CREW

CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
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Via online portal

Re: Comment of Citizens for Responsibility and Ethics in Washington in response to
Notice of Proposed Rulemaking: Beneficial Ownership Reporting Requirements, U.S. Financial Crimes Enforcement Network, RIN 1506-AB49, 86 Fed. Reg. 233 (December 8, 2021)

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully submits this comment in response to the notice of proposed rulemaking ("NPRM") that the U.S. Financial Crimes Enforcement Network ("FinCEN") issued on December 8, 2021 regarding its proposed regulation implementing the provisions of the Corporate Transparency Act ("CTA") related to the reporting of beneficial ownership information. CREW is a nonpartisan anti-corruption and good government watchdog organization and appreciates this opportunity to provide views to FinCEN as you implement Congress's transformative anti-corruption legislation.

In our previous comment, which we filed in response to FinCEN's advanced notice of proposed rulemaking, we encouraged FinCEN to take this opportunity--the first in decades--to develop the bold and comprehensive regulatory framework necessary to address our country's disastrously deficient and outdated corporate transparency regime.[1] You have successfully done so.

With this observation in mind, CREW has a simple, overarching recommendation: do not make substantial changes to your proposed rule that weaken the definition of beneficial ownership, the definition of domestic reporting

[1] Comment of Citizens for Responsibility and Ethics in Washington in response to *Notice and Request for Comments: Beneficial Ownership Reporting Requirements*, U.S. Financial Crimes Enforcement Network, 86 Fed. Reg. 17557 (April 5, 2021) ("CREW Comment") *available at* https://www.citizensforethics.org/wp-content/uploads/2021/05/FINAL-FinCEN-CTA-ANPRM-Comment-1.pdf.

companies, or that expand the number of exemptions to the statute. We discuss each briefly in turn.

(1) Definition of beneficial ownership.[2]

Congress passed the CTA to address the glaring deficiencies in our anti-money laundering ("AML") legal regime, and the text of the statute clearly supports a broad interpretation of the definition of beneficial owners. In particular, we strongly agree with FinCEN that "a reporting company would identify at least one beneficial owner under [the substantial control] component regardless of whether (1) any individual satisfies the ownership component, or (2) exclusions to the definition of beneficial owner apply."[3] As FinCEN's preamble explains, the CTA reflects congressional intent to design a system that provides law enforcement with useful and comprehensive information about the beneficial owners of reporting entities. Artificially limiting the definition of beneficial ownership in a way that would allow reporting entities to avoid disclosing their beneficial owners would run counter to congressional intent. Each reporting entity should have at least one beneficial owner, and we agree with FinCEN that the text of the regulation will have that effect.

Additionally, the "substantial control" test you developed in the proposed regulation should not be altered: it is both consistent with congressional intent in drafting the CTA and it adopts some of the best practices we pointed to in our previous comment. Specifically, we agree with your decision to, in part, model elements of the proposed rule on the United Kingdom's People with Significant Control ("PSC") register. In our previous comment we noted that the UK's four-pronged approach provides businesses with the clarity necessary to comply with the regulations from the outset and offers regulators the flexibility necessary to prevent bad actors from gaming the system by evading the specific wording of the bright line rules. The proposed rule makes it clear that, as we suggested, an individual may be a beneficial owner under the statute "even if the individual owns substantially less than a 25% interest in a company."[4]

Finally, we strongly agree with your decision to reject the definition of control found in the Customer Due Diligence Rule ("CDD Rule"). The CDD Rule's definition of beneficial owner as the single individual who exercises control is far too restrictive and is directly contradicted both by the plain text of the CTA and by Congress's intent in drafting the statute. As we explained in our comment, interpreting the phrase "*an* individual who … exercises substantial control"[5] to mean "*the* individual who…

[2] 86 Fed. Reg. 69920, 69933 (Dec. 8, 2021).
[3] *Id*.
[4] CREW Comment at 4.
[5] 31 U.S.C. § 5336(a)(3)(A).

exercises substantial control" runs counter to congressional intent and to basic common sense.

(2) Definition of domestic reporting companies.[6]

We strongly agree with the proposed regulation's definition of domestic reporting companies. As we explained in our previous comment, the plain text of the CTA creates a structure wherein, "all entities formed by a filing of any kind with any relevant authority that are not specifically exempted by the statute are included in the definition of reporting companies."[7] We therefore agree with you that the way to determine whether a legal entity falls within the scope of the CTA is to "focus on the act of filing to create the entity as the determinative factor in defining entities besides corporations and limited liability companies that are also reporting companies."[8] We also strongly agree with your decision not to define reporting entities to exclude certain types of bespoke trust structures.

Finally, we would like to reiterate the point we made in our previous comment: Congress created a baseline expectation that a company formed by a filing with a competent government entity (broadly defined) will need to report beneficial ownership information *unless* it falls within one of the specifically delineated exemptions to this definition. In doing so, Congress chose a broad definition of reporting companies followed by a number of specific exemptions to the requirements. We simply do not not believe that the text of the CTA provides you with the flexibility to artificially narrow the scope of companies that are required to report beneficial ownership information.

(3) Exemptions to reporting company definition.[9]

We strongly agree with FinCEN's decision not to add any additional exemptions beyond those specifically outlined in the CTA. As we explained in our comment, every additional exemption creates new opportunities for savvy and malicious actors to find gaps and loopholes within the framework. Congress was very clear that FinCEN should only exercise its authority to create new categories of exempt entities in situations where requiring beneficial ownership information "would not serve the public interest" and "would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes."[10] This is an exacting standard and should be reserved exclusively for instances where FinCEN can be: (1) as certain as possible that the new exemption would not create any new loophole that could be exploited

[6] 86 Fed. Reg. at 69938.
[7] CREW Comment at 4.
[8] 86 Fed. Reg. at 69938.
[9] 86 Fed. Reg. at 69939.
[10] 31 U.S.C. § 5336(a)(11)(B)(xxiv).

by malicious actors; and (2) that the exemption is necessary to alleviate a substantial undue burden on a clearly defined class of entities. We agree wholeheartedly that this standard has not been met with respect to any of the numerous proposed exemptions that FinCEN considered from other commenters. And even if a plausible case could be made for a new exemption--though we see none--we encourage you to wait to implement such potential exemption until you have had time to assess how the CTA's framework is functioning in real world scenarios.

Conclusion

Over the last thirty years, the United States has become a world leader in financial secrets and a haven for international corruption and dirty money. It is hard to overstate the scale of the unfolding catastrophe. Thankfully, Congress took action to rebuild our defenses and empower law enforcement to fight money laundering and terrorist financing. The Corporate Transparency Act is the first step towards designing a truly state of the art legal regime to protect the nation from malicious actors intent on abusing our institutions to shelter their ill-gotten gains. In our previous comment we called on FinCEN to make the bold changes that are necessary to combat corruption and the pernicious influence of untraceable money on our country: to design a regulatory framework that rises to the level of the challenges we face. You have succeeded in every possible respect.

The proposed rule is bold and comprehensive--a blueprint for a twenty-first century anti-money laundering regime. We encourage you not to be swayed by those who would seek to weaken this rule in service of their personal pecuniary interests. The minor inconveniences this new regime will place on some businesses must not interfere with the task at hand. You have written a rule that will revolutionize our country's ability to combat illicit finance, in a stroke transforming the United States from one of the worst jurisdictions in the world for money laundering into one of the world's leaders. We look forward to working with you as you finalize this regulation--and as you look forward to the next steps in the fight against illicit and corrupt finance.

Sincerely,

Noah Bookbinder
President