



555 12th St. NW, Ste. 1001
Washington, D.C. 20004

Via www.reginfo.gov/public/do/PRAMain
and U.S. First Class Mail

October 24, 2022

The Honorable Janet L. Yellen
Secretary of the Treasury
Department of the Treasury
Washington, DC 20220

The Honorable Shalanda Young, Director
Office of Management and Budget
Attn: OIRA/Paperwork Reduction Act
Washington, DC 20503

Dear Madam Secretary and Madam Director:

RE: Treasury/FinCEN Notice Titled "Agency Information Collection Activities;
Submission for OMB Review; Comment Request; Financial Crimes
Enforcement Network (FinCEN)," OMB Control No. 1506-0049,
87 *Fed. Reg.* 58645 (September 27, 2022)

This letter presents comments of the National Federation of Independent Business (NFIB)¹ in response to the above-cited Treasury Financial Crimes Enforcement Network (FinCEN) notice. The notice sought comment on FinCEN's request that the Office of Management and Budget (OMB) approve under the Paperwork Reduction Act continuation of the information collection work of the FinCEN "314 Program Office" (OMB Control No. 1506-0049). The 314 Program Office gathers intelligence on Americans and others from U.S. banks and other financial institutions sought by law enforcement agencies of the U.S. or foreign countries under section 314(a) of the USA PATRIOT Act.² NFIB requests and recommends that OMB withhold its approval until the President adds FinCEN to the U.S. intelligence community under Executive Order 12333,³ thereby instituting for FinCEN important safeguards that apply to other U.S. intelligence agencies to protect the liberty and privacy of the American people.

¹ NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the U.S. and the 50 states hear the voice of small business as they formulate public policies.

² Section 314(a) of the USA PATRIOT Act (Public Law 107-56, October 26, 2001), as amended by section 6202(f) of the Intelligence Reform and Terrorism Prevention Act (Public Law 108-458, December 17, 2004), 31 U.S.C. 5311 note.

³ Section 3.5(h), Executive Order 12333, "United States Intelligence Activities," as amended, 50 U.S.C. 3001 note (defining "Intelligence Community" and "elements of the Intelligence Community").

1. Statute and Implementing Regulation for the FinCEN 314 Program Office

Section 314(a)(1) of the USA PATRIOT Act provides that “[t]he Secretary shall, within 120 days after the date of enactment of this Act, adopt regulations to encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.” Section 314(a)(2)(C) authorizes the regulations to include “procedures for cooperation and information sharing focusing on -- . . . (C) means of facilitating the identification of accounts and transactions involving terrorist groups and facilitating the exchange of information concerning such accounts and transactions between financial institutions and law enforcement organizations.”

The regulations issued by the Secretary of the Treasury under section 314(a) state in part:

A law enforcement agency investigating terrorist activity or money laundering may request that FinCEN solicit, on the investigating agency's behalf, certain information from a financial institution or a group of financial institutions. When submitting such a request to FinCEN, the law enforcement agency shall provide FinCEN with a written certification, in such form and manner as FinCEN may prescribe. At a minimum, such certification must: State that each individual, entity, or organization about which the law enforcement agency is seeking information is engaged in, or is reasonably suspected based on credible evidence of engaging in, terrorist activity or money laundering; include enough specific identifiers, such as date of birth, address, and social security number, that would permit a financial institution to differentiate between common or similar names; and identify one person at the agency who can be contacted with any questions relating to its request. Upon receiving the requisite certification from the requesting law enforcement agency, FinCEN may require any financial institution to search its records to determine whether the financial institution maintains or has maintained accounts for, or has engaged in transactions with, any specified individual, entity, or organization.⁴

Section 314(a) of the USA PATRIOT and the above-quoted implementing regulation have generated a massive FinCEN intelligence collection operation carried out by FinCEN's 314 Program Office.

⁴ 31 CFR 1010.520 (emphasis added). The Treasury regulation appears to some extent to reach further than the law may allow. Note that the regulation ignores the specific purpose limitation in section 314(a), which speaks of information outbound from the government to financial institutions: “with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial institutions information” Note also that section 314(a)(2)(C) appears to limit FinCEN collection of intelligence on bank accounts and transactions under section 314 to “accounts and transactions involving terrorist groups,” but the Treasury regulation allows use of section 314 for accounts and transactions involving either terrorism or money laundering.

2. Intelligence Agency Safeguards Should Apply to FinCEN

Since its creation by a Treasury Order on April 25, 1990, FinCEN has transformed from a small Treasury unit into a domestic intelligence agency that gathers vast amounts of intelligence on Americans and others. The work of the FinCEN 314 Program Office illustrates the massive intelligence collection FinCEN undertakes within the United States.⁵ As FinCEN said in October 2022, “FinCEN’s regulations under Section 314(a) enable federal, state, local, and foreign (European Union) law enforcement agencies, through FinCEN, to reach out to more than 34,000 points of contact at more than 14,000 financial institutions to locate accounts and transactions of persons that may be involved in terrorism or money laundering.”⁶ FinCEN’s notice said the estimated number of respondents to its 314(a) requests was 14,960, with the estimated annual number of responses per respondent of 365.⁷ Thus, in a year, FinCEN requires U.S. banks and other financial institutions to conduct for U.S. and foreign law enforcement agencies an estimated 5,460,400 (14,960 times 365) searches for intelligence.

Note that the Treasury regulation quoted above refers to collection of information on an “individual,” who may be a U.S. citizen or a foreign citizen.⁸ Thus, some portion not specified publicly of the 5,460,400 searches that FinCEN orders U.S. financial institutions to perform seek intelligence on the financial accounts and transactions of Americans. And since FinCEN says European Union law enforcement agencies get to participate in its 314 Program, it would appear that FinCEN’s 314 Program Office even collects intelligence on Americans for foreign law enforcement agencies. When U.S. agencies conduct massive operations to collect intelligence on Americans, extensive safeguards to protect the liberty and privacy of Americans should apply to those operations.

Note also that the Treasury regulation quoted above requires a U.S. or foreign law enforcement agency requesting FinCEN collection of intelligence on an individual to make a “*written certification*” that the individual “*is reasonably suspected based on*

⁵ The 314 Program is only one of the intelligence collection programs involving Americans that FinCEN runs. Other examples include the FinCEN Suspicious Activity Report program, the FinCEN Foreign Bank Account Reporting program, and the FinCEN Currency Transaction Reporting program. And starting in January 2024, FinCEN will run a new program requiring many American business owners, including small business owners, to file beneficial ownership reports with FinCEN. Department of the Treasury, FinCEN, “Beneficial Ownership Information Reporting Requirements,” 87 Fed. Reg. 59498 (September 30, 2022).

⁶ FinCEN’s 314(a) Fact Sheet (October 4, 2022), available at <https://www.fincen.gov/sites/default/files/shared/314afactsheet.pdf> (visited October 12, 2022).

⁷ 87 Fed. Reg. 58645, col. 3.

⁸ Section 314(a) of the USA PATRIOT Act addresses “individuals, entities, and organizations” without distinguishing U.S. citizens from other individuals or distinguishing entities and organizations organized in the United States from those organized in other countries. Thus, FinCEN and its implementing regulations may reach U.S. small businesses and their owners.

credible evidence of engaging in, terrorist activity or money laundering,” but does not actually require the requesting agency to demonstrate to FinCEN any of the alleged credible evidence. Thus, 5,460,400 times a year, FinCEN compels U.S. financial institutions to search for intelligence on the financial activities of an individual -- who may be a U.S. citizen -- on the say so, without showing any evidence, of any law enforcement agency in the U.S. or in any of the 27 countries of the European Union. The liberty and privacy of Americans should not depend on a trust-us certification of a law enforcement agency, without at least some demonstration of reliable information such as credible evidence to back up that certification.

The issue is not whether the U.S. Government should collect, retain, analyze, and disseminate intelligence from U.S. financial institutions needed to protect Americans from terrorism and from money laundering for illegal activities. The Government should, of course, do so (with proper authorization and safeguards by statute⁹). The issue is what safeguards the Government should have in place to protect the liberty and privacy of the American people. Congress and Presidents debated those questions for decades with regard to the other U.S. intelligence agencies, a debate that yielded the intelligence oversight provisions of the National Security Act and the safeguards in Executive Order 12333.

With FinCEN now serving as a major domestic intelligence agency, collecting, retaining, analyzing, and disseminating vast amounts of intelligence collected inside the United States about Americans and others, the government needs to extend to FinCEN statutory congressional intelligence oversight and the safeguards that apply by executive order to all the other U.S. intelligence agencies. While extending congressional intelligence oversight statutes to all FinCEN activities must await legislative action,¹⁰ the President can take action immediately to apply appropriate safeguards to FinCEN.

The President should include FinCEN in the U.S. intelligence community for purposes of Executive Order 12333, by amending section 3.5(h) of the Executive Order to read “(13) The Office of Intelligence and Analysis and the Financial Crimes Enforcement Network of the Department of the Treasury.” By including FinCEN in the Executive Order’s definition of the intelligence community, the President would extend to FinCEN: (1) the duty in conducting intelligence activities to “protect fully the legal rights of all United

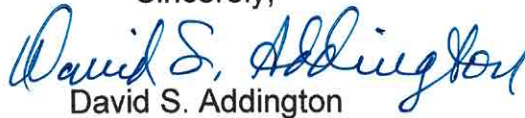
⁹ An agency has no power unless Congress has conferred the power on the agency by statute. *NFIB v. Department of Labor, OSHA*, 142 S. Ct. 661, 665 (2022) (“Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.”); *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 374 (1986) (“First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”).

¹⁰ The Department of the Treasury and FinCEN do not appear to have disclosed the extent, if any, to which FinCEN complies with the requirements of intelligence oversight provisions of the National Security Act that apply to “financial intelligence activities.” 50 U.S.C. 3091(f). Legislation introduced in the 117th Congress (Financial Crimes Enforcement Network Improvements Act, H.R. 7623) recognized the need for better congressional and administrative oversight of FinCEN.

States persons, including freedoms, civil liberties, and privacy rights guaranteed by Federal law;"¹¹ (2) the requirement for Secretary of the Treasury procedures, approved by the Attorney General, to govern FinCEN collection, retention, and dissemination of information concerning U.S. persons;¹² (3) the duty to report to the Attorney General possible violations of federal law by FinCEN employees;¹³ (4) the duty to report to the Intelligence Oversight Board concerning FinCEN intelligence activities that may be unlawful or contrary to Presidential order or directive;¹⁴ and (5) the requirement to "[e]nsure that the inspectors general, general counsels, and agency officials responsible for privacy or civil liberties protection . . . have access to any information or intelligence necessary to perform their official duties."¹⁵

For the foregoing reasons, to protect the liberty and privacy of the American people, the Director of OMB should withhold approval of FinCEN's request to continue the work of the FinCEN 314 Program Office and should recommend that the President amend Executive Order 12333 to include the Financial Crimes Enforcement Network of the Department of the Treasury within the definition of the United States intelligence community.

Sincerely,



David S. Addington

Executive Vice President and General Counsel

¹¹ Executive Order 12333, section 1.1(b).

¹² Executive Order 12333, section 2.3.

¹³ Executive Order 12333, section 1.6(b).

¹⁴ Executive Order 12333, section 1.6(c).

¹⁵ Executive Order 12333, section 1.6(h).