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February 14, 2023

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
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RE: Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities (Docket Number FINCEN-2021-0005 and RIN 1506-AB49/AB59)

To Whom It May Concern:

We, as state attorneys general, write to provide comments about Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, Docket Number FINCEN-2021-0005 and RIN 1506-AB49/AB59.

For the reasons set forth below, we object to the following:

- The proposed requirement that State, local, and Tribal entities (SLTs) provide a separate written justification directly to FinCEN to obtain access to the beneficial ownership database.
- FinCEN's decision to review the orders from "courts of competent jurisdiction" rather than allowing SLTs to self-certify that they have such orders, particularly if there is no deadline for FinCEN to review and approve these orders.

In addition to those objections, we suggest several other amendments to the proposed regulations. These proposed amendments include making it clear that litigants who receive beneficial ownership information during a case are subject to the same non-disclosure laws applying to those who receive information directly from FinCEN.

I. The Proposed “Written Justification” Requirement is Not Mandated by Statute and Is Inconsistent with the Sense of Congress; Will Cause Delay; Invites Second-Guessing of State Court Decisions by FinCEN Staff; and Includes No Estimated Regulatory Burden

The most troubling proposed regulation requires SLTs to draft and submit a separate “written justification” directly to FinCEN, above and apart from the statutorily-mandated request to get authorization from a court of competent jurisdiction. 31 U.S.C. § 5336(c)(2)(B)(i)(II). The proposed regulation provides:

The head of a State, local, or Tribal agency, or their designee, who makes a request under paragraph (b)(2) of this section shall submit to FinCEN, in the form and manner as FinCEN shall prescribe:

- (i) A copy of a court order from a court of competent jurisdiction authorizing the agency to seek the information in a criminal or civil investigation; and
- (ii) A written justification that sets forth specific reasons why the requested information is relevant to the criminal or civil investigation.**

31 C.F.R. § 1010.955(d)(1)(ii)(B)(2) (emphasis added).

First, the statutory language does not support imposing this additional requirement and it is inconsistent with Congress’s decision to create the database to provide rapid access to beneficial ownership information. Congress created the database in part to address challenges facing SLTs, which “may not have the same resources as their Federal counterparts to undertake long and costly investigations to identify . . . beneficial owners” of corporate entities used in the commission of crimes.¹ The additional requirement runs counter to the directive of Sen. Sherrod

¹ See Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities, 87 Fed. Reg. 77404, 77405 (proposed Dec. 16, 2022) (to be codified at 31 C.F.R. pt. 1010)

Brown, “one of the primary authors of the CTA,” who “encouraged FinCEN to ‘ensure that federal, state, local and tribal law enforcement can access the beneficial ownership database without excessive delays or red tape in a manner modeled after its existing systems providing law enforcement access to databases containing currency transaction and suspicious activity report information.’” *Id.* at 77407, 77408.

Second, the additional requirement risks delaying our investigations and those of other SLTs. Members of the investigation team will be required to draft a separate justification *to FinCEN*, in addition to the court order, serve that separate justification and the court order on FinCEN, and await a decision.

Third, this schema risks putting FinCEN in the position of reviewing the adequacy of the state court authorization, particularly if FinCEN takes it upon itself to compare the court order to the written justification. It is not clear what recourse an SLT would have if FinCEN determined that the written justification was inconsistent with the court order or insufficiently detailed. The court orders will typically be from state courts unlikely to have jurisdiction over FinCEN, and FinCEN does not appear to contemplate an internal review process if it denies access to the beneficial ownership database. *Accord* 31 U.S.C. § 5336(c)(6)(B)(iii) (“The Secretary of the Treasury . . . may decline to provide information requested under this subsection upon finding that . . . other good cause exists to deny the request.”).

Finally, FinCEN appears to have neglected to estimate the regulatory burden it proposes to impose on SLTs by requiring the additional written justification. While it does estimate (at 20-30 hours) the burden on seeking approval from a court of competent jurisdiction, FinCEN NPRM at 77428, 77435, it makes no effort to calculate the number of hours SLTs would have to

spend on the separate written justification to FinCEN, as would appear to be required by Executive Order 12866² cited in the NPRM. *See id.* at 77426.

II. FinCEN Should Allow SLTs to Self-Certify They Have the Order from a Court of Competent Jurisdiction

In a 2021 letter submitted in connection with the Advance Notice of Proposed Rulemaking, 40 attorneys general suggested that FinCEN develop a portal that allowed SLTs to self-certify that they have the statutorily-required order from a court of competent jurisdiction.³ The draft regulations in the NPRM instead provide that the court order be served on FinCEN, which then will “review[] the relevant authorization for sufficiency and approve[] the request.” *Id.* at 77409-10.

As FinCEN acknowledges, it currently fields fewer than 100,000 inquiries a year related to the existing databases it manages. *Id.* at 77408. In 2024, it is estimated that 32 million reporting companies will be providing information to the database. *Id.* Moreover, FinCEN forthrightly discloses that it faces “potential budget shortfalls.” *Id.*

² The Executive Order provides:

Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

Executive Order 12866, 3 C.F.R. 638 (Oct. 4, 1993) (<https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>).

³ Letter from Nat'l Ass'n of Att'ys Gen. to Policy Div., Fin. Crimes Enf't Network (May 6, 2021), at 2-3 (<https://naagweb.wpenginepowered.com/wp-content/uploads/2021/05/Comments-from-NAAG-FINAL-with-PR.pdf>).

The more fulsome FinCEN's role is in preapproving these requests, the higher the risk that our investigations are delayed because FinCEN's limited staff cannot quickly review the court orders and approve the requests to search the database. The combination of a huge increase in workload and the "potential budget shortfalls" create the unnecessary risk that our investigations will be stymied because FinCEN lacks sufficient resources.

Rather than setting up a protocol that requires FinCEN to review every court order, an auditable self-certification system would ensure that our investigations are able to move quickly. It is unnecessary for FinCEN to pre-approve each request for several reasons:

First, it is our understanding that SLTs have complied with the non-disclosure requirements for Suspicious Activity Reports and other protected FinCEN data.⁴ Accordingly, SLTs have a track record of responsible use of sensitive data and there is no need for FinCEN to review each court order before granting access to the database.

Second, there are ample deterrents to making willful misstatements to access the database. *See, e.g.*, 31 U.S.C. § 5336(h)(3)(B) (up to five or ten years in prison for unlawful disclosure of beneficial ownership information); 18 U.S.C. § 1001(a)(3) (up to five years in prison for making false statements).

⁴ Published press releases from the U.S. Department of Justice about prosecutions of individuals who unlawfully disclosed protected information of this nature reflect that the defendants were a FinCEN employee, an Internal Revenue Service employee, a Federal Bureau of Investigations agent, and a banker. Press Release, U.S. Att'y's Office, S. Dist. of N.Y., Former Senior FinCEN Employee Pleads Guilty to Conspiring to Unlawfully Disclose Suspicious Activity Reports (Jan. 13, 2020) (<https://www.justice.gov/usao-sdny/pr/former-senior-fincen-employee-pleads-guilty-conspiring-unlawfully-disclose-suspicious>); Press Release, U.S. Att'y's Office, N. Dist. of Cal., IRS Employee Charged with Unlawful Disclosure of Suspicious Activity Reports (Feb. 21, 2019) (<https://www.justice.gov/usao-ndca/pr/irs-employee-charged-unlawful-disclosure-suspicious-activity-reports>); Press Release, U.S. Dep't of Justice, Former FBI Special Agent Sentenced to Five Years in Bribery Scheme (Sep. 14, 2015) (<https://www.justice.gov/opa/pr/former-fbi-special-agent-sentenced-five-years-bribery-scheme>); Press Release, U.S. Att'y's Office, Central Dist. of Cal., Former Chase Bank Official Convicted of Taking Bribes and Disclosing Existence of a Suspicious Activity Report (Jan. 11, 2011) (<https://archives.fbi.gov/archives/losangeles/press-releases/2011/la011111.htm>).

Third, FinCEN could audit individual offices, or set up a standard requirement that court orders be provided after the fact for a certain percentage of cases.

If instead FinCEN wishes to review each court order, it should also be willing to agree to regulations that require it to review each order within a fixed amount of time—perhaps 24 or 48 hours—to ensure that investigations are not delayed by the review and approval process.

III. Other Proposed Amendments to the Draft Regulation

a. Make Clear that Litigants Are Also Prohibited from Disclosing Beneficial Ownership Information

The regulations contemplate that beneficial ownership information may need to be disclosed during litigation. Section 1010.955(a) of Title 31 of the Code of Federal Regulations should thus be amended to add a subpart: “(4) An attorney or party who receives information under paragraph (C)(2)(vi) of this section.” That will help put defendants and defense attorneys on notice of the disclosure prohibitions, which SLT prosecutors and other government attorneys should not be required to police.

b. Allow Beneficial Ownership Information to be Sought After a Case Has Been Charged

The regulations refer to a “court with jurisdiction over the *investigation*” as the one that may authorize SLTs to obtain information. Section 1010.955(b)(2)(i) should be amended to refer to a “court with jurisdiction over the *investigation or case*,” given that there may be situations where beneficial ownership information becomes relevant only after a case has been charged. For example, efforts to tamper with witnesses by bribing them could involve the use of shell corporations.

c. Cover Administrative, as Well as Civil and Criminal, Violations

The regulations address “civil or criminal violations of law.” Section 1010.955(b)(2)(ii) should be amended to provide that “A State, local, or Tribal law enforcement agency is an

agency of a State, local, or Tribal government that is authorized by law to engage in the investigation or enforcement of civil, criminal, or administrative violations of law.” This will ensure that if investigations result in administrative enforcement actions—rather than, or in addition to, criminal or civil cases—those adjudications will not be attacked as a misuse of beneficial ownership information.

IV. Conclusion

Attorneys general have repeatedly supported a common-sense beneficial ownership scheme that will enable us to “reduce criminals’ and terrorists’ abuse of our institutions,”⁵ and ensure that we have timely and efficient access to beneficial ownership information in our criminal, civil, and administrative cases.⁶

The proposed beneficial ownership database can provide critical information to ensure that we hold accountable bad actors ranging from corrupt officials, to organized criminals who exploit nascent marijuana legalization in some of our states, to white collar criminals who seek to hide their ill-gotten gains. If the regulatory scheme is unduly burdensome, or if the procedures FinCEN develops result in delays during fast-moving investigations, however, the beneficial ownership database will not be “highly useful to . . . law enforcement agencies,” National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 4604§ 6402(8)(C) (2021), as Congress requires.

⁵ Letter from Nat’l Ass’n of Att’ys Gen. to Hon. Michael Crapo, Chairman, Senate Banking, Housing and Urban Affairs Committee, and Hon. Sherrod Brown, Ranking Member, Senate Banking, Housing and Urban Affairs Committee (June 30, 2020) (<https://naagweb.wpenginepowered.com/wp-content/uploads/2020/10/Final-NAAG-Support-of-ILLICIT-CASH-Act.pdf>). Forty-two attorneys general signed this letter.

⁶ Letter from Nat’l Ass’n of Att’ys Gen. to Policy Div., Fin. Crimes Enf’t Network (May 6, 2021) (<https://naagweb.wpenginepowered.com/wp-content/uploads/2021/05/Comments-from-NAAG-FINAL-with-PR.pdf>). Forty attorneys general signed this letter, which provided comments to the Advanced Notice of Proposed Rulemaking for the CTA.

The objections and suggestions we make are designed to ensure that this database allows us and other enforcers to “access the beneficial ownership database without excessive delays or red tape,” FinCEN NPRM at 77408, and takes into account the fact that many of us do “not have the same resources as [our] Federal counterparts to undertake long and costly investigations to identify . . . beneficial owners.” *Id.* at 77405.

We look forward to working with FinCEN on the implementation of this database to ensure that we and other SLTs can use it as Congress intended: as a highly useful tool to help us efficiently access important beneficial ownership data to serve and protect the public.

As submitted by 42 State Attorneys General



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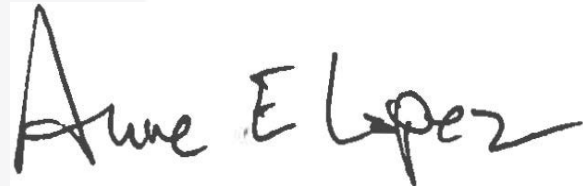
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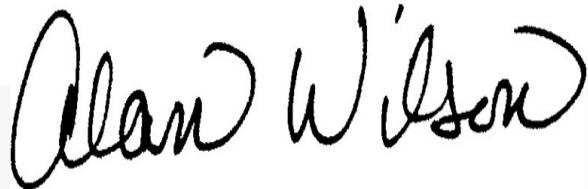
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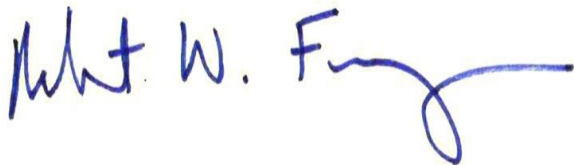
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