

May 5, 2021

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

RE: Beneficial Ownership Information Reporting Requirements
Docket Number FINCEN–2021–0005 and RIN 1506–AB49

Dear Sir or Madam:

The American Bankers Association¹ appreciates the opportunity to comment on the Financial Crimes Enforcement Network (FinCEN) advanced notice of proposed rulemaking on the Beneficial Ownership Information Reporting Requirements (ANPRM).² The ANPRM is designed to collect feedback on the creation of the registry, which will be a database of information on the beneficial owners of certain legal entities, as mandated by the National Defense Authorization Act for Fiscal Year 2020 (NDAA).³ The section of the NDAA that creates the beneficial ownership registry was initially introduced into Congress as the Corporate Transparency Act (CTA). FinCEN seeks input on all aspects of the registry, including its creation and maintenance, the collection of information from reporting companies, and disclosure of the information to authorized parties, including financial institutions.

ABA has long supported efforts to modernize the current anti-money laundering/countering the financing of terrorism (AML/CFT) regime, and we encouraged Congress to enact legislation establishing the beneficial ownership registry. Throughout, ABA has sought to make the BSA regime more risk focused, effective, and efficient.⁴ This particular effort, focused on creating a database of beneficial ownership data, is designed to provide a resource for law enforcement, but we believe an equally important objective is to provide a mechanism for financial institutions to verify beneficial ownership information, which will alleviate some of the burdens associated with the 2016 Customer Due Diligence rule (CDD rule) as well as use the information for customer due diligence. Therefore, as FinCEN updates existing requirements for financial institutions,⁵ it will be critical to reduce any unnecessary or duplicative burdens to ensure the efficiency of the process, a step required by Congress in the legislation.

¹ The American Bankers Association is the voice of the nation's \$21.9 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$17.8 trillion in deposits and extend nearly \$11 trillion in loans.

² 81 Federal Register pp. 17557 et. seq., April 5, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-04-05/pdf/2021-06922.pdf>

³ Public Law 116–92, <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf>

⁴ See *A New Framework for Partnership*, October 16, 2008, <https://www.aba.com/-/media/documents/reports-and-surveys/ababsareport2008.pdf>

⁵ Customer Due Diligence Requirements for Financial Institutions, issued May 11, 2016, <https://www.govinfo.gov/content/pkg/FR-2016-05-11/pdf/2016-10567.pdf>

Summary of the Comment

ABA supports the creation of the federal beneficial ownership registry as an important tool to combat money laundering, terrorist financing, and illicit financial activity. Throughout the process, we believe FinCEN must ensure that use of and access to the registry is straightforward and easily understood by reporting companies as well as readily usable by law enforcement, appropriate regulators, and the financial sector. Definitions that identify covered reporting companies – and exempt legal entities – should be clear, well-explained and easily applied. For instance, the definition of beneficial owners, particularly what constitutes “substantial control,” or how to calculate the 25% equity ownership interest, should be clearly articulated and readily understood.

Because many of the legal entities that will be required to report their beneficial ownership information to the registry are unfamiliar with FinCEN or this new mandate, clear notice to reporting companies will be critical. FinCEN and Treasury should take advantage of every channel possible to publicize the requirement to register by issuing public service announcements and partnering with the Internal Revenue Service (IRS), state, local, and tribal authorities that create, charter, and register legal entities, and national and local bar associations to provide information to attorneys who help establish these entities.

The reporting requirements should be simple and straightforward and focus on collecting beneficial ownership information, not extraneous information about reporting companies that is unrelated to beneficial ownership. ABA recommends that FinCEN start by using its own model beneficial ownership form, *Certification Regarding Beneficial Owners of Legal Entity Customers*⁶ that was part of the 2016 CDD rule.⁷ Bank customers have become familiar with the form, and it is easy to use, collects the necessary information, and includes explanatory terms. Of course, the form will have to be revised to reflect changes made by the statute, but it is an existing system that has worked well.

ABA recommends that reporting companies submit information electronically. This has the advantage of avoiding errors that can occur when data is transcribed from paper forms, allows ready use of the data without waiting for an upload of a paper form, and can be designed to flag errors in data fields as information is submitted. ABA also urges FinCEN to consider permitting batch filing. However, FinCEN should permit exceptions from the requirement for electronic filing in appropriate circumstances, e.g., when a company does not have access to a secure filing system or when information is coming from outside the United States where data transmission is either impractical or not secure.

Once entered into the registry, beneficial ownership information should be secured to protect the privacy of both those submitting the data and the beneficial owners who are the subject of the reports.

Because the database is designed to provide reliable information for law enforcement and others, we recommend that FinCEN take steps to validate information that has been submitted. This does not require extensive vetting of each entry, but steps to verify the existence and bona fides of the reporting company. Without steps to validate data, the registry will be no more reliable than the current system of collecting information from bank customers and taking it at face value.

⁶ See 81 *Federal Register*, p. 29454, May 11, 2016

⁷ Customer Due Diligence for Financial Institutions, 81 *Federal Register*, pp. 29398 et seq., May 11, 2016

Determining who has access to the registry also will be an important element of the system. Because the information is to be used to combat money laundering, terrorist financing, and illicit finance, it should be as accessible as possible to the financial sector so that it supports the efficiency and effectiveness of banks' customer due diligence programs. Limiting bank access to and use of the beneficial ownership information in the database will handicap their ability to identify potential financial crimes.

To track those who have accessed information in the database, FinCEN will need to assign some system for identification of users, possibly through an assigned user number. Identifying users will also create a mechanism for FinCEN to notify them automatically when there is a change to the beneficial ownership information of any entity they researched in the registry.

Finally, when FinCEN creates the "FinCEN Identifier" for legal entities and beneficial owners, ABA recommends that FinCEN distinguish between legal entities and individuals when issuing Identifiers. ABA also suggests that FinCEN consider using elements in the Identifier to provide basic information about the subject, such as where the reporting company is located and when the identifier was issued, similar to identifying information used in other identifiers.⁸ Also, when creating this new FinCEN Identifier, FinCEN should coordinate through Treasury, the Federal Trade Commission, the Financial Action Task Force (FATF) and others that are working on efforts to create digital identities to ensure the systems are not in conflict.

Background

Congress enacted the CTA in order to deter use of the corporate structure to conceal and facilitate illicit financial activity. While most legal entities are used for legitimate purposes, FinCEN and U.S. government reports⁹ have consistently identified the ability to use these structures as a shield for criminal enterprise. Therefore, FinCEN and law enforcement agencies strongly support establishment of the registry. Although FinCEN's 2016 CDD rule requires banks and other financial institutions to collect beneficial ownership information from customers when opening accounts, the need for a formal registry against which the beneficial ownership data collected by banks can be verified has always been an important but missing part of the equation. Moreover as FinCEN recognizes, "[R]equiring financial institutions to obtain beneficial ownership information at the time of account opening, as the CDD Rule requires, does not make beneficial ownership information about U.S. legal entities available to law enforcement before an account is opened."¹⁰ The new registry is intended to fill those gaps.

Another objective for creating the federal beneficial ownership registry is to be consistent with international expectations to combat money laundering and terrorist financing. For many years, the international community has been critical of the lack of a federal database of beneficial ownership information in the United States.¹¹ The CTA now sets the standards for the federal beneficial ownership registry.

⁸ For example, when Social Security numbers were initially issued, they identified where the number was issued as well as when it was issued. Similarly, when area codes were assigned for telephone numbers, they initially identified to location of the number.

⁹ 81 Federal Register p 17558-9

¹⁰ Ibid, p.17559

¹¹ See, e.g., the Financial Action Task Force evaluation of the United States' measures to combat money laundering and terrorist financing, <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>, December 2016, pp. 222-228.

ABA looks forward to working with FinCEN throughout the implementation process to help structure the registry as a useful and useable database, and to that end, we offer the following initial comments.

Recommendations for Clear and Easily-Applied Definitions

1. Similar Entities

As a threshold matter, FinCEN must address terms not defined by the statute. For example, while the statute defines certain legal entities such as corporations and limited liability companies that must register, it also includes the catch-all phrase, “similar entities,” without defining the term. The approach FinCEN used in the CDD rule requires companies to report beneficial information to a financial institution at account opening focuses on whether the entity must register or file documentation with a state or tribal chartering authority such as the state secretary of state. This approach has worked well to date; it creates a straightforward and easily applied test to identify which entities must register. It also provides FinCEN with partners to help explain the registration requirement to entities as they are being formed.¹² Therefore, ABA recommends that the term “similar entities” should be defined as those which must register their existence with a state or tribal chartering authority.

ABA believes that this definition is sufficiently broad to encompass an appropriate universe of legal entities, particularly for the first round of registration when many thousands will need to register for the first time. It is also important to bear in mind that there is another mandate in the statute that requires FinCEN to analyze whether there are entities not registered with state authorities who should be covered, allowing a later analysis of whether a broadening of the definition is necessary.

Because not all covered entities will be domestic, and to clarify which non-domestic companies are covered, we also recommend defining what is meant by “registered to do business in the United States.”

2. Beneficial Owner

Another term that FinCEN will need to define further is “beneficial owner.” The CDD rule and the CTA define an equity beneficial owner as one who owns 25% or more of the interests of the company.¹³ ABA recommends that FinCEN continue using the 25% demarcation, which was carefully selected after much deliberation and works well for banks complying with the CDD rule. However, since calculation of the 25% is not always straightforward, FinCEN should explain how that amount is calculated and what should be included—e.g., whether it includes both direct and indirect ownership and what is covered when including indirect ownership.

Another aspect of beneficial ownership that needs clear articulation is what constitutes “substantial control” to define a control beneficial owner. To be consistent with the CDD rule,

¹² For example, FinCEN can urge state or tribal authorities to notify entities seeking a charter of the requirement, with a link to the FinCEN website for registration, similar to the information chartering authorities provide about the need to obtain an employee identification number (EIN) from the Internal Revenue Service.

¹³ There may be instances when, based on risk assessment, an individual financial institution might apply a lower percentage, but that decision should be left to the institution.

ABA recommends that FinCEN define the term in such a way that a reporting company can only have a single beneficial owner with “substantial control.” However, the CDD rule definition is not always clear. ABA recommends that FinCEN offer examples in the rule to illustrate both what constitutes and what does not constitute substantial control. For example, while an authorized signer on an account has a certain level of control over the funds in the account, that control is limited by the authority the individual has been given by the organization; often it does not include control of the legal entity. ABA urges FinCEN to clarify that solely being an authorized signer on the account does not make a person a control beneficial owner. On the other hand, a CEO that has a significant level of independent authority to make decisions about the organization would be an example of a control beneficial owner.

In the current regulation, FinCEN defines a control beneficial owner as “[a] single individual with significant responsibility to control, manage, or direct a legal entity customer, including: (i) [a]n executive officer or senior manager...; or (ii) [a]ny other individual who regularly performs similar function.”¹⁴ To supplement the existing approach in the regulation, FinCEN should state that the term “substantial control” also includes the power to vote, direct votes, appoint board members, make decisions involving the share or merger of the company, or direct the control or disposition of the assets of the company.

3. Applicant

In the ANPRM, FinCEN asks whether it should define the term “applicant.” In part, it depends on the role assigned to the applicant. If the applicant is the person who submits the necessary documentation to a state secretary of state or other appropriate authority to create the legal entity, and that is that person’s sole role in the process, it appears that information has limited value for law enforcement, particularly since the information can be obtained from the secretary of state if it is ever needed. If the applicant has completed his or her association with the legal entity once it is formed, then it becomes superfluous data for the beneficial ownership registry.¹⁵

On the other hand, the person who submits the information to the beneficial ownership registry may be certifying the information submitted to the database. In that case, FinCEN should identify and verify the identity of that person at the time the beneficial ownership information is submitted. However, FinCEN’s interest in the person is due to his or her role *certifying* the data, not as the applicant.

Fundamentally, ABA believes the decision about whether to collect information on applicants is whether doing so adds worthwhile information about beneficial owners. Without further support, ABA recommends against collecting this information, which in turn eliminates the need for a definition.

4. Exemptions

Another important set of definitions will determine which legal entities are exempt from registration. The CTA provides an extensive list that identifies those entities that are exempt from coverage. ABA recommends that FinCEN use the definitions set forth in the statute which generally match the exemptions in the existing CDD rule. If, during the rulemaking process,

¹⁴ 81 Federal Register, May 11, 2016, p. 29452, <https://www.govinfo.gov/content/pkg/FR-2016-05-11/pdf/2016-10567.pdf>

¹⁵ If the applicant serves another role once the entity has been formed, then he or she will be captured through a different definition.

additional clarity is needed or additional exemptions should be added, FinCEN can do so then. In addition, FinCEN will be able to take a closer look at the exemptions when it updates the CDD rule.

FinCEN asks whether a trust or special purpose vehicle, formed by a filing with the secretary of state or comparable state or tribal authority, should be included. As noted previously, using the state filing requirement to identify covered legal entities is simple and straightforward. It has been the guiding principle under the CDD rule and has worked well. ABA recommends that FinCEN continue this approach for now. Therefore, if a trust or special purpose vehicle must register under state law, it should submit its beneficial ownership information to the registry.

5. Validating Exemptions

FinCEN also asks whether a legal entity should be required to file a form documenting that it qualifies for an exemption from filing. ABA does not believe that the benefit of collecting exemption information sufficiently outweighs the burden of creating a sub-database to track exemptions.

When a legal entity opens an account with a financial institution, it can explain which exemption applies as part of the financial institution's customer due diligence process,¹⁶ but that information does not need to be included in the registry. We recommend a similar approach for the registry, and believe that the only time exemption information should be required is if a registered entity *becomes* exempt, then it should file a short form to de-list from the registry.

Recommendations for the Beneficial Ownership Information Reporting Process

Perhaps the most important element of the entire registry is the reporting requirement and the information that FinCEN will collect from legal entities. ABA believes that FinCEN has already put in place a firm foundation for reporting companies through the CDD rule and should use the existing model form as the basis for collecting beneficial ownership from reporting companies. The form is simple and straightforward and it includes sufficient information to help entities understand why the information is required and what must be submitted. The existing form also has the benefit of being a document that many companies already know, having completed the form at the time they opened a new bank account. While there will be some changes needed to conform the existing model to the requirements of the AMLA, that should be a simple process.

One key element to the information being submitted to the registry is that the person submitting the beneficial ownership registration to FinCEN should certify the accuracy of the data provided, to the best of his or her knowledge—ideally, under penalty of perjury. ABA recommends that FinCEN incorporate such a certification in the registration form being submitted by reporting companies as an important element in the process.

1. Information on the Reporting Company

FinCEN asks what information should be collected on the legal entity itself. At a minimum, FinCEN should collect and verify the same data on the company that is collected under the Customer Identification Program rules: the name of the company, its physical address (i.e., the

¹⁶ If a financial institution questions why a legal entity customer is not registered, at that time the customer can provide the rationale to the financial institution which can then retain the information as part of its normal customer due diligence.

principle place of business), and its taxpayer identification number. ABA also recommends that as part of the process, FinCEN verify the existence of the entity by confirming that the entity is registered with the state authorities where it is chartered and possibly obtain a certificate of good standing from the state or tribal authority that chartered the entity. FinCEN should collect sufficient information about the entity to enable it to validate the information so it is reliable for any user of the database.

It also has been suggested that FinCEN consider collecting NAICS codes¹⁷ as an identifier. ABA does not believe this is useful information for the database. Fundamentally, we believe that for FinCEN to require the collection of information about a reporting company, two key questions must be answered affirmatively: is the information relevant to beneficial ownership? And does the information add value to law enforcement efforts to trace beneficial owners? In addition to the information outlined in the preceding paragraph, other data seems unnecessary for the registry.

2. Affiliates, Subsidiaries, and Holding Companies

Another question FinCEN asks is whether to collect information on affiliates, holding companies, and subsidiaries of legal entities. Again, while it may be tempting to use the registry as a vehicle to amass data, ABA recommends evaluating the relevance of information on affiliates, subsidiaries, and holding companies to identifying beneficial ownership. The focus should be on the legal entity in question and the beneficial owners of that legal entity. If a related legal entity such as a holding company or an affiliate is identified as a beneficial owner of the reporting company, then it is appropriate, and in fact necessary, to collect information on that legal entity. But the reason the information becomes relevant is because it is a beneficial owner of the reporting company, not because it is within the corporate family. Therefore, ABA recommends against collecting information on affiliates, subsidiaries, and holding companies solely because they are part of the corporate structure.

3. Accuracy of Information Submitted

Overall, as discussed previously, FinCEN should take steps to verify basic elements of the data submitted by reporting companies to ensure its accuracy. Without that assurance, the information in the registry is unverified information which undermines the entire purpose for the registry. As one banker noted, If FinCEN does not validate the information in some way, then users of the registry are using unverified information to verify unverified information.

The first step, of course, is to require the person submitting the beneficial ownership information to certify its accuracy, similar to the way individuals submitting beneficial information to financial institutions do today.

Validation of the information submitted does not need to be an extensive undertaking. For example, FinCEN can and should verify with a secretary of state or other chartering authority that the company exists and is in good standing. The validity of the address can easily be validated against a variety of different public databases such as the United States Postal Service (USPS). The taxpayer identification number can be validated with the IRS. And, of

¹⁷ A NAICS code is a self-selected identification code that is used to define the primary nature of a company's business activity. See [https://www.naics.com/what-is-a-naics-code-why-do-i-need-one/#:~:text=A%20NAICS%20\(pronounced%20NAKES\)%20Code,related%20to%20the%20US%20Economy](https://www.naics.com/what-is-a-naics-code-why-do-i-need-one/#:~:text=A%20NAICS%20(pronounced%20NAKES)%20Code,related%20to%20the%20US%20Economy).

course, the identity of the beneficial owners can be validated following the same process as used by banks to validate individuals through Customer Identification Program (CIP) procedures.¹⁸ In fact, the database should be structured so that much of the validation to be done through software applications.

4. Electronic Filing

ABA encourages FinCEN to create an electronic reporting system, which would be the most efficient and effective way to collect the beneficial ownership information. However, in setting up that system, it will be critical to ensure that appropriate safeguards are in place to ensure the security and confidentiality of any information submitted, since information on individual beneficial owners is sensitive personal information. This includes ensuring that the channels used to transmit and retrieve data from the registry also are secure.

Establishing an electronic filing system offers FinCEN the opportunity to incorporate data integrity checks to ensure that the information is complete and does not contain inconsistencies. Having the information filed electronically also allows FinCEN and others to access and use the data quickly. Finally, by having the reporting company submit the information directly, it will reduce the likelihood of errors that occur when information is transcribed from a paper form to the database. To improve efficiency, we recommend that FinCEN permit batch filing, especially to facilitate the submission of data from the large number of legal entities that will be filing for the first time.

While electronic filing is preferable, not all companies, such as smaller businesses or foreign businesses, will be able to file electronically. Therefore, FinCEN should provide an alternative means that allows these companies to submit data. The goal should be make it as easy as possible for reporting companies to submit their beneficial ownership information.

Because many of the companies that will be submitting this information will be doing so for the first time, FinCEN will need to make sure that reporting companies have secure but ready access the system for registration. Using a secure portal, such as what is used for distributing information requests to banks or for law enforcement to submit queries to the BSA database is probably the ideal solution, but whatever format is chosen, there must be a mechanism incorporated to verify the identity of the reporter and also allow the reporter to access their own records to make corrections or to submit changes easily.

We recommend FinCEN consult with states and tribal authorities to identify existing programs used by those agencies to see if there are elements that FinCEN can replicate or use as a model. In the process, FinCEN also should explore whether relevant data held by states and Indian tribes can pre-populate the beneficial ownership registry with information. This is likely to require FinCEN to enter into memoranda of understanding with each state or tribal authority that allows FinCEN to link its registry to state or tribal databases that track entities chartered under their authority.

¹⁸ See, e.g., 31 CFR §1020.220, Customer identification program requirements for banks.

5. Correcting Information

To promote the accuracy of beneficial ownership information, FinCEN must permit companies to correct, without penalty, information submitted inadvertently in error. Especially in the initial phases of registration, it is inevitable that reporting companies will make mistakes, particularly as they begin to understand the reporting requirements.¹⁹

ABA also urges FinCEN to incorporate a mechanism to notify anyone who has queried the database regarding a particular legal entity when there has been a change to the beneficial ownership information on file for that entity – either a correction or an update. This will ensure that those who have accessed the database have correct and up-to-date information.

6. Pooled Investment Companies

To comply with the statutory requirements, FinCEN must establish a process for pooled investment companies to file limited information. Since these are foreign entities, the filing process should be as simple as possible, and the required information should be certified and submitted electronically, with an alternative process available when electronic submission is not practical. The beneficial ownership information should be submitted directly to FinCEN and not through an intermediary foreign authority, although exceptions may be needed to accommodate restrictions of foreign law. The information submitted also should identify the home regulator of the entity.

The information collected for pooled investment companies should include: information about the individual designated as the manager of the pooled investment vehicle and the name and business address of the manager without additional identifying information. Because these are foreign entities, the name and address of an agent in the United States for appointment of service should also be required. In addition, because some of these entities will be managed by another financial institution, not an individual, submitting the name of the entity, such as a financial institution, that acts as the control party without more should be acceptable. Finally, the information, like other information in the database, should be accessible to law enforcement, appropriate regulators, and financial institutions.

7. Notifying Legal Entities of this New Obligation

One of the most important tasks facing Treasury and FinCEN will be notifying companies of this new obligation to register previously private information – beneficial ownership data – with an agency – FinCEN – that is unfamiliar to most of them. Moreover, FinCEN and Treasury must inform two different groups of this requirement: newly chartering legal entities and existing legal entities.

Providing notice to companies submitting charter applications to state authorities should be relatively simple and straightforward. For example, when a new company is being chartered, one of the standard notifications they receive from state and/or tribal authorities is a notice to file an application with the Internal Revenue Service for an employer identification number (EIN). Typically, this is accomplished by a simple notice on the application form that includes a link to

¹⁹ Even though the beneficial ownership requirements have been in effect for the financial sector for nearly three years, banks report they struggle occasionally to answer customer questions about specific data-points required for the beneficial ownership form.

the IRS website where an application for an EIN can be filed. A similar notice could be incorporated that directs the applicant to register beneficial ownership information with FinCEN and includes a link to the FinCEN secure portal, once it has been established.

FinCEN also should consider asking state and tribal authorities to include a notice on their website page(s) dedicated to chartering legal entities. This notice should include a link to additional information about the new beneficial ownership registration requirement on FinCEN's website.

Notifying existing legal entities will be more challenging. ABA suggests that Treasury produce a series of short public service announcements that alert legal entities of this new obligation. Having Treasury create these public service announcements underscores the official nature of the mandate.

In addition, we recommend notifying existing companies by including a notice with tax filing information from the IRS. Because most legal entities file an annual tax return, incorporating a simple notice from the IRS would reach the great majority of them.

In addition, FinCEN should request that state and tribal authorities add a notice to their websites as well as any annual or regular notice that they send out to legal entities that they have chartered.

FinCEN also should consider working with state and national bar associations to alert attorneys about the new obligation because lawyers are frequently involved in drafting the necessary documentation to charter a legal entity.

Finally, ABA recommends that FinCEN provide information about the obligation and registry on its website in a prominent place. By posting the notice in addition to an explanation of the information required, other authorities, including financial institutions, bar associations, and state and tribal authorities can easily link to the FinCEN website, assuring uniformity and consistency.

8. Content of the Notice

When notifying legal entities of the new requirement, ABA recommends that the notice include a simple statement about the purpose for the collection of the information. The notice should explain how to identify beneficial owners as this will help avoid confusion and ensure consistency in the information provided. FinCEN provides similar information on the model template provided with the CDD rule that can readily be adapted to the new notice about the registry.

Recommendations for Establishment of a FinCEN Identifier

ABA supports the creation of a new FinCEN Identifier as a useful tool for managing beneficial ownership information. While much will depend on the final format of the number and the ability of the public to use that information, as well as its reliability, it has the potential to make the process more effective and efficient. However, when an application for an Identifier has been submitted to FinCEN, there should be an established timeline for when it will be issued; ABA believes that no more than 30 days would be appropriate.

While the creation of the FinCEN Identifier is in the hands of FinCEN, it will be important to ensure appropriate public engagement and feedback during the process. The financial industry

will adapt to the FinCEN Identifier in whatever format it takes, but ABA offers a number of observations for the agency to consider.

First, as FinCEN is undoubtedly aware, there are a number of efforts underway elsewhere to develop different types of identifiers. For example, the Financial Action Task Force (FATF) has issued guidance on digital identities.²⁰ In addition, Treasury, the Federal Trade Commission and others have projects underway to look at digital identity.²¹ As FinCEN develops its Identifier, it should coordinate with these efforts to avoid creating conflicting or duplicative identifiers that create confusion.

Similarly, when issuing the Identifier, ABA suggests that FinCEN coordinate with secretaries of state and tribal authorities on the numbers that they assign to legal entities. FinCEN also should consider the system used by the IRS to assign taxpayer identification numbers to determine whether it makes sense to coordinate that number with the FinCEN Identifier in some way.

As it creates this unique FinCEN Identifier, FinCEN might use digits in the Identifier as a source of other information, such as using a digit to identify when it was issued or where it was issued—i.e., the geolocation of the company or person to whom the number is assigned. Another digit might identify the type of business or where it was chartered. This additional information can be useful to banks' customer due diligence process.

Recommendations for the Access to the Registry and to Promote the Security and Privacy of the Information

From the perspective of ABA members, the ability to access the beneficial information in the new registry is critical to improve compliance with the CDD rule and BSA/AML compliance more generally. However, the more restrictions that are placed on the ability of banks and other financial institutions to access the database, the less useful the registry will be to the industry. That, in turn, will limit the ability of financial institutions to use the database as a tool to support law enforcement. ABA urges FinCEN to make the registry as accessible to the financial sector as possible. We oppose the idea of restricted access where a bank merely validates information supplied by the customer. If that is the only access permitted to banks, the registry will not be a tool for banks conducting customer due diligence.

At the same time, we recognize the importance of protecting the information in the registry, particularly information on individual beneficial owners since that is sensitive personal information. Therefore, ABA recommends that the ability to access the database include some type of validation or identification code to identify and verify the person accessing the database. This also will be important to have for audit trail purposes, as required by the statute. One mechanism that FinCEN might consider when establishing a means to track who from the financial sector has accessed the database would be to build on the current process for assigning point of contact information used for the 314(a) process.²²

²⁰ *Digital Identity*, March 2020,

<https://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-on-Digital-Identity.pdf>

²¹ See, e.g., Better Identity Coalition policy forum, *Identity, Authentication, and the Road Ahead*, February 4 and 5, 2020, <https://www.betteridentity.org/policy-forum>

²² Under §314(a) of the USA Patriot Act, banks verify transaction and account information for law enforcement on certain identified subjects. When FinCEN distributes a list for verification or matching, it sends that information to a previously identified point of contact.

One of the challenges with allowing financial institutions to access the database is that the statute requires a customer to grant permission for access. To document permission we recommend that FinCEN incorporate appropriate language into the model beneficial ownership form that grants that permission to the financial institution.

Another option for FinCEN to consider would be to establish certain permissible purposes for accessing the registry, similar to the permission to access credit reporting information under the Fair Credit Reporting Act. For example, a permissible purpose to access the beneficial ownership registry might be the opening of a new account, a change to an account, or a regular review of a customer and account. If a bank can demonstrate a permissible purpose, that alone should permit access to the registry.

FinCEN also must consider expectations for how financial institutions will manage discrepancies. Hopefully, those instances will be limited, but when FinCEN updates the CDD rule, it will need to address this issue. ABA recommends that when a discrepancy is discovered, the bank contact the customer and ask for an explanation. If there is a satisfactory explanation, that should be sufficient and the *bank* should not have an obligation to report to FinCEN. Rather, the bank can assume that reporting company will file an update when beneficial ownership information changes.

Recommendations for Reducing Cost and Improving Process, Outreach

The costs associated with creating and managing the new beneficial ownership registry will be significant, but because so many variables still must be addressed and resolved, it is impossible to estimate what the final costs might be. Assuming the registration process is simple and follows the model form in the CDD rule, will minimize the costs for reporting companies. Costs for the financial sector will depend on expectations about how it uses information from the registry, including what steps are required to research and resolve any potential discrepancies.

One step that will help minimize costs – and confusion – is to have the same form for all businesses and not try to vary the reporting form based on the type of business. Since FinCEN introduced the model beneficial ownership form, it has worked well, and ABA sees no reason to depart from that and provide a variety of reporting forms and formats.

Clearly one of the most important steps for FinCEN will be coordinating with the requirements of secretaries of state and tribal authorities. Under the terms of AMLA, FinCEN is already charged with conducting additional outreach, and coordinating efforts with the authorities at the state and tribal level that create legal entities will be an important part of these efforts.

Finally, in analyzing the creation of the new beneficial ownership registry, ABA suggests that FinCEN consider whether the process should be expanded to include different non-bank financial institutions, particularly fintech companies, including whether they should be required to register or whether they should have access to the registry similar to that permitted for other financial institutions.

Conclusion

ABA appreciates the opportunity to comment on the ANPRM and looks forward to continuing to support FinCEN's work to create a useful and useable federal beneficial ownership registry. If you have additional questions about our recommendations, please contact the undersigned at rowe@aba.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Rowe, III". The signature is written in a cursive style with a horizontal line extending to the right.

Robert G. Rowe, III
Vice President & Senior Counsel