

northwest

REGISTERED AGENT

Financial Crimes Enforcement Network
U.S. Department of the Treasury
2070 Chain Bridge Road
Vienna, VA 22182

March 13, 2023

RE: Docket ID NO. FINCEN-2023-0001

To whom it may concern:

Northwest Registered Agent (“NWRA”) appreciates the opportunity to comment on the application that will be used to collect information from individuals who seek to obtain a FinCEN Identifier (“Application”). This Comment is submitted as a joint effort between NWRA and Registered Agents Inc (“RAI”), both of which provide not only registered agent services nationwide, but also business formation and ancillary filing services. This Comment is submitted to make both the Financial Crimes Enforcement Network (“FinCEN”) and Department of the Treasury aware of the hardships that not only NWRA and RAI will face, but also every other business entity that provides similar services (hereinafter collectively referred to as “Business Services Providers” or “BSP”), if the availability and processing of the Application as well as the issuance of the FinCEN Identifier does not begin prior to the January 1, 2024, effective date of the Corporate Transparency Act (“CTA”). This Comment will be divided into three parts to help illustrate the importance of early availability and processing of the Application and issuance of the FinCEN Identifier. Part I explains the key role BSP play in the business formation process. Part II details the difficulties faced by BSP caused by the Initial Beneficial Ownership Information Report (“Report”) due shortly after formation. Finally, Part III makes specific recommendations regarding the availability and processing of the Application as well as the issuance of the FinCEN Identifier. Following the conclusion of this Comment is an Addendum section which details additional considerations related to the Application and FinCEN Identifier.

Part I: Business Services Providers have long played a crucial role in business formation.

Unfortunately, there is no reliable statistic showing how many new businesses are formed by BSP annually; however, there has been a proliferation of business formations in total over the last several years. From January of 2020 through December of 2022, 14,776,310 new business were formed in the U.S.¹ Over the last 7 years, annual business formations have increased by 80%, jumping from

1 United States Census Bureau, Business and Industry, Time Series/Trend Charts, (Aug. 6, 2019), [https://www.census.gov/econ/currentdata/dbsearch?programCode=BFS&startYear=2015&endYear=2023&categories\[\]=TOTAL&dataType=BA_BA&geoLevel=US&adjusted=0¬Adjusted=1&errorData=0#table-results](https://www.census.gov/econ/currentdata/dbsearch?programCode=BFS&startYear=2015&endYear=2023&categories[]=TOTAL&dataType=BA_BA&geoLevel=US&adjusted=0¬Adjusted=1&errorData=0#table-results)

2,796,715 in 2015 to 5,044,748 in 2022.² Of the 2022 formations, NWRA and RAI, cumulatively, accounted for approximately 130,000, or roughly 3%.³

Although NWRA and RAI contribute greatly to this sector, these entities hardly have a corner on the market. In 2021, LegalZoom reported filing 470,000 business formations⁴, whereas NWRA and RAI's combined total was roughly 110,000.⁵ These three entities combined for just under 600,000 business formations in 2021, which would be approximately 10% of the 5,380,477 entities formed that year.⁶ The aforementioned entities were all formed within the last 25 years, as was IncFile, formed in 2004, which has assisted with over 800,000 business formations since it began operations.⁷ The BSP industry is also occupied by stalwarts, such as CT Corporation and CSC, both of which have been in operation and assisting with business formations for over 100 years.⁸

In recent years, many individuals, either as a means of supplementing income or moving toward self-employment, have created third party seller accounts with businesses such as Amazon and Etsy, with many of these individuals forming an LLC to help retain privacy on their storefronts. The pandemic served to catalyze this transition and also contributed to the massive recent influx of business formations mentioned above. Many of the individuals forming these businesses sought guidance and turned to BSP, the number of which has increased to meet demand. For example, in 2015, ZenBusiness began operations and has already helped form over 400,000 business entities to date.⁹ Now, a simple Google search returns countless start-up companies within the BSP space that cater to even the most niche of entity types.

Clearly, BSP have long played an integral role in the business formation process, and, as the demand to form businesses increases, the importance of BSP will continue unabated. However, as detailed in Part II, the information required in the Report, as it concerns employees of BSP, will negatively impact the ability of BSP to process business formations. Further, the transmission of the required information from BSP to client entity Reporting Companies creates an additional and unnecessary target for bad actors in the cybersecurity space and will result in a substantial breach of laws protecting the privacy of individual personal identifiers.

Part II: Business Services Providers and their employees will face a substantial hardship if Applications are not processed and FinCEN Identifiers are not issued prior to January 1, 2024.

² *Id.*

³ Internal Company Statistics.

⁴ Press Release, LegalZoom, LegalZoom Reports Fourth Quarter and Full Year 2021 Results (Mar. 10, 2022), <https://investors.legalzoom.com/news-releases/news-release-details/legalzoom-reports-fourth-quarter-and-full-year-2021-results>

⁵ *Id.* at 3.

⁶ *Id.* at 1.

⁷ Why Our Customers Love Us, incfile, <https://www.incfile.com/why-choose-incfile>

⁸ See DE registration data.

⁹ Start and Grow with ZenBusiness, zenbusiness, https://www.zenbusiness.com/file/zb/?headline=Launch+Your+Business+Today&utm_source=google&utm_medium=cpc&utm_campaign=17131809508&adgroupid=142974708191&creative=616376854703&matchtype=p&utm_term=zenbusiness%20llc&device=c&CT=Prospecting_&ST=ZenBusiness_&gclid=EAIAIQobChMIItba13ImG_QIVsxStBh1BQwwqEAA_YASAAEgLNlvD_BwE

Although the Report requires detailed information from the Reporting Company, there is one primary requirement causing consternation among NWRA, RAI, and likely all BSP: Company Applicant information. Under the current rule, a Company Applicant includes within its definition “the individual who directly files the document that creates the entity.”¹⁰ If a Business Services Provider assisted with the formation, the Company Applicant will undoubtedly be an employee of that Business Services Provider. As written, the rule requires that an employee’s “name, birthdate, address, and a unique identifying number and issuing jurisdiction from an acceptable identification document (and the image of such document)”¹¹ must appear on the Report. However, the Company Applicant’s personal FinCEN Identifier may be provided in lieu of the foregoing information. Despite appearing as a viable means of safeguarding the employee information of BSP, FinCEN has stated that there is no plan to issue FinCEN Identifiers prior to January 1, 2024.¹²

Access to and the processing of the Application will not begin until the enactment date, and despite FinCEN’s estimate “that the number of individuals who will apply for a FinCEN Identifier will likely be relatively low”¹³ in 2024, that estimate still stands at 325,569 applicants.¹⁴ Couple those applications with the 32.5 million Beneficial Ownership Information Reports for all Reporting Companies that FinCEN estimates to be filed in 2024¹⁵ and the processing capacity of the agency comes into question. Those concerns are then exacerbated by the fact that the agency has no experience with processing the Application or Report, meaning there will be an initial learning curve and unexpected obstacles as processing begins. To date, no indication has been given on how the Application or Report will be processed, e.g. on a first come-first served basis, will the Report take priority since the Application is optional, what is the processing time per Application and Report, etc.

As such, employees of BSP, for an undetermined length of time, would be required to turn over private, sensitive information to the owner of the newly formed Reporting Company so that the requirements of the Report can be met. Alternatively, BSP may mandate that the Report become part of their respective business formation services, which would come at an increased cost that is either transferred to clients or assumed by the BSP. Most states have streamlined their business formation filing process to the point where forming an entity takes no longer than 10 minutes of data entry followed by an online payment. FinCEN estimates that the amount of time needed to complete a Report would be 70 minutes if submitted by the Reporting Company.¹⁶ BSP that submit the formation filing to its respective State and also file the Report can expect a reduction in that time expenditure in that the Reporting Company will still be required to spend the estimated 30 minutes needed to “identify and collect information

10 <https://www.fincen.gov/beneficial-ownership-information-reporting-rule-fact-sheet>

11 *Id.* at 10.

12 Conference Call?

13 Beneficial Ownership Information Reporting Rule Fact Sheet, FinCEN, (Sept. 9, 2022), <https://www.federalregister.gov/documents/2023/01/17/2023-00708/agency-information-collection-activities-proposed-collection-comment-request-individual-fincen#open-comment>

14 *Id.*

15 See Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports, Financial Crimes Enforcement Network (Jan. 17, 2023) (“Refer to the final BOI reporting rule RIA cost analysis for the underlying sources and analysis related to this estimate. See 87 FR 59562-59579 (Sept. 30, 2022). <https://public-inspection.federalregister.gov/2023-00703.pdf>.”)

16 87 FR 59498, 59553.

about beneficial owners and applicants.”¹⁷ Of the 70 minute estimate, FinCEN allocated 20 towards the reading and reviewing of the Report and another “20 minutes to fill out and file the [R]eport, including attaching a scanned copy of an acceptable identification document for each beneficial owner and applicant.”¹⁸ Thus, BSP will be spending roughly 40 minutes submitting the Report, a time expenditure 4x that of the business formation filing itself. BSP must then decide whether to charge a premium for the filing of the Report and risk loss of business or charge a nominal fee which will diminish profits.

A significant consideration is the liability that both BSP and Reporting Companies may face if private, identifying employee information is turned over to a Reporting Company, who then mishandles or abuses that information. Employers have a duty of care in the safeguarding of sensitive, private employee information. Giving third parties access to employee names, dates of birth, addresses, ID images and numbers, etc. without employee consent would be a breach of that duty.¹⁹ This duty has moved beyond mere common law, with several states passing legislation to protect employee information and many others introducing similar bills.²⁰

Employees of BSP will also be put in a very precarious position. While BSP are prohibited from requiring that their employees consent to the disclosure of their private identifying information,²¹ the employees submitting formation filings are likely low level, at-will employees. Therefore, whereas most individuals would be unwilling to provide their private information to an unfamiliar third party, these employees, even if not required by their employer, may feel their jobs are at risk if they do not voluntarily consent to the public disclosure of their private, sensitive, identifying information.

Even if employees of BSP consent to the release of their information to Reporting Companies and even if those Reporting Companies solely use that information for its intended reporting purpose, the transmission of that data between the two parties creates a substantial risk if not done securely. In order to ensure the secure transfer of data, BSP will need to implement additional cybersecurity measures, the cost of which will either be transferred to their clients in the form of increased prices or absorbed by BSP themselves.

The Company Applicant requirement, absent the FinCEN Identifier, essentially forces a BSP to choose between its clients, profits or employees. Obviously, no good choice exists between the three, but as Part III explains, this scenario is entirely preventable.

Part III: Processing the Application and issuing FinCEN Identifiers prior to the enactment date, as well as implementing other simple measures, would mitigate most, if not all, negative impacts caused by the Company Applicant requirement.

Numerous anticipated hardships are detailed above, the singular source of which is the inability to obtain a FinCEN Identifier prior to January 1, 2024. The simplest and easiest solution to these

¹⁷ *Id.* at 13.

¹⁸ *Id.*

¹⁹ See *Dittman v. UPMC*, 196 A.3d 1036 – PA Supreme Court 2018; *Sackin v. Transperfect Glob. Inc.*, No. 17 Civ. 1469, 2017 U.S. Dist. LEXIS 164933 (S.D.N.Y. Oct. 4, 2017); *AFGE v. OPM* (In re United States OPM Data Sec. Breach Litig.).

²⁰ Tierney, Mike, *Data Privacy Laws by State: Different Approaches to Privacy Protection*, netwrix, (Jan. 13, 2022), <https://blog.netwrix.com/2019/08/27/data-privacy-laws-by-state-the-u-s-approach-to-privacy-protection/>

²¹ In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig., 266 F. Supp. 3d 1 (D.D.C. 2017). See also *Id.* at 19.

hardships is to begin the FinCEN Identifier application and issuing process no later than the beginning of Q3 2023. An early application process would not only address all of the concerns of NWRA, RAI and most BSP, but it would also allow FinCEN to gain valuable experience and workout any stumbling blocks that may be present in its processing procedures before Reports are submitted en masse to the agency.

Much of this Comment presupposes that the Application will be manually reviewed by FinCEN before the Identifier is issued to the applicant. However, another option that would assuage BSP concerns would be the automation of the Application review process with FinCEN Identifiers being issued instantaneously. Then, so long as the automated system is functional on January 1, 2024, early availability and processing of the Application would be a moot point, as BSP employees would still be able to obtain the FinCEN Identifier and provide it to client Reporting Companies prior to January 31, 2024, when the first Reports will be due.

However, the solutions detailed above, even if fully implemented may still fail to prevent the harms laid out in Part II. For instance, the volume of Applications may be higher than FinCEN's estimate to the extent that the approval process, even if beginning in Q3 of 2023, is significantly delayed. Further, even if the Application and issuance of the FinCEN Identifier is automated, technical issues could prevent website functionality for an extended period. To mitigate these possibilities but still protect BSP employees, the inability of a Company Applicant to obtain a FinCEN Identifier prior to the due date of the Report should be considered a valid reason for FinCEN to approve an extension of a Report's due date.

This simple alternative truly benefits all interested parties: FinCEN may begin gaining needed expertise in its filing procedures; BSP will not need to sacrifice profits to ensure Reports are coupled with business formation services or risk exposure to liability for turning over employee information; potential clients will not face increased costs; and, most importantly, employees of BSP will not feel pressured to provide their sensitive information to third parties, risking public exposure of their private, personal identifiers with no safety net.

Summation

Although 2023 is still in its infancy, January 1, 2024, continuously draws nearer. FinCEN must act quickly to prevent the issues detailed above and, upon approval of the Application itself, begin making it available to those interested in obtaining a FinCEN Identifier as soon as possible. So long as the FinCEN Identifier is issued prior to the enactment date, BSP may continue to assist with the continuous stream of new business formations without drastically altering operations, facing significant costs and delays, exposing themselves to liability, or exposing their employees to potential identity theft.

Sincerely,

Northwest Registered Agent LLC

Addendum: Additional Considerations

1. The Application does not seem to account for the termination of a FinCEN Identifier. The apparent inability to terminate a FinCEN Identifier implies that an individual who obtains one is expected to update their information on file with FinCEN in perpetuity. Is this correct?
2. The individuals employed by BSP that actually submit business formations to the respective states are not high ranking officers with extended tenure; rather, these employees turn over frequently. Does FinCEN expect or require individuals with FinCEN Identifiers to update their information once they are no longer employed by BSP?
3. Although the issuance of a FinCEN Identifier solves many of the issues presented in the Comment above, it creates a separate issue. What is to prevent a Reporting Company from using and/or distributing the FinCEN Identifier of a Company Applicant employed by a BSP? Is a Company Applicant who has been issued a FinCEN Identifier able to track the use of their FinCEN Identifier and report to FinCEN any unauthorized usage?