

To: Members of the Committee on Financial Services

From: Financial Services Majority Staff

Date: July 18, 2023

Subject: Subcommittee on National Security, Illicit Finance, and International Financial Institutions Hearing Entitled “Potential Consequences of FinCEN’s Beneficial Ownership Rulemaking.”

On Tuesday, July 18, 2023, at 2:00pm in Room 2128 of the Rayburn House Office Building, the Subcommittee on National Security, Illicit Finance, and International Financial Institutions will hold a hearing entitled “Potential Consequences of FinCEN’s Beneficial Ownership Rulemaking” The following individuals will testify:

- Kevin Kuhlman (Cool-Man): Vice President, National Federation of Independent Business (NFIB)
- Jim Richards: Founder and Principal, RegTech Consulting LLC
- Pete Selenke: Vice President and Anti-Money Laundering/Bank Secrecy Act Officer, Central Bank (Jefferson City, MO)
- Gary Kuhlman (Cal-Man): Executive Director, Transparency International US

Background

This hearing will give Members of the Financial Services Committee (Committee) the opportunity to hear from key witnesses who can highlight issues with the Financial Crimes Enforcement Network (FinCEN)’s Beneficial Ownership Rulemaking and the unintended consequences that may arise if FinCEN does not properly educate small businesses on the upcoming beneficial ownership information (BOI) reporting rule. The hearing will examine the new beneficial ownership reporting obligation prescribed by the Corporate Transparency Act (CTA) and how FinCEN made the decision to deviate significantly from Congress’ intent when crafting proposed and final BOI rules. The BOI reporting regime regulations go into effect on January 1, 2024.

Corporate Transparency Act (CTA)

On January 1, 2021, Congress enacted the William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021 (FY21). Division F of the FY21 NDAA, also known as the Anti-Money Laundering Act of 2020 (AMLA), made significant reforms to the U.S. anti-money laundering (AML) regime. Division F includes AMLA as well as the Corporate Transparency Act (CTA).

AMLA sought to strengthen, modernize, and streamline the existing AML regime. In addition, AMLA directs FinCEN to work closely with regulatory, national security, and law enforcement to identify risks and priorities, as well as provide feedback to industry partners.

The CTA is intended to target terrorists and other bad actors set up corporate or small business structures to move “dirty” money through the U.S. financial system. Both domestic and foreign companies that are registered to do business in the U.S. are subject to the CTA regulations and could face civil and criminal penalties if they do not comply with the BOI regulations.

As laid out by FinCEN, BOI information is to be disclosed and updated via an electronic report that will be accessible and maintained by FinCEN. This IT system is known as the Beneficial Ownership Secure System (BOSS).¹ Companies formed on or after the January 1, 2024, effective date will be required to report BOI information 30 calendar days after registering with a secretary of state, whereas companies formed prior to the effective date will have until January 1, 2025 to report.² The CTA requires each agency requesting BOI from the BOSS system to certify that a permanent, auditable system of records has been established and will be maintained. The records will describe: each request, how the information is used, and how the beneficial ownership information is secured.

Financial Crimes Enforcement Network (FinCEN)

FinCEN was first established in 1990 as an office within Treasury by order of the Secretary of the Treasury.³ Congress later codified the framework and mandate for FinCEN in 31 U.S.C. § 310. The statutory mandate for the new office was to analyze financial data and provide strategic support to law enforcement authorities.

FinCEN’s current mission is “to safeguard the financial system from illicit use, combat money laundering, and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.”⁴ It accomplishes this mission by identifying the flow of financial resources to terrorists, terrorist organizations, money launderers, and other criminal elements through intelligence analysis and sharing the lead data it develops with relevant law enforcement, intelligence community, and international partners for investigation and disruption.

Under the negotiated CTA, FinCEN is authorized to collect and disclose the information that is reported pursuant to the CTA to authorized government authorities and financial institutions.⁵ This information can provide critical data to “law enforcement, national security agencies, and others to help prevent criminals, terrorists, proliferators, and corrupt oligarchs from hiding illicit money or other property in the United States.”⁶

¹ <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>.

² *Id.*

³ <https://www.govinfo.gov/content/pkg/USCODE-2010-title31/html/USCODE-2010-title31-subtitleI-chap3-subchapI-sec310.htm>.

⁴ FinCEN, Mission, <https://www.fincen.gov/about/mission>.

⁵ <https://www.fincen.gov/boi>.

⁶ *Id.*

Beneficial Ownership Definitions and Reporting Requirements Effective January 1, 2024

Reporting Companies

According to FinCEN, the BOI regulation identifies two types of reporting companies: domestic and foreign. A domestic reporting company is a corporation, limited liability company (LLC), or any entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe. A foreign reporting company is a corporation, LLC, or other entity formed under the law of a foreign country that is registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office.

Reporting companies will primarily fall within the following categories: limited liability partnerships, limited liability limited partnerships, business trusts, and most limited partnerships, in addition to corporations and LLCs. Furthermore, FinCEN notes that the definition of reporting company applies only to legal entities that have 20 or fewer employees and less than \$5 million in gross receipts or sales as reflected in the previous year's federal tax returns.⁷

Beneficial Ownership

Under the regulation, reporting companies must identify and report their beneficial owners to FinCEN on or after the January 1, 2024, effective date. According to FinCEN, the final rule defines a “beneficial owner,” with respect to a reporting company, as “any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company.”⁸

Reporting Company Information

According to FinCEN, a reporting company will need to provide: (1) its legal name and any trade name or DBA; (2) its address; (3) the jurisdiction in which it was formed or first registered, depending on whether it's a U.S. or foreign company; and (4) its Taxpayer Identification Number (TIN). For each of the company's beneficial owners and each company applicant (if required), the company is required to provide the individual's: (1) legal name; (2) birthdate; (3) address (in most cases, a home address); and (4) an identifying number from a driver's license, passport, or other approved document for each individual, as well as an image of the document that the number is from.⁹

According to FinCEN, there will be approximately 32.6 million reporting companies in Year 1, and 5 million additional reporting companies in each of the years 2-10. Furthermore, FinCEN estimates that the total cost of filing BOI reports is approximately \$22.7 billion in the first year and \$5.6 billion in the years after.¹⁰

⁷ 87 FR 59529

⁸ 31 CFR 1010.380(d)(1)

⁹ <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>.

¹⁰ <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements#footnote-257-p59562>.

Legislation For Consideration

1. **H.R. 4035: “Protecting Small Business Information Act of 2023” (Rep. McHenry)**
 - a. This legislation will protect small businesses' sensitive information and Americans' privacy by delaying the effective date for the upcoming beneficial ownership information (BOI) reporting requirements, which is currently January 1, 2024, until FinCEN finalizes both the Access Rule, and the CDD Congruence Rule.
2. **H.R. _____: “Protect Small Business & Prevent Illicit Financial Activity Act of 2023” (Rep. Nunn)**
 - a. This legislation reverts the FinCEN beneficial ownership filing deadline for existing small businesses to the statutorily mandated two years after the effective date of the regulation for initial filing. Additionally, it extends the filing deadline for updating beneficial ownership for registered small businesses to 90 days, which was shortened to 30 days during FinCEN's rulemaking process. Finally, this legislation closes a loophole created by FinCEN's filing form notice and comment that would allow a reporting company to obfuscate its beneficial owners.
3. **H.R. 3244: “Stop Fentanyl Money Laundering Act of 2023” (Rep. Luetkemeyer)**
 - a. This legislation allows the Treasury Department to utilize its existing special measure authorities to target and thwart the money laundering facilitating Fentanyl trafficking in foreign jurisdictions. It also provides law enforcement with streamlined and updated Suspicious Activity Reports to follow the money of narcotics trafficking. Additionally, the bill requires FinCEN to provide critical information on the usefulness of the SAR updates.
4. **H.R. _____: “Iran-China Energy Sanctions Act of 2023” (Rep. Lawler)**
 - a. This legislation would require sanctions on Chinese financial institutions for conducting transactions involving China's purchases of Iranian petroleum. In March, Chinese imports of Iranian crude rose to 800,000 barrels day, a 20 percent month-on-month increase. Under current law, the President must prohibit or restrict correspondent or payable-through accounts of foreign financial institutions that carry out “significant financial transactions” with Iranian banks. These are commonly known as secondary sanctions. The Iran-China Energy Sanctions Act stipulates that any transaction by a Chinese financial institution involving the purchase of Iranian oil qualifies as a significant financial transaction, triggering U.S. sanctions. In addition, the bill requires the President to make an annual determination whether Chinese financial institutions are engaged in these sanctionable transactions.
5. **H.R. _____, “The INCSR Improvement Act” (Waters) –**
 - a. This bill would add optional "Improvements" sections to country listings in the Money Laundering volume of the International Narcotics Control Strategy Report (INCSR), issued annually by the Department of State. It would also add Treasury to the report's consultative agencies.

6. **H.R. _____, “Foreign Affiliates Sharing Pilot Program Extension Act”** (Garcia [TX])
 - a. This bill would change the tolling date of the referenced anti-money laundering pilot program from three years after the date of enactment (January 1, 2021) to three years after the date that the Secretary of the Treasury actually starts the program.
7. **H.R. _____, “Combatting Foreign Surveillance Spyware Sanctions Act”** (Himes)
 - a. This bill would impose sanctions on individuals and entities who directly or indirectly facilitate spyware, including spyware that could enable the targeting of United States Government officials or personnel of the intelligence community.
8. **H.R. _____, “Russia and Belarus Financial Sanctions Act”** (Sherman)
 - a. This bill would require a U.S. financial institution to ensure any entity or person owned or controlled by such institution comply with U.S. financial sanctions applicable to Russia or Belarus to the same extent required of that institution.