this basis has made a difference in addressing illicit finance risks.

Instead of requiring beneficial ownership information to be refreshed every time a customer opens an account, institutions should be permitted to rely on updates provided to FinCEN by reporting

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27 31 U.S.C. § 5336(b)(1)(D)-(E).

28 ANPRM, 86 Fed. Reg. at 17,563.

29 Likewise, account openings should no longer serve as the trigger for confirming and collecting a certification of previously provided beneficial ownership information. *See* 31 C.F.R. § 1010.230(b); Financial Crimes Enforcement Network, *Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions*, FIN-2018-G001, at 8 (Apr. 3, 2018).

30 Multiple account openings within a short time may occur, for example, for title or escrow customers that can open multiple accounts daily to assist in closing real estate transactions. Large legal entity customers may also open multiple accounts to assist with business-related needs for general checking, lines of credit, lending, investment, or other activities.

companies, together with any periodic certifications. Of course, institutions will continue to undertake ongoing monitoring of their customers on the basis of risk, which as previously noted, may warrant collecting, updating, or re-verifying beneficial ownership information.

D. FinCEN and the other relevant federal agencies should harmonize the CIP rule, which is incorporated in part in the CDD rule, with the CTA.

In harmonizing the CDD rule and revisions to the CDD rule to the CTA, FinCEN, together with the other relevant federal agencies, should also modify the application of the CIP rule. The existing CDD rule expressly refers to the CIP rule for certain purposes: financial institutions must verify the identity of each beneficial owner of an entity according to risk-based procedures that contain, at a minimum, the same elements financial institutions are required to use to verify the identity of individual customers under applicable CIP requirements.[31] Accordingly, to enable the CDD rule to be harmonized with the CTA, it is necessary to address inconsistencies between the CTA and those aspects of the CIP rule that are incorporated into the CDD rule.

One such inconsistency arises in the information about individuals that must be reported under the CTA and collected under the CIP rule. Under the CTA, a reporting company must provide, for each beneficial owner (and each applicant) the full legal name, date of birth, current residential or business street address, and a unique identifying number from an acceptable identification document, which may be a passport, driver's license, or other identification document.[32] The CTA does *not* require the collection of Social Security numbers. Under the CIP rule, in contrast, the unique identifying number for each U.S. person individual and certain non-U.S. person individuals *must* be a Social Security number.

To enable institutions to rely on the FinCEN Database for the purpose of satisfying their obligations under the CDD rule and any revised rule, including those aspects of the rule that incorporate the CIP rule, FinCEN, together with the other relevant federal agencies, should align the identifying numbers permitted under the CIP rule with those permitted under the CTA. This alignment could be made either through exemptive relief or an amendment to the CIP rule. Such an alignment would also reduce burdens on financial institutions and their customers that result from the frequent reluctance of individuals to provide full Social Security numbers, especially when in the context of providing beneficial ownership information.

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31 *See* 31 C.F.R. § 1010.230(b)(2).

32 31 U.S.C. § 5336(b)(2)(A). A reporting company may, in lieu of providing this information for any beneficial owner, provide the individual's FinCEN identifier.

lll. FinCEN should interpret the CTA to require reporting from the broadest possible array of legal entities and otherwise increase the usefulness of the FinCEN Database.

In this section, we address several recommendations that we believe would enhance the usefulness of the FinCEN Database to its users, including law enforcement, intelligence, and national security agencies, as well as financial institutions and federal functional regulators.

A. The scope of "reporting company" should be construed as broadly as possible under the CTA.

The CTA generally defines a "reporting company" as a corporation, limited liability company ("LLC"), or "other similar entity" that is created by the filing of a document with a secretary of state or a similar office under the law of a U.S. state or Indian Tribe (as defined in the CTA) or formed under foreign law and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the law of a U.S. state or Indian Tribe.[33]

We believe that the FinCEN Database will be more effective if it includes beneficial ownership information for a broad range of entity types. As recognized by Congress, by inclusion of other similar entities, the entities that present illicit finance risks due to their beneficial ownership are not limited to corporations and LLCs. Accordingly, we believe that FinCEN should interpret this phrase to include *any* entity that is, like a corporation or an LLC, created or, if formed under foreign law, registered to do business by filing a document with a secretary of state or similar office. By interpreting "other similar entity" broadly, the "reporting companies" required to provide beneficial ownership information to FinCEN would include any statutory trusts, limited partnerships, general partnerships, and special purpose vehicles that are, as applicable, created or registered to do business by a filing of the type specified in the CTA. A narrow definition of "other similar entity" that categorically excludes certain entity types from required beneficial ownership reporting would create a clear gap in the regime established by Congress in the CTA and may increase illicit finance risks. Further, any unnecessary burdens that arise from a broad construction of the entities subject to required beneficial ownership reporting under the CTA may be addressed through targeted exemptions. That is, the Secretary of the Treasury, with the concurrence of the Attorney General and the Secretary of Homeland Security, may determine that the activities or characteristics of certain entities or classes of entities that are not otherwise exempt are such that the burdens that would be imposed by required beneficial ownership reporting are disproportional to any associated benefits, and therefore that such entities or classes of entities should be exempt.[34]

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[33] *Id*. § 5336(a)(11)(A). Several enumerated types of entities are excluded from this general definition. *See id.* § 5336(a)(11)(B).

[34] *See id*. § 5336(a)(11)(B)(xxiv).

B. FinCEN should engage with tribal governments to implement beneficial ownership reporting for tribal-owned entities.

BPI encourages FinCEN to continue to engage with tribal governments to address the potential impact of beneficial ownership reporting under the CTA on tribal-owned businesses. Tribal-owned business are frequently formed under the authority of a tribal government either as an unincorporated instrumentality or a political subdivision and, in either case, generally retain sovereign immunity unless otherwise waived. These tribal-owned businesses also have formation documents that are substantially different from those of other legal entities; ultimate control may be retained by a tribal council, which delegates authority to businesses and individuals. Further, certain tribal-owned businesses, in particular casinos, are subject to licensing requirements and oversight by a gaming regulator, and tribal-owned casinos are required to have a BSA/AML program, which provides greater transparency into their operations than is generally available for other legal entities. Accordingly, in implementing the CTA, FinCEN should consider the unique nature of tribal-owned businesses, including by engaging with tribal governments to determine the extent to which these businesses should be considered "reporting companies" under the CTA.

C. FinCEN should require reporting of useful information, such as a structural chart, for entities interposed between a reporting company and its beneficial owners.

As described in Section II.D above, reporting companies are required to report to FinCEN the full legal name, date of birth, current residential or business street address, and a unique identifying number or, in the alternative, a FinCEN identifier. We believe that, especially where an entity has one or more entities interposed in its organizational structure between it and its beneficial owners, it would increase the usefulness of the FinCEN Database to users if the entity were required to provide limited additional organizational documents, such as an organizational structure chart, which could be used to understand the intermediate holding structure. Requiring the provision of this information could, in addition to making useful information available to users of the database, limit the ability of individuals to hide beneficial ownership relationships through complex organizational structures.

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BPI appreciates FinCEN's consideration of its comments. If you have any questions, please contact the undersigned by phone at 202-589-1935 or by email at *Angelena.Bradfield@bpi.com.*

Respectfully submitted,

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