January 25, 2016

Financial Crimes Enforcement Network
Department of the Treasury
P.O. Box 39
Vienna, Virginia 22183

Re: Notice of Availability of Regulatory Impact Assessment and Initial Regulatory Flexibility Analysis Regarding the Customer Due Diligence Requirements for Financial Institutions; FinCEN–2014–0001

To Whom It May Concern:

On behalf of the 1.453 million credit union members we represent, the Heartland Credit Union Association (HCUA) appreciates the opportunity to comment on the Financial Crimes Enforcement Network's (FinCEN) notice of availability of certain documents related to its Customer Due Diligence Requirements for Financial Institutions proposed rulemaking (CDD Proposal).

In August 2014, FinCEN issued a proposed rule to amend existing Bank Secrecy Act (BSA) regulations regarding customer due diligence requirements for credit unions, banks, and related entities. The CDD Proposal would also impose a new requirement under the BSA to identify the beneficial owners of legal entity customers, subject to certain exemptions. In December 2015, FinCEN made available a Regulatory Impact Assessment (RIA) and an Initial Regulatory Flexibility Analysis (IRFA) related to the CDD Proposal. This letter addresses issues with the RIA and IRFA.

Regulatory Impact Assessment

FinCEN determined that the implementation and compliance-related costs of the CDD Proposal may exceed $100 million annually, making this rulemaking an "economically significant regulatory action," which requires agencies to conduct an RIA. FinCEN believes the RIA provides an economic rationale for the rulemaking. HCUA questions aspects of the RIA, including its conclusion. Our primary concern with the RIA is that FinCEN has taken the position that for the betterment of society as a whole, financial institutions must absorb the additional regulatory costs associated with the CDD Proposal. As described in the RIA, "Although limitations prevent us from fully quantifying all costs and benefits attributable to the CDD rule, the U.S. Department of the Treasury is confident that the proposed rule would yield a positive net benefit to society." FinCEN has concluded that the benefit to all of society outweighs the cost to financial institutions. However, this is a flawed approach to a cost-benefit comparison; it is essentially a tax on financial institutions.

As described above, rather than weigh the cost to a financial institution of complying with the rule against the benefit of reduced criminal activity to that financial institution and its customers, FinCEN is applying the benefit not to a single institution and its customers but instead to the entire society, noting that "all citizens benefit from actions to mitigate these activities regardless of who pays." This is a flawed approach to examining the costs and benefits of a rulemaking. Such an approach characterizes the compliance costs of the rule as a tax on covered entities that are required to comply.

Initial Regulatory Flexibility Analysis

HCUA does not agree with FinCEN's reasoning for not exempting certain entities from aspects of the CDD Proposal. Specifically, in the IRFA FinCEN states that exempting small entities from the beneficial ownership requirement would put those entities at greater risk of abuse by money launderers and other financial criminals, as criminals would seek out institutions without this requirement. As discussed below, we believe appropriate exemptions would not result in illegal consumer activities, particularly at a credit union where membership is limited.

Minimizing Regulatory Burdens for Credit Unions

As FinCEN and federal financial regulators have noted, identifying the "beneficial ownership" of entities can be challenging and costly for financial institutions, as discussed in the March 2010 joint interagency guidance to clarify and consolidate regulatory expectations on obtaining "beneficial ownership" for financial institutions. We acknowledge that the agency has reduced the scope of requirements that could have been even more burdensome under the 2012 advance notice of proposed rulemaking. . The additional time needed for account openings would include time to receive and verify the information provided on the new certification form. The proposed certification form under Appendix A would be required to be completed by the person opening a new account on behalf of a "legal entity customer" to help identify the "beneficial owners." Other aspects of the proposed rule would also require a financial institution to establish and maintain written CDD procedures that are reasonably designed to identify and verify "beneficial owners" of "legal entity customers" (e.g., corporation, limited liability company, partnership, or similar business entity).

Financial institutions may have difficulty verifying the "beneficial ownership" information on the new certification form, based on existing risk-based Customer Identification Program (CIP) practices. These practices may be more appropriate and effective for other types of accounts in which the person opening the account for himself or herself will likely have additional identification documents on hand, or where the accountholder is the person opening the account. Because of these challenges, we urge FinCEN to remove the verification requirement. If FinCEN must require verification, then it should not require a financial institution to verify the status of an identified "beneficial owner."

Exemptions

HCUA supports appropriate exemptions from any new requirements for financial institutions, including exemptions for entities that are currently exempt from CIP requirements, existing customers prior to the effective date of the rule, trusts, entities where their "beneficial ownership" information is generally available from other sources, and other lower-risk accounts. These exemptions would help minimize additional compliance burdens and costs on credit unions and smaller financial institutions. Regarding intermediary or pooled accounts, we also believe the rule should minimize compliance burdens, and financial institutions should have no CIP obligations on an intermediary or pooled account's underlying clients.

Proposed Definition of "Beneficial Owners"

FinCEN has proposed to define "beneficial owners" of "legal entities," which includes any person that satisfies either the 1) ownership or 2) control prongs:

"1. Each individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25% or more of the equity interests of a legal entity customer; and

2. A single individual with significant responsibility to control, manage, or direct a legal entity customer, including (i) An executive officer or senior manager (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer); or another individual who regularly performs similar functions."

The number of individuals that may meet the definition of a "beneficial owner" could vary. Under the ownership test, up to four individuals may need to be identified, while under the control test, only one individual must be identified.
HCUA believes the proposed definition of "beneficial owners" of "legal entities" is too broad and would present challenges for financial institutions, especially smaller credit unions, as they attempt to determine relationships and to obtain the relevant documents to identify and verify this information. The agency should minimize the number of individuals that must be identified and consider narrowing the definitions for both the ownership and control prongs. In addition, because of challenges with identifying the proper individual under a very broad definition for the control prong, the agency should consider removing the second prong.

Other Issues and Concerns

Credit unions also have concerns about increased costs for monitoring potential changes to previously identified "beneficial owners." Financial institutions should not be required to update or refresh periodically the "beneficial ownership" information. In addition, credit unions have questions about the effect on Office of Foreign Assets Control (OFAC) screening. We ask FinCEN to clarify how the names of the "beneficial owners" should be handled for OFAC screening and to provide additional information to help with compliance.

Under the CDD Proposal, the certification form would include information associated with the name, address, date of birth, and social security number (or passport number or similar information for foreign persons) for "beneficial owners." We are concerned that this information would potentially be accessible by a number of persons in addition to the "beneficial owner" and would be at a greater risk of unauthorized access, especially if persons are opening accounts on behalf of "beneficial owners." FinCEN should fully consider how the new information collection could impact customer confidentiality, privacy, fiduciary, information security, and other legal protections and responsibilities.

Delayed Effective Date

Even with the changes we recommend, we urge FinCEN to provide a delayed effective date that is more than 18 months from the issuance of the final rule. Institutions will need this time to incorporate the new "beneficial ownership" requirements into their BSA/AML programs and to modify their account opening processes

As always, we appreciate the opportunity to review this issue. We will be happy to respond to any questions regarding these comments.

Sincerely,

Don Cohenour
President