

February 7, 2022

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

Submitted via <https://www.regulations.gov>

Re: Beneficial Ownership Information Reporting Requirements, Docket Number
FINCEN-2021-0005 and RIN 1506-AB49.

Dear Sir/Madam:

On behalf of the State of Utah, we respectfully submit the following comments in response to the Corporate Transparency Act (CTA) and its proposed beneficial ownership information (BOI) reporting rule (“Proposed Rule”).¹ While we recognize the importance of transparency to combat money laundering, terrorist financing, and other related threats to the integrity of the financial system, we are concerned that the Proposed Rule imposes significant burdens on small businesses and states.

First, the Proposed Rule will create new risks and increase compliance costs for Utah’s small businesses if it implements the CTA regulations piecemeal. As the Financial Crimes Enforcement Network (FinCEN) acknowledges, every reporting company under the CTA will be a small business.² We respectfully request that the Proposed Rule take effect no sooner than the effective date of the other CTA regulations to be promulgated, including those regarding beneficial ownership information access and disclosure protocols, and revisions to the existing customer due diligence rule.

Second, the Proposed Rule should minimize the burdens on small business in providing corporate and BOI information to the federal government. Small businesses who have never been required to provide BOI information before will now be required to provide private information regarding ownership and company information. In addition to the privacy concerns related to these disclosures, we request that the Proposed Rule not extend requirements beyond those

¹ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010), (Docket Number FINCEN-2021-0005 and RIN 1506-AB49).

² Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69951 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

required by the statute to minimize the burden on small businesses. We further request that deadlines for compliance be extended.

The Proposed Rule will also create substantial costs for states. FinCEN acknowledges that the Proposed Rule will create indirect costs, but the costs are much higher than FinCEN estimates given that small businesses often require the most customer service in connection with corporate filings. We respectfully request robust messaging and a dedicated FinCEN call center to assist small businesses with these requirements.

BACKGROUND

The CTA is part of the Anti-Money Laundering Act of 2020, which is part of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.³ “Section 6403 of the CTA, among other things, amends the Bank Secrecy Act (BSA) by adding a new Section 5336, Beneficial Ownership Information Reporting Requirements, to Subchapter II of Chapter 53 of Title 31, United States Code.”⁴

The CTA requires a reporting company to report its beneficial ownership to FinCEN.⁵ The CTA defines a “reporting company” as a “corporation, limited liability company, or other similar entity” created under state or tribal law or created under foreign law and registered with a state or tribe.⁶ The CTA delineates twenty-four exceptions to the definition of a reporting company.⁷ Among the exempt companies are entities with “more than 20 employees” and “more than \$5,000,000 in gross receipts or sales,”⁸ which the Proposed Rule defines as a “large operating company.”⁹ The CTA defines “beneficial ownership” as “an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise [] exercises substantial control over the entity [] or [] owns or controls not less than 25 percent of the ownership interests of the entity.”¹⁰ Among many other particulars, CTA also details the information that a reporting company must include in the report¹¹ and when to report.¹² The reporting companies will primarily be small companies.¹³ The CTA’s effective date is “the effective date of the regulations prescribed by the Secretary of the Treasury under this subsection, which shall be promulgated not later than 1 year after the date of enactment of this section.”¹⁴

³ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, at §§ 6401 – 6403 (January 1, 2021).

⁴ *See id.* *See also* Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, n. 1 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

⁵ 31 USC § 5336(b).

⁶ 31 USC § 5336(a)(11).

⁷ *See id.*

⁸ 31 USC § 5336(a)(11)(B)(xxi).

⁹ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69972 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

¹⁰ 31 USC § 5336(a)(3).

¹¹ 31 USC § 5336(b)(2).

¹² 31 USC §§ 5336(b)(1)(A), (B), and (C).

¹³ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69951 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

¹⁴ 31 USC § 5336(b)(5).

On December 8, 2021, FinCEN proposed and requested comments on the Proposed Rule for the implementation for the BOI reporting under the CTA.¹⁵ The Proposed Rule proposed regulations regarding the content and timing of initial, updated, and corrected CTA reports, among other matters.¹⁶ The comment period ends February 7, 2022.

DISCUSSION

Protect Small Businesses with One Effective Date for All Regulations

FinCEN should not make the Proposed Rule effective until CTA completes its review of the Proposed Rule and promulgates all additional CTA regulations. This is crucial to protecting small businesses from potentially conflicting CTA regulations and additional compliance costs each time a new CTA regulation is released. It bears repeating that based on FinCEN's own analysis, all reporting companies will be small businesses. The Proposed Rule's supplementary information states that "FinCEN assumes that all entities estimated to be reporting companies are small, for purposes of this analysis."¹⁷ The supplementary information further states that "FinCEN estimates that there are approximately 25 million existing reporting companies and 3 million new reporting companies formed each year."¹⁸ Piecemeal adoption of CTA regulations will only increase the burden on small businesses.

To ease the burden, the effective date of this Proposed Rule should be no sooner than the date on which all other CTA regulations are ready for implementation. In the Proposed Rule FinCEN states as follows:

FinCEN intends to issue three sets of rulemakings to implement the requirements of Section 6403: A rulemaking to implement the beneficial ownership information reporting requirements, a second to implement the statute's protocols for access to and disclosure of beneficial ownership information, and a third to revise the existing CDD Rule, consistent with the requirements of section 6403(d) of the CTA. In this proposed rule, however, FinCEN seeks comments only on the first—the proposed regulations that would implement the reporting requirements of Section 6403.¹⁹

¹⁵ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010), (Docket Number FINCEN-2021-0005 and RIN 1506-AB49), <https://www.federalregister.gov/documents/2021/12/08/2021-26548/beneficial-ownership-information-reporting-requirements>.

¹⁶ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69969 - 69974 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

¹⁷ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69951 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

¹⁸ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69951 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

¹⁹ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69921 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

Thus, under its current plan FinCEN must promulgate at least two additional rules prior to the full implementation of CTA regulations. It is likely that the access and disclosure regulations will have at least some overlap or effect on the Proposed Rule. Before FinCEN collects BOI from small businesses it should promulgate regulations regarding control and access to the beneficial ownership information. Certainly, FinCEN should not collect the information before processes are in place to protect and share the information. Before FinCEN collects the beneficial ownership information from small businesses FinCEN should also amend its customer due diligence (CDD) rule. The CDD rule regards beneficial ownership information verified by financial institutions. The amended CDD rule may also affect the Proposed Rule and reduce the burden of the CTA on small businesses.

Furthermore, FinCEN must do additional analysis before effectuating the Proposed Rule. The CTA requires that in promulgating BOI reporting regulations FinCEN must establish state and tribal partnerships.²⁰ FinCEN considered some partnership options but “continues to consider whether there are feasible opportunities to partner with state authorities on the BOI reporting requirement.”²¹ FinCEN must also complete an initial regulatory flexibility analysis of the Proposed Rule pursuant to the Regulatory Flexibility Act.²²

Protect Small Businesses with Minimal Burdens and Privacy Protections

The Proposed Rule could better minimize the CTA burden on small businesses. The CTA requires that FinCEN minimize burdens.²³ For example, the Proposed Rule requires small businesses to scan beneficial owner identification documents and provide the documents to FinCEN. Not only does this cause concern for the privacy of Utah’s citizens who may be required to scan and provide copies of their driver license or passport to FinCEN, but FinCEN does not provide sufficient justification for why this burden should be imposed on small businesses. FinCEN’s argument that this would serve as a “highly useful” database does not outweigh the privacy and regulatory burdens on small businesses.

FinCEN also seeks additional information from small businesses that is not required by statute. Rather than decreasing the burden on small businesses as required by statute, the Proposed Rule would increase the burden by requiring additional information about the business. In addition to reporting BOI, the Proposed Rule requires small businesses to report business names, trade names, addresses, and unique numbers identifying the business.²⁴ FinCEN is also considering requiring small businesses to specify whether a beneficial owner falls under the “ownership interests” or “substantial control.” Small businesses may be required to engage legal or accounting professionals to ensure compliance with reporting. FinCEN’s argument that such reporting would “enhance the utility of the database” does not justify the Proposed Rule’s

²⁰ 31 USC § 5336(b)(1)(F).

²¹ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69950 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

²² Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69951 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

²³ 31 USC § 5336(b)(1)(F).

²⁴ 31 CFR 1010.380(b)(1).

attempt to seek information not required by statute and that would substantially increase the burden on small businesses.²⁵

In addition, the Proposed Rule requires a TIN, or if the small business does not have a TIN, a Dun & Bradstreet Data Universal Numbering System (DUNS) number or a Legal Entity Identifier (LEI). This presents an additional, unnecessary burden on the reporting company that is not required by the CTA. While FinCEN describes this as a “limited burden,”²⁶ small businesses often struggle in simply obtaining EIN or TIN numbers.

The Proposed Rule requires that the reporting company submit the reporting within fourteen (14) days after formation.²⁷ This is an unreasonably short timeframe given normal periods for states to process corporate filings; it does not account for any unforeseen delays, nor situations where the effective date of the corporate filing is intentionally delayed. By requiring the initial filing within 14 days, many small businesses may be unable to comply. The deadline should be at least six (6) months.

Minimize States’ Indirect Costs

FinCEN acknowledges that the Proposed Rule will create indirect costs for states, local and Tribal governments.²⁸ The costs will be substantial and the State of Utah objects to what amounts to an unfunded mandate. The Utah Department of Commerce already provides customer support for individuals trying to file corporate and other documents. Given that small businesses often rely on customer support in connection with corporate filings, it is anticipated that the Department of Commerce customer service agents will spend a considerable amount of additional time responding to CTA compliance questions and additional staff will be needed to cover the increased customer service calls. While the Proposed Rule indicates that FinCEN has a “call center,”²⁹ we respectfully request that FinCEN provide dedicated support to relieve the states of this regulatory burden.

The states will also incur costs when providing the notice required by CTA.³⁰ The Proposed Rule indicates that “[t]he provision of these funds depends on availability of appropriations.”³¹ FinCEN should provide a mechanism for reimbursing the states for these substantial costs and provide dedicated customer service for applicants, reporting companies, and beneficial owners.

²⁵ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69931 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

²⁶ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69932 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

²⁷ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69941 and 66970 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

²⁸ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69949 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

²⁹ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 69955 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

³⁰ 31 USC § 5336(e).

³¹ Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920 n.202 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).

CONCLUSION

FinCEN should not increase the burdens to Utah's small businesses by making the Proposed Rule effective before completing its review and promulgating other CTA regulations. FinCEN acknowledges "that small businesses would be substantially impacted by the proposed rule."³² Utah's small businesses are already dealing with staffing shortages, inflation, and the adverse effects of the Covid-19 virus. To make the Proposed Rule effective sooner would place the costs and burdens of compliance with piecemeal regulations squarely on small businesses.

FinCEN should also comply with the mandate of minimizing the burdens caused by the Proposed Rule. FinCEN can do this by setting realistic filing deadlines and documentation requirements, and by protecting the privacy of small business owners.

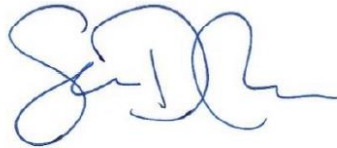
Finally, FinCEN must plan for the costs that states will incur and provide ways for those costs to be borne by the federal government.

Thank you for the opportunity to provide comments. If you have any questions, please contact the Office of the Governor for the State of Utah, Utah Attorney General, Utah Department of Commerce, the Utah Office of State Treasurer, or the Utah Office of the State Auditor.

Respectfully submitted,



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³² Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 69920, 699451 (proposed December 8, 2021) (to be codified at 31 C.F.R. Part 1010).