Via www.regulations.gov

February 7, 2022

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

Re: Treasury (FinCEN) Notice of Proposed Rulemaking Titled "Beneficial Ownership Information Reporting Requirements," RIN 1506-AB49, FINCEN-2021-00005, 86 Fed. Reg. 69920 (December 8, 2021)

Dear Madam Secretary,

This letter presents the Ohio Chamber of Commerce's ("Chamber") comments on the Treasury notice of proposed rulemaking titled "Beneficial Ownership Information Reporting Requirements" and published in the Federal Register on December 8, 2021 ("Proposed Rule") to implement the beneficial ownership reporting requirements of the Corporate Transparency Act ("CTA"). The numerous exemptions in the Proposed Rule render larger businesses free from the Proposed Rule's reporting requirements and place the burden of reporting beneficial ownership information squarely on small businesses.[1] As Ohio's leading business advocate and resource, the Chamber aggressively champions free enterprise, economic competitiveness, and growth. The Proposed Rule as currently drafted is anathema to the Chamber's mission. That is because, as outlined below, the Proposed Rule would create significant financial costs and burdens for small business owners, including a heightened risk of cyberattack. These detrimental effects on small businesses will potentially be further compounded by harsh civil and criminal enforcement penalties imposed on reporting companies and beneficial owners. Such penalties are particularly unfair in light of the ambiguity and breadth of the proposed regulations, as well as the absence of a good faith safe harbor.

1. The Definition of Beneficial Ownership

The definition of beneficial ownership in the proposed regulation is overly broad, ambiguous, and will require more than 25 million small businesses in America to spend an aggregate of $4 billion to comply with the Proposed Rule.[2] Under the Proposed Rule, a "beneficial owner" means: any individual

[1] Proposed 31 CFR 1010.380(c)(2) (i) – (xxiii).
[2] 86 Fed.Reg. at 69948, col. 2 ("The net present value of the total cost over a 10-year horizon at seven percent discount rate for these information collections is approximately $3.4 billion. At a three percent discount rate, the net present value is

who (1) "directly or indirectly, either exercises substantial control over such reporting company"; or (2) "owns or controls at least 25 percent of the ownership interests of such reporting company."[3] Both of the beneficial ownership prongs are problematic for the reasons set forth below.

a. The "Substantial Control" Prong

The substantial control prong of the Proposed Rule includes but is not limited to: (1) "service as a senior officer of the reporting company"; (2) "authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors (or similar body)"; (3) "direction, determination or decision of, or substantial influence over, important matters affecting the reporting company; or (4) "any form of substantial control over the reporting company."[4] And an individual or outside entity may exercise "direct or indirect" control of a business under any of these four provisions in numerous ways.[5]

All of the provisions in the "substantial control" prong are ambiguous or overly broad. The first provision broadly defines a "senior officer" as "any individual holding the position of or exercising the authority of a president, secretary, treasurer, chief operating officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function."[6] FinCEN states that "beneficial owners are of interest because of their economic status as persons who own or control a reporting company."[7] Yet the Proposed Rule incorrectly assumes that every senior officer of a reporting company exercises substantial control over the company. Yet, secretaries and general counsel often have ministerial or advisory functions with very little control of the company. Chief executive, chief operating, or chief financial officers of companies may have substantial authority that reaches through a company, but others do not.

The second provision is ambiguous because it does not define what constitutes "authority" over the appointment or removal of an officer or a majority or dominant majority over the board of directors.

The third provision includes individuals who direct, determine, decide, or exert substantial influence over a laundry list of matters affecting the business, including but not limited to: "the lease, mortgage, or other transfer of the principal assets"; the "reorganization, dissolution or merger of the reporting company,"; "major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget"; "the selection of business lines or ventures, or geographic focus of the reporting company; "compensation schemes and incentive programs for senior

---

approximately $3.98 billion as the aggregate cost estimate of the proposed rule."); *id.* at 69951-52 ("FinCEN estimates that there are approximately 25 million existing reporting companies and 3 million new reporting companies formed each year.")

[3] Proposed 31 CFR 1010.380(d).

[4] Proposed 31 CFR 1010.380(d)(1).

[5] Proposed 31 CFR 1010.380(d)(2) ("An individual may directly or indirectly exercise substantial control over a reporting company through a variety of means, including through board representation; through ownership or control of a majority or dominant minority of the voting shares of the reporting company; through rights associated with any financing arrangement or interest in a company; through control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; through arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees, or through any other contract, arrangement, understanding, relationship, or otherwise. An individual who has the right or ability to exercise substantial control as specified in paragraph (d)(1) of this section and this paragraph (d)(2) shall be deemed to exercise such substantial control.")

[6] Proposed 31 CFR 1010.380(f)(8).

[7] 86 Fed. Reg. 69930, col. 2.

officers," "the entry into or termination, or the fulfillment or non-fulfillment of significant contracts"; and "amendments of any substantial governance documents of the company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures."[8] The breadth of this definition leaves open the distinct possibility that a number of non-management employees involved in any of these activities could conceivably be deemed to be beneficial owners by government regulators.

The fourth provision is a catch-all and includes any form of substantial control over the company including, but not limited to: "board representation; ownership or control of a majority or dominant minority of the voting shares of the reporting company; ownership or control of a majority or dominant minority of the voting shares of the reporting company; rights associated with any financing arrangement or interest in a company; control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or through any other contract, arrangement, understanding, relationship, or otherwise."[9] Even further expanding this sweeping catch-all provision, the Proposed Rule also affirmatively states that "the catch-all provision recognizes that control exercised in novel and unorthodox ways can still be substantial."[10]

The Proposed Rule contains no cap on the number of beneficial owners that must be disclosed under any of the four substantial control prongs. Based on the breadth, complexity, and ambiguity of these provisions, small businesses acting in good faith to interpret the Proposed Rule will likely struggle to identify all individuals or even outside entities who could conceivably be deemed by FinCEN to exercise substantial control. Small business owners may therefore need to expend funds to hire legal counsel to interpret and apply the Proposed Rule. And even if legal counsel is retained, the Proposed Rule opens the door for future aggressive civil or criminal enforcement actions and penalties (discussed more fully below) if regulators' interpretations any of the four "substantial control" provisions differs from the understanding of small business owners and their attorneys.

b. The "Ownership Interest" Prong

The Proposed Rule considers a wide range of assets that small business owners must consider in determining levels of ownership. These assets include both equity in the reporting company and numerous interests, including: capital or profit interests (including partnership interests) or convertible instruments, warrants or rights, or other options or privileges to acquire equity, capital, or other interests in a reporting company.[11] Debt instruments also must be included if they enable the holder to exercise the same rights as one of the specified equity or other interests, including the ability to convert the instrument into one of the specified equity or other interests.[12] The Proposed Rule then instructs small businesses to perform a complicated analysis to determine ownership:

> "In determining whether an individual owns or controls 25 percent of the ownership interests of a reporting company, the ownership interests of the reporting company shall include all ownership

[8] Proposed 31 CFR 1010.380(d)(iii)(A)-(G).
[9] Proposed 31 CFR 1010.380(d)(2).
[10] Fed. Reg. 69934.
[11] *Id.*
[12] *Id.*

interests of any class or type, and the percentage of such ownership interests that an individual owns or controls shall be determined by aggregating all of the individual's ownership interests in comparison to the undiluted ownership interests of the company."[13]

Most of the 25 million small business owners affected by the Proposed Rule will not understand the meaning of aggregation of ownership interests and dilution of business interests. Asking small businesses to perform this sophisticated calculation across a wide range of ownership interest categories will present practical challenges and impose additional costs, such as the imposition of legal or accounting fees. And it again leaves the door open to future aggressive civil or criminal enforcement actions (discussed more fully below) if government regulators' interpretations of this provision differs from the understanding of small business owners or small business owners' accountants or lawyers. Accordingly, the Proposed Rule should be simplified and revised to consider only an individual's equity interest in determining ownership to minimize these burdens and risks on small business owners.

2. Cybersecurity Risks

It is clear that the CTA creates a national registry of small business owners that will be a prime target for hackers. The Proposed Rule implements this in a way that is even more dangerous. The Proposed Rule instructs that for each beneficial owner and company applicant, reporting companies must disclose the individual's full legal name, date of birth, current residential or business street address, and a unique identifying number for an acceptable identification document, such as a valid passport or driver's license.[14] The Proposed Rule recognizes the "sensitivity of the reportable information" imposed upon small businesses and states that the CTA "imposes strict confidentiality, security, and access restrictions on the data."[15] Yet the Proposed Rule acknowledges that this information is made accessible, under certain circumstances, to governmental authorities and financial institutions.[16]

Despite the government's awareness of the need for better cybersecurity and methods to prevent cyberattacks,[17] cyber intrusions continue to dramatically increase. A recent FinCEN report stated that Treasury Secretary Janet L. Yellen noted that "ransomware and cyber-attacks are victimizing businesses large and small across America and are a direct threat to our economy."[18] That same FinCEN report further underscored that financial institutions – with whom small business owners' personal information would be shared – are at great risk for such attacks based on the following findings:

- Financial institutions filed 635 Suspicious Activity Reports ("SARs") in the first half of 2021 related to suspected ransomware activity.

- The SARs in the first half of 2021 referenced 458 suspicious transactions amounting to $590 million.

---

[13] Proposed 31 CFR 1010.380(d)(3)(iii).
[14] Proposed 31 CFR 1010.380(b)(2).
[15] Fed. Reg. 69929.
[16] *Id.*
[17] Department of Homeland Security, *Cybersecurity*, https://www.dhs.gov/topics/cybersecurity (last visited Feb. 4, 2022).
[18] FinCEN, *Financial Trend Analysis*, https://www.fincen.gov/sites/default/files/2021-10/Financial%20Trend%20Analysis_Ransomware%20508%20FINAL.pdf (last visited Feb. 4, 2022).

- The first half of 2021 exceeded the value reported for the entirety of 2020, which was $416 million, showing an uptick in ransomware activity.

- The average amount of reported ransomware transactions per month in 2021 was $102.3 million.

- Based on SARs data, FinCEN identified 68 different ransomware variants active in the first half of 2021.[19]

Moreover, a September 2021 poll by The Pearson Institute and The Associated Press-NORC Center for Public Affairs Research shows that "about 9 in 10 Americans are at least somewhat concerned about hacking that involves their personal information, financial institutions, government agencies or certain utilities. And about two-thirds say they are very or extremely concerned."[20]

The Proposed Rule requires over 25 million small businesses to disclose highly personal information about their owners. Allowing governmental and financial institutions access to this database increases the potential for improper disclosure, misuse, and access of private information. Additionally, the addition of small business owners to this database creates a new threat vector that can be exploited by cyber criminals.

3. Post-Violation Civil and Criminal Penalties

The CTA makes it unlawful for any person to "willfully provide, or attempt to provide, false or fraudulent beneficial ownership information … to FinCEN" or to "willfully fail to report completed or updated beneficial ownership to FinCEN."[21] The CTA further provides for civil and criminal penalties for any person violating the obligation.[22] Such persons shall be liable for a civil penalty of up to $500 for each day a violation continues or has not been remedied, and may be fined up to $10,000 and imprisoned for up to two years, or both, for a criminal violation.[23]

The Proposed Rule adopts the language of the CTA regarding civil and criminal penalties and clarifies that: (1) "person" includes any individual, reporting company, or other entity; (2) "beneficial ownership information" includes any information provided to FinCEN under this section; (3) a person who "provides or attempts to provide beneficial ownership information" does so if such person does so directly or indirectly; and (4) a person "fails to report" complete or updated beneficial ownership information to FinCEN if such person directs or controls another person with respect to any such failure to report, or is in substantial control of a reporting company when it fails to report.[24] Thus, the Proposed Rule contains sweeping potential civil and criminal penalties against numerous beneficial owners and reporting entities for failure to comply.

---

[19] *Id.*
[20] Alan Suderman, *Cyberattacks concerning to most in US: Pearson/AP-NORC poll*, AP News, Oct. 11, 2021) https://apnews.com/article/joe-biden-technology-business-china-russia-c9a698542ed95bfa49f9cee0e96ef9a6 (last visited Feb. 4, 2022).
[21] Fed. Reg. 69944 (citing 31 U.S.C. 5336(h)).
[22] 31 U.S.C. 5336(h)(3)(A).
[23] *Id.*
[24] Fed. Reg. 69944.

Small businesses frequently lack the financial ability to hire attorneys and accountants to ensure compliance with an ever-growing number of local, state, and federal regulations. Now they are being asked to comply with the Proposed Rule implementing the disclosure of beneficial ownership information set forth in the CTA. FinCEN's efforts to ensure that small businesses comply with these new regulations would be more effective if its focus was on educating small businesses about such regulations, rather than imposing fines or instituting criminal prosecutions. Indeed, the CTA requires the Secretary of the Treasury to take the first step in educating reporting company by directing the Secretary to "take reasonable steps to provide notice to persons of their obligations to report beneficial ownership information …"[25] FinCEN should, however, provide more than mere notice of new regulations to reporting companies, beneficial owners, and applicants. Rather, FinCEN should provide educational materials, answer small business owners' questions, and provide assistance as needed, including assistance to a person seeking to submit a corrected report.

Additionally, FinCEN in the Proposed Rule should provide small businesses acting in good faith with an opportunity to correct a violation and come into compliance without facing the risk of fines or enforcement actions. Significantly, this is consistent with the statutory safe harbor provision in the CTA, which allows for correction of inaccurate information within 90 days after a report was submitted if the purpose was not to evade the reporting requirements and the person lacked actual knowledge that any information contained in the report is inaccurate.[26]

4. Updates to Reports

Under the Proposed Rule, a reporting company must file an updated report "within 30 calendar days after the date on which there is any change to respect to any information previously submitted to FinCEN, including any change with respect to who is a beneficial owner of a reporting company and any change with respect to information reported for any particular beneficial owner or applicant."[27]

This update requirement in the Proposed Rule will impose a stunning burden on small businesses. Indeed, there is a distinct possibility that the Proposed Rule could require updates on a near-monthly basis throughout the year. For example, the Proposed Rule requires an update to a report if there is a change of address of a beneficial owner, the death of a beneficial owner after the estate of the deceased owner is settled, a management decision resulting in the change of a beneficial owner, or even if a beneficial owner obtains a new state driver's license.[28] Moreover, the Proposed Rule as currently drafted ignores the fact that a reporting company may not become aware of a change regarding beneficial ownership information previously reported until 30 days after the change has occurred, leaving both the beneficial owner and the reporting company to face potential civil or criminal penalties as a result.

Accordingly, the Proposed Rule should be modified to state that a reporting company must file an updated report "within 90 calendar days after the date on which the reporting company becomes aware of any change." This is consistent with the policy intent of the safe harbor provision set forth in the CTA.

[25] 31 U.S.C. 5336(e)(1).
[26] of 31 U.S.C. 5336(h)(3)(C).
[27] Proposed 31 CFR 1010.380(a)(2).
[28] Fed. Reg. 69962.

5. Accuracy and Completeness of Reports

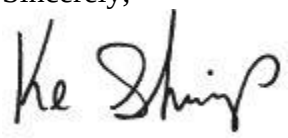
The Proposed Rule specifies that each person filing a report shall certify that the report is accurate and complete.[29] If, however, a report is determined at a later time to be inaccurate or incomplete – perhaps because the information in the report was provided by others – certifying individuals could face severe civil or criminal penalties under the plain language of the Proposed Rule and the False Statements Act of 18 U.S.C. 1001 if skeptical federal prosecutors later believe that the erroneous certification was knowing and willful rather an innocent mistake. To eliminate this unfair and inequitable result and ensure that reporting companies can only certify the accuracy and completeness of the reports to the extent of their knowledge, the Proposed Rule should be modified to state that each person filing a report "shall certify that the report is accurate and complete *to the best of the certifier's knowledge after diligent inquiry*." This is consistent with the intent of the safe harbor provision set forth in the CTA.

****

While well-intentioned, the Chamber believes that the Proposed Rule as currently drafted would create materials risks and financial burdens for small businesses for the reasons outlined above. FinCEN estimates the cost to the 25 million small businesses required to comply with the Proposed Rule is an aggregate of $4 billion.[30] This estimate is likely substantially understated. For example, FinCEN estimates that the cost to these small businesses will be "approximately $45 apiece to prepare and submit an initial report in the first year that the BOI reporting requirements are in effect."[31] But that estimate does not take into account the legal and accounting fees small businesses likely must incur to interpret and comply with the Proposed Rule. Nor does it factor in the cost of preparing updated reports.

For all of the reasons set forth herein, the Chamber therefore requests that the Proposed Rule be modified to ease these burdens on small business owners.

Sincerely,



Kevin D. Shimp
General Counsel, Ohio Chamber of Commerce
34 S. Third St., Suite 100
Columbus, OH 43215
614-228-4201

[29] Proposed 31 CFR 1010.380(b).
[30] *See supra* n.2.
[31] Fed. Reg. 69953.