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October 6, 2023

Hon. Janet L. Yellen, Secretary of the Treasury  
FinCEN-2023-0014/OMB 1506-0076  
c/o Andrea M. Gacki, Director, FinCEN  
Policy Division, FinCEN  
P.O. Box 39, Vienna, VA 22183

Hon. Shalanda Young, Director  
Office of Management and Budget  
FinCEN-2023-0014/OMB 1506-0076  
725 17<sup>th</sup> St. NW  
Washington, DC 20503

Dear Madam Secretary and Madam Director:

- RE: (1) Treasury/FinCEN Notice of Proposed Rulemaking titled "Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024," FINCEN-2023-0014, OMB Control No. 1506-0076, 88 *Fed. Reg.* 66730 (September 28, 2023) ("Deadline Extension Notice")
- (2) Treasury Notice of Information Collection/Request for Comments titled "Agency Information Collection Activities; Submission for OMB Review; Comment Request; Beneficial Ownership Information Reports," OMB Control No. 1506-0076, 88 *Fed. Reg.* 67443 (September 29, 2023) ("BOIR Form Notice")
- (3) Treasury Notice of Information Collection/Request for Comments titled "Agency Information Collection Activities; Submission for OMB Review; Comment Request; Individual FinCEN Identifier Application," OMB Control No. 1506-0076, 88 *Fed. Reg.* 67449 (September 29, 2023) ("FinCEN Identifier Application Notice")

This letter presents comments of the National Federation of Independent Business (NFIB)<sup>1</sup> on the three *Federal Register* notices cited above on beneficial ownership information (BOI) reporting under section 5336 of title 31 of the U.S. Code and petitions for extension of deadlines. Please note the duty of the Department of the Treasury ("Treasury") and the Office of Management and Budget (OMB) under 5 U.S.C. 555(e)

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<sup>1</sup> 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 the beneficial ownership information reporting requirements fall on small businesses, including many NFIB members.

with respect to petitions. NFIB opposes the intrusive BOI reporting regime established by 31 U.S.C. 5336 but participates in the process to establish regulations to implement that statute, in an effort to minimize the damage the regime inflicts on small businesses. NFIB emphasizes that sections 5336(b)(1)(f)(iii) and (b)(4)(B)(i) of title 31 of the U.S. Code require FinCEN to minimize the burdens on reporting companies associated with collection of BOI.

For the convenience of readers, NFIB recommendations, requests, and petitions appear below in bold typeface.

### 1. Comments on Notice Concerning Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024

Under the current BOI reporting rule that takes effect January 1, 2024, a company created or registered on or after January 1, 2024, and which has a duty to report BOI to the Treasury Financial Crimes Enforcement Network (FinCEN), must make that report within 30 days of its creation or registration.<sup>2</sup> The Deadline Extension Notice proposes to revise the current rule to require that report in 90 days rather than 30 days when the creation or registration occurs during 2024.<sup>3</sup> The preamble to the proposed rule states that the extension from 30 to 90 days will: “increase the time available for these entities to understand and comply with their new regulatory obligations;”<sup>4</sup> “provide new reporting companies additional time to obtain the information necessary;”<sup>5</sup> and “give reporting companies more time to resolve questions that may arise in the process of completing their initial BOI reports.”<sup>6</sup> These reasons more than justify the proposed extension from 30 to 90 days of the deadline for a BOI report from a company created or registered after January 1, 2024. Indeed, they justify at least a 90-day, rather than a 30-day, deadline for all initial BOI reports.

FinCEN stated, “[f]or the first time, the United States is now requiring legal entities to submit beneficial ownership information to a centralized, Federal Government database, and the reporting requirements are likely to be entirely new to business owners,

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<sup>2</sup> 31 CFR 1010.380(a)(1)(i) and (ii).

<sup>3</sup> Proposed 31 CFR 1010.380(a)(1)(i) and (ii), 88 *Fed. Reg.* at 66732, col. 3. Treasury maintains that, although 31 U.S.C. 5336 requires entities created or registered on or after January 1, 2024, to file BOI reports “at the time of formation or registration,” Treasury may exempt them from reporting for 90 days by exercising the exemption authority granted by 31 U.S.C. 5318(a)(7). 88 *Fed. Reg.* at 66731, col. 1, note 11. If the exemption authority has the breadth that Treasury maintains, Treasury should exempt all entities from the duty to file BOI reports until January 1, 2025, given that the BOI reporting start date of January 1, 2024, is fast approaching and Treasury has neither issued all the BOI regulations required by 31 U.S.C. 5336 nor taken the actions necessary to educate entities on their duties under 31 U.S.C. 5336.

<sup>4</sup> 88 *Fed. Reg.* at 66731, col. 1.

<sup>5</sup> 88 *Fed. Reg.* at 66731, col. 2.

<sup>6</sup> 88 *Fed. Reg.* at 66731, col. 2.

corporate formation professionals, secretary of state offices, and other key stakeholders.”<sup>7</sup> But FinCEN goes on to state: “After January 1, 2025, however, FinCEN expects that the BOI reporting requirements will be more familiar to those involved in corporate formation, and newly created or registered companies should be in a better position to promptly file their BOI reports.”<sup>8</sup> FinCEN’s expectation about familiarity in future years is misplaced when it comes to many prospective small business owners. They often do not have the aid of (expensive) business formation professionals. Whether the prospective small business owner’s first time forming a company occurs before, on, or after January 1, 2024, that owner often will have no prior knowledge of FinCEN or BOI reporting and would need more than 30 days to figure out the BOI rules, collect BOI data, and file a report. **Accordingly, NFIB recommends and requests that Treasury revise proposed 31 CFR 1010.380(a)(1)(i) and (ii) to read:**

**§ 1010.380 Reports of beneficial ownership information.**

**(a) Reports required; timing of reports--**

**(1) Initial report.--**

**(i) A domestic reporting company created on or after January 1, 2024, shall file an initial report in the form and manner specified in subsection (b) of this section within 90 calendar days after the earlier of the date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the company has been created.**

**(ii) Any entity that becomes a foreign reporting company on or after January 1, 2024, shall file an initial report in the form and manner specified in subsection (b) of this section within 90 calendar days after the earlier of the date on which it receives actual notice that it has been registered to do business or the date on which a secretary of state or similar office first provides a public notice, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business.**

**2. Comments on Notice Concerning Beneficial Ownership Information Reporting Form**

Section 5336(b)(2)(A) of title 31 of the U.S. Code specifies exactly what information the Secretary of the Treasury shall collect in BOI reports about beneficial owners and applicants: namely, information that will “identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company by--(i) full

<sup>7</sup> 88 Fed. Reg. at 66731, col. 3.

<sup>8</sup> 88 Fed. Reg. at 66731, col. 3.

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 . . . .” The statute granted authority to collect four items -- no more and no less -- of information on beneficial owners and applicants of reporting companies. Section 5336 does not allow the Secretary of the Treasury to collect other information in the BOI reports about beneficial owners and applicants. The BOIR Form Notice goes beyond what the law allows when it seeks identifying document images for beneficial owners and applicants.

Also, since the focus of section 5336 was to obtain information about beneficial owners and applicants, with a minimized burden on reporting companies, it is highly unlikely that section 5336 allows FinCEN to collect substantially more information about reporting companies than section 5336 allows FinCEN to collect on beneficial owners and applicants. Thus, the BOIR Form Notice should not allow FinCEN to seek the following information on reporting companies: Employer Identification Numbers, Social Security Numbers, Individual Taxpayer Identification Numbers, tax identification numbers, or jurisdiction of formation or registration.

The U.S. Supreme Court has made clear that a federal agency has no power, such as the power to collect information, unless Congress has vested that power in the agency by law.<sup>9</sup> **NFIB recommends and requests that Treasury and OMB edit the proposed BOI reporting form so that it does not call for any information on reporting companies, beneficial owners, or applicants beyond “(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 . . . .” and specifically does not seek identifying document images.**

The BOIR Form Notice also states how reporting companies must file BOI reports (BOIRs): “The BOIRs will be filed by completing a form (the BOIR Form) and submitting it through an online portal or submitting the information through an Application Programming Interface (API).”<sup>10</sup> Also, the FinCEN Identifier Application Notice says that those who request an identifier must file the application “electronically.”<sup>11</sup> Use of an “online portal” or an “Application Programming Interface,” or filing “electronically,” implies access to a computer and electronic communications service, but some small businesses do not own or have ready access to a computer or to the necessary electronic communications service. **Accordingly, NFIB recommends and requests**

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<sup>9</sup> *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.”).

<sup>10</sup> 88 *Fed. Reg.* at 67443, col. 3, to 67444, col. 1.

<sup>11</sup> 88 *Fed. Reg.* at 67450, col. 1.

that Treasury add at the end of 31 CFR 1010.380 the following new subsection: “(h) **Filing methods.** Reports and amendments to reports required, and FinCEN identifier applications made, under this section shall be filed with FinCEN through the FinCEN online portal or through an Application Programming Interface with FinCEN, except that, if a person required to file a report or amendment, or filing a FinCEN identifier application, cannot, due to lack of reasonable access to necessary equipment or electronic service, file through one of such means, such person may complete the report, amendment, or application on a paper copy of the relevant form and file the form by sending it by U.S. Postal Service or a commercial courier service to: Director, Financial Crimes Enforcement Network, ATTN: Beneficial Ownership Information, P.O. Box 39, Vienna, Virginia 22183.”

### 3. Comments on Notice Concerning FinCEN Identifier Application Form

Section 5336(b)(3)(A)(i) of title 31 of the U.S. Code specifies exactly what information an individual must provide to obtain a FinCEN identifier -- full legal name, date of birth, current residential or business street address, and a unique identifying number from an acceptable identification document. Yet the FinCEN Identifier Application Notice calls for the application to include an identifying document image.<sup>12</sup>

As stated above, the U.S. Supreme Court has made clear that a federal agency has no power, such as the power to collect information, unless Congress has vested that power in the agency by law.<sup>13</sup> Congress carefully considered the scope of information required in FinCEN identifier applications, and the law specifies exactly four items that a FinCEN identifier application shall contain. **Accordingly, NFIB recommends and requests that Treasury and OMB edit the proposed FinCEN Identifier application so that it does not call for any information beyond full legal name, date of birth, current residential or business street address, and unique identifying number from an acceptable identification document, and specifically does not seek identifying document images.**

### 4. Petition for Changes to Beneficial Ownership Information Reporting Deadlines in Current 31 CFR 1010.380

FinCEN has explained that its proposed extension of deadlines for initial BOI reports will: “increase the time available for these entities to understand and comply with their new regulatory obligations;”<sup>14</sup> “provide new reporting companies additional time to obtain the information necessary;”<sup>15</sup> and “give reporting companies more time to resolve

<sup>12</sup> 88 Fed. Reg. at 67451, col. 1.

<sup>13</sup> See note 9 above.

<sup>14</sup> 88 Fed. Reg. at 66731, col. 1.

<sup>15</sup> 88 Fed. Reg. at 66731, col. 2.

questions that may arise in the process of completing their initial BOI reports.”<sup>16</sup> Whether small businesses are submitting their first BOI report, an update to a previous report, or an application for a FinCEN identifier, they need sufficient time to understand and comply with the regulations, obtain the information needed to comply with the regulations, and to resolve questions that arise. FinCEN should recognize that small businesses have a greater need for time to comply than others may need, because they often cannot afford the experts, accountants, and lawyers others use to decipher and comply with government reporting rules like the BOI rules. Regulatory compliance often is a do-it-yourself project for an already overburdened small business owner. FinCEN should comply with the statutory policy to take account of the needs of small businesses.<sup>17</sup>

**Accordingly, pursuant to the First Amendment to the Constitution and section 553(e) of title 5 of the U.S. Code, NFIB petitions for the following five amendments to 31 CFR 1010.380:**

**[1] Revise 31 CFR 1010.380(a)(1)(i) and (ii) (relating to post-1/1/24 entities) to read:**

**§ 1010.380 Reports of beneficial ownership information.**

***(a) Reports required; timing of reports--***

***(1) Initial report.--***

**(i) A domestic reporting company created on or after January 1, 2024, shall file an initial report in the form and manner specified in subsection (b) of this section within 90 calendar days after the earlier of the date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice, such as through a publicly accessible registry, that the company has been created.**

**(ii) Any entity that becomes a foreign reporting company on or after January 1, 2024, shall file an initial report in the form and manner specified**

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<sup>16</sup> 88 *Fed. Reg.* at 66731, col. 2.

<sup>17</sup> The Regulatory Flexibility Act (RFA), Public Law 96-354, 5 U.S.C. 601 note, calls for federal agencies to take proper account of the concerns of small businesses. In paragraph 2(a)(4) of the RFA, Congress declared that “the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity . . . .” Congress also noted in paragraph 2(a)(6) of the RFA that “the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation . . . .”

in subsection (b) of this section within 90 calendar days after the earlier of the date on which it receives actual notice that it has been registered to do business or the date on which a secretary of state or similar office first provides a public notice, such as through a publicly accessible registry, that the foreign reporting company has been registered to do business.

[2] In paragraph (a)(1)(iii) (relating to pre-1/1/24 entities), strike “January 1, 2025” and insert “January 1, 2026”.


[3] In paragraph (a)(1)(iv) (relating to reports from no longer exempt entities), strike “30 days” and insert “90 days”.

[4] In paragraph (a)(2)(i) (relating to updates of BOI reports), strike “30 calendar days” and insert “365 calendar days”.

[5] In paragraph (a)(3) (relating to corrected reports), strike “30 calendar days” and insert “90 calendar days”; and strike “30-day period” and insert “90-day period”.

[6] In paragraph (b)(4)(iii)(A), strike “change within 30 calendar days” and insert in lieu thereof “change within 90 calendar days”; strike “inaccuracies within 30 calendar days” and insert in lieu thereof “inaccuracies within 90 calendar days”; and strike “30-day period” and insert “90-day period”.

As FinCEN prepares to execute the BOI reporting regime under section 5336 of title 5 of the U.S. Code, FinCEN should make the changes NFIB requests above to help minimize the damage and burden the regime inflicts on small businesses. FinCEN also should ensure that it is fully prepared to protect the vast hoard of intelligence it will collect on Americans and their businesses under section 5336 from misuse or improper disclosure by the government.

Sincerely,  
  
David S. Addington

Executive Vice President and General Counsel