



FACTCOALITION

Financial Accountability & Corporate Transparency

The Honorable Blaine Luetkemeyer
Chairman
House Committee on Financial Services
Subcommittee on National Security, Illicit
Finance, and International Financial
Institutions
U.S. House of Representatives
Washington, DC 20515

The Honorable Joyce Beatty
Ranking Member
House Committee on Financial Services
Subcommittee on National Security, Illicit
Finance, and International Financial
Institutions
U.S. House of Representatives
Washington, DC 20515

RE: Hearing titled, “Potential Consequences of FinCEN’s Beneficial Ownership Rulemaking”

Dear Chairman Luetkemeyer and Ranking Member Beatty,

On behalf of the Financial Accountability and Corporate Transparency (FACT) Coalition, we appreciate the opportunity to comment on your hearing titled, “Potential Consequences of FinCEN’s Beneficial Ownership Rulemaking.” The FACT Coalition is a non-partisan alliance of more than 100 state, national, and international organizations promoting policies to combat the harmful impacts of corrupt financial practices.¹ The FACT Coalition has organized for more than ten years to end the abuse of anonymous U.S. shell entities, including through the reforms passed in the Corporate Transparency Act.

According to the U.S. Treasury Department, illicit proceeds equaling a staggering 2 percent of U.S. gross domestic product (GDP) move through our financial system each year.² As the inaugural 2021 U.S. Strategy to Counter Corruption noted, U.S. financial secrecy poses real dangers to average Americans, undermining public health, public safety, and national security.³

The Financial Crimes Enforcement Network (FinCEN) has a critical role to play in addressing these dangers. FinCEN analyzes financial data to identify trends and help uncover illicit flows, provides support to law enforcement and national security officials to better investigate these cases, and implements structural reforms – such as those named in the U.S. Strategy on Countering Corruption – to prevent abuse of the U.S. financial system by the criminal and corrupt. The bipartisan Corporate Transparency Act is the keystone in that reform agenda.

¹ The FACT Coalition, “About Us,” <https://thefactcoalition.org/about-us/coalition-members-and-supporters/>

² U.S. Treasury Department, “Treasury Strategic Plan 2022-2026,” P. 23, March 2022, <https://home.treasury.gov/system/files/266/TreasuryStrategicPlan-FY2022-2026.pdf>.

³ White House, “U.S. Strategy on Countering Corruption,” December 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

Congress has a crucial oversight and appropriations role in empowering FinCEN to safeguard the U.S. financial system both effectively and efficiently.

The Corporate Transparency Act: Risks and Opportunities in Implementation

This hearing comes at a critical time: the Corporate Transparency Act (CTA) represents the most important individual legislative instrument in decades toward ending the U.S.’s status as the world’s top financial secrecy jurisdiction. As the bureau tasked with implementing this vital law, it is important that FinCEN faces appropriate scrutiny – and receives sufficient support – from Congress with regard to these ongoing efforts.

The passage of the Corporate Transparency Act was a rare act of bipartisan consensus that built upon years of advocacy and support from diverse stakeholders, including transparency groups, financial institutions, national security experts, business, law enforcement, anti-human trafficking groups, labor, and congressional champions.⁴ Accordingly, there is now bipartisan interest in seeing the law implemented effectively, and in a manner that conforms to congressional intent.

FinCEN’s First CTA Rule Faithfully Implements the Statute

Last year, FinCEN released a strong first rule to implement the CTA defining which entities will be required to report under the law, among other considerations.⁵ The rule faithfully implemented the statute by including strong definitions for “beneficial ownership” and “substantial control”, as well as reasonable and timely requirements for companies and owners to disclose their information to the beneficial ownership registry to be established by FinCEN. Further, the rule faithfully tailored exemptions to those established in the law, without broadening them further. Finally, under the rule, every company must report at least one beneficial owner, which reflects the reality that entities must be controlled by individuals. Taken together, these aspects of the rule will reduce gaps in coverage and improve the completeness, accuracy, and usefulness of information collected for use by law enforcement agencies and financial institutions.

⁴ The FACT Coalition, “Endorsements for Beneficial Ownership Transparency,” October 19, 2020, <https://thefactcoalition.org/endorsements-beneficial-ownership-transparency/>.

⁵ The FACT Coalition, “The FACT Coalition Welcomes First Final Rule to Implement Landmark Corporate Transparency Act,” September 29, 2022, <https://thefactcoalition.org/the-fact-coalition-welcomes-first-final-rule-to-implement-landmark-corporate-transparency-act/>

FinCEN's Draft Second Rule Unnecessarily Complicates Access for Authorized Users

Despite this success, the Bureau has stumbled in numerous steps along the road to full implementation in 2024. FACT appreciates the bipartisan, bicameral letter sent in April by Chairman McHenry and Senator Sheldon Whitehouse alongside 10 of their colleagues noting serious flaws in FinCEN's draft rule governing access to the forthcoming beneficial ownership information database for authorized users, as well as with the Bureau's draft beneficial ownership information intake form.⁶

FinCEN's draft access rule contains numerous deficiencies that risk seriously undermining the overall effectiveness of the CTA, as noted in FACT's official comment sent on February 15, 2023.⁷ Specifically, the rule risks overly complicating access to collected beneficial ownership information for numerous key stakeholders, including state, local, and tribal law enforcement authorities, relevant financial institutions, and trusted foreign partner jurisdictions.

In particular, FinCEN, without basis, raised the bar for directory use by U.S. state, local, and tribal authorities by including the unfounded requirement that relevant authorities obtain a "court order" to access the directory, instead of the statute's plain language of "court authorization" by an "officer of the court."⁸ Further, FinCEN's draft rule instituted burdensome restrictions, which lack statutory basis, on trusted foreign partners who access the information via U.S. agency request, in ways that limit the prospects of and value in sharing for international investigations and prosecutions.

Perhaps most consequentially, the draft rule undermines the stated anti-money laundering and countering the financing of terrorism (AML/CFT) purpose of the CTA by limiting access criteria for financial institutions to a narrow subset of activities required by the Customer Due Diligence Rule, rather than allowing access pursuant to those institutions' broader AML/CFT responsibilities. FinCEN must reverse course on these limitations to directory access and information sharing to faithfully implement the CTA and congressional intent around access.

⁶ House Financial Services Committee, "McHenry, Whitehouse Lead Bipartisan, Bicameral Letter Demanding Proposed Beneficial Ownership Reporting Regime Reflect Congressional Intent," April 4, 2023, <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408688>

⁷ The FACT Coalition, "FACT Coalition Urges Treasury Department To Make Critical Improvements to Draft Regulation to Implement Landmark Corporate Transparency Act," February 15, 2023, <https://thefactcoalition.org/fact-coalition-urges-treasury-department-to-make-critical-improvements-to-draft-regulation-to-imple-ment-landmark-corporate-transparency-act/>

⁸ 31 U.S.C. § 5336(c)(2)(B)(i)(II)

Draft Intake Form Risks Bankrupting the CTA

It is also critical, as Chairman McHenry and Senator Whitehouse note in their letter, that FinCEN corrects its draft beneficial ownership information intake form which, in its current form, introduces unprecedented optionality in reporting under the CTA, allowing filers to declare information as “unknown” or that they were “unable to obtain” certain data. While FinCEN has confirmed that it will be reissuing the form,⁹ it is imperative that the final document not allow reporting entities to dodge their responsibilities under the law, and require full, accurate, and up-to-date information to be provided to the Bureau, without exception.

Additional Congressional Appropriations are Crucial to the CTA’s Success

While ultimate responsibility for implementation of the CTA lies with FinCEN and, more broadly, Treasury and the Administration, Congress must do its part to make sure that this landmark anti-money laundering measure is effective in its final form. FinCEN officials have repeatedly communicated their need for additional funding to get this law right, as well as to ensure that the Bureau is able to move forward with its additional responsibilities and initiatives, including those outlined in the 2021 Strategy on Countering Corruption.

Additional funding for FinCEN is particularly crucial to the most important element of CTA implementation – ensuring that information collected under the law is verified as real and accurate. Acting FinCEN Director Himamauli Das cited budgetary concerns as a potential roadblock to effective verification for the upcoming beneficial ownership information database during testimony before the Committee in April.¹⁰ The technological infrastructure, data licenses, and other tools needed to ensure accurate verification are costly, but necessary. The Administration committed to verification of beneficial ownership data in March,¹¹ and the text of the CTA requires collected information to be “highly useful” for authorized users. As information in any database can only be “highly useful” if it is clear, consistent, and accurate, Congress cannot afford to deny FinCEN the funding it needs to get verification right. Resourcing will similarly be necessary to allow FinCEN to build a database that incorporates modern technology and data security best practices to safeguard collected information.

⁹ Dylan Tokar, “U.S. Treasury to Change Proposed Corporate-Ownership Reporting Form,” March 28, 2023, <https://www.wsj.com/articles/u-s-treasury-to-change-proposed-corporate-ownership-reporting-form-b787b167>.

¹⁰ House Financial Services Committee, “Hearing Entitled: “Oversight of the Financial Crimes Enforcement Network (FinCEN) and the Office of Terrorism and Financial Intelligence (TFI),” April 27, 2023, <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=408719>

¹¹ Department of the Treasury, “Remarks by Secretary Janet L. Yellen on Anti-Corruption as a Cornerstone of a Fair, Accountable, and Democratic Economy at the Summit for Democracy,” March 28, 2023, <https://home.treasury.gov/news/press-releases/jy1371#:~:text=I%20said%20at%20the%20first,the%20tools%20they%20need%20to>

Finally, FinCEN remains behind schedule in its efforts to ensure a smooth transition to the new beneficial ownership reporting regime. Particularly, the Bureau has not sufficiently engaged authorities at the state level to inform local businesses of their upcoming responsibilities under the law. Additional resources are crucial to ensure that small businesses and other covered entities have appropriate resources to understand their compliance obligations under the law.

Congress Must Not Unnecessarily Delay CTA's Implementation

Members of the Committee have suggested delaying the CTA's implementation until FinCEN is able to finalize a rulemaking amending the Customer Due Diligence Rule (CDD Rule) to conform with the CTA. Congress should not mandate any delay of the Corporate Transparency Act's implementation. Instead, it should provide FinCEN with the budgetary resources necessary to complete the final rulemaking on the CDD Rule in a timely fashion. The rulemaking itself can be simplified and executed quickly. The CTA simply requires that the definition of beneficial owner included in the CDD rule be conformed with the new definition under the CTA. This is a discrete change, and does not necessitate a lengthy rulemaking to complete.

Additional Considerations: FinCEN's Role in the Strategy on Countering Corruption

FinCEN responsibilities go beyond carrying out the CTA. In addition to acting as the nation's foremost financial intelligence unit, the Bureau has been tasked with carrying out various initiatives outlined in the 2021 Strategy on Countering Corruption. These include long-overdue rulemakings targeting money laundering through \$50 trillion U.S. real estate and \$11 trillion private investment markets, both of which have been favorite venues for corrupt actors worldwide to stash their ill-gotten gains. It is crucial that the U.S. plug these industry-sized holes in our AML programs, and FinCEN needs additional funding, as well as political support, to advance these needed reforms in a timely fashion.

Conclusion

Thank you for your time and consideration. If you have any questions, you can contact Erica Hanichak (ehanichak@thefactcoalition.org).

Sincerely,

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