October 26, 2023

Policy Division
Financial Crimes Enforcement Network
U.S. Department of Treasury
P.O. Box 39
Vienna, VA 22183

Submitted electronically via www.reginfo.gov/public/do/PRAMain

**RE: Agency Information Collection Activities; Submission for OMB Review; Comment Request; Beneficial Ownership Information Reports**

**Docket Number FINCEN-2023-0002; OMB Control Number 1506-0076 (RIN 1506-AB49)**

Dear Director Gacki:

This letter responds to the notice of information collection and request from the United States Department of the Treasury ("Treasury") that was published on September 29, 2023 (the "Notice") in advance of Treasury's submission to the Office of Management and Budget of the beneficial ownership information report and information collection request under the United States Corporate Transparency Act ("CTA").

**About GBX**

GBX Group, LLC ("GBX") specializes in acquiring, preserving, and operating historic real estate in urban markets. We partner with investors to fund the purchase and preservation of historic real estate with the goal of generating community revitalization and economic growth. Since 2001, GBX has been involved in 196 real estate projects in 24 states. Our vast real estate operations and operating history to date have resulted in GBX organizing and/or owning over approximately 300 state-registered, affiliated entities, primarily limited liability companies, the majority of which are not eligible for any exemptions under the CTA. Also, going forward, GBX will organize and/or otherwise have ownership interests in more entities that are likely to be non-exempt under the CTA.

Since the enactment of the CTA, our staff has worked to understand the application of the law to our operations and to establish new workflows so that we are prepared to submit timely, complete and accurate filings beginning on January 1, 2024. This effort has required us to create a task force of multiple employees across several business units to:

i. Develop a master CTA database that inventories hundreds of GBX-affiliated entities;

ii. Determine which such entities are eligible for exemptions and which are reporting companies;

iii. Identify company applicants for all reporting companies and catalogue the requisite identifying information for such individuals;

iv. Distinguish the beneficial owners ("BOs") of such entities from non-BOs (i.e., those with smaller interests);

v. Develop processes for collecting and cataloguing the requisite identifying information[1] for all BOs in a manner that ensures GBX's timely receipt of such information as well as data privacy for BOs;

vi. Message to our third-party partners with ownership interests in GBX-affiliated entities about the CTA's requirements and our expectations for the sharing of BOI to support CTA compliance;

vii. Modify our governance documents for entities co-owned by third parties to address the sharing of CTA compliance obligations;

viii. Understand how preparing and submitting beneficial ownership information reports ("BOIRs") via the Beneficial Ownership Secure System ("BOSS") will work in practice; and

ix. Design and stand up processes to aid us in timely submitting accurately modified filings resulting from future reporting company and BO information ("BOI") changes.

Our CTA preparatory work as outlined above has been a significant undertaking due to the complexity of our organizational structure and because most GBX entities are non-exempt under the CTA. We believe many of the above-listed items can be thoroughly completed with proper planning and diligent execution, albeit at a disproportionate cost to the benefit that any regulator or law enforcement agency could gain from accessing our CTA filings. Further, we are concerned that careful planning and diligent execution will not be enough to enable us to achieve perfect CTA reporting for those entities that we co-own with third parties. This concern is driven in large part by the BOI reporting options that the Financial Crimes Enforcement Network ("FinCEN") has indicated that it will make available to BOIR filers.

**Unknown Checkboxes**

The primary purpose of this letter is to express our concern with FinCEN's removal of the "unknown checkboxes" (as that term is defined in the Notice, i.e. the checkboxes that would allow a reporting company to indicate if BOI is unknown or if the reporting company is unable to identify information about a BO) from the BOIR information options. We have spent a considerable amount of time evaluating how missing or otherwise unavailable information about a third-party

[1] Including FinCEN identifiers, when it becomes possible for BOs to obtain them.

BO will affect our ability to prepare, contribute to, and submit BOIRs, and consequently how our risk of CTA non-compliance may rise. We believe that not being able to communicate a reason for omitting BOI will force companies like ours to submit incomplete, and therefore non-compliant, BOIRs. We anticipate that some of our third-party partners, such as those with whom we are engaged in joint ventures (we have many such arrangements, since we often work with development and other partners on real estate projects), will fail to cooperate with our requests to share the BOI necessary for us to prepare and file BOIRs as and when necessary. And, although we will seek to obligate such partners to provide such BOI via our direct written agreements (in some cases, also attaching consequences to any violation of such obligations), we cannot guarantee that all our partners will consistently provide us with the information needed to prepare accurate and complete BOIRs when we need it. Additionally, in some cases, our agreements cannot be amended to compel production of information without consent, meaning that there may be no avenue for us to collect the required information.

Imposing the burden of completion of 100% of the BOIR fields as a prerequisite to submission will prevent reporting companies from submitting timely, complete and accurate filings. It is our belief that the following consequences—which some earlier commenters to FinCEN believed would result from *including* the unknown checkboxes in the BOIRs—will instead be the consequences of imposing a "100% complete BOIR" requirement as a precondition to BOIR filing.

"This might inadvertently discourage reporting companies from filing in a timely manner (or filing at all) because they do not have sufficient information. It may also incentivize reporting companies to file meaningless or untruthful information in certain fields to make a deadline. These difficulties also have the potential to significantly increase the volume of inquiries to FinCEN's Contact Center from reporting companies that seek clarification of the filing requirements when they are unable to obtain BOI."

Essentially, for a reporting company that has been unable to obtain BOI from an uncooperative third party, the consequences will be the same, i.e. the BOIR (and the reporting company) will be non-compliant, and in the scenario where the unknown checkboxes are not available, the reporting company will not be able to communicate that it has made a good faith effort to try to obtain such information. The reporting company will be non-compliant due to circumstances outside of its control.

Additionally, we disagree with the concern that including the unknown checkboxes "*would incorrectly suggest to filers that it is optional to report required information, and that reporting companies need not conduct a diligent inquiry to comply with their reporting obligation*." With any type of filing there is the risk that a person may fail to include required information or conduct diligent inquiry. For example, there is nothing in the revised form that would prevent a person from limiting the number of beneficial owners they choose to report or failing to conduct a detailed analysis to identify persons with substantial control. Given that this is an inherent risk of any information collection, it should not form the basis for excluding a reasonable option that would otherwise prevent non-filing of the form. Moreover, many other government forms, such as tax filings, use instructions and design choices to encourage filers to be as complete as possible.

This is why we are in favor of part of FinCEN's "alternative implementation" (as described in the Notice) that would allow a reporting company to select the following options via a drop-down list, *so long as* filings using such options are deemed to satisfy a company's reporting obligations.[2]
"FinCEN is considering several drop-down options, including (but not limited to): ''Cannot Contact BO''; ''BO Unresponsive''; ''BO Refused to Provide''; and ''Third Party Refused to Provide.'' Drop-down options will not be included in the other sections of the form (i.e., Reporting Company Section and Company Applicant(s) Section)."

In short, there needs to be a clear process for a reporting company that has made a good faith attempt to collect the necessary BOI and to timely file a BOIR—but has failed to do so due to the actions (or inaction, as the case may more likely be) of a third-party BO to supply the necessary information—to not have to bear the risk of non-compliance that arises from the reporting company's obligation to file an incomplete BOIR in such a situation as well as to certify that the information supplied in such report is true, correct and complete. The benefits of the alternative implementation that are summarized in the Notice, such as providing immediately available BOI to law enforcement agencies and other agencies and providing insight into common difficulties of filers about which FinCEN may provide guidance, flow only to law enforcement and regulators and do not help mitigate any risk to a reporting company that may arise from an uncooperative third-party BO.

We understand that FinCEN intends to listen to "feedback from filers and database users in the months following implementation on January 1, 2024," and it is our hope that rather than waiting to hear from filers about this issue after BOSS goes live and FinCEN starts receiving BOIR filings, that our concerns about this issue, which are reasonably foreseeable to future filers like us, be taken into consideration now as initial implementation options continue to be developed. We note that more than 575,000 properties in the United States are owned by real estate investment trusts, many of which may not be able to rely on an exemption from CTA reporting at the fund or prop co levels, even though their businesses are subject to significant regulation and oversight through large, professional asset managers.[3] These businesses form hundreds of entities every day, and like us, are not in a position to wait and see how things play out with such significant legal consequences on the line.

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[2] The Notice states that such alternative implementation contemplates that "[t]he drop-down options would not excuse reporting companies of their obligation to submit complete and truthful written responses for each filed by the applicable filing deadline; all fields must be filled out before a reporting company has satisfied its reporting obligations."
[3] Nareit, *A Snapshot of Today's REIT Industry* (2023).

We thank you for your time, appreciate your consideration of our comments and welcome the opportunity to discuss any of the above at your convenience. If you have any questions, please contact Kelly Hoy, Chief Legal Officer and Secretary of GBX, at khoy@gbxgroup.com, or Cary Zimmerman, Assistant General Counsel of GBX, at czimmerman@gbxgroup.com.

Sincerely,

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