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Peeking Into the House of Cards: Money Laundering, Luxury Real Estate, and the Necessity of Data Verification for the Corporate Transparency Act's Beneficial Ownership Registry

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PEEKING INTO THE HOUSE OF CARDS: MONEY LAUNDERING, LUXURY REAL ESTATE, AND THE NECESSITY OF DATA VERIFICATION FOR THE CORPORATE TRANSPARENCY ACT'S BENEFICIAL OWNERSHIP REGISTRY

*S. Alexandra Bieler**

“His was a scheme for the twenty-first century, a truly global endeavor that produced nothing — a shift of cash from a poorly controlled state fund in the developing world, diverting it into the opaque corners of an underpoliced financial system that’s all but broken.”¹

ABSTRACT

It is estimated that \$800 billion to \$2 trillion are laundered globally every year, funding the schemes of bad actors and terrorists alike. These astronomical sums are moved around the world without detection; this is in large part due to the ease with which anonymous shell companies, typically limited liability companies (LLCs), can be created, particularly in the United States. America is one of the most egregious enablers of this practice because most states require little to no information about the person ultimately controlling the entity, known as the “beneficial owner.” Working through an LLC, bad actors often turn to America’s luxury real estate market that enables the cleansing of millions of dollars of dirty money quickly and without a trace. Considering this vulnerability, the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) began to track the beneficial owners behind certain all-cash real estate purchases made by entities and found that a third of buyers had also been subjects of a previous suspicious activity report.

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1. TOM WRIGHT & BRADLEY HOPE, BILLION DOLLAR WHALE 85 (2019).

In order to combat this issue, the Corporate Transparency Act (CTA), a statute passed with bipartisan support, included provisions that directed FinCEN to collect and maintain a database of beneficial ownership information for a variety of entities, including LLCs. While this is a huge step in the right direction and aligns the United States with international anti-money laundering (AML) efforts, the beneficial ownership registry is missing a crucial component: a data accuracy verification mechanism. Without having a way to determine whether the information being received is accurate, the beneficial ownership registry stunts its own usefulness. This Note takes a close look at how the problem of data accuracy is tackled by both nonprofit, AML-focused organizations and countries with beneficial ownership registries. It then reflects on the infrastructure and norms present in the United States that could be helpful in attaining this certification goal. Finally, it posits that, among all the options available, FinCEN should utilize a proof of identity requirement, an internal, and ideally external, cross-referencing structure, and a red-flagging system.

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INTRODUCTION

Do you know your neighbor? More pointedly, do you know whether you have a neighbor? If you live in a crowded metropolitan area, you might not. In cities like New York, Miami, and London, luxury buildings with dozens of apartments remain eerily empty, taking their communities with them.² The significance of phantom pied-à-terre ownership has implications well beyond the seemingly mundane issue of quiet buildings or streets. These unoccupied properties sit at the intersection of anonymity in corporate structures and international anti-money laundering (AML) efforts.

Every year in the United States, more than two million corporations and limited liability companies (LLCs) are formed in states that do not require any information about who is ultimately at their helm.³ In AML

2. Emily Badger, *When the (Empty) Apartment Next Door is Owned by an Oligarch*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/upshot/when-the-empty-apartment-next-door-is-owned-by-an-oligarch.html> [<https://perma.cc/QUS7-B8S7>].

3. Aroma Sharm & Yawen (Alice) Yu, *The Corporate Transparency Act: New Beneficial Ownership Reporting Requirements*, NAT'L L. REV. (Feb. 12, 2021), <https://>

terms, these hidden characters are known as “beneficial owners,” the natural persons who ultimately own or control an entity. The anonymity the LLC allows for the commission of illegal activities, such as tax evasion, bribery, money laundering, and terrorism financing.⁴ As Congresswoman Carolyn Maloney observed, LLCs “are the vehicle of choice for terrorist groups around the world that want to move their money.”⁵ Instinctively, such unscrupulous practices may seem the domain of a remote and unregulated tropical island; however, the nonprofit Tax Justice Network ranked the United States as the second worst offender in allowing individuals to hide their finances from the law.⁶ In addition, a study by the University of Utah found that it was easier to set up an untraceable company in the United States than in almost any other country, with the “business-friendly” states such as Delaware and Nevada being the most egregious offenders.⁷

One of the most popular ways to utilize the invisibility of the anonymous shell company is through luxury real estate. The Washington Post reported that, in the last quarter of 2015, 58 percent of all property purchases over \$3 million were made by LLCs.⁸ In the past 10 years, the

www.natlawreview.com/article/corporate-transparency-act-new-beneficial-ownership-reporting-requirements [<https://perma.cc/FE4N-E73D>].

4. SECRETARIAT GLOB. F. ON TRANSPARENCY & EXCH. INFO. FOR TAX PURPOSES & INTER-AM. DEV. BANK, A BENEFICIAL OWNERSHIP IMPLEMENTATION TOOLKIT 4 (2019), <https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf> [<https://perma.cc/7LW6-CV9X>] [hereinafter BENEFICIAL OWNERSHIP TOOLKIT]. For example, a drug trafficker could set up a night club to appear to have legal sources of income from the sale of tickets and alcohol, while in reality the money is from the sale of drugs.

5. Keith Larsen, *Full Disclosure: New Law Requires Shell Companies Reveal True Ownership*, REAL DEAL (Jan. 27, 2021, 11:00 AM), <https://therealdeal.com/national/2021/01/07/full-disclosure-new-law-requires-shell-companies-reveal-true-ownership/> [<https://perma.cc/XR4K-MNUD>].

6. *Financial Secrecy Index 2020 Reports Progress on Global Transparency – But Backsliding from US, Cayman and UK Prompts Call for Sanctions*, TAX JUST. NETWORK (Feb. 18, 2020), <https://www.taxjustice.net/press/financial-secrecy-index-2020-reports-progress-on-global-transparency-but-backsliding-from-us-cayman-and-uk-prompts-call-for-sanctions/> [<https://perma.cc/8A7T-9CMP>] (finding the Cayman Islands to be the top offender with Switzerland, Hong Kong, and Singapore ranking third to fifth).

7. Andrew Rice, *Stash Pad*, N.Y. MAG. (June 27, 2014), <https://nymag.com/news/features/foreigners-hiding-money-new-york-real-estate-2014-6/#print> [<https://perma.cc/U6P2-HEYU>]. The only locale that beat the United States in this regard was Kenya. *Id.*

8. Ana Swanson, *How Secretive Shell Companies Shape the U.S. Real Estate Market*, WASH. POST (Apr. 12, 2016, 11:58 AM), <https://www.washingtonpost.com/>

confluence of “decreasing real estate prices, a weaker dollar, and capital flight from Russia and China” have made U.S. real estate incredibly desirable for foreign investors.⁹ This has not gone unnoticed. The U.S. Department of the Treasury (“USDT” or “Treasury Department”) emphasized the risk of anonymous companies using real estate transactions to purchase valuable assets in its *2020 National Strategy for Combating Terrorist and Other Illicit Financing*.¹⁰ Former Director of the Treasury Department’s Financial Crimes Enforcement Network (FinCEN), Kenny Blanco, has repeatedly remarked that a key vulnerability of the U.S. real estate industry is the ability to purchase property through shell companies.¹¹ The New York Times series *Towers of Secrecy: Piercing the Shell Companies* brought the issue into the public eye, painting a bleak landscape of brokers knowing little to nothing about their buyers and persons under government investigation purchasing lavish properties.¹²

There have long been calls for legislative action in regards to identifying and tracking the beneficial owners shrouded by these anonymous corporate structures.¹³ The Financial Action Task Force (FATF), an intergovernmental body that sets AML standards, first put out recommendations concerning beneficial ownership in the 1990s.¹⁴ Since then, groups including the G7, United Nations, and European Union have

news/wonk/wp/2016/04/12/how-secretive-shell-companies-shape-the-u-s-real-estate-market/ [https://perma.cc/G22F-V7F2].

9. Jeffrey R. Boles, *Million Dollar Ghost Buildings: Dirty Money Flowing Through Luxury Real Estate Markets*, 45 REAL EST. L.J. 476, 486 (2017).

10. FINCEN, NATIONAL STRATEGY FOR COMBATING TERRORIST & OTHER ILLICIT FINANCING 16 (2020), <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf> [https://perma.cc/2P99-HV6J] [hereinafter USDT STRATEGY FOR COMBATING ILLICIT FINANCING].

11. INT’L COMPAR. LEGAL GUIDES, ANTI-MONEY LAUNDERING 2020 4 (Joel M. Cohen & Stephanie L. Brooker eds., 3d ed. 2020) [hereinafter ICLG ANTI-MONEY LAUNDERING 2020].

12. Stephanie Thomas, *Cracking Down on Money Laundering in U.S. Real Estate*, N.Y.U. J. LEGIS. & PUB. POL’Y (Apr. 25, 2019), <https://nyujlpp.org/quorum/thomas-cracking-down-on-money-laundering-in-u-s-real-estate/> [https://perma.cc/V4E7-3D WY] (referencing Louise Story & Stephanie Saul, *Towers of Secrecy: Piercing the Shell Companies*, N.Y. TIMES (2015-2018), <https://www.nytimes.com/news-event/shell-company-towers-of-secrecy-real-estate> [https://perma.cc/Y64V-4P4R]).

13. USDT STRATEGY FOR COMBATING ILLICIT FINANCING, *supra* note 10, at 40.

14. LEXISNEXIS, THE HIDDEN WORLD OF BENEFICIAL OWNERSHIP 5 (2017), https://internationalsales.lexisnexis.com/_data/assets/pdf_file/0003/377634/LxNx_BeneficialOwnership_0516.pdf [https://perma.cc/CQ4V-3CVN].

weighed in and implemented policies targeting beneficial ownership.¹⁵ In the United States, legislation from the Bank Secrecy Act (BSA) to the Patriot Act and related Customer Due Diligence (CDD) rules have touched upon this goal. The most recent law to address this problem is the Corporate Transparency Act (CTA).¹⁶ Among other enactments, the CTA allows the Treasury Department to put in place a beneficial ownership registry to assist the agency in identifying and pursuing bad actors.¹⁷ This is an important step for AML efforts in the United States, but the CTA in its current form leaves open significant questions about implementation and effectiveness.

Part I of this Note discusses the legislative and regulatory strategies implemented to combat the concealment of bad actors before the passage of the CTA. Part II argues that without a verification mechanism within the CTA to assure data accuracy, the effectiveness of the entire beneficial owner database falters. Part II then proceeds to detail how nonprofit organizations and other countries have balanced data accuracy with the privacy of individuals and the burden on reporting parties. Part III takes stock of these options, considers current AML requirements in the United States, and argues that proof of identity protocols, internal and external cross-referencing strategies, and a red-flagging system, if incorporated into the CTA's rulemaking, would be the most effective and practical approach to ensure data verification and support the overall usefulness of the database.

I. REAL ESTATE AND THE FIGHT AGAINST ANONYMITY IN THE UNITED STATES

As the digital world expands and bad actors find new strategies to conceal themselves and their ill-gotten assets, governments must keep pace to uncover them. The many benefits of the real estate market, when

15. *Who We Are*, FATF, <https://www.fatf-gafi.org/about/> [<https://perma.cc/B6Y6-L5EL>] (last visited Nov. 20, 2021). In 2003, the FATF set the first international guidelines to beneficial ownership and, in 2012, it released updated guidance that has since been amended as of October 2020. FIN. ACTION TASK FORCE, BEST PRACTICES ON BENEFICIAL OWNERSHIP FOR LEGAL PERSONS 5, 7 (2019), <https://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf> [<https://perma.cc/8J6E-8MAH>] [hereinafter BEST PRACTICES].

16. See Larsen, *supra* note 5.

17. *Id.*

combined with anonymous corporate structures, pose a difficult problem for regulators. In understanding the solution, it is important to address the advantages real estate provides, how the CTA's legislative predecessors were structured to handle bad actors in light of these advantages, and what deficiencies those solutions suffered that the CTA now endeavors to address.

A. MILLION DOLLAR GIFTING

Owning a home is a quintessential part of the American dream that provides the owner with many advantages; interestingly, these same benefits make real estate an exceedingly attractive option for money laundering. But there are some additional, unique elements that add value to investing ill-earned gains into the U.S. real estate market. The merits of this nefarious strategy are outlined below:

1. **A Single Quick Transaction:** There are very few ways to successfully turn millions of dollars with suspicious origins into a legitimate investment without significant difficulty, and real estate is one of them.¹⁸ Once a piece of property is purchased, the derivation of that cash is forgotten.¹⁹ Perhaps most importantly, there is nothing inherently illegal about wiring money from an anonymous offshore bank account to purchase property in the United States; further, because it happens legitimately every day, the money laundering process is coated with a veneer of propriety.²⁰
2. **Ease of Creating Opaque Corporate Structures:** It takes only a bit of inventive corporate structuring to make the ownership of a property essentially untraceable.²¹ Buyers employ additional strategies to increase obscurity, often layering companies atop one another or filling out the LLC formation paperwork using the names of lawyers or other placeholders called “nominees” instead of the actual purchaser's name.²²

18. See Rice, *supra* note 7. See generally, ICLG ANTI-MONEY LAUNDERING 2020, *supra* note 11.

19. See Rice, *supra* note 7.

20. *Id.*

21. *Id.*

22. Louise Story, *U.S. Will Track Secret Buyers of Luxury Real Estate*, N.Y. TIMES (Jan. 13, 2016), <https://www.nytimes.com/2016/01/14/us/us-will-track-secret-buyers-of-luxury-real-estate.html> [<https://perma.cc/H6M9-E3D8>].

3. **Appreciation of Value:** The real estate industry is further vulnerable to abuse by illicit actors looking to launder criminal proceeds because the value of high-end properties tends to appreciate over time and can shield the owner from currency fluctuations and market instability.²³

4. **Pressure Resistance:** Small tax havens like Bermuda or the Seychelles are largely defenseless if they ever face a United Nations sanction or serious pressure from a major world power.²⁴ Popular cities for luxury real estate in the United States do not face that same potential of threats, making them ideal locations for property purchased with dirty money, even when compared to other locales with more favorable tax laws.²⁵

5. **Practicality:** Finally, an apartment in a popular city is not just a financial tool, it is a place to live. Owning property in a desirable location that can be used at the buyer's discretion adds a practical layer to the scheme.²⁶

Real estate professionals are often concerned that the policies aimed at stemming the flow of anonymous money into the real estate market will have negative effects on said market.²⁷ Yet, although it might be beneficial to the industry, there are significant harmful consequences to having so much anonymous purchasing in play.²⁸ Take New York City as a case study: foreign investment in New York City both drives up purchase prices for every-day New Yorkers and increases rent prices due

23. ICLG ANTI-MONEY LAUNDERING 2020, *supra* note 11 (citing FINCEN, ADVISORY TO FINANCIAL INSTITUTIONS AND REAL ESTATE FIRMS AND PROFESSIONALS (FIN-2017-A003) 4 (Aug. 22, 2017), https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%28002%29.pdf [<https://perma.cc/Y72L-JW2M>]).

24. Ryan Cooper, *How Foreign Investors Launder Their Money in New York Real Estate*, WEEK (Nov. 13, 2017), <https://theweek.com/articles/736313/how-foreign-investors-launder-money-new-york-real-estate> [<https://perma.cc/4PM5-8M7V>].

25. *Id.*

26. *Id.*

27. Fang Block, *Proposed State Legislation on LLCs Unlikely to Hurt Manhattan Property Market*, MANSION GLOB. (Oct. 3, 2017), <https://www.mansionglobal.com/articles/further-llc-disclosure-unlikely-to-hurt-manhattan-property-market-76263> [<https://perma.cc/VWL2-JCZF>].

28. See Jordan Metzger et al., *LLC Sellers And Buyers Beware: Unprecedented Reporting Requirements*, JD SUPRA (Oct. 29, 2019), <https://www.jdsupra.com/legalnews/llc-sellers-and-buyers-beware-68449/> [<https://perma.cc/W7D2-N68J>].

to all the empty apartments kept off the market.²⁹ Meanwhile, the heightened demand for luxury real estate by money launderers shifts property developers' priority to high-end projects, further shrinking the market for average city-dwellers.³⁰ Additionally, whole neighborhoods suffer, as these unoccupied apartments create "ghost communities" that reduce local tax and business revenues, as well as the vibrancy of the community.³¹

Both the incentives and the stakes are high. The amount of money laundered globally in a single year is estimated to be 2 to 5 percent of the global gross domestic product (GDP), which is equivalent to \$800 billion to \$2 trillion.³² With such a significant sum at stake, many solutions have been both contemplated and enacted. This Note, however, will limit its discussion to a few crucial players: the BSA, FinCEN's risk-based geographic targeting orders (GTOs), the European Union's Anti-Money Laundering Directives ("AMLDs"), and, most recently, the CTA.

B. THE BANK SECRECY ACT

The Bank Secrecy Act of 1970 was the first landmark legislation implemented to keep bad actors from clouding the origins of criminal proceeds through banks and other financial institutions.³³ It initially required the cooperation of financial institutions to fight money laundering and has since been expanded to aid in tracking and intercepting terrorist funding.³⁴

The Patriot Act of 2001, passed in the wake of the September 11, 2001 terrorist attacks, amended the BSA's compliance program to adopt customer identification regimes; this process is commonly referred to as Know Your Customer (KYC), and includes a customer identification

29. See Cooper, *supra* note 24. See also Boles, *supra* note 9, at 492.

30. See Boles, *supra* note 9, at 492. Money launderers prefer more expensive properties, because a higher price tag allows for more money to be cleansed at once. *Id.*

31. *Id.*

32. Off. Drugs & Crime, *Money Laundering*, UNITED NATIONS, <https://www.unodc.org/unodc/en/money-laundering/overview.html> [<https://perma.cc/P9BU-KNWB>] (last visited Apr. 25, 2021).

33. Alina Laumann, *The History of Anti-Money Laundering – Events, Regulations, and Adaptations in the United States*, KROLL (July 16, 2019), <https://www.kroll.com/en/insights/publications/compliance-risk/history-anti-money-laundering-united-states> [<https://perma.cc/9MHT-933F>].

34. *Id.*

program (CIP), CDD, and ongoing monitoring.³⁵ CIP emerged through FinCEN rulemaking in 2003 and requires, at a minimum, that financial institutions put forward procedures to verify the identity of anyone seeking to open an account, maintain records on the information used to verify the person's identity, and determine whether the person has any links to known or suspected terrorist activity.³⁶ The rule requires financial institutions to retrieve the individual's name, date of birth, address, and unique identification number.³⁷ Further, the CIP must include risk-based procedures for verification to ensure that financial institutions have a reasonable belief as to each customer's identity.³⁸ This does not, however, require financial institutions to establish the accuracy of every element of identifying information.³⁹

In 2016, final rules were issued under the BSA to clarify and strengthen CDD requirements for financial institutions.⁴⁰ Relevantly, the rules require verification of beneficial owner identity for all non-excluded entities when they open a new account.⁴¹ This can be achieved either by acquiring the information needed on a standard certification form or through the substantive requirements laid out in the rules.⁴² Under these strictures, the financial institution is permitted to, "rely on the beneficial ownership information supplied by the customer, provided that it has no knowledge of facts that would reasonably call into question the reliability

35. *Bank Secrecy Act (BSA)*, OCC, <https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html> [<https://perma.cc/K9DU-78PY>]; *FinCEN CDD Rule: New Customer Due Diligence Requirements*, TRULIOO (Jan. 9, 2018), <https://www.trulioo.com/blog/fincen-final-cdd-rule> [<https://perma.cc/J44T-ZVHB>].

36. Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 Fed. Reg. 25,090 (proposed May 9, 2003) (to be codified at 31 C.F.R. pt. 103) [hereinafter *Customer Identification Programs for Banks*].

37. Customer Identification Program Requirements for Banks, 31 C.F.R. § 1020.220(a)(2)(i).

38. FINCEN, GUIDANCE ON CUSTOMER IDENTIFICATION REGULATIONS, FAQs: FINAL CIP RULE 1 (2004), <https://www.fincen.gov/sites/default/files/guidance/finalciprule.pdf> [<https://perma.cc/6KPD-PVB6>].

39. *Id.* at 6.

40. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (proposed May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

41. 81 Fed. Reg. 29,398 (May 11, 2016).

42. *Id.*

of the information.”⁴³ The financial institution must then maintain a database of the information, which is retrievable upon request by law enforcement.⁴⁴

The BSA and its progeny all rely heavily on financial institutions to collect, verify to some extent, and store beneficial ownership data. With the emergence of the CTA, some of this burden shifts from these institutions to the entity requesting financing.⁴⁵ The BSA also requires the Treasury Department to revise its CDD rules to conform with the CTA’s broad disclosure and verification requirements.⁴⁶

Outside of the CDD rules, which address the behavior of financial institutions, FinCEN has employed other methods to address the concealment of beneficial ownership. One of the most successful is the GTO program, which uses the increased risk of high-end real estate to track potential money launderers.

C. FINCEN’S RISK-BASED GEOGRAPHIC TARGETING ORDERS

Although the Patriot Act authorizes the Treasury Department to require that real estate companies scrutinize buyers, it has faced fierce lobbying against issuing such rules.⁴⁷ Despite this, since 2016, FinCEN has issued GTOs, which require title insurance companies to report the natural persons behind transactions that are not financed by loans from institutions.⁴⁸ Since then, FinCEN has extended the GTOs every six months and expanded their purview.⁴⁹

1. *The Initial GTOs - January 2016*

On January 13, 2016, FinCEN issued GTOs that “temporarily require[d] certain U.S. title insurance companies to identify the natural

43. *Id.*

44. *Id.*

45. Cohen & Gresser LLP, *Pulling Back the Curtain: Congress Establishes a Beneficial Ownership Registry for U.S. and Foreign Businesses*, JD SUPRA (Jan. 4, 2021), <https://www.jdsupra.com/legalnews/pulling-back-the-curtain-congress-2944568/> [<https://perma.cc/F9Y9-7GFL>].

46. *Id.*

47. *See* Story, *supra* note 22.

48. FINCEN, FINCEN TAKES AIM AT REAL ESTATE SECRECY IN MANHATTAN AND MIAMI 1 (2016), https://www.fincen.gov/sites/default/files/news_release/20160113.pdf [<https://perma.cc/C6SJ-Q9HP>] [hereinafter FINCEN TAKES AIM].

49. *See* discussion *infra* Section I.C.2.

persons behind companies used to pay ‘all cash’ for high-end residential real estate in the Borough of Manhattan in New York City, New York, and Miami-Dade County, Florida.”⁵⁰ FinCEN focused on all-cash purchases due to the concern that those buying without any bank financing were individuals potentially trying to hide their assets and identities behind LLCs.⁵¹ FinCEN targeted title insurance companies because they are a common feature in the vast majority of real estate transactions.⁵² For the purpose of the GTOs, FinCEN defines a beneficial owner as “each individual who, directly or indirectly, owns 25 [percent] or more of the equity interests” of the entity that bought the property.⁵³ Once title insurance companies identify those people, they are required to copy driver’s licenses or passports, and hand their names over to the Treasury Department, with penalties for any party who provides false information.⁵⁴

The initial GTOs were in effect for 180 days, from March 1, 2016 to August 27, 2016,⁵⁵ but they have steadily proliferated both in geographic coverage and duration.

2. *Subsequent Extensions of FinCEN’s GTOs*

The success of the initial program⁵⁶ spurred FinCEN to announce additional GTOs in July 2016 that covered not only New York and Miami, but also Los Angeles, San Francisco, San Diego, and San Antonio.⁵⁷ The order extension was effective starting August 28, 2016, and ran for 180 days.⁵⁸ Then, in February 2017, FinCEN announced the renewal of the

50. See FINCEN TAKES AIM, *supra* note 48.

51. *Id.* Prior AML rules already made it more difficult to launder in the mortgage market, but cash purchases are much more complex. *Id.*

52. *Id.* at 2.

53. See Story, *supra* note 22.

54. *Id.*

55. See FINCEN TAKES AIM, *supra* note 48.

56. See *infra* Section I.B.3.

57. *U.S. Title Insurers Required to Identify High-End Cash Buyers in Six Major Metropolitan Areas*, FINCEN (July 27, 2016), <https://www.fincen.gov/news/news-releases/fincen-expands-reach-real-estate-geographic-targeting-orders-beyond-manchattan> [<https://perma.cc/76F4-VBZV>] [*hereinafter Cash Buyer Identification*].

58. *Id.*

existing GTOs to remain in place for another 180 days starting from February 24, 2017.⁵⁹

That August, FinCEN announced a revised version of the program along with an advisory highlighting the risks of money laundering associated with real estate transactions.⁶⁰ In line with the then-recently passed Countering America's Adversaries Through Sanctions Act, this GTO captured a broader range of transactions and expanded geographically to cover Honolulu;⁶¹ it was in place from September 22, 2017 to March 20, 2018.⁶² Thereafter, the orders were renewed, increased, and modified every 180 days.⁶³

59. FINCEN, FINCEN RENEWS REAL ESTATE "GEOGRAPHIC TARGETING ORDERS" TO IDENTIFY HIGH-END CASH BUYERS IN SIX MAJOR METROPOLITAN AREAS 1 (2017), <https://www.fincen.gov/sites/default/files/2017-02/Renewed%20GTO%20NR%20FINAL%20%28Posting%29.pdf> [<https://perma.cc/6WHP-EH4X>] [hereinafter RENEWED GEOGRAPHIC TARGETING ORDERS].

60. FINCEN, FINCEN ALSO PUBLISHES ADVISORY HIGHLIGHTING MONEY LAUNDERING RISKS AND ENCOURAGING REAL ESTATE PROFESSIONALS TO REPORT SUSPICIOUS ACTIVITY (2017), https://www.fincen.gov/sites/default/files/advisory/2017-08-22/Risk%20in%20Real%20Estate%20Advisory_FINAL%20508%20Tuesday%20%28002%29.pdf [<https://perma.cc/2DGP-WZGR>].

61. FINCEN TARGETS SHELL COMPANIES PURCHASING LUXURY PROPERTIES IN SEVEN MAJOR METROPOLITAN AREAS, FINCEN (Aug. 22, 2017), <https://www.fincen.gov/news/news-releases/fincen-targets-shell-companies-purchasing-luxury-properties-seven-major> [<https://perma.cc/6UFQ-74CN>].

62. FINCEN, GEOGRAPHIC TARGETING ORDER 3 (2017), <https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20Order%20-%202018.22.17%20Final%20for%20execution%20-%20Generic.pdf> [<https://perma.cc/8EVJ-MQVS>].

63. *FinCEN Reissues Real Estate Geographic Targeting Orders and Expands Coverage to 12 Metropolitan Areas*, FINCEN (Nov. 15, 2018), <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-and-expands-coverage-12> [<https://perma.cc/UH2S-TT24>]; FINCEN, GEOGRAPHIC TARGETING ORDER COVERING TITLE INSURANCE COMPANY (2019), https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20Order%20FINAL%20GENERIC%205.15.2019_508.pdf [<https://perma.cc/7VZE-MLVC>]; *FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas*, FINCEN (May 8, 2020), <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-1> [<https://perma.cc/524X-HK6F>]; *FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas*, FINCEN (Nov. 5, 2020), <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-2> [<https://perma.cc/YS53-PYTZ>]; *FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas*, FINCEN (Apr. 29, 2021), <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-3> [<https://perma.cc/W6C2-M3KZ>]; Nicholas Nehamas & Kevin G.

One commentator remarked that the success and continued growth of the GTO initiative is indicative of FinCEN's interest in a permanent program, either through rulemaking or congressional legislation.⁶⁴ However, while the GTOs generated important data in the fight against money laundering, they have some important drawbacks that are ultimately addressed by the CTA.⁶⁵

3. Information Gathered from the GTO Program

In July 2016, FinCEN reported that the initial GTOs were aiding law enforcement in the identification of illicit activity and providing information helpful in guiding future regulatory approaches.⁶⁶ FinCEN also announced that the intelligence from the GTOs was providing “greater insight on potential assets held by persons of investigative interest ... generat[ing] leads[,] and identify[ing] previously unknown subjects” in federal and state cases.⁶⁷ FinCEN announced in February 2017 that since the initial GTO, it found that “about 30 percent of the transactions covered by the GTOs involve[d] a beneficial owner . . . that [was] also the subject of a previous suspicious activity report” (SAR).⁶⁸ Further, since the GTO program was introduced, one report found that the number of all-cash purchases in Miami by entities had fallen 95 percent.⁶⁹

Hall, *The Hunt for Dirty Money in Miami Real Estate Is Working — and Will Continue, Feds Say*, MIA. HERALD (Mar. 21, 2018), <https://www.miamiherald.com/news/business/real-estate-news/article206232819.html> [<https://perma.cc/H5CA-FLWL>]. It should be noted that there were no announcements of the extensions in March and September 2018 but also no indication that the GTOs had ceased. *Id.* The Miami Herald article proffers that while there is no stated reason for this shift, it has been speculated that it was due to the recently-appointed, Trump Administration head of FinCEN, Kenneth Blanco, not wanting to draw attention to the GTO with President Trump's ties to the real estate industry. *Id.* However, JD SUPRA reports that “[s]ources familiar with [FinCEN's] thinking say the new order was kept confidential because regulators don't want to give money launderers a road map for structuring their transactions to avoid reporting.” Stanley Foodman, *Did You Know that GTO's Have a \$300,000 Threshold?*, JD SUPRA (Aug. 27, 2018), <https://www.jdsupra.com/legalnews/did-you-know-that-gto-s-have-a-300-000-40284/> [<https://perma.cc/8H9Z-ZKM5>].

64. Thomas, *supra* note 12.

65. *See infra* Section I.C.4.

66. *Cash Buyer Identification*, *supra* note 57.

67. *Id.*

68. RENEWED GEOGRAPHIC TARGETING ORDERS, *supra* note 59.

69. Thomas, *supra* note 12.

And, despite the increased regulation, according to the president of the New York real estate firm Compass, there was no negative impact on the overall luxury housing market.⁷⁰

4. *Drawbacks of the GTO Program and How They Are Addressed by the CTA*

Despite the success of the GTO initiative, there are still several blind spots that the CTA attempts to address. A few of these drawbacks are attributable to the use of title insurance companies. First, title insurance companies do not always interact with the buyers either directly or frequently enough where they would be able to know or easily learn who the beneficial owners are.⁷¹ Second, title insurance companies do not always handle the purchasing funds.⁷² Finally, the operations of title insurance companies differ by state, so a broad set of rules is generally too sweeping to target area-specific requirements, making the promulgated rules less effective.⁷³

Another significant roadblock is that many states do not require title insurance, which allows bad actors to circumvent the GTOs entirely.⁷⁴ While institutional lenders do require title insurance to obtain financing, even where it is not statutorily required, money launderers are most likely to employ all-cash and privately financed transactions.⁷⁵ Unfortunately, these are the very transactions that avoid the title insurance process and, therefore, FinCEN monitoring.⁷⁶ There is limited risk to the money launderer in avoiding title insurance because generally he “can trust that the title is clean” in luxury real estate.⁷⁷ Both the developer and “legitimate buyers have [most likely] conducted [an] in-depth title search[] to secure their investment[.]”⁷⁸ In such circumstances, the illicit buyer is safe from bad title and FinCEN. This type of loophole is closed by the CTA, as coverage is not determined by whether the entity is buying

70. Block, *supra* note 27.

71. Thomas, *supra* note 12.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

a property or using title insurance.⁷⁹ Under the CTA, unless a relevant exemption can be claimed, the organization will be required to submit beneficial ownership information.⁸⁰

Another crucial point of criticism is the GTO initiative comes into play far too late in the process and forces unreasonable search costs on the parties involved.⁸¹ Currently, beneficial ownership is revealed not when the entity is formed, but only when it purchases real estate.⁸² Under the provisions of the CTA, beneficial ownership information must be submitted at the time of formation, and companies already in existence must report no more than two years after the implementing regulations are issued.⁸³ The CTA undoubtedly solves many of these important problems; however, as will be discussed, it has its own gaps that need to be filled. The next Part outlines the relevant portions of the CTA so that its blind spots can be more fully examined.

D. THE CORPORATE TRANSPARENCY ACT

Enacted by Congress on January 1, 2021, overriding a presidential veto and with strong bipartisan support, the Anti-Money Laundering Act (AML Act), contained within the National Defense Authorization Act Year 2021 (NDAA), amended the BSA.⁸⁴ The AML Act is the most significant change in U.S. AML efforts since the 2001 Patriot Act⁸⁵ and contains, in part, the CTA.⁸⁶

Among other requirements, the CTA tasks FinCEN with developing and maintaining a beneficial ownership registry for certain enumerated entities.⁸⁷ Under the CTA, the term “beneficial owner” is defined to mean someone who owns 25 percent or more of the entity or who exercises

79. See *infra* Section I.D.1. See also 31 U.S.C. § 5336(a)(11).

80. See *infra* Section I.D.1. See also 31 U.S.C. § 5336(a)(11).

81. Thomas, *supra* note 12.

82. *Id.*

83. See *infra* Section I.D.1. See also 31 U.S.C. § 5336(b)(1)(B)-(C).

84. SATISH M. KINI ET AL., CONGRESS PASSES SWEEPING ANTI-MONEY LAUNDERING AND CORPORATE BENEFICIAL OWNERSHIP LAW 1 (2021), <https://www.debevoise.com/insights/publications/2021/01/congress-passes-sweeping-anti-money-laundering-and> [<https://perma.cc/7UM6-KMYE>].

85. *Id.*

86. Sharm & Yu, *supra* note 3.

87. See 31 U.S.C. § 5336(b)(1)(A)-(C), (F).

“substantial control” over the entity.⁸⁸ The term “substantial control” is left undefined.⁸⁹ The CTA also carves out certain groups who are not considered beneficial owners, including minors, persons acting as nominees or custodians, employees, persons whose interest is only as a right of inheritance, and most creditors.⁹⁰

New entities organized in the United States must report beneficial ownership information at formation;⁹¹ companies already in existence must report the same information no more than two years after the Treasury Department issues the implementing regulations.⁹² If there is any change in beneficial ownership, the company is required to update FinCEN within a year of the date of the change.⁹³

Not every entity needs to submit information. In fact, many types of companies are exempt, such as publicly-traded companies, tax-exempt entities, financial institutions, and others.⁹⁴ It also excludes any entity that employs more than twenty full-time employees in the United States, files federal income tax returns showing more than \$5 million in gross receipts or aggregate sales in the previous year, and has a physical presence in the United States.⁹⁵ The Attorney General and the Secretary of Homeland Security can also grant dispensation to any company if they determine that reporting by that entity would not serve the public interest and would not be highly useful to AML and anti-terrorism efforts.⁹⁶ These exemptions do not apply to most small businesses or single-member LLCs.⁹⁷

88. 31 U.S.C. § 5336(a)(3)(A)(i)-(ii).

89. *See Corporate Transparency Act: New Federal Reporting Requirements for Certain U.S. Formed or Registered Entities*, SIDLEY AUSTIN (Feb. 17, 2021), <https://www.sidley.com/en/insights/newsupdates/2021/02/corporate-transparency-act> [<https://perma.cc/5P3C-75TQ>] (“The term ‘substantial control’ is not defined in the CTA and remains subject to definition or guidance in Treasury regulations.”); 31 U.S.C. § 5336(a)(3)(A).

90. 31 U.S.C. § 5336(a)(3)(B)(i)-(iv).

91. 31 U.S.C. § 5336(b)(1)(C).

92. 31 U.S.C. § 5336(b)(1)(B).

93. 31 U.S.C. § 5336(b)(1)(D).

94. 31 U.S.C. § 5336(a)(11)(B). The CTA also allows the Treasury Department to create further exemptions with the approval of the Attorney General and the Secretary of Homeland Security. *Id.*

95. 31 U.S.C. § 5336(a)(11)(B)(xxi).

96. 31 U.S.C. § 5336(a)(11)(B)(xxiv).

97. *See Federal Corporate Transparency Act Requires Companies to Disclose Beneficial Owner*, PORTER WRIGHT (Mar. 2, 2021),

Reporting companies are required to submit, for each beneficial owner or applicant: (1) the full legal name, (2) date of birth, (3) current residential or business street address, and (4) a unique identifying number.⁹⁸ The unique identifying number must be a passport number, a driver's license number, or a FinCEN identifying number, available from the agency upon request.⁹⁹

Any person that fails to report complete or updated information, or that provides false information, will be liable for a penalty up to \$500 a day and could face criminal fines up to \$10,000 or a maximum of two years in prison, or both.¹⁰⁰ There is, however, a safe harbor if a person, acting in good faith, corrects inaccurate information within 90 days of the submission.¹⁰¹

Although the database is required to be nonpublic,¹⁰² under proper protocols it can be accessed by federal agencies; state, local, and tribal agencies; and financial institutions with the consent of the reporting company.¹⁰³ Foreign law enforcement agents may also obtain the stored information by requesting it from the appropriate federal agency.¹⁰⁴ There are substantial penalties in place for unauthorized disclosure or use of the beneficial ownership information, with a \$500 fine for each day the violation continues with charges of up to \$250,000, and jail time up to five years.¹⁰⁵ The severity increases if unauthorized disclosure is made while violating another law or as a part of illegal activity.¹⁰⁶

<https://www.porterwright.com/media/federal-corporate-transparency-act-requires-companies-to-disclose-beneficial-owner/> [<https://perma.cc/ME5H-8G6L>].

98. See 31 U.S.C. § 5336(b)(2)(A)(i)-(iv)(I).

99. 31 U.S.C. § 5336(a)(1)(A)-(D), (b)(3)(A).

100. 31 U.S.C. § 5336(h)(3)(A).

101. 31 U.S.C. § 5336(h)(3)(C).

102. Corporate Transparency Act, Pub. L. No. 116-283, § 6402(7)(A), 134 Stat. 4604 (2021).

103. 31 U.S.C. § 5336(c)(2)(B).

104. 31 U.S.C. § 5336(c)(2)(B)(ii).

105. 31 U.S.C. § 5336(h)(3)(B)(i)-(ii)(I).

106. 31 U.S.C. § 5336(h)(3)(B)(i), (ii)(II).

E. THE EUROPEAN UNION'S ANTI-MONEY LAUNDERING DIRECTIVES

The E.U. AMLDs, which have been setting AML standards for its members since 1991,¹⁰⁷ are a good juxtaposition for the CTA, as they have a long tenure and have broached many of the topics at issue. Fast-forward a couple of decades to AMLD IV, which was agreed to in 2015 and required implementation by June 2017.¹⁰⁸ Under AMLD IV, the E.U. established ultimate beneficial owner (UBO) registries and certain regulations to help enforce them.¹⁰⁹ AMLD IV defines the beneficial owner as any natural person or persons who ultimately own or control the legal entity, with a shareholding to ownership interest over 25 percent as an indication of direct ownership.¹¹⁰ AMLD IV introduced an explicit requirement for all legal persons, including companies, to hold and maintain beneficial ownership information that must be made readily available to competent authorities and obliged entities.¹¹¹ Each member state is also required to create a central register where beneficial ownership information can be stored to ensure that the information is kept current and adequate.¹¹² AMLD IV required that competent authorities and financial intelligence units could access the central registry to retrieve information.¹¹³ It also dictated that Member States should ensure that anyone who is “able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud, [is] granted access to beneficial ownership information, in accordance with data protection rules.”¹¹⁴

107. *A Brief History of the AMLDs: Part One*, COMPLY ADVANTAGE (Aug. 18, 2020), <https://complyadvantage.com/blog/brief-history-amlds-part-one/> [<https://perma.cc/NW6P-Q6HP>].

108. *See* Directive 2015/849, of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141) 73 (EU) [hereinafter AMLD IV]. *See also id.* at ch. I, §2, art. 6 ¶ 1.

109. *Id.* at ch. III, art. 30, ¶¶ 3-10.

110. *Id.* at ch. I, §1, art. 3, ¶ 6(a)(i).

111. *Id.* at ch. III, art. 30, ¶¶ 1-2.

112. *Id.* at ¶¶ 3-4.

113. *Id.* at ¶ 5.

114. *Id.* at Introduction, ¶ 14; AMLD IV also notes that Member States can allow for wider access if they so choose. *Id.* at Introduction, ¶ 15.

Just over a year later, the European Union adopted AMLD V, which amended and updated the provisions of AMLD IV, and required transposition by January 10, 2020.¹¹⁵ In a departure from the more permissive requirements of the AMLD IV, AMLD V requires the beneficial ownership registry to be public and interconnected across member states.¹¹⁶ AMLD VI, the most recent update which came into force in December 2020,¹¹⁷ does not make any significant changes to the UBO registry or related areas.

II. THE CTA'S MISSING VERIFICATION MECHANISM AND A GLOBAL LOOK AT BENEFICIAL OWNERSHIP DATA ACCURACY STRATEGIES

The implementation of the CTA aligns the United States more closely to the standard for anonymity and AML compliance adopted by the European Union, United Kingdom, and AML-focused nonprofit organizations. However, the existence of the registry alone does not ensure that reliable and up-to-date beneficial ownership information will be received.¹¹⁸ Verifying information accuracy is a critical factor in

115. See Directive 2018/843, of the European Parliament and of the Council of 30 May 2018 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 73 (EU) [hereinafter AMLD V]; *id.* at Introduction, ¶ 53. The quick turnaround between the amendments in AMLD IV and those in AMLD V was caused by the proliferation of high-profile terrorist attacks in Europe from 2015 to 2017. A Guide to the EU's 5th Anti-Money Laundering Directive (AMLD5), SYGNA, <https://www.sygna.io/blog/what-is-amld5-anti-money-laundering-directive-five-a-guide/> [<https://perma.cc/3R8P-DEZ8>] (last visited Apr. 25, 2021).

116. See AMLD V, *supra* note 115, at Introduction, ¶ 33, art. 1 ¶ 15(c), art. 1, ¶ 15(g).

117. Directive 2018/1673, of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law, 2018 O.J. (L 284) 22, art. 13, ¶ 1 (EU) [hereinafter AMLD VI].

118. BENEFICIAL OWNERSHIP TOOLKIT, *supra* note 4, at 19.

implementing a beneficial ownership registry¹¹⁹ and, unsurprisingly, it is an issue that many countries have faced.¹²⁰

The expectation when a beneficial ownership registry is set up and submission is required is that those with something to hide will lie.¹²¹ After all, neither money launderers nor terrorist groups are strangers to breaking the law and undertaking deception to cover their tracks, and while sanctions are an integral part of the operation, they alone are not substantial enough to deter bad actors if it is unlikely they will be caught.

Falsified beneficial ownership information is not easy to spot without a due diligence mechanism in place. Take, for example, the infamous Troika Laundromat scandal, where it was revealed that an underground banking network had been used to funnel approximately \$8.8 billion through more than 70 offshore shell organizations.¹²² This web allowed many to avoid restrictions by hiding their identities and storing their assets overseas, facilitating money laundering.¹²³ The beneficial owner of a Panamanian company involved in many of these transactions was none other than Armen Ustyan, a thirty-four-year-old

119. See FIN. ACTION TASK FORCE, METHODOLOGY FOR ASSESSING TECHNICAL COMPLIANCE WITH THE FATF RECOMMENDATIONS AND THE EFFECTIVENESS OF AML/CFT SYSTEMS 110-11 (2020), <https://www.fatf-gafi.org/media/fatf/documents/methodology/fatf%20methodology%2022%20feb%202013.pdf>

[<https://perma.cc/RK7R-NWBN>]; AMLD V, *supra* note 115, at Introduction, ¶ 22 (“Accurate identification and verification of data of natural and legal persons are essential for fighting money laundering or terrorist financing.”). See also BENEFICIAL OWNERSHIP TOOLKIT, *supra* note 4, at 22.

120. See, e.g., *The Companies We Keep: What the UK’s Open Data Register Actually Tells Us About Company Ownership*, GLOB. WITNESS (July 2018), <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/companies-we-keep/#chapter-0/section-1> [<https://perma.cc/Q8U6-CY9X>] [hereinafter *The Companies We Keep*] (finding that while the United Kingdom’s register can assist in preventing money laundering, there are “significant issues with ensuring data quality”); TRANSPARENCY INTERNATIONAL, G20 LEADERS OR LAGGARDS? 13 (2017) [hereinafter LEADERS OR LAGGARDS] (“Verification is weak across the board.”).

121. Zosia Szykowski & Chris Taggart, *What We Really Mean When We Talk About Verification (Part 1 of 4)*, OPEN OWNERSHIP (May 2017), <https://www.openownership.org/news/what-we-really-mean-when-we-talk-about-verification-part-1-of-4/> [<https://perma.cc/B9LD-C6TA>].

122. See Sophie Perryer, *Troika Laundromat: Inside Europe’s Latest Money Laundering Scandal*, EUROPEANCEO (July 1, 2019), <https://www.europeanceo.com/finance/troika-laundromat-inside-europes-latest-money-laundering-scandal/> [<https://perma.cc/KG4R-BVKC>].

123. *Id.*

seasonal construction worker who had no knowledge of the company and received no benefit from its actions.¹²⁴

Ustyan's story is unfortunately not unique, and it provides a stark example of the dangers of trusting data that has not been verified.¹²⁵ Bad actors will sometimes pay students or highly indebted persons a small sum for their identities to open bank accounts.¹²⁶ Thus, verification is partially about ensuring accurate data, but on the assumption that the data of bad actors is likely inaccurate, it is predominately about unearthing suspicious information that might signal foul play.¹²⁷

The CTA, at least in its current state, is missing this verification mechanism.¹²⁸ The statute is clear that FinCEN can implement policies to verify accuracy,¹²⁹ and there is a requirement that the Secretary and Attorney General conduct a study to ensure the veracity of the information,¹³⁰ but there is no specific mention of strategies to promote accuracy and uncover falsehoods. While the access allowed to financial institutions for CDD purposes could potentially catch some transgressors, the customer consent requirement permits bad actors to withhold consent and try their luck elsewhere.¹³¹ Therefore, it is imperative to the effectiveness of the CTA that a verification strategy be articulated and implemented. While there are many options, it is also important to tailor whatever method chosen to the needs of the United States and the foundation already in place. This Note will now examine the most suggested and implemented proposals and consider how they work in tandem with the United States' current regulatory framework.

124. Maíra Martini, *Verifying the Beneficial Owner of Companies. Why and How.*, VOICES FOR TRANSPARENCY (Mar. 19, 2019), <https://voices.transparency.org/verifying-the-beneficial-owner-of-companies-why-and-how-d6e24bd9f99f> [<https://archive.is/20hLY>].

125. *Id.*

126. ANDRES KNOBEL, BENEFICIAL OWNERSHIP VERIFICATION: ENSURING THE TRUTHFULNESS AND ACCURACY OF REGISTERED OWNERSHIP INFORMATION 40 (2019), https://www.taxjustice.net/wp-content/uploads/2019/01/Beneficial-ownership-verification_Tax-Justice-Network_Jan-2019.pdf [<https://perma.cc/WG78-5XAV>].

127. Szytkowski & Taggart, *supra* note 121.

128. *See supra* Section I.C. *See generally* 31 U.S.C. § 5336.

129. *See, e.g.*, 31 U.S.C. § 5336(b)(4)(B)(ii), (d)(2), (d)(3)(C).

130. *See* Corporate Transparency Act, Pub. L. No. 116-283, § 6502(b).

131. *See* 31 U.S.C. § 5336(c)(2)(B).

A REVIEW OF POTENTIAL SOLUTIONS

There are some effective practices that the CTA already implements, including ongoing reporting requirements,¹³² e-filing procedures that constrain certain fields,¹³³ and penalties for failure to comply.¹³⁴ However, to be in accordance with international AML standards, more needs to be done to ensure data accuracy. There is a concern that such thorough verification is not possible. In testimony before the Senate Banking Committee in 2019, then-FinCEN Director Kenneth Blanco responded to a question on the topic, saying “if what you’re asking us to do is verify the information, I’ll just be candid with you: that would be a big mistake. There would be no way that FinCEN could verify that information.”¹³⁵ Despite this bleak outlook on the feasibility of data verification, experts are in agreement that it is imperative to an effective beneficial owner database.¹³⁶

Solutions vary, and it is critical to understand the implications of each one, how they interplay with other factors, and whether any would be feasible and effective in the United States. A good place to start is with an examination of the strategies suggested by nonprofit organizations and implemented by governments across the world; the most popular methods have been grouped into the following categories: (1) a publicly available beneficial ownership registry; (2) requiring proof of identity and proof of ownership; (3) cross-referencing the database information using internal governmental or external sources; (4) a red-flagging system; and (5) sample testing. While these are distinct methods, they often overlap and

132. See 31 U.S.C. § 5336(b)(1)(D). See also BEST PRACTICES, *supra* note 15, at 40.

133. See Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17,557, 17,563 (Apr. 5, 2021) (to be codified at 31 C.F.R. pt. 1010). See also Data, OPEN OWNERSHIP, <https://www.openownership.org/guide/data/> [<https://perma.cc/ZD3A-HELG>] [hereinafter *Data*].

134. See 31 U.S.C. § 5336. See also BEST PRACTICES, *supra* note 15, at 15.

135. *Combating Illicit Financing by Anonymous Shell Companies Through the Collection of Beneficial Ownership Information: Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 116th Cong. 1:27:53 (2019) (testimony of Kenneth Blanco, former FinCEN Director), <https://www.banking.senate.gov/hearings/combating-illicit-financing-by-anonymous-shell-companies-through-the-collection-of-beneficial-ownership-information> [<https://perma.cc/4H22-9TEN>].

136. LEADERS OR LAGGARDS, *supra* note 120, at 9; KNOBEL, *supra* note 126, at 2; OPEN OWNERSHIP, VERIFICATION OF BENEFICIAL OWNERSHIP DATA 2 (2020), <https://www.openownership.org/uploads/OpenOwnership%20Verification%20Briefing.pdf> [<https://perma.cc/9W4Q-Q2TD>] [hereinafter VERIFICATION OF BENEFICIAL OWNERSHIP DATA].

complement each other, and thus the lines between them are not always strictly delineated.

1. *A Publicly Available Beneficial Ownership Registry*

Although the CTA states that the beneficial ownership database is not to be made public,¹³⁷ because this option has been consistently recommended by watchdog organizations and recently required under the AMLD V, it should receive some consideration.

The basic proposal for a beneficial ownership database is outlined by the FATF under the so-called “registry approach,” which tracks the beneficial ownership registry in the CTA.¹³⁸ The FATF recommends that basic information about the company be made publicly available.¹³⁹ Then, beneficial ownership information could be made publicly available or, instead, limited accessibility could be provided to financial institutions and designated non-financial business or professionals (“DNFBP”).¹⁴⁰ FATF acknowledges that while technological advances may allow beneficial ownership information to be made publicly available, such a course would need to be balanced with privacy concerns.¹⁴¹ Some groups go a step further than the FATF proposal, advocating that the public should have access to beneficial ownership data without barriers.¹⁴²

137. See Corporate Transparency Act, § 6402(7)(A).

138. See BEST PRACTICES, *supra* note 15, at 24. DNFBPs vary based on jurisdiction but generally include auditors, lawyers, notaries, trusts, and other professionals. *What are DNFBPs?: What You Need to Know*, COMPLY ADVANTAGE, <https://complyadvantage.com/knowledgebase/anti-money-laundering/designated-non-financial-businesses-professions/> [<https://perma.cc/4VKD-XYU8>] (last visited Oct. 23, 2021).

139. See BEST PRACTICES, *supra* note 15, at 24.

140. *Id.*

141. FIN. ACTION TASK FORCE, TRANSPARENCY AND BENEFICIAL OWNERSHIP 21 (2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> [<https://perma.cc/59D4-29X7>].

142. See OPEN OWNERSHIP, *BRIEFING: THE CASE FOR PUBLIC BENEFICIAL OWNERSHIP REGISTERS 2* (2017), <https://www.openownership.org/uploads/the-case-for-public-beneficial-ownership.pdf> [<https://perma.cc/V4XH-YKHH>]. Some countries have purportedly public databases but have some bar that make them less than truly public, like payment for access, identification requirements, collection of data on those searching, and only being searchable by obscure identification codes. See also *Patchy Progress in Setting Up Public Beneficial Ownership Registers in the EU*, GLOB. WITNESS (Mar. 20, 2020), <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/5aml-d-patchy-progress/> [<https://perma.cc/L87F-KBPA>] [hereinafter *Patchy Progress*].

This sort of openly public database has begun to creep into legislation, albeit slowly and with resistance. In 2016, the United Kingdom introduced the Persons with Significant Control (PSC) register, one of the first public registries of beneficial ownership information.¹⁴³ The AMLD V, implemented in 2020, requires that member states make their UBOs accessible to the public.¹⁴⁴ However, as of March 2020, Global Witness found that only five out of twenty-seven E.U. members, plus the United Kingdom, had implemented free-to-access public registers.¹⁴⁵

Proponents for a public beneficial ownership database argue that such access has numerous benefits in the fight to deter money laundering and terrorist financing. First, by granting public access, governments allow members of the public, non-profit organizations focused on AML and anti-terrorism efforts, and the press the opportunity to scrutinize the information.¹⁴⁶ This fosters public trust in the integrity of the financial system and provides another source for finding discrepancies that could lead to bad actors, thereby improving data quality.¹⁴⁷ For example, Global Witness analyzed the Companies House¹⁴⁸ data and while it did not discover any criminal wrongdoing, it did identify errors because it was able to access the database.¹⁴⁹ A public register can also enhance the speed and efficiency by which financial institutions, domestic government authorities, and international government authorities can obtain

143. GLOBAL WITNESS & OPEN OWNERSHIP, LEARNING THE LESSONS FROM THE UK'S PBO PUBLIC BENEFICIAL OWNERSHIP REGISTER 2 (2017), <https://www.openownership.org/uploads/learning-the-lessons.pdf> [<https://perma.cc/8UWP-FQPG>] [hereinafter LEARNING LESSONS]. The United Kingdom removed a small paywall in 2015 which has caused use to grow exponentially from six million searches in 2014 through 2015 to two billion searches per year. Nienke Palstra, *10 Lessons from the UK's Public Register of the Real Owners of Companies*, GLOB. WITNESS (Oct. 23, 2017), <https://www.globalwitness.org/en/blog/10-lessons-uks-public-register-real-owners-companies/> [<https://perma.cc/3TGP-HBWQ>].

144. AMLD V, *supra* note 115, at Introduction ¶33, art. 1 ¶15(c); *supra* Section I.D.

145. *Patchy Progress*, *supra* note 142. Five other Members have a centralized register which is available to the public but with significant restrictions that hinder its usefulness. *Id.* 17 out of 27 Member States do not have a register available to the public, but this is a broad category that covers a variety of situations. *Id.*

146. AMLD V, *supra* note 115, at Introduction ¶30.

147. *Id.*; *Sufficient Data Should Be Freely Accessible to the Public*, OPEN OWNERSHIP (July 2021) <https://www.openownership.org/principles/public-access/> [<https://perma.cc/ACM2-NN93>] [hereinafter *Sufficient Data*].

148. The U.K. organization that houses the beneficial ownership database.

149. BEST PRACTICES, *supra* note 15, at 51.

information to help with their own AML efforts.¹⁵⁰ Open Ownership maintains that if beneficial ownership data is public, it can reduce the cost and complexity associated with private sector CDD, leveling the playing field.¹⁵¹

However, there is also evidence that public databases are not as useful as leaked materials, such as the Panama Papers,¹⁵² which tend to have more information with higher specificity.¹⁵³ Some commentators observed that “there is a great deal of misplaced confidence in the value of public registers.”¹⁵⁴ Rebutting this argument, the Tax Justice Network contends that the pressure that arises from public scrutiny is undervalued, and cases like the Panama Papers could be more easily detected if the public were given the tools to question the veracity of beneficial ownership information.¹⁵⁵

The predominant concern with public beneficial ownership registers is privacy. Prior to AMLD V and its public UBO registry requirement, the European Data Protection Supervisor released an opinion warning that the proposed measure posed a “significant and unnecessary risk for the individual rights to privacy and data protection.”¹⁵⁶ This is particularly

150. See AMLD V, *supra* note 115, at Introduction ¶130. See also *Sufficient Data*, *supra* note 147.

151. See *Sufficient Data*, *supra* note 147.

152. In 2016, a whistleblower leaked more than eleven-and-a-half million documents containing information on more than 210,000 offshore entities from the Panamanian law firm, Mossack Fonseca. See *Panama Papers Q&A: What Is the Scandal About?*, BCC (Apr. 6, 2016) <https://www.bbc.com/news/world-35954224> [<https://perma.cc/BTV5-YY6U>]. After a thorough investigative report, it was revealed that the firm’s clients, many of them wealthy and high-profile individuals, were using shell companies to dodge taxes, avoid sanctions, and launder money. *Id.* It is considered one of the largest and most significant data leaks in history. *Id.*

153. See TOM KEATINGE & ANTON MOISEIENKO, FOR WHOSE BENEFIT? REFRAMING BENEFICIAL OWNERSHIP DISCLOSURE AROUND USERS’ NEEDS 24 (2020), https://static.rusi.org/243_ubo_web.pdf [<https://perma.cc/GX3W-T8LP>].

154. *Id.* at 25.

155. See Knobel, *FATF Beneficial Ownership Report Reveals Cutting-Edge Verification Processes, Hesitates to Endorse Public Registries*, TAX JUST. NETWORK (Nov. 27, 2019), <https://www.taxjustice.net/2019/11/27/fatf-beneficial-ownership-report-reveals-cutting-edge-verification-processes-hesitates-to-endorse-public-registries/> [<https://perma.cc/X88M-LUUV>].

156. Paolo Panico, *Are Public Registers of Beneficial Owners in Breach of the GDPR?*, IFC (Feb. 4, 2019), <https://www.ifcreview.com/articles/2019/april/are-public-registers-of-beneficial-owners-in-breach-of-the-gdpr/> [<https://perma.cc/Y62Y-PQMG>] (internal citations omitted).

true for the European Union, which has to comply with the General Data Protection Regulation (GDPR), with some commentators arguing that such a requirement is directly in breach of the expansive privacy statute.¹⁵⁷ Those concerns are not unfounded. At the beginning of 2021, the Belgian UBO register was taken offline for some time after the discovery of a data breach.¹⁵⁸

Privacy First, an independent foundation whose aim is to preserve privacy rights,¹⁵⁹ initiated legal action against the Dutch government seeking an injunction against its registry.¹⁶⁰ The foundation, relying on the GDPR and the European Charter of Fundamental Rights, believed that the outcome of the litigation would be positive for them, noting that the Court of Justice of the European Union (CJEU) had already invalidated similar legislation for privacy concerns.¹⁶¹ However, on March 18, 2021, the District Court of the Hague rejected Privacy First's claim but "expressed its doubts as to the legitimacy of the (partly) public nature of the UBO-register."¹⁶² The Court did not want to make a decision that would require the Netherlands to defy AMLD V before it had ruled on the Directive's legitimacy.¹⁶³ A similar case is pending in Luxembourg.¹⁶⁴

Public database proponents acknowledge the importance of privacy and data protection, and admit that striking a balance between these interests and transparency will require a nuanced look at what is being

157. *Id.*

158. Pleuni Visser et al., *Netherlands: Court Doubts the Legitimacy of The Dutch UBO-Register*, MONDAQ (Apr. 21, 2021), <https://www.mondaq.com/corporate-and-company-law/1059854/court-doubts-the-legitimacy-of-the-dutch-ubo-register> [<https://perma.cc/CUM9-SJLK>].

159. *See About Privacy First*, PRIVACY FIRST, <https://www.privacyfirst.eu/> [<https://perma.cc/4QDQ-96KF>].

160. *Privacy First Initiates Court Case to Dispel Privacy-Violating UBO Register*, PRIVACY FIRST, (Jan. 6, 2021), <https://privacyfirst.eu/court-cases/691-privacy-first-initiates-court-case-to-dispel-privacy-violating-ubo-register.html> [<https://perma.cc/56ZW-C2VK>].

161. *Id.* For example, the CJEU found that data retention requirements in the national security laws of France, the United Kingdom, and Belgium, which would have made providers of electronic communications services retain traffic and location data on a general and indiscriminate basis, were unlawful. *See End of the EU's Data Retention Saga? CJEU Clarifies Conditions for State Surveillance Regimes*, JONES DAY (Oct. 2020), <https://www.jonesday.com/en/insights/2020/10/cjeu-clarifies-conditions-for-state-surveillance-regimes> [<https://perma.cc/J53D-NGMZ>].

162. Visser et al., *supra* note 158.

163. *Id.*

164. *Id.*

published, whose data is being published, and how it is being published.¹⁶⁵ However, they also proffer that these rights are not absolute and that privacy compromises are already made every day.¹⁶⁶ One suggestion to mitigate the drawbacks of a public database is using case-by-case exemptions where individuals can apply to not have their information published.¹⁶⁷ In the United Kingdom, for instance, one can file for an exemption where he or she can provide evidence proving, “a serious risk of violence or intimidation due to the nature of their company’s operations.”¹⁶⁸

2. *Requiring Proof of Identity and Proof of Ownership*

Requiring some proof of identification for the beneficial owner allows the government to further ensure that the beneficial owner is a real person and is who the owner claims to be.¹⁶⁹ In Denmark, beneficial owners are required to submit a scanned copy of their passport or other national identification, which is argued to be reasonable because proof of identification is needed to open a bank account.¹⁷⁰ This method raises the stakes, as bad actors not only have to undertake falsifying convincing documents that may tip off authorities,¹⁷¹ but they also have to risk incurring additional sanctions for forgery.

More rigorous forms of identification could be required such as biometric data (fingerprints and eye retina scans), or potentially

165. OPEN OWNERSHIP ET AL., DATA PROTECTION & PRIVACY IN BENEFICIAL OWNERSHIP DISCLOSURE 29-30 (2019), <https://www.openownership.org/uploads/oo-data-protection-and-privacy.pdf> [<https://perma.cc/SBG4-7TE4>].

166. *Id.* at 30-31. For example, most countries require political candidates to disclose personal details. *Id.* Section 885 of the NDAA, the very same law where the CTA resides, requires the beneficial ownership registry of federal government contractors and grantees (“FAPIS”) to be publicly available. See Neil Gordon, *The U.S. Just Created a Public Beneficial Ownership Registry for a Subset of Companies*, POGO (Mar. 4, 2021), <https://www.pogo.org/analysis/2021/03/the-u-s-just-created-a-public-beneficial-ownership-registry-for-a-subset-of-companies/> [<https://perma.cc/CD2Y-D7R8>].

167. See OPEN OWNERSHIP ET AL., *supra* note 165, at 38-39. See also LEARNING LESSONS, *supra* note 143, at 5; Keatinge & Moiseienko, *supra* note 153, at 6.

168. LEARNING LESSONS, *supra* note 143, at 5. In the first six months of the register, over one million U.K. companies filed with the registry; of those, 270 individuals applied for this exemption, and only five of those have been granted. *Id.*

169. See *Data*, *supra* note 133; KNOBEL, *supra* note 126, at 37.

170. *The Companies We Keep*, *supra* note 120, at 27.

171. *Id.* at 27-28.

employing new anti-fraud techniques, such as tracking IP addresses to ensure that the computer is in the country the beneficial owner claims to be from.¹⁷² If more traditional forms of identification are used, like passports or driver's licenses, it is recommended that the government agency tries to arrange a meeting in person or over video call to aid in verification.¹⁷³

This method could also be narrowed to apply to only higher-risk cases. Namely, “[i]n some countries, where the [beneficial owner] is not a local citizen, the registry authority requires the applicant to proffer a certified copy of the passport and [] certificate of incorporation for legal persons.”¹⁷⁴ In other nations, there is reliance on either obliged parties or official representatives from the applicant's home to certify the information provided.¹⁷⁵

Regardless of the route taken, staff from whichever department or agency the beneficial ownership registry is housed will likely need supplementary training on how to assess the veracity of identification documents.¹⁷⁶

3. *Cross-Referencing Beneficial Ownership Data*

Another potential solution is to cross-reference the beneficial ownership data either internally with other government databases, or externally with financial institutions or professional organizations. Using a supplementary information platform to assist in verification ensures that the data submitted is the same across all registries and raises red flags if it is not.¹⁷⁷ This is what the FATF calls the “existing information approach,” which it recommends pairing with the registry approach for greater assurances of accuracy.¹⁷⁸

a. *Intragovernmental Cross-Checking*

Intragovernmental cross-checking relies on information that has already been gathered by other governmental authorities to ensure that the

172. KNOBEL, *supra* note 126, at 37.

173. *Id.*

174. BEST PRACTICES, *supra* note 15, at 52.

175. *Id.*

176. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 6.

177. BEST PRACTICES, *supra* note 15, at 37, 44; *The Companies We Keep*, *supra* note 120, at 28; Keatinge & Moiseienko, *supra* note 153, at 23.

178. BEST PRACTICES, *supra* note 15, at 11, 21-22.

data provided to the beneficial ownership registry is, in fact, correct.¹⁷⁹ Depending on the country, the database could be compared to a tax authority, law enforcement, or land register database, as well as other internal sources.¹⁸⁰ In France, for example, clerks handle the verification of information on their own and then cross-check it with the Trade Register,¹⁸¹ the main database of all companies registered in France.¹⁸² China, too, cross-checks beneficial ownership information against at least seven other government registries.¹⁸³

In the United States, FinCEN could turn to its fellow Treasury Department bureau, the Internal Revenue Service (IRS), to compare the beneficial ownership information submitted. Internal Revenue Code § 6103(h) authorizes the IRS to enter into agreements with governmental agencies to share tax information for tax administration purposes, an umbrella under which money laundering prevention would likely fall.¹⁸⁴ Or, if other identification verification strategies are used,¹⁸⁵ such as fingerprinting, FinCEN could use the Federal Bureau of Investigation's (FBI) Integrated Automated Fingerprint Identification System ("IAFIS").¹⁸⁶ The U.S. Postal Service (USPS) could also provide useful information by cross-referencing the address provided with their records, to see if the location is feasible.¹⁸⁷

179. *Id.* at 44. This is similar to the recommendation that FinCEN makes for financial institutions trying to strengthen their CDD policies, proposing that, "AML staff may find it useful to cross-check for beneficial ownership information in data systems maintained within the financial institution for other purposes, such as credit underwriting, marketing, or fraud detection." FINCEN ET AL., JOINT RELEASE, GUIDANCE ON OBTAINING AND RETAINING BENEFICIAL OWNERSHIP INFORMATION 2 (2010), <https://www.sec.gov/rules/other/2010/34-61651-guidance.pdf> [<https://perma.cc/2VXT-T6S6>].

180. BEST PRACTICES, *supra* note 15, at 44.

181. *Id.* at 49.

182. *The French Trade Registry*, CO. FORMATION FR., <https://www.companyformationfrance.com/trade-registry-france> [<https://perma.cc/XQE7-CLAP>] (last updated Jan. 16, 2020).

183. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 5.

184. I.R.C. § 6103(h).

185. *See supra* Section II.A.2.

186. *See generally Privacy Impact Assessment Integrated Automated Fingerprint Identification System National Security Enhancements*, FED. BUREAU INVESTIGATION (Apr. 25, 2021), <https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments/iafis> [<https://perma.cc/ZC6F-9SYZ>].

187. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 4.

If cross-checking within the government, an automatic control among the relevant databases could be developed to verify information as it is submitted.¹⁸⁸ Denmark, by way of example, has a common portal that automatically checks information filed with various government registers.¹⁸⁹ Even if the system is not as streamlined as Denmark's, it would still provide a valuable opportunity to ensure that information is correct.

b. Private Database Cross-Checking

Aside from, or in conjunction with, cross-checking within the government, another method of review relies on using the information gathered from private entities.¹⁹⁰ There has been success in this strategy: Spain has three separate beneficial ownership databases, each comprised of information collected by different obliged entities.¹⁹¹ One is from notaries, another is submitted by an authorized representative of the company, and the third is derived from credit institutions.¹⁹² The overlapping nature of the databases allows for verification across industries in Spain.¹⁹³ Information could also be gathered from non-obliged entities, such as Google Maps, to ensure that a certain address or zip code aligns with the type of address given (home, business, etc.), serving as the extra-governmental mirror to the USPS function.¹⁹⁴

In some countries, in order to complete company registration, one must open a bank account with a financial institution, triggering the bank's CDD processes.¹⁹⁵ If preservation of a bank account throughout the life of the legal entity was mandatory, it could enhance the maintenance of accurate and up-to-date information by utilizing the financial institution's "ability to periodically refresh customer files or identify when changes" are made.¹⁹⁶

A ready solution in the United States comes from the BSA and its already-in-place CDD requirements for financial institutions.¹⁹⁷ As

188. BEST PRACTICES, *supra* note 15, at 44.

189. *Id.* at 48.

190. *Id.* at 37.

191. *Id.* at 39-40.

192. *Id.*

193. *Id.*

194. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 4.

195. BEST PRACTICES, *supra* note 15, at 31.

196. *Id.*

197. *See supra* Section I.B.

outlined above, under CDD requirements, financial institutions must identify and verify their customers and obtain the beneficial ownership information of companies opening accounts.¹⁹⁸ Not only is this another source of beneficial ownership information, it also means that financial institutions already have mechanisms in place to try and assure accuracy, compounding its usefulness. While the CTA requires customer consent when financial institutions ask to retrieve customer information from the beneficial owner registry, the same would not necessarily be true the other way around.¹⁹⁹ After all, when a financial institution files a SAR, it is not allowed to notify anyone involved in the transaction.²⁰⁰ By and large, as two commentators note “this principle is wholly unobjectionable” as long as there are “appropriate channels for reporting discrepancies.”²⁰¹

4. *A Red-Flagging System*

Another form of verification, generally paired with other methods, is a red-flagging system that is set up to catch patterns indicative of suspicious activity.²⁰² Such indications could be: submission of the same credit card or email address for multiple entities; whether the level of assets matches the average for the claimed industry; whether the entity has a high level of assets despite being a few hours old; whether it is a foreign entity incorporated in a tax haven; and any other such qualities that might suggest illicit activity.²⁰³ Despite supporting the United Kingdom’s public beneficial ownership database, Global Witness suggests that Companies House develop a red-flag system, ideally implementing data science to create an automated approach.²⁰⁴ For example, a Ukrainian working group proposed a verification system based on locally-known techniques for avoiding beneficial ownership

198. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,398 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

199. See 31 U.S.C. § 5336(c)(2)(B).

200. See 31 U.S.C. § 5318(g)(2).

201. Keatinge & Moiseienko, *supra* note 153, at 23. However, this same paper asks, then, what is the benefit of such a registry? *Id.*

202. BEST PRACTICES, *supra* note 15, at 44; VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 8.

203. BEST PRACTICES, *supra* note 15, at 44; KNOBEL, *supra* note 126, at 48.

204. *The Companies We Keep*, *supra* note 120, at 29.

detection.²⁰⁵ There, factory workers are commonly listed as the beneficial owners of wealthy entities.²⁰⁶ The proffered system would raise a red-flag when tax data shows that someone listed as a beneficial owner of a profitable company makes significantly less money than would be expected.²⁰⁷

Red-flag programs have been successfully implemented in several countries. For example, in Austria, the entity that keeps the beneficial ownership registry is responsible for the accuracy of the data.²⁰⁸ To do this, the entity's information is cross-referenced with information from available sources and, if it is determined that there is something wrong with the entity (either incompleteness or falsity), it is flagged.²⁰⁹

Because red-flagging systems are intended to catch context-specific patterns, they are most easily implemented within a digitized system where the beneficial ownership information is open data.²¹⁰ This type of set-up would ideally allow for the utilization of artificial intelligence (AI) and machine learning technology.²¹¹ However, the time and financial investment in a system that uses AI and machine learning can be a barrier for implementation.²¹² Further, for every additional category or database utilized in the red-flagging system, there is an increased likelihood of entries being incorrectly flagged as suspicious, which would decrease the usefulness of the mechanism.²¹³ If this path is chosen, it will be imperative to examine the processes involved and enact protocols that address such disparities.²¹⁴

5. *Sample Testing*

Some registries use a technique known as sample testing—randomly pulling submissions and comparing them with the information in public and non-public sources—to confirm data accuracy and monitor how

205. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 9.

206. *Id.*

207. *Id.*

208. BEST PRACTICES, *supra* note 15, at 45-46.

209. *Id.*

210. *Data*, *supra* note 133.

211. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 8.

212. *Id.*

213. *Id.*

214. *Id.*

much correct or incorrect data the registry is receiving.²¹⁵ By pulling samples of the data and scrutinizing the information therein, government agencies can furnish a powerful deterrent against those willing to risk submitting false information.²¹⁶ Denmark has successfully put into practice a form of sample testing that accurately identifies suspicious entries.²¹⁷

However, an important complaint about sample testing is that it is not “very effective” and can require a lot of resources for implementation.²¹⁸ In light of these drawbacks, countries should use a “risk-based approach” when administering sample testing.²¹⁹ Similar to the method requiring proof of identity and ownership for foreign beneficial owners, sample testing could also be tailored to focus on risk factors,²²⁰ such as whether the beneficial owner or entity originates from a country with weaker identification regulations. As demonstrated above, inclusion of risk factors will likely be most effective if the data is gathered by locale.²²¹

B. METHODS IN COMBINATION AND THE TAX JUSTICE NETWORK PROPOSAL

Although each strategy has merit on its own, the FATF has found that the most effective beneficial ownership registries are those that combine multiple approaches.²²² A proposal by the Tax Justice Network embodies this principle by suggesting a multi-step proposal that touches on many of the above-described methods.²²³ This strategy for data verification works in three steps.²²⁴ The first requires the relevant data to be collected and, ideally, backed up with certain assurances: a digital signature, finger print or retinal scan, or scanned copies of national identification, as well as signed statements attesting to the validity of the

215. See BEST PRACTICES, *supra* note 15, at 45. See also Keatinge & Moiseienko, *supra* note 153, at 10.

216. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 7.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. See *supra* notes 204-07 and accompanying text.

222. BEST PRACTICES, *supra* note 15, at 8.

223. KNOBEL, *supra* note 126, at 2-3.

224. *Id.*

information, to name a few.²²⁵ The second step is akin to the cross-referencing function, requiring an automatic IT system to take the information provided and check that it is consistent with existing data in government databases.²²⁶ The submitted data would also be compared to records outside the government, so that, for example, a listed business address is not, in reality, a local park, and a recently deceased person is not the beneficial owner.²²⁷ This step also includes authenticating the beneficial owner either through biometric data or a digital signature, or simply by contacting the person at his or her official phone number or email address (not the one submitted to the register), to make sure someone's identity was not stolen (or even voluntarily sold) in the process.²²⁸ The last step is red-flagging, which requires "finding patterns of legal vehicles' structures and their owners . . . to confirm the reasonableness of the declared data, even if it looks valid because it matches government records."²²⁹ This step utilizes big data to see if the information is reflective of legitimate or illegitimate company structures, as well as politically exposed persons and suspicious transactions.²³⁰

Thus, the different methods described work best in tandem, each enhancing the effectiveness of the other. However, throwing the proverbial kitchen sink of verification strategies at a beneficial ownership register is not advisable and would likely frustrate all parties involved. Instead, by understanding the various systems in play and tailoring them to what is already in place, a balance can be struck between accuracy, privacy, and burdensomeness.

III. MOVING FORWARD WITH THE CTA

The implementation of the CTA is still in its infancy; and with the benefit of other countries' experiences, there is an opportunity to hit the ground running and develop a database that is truly worth the inconvenience to law-abiding entities. This is not a peripheral issue, the notice and comment period for regulations implementing the CTA concluded on May 5, 2021 and the problem of data accuracy and

225. KNOBEL, *supra* note 126, at 35-38.

226. *Id.* at 2-3, 41-45.

227. *Id.*

228. *Id.* at 40-41.

229. *Id.* at 3.

230. *Id.* at 47-53.

verification comes up repeatedly.²³¹ The Securities Industry and Financial Markets Association (SIFMA), in particular, urges that “FinCEN should utilize any and all verification mechanisms available, including from other government agencies, and require reporting companies to supply any missing data and address inconsistent data.”²³² Other submissions to FinCEN included requests for document verification,²³³ cross-referencing with pre-existing databases,²³⁴ and automation of red flags,²³⁵ to name a few.

231. Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17,557, 17,557 (proposed Apr. 5, 2021) (to be codified at 31 C.F.R. pt. 1010).

232. Securities Industry and Financial Markets Association, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 4 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0167> [<https://perma.cc/Y88E-NWU4>].

233. *See, e.g.*, London Stock Exchange Group, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 2 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0158> [<https://perma.cc/2WWV-2VKK>]; Bank Policy Institute, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 4 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0124> [<https://perma.cc/KYP7-GLBP>]. *See also* Fact Coalition, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 70-71 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0142> [<https://perma.cc/YUH7-UTS9>].

234. *See, e.g.*, National Association of Assistant United States Attorneys, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 2 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0123> [<https://perma.cc/S2MQ-F3N3>]. *See also* Global Financial Integrity, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 6-7 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0198> [<https://perma.cc/YGV8-JFBL>]; RegTech Consulting LLC, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 52-53 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0209> [<https://perma.cc/TZT6-RPKH>].

235. *See, e.g.*, Alliance for Securing Democracy, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 3 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0130> [<https://perma.cc/6B29-E58F>]; Project on Government Oversight, Comment Letter on Proposed Rule on Beneficial Ownership Information Reporting Requirements, at 3 (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0108> [<https://perma.cc/7TP5-Y4G7>].

A. TACKLING THE DATA VERIFICATION PROBLEM

Considering the information reviewed, as FinCEN moves forward with implementation, it should consider a mechanism similar to that proposed by the Tax Justice Initiative, including a proof of identity requirement and an internal, and ideally external, cross-referencing structure, that would be supplemented by a red-flagging system.

1. *Proof of Identity Requirement*

Along with the other information requested, FinCEN should require not only a unique identification number from a passport or driver's license, but also a certified copy of the corresponding document. The CTA currently requires the submission of a unique identification number from a passport, driver's license, or a FinCEN identification number, which can be requested from the agency.²³⁶ Although there are benefits to some of the proof of identity measures outlined in Part II—biometric methods, face-to-face meetings, or video calls—these would be impractical and disproportionately burdensome measures to implement.²³⁷ Further, while fingerprints could potentially be cross-referenced with the FBI's IAFIS database, the pool is much smaller than, for example, the IRS' tax information database.²³⁸

Instead, requesting a certified copy of the documentation from which the unique identification number originates could balance the interests of verification while not being overly onerous. It is both reasonable and easy to request a certified copy of the identification documentation detailed above; the same form of identification is required for a great variety of activities, from opening a bank account,²³⁹ to traveling, to applying to a job. Certification adds an additional layer of protection because many

236. 31 U.S.C. § 5336(a)(1)(A)-(D), (b)(3)(A).

237. *See supra* Part II.

238. According to the February 2021 FBI monthly fact sheet, IAFIS contains the fingerprints of more than 155 million criminals and civil individuals. March 2021 Next Generation Identification (NGI) System Fact Sheet, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view> [<https://perma.cc/D449-EX7F>] (last visited, Apr. 25, 2021). For contrast, in 2019, the IRS processed more than 253 million federal tax returns. *See Returns Filed, Taxes Collected & Refunds Issued*, INTERNAL REVENUE SERV., <https://www.irs.gov/statistics/returns-filed-taxes-collected-and-refunds-issued> [<https://perma.cc/L824-HB82>] (last updated Oct. 22, 2020).

239. *The Companies We Keep*, *supra* note 120, at 27.

states require a notary to compare and verify the copy.²⁴⁰ Further, it is a function familiar to the U.S. government, and necessitates more effort on the part of bad actors who would need to falsify the documents sufficiently to surpass scrutiny while risking additional forgery sanctions.²⁴¹ The decision could be made to use a risk-based approach, as mentioned above in Section II.A.5, and only request documentation for certain groups,²⁴² but that could just push bad actors into shifting their falsehoods to avoid the requirement. It makes the most sense to utilize a blanket condition for all who are not exempt from the database.

However, the risk of forged documents cannot be ignored, both for domestic materials and foreign documentation where there might be less familiarity with identifying falsified materials. The latter concern could be mitigated by requiring certification from a representative of the foreign country.²⁴³ However, unless there is already infrastructure in place that can be utilized to identify forgeries, there will need to be at least some training concerning the veracity of documentation.²⁴⁴

Importantly, a dedicated money launderer with a large enough network has the motive and means to have convincing fake identification documents created, but this is a much broader problem with its own complexities and regulatory challenges.²⁴⁵

2. Cross-Referencing Mechanism

Once the beneficial ownership information has made it into the government's database, there should also be automatic cross-referencing mechanisms in place to verify the information. FinCEN is well positioned

240. David Thun, *How to Certify a Copy of a Document*, NAT'L NOTARY ASS'N (Apr. 9, 2014), <https://www.nationalnotary.org/notary-bulletin/blog/2014/04/how-to-certify-copy-document> [<https://perma.cc/UJLR6-2ADY>].

241. See *supra* Section II.A.1; *The Companies We Keep*, *supra* note 120, at 27-28.

242. BEST PRACTICES, *supra* note 15, at 52-53.

243. *Id.*

244. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 6.

245. See, e.g., *Identity and Travel Document Fraud*, INTERPOL, <https://www.interpol.int/en/Crimes/Counterfeit-currency-and-security-documents/Identity-and-travel-document-fraud> [<https://perma.cc/E2CM-65RC>] (last visited Jan. 21, 2022); Nigel Lewis, Agents Struggle to Spot Fake Documents During Anti-Money Laundering Checks, THE NEGOTIATOR (July 6, 2018), <https://thenegotiator.co.uk/anti-money-laundering-checks/> [<https://perma.cc/ET3F-PRDH>]; FINCEN, THE SAR ACTIVITY REVIEW: TRENDS, TIPS & ISSUES 25 (2006), https://www.fincen.gov/sites/default/files/sar_report/sar_tti_10.pdf [<https://perma.cc/QLS3-VRB2>].

to utilize both internal government information and external data sources to verify the beneficial ownership database due to its place in the government and the cursory nature of the information requested under the CTA.²⁴⁶

As discussed earlier, FinCEN could utilize the vast collection of information retained by the IRS to spot any discrepancies.²⁴⁷ The IRS is very likely already authorized to share such information with FinCEN, as money laundering is synonymous with tax evasion.²⁴⁸ Although other databases, such as the FBI's fingerprint database could be used as a cross-reference, they might require additional information (like fingerprints or retina scans) and would likely be far more limited.²⁴⁹ The IRS database contains similar, relevant information and is vast, making it an sensible companion to the beneficial ownership registry.

The data that can be gathered from financial institutions provides another excellent source of information because of their CDD requirements.²⁵⁰ The BSA already requires financial institutions to reasonably believe that the information they are receiving is correct, creating another layer of verification.²⁵¹ Further, under the BSA, financial institutions are required to keep the information retrieved in a database where it can be pulled upon law enforcement request.²⁵² Thus, both the information and the legality of the exchange are firmly in place for an effective cross-referencing tool; the query then turns to how this process should be conducted.

Information gathered from both internal and external cross-referencing would benefit from a central, private, registry programmed to do automatic checks as data is received. For the intelligence gathered from governmental sources, a central database within the government would allow for automatic checking that could be done upon the intake of information. Or, if FinCEN decides to employ a spot-checking mechanism, although it is not recommended here, certain entries could be marked for the spot-checking process, and the first step could be cross-referencing with the governmental data. The former would be preferable

246. See 31 U.S.C. § 5336(b)(2)(A)(i)-(iv)(II); KNOBEL, *supra* note 126, at 36-37.

247. See *supra* note 184 and accompanying text.

248. See I.R.C. § 6103(h); *supra* Section II.A.3.a.

249. See BEST PRACTICES, *supra* note 15, at 52.

250. *Id.* at 37.

251. Cohen & Gresser LLP, *supra* note 45.

252. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398, 29,398 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, 1026).

as it would mean that every entry had gone through some sort of check, but the latter would be less burdensome to implement.

For private institutions, the process could either require a first step from FinCEN or the financial institution. FinCEN could require entities to submit, along with their other information, the financial institutions with which they have accounts. FinCEN could then reach out to those institutions, request the information, and require that they update FinCEN when there are changes. In contrast, it could be mandated that the financial institution submit the beneficial ownership information for all non-exempt entities to a portal where it could easily be collated. This would provide the benefit of determining who did not permit their information to be sent in, which could be a good place to begin the red-flagging process.

Alternatively, the financial institution could either reach out to clients to inquire about exemption status or provide a general notice that any customers exempted from the CTA should reach out to them before a certain date, at which point they would send the information en masse. These tasks could be done by a person, but there would be more time and opportunity for error; a digital infrastructure would aid in more effectively implementing all the precautions suggested here.

3. *Red-Flagging System*

FinCEN should also consider, at least initially, a simple red-flag system that relies on basic data pattern-recognition. While the sort of red-flag infrastructure described by the Tax Justice Initiative would be comprehensive and useful, it also requires significant data scaffolding.²⁵³ Instead, a red-flag system which focuses on less-complex patterns that are easier for a system to discern, with a clear delineation when it comes to reporting entries for review, is a good place to start. Automatic flags for the multiple entries with the same identification number, address, email, or phone number, for example, are a straightforward and effective way to determine if something nefarious is transpiring. This strikes a balance between discouraging bad actors and implementing a new, expensive, and complicated infrastructure.

253. KNOBEL, *supra* note 126, at 47.

B. REJECTED MECHANISMS

Although each has utility and merit in the data verification process, employing a public database and using spot-checking are not recommended at this time.

1. *Public Database*

While the AMLDs and transparency watchdogs both recommend a public beneficial ownership database to assist in the verification of data, for the potential privacy issues involved, the benefits are not totally proven.²⁵⁴ While there are several apparent benefits—providing information to the press and nonprofits, fostering public trust, putting pressure on entities, and enhancing the speed at which law enforcement agencies can access the data—the drawbacks are forceful enough to curb a recommendation.²⁵⁵ As mentioned in Section II.A.1, the very general information provided by databases is not often useful to those who might peruse it for discrepancies.²⁵⁶ Further, there has already been a data breach with the Belgian UBO register that required it to be temporarily taken offline.²⁵⁷ And, importantly, the CJEU has expressed skepticism over the public UBO registry,²⁵⁸ and a FinCEN public registry could face similar challenges here. In light of the other options available to FinCEN, until there is more clarity on the legality of a public registry, there is no cause to recommend a public database.

2. *Sample Testing*

Finally, while sample testing can be a good resource for verification, balancing its effectiveness with the cost of its implementation is a challenge.²⁵⁹ The significant number of entities would make it difficult to

254. See *supra* Section II.A.1.

255. See *supra* Section II.A.1; AMLD V, *supra* note 115 at Introduction ¶ 30; *Sufficient Data*, *supra* note 147; *Best Practices*, *supra* note 15, at 51; Knobel, *supra* note 155.

256. See *supra* Section II.A.1. See also Keatinge & Moiseienko, *supra* note 153, at 24; Visser et al., *supra* note 158.

257. See *supra* Section II.A.1. See also Keatinge & Moiseienko, *supra* note 153, at 24; Visser et al., *supra* note 158.

258. See Visser et al., *supra* note 158.

259. See *supra* Section II.A.5. See also VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 7.

sample test without some careful, risk-based factors.²⁶⁰ There are, however, good options for factors, including where the beneficial owner claims to be from, or even the state the entity is incorporated in, so as to target those locales that will turn a blind eye to malfeasance. But, again, in light of the associated costs, there are better ways to engage in data verification.

CONCLUSION

The story of this paper is both familiar and foreign; flashy apartments hiding international secrets is likely no big surprise to the average person.²⁶¹ What happens next might not be so well-known. That these sorts of transactions ultimately spurred FinCEN to initiate the GTOs that are still in place at the time of writing, and that the data from those GTOs highlights the usefulness of and need for beneficial ownership regulations.²⁶² That the CTA sprung from this bedrock with the goal of enhancing the fortifications against global money laundering. That its proper implementation requires for there to be a method for data verification so that the information submitted can be put to work and further FinCEN's goals. Maybe this plotline is less dazzling, but it is imperative to the success of the United States' AML efforts.

There is also no need for panic or dismay from the real estate industry. As Terri Adler, managing partner and real estate chair at the law firm Duval & Stachenfeld commented, "[a]s long as the regulations and privacy to the information make sense and work, it will not stop investors from coming here."²⁶³ The recommendations outlined in this Note—a proof of identity requirement, a cross-referencing mechanism, and a red flag system—are intended to strike this balance, justifying the relative inconvenience of complying with the beneficial ownership registry with the implementations of rules that will support effective AML and anti-terrorism efforts.

260. VERIFICATION OF BENEFICIAL OWNERSHIP DATA, *supra* note 136, at 7.

261. See Story & Saul, *supra* note 12. See generally WRIGHT & HOPE, *supra* note 1

262. See *supra* Section I.C.3.

263. See Larsen, *supra* note 5.

RETURNING TO THE STATUTORY TEXT: WHY THE LANGUAGE OF SECTION 13(B) REQUIRES COURTS TO NARROWLY CONSTRUE THE FTC'S ABILITY TO OBTAIN INJUNCTIVE RELIEF

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ABSTRACT

The Federal Trade Commission (FTC) enforces over 70 laws in the areas of antitrust and consumer protection, and one valuable tool to support their enforcement is Section 13(b) of the Federal Trade Commission Act (“Section 13(b)”). Section 13(b), among other features, grants the FTC authority to seek an injunction in district court against any defendant that is “about to violate” one or more of those laws. For the past three decades, courts have adopted a permissive judicial interpretation of that language, authorizing injunctions against defendants when the allegedly impending violations were only “likely to recur” based on past misconduct. This is known as the “likelihood of recurrence” standard.

Recently, the Third Circuit’s holding in *FTC v. Shire Viropharma, Inc.* potentially upends the longstanding dominance of that permissive judicial interpretation. *Shire* found that the “likelihood of recurrence” standard was incompatible with the statutory text of Section 13(b). In particular, the court found that the phrase “about to violate” sets a benchmark for seeking injunctive relief that is higher than the “likelihood of recurrence” standard. In other words, for the FTC to seek injunctive relief, the alleged violation needs to truly be about to occur rather than merely likely to occur.

An examination of the plain meaning and congressional intent, which can be discerned from the legislative history, of Section 13(b) shows that the statute does indeed set a standard for awarding injunctive relief that is higher than the “likelihood of recurrence” standard. Namely, Section 13(b) requires that future violations be

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imminent or impending—not merely likely—for injunctive relief to be granted. Since the “likelihood of recurrence” test does not comport with the plain meaning or congressional intent of the statute, courts should no longer use it when determining if a defendant is “about to violate” the law. Instead, courts should undertake an analysis that is true to the text, and carefully and properly consider whether future violations are genuinely about to occur.

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I. INTRODUCTION

The Federal Trade Commission (FTC)—founded over a hundred years ago during the Progressive Era—was once largely toothless.¹ That began to change in the 1970s when the bipartisan agency was given greater authority under the Federal Trade Commission Act (“FTC Act”) to enforce its findings by obtaining injunctive relief for consumers in

1. See discussion *infra* Section II.A.1.

federal court.² That authority—codified in Section 13(b) of the FTC Act (“Section 13(b)”)—states that

Whenever the Commission has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the [FTC] . . . the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice.³

The statutory language “is violating, or is about to violate” has recently come under increased scrutiny.⁴ For decades, the broad judicial construction of the phrase “about to violate” has greatly expanded the scope of Section 13(b) and the ability of the FTC to employ the courts to enforce consumer protections.⁵ Recently, however, the Third Circuit rejected the Ninth Circuit’s expansive construction of the statute, which had found that “likelihood of recurrence” satisfies the statute’s “about to violate” standard.⁶

Like the Third Circuit, this Note argues that the Ninth Circuit’s interpretation is unsupported by the text and congressional intent of Section 13(b). Ultimately, the Supreme Court will have to resolve this split. If it follows the Third Circuit’s narrow construction of the statute, the circumstances under which the FTC can seek injunctive relief from district courts will be significantly reduced. Namely, the FTC may be unable to seek injunctive relief against defendants whose violations have ceased but are still likely to recur.

Part II of this Note examines the history of Section 13(b) and how the “likelihood of recurrence” test became the judicial default. Part III examines recent caselaw that challenges the predominance of the “likelihood of recurrence” test. Part IV argues that, in determining whether to grant injunctive relief against a defendant, the “likelihood of recurrence” test is unfaithful to the statutory text and congressional intent of Section 13(b).

2. See discussion *infra* Section II.A.2.

3. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b).

4. See discussion *infra* Part III.

5. Specifically, its ability to pursue past violations. See discussion *infra* Section II.B.2.

6. Compare *FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 155-56 (3d Cir. 2019), with *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

II. SECTION 13(B) AND THE “LIKELIHOOD OF RECURRENCE” STANDARD

In response to concerns about the adequacy of the FTC’s enforcement mechanisms, the 93rd Congress amended the FTC Act to add Section 13(b).⁷ Section 13(b) grants the FTC the ability to seek temporary restraining orders, preliminary injunctions, and permanent injunctions in district court, so long as the defendant “is violating” or “is about to violate” any of the laws enforced by the agency.⁸ When the FTC began using Section 13(b), many courts grappled with how to determine whether the FTC had met its initial burden of showing that the defendant is “about to violate” the law.⁹ Specifically, in cases where a defendant had previously violated the law and the FTC alleged that it was about to violate the law again, courts increasingly began to use the “likelihood of recurrence” test.¹⁰ Under this standard, so long as the FTC demonstrates that a past violation is “likely to recur,” the court will find that the FTC has met its burden of showing that the defendant is “about to violate” the law.¹¹

Section II.A introduces the historical background and legislative history that gave rise to Section 13(b). Section II.B then examines the caselaw that led to the near-universal use of the “likelihood of recurrence” test in cases where the FTC is alleging that a defendant is “about to violate” the law.

A. THE CREATION OF SECTION 13(B)

As the administrative state grew dramatically in the 1970s, weak enforcement mechanisms constrained the FTC and commentators criticized the agency for its correspondingly lackluster efforts to protect

7. See discussion *infra* Section II.A.

8. Federal Trade Commission Act § 13(b). Note that the language of Section 13(b) encompasses only ongoing or future violations (“is violating or is about to violate”), not past violations. See also *AMG Cap. Mgmt. v. FTC*, No. 19-508, 2021 U.S. LEXIS 2108, at *1348 (Apr. 22, 2021). Nonetheless, the FTC often pursues past violations under Section 13(b) anyway, with great success, by alleging that the past violator “is about to violate” the law again and must be enjoined. See discussion *infra* Section II.B.2.

9. See discussion *infra* Section II.B.

10. See *id.*

11. See *id.*

consumers.¹² For decades, the FTC had been limited to enforcing its laws through a process known as administrative adjudication.¹³ Unfortunately, this wholly-internal process was slow, burdensome, and did little to remedy illegal conduct.¹⁴

1. The Historical Basis for Section 13(b)

When the FTC was founded in the early 1900s, lawmakers were mainly concerned with the rise of monopolies, cartels, and other anti-competitive actors.¹⁵ In response, Congress passed the FTC Act, which prohibited anti-competitive conduct and tasked the FTC with policing such violations.¹⁶ A little over twenty years later, an increase in consumer frauds spurred further expansion of the FTC's jurisdiction to cover frauds and deception against consumers.¹⁷ To that end, Congress amended the FTC Act in 1938 to ban "unfair or deceptive acts or practices," giving the FTC sole jurisdiction to police such violations.¹⁸

Despite such wide mandates to police anti-competitive conduct and consumer fraud, Congress only granted the FTC limited remedies to

12. See EDWARD F. COX ET AL., THE NADER REPORT ON THE FEDERAL TRADE COMMISSION 66-73 (1969) (describing the cease-and-desist remedy as inadequate and criticizing FTC enforcement as inconsistent and haphazard).

13. Federal Trade Commission Act, ch. 311, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)).

14. See Trans-Alaska Pipeline Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591 (1973) (noting that the current system of administrative adjudication hampers the FTC's investigative and law enforcement functions); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 62-64 (1969), reprinted in 1 J. REPRINTS FOR ANTITRUST L. & ECON. 885, 952-54 (1969) (addressing inadequacy of then-existing remedies for FTC Act violations).

15. See Woodrow Wilson, Address Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies (Jan. 20, 1914), H.R. Doc. No. 625, 63d Cong., 2d Sess. 3 (1914) (arguing that legislative action needed to be taken against detrimental monopolies).

16. Ch. 311, 38 Stat. at 719.

17. See Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1157 (1992) (noting the need "to address a national crisis in the advertising and sale of drugs and devices that could endanger health").

18. Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111, 111 (1938) (amending the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914)).

carry out these mandates.¹⁹ Under Section 5 of the FTC Act, whenever the FTC uncovered anti-competitive conduct or consumer fraud, the foremost remedy was to issue “an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.”²⁰ The only way to issue this cease and desist order was for the FTC to initiate litigation through an internal administrative adjudication process.²¹ If, at the end of that adjudication, an administrative law judge found that there were violations of the law, he could then issue a cease and desist order.²²

The problem with this approach was that the internal adjudicative process was slow and the cease and desist remedy was not a particularly effective deterrent against violators.²³ First, an administrative adjudication could take years.²⁴ Second, while that process played out, there was nothing to stop the defendant from continuing to engage in the anti-competitive or fraudulent conduct.²⁵ For instance, a defendant could continue its process of acquiring a company even if the FTC was suing to block the acquisition on antitrust grounds.²⁶ Likewise, a defendant accused of scamming consumers via false advertisements could continue to run them up until the moment a final decision was rendered.²⁷ Third, if a party was ultimately found liable, a cease and desist order was not a particularly formidable remedy, because the FTC could not seek a

19. *Id.* at 114-15. The only limited exception, at the time, involved false advertisements for “food, drugs, devices, or cosmetics.” Only in those such cases could the FTC seek a different remedy: litigation in federal district court.

20. *Id.* at 112.

21. *See, e.g.*, A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority, FTC, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/LRB8-G549>] (last modified May 2021).

22. *Id.*

23. *See* EDWARD F. COX ET AL., *supra* note 12, at 72-73.

24. *See id.* (estimating four years as the average duration of an investigation and noting that some extend more than twenty years).

25. *See id.* at 73 (noting that alleged violators can continue their illegal conduct up until the moment a final cease and desist order is granted).

26. *See* Letter from Lewis A. Engman, Chairman, Fed. Trade Comm’n, to Rep. Harold T. Johnson (Nov. 9, 1973), *reprinted in* 119 CONG. REC. 36,610 (1973) (explaining how the inability of the FTC to obtain preliminary injunctive relief allows illegal conduct to continue unabated).

27. *See id.*

contempt order if a defendant violated its cease and desist order.²⁸ For a party engaged in illegal conduct, there was little incentive to not violate the law because they could continue to act unlawfully even once sued and, if ultimately found guilty, were simply prohibited from engaging in that conduct without additional repercussions.²⁹

Overall, the FTC's ability to enforce its laws was constrained by a cumbersome administrative adjudication process and weak remedies.³⁰ So, in 1973, the agency turned to Congress for help.³¹

2. *The Legislative History of Section 13(b)*

In the early 1970s, the United States faced a dire energy crisis.³² U.S. oil production was in a steep decline and fraying international relations spurred many members of the Organization of the Petroleum Exporting Countries (OPEC) to curtail the amount of oil exported to the United States.³³ In response, Congress hurriedly worked to pass legislation authorizing the construction of a crucial new domestic oil pipeline in Alaska.³⁴ This legislation, called the Trans-Alaska Pipeline Authorization Act, was introduced into Congress on March 1, 1973.³⁵ As the bill worked its way through Congress, Senator Henry Jackson of Washington, at the behest of the FTC, offered up an amendment that would increase the agency's enforcement powers.³⁶ This amendment would ultimately add Section 13(b) to the FTC Act.³⁷ Specifically, the

28. See EDWARD F. COX ET AL., *supra* note 12, at 73 (noting the general lack of concern exhibited by respondents).

29. *Id.*

30. See *supra* notes 19-29 and accompanying text.

31. See *supra* notes 26-27.

32. See Richard Nixon, 37th President, United States of America, Address to the Nation About Policies to Deal with the Energy Shortages (Nov. 7, 1973), <https://www.presidency.ucsb.edu/node/255503> [<https://perma.cc/36KQ-JHRT>].

33. *Id.*

34. See MESSAGE FROM PRESIDENT NIXON, H.R. DOC. NO. 187, 93d Cong., 2d Sess. 1-4 (1973), reprinted in 119 CONG. REC. 36,620-22 (1973) (detailing Congress' work to achieve energy self-sufficiency).

35. See Trans-Alaska Pipeline Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591 (1973).

36. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1988). See 119 CONG. REC. 22,980 (1973) (statement of Sen. Jackson) (explaining how Section 53(b) will enable the FTC to seek injunctive relief in federal district courts).

37. See § 408, 87 Stat. at 591 (adding Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1988)).

amendment would empower the FTC to sue, in district court, for a temporary injunction whenever it had reason to believe that a defendant was violating or was “about to violate” any of the FTC’s laws.³⁸ Additionally, the amendment contained a second provision that would even allow the FTC to seek, in district court, a permanent injunction in “proper cases . . . after proper proof.”³⁹

The congressional intent of Section 13(b) is best explained by examining the legislative history.⁴⁰ A report by the Senate Commerce Committee (“Commerce Committee Report”) focused on how, even after the FTC initiates an internal adjudication, the perpetrator can nonetheless continue to violate the law until a final order is issued.⁴¹ That oversight incentivizes defendants to delay the administrative proceedings as long as possible, since they could freely violate the law up until the administrative law judge issues a cease and desist order.⁴² In light of this, the stated purpose of Section 13(b) was to remove this constraint and make certain that there would be “prompt enforcement” of the FTC’s laws.⁴³

This sentiment was echoed during the congressional floor debates.⁴⁴ Representative Neal Smith of Iowa recognized the acute need to halt potentially illegal conduct “while the litigation winds its way through final decision.”⁴⁵ Representative John Melcher of Montana saw the legislation as a key tool in removing “procedural roadblocks” and allowing the FTC to act “in a quick and effective manner” to better combat illegal conduct.⁴⁶ Other representatives also noted that, since Section 13(b) would be preliminarily used to enjoin defendants from violating the law, there would no longer be an incentive for defendants to prolong administrative proceedings.⁴⁷ In sum, members of Congress

38. *Id.* at 592.

39. *Id.*

40. *See infra* notes 41-52 and accompanying text.

41. S. REP. NO. 93-151 (1973) (accompanying S. 356).

42. *Id.*

43. § 408, 87 Stat. at 591 (1973).

44. *See infra* notes 45-47 and accompanying text.

45. 119 CONG. REC. 36,609 (1973) (remarks of Rep. Smith).

46. 119 CONG. REC. 36,597 (1973) (remarks of Rep. Melcher).

47. 119 CONG. REC. 36,609 (1973) (remarks of Rep. Smith) (“The possibility of injunction should give serious second thoughts to those who plan a quick ‘killing’ and withdrawal before retribution occurs.”). *See also id.* at 36,610 (remarks of Rep.

supported Section 13(b) as a measure that would empower the courts to both provide greater consumer protections and ease some of the procedural constraints on the FTC's enforcement authority.⁴⁸

There was also much discussion surrounding the portion of Section 13(b) that would authorize the FTC to seek permanent injunctive relief.⁴⁹ While many in Congress thought permitting the FTC to seek preliminary injunctions was a rational, measured response to a legitimate procedural loophole, allowing the FTC to seek permanent injunctions—thereby completely bypassing the internal administrative process altogether—represented a remarkable increase in the FTC's enforcement abilities.⁵⁰ Yet, despite the potential for significantly-increased injunctive power, the legislative history suggests a more measured purpose.⁵¹ First, as noted in the Commerce Committee Report, the permanent injunction provision was intended to provide for the quick disposition of cases involving run-of-the-mill fraud, such as blatantly deceptive advertisements.⁵² The Commerce Committee Report explained how, in such “proper cases” after The FTC proffered “proper proof,” the district court would be able to dispose of the case by issuing a permanent injunction—a remedy that is essentially the same as the cease and desist order that caps the arduous administrative process but in a much shorter time frame.⁵³ Second, there were concerns from the judiciary that limiting its role to issuing a preliminary injunction with no control over the FTC's subsequent internal administrative adjudication would reduce its oversight on the case.⁵⁴ Allowing judges to hear the entire case and issue a permanent injunction would placate these concerns by giving district courts total control over the disposition of the matter.⁵⁵

Johnson) (explaining how enjoined parties would no longer find it advantageous to delay FTC proceedings).

48. § 408, 87 Stat. at 591 (“[T]he investigative and law enforcement responsibilities of the [FTC] have been restricted and hampered because of inadequate legal authority . . . to seek preliminary injunctive relief . . .”).

49. *See infra* notes 50-54.

50. *Compare* Federal Trade Commission Act, 15 U.S.C. § 53(b), *with* Federal Trade Commission Act, 15 U.S.C. § 45(b).

51. S. REP. NO. 93-151 (1973) (accompanying S. 356) (explaining the history of bill).

52. *Id.* at 30-31.

53. *Id.* at 44, 52.

54. *Id.* at 30-31.

55. *Id.*

In sum, Section 13(b) revolutionized the FTC's ability to enforce its laws.⁵⁶ At a minimum, the FTC could now ask a court to temporarily enjoin illegal conduct while the agency's administrative proceedings played out.⁵⁷ Even better, for garden-variety violations, the FTC could also request a court to permanently enjoin the illegal conduct, a remedy that was just as good, if not better, than what the FTC previously could only get at the end of an arduous administrative adjudication.⁵⁸

B. SECTION 13(B) IN ACTION: THE RISE OF THE "LIKELIHOOD OF RECURRENCE" STANDARD

This Section will examine the caselaw that developed as the FTC began using its powers under Section 13(b) to litigate directly in federal district court. Section II.B.1 explains the FTC's initial difficulty in bringing Section 13(b) cases. Section II.B.2 examines how the "likelihood of recurrence" test became the paramount standard used by courts when determining if the FTC has shown that a defendant is "about to violate" the law.

1. *A Slow Start and a Constitutional Challenge*

After Section 13(b) was passed, the FTC did not exactly rush to district court to seek injunctions through its newly-delegated authority.⁵⁹ In fact, five years after Section 13(b) was passed, the General Accounting Office criticized the FTC for not making better use of its new Section 13(b) powers.⁶⁰ Then, in the 1980s, the FTC began to use its Section 13(b) authority more frequently, especially in consumer fraud cases.⁶¹ These initial actions invited a broad constitutional challenge to

56. See *infra* notes 57-58 and accompanying text.

57. Federal Trade Commission Act, 15 U.S.C. § 53(b).

58. *Id.* See S. REP. NO. 93-151 (1973) (accompanying S. 356) (explaining history of bill).

59. Letter from Gregory J. Ahart, Director, U.S. Gen. Acct. Office, to Michael Pertschuk, Chairman, Fed. Trade Comm'n, in 889 ANTITRUST & TRADE REG. REP. (BNA) A-24, F-1 (Nov. 16, 1978).

60. *Id.* See also COMPTROLLER GENERAL, VICTIMS OF UNFAIR BUSINESS PRACTICES GET LIMITED HELP FROM THE FEDERAL TRADE COMMISSION, H.R. DOC. NO. 78-140, at 23-24 (1978).

61. See, e.g., FTC v. Pharmatech Research, Inc., 576 F. Supp. 294 (D.D.C. 1983). See also Report of the American Bar Association Section of Antitrust Law Special

Section 13(b).⁶² *FTC v. American National Cellular* challenged the constitutionality of Section 13(b), claiming that giving the FTC the ability to seek injunctive relief essentially granted the agency law enforcement authority in violation of the separation of powers.⁶³ The Ninth Circuit disagreed and upheld the constitutionality of the statute.⁶⁴

2. *The “Likelihood of Recurrence” Test Emerges*

After fending off a challenge to the constitutionality of Section 13(b), the FTC began to use its Section 13(b) authority much more frequently, especially for consumer protection cases.⁶⁵ In fact, by the late 1990s, the FTC was litigating the majority of its consumer fraud cases in district courts instead of through administrative adjudication.⁶⁶

As the FTC increasingly asserted its Section 13(b) authority, conflict arose over the “is violating, or is about to violate” language in the statute.⁶⁷ In particular, there was confusion regarding how to determine whether a defendant is “about to violate” the law.⁶⁸ The statute neither defined the word “about” nor explained how to distinguish a party that merely has the potential to violate the law from a party that is on the verge of violating the law.⁶⁹ As a result, courts faced a dilemma over how to define common words⁷⁰ and phrases when they appear in a statute.⁷¹ This phenomenon is not unusual; words and phrases that are easily understood in everyday parlance can quickly

Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43, 78-85 (1989) (Kirkpatrick II) [hereinafter *The Kirkpatrick Report*].

62. *FTC v. Am. Nat’l Cellular*, 810 F.2d 1511, 1513 (9th Cir. 1987).

63. *Id.*

64. *Id.* at 1514.

65. *See The Kirkpatrick Report*, *supra* note 61, at 78-85.

66. *See* Stephen Calkins, *Articles and Comments: An Enforcement Official’s Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 432 (1997) (“[M]ost FTC consumer protection enforcement is now conducted directly in court under [Section 13(b)], rather than by means of administrative adjudication.”).

67. *See, e.g., FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

68. *Id.*

69. *See* Federal Trade Commission Act, 15 U.S.C. § 53(b).

70. *Taniguchi v. Kan Pac. Saipan*, 566 U.S. 560 (2012) (analyzing how to define the word “interpreter”).

71. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (analyzing how to define the phrase “law enforcement officer”).

devolve into complicated legal quagmires as each party pushes interpretations beneficial to their cause.⁷²

At first, courts simply dodged parties' attempts to convince them to establish a standard for determining whether a defendant is "about to violate" the law.⁷³ One court even came to the tortured conclusion that a defendant's past violations (which all parties agreed had stopped) were actually still ongoing, all so the court would not have to answer the potentially precedent-setting question of how to evaluate whether a defendant is "about to violate" the law.⁷⁴

Eventually, however, courts began to coalesce around a standard for determining whether a defendant is "about to violate" the law.⁷⁵ Decades before Congress added Section 13(b) to the FTC Act, the Supreme Court ruled in *United States v. W.T. Grant Co.* that injunctive relief can be granted against any defendant who previously violated the law so long as there is a "cognizable danger of recurrent violation."⁷⁶ Eventually, the Ninth Circuit became the first court to apply that standard to a Section 13(b) case, ruling that its decision to grant injunctive relief hinged on whether the defendant's violations were "likely to recur."⁷⁷ The Ninth Circuit did not seem to think that the "likelihood of recurrence" standard was in tension with the plain text of Section 13(b), which requires that violations be about to occur, not merely likely to occur.⁷⁸

Despite this potential friction, numerous courts across the country, when faced with a defendant who had already violated the law and may

72. See also *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); Kevin Aguirre, *Willfulness in a Post-Robare World: Evidence of Subjective Intent, Not Negligence Conduct, is Needed to Show Willful Violations of Securities Laws*, 25 *FORDHAM J. CORP. & FIN. L.* 501 (2020) (discussing judicial interpretation of the term "willful," as found in various provisions of the securities laws). See generally *Taniguchi*, 566 U.S. 560; *Ali*, 552 U.S. 214.

73. See, e.g., *FTC v. Va. Homes Mfg. Corp.*, 509 F. Supp. 51, 56-57 (D. Md. 1981), *aff'd*, 661 F.2d 920 (4th Cir. 1981). This was the first case where the FTC sought a permanent injunction under its Section 13(b) authority.

74. *Id.* at 56-58 (ruling that, although the defendant had stopped distributing the unlawful warranty services, the fact that those warranties remained in public circulation was sufficient to infer that violations were ongoing).

75. See, e.g., *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

76. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). This is known as the "likelihood of recurrence" test.

77. *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087-88 (9th Cir. 1985).

78. See *id.*

be “about to violate” the law again, have since adopted the “likelihood of recurrence” test to determine whether to grant an injunction.⁷⁹ Under this test, violations are likely to recur if there is a “cognizable danger of future violations.”⁸⁰ These “cognizable danger” factors can include:

The degree of scienter, whether the conduct was an isolated instance or recurrent, whether the defendants’ current occupations position them to commit future violations, the degree of harm consumers suffered from defendants’ unlawful conduct, and defendants’ recognition of their own culpability and the sincerity of their assurances (if any) against future violations.⁸¹

Notably, some of those factors consider past conduct while others consider potential indicators of future violations.⁸²

Ostensibly, both types of factors must be present, since Section 13(b) does not allow injunctive relief based on past violations alone.⁸³ Nonetheless, courts have allowed the FTC to seek injunctive relief

79. *E.g.*, *FTC v. USA Fin.*, 415 F. App’x 970, 975 (11th Cir. 2011); *FTC v. Accusearch*, 570 F.3d 1187, 1201-02 (10th Cir. 2009); *FTC v. Elegant Sols.*, No. SACV 19-1333 JVS (KESx), 2020 U.S. Dist. LEXIS 137774 (C.D. Cal. July 6, 2020) (granting a request for a permanent injunction because “the FTC has reason to believe that the past conduct is likely to recur”); *FTC v. BF Labs*, No. 14-CV-00815-BCW, 2014 U.S. Dist. LEXIS 174223 (W.D. Mo. Dec. 12, 2014) (denying a request for a preliminary injunction because the court was “unable to find that there was a cognizable danger of recurrent violations”); *FTC v. Home Assure*, No. 09-cv-547-T-23TBM, 2009 U.S. Dist. LEXIS 32053 (M.D. Fla. Apr. 8, 2009) (denying a request for a preliminary injunction because the court was “unable to find that there is a cognizable danger of recurrent violation or some reasonable likelihood of future violations”); *FTC v. Nat’l Urological Grp.*, No. 04-CV-3294-CAP, 2005 U.S. Dist. LEXIS 57382 (N.D. Ga. June 24, 2005) (denying a request for an injunction after finding that the past violations were not likely to recur); *FTC v. Crescent Publ’g Grp.*, 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (granting a request for a preliminary injunction because “there is a material likelihood of future violations”); *FTC v. Equinox Int’l Corp.*, CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866 (D. Nev. Sept. 14, 1999).

80. *FTC v. Citigroup*, 239 F. Supp. 2d 1302, 1306 (N.D. Ga. 2001) (quoting *FTC v. Magui Publishers*, No. 89–3818, 1991 WL 90895, at *15 (C.D. Cal. Mar. 28, 1991)).

81. *Magui*, 1991 WL 90895, at *15.

82. *See id.* Compare forward-looking factors such as “whether the defendant’s current occupations position them to commit future violations” with backward-looking factors such as “the degree of harm consumers suffered from defendants’ unlawful conduct.” *Id.*

83. Federal Trade Commission Act, 15 U.S.C. § 53(b) (establishing that the FTC can seek injunctive relief only when a defendant “is violating, or is about to violate” the law).

solely based on past violations.⁸⁴ One court ruled that “the protracted and systematic nature of [the defendant’s] past conduct and the degree of harm consumers suffered from it would certainly permit an inference of future misconduct and likelihood of recurrent bad acts.”⁸⁵ Far from even pretending to consider whether the defendant was “about to violate” the law, the court ruled in favor of the FTC based solely on the defendant’s “past conduct” and “degree of harm consumers suffered.”⁸⁶ At least one other district court has taken a similar approach.⁸⁷

In another case, a court stretched its application of the “likelihood of recurrence” test to find that “an extensive history of violations does beget an inference that future violations are likely to occur.”⁸⁸ Under this reasoning, for the FTC to satisfactorily show that a defendant is “about to violate” the law, all the agency needs to do is show an “[e]xtensive history of violations.”⁸⁹ All told, these cases demonstrate how, despite the text of Section 13(b), merely alleging past violations can be sufficient for a court to infer that additional violations are about to occur.⁹⁰

The “likelihood of recurrence” standard is so entrenched that even courts noting its potential incompatibility with the plain text of Section 13(b) use it anyway.⁹¹ For instance, one court, upon analyzing whether a defendant was “about to violate” the law, noted that Section 13(b) required it to “independently assess whether violations are *imminent*.”⁹² Yet, despite recognizing this imminency requirement, the court went ahead and analyzed the claims under the “likelihood of recurrence”

84. See, e.g., *FTC v. ENGAGE-A-CAR Servs.*, No. 86-3758, 1986 U.S. Dist. LEXIS 16357, at *12-13 (D.N.J. Dec. 17, 1986).

85. *Id.* at *12.

86. *Id.*

87. See *FTC v. Shopper Sys.*, No. 12-23919, 2013 U.S. Dist. LEXIS 204102, at *9 (S.D. Fla. July 3, 2013) (issuing a preliminary injunction after finding that the “alleged violations . . . are likely to recur in the future given the *past* alleged violations of the FTC Act” (emphasis added)).

88. *FTC v. GTP Mktg.*, No. 4-90-123, 1990 U.S. Dist. LEXIS 3325, at *12–13 (N.D. Tex. Mar. 15, 1990).

89. *Id.*

90. *Id.*; *Shopper Sys.*, 2013 U.S. Dist. LEXIS 204102, at *9; *FTC v. ENGAGE-A-CAR Servs.*, No. 86-3758, 1986 U.S. Dist. LEXIS 16357, at *12-13 (D.N.J. Dec. 17, 1986).

91. See *infra* notes 92–94 and accompanying text.

92. *FTC v. Merch. Servs. Direct*, No. 13-CV-0279, 2013 U.S. Dist. LEXIS 114960, at *4 (E.D. Wash. Aug. 13, 2013) (emphasis added).

test.⁹³ The court did not explain why it recognized the necessity of one standard (that violations must be “imminent”) but disregarded it entirely and employed another (that violations need only be “likely to recur”).⁹⁴

In sum, the “likelihood of recurrence” test is now the well-established principle used by courts when determining if a defendant accused of past violations is “about to violate” again.⁹⁵ Although the “about to violate” language in Section 13(b) suggests that injunctive relief should only be awarded if violations are “about” to occur, rather than merely “likely” to occur, courts continue to use the “likelihood of recurrence” standard.⁹⁶ Additionally, some courts have awarded

93. *Id.* at *9–10.

94. *Id.* at *4, *9–10.

95. *See* FTC v. USA Fin., 415 F. App’x 970, 975 (11th Cir. 2011); FTC v. Accusearch, 570 F.3d 1187, 1201-02 (10th Cir. 2009); FTC v. Elegant Sols., No. SACV 19-1333 JVS (KESx), 2020 U.S. Dist. LEXIS 137774 (C.D. Cal. July 6, 2020) (granting a request for a permanent injunction because “the FTC has reason to believe that the past conduct is likely to recur”); FTC v. BF Labs, No. 14-CV-00815-BCW, 2014 U.S. Dist. LEXIS 174223 (W.D. Mo. Dec. 12, 2014) (denying a request for a preliminary injunction because the court was “unable to find that there was a cognizable danger of recurrent violations”); FTC v. Home Assure, No. 09-cv-547-T-23TBM, 2009 U.S. Dist. LEXIS 32053 (M.D. Fla. Apr. 8, 2009) (denying a request for a preliminary injunction because the court was “unable to find that there is a cognizable danger of recurrent violation or some reasonable likelihood of future violations”); FTC v. Nat’l Urological Grp., No. 04-CV-3294-CAP, 2005 U.S. Dist. LEXIS 57382 (N.D. Ga. June 24, 2005) (denying a request for an injunction after finding that the past violations were not likely to recur); FTC v. Crescent Publ’g Grp., 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (granting a request for a preliminary injunction because “there is a material likelihood of future violations”); FTC v. Equinox Int’l Corp., CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866 (D. Nev. Sept. 14, 1999).

96. *See* FTC v. Evans Prods. Co., 775 F.2d 1084, 1087-88 (9th Cir. 1985); FTC v. USA Fin., 415 F. App’x 970, 975 (11th Cir. 2011); FTC v. Accusearch, 570 F.3d 1187, 1201-02 (10th Cir. 2009); FTC v. Elegant Sols., No. SACV 19-1333 JVS (KESx), 2020 U.S. Dist. LEXIS 137774 (C.D. Cal. July 6, 2020) (granting a request for a permanent injunction because “the FTC has reason to believe that the past conduct is likely to recur”); FTC v. BF Labs, No. 14-CV-00815-BCW, 2014 U.S. Dist. LEXIS 174223 (W.D. Mo. Dec. 12, 2014) (denying a request for a preliminary injunction because the court was “unable to find that there was a cognizable danger of recurrent violations”); FTC v. Home Assure, No. 09-cv-547-T-23TBM, 2009 U.S. Dist. LEXIS 32053 (M.D. Fla. Apr. 8, 2009) (denying a request for a preliminary injunction because the court was “unable to find that there is a cognizable danger of recurrent violation or some reasonable likelihood of future violations”); FTC v. Nat’l Urological Grp., No. 04-CV-3294-CAP, 2005 U.S. Dist. LEXIS 57382 (N.D. Ga. June 24, 2005) (denying a request for an injunction after finding that the past violations were not likely to recur); FTC v. Crescent Publ’g Grp., 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (granting a request for a

injunctive relief based solely on past violations – a result that may stray even further afield from the text of Section 13(b).⁹⁷

III. THE CRUSADE AGAINST THE “LIKELIHOOD OF RECURRENCE” STANDARD

For over three decades, the “likelihood of recurrence” test enjoyed widespread acceptance by courts hearing Section 13(b) cases.⁹⁸ Recently, however, there has been some significant pushback, especially in the Third Circuit.⁹⁹ This Part examines recent caselaw that imperils the supremacy of the “likelihood of recurrence” standard.

A. SHIRE VIROPHARMA AND A NEW STATUTORY INTERPRETATION

Recently, the ordinary power of courts to issue permanent injunctions has been threatened by a narrow judicial construction of the “about to violate” language of Section 13(b).¹⁰⁰ Shire ViroPharma, Inc. (“Shire”)—a pharmaceutical company—produced a lucrative drug for the treatment of a life-threatening intestinal infection.¹⁰¹ When a competitor wanted to create a cheaper generic equivalent, Shire barraged the FDA with dubious filings designed to delay the equivalent’s approval.¹⁰² Five years after Shire lost that battle with the FDA, the FTC sued, alleging that Shire had engaged in the anticompetitive practice of “sham petitioning.”¹⁰³ It invoked Section 13(b) to seek a permanent injunction, claiming that although the sham petitioning process for that

preliminary injunction because “there is a material likelihood of future violations”); *FTC v. Equinox Int’l Corp.*, CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866 (D. Nev. Sept. 14, 1999).

97. See *FTC v. Shopper Sys.*, No. 12-23919, 2013 U.S. Dist. LEXIS 204102, at *9 (S.D. Fla. July 3, 2013); *FTC v. GTP Mktg.*, No. 4-90-123, 1990 U.S. Dist. LEXIS 3325, at *12–13 (N.D. Tex. Mar. 15, 1990); *FTC v. ENGAGE-A-CAR Servs.*, No. 86-3758, 1986 U.S. Dist. LEXIS 16357, at *12-13 (D.N.J. Dec. 17, 1986).

98. See discussion *supra* Section II.B.2.

99. See *FTC v. Shire ViroPharma*, 917 F.3d 147, 156–159 (3d Cir. 2019).

100. *Id.*

101. Complaint for Injunctive and Other Equitable Relief at 1, *FTC v. Shire ViroPharma*, 917 F.3d 147 (3d Cir. 2019).

102. *Id.* at 16-21.

103. *Id.* “Sham petitioning” is the practice of petitioning in bad faith before an executive agency to ensure that the approval of a competitor’s product is delayed or denied.

drug had ceased, there was a danger that Shire could engage in similar sham petitioning with another drug in the future.¹⁰⁴ The FTC argued they had satisfied the “about to violate” statutory language of Section 13(b) by showing a past violation and a reasonable likelihood of recurrent future conduct.¹⁰⁵

Shire prevailed in the district court.¹⁰⁶ On appeal to the Third Circuit, the court affirmed.¹⁰⁷ In the opinion, Chief Judge Smith cited Section 13(b) as constraining the courts’ customary power to issue permanent injunctions, specifically noting that the “about to violate” language of the statute plainly establishes a burden that is higher than the “likelihood of recurrence” standard that the FTC put forth.¹⁰⁸ The panel’s tone—criticizing the FTC for “trot[ting] out” the argument that remedial legislation should be liberally construed—suggests a hostility to the FTC’s mission and little concern over Shire’s allegedly unlawful campaign to protect its monopoly that burdened insurers and patients with high costs for a vital medicine.¹⁰⁹ As for establishing the “exact confines” of the “about to violate” language, the Third Circuit left that task “for another day.”¹¹⁰

B. THE VARIED RESPONSES TO *SHIRE*

The judicial response to *Shire* has not been uniform.¹¹¹ One court found *Shire* unpersuasive and ruled that the “about to violate” pleading standard can be met, even if the illegal conduct has stopped, so long as the FTC presents evidence that violations “could” resume.¹¹² Compared to *Shire*, this opinion presents an even looser interpretation of Section

104. *Id.* at 44-45.

105. Plaintiff Federal Trade Commission’s Opposition to Shire ViroPharma Inc.’s Motion to Dismiss at 8-10, *FTC v. Shire ViroPharma*, No. 17-cv-00131, 2018 U.S. Dist. LEXIS 45727 (D. Del. Mar. 20, 2018).

106. *FTC v. Shire ViroPharma*, No. 17-cv-00131, 2018 U.S. Dist. LEXIS 45727, at *19 (D. Del. Mar. 20, 2018).

107. *FTC v. Shire ViroPharma*, 917 F.3d 147, 161 (3d Cir. 2019).

108. *Id.* at 156, 159.

109. *Id.* at 158.

110. *Id.* at 160.

111. *See infra* notes 112-22 and accompanying text.

112. *FTC ex rel. Yost v. Educare Ctr. Servs.*, 433 F. Supp. 3d 1008, 1012-14 (W.D. Tex. 2020). The court was particularly concerned that the defendant still maintained the “intact infrastructure” used in the previous violations. *Id.*

13(b), one where “could violate” is now synonymous with “about to violate.”¹¹³

Additionally, two district courts in the Ninth Circuit declined to follow *Shire*.¹¹⁴ This is hardly surprising considering that the Ninth Circuit was the first to adopt the “likelihood of recurrence” test, which remains the binding precedent in that circuit.¹¹⁵ Neither district court ruling was appealed.¹¹⁶

Shire did convince a district court in the Eleventh Circuit to take a fresh look at the “ordinary meaning” of Section 13(b)’s text; it concluded that the “likelihood of recurrence” standard did not accurately reflect the language of the statute.¹¹⁷ The court found that “about to violate” “evokes imminence, as if the offending action could be resumed with little delay.”¹¹⁸ By contrast, “[l]ikelihood of recurrence is less immediate than ‘about to.’ It is similar to a preponderance, ‘more likely than not.’”¹¹⁹ Despite abrogating the “likelihood of recurrence” standard, the court did not assert any new framework for determining whether a defendant is “about to violate” the law.¹²⁰ It hinted that the FTC must show that there is some “imminence” as to the violations but did not establish any factors that courts could use to analyze whether a defendant is “about to violate” the law.¹²¹ Regardless, this ruling, coupled with *Shire*, suggests a potential for widespread change in how courts interpret the “about to violate” requirement of Section 13(b) cases.¹²²

113. Compare *FTC v. Shire ViroPharma*, 917 F.3d 147, 155-57 (3d Cir. 2019), with *Educare Ctr. Servs.*, 433 F. Supp. 3d at 1013-14.

114. See *FTC v. Elec. Payment Sols. of Am.*, No. 17-02535, 2019 U.S. Dist. LEXIS 157978, at *25-26 (D. Ariz. Aug. 28, 2019); *FTC v. Adept Mgmt.*, No. 16-cv-720, 2019 U.S. Dist. LEXIS 96061, at *1 (D. Or. June 7, 2019).

115. *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

116. See *FTC v. Elec. Payment Sols. of Am.*, No. 17-02535, 2019 U.S. Dist. LEXIS 157978, at *25-26 (D. Ariz. Aug. 28, 2019); *FTC v. Adept Mgmt.*, No. 16-cv-720, 2019 U.S. Dist. LEXIS 96061, at *1 (D. Or. June 7, 2019).

117. *FTC v. Hornbeam Special Situations*, No. 17-cv-3094, 2018 U.S. Dist. LEXIS 204340, at *12-13 (N.D. Ga. Oct. 15, 2018). This ruling came before *Shire* was affirmed by the Third Circuit.

118. *Id.* at *13.

119. *Id.* at *13-14.

120. *Id.* at *16.

121. *Id.* at *13-14.

122. See discussion *supra* Section III.B.

IV. ANALYSIS

Section III introduced the current debate over whether the “likelihood of recurrence” standard is the appropriate test to determine, under Section 13(b), whether a defendant is about to violate the law. This Section will argue that the “likelihood of recurrence” test should not be used because it is unfaithful to the plain meaning and congressional intent of Section 13(b).

A. THE “LIKELIHOOD OF RECURRENCE” TEST IS INCOMPATIBLE WITH THE PLAIN MEANING OF SECTION 13(B)’S TEXT

The plain meaning of the “about to violate” language of Section 13(b) demands a standard that is higher than the “likelihood of recurrence” standard.¹²³ Generally, when interpreting a statute, the first step is to consider the plain meaning of the statutory text.¹²⁴ If the text of the statute has a plain, unambiguous meaning, that interpretation will control absent extenuating factors.¹²⁵

When courts evaluate the plain meaning of statutory text, some factors that are often considered include the common usage or dictionary definition of the word or phrase.¹²⁶ In fact, courts often turn to dictionary definitions when a word or phrase is undefined in a statute, as is the case here.¹²⁷ According to Merriam-Webster, a leading American English-

123. See *infra* notes 124-32 and accompanying text.

124. See generally *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Taniguchi v. Kan Pac. Saipan*, 566 U.S. 560 (2012); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008).

125. The bar for a court to disregard the plain, unambiguous meaning of a statute is incredibly high. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (ruling that Tennessee Valley Authority (TVA) must comply with the plain meaning of particular language in the Endangered Species Act, even though doing so would force the TVA to abandon a \$100 million dam construction project that was already well underway); *United States v. Locke*, 471 U.S. 84, 93-94 (1985) (upholding a statutorily-set filing deadline of “prior to December 31st” because it was clear and unambiguous, even though the agency all but admitted that it was a scrivener’s error and did not intend to foreclose filings made on December 31st).

126. See generally *Bostock*, 140 S. Ct. 1731; *Taniguchi*, 566 U.S. 560; *Ali*, 552 U.S. 214.

127. E.g., *Taniguchi*, 566 U.S. at 566-70 (using dictionary definitions to differentiate between an “interpreter” and a “translator”); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (using the dictionary definition of “marketing” to interpret a statute).

language dictionary, the adverb “about” is defined as “almost” or “on the verge of.”¹²⁸ This definition is clear, well-established, commonly recognized, and non-technical. As such, the ordinary meaning of “about to” is clear and unambiguous.¹²⁹

Returning to Merriam-Webster, the word “likely” is best defined as “probably.”¹³⁰ This clearly does not evoke the same level of imminence or immediacy that is required under the plain meaning of Section 13(b)’s statutory text.¹³¹ Put simply, the phrases “likely to” and “about to” are not interchangeable.¹³²

As such, the “likelihood of recurrence” test inadvertently sets a standard that is lower than what is required by the plain meaning of the “about to violate” language of Section 13(b). Since the “likelihood of recurrence” test does not comport with the plain meaning of the text, courts should no longer use it when determining if a defendant is “about to violate” the law. Instead, courts should undertake an analysis that stays true to the plain meaning of the statutory text. Under such an analysis, the phrase “about to violate” should be interpreted as it is commonly understood. The examination should primarily consider whether the defendant is on the verge of violating the law, and other factors that help inform whether the violations are imminent, rather than merely likely.

B. THE “LIKELIHOOD OF RECURRENCE” TEST IS UNFAITHFUL TO THE CONGRESSIONAL INTENT OF SECTION 13(B)

Additionally, the congressional intent discerned from the statute’s legislative history suggests that the “likelihood of recurrence” test is not the appropriate standard for Section 13(b) cases.¹³³ Generally, if the

128. *About*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/about> [<https://perma.cc/8S5C-L4B8>] (last visited Apr. 5, 2021).

129. *See Asgrow Seed Co.*, 513 U.S. at 187-89 (finding that the ordinary meaning of a word in a statute is clear if there is a standard and well-accepted definition of that word).

130. *Likely*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/likley> [<https://perma.cc/C929-S4YF>] (last visited Apr. 5, 2021).

131. *See Taniguchi*, 556 U.S. at 566-70 (ruling that a translator cannot be considered an “interpreter” because it requires a different skillset and entails different job functions).

132. *See id.*

133. *See infra* notes 134-44 and accompanying text.

plain meaning of the text is clear, that interpretation will control, and the statutory analysis will end there.¹³⁴ Courts will look past the plain meaning of the statutory text only if there is a severe and irreconcilable conflict between the plain meaning of the text and the express intent of the legislature.¹³⁵

Here, the purpose and legislative history of Section 13(b) are not irreconcilable with its plain meaning and, in fact, both actually support an interpretation of the text grounded in its plain meaning.¹³⁶ The legislative history makes clear that Section 13(b) was designed to serve two goals: to halt ongoing illegal conduct while the FTC is prosecuting it and to halt pending conduct (typically mergers) that the FTC believes would be illegal if it came to fruition.¹³⁷ Essentially, it was intended to be a “gap filler” that removed minor procedural hurdles and supplemented the agency’s existing legal authority.¹³⁸

Instead, far from being a mere gap filler, Section 13(b) now serves as the conduit through which the FTC litigates almost all of its enforcement actions.¹³⁹ Of course, there is nothing wrong with the FTC deciding to make the most of this valuable enforcement tool—one that has become all the more salient as the FTC combats novel issues, such as data privacy and information security.¹⁴⁰ Instead, the pivotal issue is that the widespread use of the “likelihood of recurrence” test has

134. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (ruling that the plain meaning of the term “sex” must control, even though doing so expands the scope of the statute well beyond what Congress had likely anticipated when they originally passed the statute).

135. See *King v. Burwell*, 576 U.S. 473, 497-98 (2015) (refusing to adopt the plain meaning of a word in the statute because doing so would doom the very program created by the statute).

136. See *infra* notes 137-45 and accompanying text.

137. See discussion *supra* Section II.A.

138. See *id.*

139. See Calkins, *supra* note 66.

140. See Letter from Chairman Joseph J. Simons, Fed. Trade Comm’n Chairman, Noah Joshua Phillips, Fed. Trade Comm’n Comm’r, Rohit Chopra, Fed. Trade Comm’n Comm’r, Rebecca Kelly Slaughter, Fed. Trade Comm’n Comm’r, and Christine S. Wilson, Fed. Trade Comm’n Comm’r, to the Chairmen and Ranking Members of the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce (Oct. 22, 2020), <https://www.adlawaccess.com/wp-content/uploads/sites/793/2020/10/2020.10.22-FTC-Letter-Section-13b-of-the-FTC-Act.pdf> [<https://perma.cc/57KE-L6RL>] (noting that recent adverse caselaw threatens the FTC’s ability to use its Section 13(b) authority to combat issues of data security and privacy).

enabled the agency to bring cases under Section 13(b) that were never intended to be under the statute's purview: cases where the illegal conduct is neither ongoing nor imminent.¹⁴¹ Since the 1980s, the FTC has used the "likelihood of recurrence" test to convince courts that an allegation of past illegal conduct alone is sufficient to trigger its Section 13(b) authority to issue injunctive relief.¹⁴² This should not be allowed to continue.

Nothing in the legislative history suggests that Congress intended for Section 13(b) to give the FTC authority to seek injunctive relief for violations that occurred solely in the past.¹⁴³ The FTC already has an avenue for litigating such cases: internal administrative adjudication.¹⁴⁴ In those cases, where the violations occurred in the past and are no longer ongoing, none of the important procedural and practical concerns that spurred the adoption of Section 13(b) are present.¹⁴⁵

In sum, the widespread acceptance of the "likelihood of recurrence" test has caused injunctive relief to be awarded in cases that were never intended to be covered by Section 13(b).¹⁴⁶ As discussed in Section IV.A., the plain meaning of the phrase "about to violate" demands that the "likelihood of recurrence" test be discontinued, an argument that is further supported by an examination of the congressional intent of Section 13(b). For those reasons, courts should no longer use the "likelihood of recurrence" test when determining if a defendant is "about to violate" the law.

141. See discussion *supra* Section II.B.2.

142. See *id.*

143. See discussion *supra* Section II.A.2.

144. Federal Trade Commission Act, § 5(b), 15 U.S.C. § 45(b).

145. Section 13(b) was intended to solve the problem that the FTC had no way to halt impending or ongoing illegal conduct while they prosecuted it. When the FTC prosecutes conduct that is no longer ongoing, that problem is not present. See *supra* notes 23-26 and accompanying text.

146. See Federal Trade Commission Act, 15 U.S.C. § 53(b) (mandating violations must be either "ongoing" or "about" to occur); *FTC v. ENGAGE-A-CAR Servs.*, No. 86-3758, 1986 U.S. Dist. LEXIS 16357, at *12-13 (D.N.J. Dec. 17, 1986); *FTC v. Shopper Sys.*, No. 12-23919, 2013 U.S. Dist. LEXIS 204102, at *9 (S.D. Fla. July 3, 2013) (issuing a preliminary injunction after finding that the "alleged violations . . . are likely to recur in the future given the past alleged violations of the FTC Act" (emphasis added)); *FTC v. GTP Mktg.*, No. 4-90-123, 1990 U.S. Dist. LEXIS 3325, at *12-13 (N.D. Tex. Mar. 15, 1990).

V. CONCLUSION

In 1973, the FTC gained the authority to seek injunctive relief in federal district court so long as it had reason to believe that a defendant “is violating, or is about to violate” any of the laws enforced by the agency.¹⁴⁷ Since then, courts have predominantly used the “likelihood of recurrence” test – which asks whether past violations are “likely to recur” – to determine whether a defendant is “about to violate” the law.¹⁴⁸ Recently, however, the dominance of the “likelihood of recurrence” test has come under scrutiny as courts question whether the principle is more permissive in granting injunctive relief than the text of Section 13(b) requires.¹⁴⁹

An examination of the plain meaning and congressional intent, which can be discerned through the legislative history, of Section 13(b) shows that the statute does indeed set a bar for awarding injunctive relief that is higher than the “likelihood of recurrence” standard.¹⁵⁰ Namely, Section 13(b) requires that future violations be imminent or impending – not merely likely – for injunctive relief to be granted.¹⁵¹ Since the “likelihood of recurrence” test does not comport with the plain meaning or congressional intent of the statute, courts should no longer use it when determining if a defendant is “about to violate” the law.¹⁵² Instead, courts must undertake an analysis that is true to the text, an analysis that must carefully and properly consider whether future violations are truly about to occur.¹⁵³

It is an immense power to be able to sue a party for violations that are yet to occur. This resolution would appropriately restrain that power by preventing the FTC from bringing cases against parties where their violative conduct is only likely to recur.¹⁵⁴ Importantly, this resolution does not take away the FTC’s power to proactively sue for future violations.¹⁵⁵ For instance, the FTC can still sue a party if their violative conduct becomes so imminent that they are truly about to violate the

147. Federal Trade Commission Act, 15 U.S.C. § 53(b).

148. See discussion *supra* Section II.B.

149. See discussion *supra* Section III.B.

150. See discussion *supra* Part IV.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

law.¹⁵⁶ And, of course, the FTC can still sue a party once it is actively violating the law.¹⁵⁷ In this way, interpreting the statute under its plain meaning and intent strikes a careful balance that prevents agency overreach while ensuring that Section 13(b) remains a powerful tool for protecting consumers.¹⁵⁸

156. *Id.*

157. *Id.*

158. *Id.*