



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

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

February 10, 2023

Hon. Janet L. Yellen, Secretary of the Treasury
c/o Himamauli Das, Acting Director, FinCEN
RIN 1506-AB49/AB59, FINCEN-2021-0005
Policy Division, P.O. Box 39, Vienna, VA 22183

Dear Madam Secretary:

RE: Treasury (FinCEN) Notice of Proposed Rulemaking Titled "Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities," RINs 1506-AB49 and 1506-AB59, FINCEN-2021-0005, 86 *Fed. Reg.* 77404 (December 16, 2022)

This letter presents comments of the National Federation of Independent Business (NFIB)¹ on the Department of the Treasury Financial Crimes Enforcement Network (FinCEN) notice of proposed rulemaking titled "Beneficial Ownership Information [BOI] Access and Safeguards, and Use of FinCEN Identifiers for Entities" and published in the *Federal Register* of December 16, 2022. The notice proposes rules to govern access to and safeguarding of the BOI that the Corporate Transparency Act² compels millions of American small businesses to report to FinCEN.³ 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 BOI access and safeguards rules 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 U.S. 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. Small businesses have a strong interest in the confidentiality of BOI reported to FinCEN.

² Corporate Transparency Act, Title LXIV of the National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283, January 1, 2021). Section 6403 in the CTA enacted section 5336 in title 31 of the U.S. Code, which requires BOI reporting.

³ 87 *Fed. Reg.* 77408, col. 2 ("FinCEN has estimated that there will be approximately 32 million reporting companies in Year 1 of the reporting requirement and approximately 5 million new reporting companies each year thereafter." (footnote omitted)).

1. FinCEN Proposes a Flawed Definition of "Intelligence Activity"

Section 5336(c)(2)(B)(i)(I) of title 31 of the U.S. Code and proposed 31 CFR 1010.955(b)(1)⁴ allow FinCEN to share BOI under specified protocols with Federal agencies engaged in an intelligence activity. Proposed 31 CFR 1010.955(b)(1)(ii) defines "intelligence activity" as follows: "Intelligence activity includes all activities conducted by elements of the United States Intelligence Community that are authorized pursuant to Executive Order 12333, as amended, or any succeeding executive order[.]" The proposed definition of "intelligence activity" creates two problems. First, by use in the definition of the word "includes" rather than the word "means," proposed section 1010.955(b)(1)(ii) implies that the term "intelligence activity" in the proposed rule might allow sharing BOI under the intelligence activity provisions of 31 U.S.C. 5336 for an activity conducted by an element of the U.S. intelligence community that is not authorized by Executive Order 12333.⁵ Yet section 3.5(g) of Executive Order 12333 states: "(g) *Intelligence activities* means all activities that elements of the Intelligence Community are authorized to conduct pursuant to this order." Secondly, the proposed definition of "intelligence activity" becomes nonsensical when the term "intelligence activity" is used in proposed 31 CFR 1010.955(b)(3)(i) to refer to an "intelligence activity" that is authorized by the law of a foreign country. No foreign country can pass a law from which an element of the United States intelligence community gets its authority to conduct an intelligence activity; the elements of the U.S. intelligence community work for the U.S. Government and not a foreign government. **Accordingly, FinCEN should revise proposed 31 CFR 1010.955(b)(1)(ii) to read: "(ii) Intelligence activity, when used in this section in reference to an activity of the United States, means all activities that elements of the United States Intelligence Community are authorized to conduct pursuant to Executive Order 12333, as amended, or any successor executive order."**

2. FinCEN Cannot Override Presidentially Mandated Procedures Governing Collection, Retention, and Dissemination by U.S. Intelligence Agencies of Information Concerning U.S. Persons

Section 5336(c)(2)(B) of title 31 of the U.S. Code and proposed 31 CFR 1010.955(b)(1) allow FinCEN to share BOI -- which for the most part is information about U.S. persons (American small businesses and their owners) -- under specified protocols with Federal agencies engaged in an intelligence activity. But section 5336 does not override presidential orders restricting the collection, retention, and dissemination of information on U.S. persons by U.S. intelligence agencies, nor does section 5336 authorize FinCEN to override those presidential orders. Proposed 31 CFR 1010.955(b)(3) provides that, under specified circumstances, FinCEN may furnish BOI to a Federal agency, when the Federal agency is acting as an intermediary for a competent authority of a foreign country that seeks the BOI for an intelligence activity that is authorized under the laws

⁴ The changes to title 31 of the Code of Federal Regulations proposed in the FinCEN notice appear at 87 *Fed. Reg.* 77453, col. 3, through 77457, col. 3.

⁵ Executive Order 12333, as amended, "United States Intelligence Activities," 50 U.S.C. 3001 note.

of the foreign country, for the Federal agency's "transmission to the . . . foreign competent authority who initiated the request[.]"⁶ But section 2.3 of Executive Order 12333 states: "Elements of the Intelligence Community are authorized to collect, retain, or disseminate information concerning United States persons only in accordance with procedures established by the head of the Intelligence Community element concerned or by the head of a department containing such element and approved by the Attorney General, consistent with the authorities provided by Part 1 of this Order, after consultation with the Director" (emphasis added). FinCEN does not have the power to authorize or direct U.S. intelligence agencies to share information about U.S. persons with the intelligence agencies of foreign countries without regard to the Executive Order 12333 procedures restricting collection, retention, and dissemination of U.S. person information. **Accordingly, FinCEN should revise proposed 31 CFR 1010.955(b)(3) by striking "and" following 1010.955(b)(3)(i), striking the period at the end of 1010.955(b)(3)(ii) and inserting in its place "; and", and adding at the end thereof: "(iii) Nothing in this section shall be construed to impair or otherwise affect any requirement in procedures relating to collection, retention, or dissemination of information concerning U.S. persons issued under section 2.3 of Executive Order 12333, as amended, or any successor order."**

3. FinCEN Should Require Financial Institutions Seeking BOI to Provide to FinCEN a Copy of the Written Consent of the Reporting Company that Furnished the BOI

Section 5336(c)(2)(B)(iii) and proposed 31 CFR 1010.955(b)(4)(i) allow FinCEN to share BOI with a financial institution to facilitate the financial institution's compliance with mandated customer due diligence requirements, with the consent of the reporting company to which the BOI relates. Proposed section 1010.955(b)(4)(i) merely states that FinCEN may disclose the BOI to the financial institution "provided each reporting company that reported such information consents to such disclosure." Given that BOI is, as FinCEN stated, "highly sensitive information"⁷ and it deals for the most part with U.S. persons, FinCEN should not merely take the word of a financial institution given by a "checkbox"⁸ on a form that its reporting company customer has consented to FinCEN's release to the financial institution of BOI about the customer.⁹ FinCEN should

⁶ See also proposed 31 CFR 1010.955(c)(2)(v), which purports to authorize any officer, employee, contractor, or agent of a federal agency, which includes an element of the U.S. intelligence community, that receives information from FinCEN pursuant to proposed 31 CFR 1010.955(b)(3), to share the BOI with the foreign person that initiated the request.

⁷ 87 *Fed. Reg.* 77408, col. 1 ("FinCEN recognizes that BOI is highly sensitive information.").

⁸ 87 *Fed. Reg.* 77422, col. 2 ("FinCEN anticipates that an FI would be able to make the certification via a checkbox when requesting BOI via the beneficial ownership IT system.").

⁹ Under the proposed rules, FinCEN will not (and properly so) take the word of a federal agency that it is engaged in a national security, intelligence, or law enforcement activity which the BOI it seeks would further. Instead, FinCEN requires the federal agency to make a written certification "setting forth specific reasons why the requested information is relevant to the activity." Proposed 31 CFR 1010.955(d)(1)(ii)(B)(1)(ii). FinCEN likewise should not take the word of a financial institution that its customer has consented to the release of the customer's BOI to the financial institution; the financial institution should produce to FinCEN a copy of a written consent signed by the customer.

require that the financial institution obtain the customer's informed consent in writing, and the financial institution should furnish a copy of that written consent to FinCEN when the financial institution requests the relevant BOI from FinCEN. **Accordingly, FinCEN should revise proposed 31 CFR 1010.955(b)(4)(i) by inserting before the period at the end of the first sentence thereof "in writing, and the financial institution furnishes to FinCEN a copy of that written consent when it requests beneficial ownership information on the reporting company".**

4. Requests for Access to BOI Should Require Senior-Level Review and Accountability

Beneficial ownership information for the most part relates to U.S. persons, and FinCEN has acknowledged that BOI is "highly sensitive information."¹⁰ Yet the FinCEN-proposed rules fail to require senior-level review in the BOI-requesting institutions before FinCEN fulfills a request under its proposed rules. Application of the sound judgment of a senior-level official, to a proposal to request BOI from FinCEN on an American small business, constitutes an important safeguard against misuse of that highly sensitive information. To ensure careful application of sound judgment in seeking access to BOI, and to ensure senior-level accountability for legality and propriety in seeking such access, FinCEN should require senior-level review and approval of requests for access to BOI. **Specifically, FinCEN should require written approvals as follows for requests to FinCEN for access to BOI: (1) from a federal agency (including the Department of the Treasury¹¹) for its own use, approval by a Senate-confirmed Presidential appointee in the agency, (2) from a federal agency for the use of a foreign agency, approval by a Senate-confirmed Presidential appointee in the agency and concurrence from a Senate-confirmed Presidential appointee in the U.S. Department of State, (3) from a State, local, or tribal government, approval by the chief executive in that government or an official in that government designated by and reporting directly to that chief executive, and (4) in the case of a financial institution, by the chief executive officer of the institution or an officer of that institution designated by and reporting directly to that chief executive officer.**

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In the preamble to its proposed rules, FinCEN no longer makes any bones about it -- it is an intelligence element of the U.S. Government. In explaining why it will handle by itself certain foreign agency requests for BOI, FinCEN said: "Given its longstanding relationships and relevant experience as the financial intelligence unit of the United

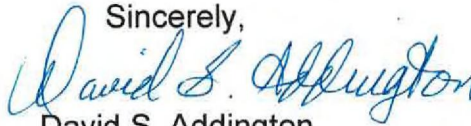
¹⁰ 87 *Fed. Reg.* 77408, col. 1.

¹¹ According to FinCEN, the Department of the Treasury plans to make broad use of beneficial ownership information on America's small businesses. 87 *Fed. Reg.* 77417, col. 1. ("FinCEN envisions Treasury components using BOI for appropriate purposes, such as tax administration, enforcement actions, intelligence and analytical purposes, use in sanctions designation investigations, and identifying blocked property pursuant to sanctions, as well as for administration of the BOI framework, such as for audits, enforcement, and oversight.").

States, FinCEN proposes to directly receive, evaluate, and respond to requests for BOI from foreign financial intelligence units."¹² Thus, FinCEN now will collect BOI on millions of America's small businesses and give some of it to intelligence units in foreign countries, all without the oversight that applies to elements of the U.S. intelligence community by statute and executive order. As FinCEN continues to reach further and further into the business and private lives of Americans, the Department of the Treasury must recognize that the creeping growth of FinCEN's mission has turned FinCEN into an intelligence agency focused on the American people. **NFIB recommends and requests that, at a minimum, the Department of the Treasury ask the President to designate FinCEN as part of the U.S. intelligence community under section 3(4)(L) of the National Security Act of 1947, as amended,¹³ and section 3.5(h)(16) of Executive Order 12333, as amended.** Those designations would help protect the freedoms, civil liberties, and privacy of Americans as required by section 1.1(b) of the Executive Order, including as enforced under guidelines issued by the Director of National Intelligence, and approved by the Attorney General, under section 1.3(a)(2) of the Executive Order and under guidelines issued by the Secretary of the Treasury, and approved by the Attorney General, pursuant to section 2.3 of the Executive Order.

As the Department of the Treasury continues to grow the mission of FinCEN as an intelligence agency operating outside the safeguards that apply to the U.S. intelligence community, FinCEN places the freedom and privacy of Americans at ever-greater risk.

Sincerely,



David S. Addington

Executive Vice President and General Counsel

¹² 87 Fed. Reg. 77410, col. 2.

¹³ 50 U.S.C. 3003(4)(L).