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United States House of Representatives
One Hundred Eighteenth Congress
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

February 14, 2023

The Honorable Janet Yellen
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C, 20220

Mr. Himamauli Das
Acting Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, Virginia 22183

Re: Department of the Treasury's Notice of Proposed Rulemaking Titled "Beneficial Ownership Information Access and Safeguards," RIN 1506-AB49/AB59, FINCEN -2021-0005, 86 Fed. Reg. 27031 (December 16, 2022)

Dear Secretary Yellen and Acting Director Das:

We write to express our serious concerns with the Department of the Treasury's Notice of Proposed Rulemaking titled "Beneficial Ownership Information Access and Safeguards" (NPRM), released on December 16, 2022. As with the previous rule on beneficial ownership reporting, this NPRM deviates from the statute and congressional intent set out in Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.[1] The beneficial ownership reporting regime was crafted to be a strategic tool to target bad actors and nation-states like Russia and China who are using our financial system to engage in illicit activity. To that end, Congress was clear with regard to its intent on: 1) the type of information to be reported, 2) how the information would be protected, and 3) who could access the information and when. Committee Republicans will continue to ensure that beneficial ownership information is protected; the database secure and accessible only by authorized individuals.

Division F included the strongest privacy and disclosure protections for America's small businesses as it relates to the collection, maintenance, and disclosure of beneficial ownership information. The protections set out in Division F ensure that small business beneficial ownership information is treated and protected just like an individual's tax return information. The protections set out in Division F mirror or exceed the protections set out in 26 U.S.C 6103, including:

[1] PL 116-283, January 1, 2021.

1. Agency Head Certification. Division F requires an agency head or designee to certify that an investigation or law enforcement, national security or intelligence activity is authorized and necessitates access to the database. Designees may only be identified through a process that mirrors the process followed by the Department of Treasury for those designations set out in 26 USC 6103.
2. Semi-annual Certification of Protocols. Division F requires an Agency head to make a semi-annual certification to the Secretary of the Treasury that the protocols for accessing small business ownership data ensure maximum protection of this critically important information. This requirement is non-delegable.
3. Court authorization of State, Local and Tribal law enforcement requests. Division F requires state, local and tribal law enforcement officials to obtain a court authorization from the court system in the local jurisdiction. Obtaining a court authorization is the first of two steps state, local and tribal governments must take prior to accessing the database. Separately, state, local and tribal law enforcement agencies must comply with the protocols and safeguards established by the Department of Treasury.
4. Limited Disclosure of Beneficial Ownership Information. Division F prohibits the Secretary of Treasury from disclosing the requested beneficial ownership information to anyone other than a law enforcement or national security official who is directly engaged in the investigation.
5. System of Records. Division F requires any requesting agency to establish and maintain a system of records to store beneficial ownership information provided directly by the Secretary of the Treasury.
6. Penalties for Unauthorized Disclosure. Division F prohibits unauthorized disclosures. Specifically, the provision establishes that any violation of appropriate protocols, including unauthorized disclosure or use, is subject to criminal and civil penalties (up to five years in prison and $250,000 fine).

Additionally, Division F requires each requesting agency to establish and maintain a permanent, auditable system of records describing: each request, how the information is used, and how the beneficial ownership information is secured. It required requesting agencies to furnish a report to the Department of Treasury describing the procedures in place to ensure the confidentiality of the beneficial ownership information provided directly to the Secretary of the Treasury.

Separately, Division F requires two additional audits. First, it directs the Secretary of Treasury to conduct an annual audit to determine whether beneficial ownership information is being collected, stored and used as intended by Congress. Division F also directs the Government Accountability Office to conduct an audit annually for six years to ensure that the Department of Treasury and requesting agencies are using the beneficial ownership information as set out in Division F. This is the same audit that GAO conducts as it relates to the Department of Treasury's collection, maintenance and protection of tax return information. This information ensures that Congress has independent data on the efficacy of the reporting regime and whether confidentiality is being maintained.

Finally, Division F requires the Department of Treasury to issue an annual report on the total number of court authorized requests received by the Secretary to access the database. The report must detail the total number of court authorized requests approved and rejected and a summary justifying the action. This report to Congress will ensure the Department of Treasury does not misuse its authority to either approve or reject court authorized requests.

The current NPRM fails to meet these directives. It is Congress' expectation that the new beneficial ownership information database; who can access the database; and the statutory safeguards to protect the information should mirror those provisions set out in 26 USC 6103.

Financial Institution Access: Separately, FinCEN should establish a secure process through which financial institutions are able to fully access the database to confirm customer information on demand. This process should include a clear definition of customer consent on which financial institutions can rely to query the database. In addition, the rule should clearly define when customer consent is revoked. This secure process is necessary to ensure financial institutions are able to satisfy responsibilities pursuant to the Customer Identification Program (CIP), the Customer Due Diligence (CDD)regulations, and the Anti-Money Laundering Act (AMLA). As FinCEN establishes this process, it must account for both civil liberty protections including privacy rights of individuals and the cybersecurity implications for storing such nonpublic personal information. Financial institutions must be able to operate within a clear, consistent framework that mitigates risk and allows for them to meet their responsibilities in such a way that harmonizes requirements.

FinCEN should also establish a process by which updates or changes in information submitted to the beneficial ownership information database is shared with the corresponding financial institution. This will help limit discrepancies between the database and institution's information. Additionally, FinCEN should clarify how discrepancies will be resolved, the circumstances in which discrepancies will be considered significant; and the steps a financial institution and FinCEN will take to mitigate the potential risks.

One possibility to mitigate risk is the use of automated notifications to a financial institution or agency of updated beneficial ownership information. This will ensure discrepancies are minimized. Harmonizing and streamlining submissions will help maintain accuracy and utility.

Importance of CDD Congruency: Finally, it is important to restate this new process was never designed to undermine the requirement that financial institutions identify and verify the beneficial owners of their legal entity customers pursuant to 31 C.F.R. § 1010.230(a). It was not designed to be used by financial institutions only at account opening. And it was not intended to impose duplicative requirements on financial institutions. To the contrary, the process established in Division F was intended to fully facilitate a financial institution's responsibility under the CDD regulation by requiring covered companies to directly provide their information to the Department of the Treasury.

Specifically, Congress intended this process to mirror the current CDD structure, including its existing definitional structure and exemptions list. As the capstone, AMLA specifically requires

the Secretary of the Treasury to revise the final rule entitled "Customer Due Diligence Requirements for Financial Institutions" (CDD Rule)[2] to, inter alia, bring the CDD rule into conformance with the statute and reduce the burdens on financial institutions and legal entity customers that will be unnecessary or duplicative. It further provides that certain elements of such rule will be rescinded upon the effective date of the relevant revised rule. The intent was for the revised CDD rule, including those provisions added pursuant to section 5403(a) of AMLA, to replace appropriate provisions of the current CDD rule and to convey a sense of congruence by its placement in the same code location. The congressional directive to FinCEN to rescind and replace the current Customer Due Diligence Rule set forth in 31 CFR 1010.230 (b)-(j) was made clear by one of the lead negotiators. Chair Carolyn Maloney. Former Chairwoman Maloney, who had spent the previous 12 years pursuing a beneficial ownership registry stated:

> "McHenry also said the bill's directive that FinCEN 'revise' the know-your-customer rule wasn't strong enough, preferring 'rescind and replace' instead. He got his way, but that brought a new hiccup, this time with Treasury, where lawyers balked at 'rescind and replace.'
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> For a weekend, the compromise appeared ready to collapse inches from the goal line. 'It was a very nerve-wracking few days. We were very, very close to a deal we've been trying to cut for 12 years,' said one staffer.
>
> But Treasury's lawyers relented, saying they could live with the changes."[3]

Thus, Congress' intent is clear on the development of a new beneficial ownership reporting paradigm, and it is our expectation that the bicameral, bipartisan agreement will be reflected in the future finalized rule.

We cannot over emphasize the importance of reviewing and reworking these regulations. They must adhere to congressional intent. The regulation must ensure that small businesses are not burdened. Financial institutions must be able to rely on one set of standards.

We look forward to continuing to work with you. If you have questions, please feel free to contact Phil Poe, Senior Professional Committee Staff, at 202-225-7502.

Sincerely,

Patrick McHenry
Chairman

Blaine Luetkemeyer
Chairman
Subcommittee on National Security,
Illicit Finance, and International
Financial Institutions

[2] 31 CFR § 1010.230: Beneficial Ownership Requirements for Legal Entity Customers, 81 Fed. Reg. 29397 (May 11, 2016).

[3] https://maloney.house.gov/media-center/in-the-news/after-12-years-of-work-congress-is-set-to-disclose-hidden-corporate-owners