[CSBS Letter re: Proposed FinCEN Rulemaking on Beneficial Ownership Information Reporting Requirements]

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Financial Crimes Enforcement Network ("FinCEN")
Policy Division
P.O. Box 39
Vienna, VA 22183
FINCEN-2021-0005
RIN 1506-AB49

Re: *Advance Notice of Proposed Rulemaking - Beneficial Ownership Information Reporting Requirements*

Dear Sir or Madam,

The Conference of State Bank Supervisors ("CSBS")[1] appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking ("ANPR" or "Notice") issued by the Financial Crimes Enforcement Network ("FinCEN") titled "Beneficial Ownership Information Reporting Requirements." CSBS appreciates FinCEN soliciting public comment on questions pertinent to the implementation of the Corporate Transparency Act (the "CTA").

The enactment of the CTA represents a pivotal moment in the fight against money laundering and terrorist financing in the United States and will help bring the United States into compliance with international anti-money laundering ("AML") and countering the financing of terrorism ("CFT") standards. In particular, by amending the Bank Secrecy Act ("BSA") to require corporations, limited liability companies, and other similar entities to disclose their beneficial owners and other information, Section 6403 of the CTA will help prevent malign actors from leveraging anonymity to hide illicit activity from law enforcement and other governmental authorities. For this reason, CSBS's members, state banking and financial regulators (hereinafter "state regulators"), strongly support the core mission and purpose of the CTA.

Given their role in the supervision of state-chartered banks and state-licensed nonbank financial institutions for compliance with BSA/AML requirements, state regulators also have a significant stake in the effective implementation of the CTA. As a result, this letter addresses issues pertaining to the implementation of the CTA and the role of state regulators in the new framework for the reporting, maintenance, and disclosure of beneficial ownership information established by the CTA. As explained below, CSBS believes that:

- State bank regulators and, to the extent possible, state nonbank financial regulators should be classified, in regulation, as an "appropriate regulatory agency" eligible to make a request to access beneficial ownership information; and
- FinCEN should consult with appropriate state regulators in the development of regulations implementing the CTA.

State Regulators Should be Deemed "Appropriate Regulatory Agencies" Eligible to Request Access to Beneficial Ownership Information

The CTA generally requires a reporting company to submit to FinCEN information that identifies the beneficial owners and applicants of the reporting company (collectively, the "beneficial ownership information"). The CTA requires FinCEN to maintain the reported beneficial ownership information in a secure, non-public database for a certain amount of time and generally prohibits the unauthorized disclosure of such information. The CTA authorizes FinCEN to disclose beneficial ownership information upon receipt of a request, through appropriate protocols, from certain federal and state governmental authorities.

One category of authorized access to beneficial ownership information from the FinCEN database involves "a request made by a Federal functional regulator or other appropriate regulatory agency."[2] The ANPR specifically requests comment on how the term "appropriate regulatory agency" should be interpreted as well as whether and how it should be defined by regulation. For the reasons set out below, state regulators believe that the term should be defined by regulation to include state bank regulators, and, to the extent possible, state nonbank financial regulators as well.

The CTA directs FinCEN to promulgate a regulation governing the form and manner in which information shall be provided to financial institutions which are authorized to request and access such information pursuant to the CTA, namely, financial institutions subject to customer due diligence ("CDD") requirements.[3] The CTA further directs that such regulation "shall include that the information shall also be available to a Federal functional regulator or other appropriate regulatory agency, as determined by the Secretary" and that such requesting agencies shall be authorized to access such information provided certain conditions are met.[4]

Clearly, then, the regulation must at least provide that "other appropriate regulatory agencies, as determined by the Secretary" are eligible to request access to beneficial ownership information. Importantly, the Secretary's determination that a type of regulatory agency qualifies as an "appropriate regulatory agency" eligible to request access to beneficial ownership information does not mean that any particular request made by an agency of that type will be granted. Rather, the agency must satisfy the conditions placed on authorized access prior to a request to access beneficial ownership information being granted.

Additionally, in granting the authority to reject requests for access to beneficial ownership information and to suspend or debar a requesting agency from further access for failure to comply with information safekeeping protocols, the CTA eschews any implication that the Secretary's determination as to whether an agency is an "appropriate regulatory agency" must be made on a case-by-case basis by focusing on whether the agency satisfies the conditions placed on authorized access. Accordingly, state regulators believe that it would be most expeditious for the regulation to identify the types or categories of regulatory agencies which the Secretary determines to be "appropriate regulatory agencies" so that such agencies have sufficient notice that they are eligible to make a request to access to such information.

Moreover, we believe that "appropriate regulatory agencies" should be interpreted and defined by regulation to include state bank regulators, and to the extent possible, state nonbank financial regulators as well. Although the CTA sets forth various conditions on authorized access, these conditions do not define what constitutes an "appropriate regulatory agency" any more than they define what constitutes a "Federal functional regulator".

Indeed, the conditions pertaining to using the information for appropriate purposes and entering into an agreement providing for protocols to safeguard the information assume that the agency has already been determined to be an appropriate regulatory agency eligible to request access.[5]

Although not definitional in nature, one of the conditions—that the agency must be legally authorized to determine the compliance of a financial institution with CDD requirements[6]—is instructive as to the intended meaning of "appropriate regulatory agency" given that an agency which fails to satisfy this condition would be incapable of using the information provided in the manner authorized by the CTA. Accordingly, state regulators believe it is appropriate to identify, in regulation, categories of regulatory agencies which qualify as "appropriate regulatory agencies" because such agencies are legally authorized to regulate and supervise financial institutions subject to customer due diligence requirements for compliance with such requirements.

Clearly, when interpreted in this manner, state bank regulators (or "state bank supervisors" as they are referred to in various parts of the Anti-Money Laundering Act of 2020 ("AMLA")[7]) would fall within the meaning of "appropriate regulatory agency". State bank regulators charter and supervise state nonmember banks and state member banks, both of which qualify as "financial institutions".[8] State banks are clearly subject to customer due diligence requirements as they are covered by the CDD rule as well as the other pillars of BSA/AML.[9] Additionally, state bank regulators are authorized under applicable law to supervise state banks for compliance with the CDD rule as with other BSA/AML requirements. Therefore, state bank regulators should be classified, in regulation, as an appropriate regulatory agency to which a request for authorized access to beneficial ownership information can be granted, provided they satisfy the conditions placed on authorized access.

Moreover, to the extent that FinCEN interprets the "customer due diligence requirements" to which a financial institution must be subject to be authorized to access beneficial ownership information as not only including the CDD rule itself but other BSA/AML requirements as well, then we believe that state nonbank financial regulators should also be identified, in regulation, as another type of "appropriate regulatory agency". While nonbank financial institutions, such as money service businesses ("MSBs"), are generally not covered by the CDD rule itself, they are certainly "financial institutions"[10] and they are subject to "customer due diligence requirements" in the broader sense of the term.

As FinCEN has itself noted, beneficial ownership identification and verification is only one of the four "core elements of customer due diligence"[11]. MSBs are clearly subject to the other core elements, including customer identification and verification as well as suspicious activity reporting requirements. Similarly, Congress clearly envisioned that the reporting of beneficial ownership information to FinCEN and its accessibility and use by financial institutions and regulatory agencies was not intended to facilitate compliance solely with the CDD rule itself, but also with AML and CFT requirements.[12]

It is worth emphasizing that, in many cases, state nonbank financial regulators are the only governmental authorities with the authority to regularly examine the nonbank financial institutions within their jurisdiction. As of year-end 2020, approximately 27,700 nonbank financial institutions were licensed and regulated by state regulators. Such institutions conduct a significant amount of financial activity; MSBs, for instance, processed approximately $1.5 trillion in payments over the course of 2020. Due to the large volume of activity within the jurisdiction of state regulators, Congress has traditionally relied on state regulators to examine nonbank financial institutions for compliance with AML requirements.[13]

Therefore, if FinCEN interprets "financial institution subject to customer due diligence requirements" as not solely referring to "covered financial institutions" under the CDD rule, then we request that FinCEN classify, in regulation, certain types of state nonbank financial regulators, such as state MSB regulators, as an "appropriate regulatory agency" to which a request for authorized access to beneficial ownership information can be granted

provided they satisfy the conditions placed on authorized access.

FinCEN Should Thoroughly Consult with State Regulators in the Development of CTA Implementing Regulations

In addition to being identified, in regulation, as "appropriate regulatory agencies" eligible to request access and use of beneficial ownership information, CSBS also believes that FinCEN should thoroughly consult with state bank regulators early and often in the process of developing the regulations to implement the CTA for several legal and practical reasons.

In directing FinCEN to take various implementation actions (e.g., producing reports, developing guidance and regulations), numerous provisions in the AMLA (of which the CTA is a part) require that such actions be undertaken in consultation with state banking and financial regulators, their representatives, or an interagency forum on which state regulators are represented, such as the Federal Financial Institutions Examination Council ("FFIEC"). At the outset, it is worth noting that, by including such consultation requirements, Congress clearly intended that there be a level of engagement and collaboration between FinCEN and state regulators beyond FinCEN simply gathering feedback from state regulators through the rulemaking process given that state regulators could engage in the public notice-and-comment process had Congress not established any consultation requirement at all.

One of the state regulator consultation requirements imposed by the AMLA governs the implementation of the CTA, namely, the requirement imposed by Section 6301 for "improved interagency consultation and coordination." Section 6301 provides in pertinent part that:

"[t]he Secretary of the Treasury shall, as appropriate, invite an appropriate State bank supervisor . . . to participate in the interagency consultation and coordination with the Federal depository institution regulators regarding *the development or modification of any rule or regulation carrying out this subchapter*."[14]

The "subchapter" referred to here is Subchapter II of Chapter 53 of Title 31 of the U.S. Code. The CTA is likewise codified in Subchapter II, specifically, 31 U.S.C. 5336. Accordingly, the regulations promulgated by FinCEN pursuant to the CTA to establish a framework for the reporting, maintenance, and disclosure of beneficial ownership information are rules or regulations "carrying out this subchapter" and thus are subject to the consultation and coordination requirements of Section 6301.

The "appropriate State bank supervisor" is defined for purposes of 6301 to mean the Chairman or members of the State Liaison Committee ("SLC") of the FFIEC.[15] By way of background, the SLC consists of five representatives from state regulatory agencies that supervise financial institutions and the Chairman of the SLC is a voting member of the FFIEC.[16] The SLC members are appointed by CSBS, the American Council of State Savings Supervisors (ACSSS), and the National Association of State Credit Union Supervisors (NASCUS) and these organizations facilitate the SLC's participation in FFIEC matters on an ongoing basis.

Section 6301 generally provides that the SLC chair or its members should be invited to participate in interagency consultation and coordination efforts undertaken by FinCEN with the "Federal depository institution regulators" in developing certain rules and regulations which, like the CTA, carry out subchapter II. "Federal depository institution regulators" is defined to mean "a member of the [FFIEC] to which is delegated any authority of the Secretary under [31 U.S.C. 5318(a)(1)]."[17] The members of the FFIEC to which authority has been delegated pursuant to 31 U.S.C. 5318(a)(1) are the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration Board—every federal member of the FFIEC except the Consumer Financial Protection Bureau.[18]

Therefore, Congress intended that, in implementing the CTA, FinCEN would consult with the SLC Chairman and/or SLC members in developing such implementation regulations by inviting them to participate in interagency deliberations regarding the developments of such regulations when the deliberations include FFIEC federal agency members. While, of course, Section 6301 reserves a certain amount of discretion as to the form and manner of such interagency consultations, clearly, if FinCEN is engaged in collective interagency discussions regarding the development of regulations covered by Section 6301 with all the relevant FFIEC member agencies except the SLC, that would certainly not live up to the spirit of robust and thorough consultation and coordination intended by Section 6301 and the AMLA more broadly.[19]

Even if FinCEN were not legally required to consult with state bank regulators in developing CTA implementing regulations, practical realities counsel in favor of doing so. FinCEN already regularly coordinates with state regulators in applying other BSA/AML requirements to state-regulated financial institutions and information sharing safeguards and protocols are in place to enable such coordination. The CTA may require entering into additional agreements with potentially new protocols and procedures to enable state bank regulators (and, as discussed above, potentially state nonbank financial regulators as well) to obtain authorized access to requested beneficial ownership information.

State regulators believe it would be most appropriate to obtain an understanding early on in the implementation process as to what the protocols for safeguarding beneficial ownership information may require of state regulators so that state regulators may begin making any requisite adjustments to their internal processes and procedures well in advance of the effective date of any CTA implementing regulation. Therefore, on practical grounds as well, state regulators strongly encourage FinCEN to engage in a robust consultation process with appropriate state regulators regarding the implementation of the CTA.

Conclusion
CSBS appreciates the opportunity to comment on the ANPR to provide the perspective of state bank and nonbank financial regulators with respect to certain issues pertinent to the implementation of the CTA. As explained herein, state regulators believe that state bank regulators and, to the extent possible, state nonbank financial regulators should be classified, in regulation, as an “appropriate regulatory agency” eligible to make a request to access beneficial ownership information reported to FinCEN pursuant to the CTA. Additionally, state regulators believe that FinCEN should coordinate and consult with appropriate state regulators in the development of regulations implementing the CTA for both legal and practical reasons. State regulators strongly support the purposes of the CTA and look forward to playing an important role as we work collaboratively with FinCEN and our other federal counterparts in achieving its mission.

Sincerely,

John Ryan
President & CEO

Footnotes

[1] CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.

[2] 31 U.S.C. 5336(c)(2)(B)(iv), added by CTA Section 6403(a) (emphasis added).
[3] See 31 U.S.C. 5336(c)(2)(C), added by CTA Section 6403(a).
[4] Id. In particular, the agency (1) must be "authorized by law to assess, supervise, enforce, or otherwise determine the compliance of the financial institution with" CDD requirements; (2) must "use the information solely for the purpose of conducting the assessment, supervision, or authorized investigation or activity" in determining the compliance of a financial institution with CDD requirements; and (3) must "enter[] into an agreement . . . providing for appropriate protocols governing the safekeeping of the information." 31 U.S.C. 5336(c)(2)(C)(i)-(iii), added by CTA Section 6403(a).
[5] 31 U.S.C. 5336(c)(2)(C)(i)-(ii), added by CTA Section 6403(a).
[6] 31 U.S.C. 5336(c)(2)(C)(iii), added by CTA Section 6403(a).
[7] See, e.g., AMLA Section 6003(8).
[8] See AMLA Section 6003(5). See also 31 U.S.C. 5312(a)(2).
[9] See 31 C.F.R. 1010.230(f) (incorporating by reference definition of "financial institution" in 31 C.F.R. 1010.605(e)(1)).
[10] See 31 U.S.C. 5312(a)(2)(R).
[11] 81 Fed. Reg. 29398 (May 11, 2016).
[12] See, e.g., CTA Section 6402(6)(B).
[13] See, e.g., 31 U.S.C. 5318(a)(6) (authorizing FinCEN to rely on examinations of financial institutions conducted by a state supervisory agency); 31 U.S.C. 5311 note (Money Laundering Suppression Act of 1994 urging States to enact uniform laws to license and regulate MSBs to prevent money laundering).
[14] 31 U.S.C. 5318(q)(1), added by AMLA Section 6301.
[15] 31 U.S.C. 5318(q)(3)(A), added by AMLA Section 6301.
[16] See 12 U.S.C. 3303(a), 3306.
[17] 31 U.S.C. 5318(q)(3)(E), added by AMLA Section 6301.
[18] See 31 C.F.R. 1010.810(b). See also 12 U.S.C. 3303(a).
[19] See, e.g., 31 U.S.C. 5336(d), added by CTA Section 6403(a) (encouraging coordination with state agencies to the greatest extent practicable).

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