NFIB

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

March 17, 2023

Hon. Janet L. Yellen, Secretary of the Treasury
c/o Himamauli Das, Acting Director, FinCEN
FINCEN-2023-0001 and OMB CN 1506-0076
FINCEN-2023-0002 and OMB CN 1506-0076
Policy Division, P.O. Box 39, Vienna, VA 22183

Hon. Shalanda D. Young, Director
Office of Management and Budget
OIRA/OMB Control No. 1506-0076
725 17th St. NW, Washington, DC 20503

Dear Madam Secretary and Madam Director:

RE: (1) Treasury (FinCEN) Notice and Request for Comments titled "Agency Information Collection Activities; Proposed Collection; Comment Request; Individual FinCEN Identifiers," FINCEN-2023-0001 and OMB Control No. 1506-0076, 88 *Fed. Reg.* 2764 (January 17, 2023)

(2) Treasury (FinCEN) Notice and Request for Comments titled "Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports," FINCEN-2023-0002 and OMB Control No. 1506-0076, 88 *Fed. Reg.* 2760 (January 17, 2023)

This letter presents comments of the National Federation of Independent Business (NFIB)[1] on the Department of the Treasury Financial Crimes Enforcement Network (FinCEN) notices cited above concerning individual FinCEN identifiers and beneficial ownership information (BOI) reports that implement section 5336 of title 31 of the U.S. Code. NFIB continues to object to FinCEN dragnet collection of intelligence on small businesses in America, because it tramples the liberty and privacy of Americans and imposes growth-stunting costs on the American economy. Specific concerns with the proposed individual FinCEN identifier and BOI report forms appear below; changes NFIB recommends and requests appear in bold typeface.

[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 United States and the fifty states hear the voice of small business as they formulate public policies. The burdens of reporting beneficial ownership information (BOI) to FinCEN fall on small businesses, including many NFIB members.

1. Individual FinCEN Identifier Application Form

The Department of the Treasury must provide an option to complete a FinCEN Identifier Application in paper form and should include on an Application, whether in paper or electronic form, a reminder to Treasury personnel that they must maintain the confidentiality of the information provided in the Application.

The Appendix with the FinCEN Identifier Application Summary of Data Fields states: "Form is only available to persons who have already obtained *login.gov* accounts and have signed in through *login.gov*."[2] Significant numbers of small businesses, including sole proprietorships, may not be able to obtain *login.gov* accounts and sign in through *login.gov* accounts, due to the lack of possession of or ready access to a computer with internet service, or due to an inability to use a computer, such as may result from a disability. Thus, they need the option to fill out and mail to FinCEN a FinCEN Identifier Application in paper form. Moreover, since the law requires the Secretary of the Treasury to "minimize burdens on reporting companies associated with the collection of beneficial ownership information,"[3] the Secretary of the Treasury has a legal duty to provide the paper form option to small businesses seeking a FinCEN identifier who lack the capability to seek such an identifier through *login.gov*. While the Department may find it more convenient to have all individuals and entities that seek FinCEN identifiers to do so online, the statute does not give priority to Department convenience; it gives priority to minimizing burdens on the individuals and entities. **Accordingly, NFIB recommends and requests that FinCEN add to the FinCEN Identifier Application Summary of Data Fields, the FinCEN Identifier Application, whether in paper or electronic form, and appropriate FinCEN paper and electronic publications for the education of the public the following statement: "If the Applicant for a FinCEN Identifier does not have the ability to obtain and use a *login.gov* account to apply for a FinCEN identifier, the Applicant may apply for a FinCEN identifier by using the paper form 'FinCEN Identifier Application' (available from FinCEN by telephoning (XXX) XXX-XXXX) and mailing the completed paper form to: Himamauli Das, Acting Director, FinCEN, Attn: FinCEN Identifier Applications, P.O. Box 39, Vienna, Virginia 22183."**

The Secretary of the Treasury has a duty to keep information reported under section 5336(b) of title 31 of the U.S. Code, including information for obtaining a FinCEN identifier, confidential in the manner specified in section 5336.[4] Regular reminders to Treasury Department personnel of their duty to keep confidential the FinCEN identifier application information they receive would help to maintain that confidentiality. **To strengthen compliance with the statutory confidentiality requirements by government personnel, NFIB recommends and requests that FinCEN add the following statement to the FinCEN Identifier Application Summary of Data Fields and FinCEN Identifier Applications, whether in paper form or electronic form: "NOTICE TO TREASURY PERSONNEL: The Treasury Department, including the**

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[2] 88 *Fed. Reg.* at 2766, col. 2.

[3] 31 U.S.C. 5336(b)(4)(B)(i).

[4] 31 U.S.C. 5336(c)(2)(A).

Financial Crimes Enforcement Network (FinCEN), shall keep the information contained in this application confidential to the extent provided by section 5336 of title 31 of the U.S. Code."

2. Beneficial Ownership Information Report Form

The Department of the Treasury must provide an option to complete a FinCEN Beneficial Ownership Information Report in paper form; should include on each BOI Report form, whether in paper or electronic form, a reminder to Treasury personnel that they must maintain the confidentiality of the information provided in the Report; must not purport to require exempt entities to file BOI reports; and must not seek information in BOI reports that the law does not authorize FinCEN to seek.

The FinCEN notice on the Beneficial Ownership Information Report form states: "The reports are to be filed electronically through an online interface."[5] As discussed above, significant numbers of small businesses, including sole proprietorships, may not be able to file a BOI report "electronically through an online interface," due to the lack of possession of or ready access to a computer with internet service, or due to an inability to use a computer, such as may result from a disability. Thus, they need the option to fill out and mail to FinCEN a Beneficial Ownership Information Report in paper form. Moreover, since the law requires the Secretary of the Treasury to "minimize burdens on reporting companies associated with the collection of beneficial ownership information,"[6] the Secretary has a legal duty to provide the paper form option to small businesses filing BOI reports who lack the capability to file electronically. While the Department of the Treasury may find it more convenient to have all individuals and entities that must file BOI reports to do so online, the statute does not give priority to Department convenience; it gives priority to minimizing burdens on the individuals and entities. **Accordingly, NFIB recommends and requests that FinCEN add to the Beneficial Ownership Information Report Summary of Data Fields, the Beneficial Ownership Information Report form, whether in paper or electronic form, and appropriate FinCEN paper and electronic publications for the education of the public the following statement: "If an individual or entity does not have the ability to file electronically through an online interface a required Beneficial Ownership Information Report, the individual or entity may fulfill its filing requirement by using the paper form 'FinCEN Beneficial Ownership Information Report' (available by telephoning FinCEN at (XXX) XXX-XXXX) and mailing the completed paper form to: Himamauli Das, Acting Director, FinCEN, Attn: BOI Reports, P.O. Box 39, Vienna, Virginia 22183."**

The Secretary of the Treasury has a duty to keep information submitted in BOI reports confidential in the manner specified in section 5336.[7] Regular reminders to Treasury

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[5] 88 *Fed. Reg.* at 2761, col. 2.

[6] 31 U.S.C. 5336(b)(4)(B)(i).

[7] 31 U.S.C. 5336(c)(2)(A).

Department personnel of their duty to keep confidential the BOI information they receive would help to maintain that confidentiality. **To strengthen compliance with the statutory confidentiality requirements by government personnel, NFIB recommends and requests that FinCEN add the following statement to the Beneficial Ownership Information Summary of Data Fields and to Beneficial Ownership Information Reports, whether in paper or electronic form: "NOTICE TO TREASURY PERSONNEL: The Treasury Department, including the Financial Crimes Enforcement Network (FinCEN), shall keep the information contained in this form confidential to the extent provided by section 5336 of title 31 of the U.S. Code."**

Sections 1(d) through 1(h) of the Beneficial Ownership Information Summary of Data Fields and BOI Report Form purport to require the filing of information by a "New exempt entity" or "Newly exempt entity." FinCEN lacks authority to require any exempt entity to file a BOI report, as section 5336 makes clear.[8] **Accordingly, to ensure that FinCEN does not purport to exercise authority to require BOI reports from exempt entities, NFIB recommends and requests that FinCEN delete items 1(d) through 1(h) from the Beneficial Ownership Information Summary of Data Fields and BOI Report Form.**

Section 5336(b)(2)(A) of title 31 specifies that a BOI report shall "identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company by--(i) full legal name; (ii) date of birth; (iii) current, as of the date on which the report is delivered, residential or business street address; and (iv)(I) unique identifying number from an acceptable identification document; or (II) FinCEN identifier in accordance with requirements in paragraph (3)." FinCEN has no authority to collect information on beneficial owners and applicants beyond the four items specified by section 5336(b)(2)(A).[9] Note that, within these specifications, the statute leaves to the reporting company the option to choose between reporting a residential street address or a business street address and the option to choose between reporting a unique identifying number from an acceptable identification document or a FinCEN identifier. FinCEN cannot, as it proposes to do in the Beneficial Ownership Information Summary of Data Fields and BOI Report Form, require reporting companies to submit the following in a BOI report: (1) an identifying document image for a company applicant (see item 33); (2) a beneficial owner's residential address, if the reporting company chooses instead to report a business address (see item 43); and (3) an identifying document image for a beneficial owner (see item 51). **Accordingly, to ensure FinCEN**

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[8] See 31 U.S.C. 5336(b)(1)(A) (BOI report filing duty applies only to a "reporting company") and 31 U.S.C. 5336(a)(11) (defining "reporting company" to exclude twenty-four categories of entities). Section 5336 exempted twenty-four categories of entities from BOI reporting requirements, and FinCEN lacks the power to compel any such exempt entity to file a BOI report. *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 (PSC) v. Federal Communications Commission (FCC)*, 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.").

[9] *See NFIB v. Department of Labor, OSHA* and *PSC v. FCC*, *supra* n. 8.

compliance with the limitation in 31 U.S.C. 5336(b)(2)(A) on the information FinCEN may collect about beneficial owners and company applicants, NFIB recommends and requests that FinCEN delete items 33 and 51 (beneficial owner and applicant document images) from the Beneficial Ownership Information Summary of Data Fields and BOI Report Form and modify item 43 to call for reporting of either a residential address or a business address.

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The Department of the Treasury, the Office of Management and Budget (OMB), and the American public will learn a great deal from the initial implementation of section 5336 of title 31. If OMB grants approval under the Paperwork Reduction Act[10] for the proposed information collections for the FinCEN Identifier Application and the Beneficial Ownership Information Reports, OMB should approve them for a short time, of not more than eighteen months,[11] and require re-approval after that short time. A requirement for an OMB near-term re-approval of the information collections would help ensure that the Department of the Treasury, and especially FinCEN, incorporate into the beneficial ownership information reporting regime the lessons learned during the initial implementation. A near-term re-approval requirement also would give the public an opportunity to share useful information through comments on the proposed re-approval. **Accordingly, NFIB recommends and requests that the Director of the Office of Management and Budget not give approval under the Paperwork Reduction Act for the information collections for the FinCEN Identifier Application and Beneficial Ownership Information Reports for a period lasting longer than eighteen months.**

NFIB appreciates the opportunity to continue to advise the Department of the Treasury and the Office of Management and Budget on how to minimize the damage inflicted by FinCEN operations on America's small businesses.

Sincerely,

David S. Addington

David S. Addington
Executive Vice President and General Counsel

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[10] 44 U.S.C. 3507.

[11] Retrospective review within eighteen months would be consistent with the Department of Treasury *Plan for Retrospective Analysis of Existing Rules* (August 22, 2011), available at https://home.treasury.gov/system/files/236/Treasury-Lookback-plan-August-2011.pdf, issued under Executive Order 13563, "Improving Regulation and Regulatory Review" (January 18, 2011). The Treasury *Plan* states (pp. 4-5): "FinCEN established a program whereby each new or significantly amended regulation is reviewed to assess clarity and effectiveness within 18 months of its effective date. FinCEN makes its regulatory assessment publicly available to the affected industries. Each assessment is targeted to the specific new regulation, or significant change to existing regulations, and a determination is made how best to evaluate its effectiveness."