



555 12th Street NW, Suite 1001
Washington, DC 20004

Via www.regulations.gov
and U.S. First Class Mail

September 14, 2020

The Honorable Steven T. Mnuchin
Secretary of the Treasury
c/o Michael Mosier, Deputy Director
Financial Crimes Enforcement Network
Comments: FINCEN-2020-0009
P.O. Box 39, Policy Division
Vienna, VA 22183

The Honorable Russell Vought, Director
Director, Office of Management and Budget
c/o Mr. Paul Ray, Acting Director
Office of Information and Regulatory Affairs
Comments: OMB Control Nos. 1506-0020,
1506-0030, and 1506-0035
Washington, DC 20503

Dear Mr. Secretary and Mr. Director:

RE: Department of the Treasury Financial Crimes Enforcement Network Notice
Titled "Agency Information Collection Activities; Proposed Renewal; Comment
Request; Renewal Without Change of Anti-Money Laundering Programs for
Certain Financial Institutions," Docket No. FINCEN-2020-0009 and OMB
Control Nos. 1506-0020, 1506-0030, and 1506-0035, 85 *Fed. Reg.* 49418
(August 13, 2020)

This letter presents comments of the National Federation of Independent Business (NFIB)¹ on the Department of the Treasury Financial Crimes Enforcement Network (FinCEN) notice titled "Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Anti-Money Laundering Programs for Certain Financial Institutions" and published in the *Federal Register* of August 13, 2020 ("Notice"). NFIB recommends below four steps the Department of the Treasury and the Office of Management and Budget (OMB) should take with respect to the FinCEN information collection activities addressed by the Notice.

Statutes on FinCEN Intelligence Collection Mandates to Financial Institutions

Federal law (12 U.S.C. 1953(a)) authorizes the Secretary of the Treasury, if he determines that the maintenance of appropriate records and procedures by a financial institution "has a high degree of usefulness in criminal, tax, or regulatory investigations

¹ NFIB is an incorporated nonprofit association representing small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. As customers of U.S. financial institutions, small businesses have a significant interest in mandates from FinCEN to those institutions.

or proceedings" and that "such records may also have a high degree of usefulness in the conduct of intelligence or counterintelligence activities . . . to protect against international terrorism," to require such institution to make and keep records and to follow specified procedures. Subsection 5318(h) of title 31 of the U.S. Code requires financial institutions to "establish anti-money laundering programs, including, at a minimum--(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs." Under the Paperwork Reduction Act, the Department of the Treasury cannot subject anyone to penalties for failing to comply with collections of information under 12 U.S.C. 1953 and 31 U.S.C. 5318, unless the collection of information displays "a valid control number assigned by the Director" of OMB.²

FinCEN Regulations Mandating That Financial Institutions Report to FinCEN

By regulation, the Department of the Treasury requires financial institutions to provide information about accounts and transactions upon FinCEN request for anti-money laundering or anti-terrorism purposes³ and to submit a wide range of reports.⁴ Also, Department regulations require covered financial institutions "to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of legal entity customers and to include such procedures in their anti-money laundering compliance program required under 31 U.S.C. 5318(h) and its implementing regulations."⁵ The Department requires that the following types of financial entities have a written anti-money laundering program reasonably designed to prevent the entity from being used to facilitate money laundering or finance terrorist activities: money services businesses, mutual funds, and operators of credit card systems,⁶ associated with OMB Control No. 1506-0020; dealers in precious metals, precious stones, or jewels,⁷ associated with OMB Control No. 1506-0030; and insurance companies and loan and finance companies, associated with OMB Control No. 1506-0035.⁸

² 44 U.S.C. 3512. One purpose of the Paperwork Reduction Act is to "minimize the paperwork burden for . . . small businesses. 44 U.S.C. 3501(1).

³ 31 CFR 1010.500 through 1010.540.

⁴ 31 CFR 1010.300 through 1010.370.

⁵ 31 CFR 1010.230.

⁶ 31 CFR 1022.210 (money services business); 1024.210 (mutual funds); and 1028.210 (operators of credit card systems).

⁷ 31 CFR 1027.210 (dealers in precious metals, precious stones, or jewels).

⁸ 31 CFR 1025.210 (insurance companies) and 1029.210 (loan and finance companies). The Department of the Treasury also has somewhat different anti-money laundering requirements for brokers or dealers in securities (31 CFR 1023.210), futures commission merchants and introducing brokers in commodities (31 CFR 1026.210), and housing government sponsored enterprises (31 CFR 1030.210).

NFIB Recommendations

The Notice asked, with respect to the collections of information associated with OMB Control Nos. 1506-0020, 1506-0030, and 1506-0035, for comments on "[w]hether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility" and "ways to minimize the burden of the collection of the information on respondents."⁹ To determine the necessity for and practical utility of the collection of the information and to determine ways to minimize the burden of the collection, NFIB recommends as follows:

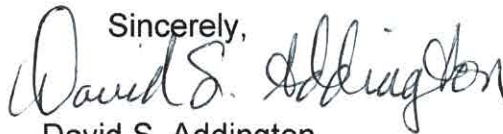
- (1) To aid the Secretary of the Treasury in making the statutory "usefulness" determination for records and procedures under 12 U.S.C. 1953(a) and to aid the Director of OMB in making the necessity and practical utility determination for related information collections under the Paperwork Reduction Act (44 U.S.C. 3512), the Secretary and the Director jointly should ask the Inspector General of the Intelligence Community to prepare a report assessing, including with specific case examples, whether and to what extent information obtained by FinCEN from financial institutions (a) has had a "high degree of usefulness" and "practical utility" in the conduct of intelligence or counterintelligence activities to protect against international terrorism, and (b) could have been obtained through means less burdensome to financial institutions and their customers.
- (2) To aid the Secretary of the Treasury and the Director of OMB in making a proper and accurate estimate of the operational and financial burden on financial institutions and their customers of the Treasury-mandated records and procedures relating to anti-money laundering and anti-terrorism, the Director should engage the services of a national accounting and auditing firm to provide an independent and comprehensive estimate of that operational and financial burden.
- (3) To aid the Secretary of the Treasury and the Director of OMB in protecting the privacy of Americans in connection with the Treasury-mandated records and procedures relating to anti-money laundering and anti-terrorism, recognizing that "[t]he economic strength and vitality of our Nation is directly linked to our consumers' confidence in the integrity and security of their personal information and the robust protection of their privacy" (Proclamation 9577 of March 6, 2017), the Secretary and the Director jointly should ask the Federal Privacy Council (established by Executive Order 13719) to review such records and procedures and recommend ways to reduce government intrusion into the privacy of Americans.
- (4) The Director of OMB should prepare and transmit to Congress legislation, judged necessary and expedient by the President, to authorize and appropriate funds to the Department of the Treasury to reimburse financial institutions for their reasonable costs of compliance with Treasury-mandated records and procedures relating to anti-money laundering and anti-terrorism.

⁹ 85 *Fed. Reg.* at 49424, col. 3 and 49425, col. 1.

Timeliness of Treasury/OMB Review of Existing FinCEN Mandates

Legislation introduced in Congress proposes to expand the concept of forcing American businesses to function as an arm of FinCEN, by requiring small businesses to gather and furnish to FinCEN beneficial ownership information on themselves (H.R. 2513/S. 1978, 116th Congress). Even the Administration, which characterized the unjustified legislation as "important progress," recognized that the legislation did not sufficiently protect small businesses from unduly burdensome disclosure requirements and did not provide for adequate access controls with respect to the information gathered under the legislation (Statement of Administration Policy on H.R. 2513 of October 22, 2019). Accordingly, before Congress and the Administration rush to consider expanding the concept of forcing America's small businesses to function as an arm of FinCEN, Treasury and OMB should pause and evaluate the existing program requiring financial institutions to serve FinCEN and take the four steps set forth above with respect to that program.

Sincerely,

A handwritten signature in black ink, reading "David S. Addington". The signature is fluid and cursive, with the first name "David" being the most prominent.

David S. Addington

Executive Vice President and General Counsel