Statement by

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Hearing on "Potential Consequences of FinCEN's Beneficial Ownership Rulemaking"

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Chairman Luetkemeyer, Ranking Member Beatty, and distinguished Members of the Committee. Thank you for the invitation to appear before you today to discuss the potential consequences of FinCEN's beneficial ownership rulemaking.

Introduction

My name is Jim Richards. For the last five years I have been the principal and founder of RegTech Consulting LLC, a private consulting firm focused on providing advice on all aspects of financial crimes risk management to AML software providers, financial technology start-ups, mid-size banks, and money services businesses. I am also a Senior Advisor to one of the leading providers of fraud detection and BSA/AML collaboration software for financial institutions in North America and serve on the board of advisors for two providers of financial crimes compliance technologies and services. The names of these firms are disclosed in my Truth in Testimony disclosure form.

For thirteen years- from 2005 through April 2018- I served as the BSA Officer and Director of Global Financial Crimes Risk Management for Wells Fargo. As BSA officer, I was responsible for governance, training, and program oversight for BSA, anti-money laundering (AML), countering the financing of terrorism (CFT), and sanctions for Wells Fargo's global operations. As Director of Global Financial Crimes Risk Management, I was responsible for BSA, AML, counter-terrorist financing (CTF), external fraud and internal fraud and misconduct investigations, the identity theft prevention program, global sanctions, financial crimes analytics, and high-risk customer due diligence. I retired from Wells Fargo in April 2018.

Prior to my role with Wells Fargo, I was the AML operations executive at Bank of America where I was responsible for the operational aspects of Bank of America's global AML and CTF monitoring, surveillance, investigations, and related SAR reporting.

I represented Bank of America and Wells Fargo as a three-term member of the BSA Advisory Group (BSAAG). I was also a founding board member of ACAMS and the AFCFS.

Prior to my 20-year career in banking, I was a prosecutor in Massachusetts, a barrister in Ontario, Canada, and a Special Constable with the Royal Canadian Mounted Police. I am the author of "Transnational Criminal Organizations, Cybercrime, and Money Laundering" (CRC Press 1998). I earned a Bachelor of Commerce (B.Comm.) degree and Juris Doctorate (JD) from the University of British Columbia.

Background and need for the AML Act and Corporate Transparency Act

In order to discuss the potential consequences of FinCEN's beneficial ownership rulemaking, it is necessary to step back and review the background and need for the AML Act of 2020 and the Corporate Transparency Act.

The US AML regime began more than fifty years ago in October 1970 with the passage of what we now refer to as the Bank Secrecy Act. The framework created then – keeping certain records and providing certain reports that had a high degree of usefulness to law enforcement – has, as Secretary Yellen stated, been more or less the same ever since. But what has not been more or less the same has been the gradual shift over the last fifty years away from *what* the private sector was required to do and *why* – providing timely, actionable intelligence to law enforcement in order to protect our financial system – to *how* the private sector was to do that – a focus on managing ever-more detailed and onerous compliance program requirements. And as that fifty-year shift was occurring, the technology available to financial institutions was changing. And criminals and kleptocrats became more global, more sophisticated, and were able to react faster than the public and private sectors could act.

That fifty-year history of the shifting BSA/AML regime can be divided into six stages:

> Stage 1: 1970 – 1986 - The path forward was set – fighting financial crime through simple reporting and recordkeeping. The private sector's mission was clear; the roadmap was simple.
>
> Stage 2: 1986 – 2001 – The paths begin to diverge: compliance with program requirements, or fighting financial crime? The mission is muddied; the roadmap gets complicated.
>
> Stage 3: 2001 – 2004 – Post 9/11: some respite from the burgeoning compliance requirements with an almost singular focus on countering the financing of terrorism.
>
> Stage 4: 2005 – 2015 – The paths diverge with the emergence of the BSA Exam Manual era: building and documenting program compliance trumps AML/CFT. Rise of the prudential regulators and civil money penalties.
>
> Stage 5: 2016 – 2020 – The conversation shifts: derisking, financial inclusion, effectiveness, fintech, collaboration, innovation. There must be a better way.
>
> Stage 6: 2021 - ? – The AML Act of 2020 and Corporate Transparency Act are intended to usher in a new era and a clear path forward: corporate transparency, fighting financial crime with innovation, public/private sector information sharing and collaboration, cross-institutional investigations.

Prior to the passage of the AMLA2020, American AML/CFT laws had not changed in any material way since the USA PATRIOT Act of 2001. A generation of Americans has been born since then,

and a generation of American AML/CFT regulations and regulatory guidance and expectations, and private sector efforts to satisfy those regulations, guidance, and expectations, have failed to keep pace with the criminals and kleptocrats, and their professional enablers that have developed ever more sophisticated methods and networks. With ever-increasing AML/CFT program requirements, the private sector has become focused on, and adept at, managing the management of financial crimes risk management, and less focused on, and inept and ineffective at, fighting financial crime threats. Put another way, the public and private sector AML/CFT regime is stuck on managing the inputs to and outputs from its remarkably complex legislative and regulatory regime, with little positive impact on the desired outcomes – detecting, preventing, and mitigating the impacts of financial crime on our communities and country.

In the three generations since the BSA was first enacted, and in the generation since the Patriot Act, financial services have become more global, more mobile, and are being delivered by more diverse, and often unregulated (or regulated but poorly supervised) businesses. The criminals and kleptocrats and their professional enablers have also become more global and more sophisticated, and have used these changes to their advantage, knowing that laws and regulations to counter their nefarious doings have not kept pace. And even if state and federal law enforcement, intelligence agencies, and national security officials had the resources to effectively access and use the 20+ million BSA reports (including 3.5 million or more Suspicious Activity Reports (SARs)) that too few financial institutions file each year, the lack of feedback from those agencies to those filers has meant that those filers simply continue doing what they're doing - filing SARs – instead of doing what they should be doing – providing timely, actionable, meaningful intelligence to law enforcement, national security agencies, and intelligence agencies. Today, the private sector producers of SARs don't know which of those SARs the public sector consumers are using, or whether those SARs are fit for purpose. And the public sector appears to lack the means to provide that feedback.

But even if most of the program requirements and SAR filings were providing timely, actionable intelligence to law enforcement, and law enforcement was providing feedback on which SARs were effective and why, that intelligence and feedback would be undermined by the lack of corporate transparency, by shell companies, and by complex corporate organizations that criminals and kleptocrats have been able to hide behind. And this is a deadly serious problem: former Treasury Secretary Mnuchin described the lack of beneficial ownership information as a "glaring hole in our system" [1]. The 2020 National Strategy for Combating Terrorist and Other

[1] February 12, 2020, Senate Finance Committee on the President's Fiscal Year 2021 budget. At the 75:22 mark of the hearing, Senator Mark Warner (D. VA) began a series of statements and questions about the lack of beneficial ownership information. Senator Warner observed that the just-submitted (February 6th) 2020 National Strategy for Combating Terrorist and Other Illicit Financing – National Strategy – indicated that the number one vulnerability

Illicit Financing indicated that the number one vulnerability facing the U.S. efforts to combat terrorism, money laundering, and proliferation financing was the lack of beneficial ownership requirements at the time of company formation.[2] And a July 2016 report by Global Witness describes how the US system allowing for anonymous legal entity ownership puts our armed forces men and women at risk. The title of that report aptly describes the threat: "Hidden Menace: How Secret Company Owners are Putting Troops at Risk and Harming American Taxpayers".[3]

The AMLA 2020, and Title LXIV of the AMLA2020, the Corporate Transparency Act of 2020, seek to address all those weaknesses in our current AML/CFT laws, and to refocus the entire regime on addressing desired outcomes. Together, these new laws could usher in a new era for the American AML/CFT regime. But they need to be implemented. And Congress has left that to FinCEN. And FinCEN has not yet delivered.

Summary of Comments

My interest in corporate transparency and beneficial ownership in the context of fighting financial crime spans four decades. From the 1999 National Money Laundering Strategy that called for a study to provide recommendations to Treasury on "how to assure that [high risk] accounts are traceable to their beneficial interest holders", to the USA PATRIOT Act's provisions for imposing special measures (section 311) and for private banking due diligence (section 312). We saw the U.S. get buffeted in its 2006 FATF Mutual Evaluation results for failing to meet the requirements of the two beneficial ownership recommendations (R33 and R34, now R24 and R25). We saw multiple bills in both the Senate and House that sought to impose beneficial ownership information reporting, without success. All of this eventually led to the 2012 customer due diligence and beneficial ownership ANPRM, the 2014 NPRM, and the 2016 Final Rule. I recall working with then FinCEN Directors Jim Freis and later Jennifer Shasky-Calvery as the final beneficial ownership rule was developed and promulgated. I recall working with Wells Fargo's

facing the U.S. efforts to combat terrorism, money laundering, and proliferation financing was the lack of beneficial ownership requirements at the time of company formation. Senator Warren noted that "one of the key vulnerabilities identified in the report is the lack of a legally binding requirement to collect beneficial ownership at the time of company formation." At the 76:50 mark, the Senator posed the following question: "Mr. Secretary, do you agree that one of our most urgent national security and regulatory problems is that the US Government still has no idea who really controls shell companies?" At the 77:25 mark Secretary Mnuchin replied: "This is a glaring hole in our own system."

[2] The National Strategy - National Strategy - listed 10 vulnerabilities. In the "Vulnerabilities Overview" section (page 12), the first of the "most significant vulnerabilities in the United States exploited by illicit actors" was "the lack of a requirement to collect beneficial ownership information at the time of company formation and after changes in ownership."

[3] Global Witness report dated July 12, 2016 - Briefing_-_Hidden_Menace_-_12072016 (2).pdf

businesses, technology teams, compliance staff, and auditors as we worked to implement the beneficial ownership rule in time for its implementation on May 11, 2018.

I retired from Wells Fargo about one month before that implementation date. As I began my consulting business, my interest shifted to rumblings in Congress about creating a centralized registry of beneficial ownership information. I followed – and wrote about – Congressional deliberations and the final CTA as made into law on January 1, 2021. What struck me then was that so much of the AML Act of 2020, and the CTA specifically, was dependent on FinCEN – from writing rules to authoring Congressional reports to designing, building, testing, and running the beneficial ownership information database. What also struck me was the apparent frustration that some in Congress felt when it came to FinCEN. For example, Financial Services Committee Chairman McHenry appears to be particularly frustrated with FinCEN. Even before the passage of the AML Act, he expressed his concerns. The House Congressional Record from December 8, 2020 at pages H6932-6933 has the following from Rep. McHenry:

> *"... Division F requires the Director of FinCEN, who is responsible for implementing this reporting regime, to testify annually for five years. This testimony is critical. For far too long FinCEN has evaded any type of congressional check on its activities. Yet, it has amassed a great deal of authority. Now, Congress will shine a light on its operations. It is my expectation that FinCEN will provide Congress with hard data on its effectiveness in targeting bad actors, including the effectiveness of this new authority to collect, maintain, and use beneficial ownership information. One final comment about the importance of FinCEN's annual testimony. In the months leading up to the House's consideration of H.R. 2513 last October, I sought data from FinCEN and from the Treasury Department, along with the Department of Justice, to better understand the need for this legislation. No such data was forthcoming. Rather, FinCEN gave anecdotes of very scary stories to justify the need for a new reporting regime. It is my expectation that FinCEN will provide Congress with the necessary data to justify this new reporting regime and the burdens it is placing on legitimate companies."*

And the due dates that Congress imposed were clearly not attainable by FinCEN. As the years have dragged on – we are two and a half years into the CTA - it's become clear to me, and to many others, that FinCEN is struggling to meet its obligations.

Underlying my comments is FinCEN's years-long lament about lack of resources. FinCEN has a daunting and important mission – to safeguard the financial system – and Congress has placed upon FinCEN many critical responsibilities in safeguarding the financial system, everything from developing and enforcing the regulations for tens of thousands of private sector entities, receiving millions of reports (more than 20 million a year) intended to provide a high degree of

usefulness to government authorities, safeguarding those reports, and analyzing those reports and getting information back to over 6,700 federal, state, local, and tribal law enforcement agencies. With this daunting mission, and millions of reports to collect and analyze, tens of thousands of private sector entities to regulate, and thousands of law enforcement agencies to support, FinCEN must be a massive agency with an impressive budget. We know it's not. It has about 300 employees and a budget of about $190 million. For the last three fiscal years – since Congress imposed so many new obligations on FinCEN- FinCEN has asked for more employees and funding than Congress has appropriated. FinCEN's Acting Director has testified before Congress that the lack of resources is one reason, if not the main reason, why FinCEN is struggling to meet its AML Act and CTA obligations.

The Acting Director has testified about effort and intent, then offers that lack of resources is preventing FinCEN from getting things done.[4] These laments have been repeated in FinCEN's rulemakings. In its December 2022 proposed beneficial ownership information access and safeguards rule (87 FR 77404 at 77408), FinCEN wrote at length about its resource constraints:

> *"FinCEN continues to face resource constraints in developing and deploying the Beneficial Ownership IT System and efforts to put in place processes to support the collection and use of BOI. There are a myriad of areas that need additional investment, including additional personnel to support efforts beyond the initial build of the Beneficial Ownership IT System. These include efforts to provide clear and transparent guidance to reporting companies and authorized users of BOI, negotiating and implementing memoranda of understanding (MOUs) with domestic government agencies, reviewing requests for BOI and accompanying court authorizations from State, local, or tribal law enforcement agencies, auditing the handling and use of BOI, and enforcement activities."*
>
> *"FinCEN is particularly focused on providing adequate customer service resources for reporting companies in the first year and beyond as they file their BOI. FinCEN currently fields approximately 13,000 inquiries a year through its Regulatory Support Section, and approximately 70,000 external technical inquiries a year through the IT Systems Helpdesk. FinCEN has estimated that there will be approximately 32 million reporting companies in Year 1 of the reporting requirement and approximately 5*

[4] In his written statement for an April 28, 2021 House Committee on Financial Services hearing, AD Das noted that FinCEN's FY2022 budget was $160 million, FY2023 is $190.1 million, and it sought $228 million for FY2024. On June 22, 2023 the House Appropriations Committee approved the financial services appropriations budget for FY24. FinCEN's appropriations were $166 million, down from FY23 of $190.2 million. And the Committee put a rider on the use of the funds by "prohibiting funding for FinCEN to promulgate the beneficial ownership reporting rules that do not reflect Congressional intent." As to hiring to implement the Corporate Transparency Act, AD Das wrote that FinCEN has already filled 95 positions through direct hiring.

million new reporting companies each year thereafter. If 10 percent of those reporting companies have questions about the reporting requirement or the form, or technical issues when filing, that could result in upwards of 3 million inquiries in Year 1, and 500,000 per year after that. Without the availability of additional appropriated funds to support this project and other mission-critical services, FinCEN may need to identify trade-offs, including with respect to guidance and outreach activities, and the staged access by different authorized users to the database. FinCEN is currently identifying the range of considerations implicated by potential budget shortfalls and the trade-offs that are available and appropriate."

Six months later, we've heard nothing more about these proposed trade-offs.[5] In fact, FinCEN appears to be struggling to promulgate rules, and what rules are promulgated often go beyond what Congress intended and are remarkably complex. If the reason(s) why FinCEN is struggling to meet its mandate are resource constraints, it would be doing the *opposite* of what it is doing: it would be putting out simple, incremental rules (and proposed rules), adhering to Congressional intent, and acknowledging that it must keep things simple since it doesn't have the resources to do any more. For example, it would have stuck with the definition of beneficial owner that is in the current rule (up to 4 legal owners and one- only one- control person). Instead, it jazzed up the definition of legal owner to something only a New York lawyer can figure out, and allowed for as many control persons as there possibly could be.

And the complexity makes FinCEN's dire resource situation even worse: complex reporting and access rules means they need even more detailed guidance and even more people manning the help line(s).

There's no doubt some truth to FinCEN's lack of resources.[6] But we don't know whether it is, indeed, resource constraints that are the root of FinCEN's struggles to promulgate and implement the rules and systems needed to operationalize the CTA, or something else.

I'll pause here to address the likely concerns that I'm being too harsh on FinCEN. I don't have a personal grudge against FinCEN, its leadership, or the men and women that work there. I've personally met and even worked with many of the eleven FinCEN directors and acting directors,

[5] In the comments I submitted, I noted that FinCEN was estimating thirty-six times as many requests the first year and six times as many requests every year thereafter: if FinCEN has twenty people manning the Support Section and Help Desk today, it will need 720 people for 2024 and 120 people every year thereafter just to help reporting companies. FinCEN currently has approximately 300 employees.

[6] FinCEN has about 300 employees and a budget of approximately $190 million. It's Australian counterpart, AUSTRAC, has about 470 employees and a budget of approximately AUS$170 million. Both agencies share the same general mission. The Australian economy is roughly one-tenth that of the US economy, and the global reach of the Australian financial sector is a fraction that of the US financial sector. There appears to be an imbalance.

and dozens of FinCEN employees. They are as dedicated a group of public servants as any. But if FinCEN's mission is so critical – and it is- then we must be critical when that mission is not being fulfilled. My criticism comes from my frustration that we're having the same conversations and hearing the same gripes that we had twenty-five years ago. We could and should be doing better: FinCEN could and should be doing so much more. I trust that my criticism and comments are fair – harsh, perhaps, but fair – and I offer recommendations.

Prior to discussing the potential consequences of FinCEN's beneficial ownership rulemaking, I need to make two detours. The first is to the current beneficial ownership information reporting rule we have had operational for more than five years, but which remains, frankly, an unreported, unknown enigma. It's as if it doesn't exist. The second is to the AML Act and Corporate Transparency Act from which FinCEN's rulemaking originates. There are a few changes to both that Congress might consider.

I. The Current Beneficial Ownership Rule

Reporting beneficial ownership didn't begin with the CTA. It has been around for almost thirty years. In the mid-1990s there was a call for obtaining beneficial ownership information in the private banking space (Congressional hearings and the New York Fed's 1997 "Guidance on Sound Practices Governing Private Banking Activities") and for high-risk accounts (such as the 1999 National Money Laundering Strategy that called for a study to provide recommendations to Treasury on "how to assure that [high risk] accounts are traceable to their beneficial interest holders"). We saw beneficial ownership get picked up in the Patriot Act in 2001 (notably the second "Special Measure" in section 311 and for private banking due diligence in section 312). We saw the U.S. get buffeted in its 2006 FATF Mutual Evaluation results for failing to meet the requirements of Recommendations 33 and 34 (now R24 and R25). All of which led to the 2012 customer due diligence and beneficial ownership ANPRM, the 2014 NPRM, and the 2016 final rule.[7]

The 2016 beneficial ownership rule has been operational for more than five years (since May 2018). It requires legal entity customers of covered financial institutions to self-disclose their beneficial owners – up to four natural persons under what is known as the "ownership prong" and a single natural person who controls the entity – when they open an account. Financial institutions then are required to consider beneficial ownership information in its customer risk ratings and as it monitors for, identifies, investigates, and possibly reports suspicious activity.

[7] This six-year rulemaking timeline – from an advance notice in 2012 through a final rule in 2016 through to its implementation in 2018 – should be kept in mind as FinCEN goes through its AMLA and CTA rulemakings. FinCEN is two and one-half years into its AMLA/CTA rulemakings, and his finalized one of twelve required rules.

How many legal entity customers have provided beneficial ownership information since May 2018? We don't know. How is that information used to identify potential suspicious activity? We don't know. How often is that information used to report suspicious activity? We don't know. Does law enforcement rely on beneficial ownership information in its investigations? We don't know.

Although the current beneficial ownership rule was mentioned, it wasn't considered in any of the Congressional reports I read, nor was it discussed in any of the reported Congressional sessions leading up to the passage of the CTA. In fact, Title LXIV of the AMLA 2020 (the CTA) is titled "Establishing Beneficial Ownership Information Reporting Requirements". We already had established BOI reporting requirements – since May 2018 legal entity customers were required to report their beneficial owners to their banks. But we are replacing that existing rule without knowing whether the beneficial ownership information it provided gave any tactical or strategic value to law enforcement.

The table below illustrates some of the differences between the current CDD rule and the proposed BOI reporting requirements rule. The italics represents decisions made by FinCEN in the course of its rulemaking. There are real, substantive differences that may make the implementation of the BOI reporting rule more problematic than is needed to meet the goal of the rule: providing actionable intelligence to law enforcement and national security agencies while minimizing the burdens on small businesses.

Beneficial Ownership Information Attributes	Current CDD/BO Rule 31 CFR 1010.230	Final BO Reporting Rule 31 CFR 1010.380
Collection of information	*By financial institutions*	By FinCEN
Verification of BOI	*None*	None
Legal entities impacted	*16 exemptions*	24 exemptions
Beneficial owner – control person(s)	*One*	*Multiple*
At least one control person	*Yes*	*Not expressed*
Beneficial owner- ownership	*25 percent or more (up to 4)*	*Not less than 25 percent (up to 4)*
Legal owner exemptions	*None*	*Five*
Company applicant	*None*	*Multiple*
Provide copies of identification documents	*No*	*Yes*
Changes to information	*Material changes on a triggering event*	*Any change to any information*
FinCEN identifier	*No*	Yes
Identification number – US persons	*SSN*	Number from one of four identification documents

II. The Corporate Transparency Act (CTA)

Many people have touted the Anti-Money Laundering Act of 2020 and the Corporate Transparency Act, as the biggest change(s) to American efforts to fight crime and corruption since the USA PATRIOT Act of 2001.

And they're right. As a whole, the AML Act will ultimately have the effect of shifting the US AML/CFT regime from a domestic-focused, regulator-versus-regulated, compliance inputs-based regime to an international, collaborative public/private sector, threat-focused, outputs-driven regime.

I published an article on December 20, 2020 (ten days before the AML Act of 2020 was enacted) titled "The Corporate Transparency Act of 2020 - the Good, the Bad, and the Ugly", in which I praised the creation of the centralized registry of beneficial ownership information (the Good), frowned about excluding money transmitters and "tall, dark, and handsome" companies (those companies with more than 20 employees, revenues of at least $5 million, and US operations … the Bad)[8], and criticized the limited and difficult access to the registry (the Ugly).

Even if money transmitters and the "tall, dark, and handsome" companies had to report their beneficial owners and applicant, there would still be very little transparency into those owners, or any other beneficial owners in the proposed FinCEN database. Financial institutions' access to the database is severely restricted, and the punishing requirements imposed on federal, State, and Tribal government agencies to gain access to the information in the database may dissuade many of them from using it at all.

There are always at least two questions that a financial institution needs to ask when onboarding a legal entity customer: (1) who are the beneficial owners of the legal entity customer? And (2) are those beneficial owners also beneficial owners of any other legal entities?

[8] Under CTA, money transmitters (which includes crypto exchanges) have been added to the list of exempt entities (up to twenty-four from the current sixteen) that do not have to report their beneficial owner(s) or applicant. The rationale seems to be that they have to register with FinCEN already, so why register again? There are problems with this rationale. First, the information submitted by these entities is not verified by FinCEN. Second, registration form only requires the money transmitter to submit one name of a person who owns or controls the entity. Third, there is no provision to link the money transmitter registration data with the BOI database. Fourth, financial institutions do not have access to the information contained in the money transmitter database (the publicly-available database includes the name and address of the money transmitter, but nothing about its owner/operator). Fifth, financial institutions will need to continue to rely on their own collection of money transmitters' beneficial ownership information, without the benefit of confirming that information from the FinCEN BOI database. I submitted a formal comment letter to FinCEN on my concerns about, and possible solutions for, the MSB issue. As to the "tall, dark, and handsome" companies, these (very few, as it turns out) companies are the perfect front company for illicit actors looking to launder criminal proceeds. Why they are not required to disclose their ultimate beneficial owners isn't obvious to me.

The CTA allows financial institutions to answer the first question, but not the second. Financial institutions can only query the BOI database for the beneficial ownership information for a particular reporting company, as long as that reporting company provides its consent. So financial institutions could get BOI for RegTech Consulting LLC, as long as RegTech Consulting LLC provides its consent, but they could not determine if RegTech Consulting LLC's beneficial owner – Jim Richards- is also the beneficial owner of other reporting companies. This is the biggest flaw in the CTA and in the proposed rules. But, since the flaw is legislative and not regulatory, the solution lies with Congress, not FinCEN. I'm recommending that (i) MSBs and larger companies be brought into the BOI regime, and (ii) that covered financial institutions be able to query the database for beneficial owners; and (iii) that Congress review what appears to be limited and daunting access to the database.

III. FinCEN's CTA Rule-makings

Congress decided that the implementation of the Corporate Transparency Act would be wholly dependent on FinCEN. Leaving aside the design, building, implementation, operation, maintenance, and security of the Beneficial Ownership Secure System (BOSS), FinCEN's most daunting challenges are twofold: first, providing guidance to 35 million small businesses on how to report their beneficial ownership; and second, in promulgating the rules needed to implement the CTA and to reconcile this new beneficial ownership reporting regime with the existing beneficial ownership reporting rule.

One of the best summaries of the AML Act and CTA, and FinCEN's rulemaking obligations under both, is set out in a Congressional Research Service report titled "The Financial Crimes Enforcement Network (FinCEN): Anti-Money Laundering Act of 2020 Implementation and Beyond". Although it is now ten months old (it was published September 27, 2022), it remains an excellent resource.

Page 8 of the CRS report discusses the beneficial ownership rulemakings:

> *"A primary aspect of early AMLA implementation has centered on AML/CFT rulemakings, including those required to implement the CTA. This section provides an overview of significant AMLA provisions for which rulemakings may be required for full implementation - and includes information on the status of such rulemakings. While some rulemakings are in progress, others appear delayed. Additionally, FinCEN remains in the process of finalizing several other significant AML-related regulations that predate or are otherwise not specified in AMLA.[9]"*

[9] Such proposals seek to address AML/CFT concerns regarding topics such as real estate transaction reports and

That footnote (footnote 28 in the original CRS report) is one of the longest footnotes I've ever run across. The reference to "several other significant AML-related regulations" in the paragraph is in fact seven regulations, all set out in the footnote, reprinted in footnote 9 herein for reference.

The September 2022 CRS report also noted that "regulations to implement the CTA were required within one year of enactment and are now overdue", and "the timeline and status of next steps in the rulemaking process remains unclear." Ten months later and two of the three CTA rules are overdue and timelines and status remain unclear. There have been some recent updates, notably with the June 13, 2023 publication of the Spring 2023 regulatory agenda. That agenda included six FinCEN rule-makings, two of which relate to the Corporate Transparency Act.

Between the CRS report, the Spring 2023 regulatory agenda, and FinCEN's own AML Act websites - https://www.fincen.gov/boi and https://www.fincen.gov/anti-money-laundering-act-2020- we can glean what rules FinCEN must publish, when, and what the proposed and final rules contain. From that we can assess their potential consequences. And offer solutions and recommendations.

I have organized these rules into three groups: the AML Act (non-CTA) rules, the CTA-related rules, and a combined list of AML Act and CTA rules that remain outstanding.[10]

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records, the "meaning of 'money' as used in the rules implementing the BSA"—including with respect to convertible virtual currency (e.g., cryptocurrency) and digital assets with legal tender status, and changes to the definition of brokers and dealers in securities to include funding portals for crowd funding. See FinCEN, Anti-Money Laundering Program Requirements for "Persons Involved in Real Estate Closings and Settlements, advance notice of proposed rulemaking (ANPRM), published in the Federal Register, vol. 68, no. 69, April 10, 2003, pp. 17569-17571; FinCEN, Anti-Money Laundering Regulations for Real Estate Transactions, ANPRM, published in the Federal Register, vol. 86, no. 233, December 8, 2021, pp. 69589-69602; FinCEN, Anti-Money Laundering Regulations for Real Estate Transactions, ANPRM, published in the Federal Register, vol. 87, no. 26, February 8, 2022, pp. 7068-7069; Board of Governors of the Federal Reserve System and FinCEN, Threshold for the Requirement to Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds that Begin or End Outside the United States, and Clarification of the Requirement to Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets with Legal Tender Status, joint notice of proposed rulemaking, published in the Federal Register, vol. 85, no. 208, October 27, 2020, pp. 68005-68019; FinCEN, Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, notice of proposed rulemaking (NPRM), published in the Federal Register, vol. 85, no. 247, December 23, 2020, pp. 83840-83862; FinCEN, Amendments to the Definition of Broker or Dealer in Securities, NPRM, published in the Federal Register, vol. 81, no. 64, April 4, 2016, pp. 19086-19094; and U.S. Department of the Treasury, Semiannual Agenda and Regulatory Plan, published in the Federal Register, vol. 87, no. 151, August 8, 2022, pp. 48324-48328.

[10] There are also six other non-AML Act rules that remain in regulatory limbo. They are: FinCEN's AML Program Requirements for "Persons Involved in Real Estate Closings and Settlements, ANPRM published in the Federal Register, vol. 68, no. 69, on April 10, 2003, pp. 17569-17571, with a proposed publication date in August 2023; FinCEN's AML Regulations for Real Estate Transactions, ANPRM published in the Federal Register, vol. 86, no. 233, December 8, 2021, pp. 69589-69602, with a proposed publication date in August 2023; FinCEN's AML Regulations for Real Estate Transactions, ANPRM published in the Federal Register, vol. 87, no. 26, February 8, 2022, pp. 7068-

AML Act (non-CTA) Rulemakings

First are nine AML Act rules, none of which have been finalized and many which are well beyond the statutory deadline.

1. National exam and supervision priorities - Section 6101(b) of the AMLA. In its Spring 2023 regulatory agenda, FinCEN has promised a proposed rule by December 2023 that (i) incorporates a risk assessment requirement for financial institutions; (ii) requires financial institutions to incorporate AML/CFT Priorities into risk-based programs; and (iii) provides for certain technical changes. Once finalized, this proposed rule will affect all financial institutions subject to regulations under the Bank Secrecy Act and have AML/CFT program obligations. The legal deadline for the rule was January 1, 2022. The *proposed* rule will be two years beyond the legal deadline for the *final* rule.
2. FinCEN Exchange - Section 6103 of the AMLA establishes the "FinCEN Exchange" to facilitate voluntary public-private information sharing partnership between the public and private sectors, facilitated by FinCEN. But like most laws, which set out what must be done, only regulations can establish how that thing must be done. In this case, section 6103 requires FinCEN to, "as appropriate, promulgate regulations that establish procedures for the protection of information shared and exchanged between FinCEN and the private sector" through the FinCEN Exchange. But because section 6103 does not impose a deadline for the issuance of such regulations, they remain (almost) forgotten and rarely tracked.
3. Dealers in Antiquities - Section 6110 of the AMLA applies BSA program and reporting obligations on Dealers in Antiquities. Final rule legal deadline (according to FinCEN's Autumn 2022 regulatory agenda) is January 00, 2023. Status – Late.
4. CTR and SAR Filing - Section 6204 of the AMLA requires the Secretary of the Treasury to conduct a formal review of the CTR and SAR filing processes with a view to streamlining the processes, and to report to Congress within one year of enactment with the findings and any proposed rulemakings to implement those findings. It's not known (by this writer) whether that report was submitted.

7069; Board of Governors and FinCEN's Threshold for the Requirement to Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds that Begin or End Outside the United States, and Clarification of the Requirement to Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets with Legal Tender Status, joint NPRM published in the Federal Register, vol. 85, no. 208, October 27, 2020, pp. 68005-68019; FinCEN's Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets, NPRM published in the Federal Register, vol. 85, no. 247, December 23, 2020, pp. 83840-83862; and FinCEN's Amendments to the Definition of Broker or Dealer in Securities, NPRM published in the Federal Register, vol. 81, no. 64, April 4, 2016, pp. 19086-19094.

5. CTR and SAR Threshold - Section 6205 of the AMLA requires the Secretary of the Treasury to review and determine whether the dollar thresholds for CTRs and SARs should be adjusted. Like the section 6204 "streamlining" review, the section 6205 report to Congress was to have been submitted within one year of enactment with the findings and any proposed rulemakings to implement those findings. It's not known (by this writer) whether that report was submitted.
6. Model validation/Testing methods - Section 6209 of the AMLA requires the Secretary of the Treasury to review and make recommendations on the "testing methods" or "model validation" process that is the bane of every large-bank BSA Officer. Actually, the section requires the Secretary to "issue a rule to specify ... the standards by which financial institutions are to test the technology and related technology internal processes" for facilitating AML/CFT compliance". Like the section 6103 rule, section 6209 does not provide a deadline for the issuance of the "testing methods rulemaking."
7. Pilot program for SAR sharing – Section 6212 of the AML Act of 2020. In its Spring 2023 regulatory agenda, FinCEN promised a final rule by November 2023, almost two years past the legal deadline of January 1, 2022.
8. No Action Letters – Section 6305 of the AMLA requires FinCEN to assess whether to establish a process to issue no-action letters in response to inquiries on the applications of the BSA or its regulations. On June 30, 2021, FinCEN announced that it had issued a report concluding that it should establish a no-action letter process. On June 6, 2022, FinCEN issued an ANPRM to solicit comments on questions relating to the implementation of a no-action letter process. However, there has been nothing since, and FinCEN has yet to propose a rule that would implement this process.
9. Whistleblower rule – Section 6314(a) of the AMLA, amended by the Anti-Money Laundering Whistleblower Improvement Act of 2022, amends 31 U.S.C. §5323 to update AML/CFT-related whistleblower incentives and protections. The new section 5323 authorizes the Secretary of the Treasury to "issue such rules and regulations as may be necessary or appropriate to implement the [updated whistleblower] provisions." In its Spring 2023 regulatory agenda, FinCEN promised an NPRM in July 2023.

Corporate Transparency Act (beneficial ownership) rulemakings

FinCEN has decided that there are three distinct rulemakings needed to implement the Corporate Transparency Act: one for the reporting of beneficial ownership, one for access to the beneficial ownership database, and one to reconcile the existing beneficial ownership rule.[11] But

[11] FinCEN's "three-rule" approach is, possibly, a stretch. See Appendix 1, my January 23, 2023 blog post https://antimoneylaundering.wtf/f/implementing-the-corporate-transparency-act---two-rules-or-three where I argue that the CTA logically required two rules. Whether two or three is not as relevant as the content and effect of the rules. And, unfortunately, one of the effects of FinCEN's three-rule approach has been added complexity and the first of three rules – the reporting rule – being called into question with the publication of the proposed access rule.

rulemaking is a process that requires at least two publications for every rule (a proposed rule and final rule), if not three publications (an advance notice). Given the "notice and comment" requirements of this rulemaking process, the time to promulgate rules can stretch into many months, and in the case of CTA rules, years.[12]

The result is that for FinCEN's implementation of the CTA, it is contemplating seven notices for the three distinct rules. As of this writing, only four of the seven notices have been published, and one of the three rules promulgated:

1. A combined Advance Notice of Proposed Rulemaking (ANPRM) for reporting, access, and beneficial ownership rule reconciliation (published April 5, 2021);
2. A Notice of Proposed Rulemaking for beneficial ownership reporting (published December 8, 2021);
3. A final beneficial ownership reporting rule (legal deadline was January 1, 2022; published September 30, 2022)
4. A Notice of Proposed Rulemaking for beneficial ownership access (published December 16, 2022);
5. A final beneficial ownership access rule (legal deadline was January 1, 2022; promised for September 2023);
6. A Notice of Proposed Rulemaking for beneficial ownership rule reconciliation (promised for November 2023); and
7. A final beneficial ownership reconciliation rule (due one year after the reporting rule was published).

Eleven final rules to implement the AML Act of 2020 and CTA

Combining these two groups of rules leaves us with eleven final rules that remain outstanding (out of twelve required rules):

1. Section 6101 - National Priorities rule - sixteen months overdue (NPRM promised for December 2023)
2. Section 6103 - FinCEN Exchange rule - no deadline imposed
3. Section 6110 - Dealers in Antiquities rule - sixteen months overdue – nothing scheduled
4. Section 6204 - CTR and SAR Streamlining rule – nothing scheduled
5. Section 6205 - CTR and SAR Thresholds rule – nothing scheduled
6. Section 6209 - Testing Methods or Model Validation rule - no deadline imposed
7. Section 6212 – SAR Sharing Pilot – final rule promised November 2023

[12] See footnote 7: the existing CDD/Beneficial Ownership rule took six years from its first proposal to implementation.

8. Section 6305 – No action letters – advance notice published in June 2022 – no deadline imposed
9. Section 6314 - Whistleblower rule - no deadline imposed (NPRM promised for July 2023)
10. Section 6403 - Beneficial Ownership Information Access rule - sixteen months overdue (final rule promised September 2023)
11. Section 6403 – Beneficial Ownership Information Reconciliation Rule – ten months overdue (proposed rule promised November 2023)

I submitted comments on FinCEN's February 2021 Advance Notice of Proposed Rule-making (ANPRM) on what became known as the "reporting" and "access" rules. I also submitted comments on the proposed BOI reporting rule and comments on the proposed BOI access rule. Those comments lay out many of the potential consequences of FinCEN's beneficial ownership rulemaking.

IV. Comments on the Final Beneficial Ownership Reporting Rule

In December 2021 FinCEN published a proposed BOI reporting rule. Hundreds of comments were submitted (my comments are here). A final rule was published on September 30, 2022.

A number of issues I commented on were not addressed in the final rule. The potential consequences of these issues could be significant. The issues I identified included the following eight:

1. Beneficial Owner(s) – The existing beneficial ownership rule (31 CFR 1010.230) makes it clear that a legal entity customer must report a single person who exercises control. The final BOI reporting rule (31 CFR 1010.380) does NOT expressly require that a reporting company have at least one beneficial owner.
2. Multiple control persons – the current rule has a single individual under the control prong. FinCEN felt strongly that there can be, and should be, multiple control persons. The statute refers to "an individual" exercising control: FinCEN sees that as "any individual" exercising control (see page 69933). I think FinCEN was wrong, both on its interpretation of the word "an" and on the idea that there needs to be more than one person with substantial control. One of the goals of the CTA was to burden reporting companies as little as possible while fulfilling the law enforcement and national security needs of the Act. Having multiple possible control persons increases the burden on reporting companies, with no known benefits to law enforcement. The better course – particularly with such dire resource constraints - would have been to start simple: provide the name and identifying information of the single person who exercises substantial control of the reporting company. If, over time, law enforcement and national security agencies have strong evidence that collecting the names and identities of multiple control persons provides actionable intelligence, then add them.

3. Multiple company applicants – similar to the control persons, FinCEN believes that there could and should be more than one company applicant. So not only the clerk of the law firm or company formation agent who physically files the documents, but the lawyer or manager who directs them. FinCEN's assumption that the name(s) of the company applicant(s) "should be readily available to reporting companies" is likely false: why would a company's principals know the name, let alone the identifying information, of the law firm clerk who filed their company formation documents? In fairness, FinCEN's final rule did away with the requirement of existing (prior to January 1, 2024) reporting companies needing to provide the name(s) of their company applicant(s). It would be more effective to list the registered agent, but the statute calls for the person/people who registered the reporting company. Again, the better approach would have been to make it simple: one person of firm as the company formation agent or registrant.
4. Identification Document Images – FinCEN has interpreted the CTA to *require* that images of beneficial owners' identification documents of all the beneficial owners and company applicants must be included in the filing. Although it is arguable whether the CTA requires the documents, rather than allows for them, this adds a level of cost and complexity, both from a technology perspective and from a privacy perspective. In addition, it is likely that fraudsters will take advantage of this requirement and scam many company principals into uploading and submitting an image of their driver's license.[13] It would have been more effective and efficient to begin this new regime without these documents, then learn from law enforcement and national security agencies whether the benefits of the documents would outweigh the costs, burdens, and risks of requiring them.[14]
5. Changes to information – FinCEN did not heed the comments of many people (including me) and organizations that argued that a revised or corrected filing be made only when there were *material* changes to *material* information. The proposed and final rule (§1010.380(a)(2)) requires new filings for "any changes with respect to any information" of a beneficial owner or company applicant. Why bring in this level of complexity at this stage? Particularly with such dire resource constraints.

[13] A recent IRS "tax scam" video warns taxpayers not to respond to emails, texts, or calls asking the taxpayer to provide their personal information. The video begins with an ominous image of a state identification document, the very thing FinCEN is asking reporting companies' beneficial owners to upload and submit. See https://youtu.be/NglAffwNFho

[14] In a July 5, 2023 blog post, I noted that FinCEN's proposed rule provided that for each beneficial owner and company applicant the reporting company provide "an image of the document from which the unique identifying number ... was obtained, which includes both the unique identifying number and photograph in sufficient quality to be legible or recognizable." The final rule - 31 CFR s. 1010.380(b)(1)(ii)(E) - simply requires "an image of the document from which the unique identifying number ... was obtained." This could be a wonderful loophole for malign actors and their clever attorneys.

6. Changes in reporting status – Proposed section 1010.380(b)(4) provides: "(4) Contents of updated or corrected report. If any required information in an initial report is inaccurate or there is a change with respect to any such required information, an updated or corrected report shall include all information necessary to make the report accurate and complete at the time it is filed with FinCEN. If a reporting company meets the criteria for any exemption under paragraph (c)(2) of this section subsequent to the filing of an initial report, its updated report shall include a notification that the entity is no longer a reporting company." FinCEN should clarify what happens when law enforcement or a financial institution then submits a query about the beneficial owners of a company that was a reporting company but has since filed a "report of exemption"? Does FinCEN return the original beneficial owners, or does FinCEN respond with "this company is not a reporting company for purposes of the CTA"?
7. The reporting timeframes – The CTA considered three different reporting scenarios, each with its own timeframe. Reporting companies "formed or registered before the effective date of the regulations" had to report "not later than two years" from that effective date.[15] Reporting companies formed or registered after that date had to report "at the time of formation or registration". And any reporting company that was updating or correcting its reporting must do so "not later than one year" after the reportable change occurred. The only rule that has an effective date is the reporting rule from September 30, 2022: FinCEN gave it an effective date of January 1, 2024. Neither the access rule nor the CDD reconciliation rule has an effective date. For reporting companies formed or registered before January 1, 2024, FinCEN interpreted "not later than two years" as one year – January 1, 2025.[16] And for reporting companies formed or registered on or after January 1, 2024, FinCEN correctly (in my view) started from Congressional intent by allowing those companies 30 calendar days to report their beneficial ownership information. And FinCEN gave all reporting companies no more than 30 days to submit updates or corrections, much less than the Congressionally mandated "not later than one year". FinCEN should reconsider these 30-day reporting requirements: 180 days provides sufficient time for additions, updates, and corrections while balancing the need of law enforcement for accurate, current information. It should be pointed out that FinCEN has given money services businesses – which include crypto exchanges – 180 days to submit their required registration documents.
8. The reporting form – separate from the proposed rule, FinCEN released a proposed reporting form. Elise Bean, the former staff director and chief counsel of the US Senate

[15] The CTA contemplated a single effective date for the regulations (regulations being plural). This legislative intent is reflected in Rep. McHenry's bill to harmonize the implementation dates of the three regulations, or rules, that FinCEN has proposed.

[16] I found it interesting that FinCEN felt that a two-year period to populate the BOI database was excessive, yet it gave financial institutions a two-year period to implement its May 2016 beneficial ownership rule.

Permanent Subcommittee on Investigations, wrote for many in her March 18, 2023 comment letter: “The Proposed Report is the worst designed government form that I have seen in 40 years of public service. As currently worded, the Proposed Report violates the CTA and its implementing regulation. The proposal provides no justification, precedent, standards, or principles for allowing reporting companies to circumvent the law’s mandatory disclosure requirements by creating a form that enables them simply to opt out of the required disclosures. I can only hope that Treasury and FinCEN will reconsider their legal obligations under the CTA and delete from the proposed form the 31 ‘unable’ and ‘unknown’ answer options enabling reporting companies to continue to hide their beneficial owners.”[17]

V. Comments on the Proposed Beneficial Ownership Access Rule

I submitted my comments on the NPRM Access Rule on December 24, 2022. I wrote that “some of my comments are critical of what has been proposed. I am not critical of the bona fides, efforts, and integrity of those that have put together the proposed access rule: we simply differ on some aspects of the proposed rule. And, as you will read below, we differ greatly on the expected costs and burdens that the private sector will incur in implementing the rule.”

Below are five of the issues I identified and remain outstanding, and how they could be addressed.

1. **Verification of beneficial ownership information without verifying beneficial owners** - at page 77408 of the proposed Access Rule (at 87 FR 77404), FinCEN provides that it will verify that the named beneficial owner is an actual person, but not that the named beneficial owner is an actual beneficial owner of that reporting company ("FinCEN continues to evaluate options for verifying reported BOI. 'Verification,' as that term is used here, means confirming that the reported BOI submitted to FinCEN is actually associated with a particular individual.").

   This is the same problem with the current CDD Rule, which has financial institutions verifying that the named beneficial owner(s) is (are) actual persons, not that they are actually beneficial owners. Footnote 46 provides: "Pursuant to Sections 6502(b)(1)(C) and (D) of the AML Act, the Secretary, in consultation with the Attorney General, will conduct a study no later than two years after the effective date of the BOI reporting final rule, to evaluate the costs associated with imposing any new verification requirements on FinCEN and the resources necessary to implement any such changes." This is an implicit

[17] In a letter to Treasury Secretary Yellen and Acting FinCEN Director Das dated April 4, 2023, a bipartisan group of Senate and House leaders, led by House Financial Services Committee Chairman Patrick McHenry (R. NC), called the proposed reporting form an “escape hatch” for bad actors.

admission that FinCEN's "verification" is a limited concept. This is repeated at page 77427, where FinCEN's estimates for the costs of building and running the program "do not include certain potential additional costs, such as for IT personnel or information verification ...".

Verification that the listed beneficial owners are, in fact, the actual beneficial owners, is different from *validation* of certain information. There are tools available for FinCEN to validate addresses, identification numbers from state driver's licenses and US passports, and reporting companies' EINs. FinCEN should do everything possible to validate the information submitted: verification, notably that the listed beneficial owners are, in fact, the beneficial owners, may not be possible.

2. Limitations on the private sector's use of beneficial ownership information – I framed this comment as "a proposed solution to the phrase "CDD Under Applicable Law". The CTA authorizes FinCEN to disclose BOI upon receipt of a request "made by a financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law." (31 U.S.C. 5336(c)(2)(B)(iii)). Notwithstanding the CTA's admonition that the beneficial ownership information be "highly useful in … facilitating important national security, intelligence, and law enforcement activities" and that financial institutions use the information "to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law", FinCEN deliberately, and with some detail, limited those requirements. It wrote, at page 77415 of its proposed Access Rule:

> "… the proposed rule would define 'customer due diligence requirements under applicable law' to mean FinCEN's customer due diligence (CDD) regulations at 31 CFR 1010.230, which require covered FIs to identify and verify beneficial owners of legal entity customers. FinCEN considered interpreting the phrase 'customer due diligence requirements under applicable law' more broadly to cover a range of activities beyond compliance with legal obligations in FinCEN's regulations to identify and verify beneficial owners of legal entity customers. FinCEN's separate Customer Identification Program regulations [1010.220], for example, could be considered customer due diligence requirements. FinCEN decided not to propose this broader approach, however. The bureau believes a more tailored approach will be easier to administer, reduce uncertainty about what FIs may access BOI under this provision, and better protect the security and confidentiality of sensitive BOI by limiting the circumstances under which FIs may access BOI. That said, FinCEN solicits comments on whether a broader

reading of the phrase ‘‘customer due diligence requirements’’ is warranted under the framework of the CTA, and, if so, how customer due diligence requirements should be defined in order to provide regulatory clarity, protect the security and confidentiality of BOI, and minimize the risk of abuse."

The result is that FinCEN defined "CDD requirements" as those in 31 CFR 1010.230 (the 2016 beneficial ownership rule). FinCEN did not include the CIP requirements in 1010.220 or the ongoing CDD requirements in 1010.210 (which refers to each type of FI's requirements, such as 1020.210 for banks), which include a requirement to identify and report suspicious activity.

Which begs the question: does this mean that financial institutions cannot use BOI for ongoing monitoring to identify and report suspicious activity? FinCEN should answer that question by amending its final rule and expand the definition of “CDD requirements” to encompass all aspects of a financial institution’s obligations to perform onboarding and ongoing due diligence, including the investigation and reporting of suspicious activity.

3. Obtaining reporting company consent to query the BOI database - The CTA requires that financial institutions must obtain the reporting company’s consent in order to request the reporting company’s BOI from FinCEN. The reporting rule – 31 CFR section 1010.955(d)(2)(iii) - provides:

   "(iii) Consent to obtain information. Before making a request for information regarding a reporting company under paragraph (b)(4)(i) of this section, the financial institution shall obtain and document the consent of the reporting company to request such information. The documentation of the reporting company’s consent shall be maintained for 5 years after it is last relied upon in connection with a request for information under paragraph (b)(4)(i) of this section."

   In other words, the rule compels financial institutions to obtain consent, but offers nothing on how to do so. It is believed that FinCEN will publish informal guidance on how that consent can be obtained. Guidance is good, by a rule is better. FinCEN should amend the rule allowing institutions to obtain consent through a notice in the institution's account opening terms and conditions or in any other customer-acknowledged agreement. Two existing regulations require financial institution customers to provide a certification or acknowledgment, or be given notice of an AML requirement, at account opening. These could be models for a 1010.955 consent. First is the certification regarding beneficial owners of legal entity customers, appendix A to 1010.230. Second is in the current CIP rule, 31 CFR 1010.220, which in turn refers to the regulations for each of the financial institution types. Using the banking regulation as an example, 31 CFR 1020.220(a)(5), the CIP "notice provisions are:

1020.220(a)(5)(i) Customer notice. The CIP must include procedures for providing bank customers with adequate notice that the bank is requesting information to verify their identities.

1020.220(a)(5)(ii) Adequate notice. Notice is adequate if the bank generally describes the identification requirements of this section and provides the notice in a manner reasonably designed to ensure that a customer is able to view the notice, or is otherwise given notice, before opening an account. For example, depending upon the manner in which the account is opened, a bank may post a notice in the lobby or on its Web site, include the notice on its account applications, or use any other form of written or oral notice.

1020.220(a)(5)(iii) Sample notice. If appropriate, a bank may use the following sample language to provide notice to its customers:

Important Information About Procedures for Opening a New Account

To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account.

What this means for you: When you open an account, we will ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

Proposed section 1010.955(d)(2)(iii) could be revised along the same lines so that financial institutions can obtain consent through its normal account opening operations:

"(iii)(A) Consent to obtain information. Before making a request for information regarding a reporting company under paragraph (b)(4)(i) of this section, the financial institution shall obtain and document the consent of the reporting company to request such information.

(iii)(B) Obtaining adequate consent. Consent is adequate if the bank generally describes the consent requirements of this section and provides the notice in a manner reasonably designed to ensure that a customer is able to view the consent, or is otherwise given notice, before opening an account. For example, depending upon the manner in which the account is opened, a bank may post a consent in the lobby or on its Web site, include the consent on its account applications, or use any other form of written or oral notice.

(iii)(C) Recordkeeping requirements. The documentation of the reporting company's consent shall be maintained for 5 years after it is last relied upon in

connection with a request for information under paragraph (b)(4)(i) of this section."

4. FinCEN's cost and burden estimates are, at best, unrealistic - In the proposed reporting rule, FinCEN estimated that it will take a financial institution 10 hours to update its customer consent forms and processes. As I commented, this is not reasonable. It will take 10 hours to read the proposed rule, let alone implement a final rule. Updating policies, procedures, processes, and forms involves compliance officers, lawyers, marketing experts, process engineers, project managers, technology specialists, etc. It will take thousands of hours of personnel time - perhaps 100,000 hours in the largest institutions - to update account opening policies, procedures, processes, and forms.

   The same holds true for estimates for the one-time administration costs to establish "admin and physical safeguards". The estimate of 40 to 80 hours is exponentially off and needs to be revisited.

   FinCEN also determined that between 1 and 2 people in the small banks, and 5 to 6 people in the large banks, on average, would access the BOI database. In addition, "based on feedback from Federal agency outreach, FinCEN assumes a minimum of one financial institution employee and a maximum of six financial institution employees would undergo annual BOI training."

   In my comments I estimated that the 3,586 small banks will have 1.5 to 10 people performing CDD, with the average small bank having 4 to 5 people performing CDD. I also estimated that the 1,263 large banks will have between 5 and 5,000 people performing CDD, with the average large bank having 26 to 27 people performing CDD.

   FinCEN's estimates were wildly off base, if not removed from reality. Federal law requires agencies to provide reasonable estimates of the costs and burdens of proposed rules. FinCEN's estimates – for these rules and other BSA-related requirements – are always deficient. Somehow FinCEN must be held accountable to publish real-world estimates of the costs and burdens of its rules. I recommend that FinCEN re-visit its estimates on the private sector's costs and burdens of meeting the requirements of the final reporting and proposed access rules. That re-visit must include sitting down with small, medium, and large financial institutions to find out what it *really* takes to implement AML/CFT rules.

5. Potential consequences from a few things that were not in the proposed (or final) reporting rule but should have been – In my comment letter I identified three things that should have been addressed in the final rule but were not. One that could have potential consequences is when a reporting company updates or corrects its beneficial ownership information.

The initial reporting of beneficial ownership provides a point-in-time snapshot of the then-current roster of a reporting company's beneficial owners. But the CTA and reporting final rule also provide for updating that initial report "if there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner." There is nothing in the rule about financial institutions getting notice from FinCEN when an already-queried reporting company corrects or amends its BOI.

CTA section 5336(b)(1)(F) provides that BOI should be highly useful to financial institutions "to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law."

If a financial institution's customer files an amended or corrected BOI report with FinCEN, FinCEN will have current and accurate BOI on that reporting company, but the reporting company's financial institution will not. The financial institution will have information that is stale, incomplete, or wrong. That is the opposite of "highly useful".

FinCEN should develop a process to provide notice to financial institutions when an already-queried reporting company corrects or amends its BOI. This will not be easy: currently there are no provisions in the proposed rules that require the financial institution to indicate whether the reporting company is not yet a customer or is a customer. And there are no provisions requiring financial institutions to report to FinCEN when the previously queried reporting company ceases to be a customer.

The other issue that was not dealt with in the proposed or final reporting rule is what financial institutions are supposed to do when the accessed beneficial ownership differs with the beneficial ownership in the institution's records.

The new BOI rules will not repeal the requirement that financial institutions identify and verify beneficial owners under 31 CFR 1010.230(a).

By the time the BOI database is functioning, and reporting companies are submitting BOI reports and financial institutions are accessing BOI reports, those financial institutions will likely have obtained beneficial ownership information on all of their legal entity customers. Although the number of potential beneficial owners under the CDD rule differs from the number of potential beneficial owners under the CTA, and the definitions of, and exceptions to, legal entity customers and reporting companies differ, financial institutions will have to manage two versions of BOI.

There is nothing in the final reporting rule about what financial institutions are supposed to do if the accessed BOI that comes back is not consistent with what they have obtained or know about their customer (or prospective customer). I expect that FinCEN considers this to be part of the third rule that will bring the current CDD rule into conformity with the current BOI reporting rule and expected final BOI access rule. However, financial institutions will need to develop risk tolerance provisions and risk assessments; develop policies, procedures, processes, and systems; and train their staff for accessing the BOI data well before the revised CDD Rule is developed by FinCEN.

Until the revised CDD Rule is published, FinCEN should be prepared to use FAQs, Advisories, and/or Guidance to provide financial institutions with information on how to manage discrepancies between the CDD Rule BOI and the Reporting Rule BOI.

VI. Comments on the Not-Yet Proposed CDD Reconciliation Rule

On June 12, 2023 FinCEN released its Spring 2023 regulatory schedule. One of the six proposed and promised rules was a Notice of Proposed Rulemaking to revise the existing CDD rule: promised for publication in November 2023 and bearing a 60-day comment period.

This hearing is on "potential consequences of FinCEN's beneficial ownership rulemaking." If there is any opportunity for potentially adverse consequences, it is with FinCEN's efforts to attempt to reconcile the current obligation for financial institutions to collect and verify their legal entity customers' beneficial ownership information with the new beneficial ownership reporting and access rules.

There is much confusion when it comes to what must be reconciled and when. Clearing up that confusion, or at least setting out a single set of facts, requires a trip back to the CTA itself.

Section 6403 of the CTA is titled "Beneficial Ownership Information Reporting Requirements" and includes both reporting of, and access to, beneficial ownership information. The section is not titled "Beneficial Ownership Information Reporting and Access Requirements". In other words, it appears that Congress intended that reporting of beneficial ownership information included access to that information. Besides, what good is it for a company to report its BOI if that BOI cannot be accessed by law enforcement and (some) financial institutions?

Section 6403 has four subsections, (a) through (d). Subsection (a) adds this new beneficial ownership regime to title 31 of the US Code with the addition of section 5336. Both section 6403 of the CTA and the new section 5336 of the BSA are titled "Beneficial Ownership Information Reporting Requirements" and include both reporting of, and access to, beneficial ownership information. The sections are not titled "Beneficial Ownership Information Reporting and Access Requirements". In other words, it appears that Congress intended that reporting of beneficial

ownership information included access to that information. Besides, what good is it for a company to report its BOI if that BOI cannot be accessed by law enforcement?

Subsections (b) and (c) of section 5336 are somewhat technical, and not applicable to this hearing. Subsection (d) is relevant and is titled "Revised Due Diligence Rulemaking". That subsection refers to the existing customer due diligence/beneficial ownership rule, and it directs FinCEN to bring that rule into conformance with this new beneficial ownership information reporting requirement "not later than one year after the effective date of the regulations promulgated under section 5336(b)(4)."

Which takes us back to section 5336. That new section has eight subsections.

Subsection (a) is all of the definitions – reporting company, beneficial owner, substantial control, ownership, etc. Subsections (b) and (c) are the operative subsections for this hearing. We can leave subsections (d) through (h) for another day.

Subsection 5336(b) is titled "beneficial ownership information reporting". Subsection 5336(c) is titled "retention and disclosure of beneficial ownership information by FinCEN". So here, in the section titled "Beneficial Ownership Information Reporting Requirements", Congress has carved out reporting from (retention and) disclosure.

As to the "reporting" subsection, 5336(b)(5) provides as follows: *"Effective Date - The requirements of this subsection shall take effect on 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."*

The "access" subsection also provided for regulations but didn't provide a timeframe. Paragraph 5336(c)(2)(C) provided for the "form and manner of disclosure to financial institutions … by regulation" without setting out when that regulation would be promulgated. Paragraph 5336(c)(3) referred to appropriate protocols for public agencies' use and access of beneficial ownership information, and that those protocols would be established "by regulation". But again, there was no time frame within which that regulation would be promulgated.

This is what FinCEN focused on when it decided that it would issue three rules: a reporting rule, an access rule, and then a rule to reconcile these new rules with the existing CDD/BO rule from 2016. But does this make sense? Clearly Congress intended that reporting companies would have rules in place, and be reporting their beneficial ownership information, within one year of the passage of the Corporate Transparency Act.

But did Congress intend to give FinCEN whatever time it needed to promulgate rules giving access to that information? What is the point of populating a database if there are no rules in place allowing law enforcement (and some financial institutions) to access that database and use the BOI?

I believe Congress intended there to be one rule that covered both reporting of and access to BOI. My interpretation aligns with that of some members of Congress: Congress intended that the rules implementing section 5336 of title 31, the "Beneficial Ownership Information Reporting Requirements", which logically included how that information would be reported, accessed, used, stored, and protected, would be promulgated within one year. And Congress further intended, and clearly set out, that the 2016 CDD/BO rule would be reconciled within a year after that. Not one reporting rule in one year, a CDD reconciliation rule a year later, then an access rule to follow (or even precede the CDD reconciliation rule) whenever FinCEN got around to it.

Which brings up the interesting scenario that we could be facing when the beneficial ownership database goes live, as promised, on January 1, 2024.

The final BOI reporting rule, promulgated under section 5336(b)(4), was published on September 30, 2022. Section 6403(d) of the CTA requires a revised due diligence rulemaking "not later than 1 year after the effective date of the regulations promulgated under section 5336(b)(4)". So, if FinCEN keeps to the Congressional time frame (which it has generally failed to do so far), the CDD reconciliation rule would be due September 30, 2023. As of July 14, 2023 FinCEN has promised a *proposed* rule to reconcile the existing CDD rule with the new reporting and access rules by November 2023. With a 60-day comment period extending out to January 2024, and then months for FinCEN to absorb and consider those comments and then promulgate a final rule, it is possible that financial institutions will be faced with managing both the existing beneficial ownership requirements and the new beneficial ownership reporting and access requirements.

And FinCEN still hasn't published a final access rule. A proposed access rule was published on December 15, 2022, with comments due by February 14, 2023. FinCEN has promised a final access rule by September 2023. FinCEN has publicly promised to have the BOI database operational by January 1, 2024. Does FinCEN's notion of "operational" mean that companies will submit BOI into the database, with law enforcement agencies and financial institutions still figuring out whether and how to access the database while revamping internal policies, procedures, controls, training, and auditing protocols? Leaving aside the likelihood that most of the estimated 35 million existing reporting companies won't be submitting their beneficial information until they're convinced that the database is secure, financial institutions will likely face years of running dual, sometimes competing beneficial ownership due diligence processes.

VII. Six Months Before the Scheduled Launch of the BOI Database – Where Are We?

I was critical of FinCEN's lack of apparent progress in promulgating rules – and communicating its progress- in a blog post from June 21, 2023 titled "FinCEN's Beneficial Ownership Database Remains a Head Scratcher".

With less than six months to go before the promised launch date of FinCEN's Beneficial Ownership Information (BOI) database, FinCEN has yet to publish a final rule on how that database will be accessed, it has yet to provide guidance to the fifty states' secretaries of state on whether and how they will support the efforts of their 35 million state-created entities that will need to submit BOI, it has yet to publish a proposed rule- let alone a final rule- on how financial institutions will use this new BOI, and it hasn't finished building and testing the actual database.

Other than that, everything is on schedule and ready to go.

"I'm proud of the progress that we've made so far", and "we are committed to successful implementation of the beneficial ownership rule", wrote FinCEN's (then) Acting Director, Himamauli Das in his written testimony for a hearing on FinCEN oversight by the Subcommittee on National Security, Illicit Finance, and International Financial Institutions of the House Financial Services Committee on April 28, 2023.[18]

When it comes to implementing this "critically important regime" that "is critical to protecting the U.S. financial system from abuse, preserving our national security, and combating illicit actors and activities that harm U.S. businesses and U.S. taxpayers" (quoting the same testimony), pride and commitment only go so far. How on track is FinCEN? Will it actually have the database implemented (whatever that means) on January 1, 2024, as promised? Will the small business community, the secretaries of state, and financial institutions have the guidance they need (and time to advise and train their stakeholders)? Will all the rules be published, with time for consideration, incorporation, and implementation?

The answers to those four questions are the same: "we simply don't know because FinCEN isn't talking."

The only thing we do know comes from the April 28th testimony of (then) Acting Director Das: "... we remain on track for implementation in January. But this is a huge undertaking, and we still have several lines of effort to carry out, including:

[18] On July 13, 2023 Treasury Secretary Yellen announced that current OFAC director Andrea Gacki had been named as FinCEN Director: https://home.treasury.gov/news/press-releases/jy1610

- Putting in place the rules that govern the beneficial ownership framework – this includes finalizing our proposed access rule, publishing a proposed customer due diligence rule revision, and finalizing the related forms;
- Completing the information technology products to administer the beneficial ownership information reporting requirement, including the databases and systems to securely collect, process, store, and provide authorized access to beneficial ownership information;
- Conducting outreach to various stakeholders, including the small business community, to inform them of the beneficial ownership information reporting requirements and better understand their questions;
- Developing the infrastructure to respond to queries, to be able to conduct audit and oversight, and to provide partner agencies and financial institutions with access to the database; and
- Building on the first tranche of guidance materials issued on March 24, 2023, by publishing additional guidance documents and materials, including a Small Entity Compliance Guide, FAQs, infographics, videos, and technical job aids to ensure that the small business community and other reporting companies have the tools they need to comply with the new requirements."

So as of late April, we know that FinCEN hasn't completed the rules, hasn't built the BOI database, hasn't conducted outreach, hasn't developed the infrastructure to respond to queries, and has yet to publish guidance beyond a recitation of the reporting rule.

FinCEN is certainly aware of the daunting challenges in implementing the CTA. In the proposed reporting rule, FinCEN noted that:

> "… certain practical steps must be completed prior to the effective date and the initiation of the collection of information, and it is undertaking significant work towards achieving a timely effective date. These steps include the design and build of a new IT system—the Beneficial Ownership Secure System, or BOSS—to collect and provide access to BOI. Upon the CTA's enactment, FinCEN began a process for BOSS program initiation and acquisition planning that will lead to the development of a detailed planning and implementation document. Once greater progress is made towards the final reporting rule and a parallel rulemaking effort relating to access to and disclosure of BOI, which will provide concrete guidance on the design and build of the BOSS, FinCEN will move expeditiously to the execution phase of the project, which will include several technology projects that will be executed in parallel."

With this admission, it appears that the BOSS cannot be completed until the final access rule is promulgated. FinCEN has promised that final rule for September 2023. It has promised a

proposed rule to revise the existing CDD and beneficial ownership rule for November 2023: it will take at least six months for a final rule.

We are less than six months from the expected implementation of the new beneficial ownership information reporting (and access) regime, and there remains more questions than answers.

VIII. Potential Consequences of FinCEN's Beneficial Ownership Rulemaking

Best Case Scenario – The new beneficial ownership regime begins on January 1, 2024

Many things need to align for a "best case" scenario to occur, but the consequences of such a scenario would be transformational: beneficial ownership information collected in an efficient manner, maintained in a secure, non-public database that is highly useful to national security, intelligence, and law enforcement agencies; with demonstrable enhancements to America's national security and anti-money laundering and countering the financing of terrorism efforts; and the United States is in compliance with international AML and CFT standards. With those goals, the full attention and resources of the federal government should be drawn to ensure the success of the new beneficial ownership regime.

What things need to align for this best case scenario to occur?

1. The final access rule is published, as promised, in September 2023 leaving three months for public sector agencies and private sector financial institutions three months to (i) design, develop, test, and implement new policies, procedures, processes, and systems; (ii) train all the necessary and appropriate people; and (iii) in the case of public sector agencies, enter into the necessary agreements with FinCEN.
2. A proposed rule to revise the existing customer due diligence and beneficial ownership rule is published, as promised, in November 2023. Interested parties have 60 days to comment, and FinCEN commits to issuing a final rule no later than July 2024. In the interim FinCEN publishes guidance on what financial institutions can and should do, and the federal functional regulators publish "forbearance" guidance to give institutions some comfort they won't be criticized.
3. A revised reporting form is published. It removes the "give it the old college try" options and compels reporting companies to provide the information required by the CTA.
4. By January 1, 2024 FinCEN has overcome the "resource constraints in developing and deploying the beneficial ownership IT System and efforts to put in place processes to support the collection and use of BOI" (quoting the proposed access rule at page 77408). The Beneficial Ownership Secure System (BOSS) is secure from hackers, fully operational, and ready for its first reporting company submissions and requests from authorized users.

5. FinCEN has published guidance for federal agencies on submitting the justifications required for each query of the BOSS.[19]
6. FinCEN has decided that it will not need to stage access by different authorized users. Instead, all authorized public sector agencies and private sector financial institutions will have access to the BOSS.[20]
7. In its final access rule, FinCEN backed off from its restrictive definition of "CDD under applicable law" and instead went with a definition that incorporates the full scope of customer due diligence – from onboarding through ongoing due diligence, including monitoring for, investigating, and reporting suspicious activity.
8. Although there was nothing in the proposed access rule that dealt with how financial institutions could obtain the consent of the reporting company, FinCEN's final rule allows financial institutions to obtain consent through a notice in the institution's account opening terms and conditions or in any other customer-acknowledged agreement.
9. FinCEN's proposed CDD reconciliation rule published in November 2023 expressly provided that financial institutions should not file a Suspicious Activity Report (SAR) solely because accessed BOI that is not consistent with what the institution has obtained or knows about their customer (or prospective customer). FinCEN and the federal functional regulators published guidance on how financial institutions should develop risk tolerance provisions and risk assessments, policies, procedures, processes, systems, and training to address any beneficial ownership information discrepancies between the CDD rule BOI and the reporting rule BOI.
10. By the end of January 2024 approximately one million existing reporting companies and 100,000 new reporting companies have submitted beneficial ownership information reports. By the end of February 2024 three million existing reporting companies and another 100,000 new reporting companies have submitted beneficial ownership information reports. Reporting companies are reporting no significant issues, and FinCEN's online and telephone help desks are staffed and not overwhelmed with queries. The National Association of Secretaries of State has issued a preliminary report that the new BOI regime appears to be operating without significant issues and without imposing undie burdens on small businesses. The BOSS remains secure. Federal, state, and Tribal law enforcement agencies are submitting

[19] At pages 77409- 77410 of the proposed access rule, FinCEN wrote that federal agencies will have immediate access to "run queries using multiple search fields" after submitting "submit brief justifications to FinCEN for their searches, explaining how their searches further a particular qualifying activity". The proposed rule does not address how this will be done: "FinCEN will develop guidance for agencies on submitting the required justifications."

[20] At page 77408 of the proposed access rule FinCEN noted: "Without the availability of additional appropriated funds to support this project and other mission-critical services, FinCEN may need to identify trade-offs, including with respect to guidance and outreach activities, and the staged access by different authorized users to the database. FinCEN is currently identifying the range of considerations implicated by potential budget shortfalls and the trade-offs that are available and appropriate."

queries. Twenty percent of banks and credit unions have submitted at least one request.

11. The GAO's mid-July 2024 report on the implementation of the FinCEN beneficial ownership information reporting and access regime is generally positive. There are some recommendations, but nothing that imperils the integrity of the reporting of, access to, security of, or value of beneficial ownership information.
12. By the end of 2024 financial institutions are reporting that their customer due diligence processes are generally more efficient and remain effective: FinCEN's guidance and rules have met Congressional intent. Approximately 30 million of the estimated 35 million reporting companies have successfully reported their beneficial ownership information, and corrected and updated reports are being filed, as required. Most federal and state law enforcement agencies are utilizing the database. Eighty percent of banks and credit unions are regularly accessing the database.
13. The FATF upgrades the United States' rating on Recommendation 24 (transparency and beneficial ownership of legal persons) from Non-Compliant to Compliant, and on Recommendation 25 (transparency and beneficial ownership of legal arrangements) from Partially Compliant to Compliant.
14. In a mid-2025 report to Congress, the Justice Department reports that the Corporate Transparency Act has met the purposes as set out in section 6402 of the CTA: the beneficial ownership information maintained in a secure, non-public database is highly useful to national security, intelligence, and law enforcement agencies and federal functional regulators; beneficial ownership information is protecting national security and has enhanced America's anti-money laundering and countering the financing of terrorism efforts; and the United States is in compliance with international AML and CFT standards.

Likely Scenario – The new beneficial ownership regime is delayed

On July 13, 2023 Treasury Secretary Yellen announced Andrea Gacki as the new Director of FinCEN.[21] This change in leadership, although very positive, will likely have some expected and typical impacts: some departures of key leaders and contributors, a "learning curve" for the new Director, and a re-assessment of some of the key initiatives. Rather than publish the final access rule in September 2023, and the proposed CDD reconciliation rule in November 2023, as promised, the new Director announces that both will be published in the first quarter of 2024, with a revised reporting form that eliminates the "don't know" options, and a final CDD reconciliation rule will be published in the third quarter of 2024.

After assessing the resources available for, and progress made in, the development and deployment of the beneficial ownership IT System and the efforts to put in place processes to support the collection and use of BOI", the new Director also notifies Congress that the new implementation date is January 1, 2025. The new Director also notifies Congress that FinCEN intends to harmonize the effective dates of all rules required under the CTA (essentially adopting Rep. McHenry's proposed Protecting Small Business Information Act, HR 4035). Implementation of the rules with the implemented BOI database will occur on January 1, 2025.

The Director is also acutely aware that Congress expects greater transparency and accountability: she also notifies Congress that FinCEN will submit quarterly reports to Congress on its rulemaking and BOSS progress.

IX. Conclusion

To implement the Corporate Transparency Act, FinCEN needs to build out a massive, highly-secure database, promulgate multiple rules, and issue guidance for those reporting beneficial ownership information and for those accessing and using that information. And it needs to do so in four years (2021 – 2024). These are ambitious goals with an aggressive timeline.

History tells us that this four-year timeline is aggressive. From 2008 through 2014 FinCEN built out its BSA Database, a central repository of all BSA reports. That six-year effort cost $120 million.[22] At roughly the same time – from 2012 through 2018- but separately, FinCEN also promulgated a single rule for the collection and verification of beneficial ownership information (the current CDD rule). A BSA database, one beneficial ownership rule, and related guidance took six years. Here, FinCEN needs to build out its beneficial ownership database, promulgate three rules, and issue guidance, all in four years. Six years may be more reasonable.

But if all goes as FinCEN says it will go, 35 million existing reporting companies will have until January 2025 to report their beneficial ownership information into a not-yet-built, centralized,

[21] https://home.treasury.gov/news/press-releases/jy1610

[22] See the Treasury OIG report OIG-14-048 titled "FinCEN Completed its BSA IT Modernization Project within Budget and on Schedule" at https://oig.treasury.gov/sites/oig/files/Audit_Reports_and_Testimonies/OIG-14-048.pdf

highly secure database. Beginning in January 2024, public sector agencies and some private sector financial institutions will be able to query that database for the beneficial ownership information it contains.

In fairness to FinCEN and Acting Director Das (and now Director Gacki), FinCEN may have the proposed and final rules ready to go; the database may be built and tested, poised on the launching pad and ready for launch on the promised date of January 1, 2024; the guidance for the states, small business community, and financial sectors may be ready with a finger on the "send" button; and they may have hired the hundreds or thousands of people needed to field queries.

But we don't know. FinCEN isn't talking. If January 1, 2024 isn't realistic, either from a technology perspective, a training/guidance perspective, or certainly a regulatory perspective, then FinCEN should announce that ASAP. It is far better for all concerned if FinCEN admitted in July 2023 that "you know folks, we simply aren't going to make the promised January 1, 2024 date. We want to get this right, and have all the rules published and operational well in advance of the launch of the beneficial ownership database. We'll roll everything out on January 1, 2025. We'll keep you updated on where we stand every 60 days."

As it stands, we are all scratching our heads, wondering whether and when FinCEN will implement the Corporate Transparency Act and the Beneficial Ownership Information rules and database. It's mid-July and the silence is deafening.

There is much that FinCEN needs to accomplish in the next 170 days. But there are only two things that FinCEN needs to get 100% right on January 1, 2024, and both deal with the security of the personal information of what could be hundreds of millions of Americans.

The first thing FinCEN must get right is the outreach and communication to 35 million small businesses, their beneficial owners, company applicants, company formation agents, and lawyers: not only how to submit beneficial ownership information and copies of identification documents, but what to watch out for from the inevitable scam artists and professional fraudsters that will prey on these businesses.

The second thing that FinCEN needs to get 100% right is the technical security of the BOSS: once the personally identifiable information – and copies of driver's licenses and passports- from tens of millions of Americans go into the BOSS, that information and those documents must be protected. Everything else – access, use, reconciling current beneficial ownership rules, etc. – can be staged, delayed, amended, enhanced over time. Security must be 100% from day one.

FinCEN has complained that lack of resources has hindered its timely and effective promulgation of the rules needed to implement the AML Act and the Corporate Transparency Act. These complaints and excuses come out in Congressional testimony, in industry speeches, and no doubt behind closed Congressional doors.

By my count, zero of the nine AML Act rules have been promulgated, and only one has made it to the proposed rule stage (SAR sharing pilot rules). Only one of the three CTA rules has been promulgated (reporting), and one is at the proposed rule stage (access). The rules FinCEN has proposed or finalized generally stray beyond what Congress intended and are remarkably complex. That complexity has been compounded by FinCEN's decision to break out its rulemaking into three rules instead of the two contemplated by the CTA, and then to promulgate these rules in serial fashion. The second (access) rule raised questions not addressed in the first reporting rule, and the third (CDD reconciliation) rule will no doubt raise even more questions with the reporting rule as well as new questions not addressed in the access rule.

If the reason(s) why FinCEN is struggling to meet its mandate are resource constraints[23], it would be doing the *opposite* of what it is doing: it would be putting out two simple, incremental rules (and proposed rules), while acknowledging that it must keep things simple since it doesn't have the resources to do any more than what Congress intended.

And the complexities of the reporting rule and proposed reporting form, and the proposed access rule, make FinCEN's resource situation even worse: complex reporting and access forms and rules mean they need even more detailed guidance and even more people manning the help line(s). They are compounding their resource issues.

The one thing that FinCEN could be doing more of – should be doing more of – that is not dependent on more resources is communicating. Clear, honest communications to all interested parties on what it is focused on, what it is prioritizing, what it is putting on the back burner and why, where it is in designing and building the beneficial ownership database, and whether it is proposing any delays in launching the database.

[23] Him Das speech at the ABA/ABA Financial Crimes Compliance Conference, December 6, 2022: "Implementation of the CTA is an intensive process that requires policy teams, economists, regulatory drafters, IT specialists, and public affairs specialists. We are working hard to complete as much of the CTA implementation work as possible within existing resources and staffing. As we enter 2023, however, we will also need to consider trade-offs in implementing this effort in the absence of additional funding—with the goal of making this program as successful as possible." https://www.fincen.gov/news/speeches/prepared-remarks-fincen-acting-director-himamauli-das-during-abaaba-financial-crimes

There is no doubt that FinCEN and its dedicated, professional staff, do incredible work in protecting our financial system and national security from malign and criminal actors and state actors. No doubt. But FinCEN's unwillingness or inability to provide what Congress is demanding- accountability and correlation (if not causation) between what they're asking the private sector to provide, on the one hand, and the law enforcement and national security outcomes, on the other hand- is hurting their mission. Time and time again Congress has asked, literally begged, FinCEN and Treasury and the DOJ to provide actual statistics on the use and utility of BSA reports, and none of them have been able to provide those statistics.

The potential consequences of FinCEN's beneficial ownership information rulemaking are far-reaching. Many things need to align for a "best case" scenario of a January 1, 2024 launch date to occur, but the consequences of such a scenario would be transformational: (i) beneficial ownership information collected in an efficient manner, maintained in a secure, non-public database that is highly useful to national security, intelligence, and law enforcement agencies; (ii) with demonstrable enhancements to America's national security and anti-money laundering and countering the financing of terrorism efforts; and (iii) the United States is in compliance with international AML and CFT standards.

But with continuing resource constraints and required rulemakings remaining incomplete (and, in the case of one of three rules, not possible until at least mid-2024), the more likely consequence is that FinCEN's new Director will soon notify Congress that a "harmonized" effective date for all three rules is July 1, 2024, and the new implementation date for the database is January 1, 2025.

America needs the Corporate Transparency Act to succeed. Success cannot be achieved with a rushed, staggered, muddled deployment of technologies, rules, and guidance. Having rules in place by July 2024 for the launch of the beneficial ownership database on January 1, 2025 gives us the best chance to succeed.

Appendix 1- Blog post: "Implementing the Corporate Transparency Act- Two Rules or Three?"

Posted January 23, 2023 at https://antimoneylaundering.wtf/f/implementing-the-corporate-transparency-act---two-rules-or-three

Accessed July 14, 2023

Implementing the Corporate Transparency Act- Two Rules or Three?

And will the CDD Reconciliation Rule come before or after the Final Access Rule?

On January 1, 2021 Congress passed the Corporate Transparency Act (CTA). Section 6403 of the CTA, titled "Beneficial Ownership Information Reporting Requirements", added a new provision to the set of laws we know as the Bank Secrecy Act (the BSA is a handful of laws that address the problems of money laundering, fraud, terrorist financing). These laws, like almost all laws, describe what needs to be done, or what is prohibited: the how that thing gets done, or how something is prohibited, is left to regulations or rules to be promulgated by the federal agency that is responsible for the subject matter at hand.

This new provision created by section 6403 of the CTA- section 5336 of the BSA- is intended to replace a current beneficial ownership reporting rule that has been in place since May 2016 and operational since May 2018. Section 5336 requires the Treasury Department's Financial Crimes Enforcement Network (FinCEN, which administers the BSA) to build a national database for companies' beneficial ownership information (BOI), and to have qualifying companies ("reporting companies") report the name or names of, and identifying information on, their beneficial owners directly into that database. Certain public law enforcement agencies, and a limited class of financial institutions, can then access or query that database to find out the beneficial owners of a reporting company. This new BOI reporting rule would be reconciled with the current beneficial ownership rule- the one from 2016. How that reconciliation will be done is left to ... you guessed it ... a rule or regulation to be promulgated by FinCEN.

Section 6403 set out what Congress wanted done, but Congress left it up to FinCEN, and some rules to be promulgated by FinCEN, to determine how companies would report their BOI, how the public and private sectors would access, use, and store that information, and how the existing CDD rule would be tweaked to accommodate the new rules. Congress gave FinCEN a year to publish the new reporting/access rule(s)- January 1, 2022- and then another year from that date(s) to publish the CDD reconciliation rule.

But which is it? Is it one rule to implement section 5336 and one rule to reconcile the existing CDD rule, or is it two rules to implement section 5336 and one rule to reconcile the existing CDD rule?

FinCEN believes it is two rules for section 5336, and one rule to reconcile the CDD rule. In a regulatory filing published in the Federal Register (where all proposed and final rules are published) on April 5, 2021 FinCEN wrote:

“While only the regulations implementing the reporting requirements must be promulgated by January 1, 2022, with an effective date to be determined, FinCEN also seeks comment at this time on its implementation of the related database maintenance, use, and disclosure provisions. Section 6403’s mandate that the final rule on customer due diligence requirements for financial institutions be revised will be the subject of a separate rulemaking, about which the public will receive notice and opportunity to comment.” 86 FR 17557 at 17558.

FinCEN is saying that Congress imposed a one-year time frame for FinCEN to promulgate rules on reporting beneficial ownership information, but did not impose any timelines on promulgating a rule on how that information would be accessed or disclosed. And the reconciliation rule must be published within one year of the final reporting rule.

Some members of Congress have indicated that it was never the intent of Congress that the updated beneficial ownership regime be separated into a “reporting” rule and an “access” rule, or that reporting companies would need to report beneficial ownership information (because the rule required them to) even before access rules were in place.

Who is right? And does it matter?

Let’s take a look at the CTA itself. There is a huge body of law on how Congressional intent is determined. I won't begin to go down that rabbit hole but suffice it to say that the first place to look for Congressional intent is the "plain meaning" (if there is one) in the statute itself. Remember, FinCEN has taken the position that Congress intended there to be three rules: one for reporting of beneficial ownership information (BOI), a second for access to BOI, and a third to reconcile the reporting rule with the existing beneficial ownership rule.

Section 6403 of the CTA is titled “Beneficial Ownership Information Reporting Requirements” and includes both reporting of, and access to, beneficial ownership information. The section is not titled “Beneficial Ownership Information Reporting and Access Requirements”. In other words, it appears that Congress intended that reporting of beneficial ownership information included access to that information. Besides, what good is it for a company to report its BOI if that BOI cannot be accessed by law enforcement?

Section 6403 has four subsections, (a) through (d). Subsection (a) adds section 5336 to title 31 of the US Code (the BSA, as discussed above). Like section 6403, subsection (a) of section 5336 is also titled “Beneficial Ownership Information Reporting Requirements”. More on that later.

Subsections (b) and (c) of section 5336 are somewhat technical, and not applicable to this article. Subsection (d) is relevant and is titled “Revised Due Diligence Rulemaking”. That subsection refers to the existing customer due diligence/beneficial ownership rule, and it directs FinCEN to bring that rule into conformance with this new beneficial ownership information reporting

requirement “not later than one year after the effective date of the regulations promulgated under section 5336(b)(4).”

Which takes us back to section 5336. That new section has eight subsections.

Subsection (a) is all of the definitions – reporting company, beneficial owner, substantial control, ownership, etc. Subsections (b) and (c) are the operative subsections for this article. We can leave subsections (d) through (h) for another day.

Subsection 5336(b) is titled “beneficial ownership information reporting”. Subsection 5336(c) is titled “retention and disclosure of beneficial ownership information by FinCEN”.

So here, in the section titled “Beneficial Ownership Information Reporting Requirements”, Congress has carved out reporting from (retention and) disclosure.

As to the “reporting” subsection, 5336(b)(5) provides as follows:

“Effective Date- The requirements of this subsection shall take effect on 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.”

The “access” subsection also provided for regulations but didn’t provide a timeframe. Paragraph 5336(c)(2)(C) provided for the “form and manner of disclosure to financial institutions … by regulation” without setting out when that regulation would be promulgated. Paragraph 5336(c)(3) referred to appropriate protocols for public agencies’ use and access of beneficial ownership information, and that those protocols would be established “by regulation”. But again, there was no time frame within which that regulation would be promulgated.

This is what FinCEN glommed onto when it decided that it would issue three rules: a reporting rule, an access rule, and then a rule to reconcile these new rules with the existing CDD/BO rule from 2016. But does this make sense? Clearly Congress intended that reporting companies would have rules in place, and be reporting their beneficial ownership information, within one year of the passage of the Corporate Transparency Act.

But did Congress intend to give FinCEN whatever time it needed to promulgate rules giving access to that information? What is the point of populating a database if there are no rules in place allowing law enforcement (and some financial institutions) to access that database and use the BOI?

I think Congress intended there to be one rule that covered both reporting of and access to BOI. My interpretation aligns with that of some members of Congress: Congress intended that the rules implementing section 5336 of title 31, the “Beneficial Ownership Information Reporting Requirements”, which logically included how that information would be reported, accessed, used, stored, and protected, would be promulgated within one year. And Congress further intended, and clearly set out, that the 2016 CDD/BO rule would be reconciled within a year after

that. Not one reporting rule in one year, a CDD reconciliation rule a year later, then an access to follow (or even precede the CDD reconciliation rule) whenever it got around to it.

Which brings up an interesting scenario.

The final BOI reporting rule, promulgated under section 5336(b)(4), was published on September 30, 2022. Section 6403(d) of the CTA requires a revised due diligence rulemaking “not later than 1 year after the effective date of the regulations promulgated under section 5336(b)(4)”. So, if FinCEN keeps to the Congressional time frame (which it has generally failed to do so far), the CDD reconciliation rule is due September 30, 2023. As of this writing, it is January 23, 2023. FinCEN has eight months to publish a CDD reconciliation rule (and it has to publish a proposed CDD rule, consider the public comments, write a final rule, submit it to the OMB for approval, then publish the final rule). And FinCEN still hasn’t published a final access rule.

A proposed access rule was published on December 15, 2022, with comments due by February 14, 2023. FinCEN will need months to consider those comments, draft a final rule, and submit that rule to the Office of Management and Budget (OMB) for its consideration, and the OMB will likely take 60 to 90 days to approve the final rule. It is highly unlikely that FinCEN will publish a final access rule before the CDD reconciliation rule due date. And FinCEN has publicly promised to have the BOI database operational by January 1, 2024. Does FinCEN's notion of "operational" mean that companies will submit BOI into the database, but law enforcement agencies and financial institutions won't be able to access that information?

Conclusion

In the long run it may not matter too much whether there should be, or will be, two rules or three rules needed to implement the Corporate Transparency Act. But in the short run- at least by early 2023- it appears that rolling out a final reporting rule, then a proposed access rule, may result in comments on the access rule that address matters that weren't covered in the reporting rule. Promulgating three related rules is simply more complex than promulgating two. FinCEN has created complexity. The bigger problem is whether FinCEN has the ability and resources to design, build, test, implement, run, and maintain the Beneficial Ownership Information Secure System (BOSS) by January 1, 2024. Or at all. I'm not worried about FinCEN hitting its promised date of January 1, 2024: I'm worried that the BOSS will not be secure or ever be fully operational.