



May 5, 2021

Submitted Electronically

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

Re: Beneficial Ownership Information Reporting Requirements, RIN 1506–AB49

Dear Ladies and Gentlemen,

The Wisconsin Bankers Association (WBA) is the largest financial trade association in Wisconsin, representing approximately 220 state and nationally chartered banks, savings and loan associations, and savings banks. WBA appreciates the opportunity to comment on the Financial Crimes Enforcement Network's (FinCEN) advance notice of proposed rulemaking regarding beneficial ownership information reporting requirements (proposal).

FinCEN has requested comment on a number of aspects related to implementation of certain provisions of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021. WBA understands and appreciates the risks presented by the potential for misuse of legal entities to conceal and facilitate illicit activity. Wisconsin banks have worked diligently to implement and follow procedures to meet their customer due diligence (CDD) obligations. The CDD rules have become a major part of bank BSA policies and thus, the CTA's mandate for revision not only presents an opportunity to better refine the process of assisting in identifying and responding to illicit financial activity, but it also represents a significant impact on bank operation and procedure, and an opportunity to clarify various matters that could ultimately lead to a smoother, and more effective CDD process. As such, WBA appreciates the opportunity to comment on FinCEN's consideration of input on how best to implement the various aspects of the CTA.

Definitions

The first category of questions for which FinCEN seeks comment relates to definitions. Question 3 asks whether the definition of "beneficial owner" is sufficiently clear. That definition being "an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise" either "exercises substantial control over the entity" or "owns or controls not less than 25 percent of the ownership interests of the entity." The CDD rules define "beneficial owner" similarly under 31 CFR 1010.230(d)(1). WBA requests that FinCEN expand upon the definition of "beneficial owner." Within that definition, WBA believes that FinCEN should provide a more specific definition of "owns." Such clarification would assist financial institutions in completing their requirements under the rule. Meaning, what is ownership for purposes of the rule?

WBA members have reported that legal entity customer representatives are often confused as to what constitutes owner vs. non-owner related involvement. The representatives in these

cases either misrepresent information on the certification, as in the example above, or seek guidance from their financial institution on the matter. The financial institution is then required to verify that information. Guidance on the definition of “ownership” would make it easier for financial institutions to open accounts by better being able to verify whether a legal entity customer’s identification of a given beneficial owner is within the ownership prong of the rule.

Question 5 of the proposal asks whether there are other terms used in the CTA that should be defined in FinCEN’s regulations to provide additional clarity. Section 6403 of the CTA discusses concepts of an “intermediary.” Furthermore, discussion within the CDD final rules suggests the concept of “intermediate accounts, without a further definition incorporated into the rule. This concept of an “intermediated account,” and their treatment, has been a point of confusion among Wisconsin financial institutions. It is WBA’s understanding that the concept of an intermediated account implies that fiduciary accounts such as lawyer trust accounts, interest-bearing real estate trust accounts, and guardianship accounts could be covered by the rule. This is based on a discussion in the preamble to the CDD final rule.¹ The discussion provides that “... a financial institution should treat the intermediary, and not the intermediary’s underlying clients, as its legal entity customer...” This discussion, which is within the preamble and not incorporated into the rule itself, has created further confusion as to when an intermediary should be treated as a legal entity customer for purposes of the rule.

As the preamble is not the rule, this presentation of a core concept on applicability is difficult for many financial institutions to incorporate into their policies. Finally, while the preamble discusses the concept of intermediaries in relation to the rule, it does not clarify what an intermediary is. As such, WBA requests that FinCEN incorporate a definition of “intermediary” and “intermediated account” into its final rules in order to clarify the matter.

Finally, WBA seeks clarification regarding application of the CDD requirements to renewals. While this is not an explicitly aspect of the CTA, WBA does believe that, in FinCEN’s efforts to best implement the CTA provisions as required to govern beneficial ownership reporting requirements as a whole, specifically, to facilitate collection in a form and manner that ensures the information is useful in utilizing accurate, up-to-date information to mitigate the risk of illicit financial activity, this is a definition that is significant to implementing the CTA and, deserving of a definition.

As a matter of background to the issue, on September 7, 2018 FinCEN issued FIN-2018-R003 (ruling) granting exceptive relief for certain renewals, and Wisconsin financial institutions have struggled to determine when the ruling is applicable. The ruling grants exceptive relief to a rollover of a CD and a renewal, modification, or extension of a loan that does not require underwriting review and approval. A CD is defined in the ruling as “...typically, the account will automatically renew absent affirmative action by the customer to close the account.” This has caused a good deal of confusion among Wisconsin financial institutions. The adverb “typically” seems to condition the definition rather than assertively require there be no affirmative action. Its passive nature makes it unclear to financial institutions as to what constitutes “action” on behalf of a customer. Specifically, financial institutions question when, and what type of customer action prohibits them from utilizing the exceptive relief.

For example: a customer comes in to a financial institution to verbally confirm renewal. The customer takes no additional action and the renewal is completed. Financial institutions have asked: is that affirmative action on behalf of the customer, now triggering the rule? Or could a

¹ 81 Fed. Reg. 91 (May 11, 2016).

financial institution enjoy the relief in this instance? WBA requests clarification as to the extent to which the “typical” definition FinCEN provides applies to the rule as well as the scope within which customer activity is considered “affirmative.” Such clarification would help financial institutions take advantage of this relief ruling and further the overall goals of the CTA.

Similarly, the guidance on loan renewals, modifications, and extensions indicates that the “industry has also represented that, as with CDs, some loans are subject to automatic renewal, modification, or extension within a specified time and require no action from the customer for that renewal, modification, or extension to take effect.” WBA requests further clarification as to what FinCEN considers “automatic” renewal in the loan category.

Finally, the guidance only permits relief for loans not subject to underwriting review and approval. Underwriting is a dynamic process unique to each institution. Activities one institution considers underwriting may not constitute underwriting at a different institution. Financial institutions are eager to know what types of activity FinCEN considers to be “underwriting” for purposes of the rule. Greater clarification would go a long way to assisting financial institutions in complying with the rule and utilizing the relief provided.

Reporting of Beneficial Ownership Information

The proposal requests comments on various requirements related to reporting of beneficial ownership information, including questions 10, 11, 12, and 13. Question 16 also asks what reporting burdens are anticipated. These questions generally relate to the obligations of a reporting company. Under the CDD rules, covered financial institutions are required to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of legal entity customers. In implementing the CTA provisions, and considering reporting of beneficial ownership information, WBA requests that FinCEN consider certain aspects that would help facilitate CDD and CTA purposes by clarifying certain requirements financial institutions must follow when identifying and verifying beneficial ownership information.

Regarding FinCEN’s questions related to reporting of beneficial ownership information, one difficulty that financial institutions face relates specifically to verification. 31 CFR 1010.230(b)(2) provides that a covered financial institution may rely on the information supplied by the legal entity customer’s representative regarding the identity of beneficial owners, provided that it has no knowledge of facts that would reasonably call into question the reliability of such information. Wisconsin financial institutions have asked for clarification on the extent to which the certification may be relied upon.

WBA has heard of situations from multiple institutions where information identified on the certification is discovered to be inaccurate when completing verification. This is common in complex ownership structures. For example, in one scenario, an LLC had what it referred to as a “Class A Member schedule” and a “Class B Member schedule.” Within each member schedule, there were different levels of ownership based upon capital contributions, membership interest, and a separate percentage interest. In cases like this, it is ambiguous as to what “ownership” applies for purposes of identifying a beneficial owner and accurately completing the certification.

In this situation, the representative of the legal entity customer was unsure how to complete the certification. As a result, the financial institution was unsure how to open the account and meet its CDD requirements. WBA requests that FinCEN remain mindful of these issues when considering its questions of what information should be required of a reporting company. To

ensure that the beneficial ownership database is useful, it would be beneficial for financial institutions to receive clarity on the extent to which financial institutions can rely upon the information provided. For example, in these scenarios when a customer informs a bank that its representation on the certification is its understanding, or best estimate, but otherwise indicates that they are not 100% certain, does that trigger further investigation by the financial institution? Can the financial institution rely upon its certification despite knowing that the representative has indicated their doubt as to its accuracy? To what extent is the financial institution required to verify the accuracy of their representation? Must the financial institution dig into the complexities itself? If the representative indicates anything less than 100% certainty, the financial institution now has knowledge that reasonably calls into question the reliability of the information, so can the financial institution open the account without violating the rule?

Financial institutions have also asked for clarification regarding their responsibility when information relied upon for verification purposes expires. For example, many financial institutions collect copies of unexpired driver's licenses during the verification process. These institutions struggle to set policies in accordance with the rule as to how they should handle a previously relied upon unexpired driver's license once the license expires. WBA requests further guidance regarding verification, as it would help financial institutions set appropriate risk-based verification procedures by clarifying when it is necessary to obtain an updated driver's license or other expired forms of identification relied upon during the verification process.

Regarding the collection and reporting of information, WBA also recommends that FinCEN should build on the existing, model beneficial ownership form provided in the CDD final rule.² Based upon input from members, the model form, or versions derived from the model form, are used by financial institutions to meet current CDD obligations. In order to reduce the costs and burdens associated with a transition to an entirely new form, WBA recommends that FinCEN build off of the existing form which is currently the basis for certification of beneficial ownership information.

Security and use of Beneficial Ownership and Applicant Information

Question 35 asks how FinCEN can make beneficial ownership information available to financial institutions with CDD obligations to make that information most useful. WBA recommends that access to the registry not be limited, as such restrictions will handicap banks' ability to make use of the information for customer due diligence and suspicious activity monitoring purposes. Furthermore, since information will be used to combat money laundering, terrorist financing and illicit finance, it should be as accessible as possible to banks so that it can be used for customer due diligence.

Conclusion

WBA appreciates the opportunity to comment on FinCEN's proposal regarding beneficial ownership information reporting requirements to implement the CTA. As CDD obligations have become a major component of financial institution's BSA programs, the proposal relates to matters that are significant to Wisconsin banks. As such, WBA requests that FinCEN consider its existing CDD rules in relation to any proposed changes it contemplates as part of its requirement to implement the CTA, and provides the above comments as specific points of interest.

² Id.

We appreciate your consideration of these comments.

A handwritten signature in black ink, reading "Rose Oswald Poels". The script is fluid and cursive, with the first name "Rose" being more prominent and the last name "Poels" written in a more compact, connected style.

Rose Oswald Poels
President/CEO