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January 13, 2022

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

Dear Madam Secretary:

RE: Treasury (FinCEN) Notice of Proposed Rulemaking Titled "Beneficial Ownership Information Reporting Requirements," RIN 1506-AB49, FINCEN-2021-0005, 86 *Fed. Reg.* 69920 (December 8, 2021)

This letter presents comments of the National Federation of Independent Business (NFIB)¹ on the Treasury notice of proposed rulemaking titled "Beneficial Ownership Information Reporting Requirements" and published in the *Federal Register* of December 8, 2021. The rules, proposed by the Treasury to implement the Corporate Transparency Act,² require more than 25 million existing small businesses in America, a number increased by 3 million each year, to spend an aggregate of \$4 billion to submit reports on their beneficial owners to the Financial Crimes Enforcement Network (FinCEN), a Treasury bureau.³ This FinCEN dragnet collection of intelligence on small businesses in America imposes growth-stunting costs on the American economy and tramples the liberty and privacy of Americans.

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 the proposed rules fall on small businesses, including many NFIB members.

² Corporate Transparency Act (CTA), 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 beneficial ownership information reporting.

³ 31 U.S.C. 310 (establishing FinCEN as a Treasury bureau); 86 *Fed. Reg.* at 69948, col. 2 ("The net present value of the total cost over a 10-year time horizon at a seven percent discount rate for these information collections is approximately \$3.4 billion. At a three percent discount rate, the net present value is 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. As mentioned before, FinCEN assumes for purposes of estimating costs to small businesses that all reporting companies are small businesses." (footnote omitted)). The Treasury estimate does not include the costs to small businesses of engaging lawyers or accountants to help them understand and comply with the rules. *Id.* at 69953, col. 1 (professional expertise).

NFIB recommends and requests that the Secretary of the Treasury submit to Congress legislation judged necessary and expedient by the President to repeal section 5336 of title 31 of the U.S. Code, which imposed on America's small businesses the duty to report beneficial ownership information (BOI). Pending repeal of section 5336, NFIB recommends and requests that the Department of the Treasury adjust as set forth in this letter proposed 31 CFR 1010.380, to reduce the damage the proposed rule inflicts on the finances, liberty, and privacy of Americans. NFIB recommendations and requests appear below in bold typeface for the convenience of the reader.

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1. FinCEN Should Give The Public the Opportunity to Comment Contemporaneously on the Rules for FinCEN Collection of BOI and for FinCEN Safeguarding of BOI, and the Safeguarding Rules Should Take Effect Before FinCEN Collects BOI

The preamble to the proposed rules states as follows with respect to section 6403 of the Corporate Transparency Act, which enacted section 5336 of title 31 of the U.S. Code:

FinCEN intends to issue three sets of rulemakings to implement the requirements of Section 6403: A rulemaking to implement the beneficial ownership information reporting requirements, a second to implement the statute's protocols for access to and disclosure of beneficial ownership information, and a third to revise the existing CDD [Customer Due Diligence] Rule, consistent with the requirements of section 6403(d) of the CTA. In this proposed rule, however, FinCEN seeks comments only on the first—the proposed regulations that would implement the reporting requirements of Section 6403. FinCEN intends to issue proposed regulations that would implement the other aspects of section 6403 of the CTA in the future and will solicit public comments on those proposed rules through publication in the *Federal Register*.⁴

The Secretary of the Treasury has a duty to issue both regulations on FinCEN collection of BOI⁵ (the first set mentioned above) and on FinCEN safeguarding of collected BOI⁶

⁴ 86 *Fed. Reg.* at 69921, col. 2.

⁵ Section 5336(b)(1)(A) of title 31 of the U.S. Code requires reporting companies, which includes many small and independent businesses, to submit to FinCEN reports with BOI about the companies, "[i]n accordance with regulations prescribed by the Secretary of the Treasury" Section 5336(b)(5) provides that "[t]he requirements of this subsection shall take effect on the effective date of the regulations prescribed by the Secretary of the Treasury under this subsection" Thus, the statutory reporting requirements of section 5336(b) take effect on the effective date of the rules issued by FinCEN (acting on the Secretary's behalf) to regulate FinCEN collection of BOI.

⁶ Section 5336(c)(2)(A) provides that "[e]xcept as authorized by this subsection and the protocols promulgated under this subsection, beneficial ownership information reported under this section shall be confidential and may not be disclosed by—(i) an officer or employee of the United States; (ii) an officer or employee of any State, local, or Tribal agency; or (iii) an officer or employee of any financial institution or regulatory agency receiving information under this subsection." Section 5336(c)(2)(B) authorizes FinCEN to disclose reported BOI upon receipt of a request "through appropriate protocols" from a federal agency engaged in national security, intelligence, or law enforcement activity, or a State, local, or tribal law enforcement agency authorized by a court of competent jurisdiction to seek the BOI in a criminal or civil investigation. Section 5336(c)(2)(B) and (C) also provides for disclosures of BOI to a federal agency requesting BOI on behalf of a foreign law enforcement agency, prosecutor, or judge; financial institutions with the consent of the BOI-reporting company; or a federal functional regulator or other appropriate regulatory agency, under "appropriate protocols governing the safekeeping of information" agreed to by the regulator or regulatory agency and the Secretary of the Treasury. Section 5336(c)(3) provides that "[t]he Secretary of the Treasury shall establish by regulation protocols described in paragraph (2)(A)" Section 5336(c)(3) requires the protocols to, among other things, "protect the security and confidentiality of any beneficial ownership information provided directly by the Secretary" and "provide such other safeguards which the Secretary determines (and which the Secretary prescribes in regulations) to be necessary or appropriate to protect the confidentiality of the beneficial ownership information." Section 5336(c)(5) authorizes access to BOI within the Department of the Treasury "subject to procedures and safeguards prescribed by the Secretary of the Treasury."

(the second set mentioned above). Acting on the Secretary's behalf, FinCEN has issued proposed regulations for the collection of BOI and given the public a deadline of February 7, 2022, to furnish to FinCEN comments on the proposed regulations.⁷ But FinCEN has failed to publish proposed rules for procedures, standards, and protocols to safeguard collected BOI from unauthorized disclosure. FinCEN should have published the two sets of proposed rules (collection and safeguarding) for public comment contemporaneously, as the views of the public on rules for FinCEN collection of BOI may vary according to the degree and kind of protection that FinCEN will afford the collected BOI. Also, under no circumstances should FinCEN begin collecting BOI on America's small businesses before FinCEN has put into effect the rules to safeguard the collected BOI from unauthorized disclosure.

Accordingly, NFIB requests and recommends that FinCEN: (1) extend the comment due date on the proposed rules on BOI Reporting Requirements from February 7, 2022, to the date comments are due on the yet-to-be-issued FinCEN proposed rules on safeguarding BOI information; and (2) add the following subsection at the end of proposed 31 CFR 1010.380: "(h) This section 1010.380 shall not take effect until the effective date of a final rule published in the *Federal Register* to implement section 5336(c)(2), (3), and (5) of title 31 of the United States Code."

2. FinCEN Should Lengthen the Deadlines for Small Businesses to Report BOI to FinCEN

Most of the reporting companies that must submit BOI reports to FinCEN are small and independent businesses.⁸ The Regulatory Flexibility Act calls for federal agencies (such as FinCEN) to take into account the special needs of small businesses.⁹ Moreover, the statute establishing the BOI reporting regime specifically requires the

⁷ 86 *Fed. Reg.* 69920, col. 1 ("Written comments on this proposed rule may be submitted on or before February 7, 2022.").

⁸ The term "reporting company" under the statute excludes "any entity that--(I) employs more than 20 employees on a full-time basis in the United States; (II) filed in the previous year Federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate . . . ; and (III) has an operating presence at a physical office within the United States" 31 U.S.C. 5336(a)(11)(B)(xxi). This exclusion and the exclusion for securities issuers under section 12 of the Securities Exchange Act, 31 U.S.C. 5336(a)(11)(B)(i), along with other exclusions in section 5336(a)(11)(B), leave few types of entities other than small businesses subject to the BOI reporting requirements.

⁹ Regulatory Flexibility Act (RFA), Public Law 96-354, 5 U.S.C. 601 note. 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"

Secretary of the Treasury to minimize burdens on BOI reporting companies (again, most of which are small businesses).¹⁰ FinCEN has said that "FinCEN is mindful of the effect of new regulations on small businesses, given their critical role in the U.S. economy and the special consideration that Congress and successive administrations have mandated that federal agencies should give to small business concerns."¹¹

Small businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher complex regulations and implement costly business systems necessary to comply with the regulations. Small businesses mostly engage in do-it-yourself compliance, in which a business owner trying to keep the business afloat attempts to keep up with regulations as much as the owner can. Thus, FinCEN should give small businesses a more reasonable amount of time to learn of and comply with BOI reporting requirements. In particular, sections 5336(b)(1)(B) ("not later than two years") and 5336(b)(1)(D) ("not later than 1 year") evince that Congress intended much longer deadlines for initial reporting by a pre-existing reporting company and for reporting updates, respectively, than the proposed rule specifies.

Accordingly, NFIB requests and recommends that FinCEN revise 31 CFR 1010.380:

(a) in subsection (a)(1)(i) (relating to newly-formed reporting companies), by striking "within 14 calendar days" and inserting in lieu thereof "within 90 calendar days";

(b) in subsection (a)(1)(iii) (relating to pre-existing reporting companies), by striking "one year after" and inserting in lieu thereof "two years after";

(c) in subsection (a)(1)(iv) (relating to no-longer-exempt reporting companies), by striking "within 30 calendar days" and inserting in lieu thereof "within 90 calendar days";

(d) in subsection (a)(2) (relating to updating), by striking "within 30 calendar days" and inserting in lieu thereof "within one year"; and

¹⁰ In prescribing rules to implement FinCEN BOI collection, the Secretary of the Treasury "shall, to the greatest extent practicable-- . . . (iii) minimize burdens on reporting companies associated with the collection of the information . . . in light of the private compliance costs placed on legitimate businesses . . .," 31 U.S.C. 5336(b)(1)(F)(iii), and in prescribing rules for BOI reports and use of unique FinCEN identifiers, shall, to the extent practicable and consistent with the purposes of section 5336, "(i) minimize burdens on reporting companies associated with the collection of beneficial ownership information" 31 U.S.C. 5336(b)(4)(B)(i). In addition to the preceding mandatory provisions of law, Congress expressed its view in hortatory language: "It is the sense of Congress that-- . . . (8) in prescribing regulations to provide for the reporting of beneficial ownership information, the Secretary shall, to the greatest extent practicable consistent with the purposes of this title--(A) seek to minimize burdens on reporting companies associated with the collection of beneficial ownership information;" Section 6402(8)(A) of the Corporate Transparency Act.

¹¹ 86 *Fed. Reg.* at 69936, col. 1.

(e) in subsection (a)(3) (relating to corrected reports), by striking "within 14 calendar days" and inserting in lieu thereof "within 90 calendar days" and by striking "14-day period" and inserting in lieu thereof "90-day period".

3. FinCEN Should Recognize That Small Businesses Cannot Report Changes to FinCEN Until They Become Aware of The Changes

Proposed 31 CFR 1010.380(a)(2) requires a reporting company to file an updated BOI report "within 30 calendar days after the date on which there is any change with 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." Situations may arise in which the reporting company does not become aware of a change with respect to information previously reported about a beneficial owner until more than thirty days after the change has occurred. For example, proposed 31 CFR 1010.380(b)(1)(ii) generally requires reporting an individual beneficial owner's residential street address used for tax residency purposes and a unique identifier, which may be from a non-expired, State-issued driver's license. Such an individual beneficial owner might change residence, or get a new license in a different state, and not inform the reporting company, or at least not inform the reporting company within thirty days. FinCEN should base its deadline for reporting upon the date on which the reporting company acquires knowledge of a change and not upon when the change occurred.

Accordingly, NFIB requests and recommends that FinCEN revise proposed 31 CFR 1010.380(a)(2) by striking "after the date on which there is any change" and inserting in lieu thereof "after the date on which the reporting company becomes aware of any change".

4. FinCEN Should Recognize that Reporting Companies Can Only Certify Accuracy and Completeness of Reports to the Extent of Their Knowledge

Proposed 31 CFR 1010.380(b) requires that each person filing with FinCEN a report under the regulation "shall certify that the report is accurate and complete." If it later turns out that the report is not accurate or is not complete because the certifying individual was unaware of information needed for accuracy or completeness, the certifying individual may face a skeptical FinCEN or skeptical federal criminal prosecutors¹² who think the individual's erroneous certification was knowing and willful rather than simply an innocent mistake due to lack of knowledge. Given the risk that severe criminal penalties could attach to erroneous certification of a FinCEN BOI report, FinCEN should not require small businesses or their certifying employees to warrant the accuracy and completeness of a BOI report, much of the content of which comes from information provided by others. **Accordingly, NFIB requests and recommends that FinCEN amend proposed 31 CFR 1010.380(b) by striking "shall certify that the report is accurate and complete" and inserting in lieu thereof "shall certify that**

¹² See False Statements Act (18 U.S.C. 1001) and section 5336(h) of title 31.

the report is accurate and complete to the best of the certifier's knowledge after diligent inquiry."

5. FinCEN Lacks Legal Authority to Seek or Compel Provision of More BOI than the Law Specifies

Congress by law specified precisely what beneficial ownership information FinCEN can obtain. Section 5336(b)(2)(A) of title 31 specifies that a BOI report shall "identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company by--(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 in accordance with requirements in paragraph (3)."

FinCEN has no authority to collect more than the four items specified by section 5336(b)(2)(A). Note also that, within these specifications, the statute leaves to the reporting company the option to choose between reporting a residential street address or a business street address and the option to choose between reporting a unique identifying number from an acceptable identification document or a FinCEN identifier. Thus, FinCEN cannot, as it purports to do in proposed 31 CFR 1010.380(b)(1), require certain reporting companies to furnish a residential street address instead of a business street address;¹³ furnish the residential street address that is the tax residency of the individual concerned;¹⁴ furnish a copy of the driver's license or other acceptable

¹³ In the preamble to the proposed rules (86 *Fed. Reg.* 69930, col. 2), FinCEN states: "FinCEN considered leaving to the reporting company the choice of which address to report, but assessed that this would unduly diminish the usefulness of the reported information to national security, intelligence, and law enforcement activity." Congress specified in the law what the BOI report shall contain, and left the reporting options within those statutory specifications to the generator of the report (the reporting company). Nothing in the statute empowers FinCEN to make an assessment that somehow overrides the statutory provision specifying the content of the BOI reports or the reporting company's options.

¹⁴ In the preamble to the proposed rules, FinCEN attempts but fails to justify its specification that the reported residential street address must be the one the individual uses for tax residency purposes. The preamble states (86 *Fed. Reg.* 69930, col. 2):

A beneficial owner's residential address for tax residency purposes . . . is of value both as a point of contact and for tax administration purposes.⁹⁴

⁹⁴ See 31 U.S.C. 5336(c)(5)(B) ("Officers and employees of the Department of the Treasury may obtain access to beneficial ownership information for tax administration purposes . . .").

FinCEN apparently has misconstrued 31 U.S.C. 5336(c)(5)(B) as if it provided FinCEN authority to collect information for tax administration purposes. Section 5336(c)(5)(B) does not authorize FinCEN or any officers or employees of the Department of the Treasury to collect information for tax administration purposes; it merely allows Treasury officers or employees to have access, for tax administration purposes, to the BOI that FinCEN is otherwise authorized to collect. FinCEN has no statutory authority to collect tax residency information.

identification document of the individual concerned;¹⁵ or furnish the taxpayer identification number or Dun & Bradstreet number of a company.¹⁶ Nor can FinCEN seek taxpayer identification numbers of beneficial owners as "additional voluntary information," as FinCEN purports to do in proposed 31 CFR 1010.380(b)(2), because the law does not authorize FinCEN to do so.¹⁷

Accordingly, NFIB requests and recommends that FinCEN revise proposed 31 CFR 1010.380(b)(1) and (2) to read as follows:

"(1) *Initial report.* An initial report of a reporting company shall include the following information:

"(i) For the reporting company:

"(A) The full legal name of the reporting company;

"(B) The business street address of the reporting company; and

¹⁵ In the preamble to the proposed rules (86 *Fed. Reg.* 69930-31), FinCEN claims that the presence of a statutory provision (31 U.S.C. 5336(h)(1)) that prohibits providing to FinCEN "a false or fraudulent identifying photograph or document" gives FinCEN authority to go beyond requiring the statutory "unique identifying number" from, for example, a driver's license (31 U.S.C. 5336(b)(2)(A)(iv)(I)) in a BOI report and to instead require the report to include a photocopy of the driver's license. The general provision punishing the furnishing of a false or fraudulent photograph or document cannot override a specific provision limiting the reporting requirement to a "unique identifying number." Moreover, there is no rational relationship between the statutory prohibition cited and the statutory content of BOI reports; the prohibition addresses what happens when FinCEN takes a unique identifying number from a BOI report and (assuming FinCEN can find a lawful basis for the inquiry) asks a State to furnish a copy of the driver's license associated with the unique identifying number. The State officials, in furnishing the requested copy, would be subject to the prohibition on furnishing a false or fraudulent photograph or document. Nothing in section 5336 of title 31 indicates that Congress contemplated that FinCEN would vacuum up huge numbers of copies of driver's licenses as part of the BOI reporting process.

¹⁶ As FinCEN admits in the preamble to the proposed rules (86 *Fed. Reg.* at 69931 (footnote omitted)), "[w]hile the CTA specifies the information required to be reported to 'identify each beneficial owner of the applicable reporting company and each applicant with respect to that reporting company,' the CTA does not specify what, if any, information a reporting company must report about itself." Given the bedrock principle that a federal agency has no power whatsoever unless Congress has provided that power by statute, *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."), FinCEN has no authority to require the furnishing of detailed information about the reporting company. Thus, FinCEN cannot require the reporting company to report its taxpayer identification number or Dun & Bradstreet number.

¹⁷ Congress has not by law authorized FinCEN to collect information on a voluntary basis, and therefore FinCEN has no authority to do so. *PSC v. FCC*, 476 U.S. 355, 374 (1986). Moreover, even when an agency has statutory authority to seek voluntary provision of information, it must comply with federal laws regulating collection and use of information, such as the Privacy Act (5 U.S.C. 552a) and the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). A federal agency is not free simply to decide without statutory authority that it wants information and send out a form asking Americans for it.

"(C) The State or Tribal jurisdiction of formation of the reporting company (or for a foreign reporting company, the State or Tribal jurisdiction where such company first registers).

"(ii) For every individual who is a beneficial owner of such reporting company, and every individual who is a company applicant with respect to such reporting company:

"(A) the individual's full legal name;

"(B) the individual's date of birth;

"(C) the individual's current residential street address or current business street address; and

"(D) the individual's unique identifying number from an acceptable identification document or the individual's FinCEN identifier.

"(iii) As used in this section, the term "acceptable identification document" means, with respect to an individual

"(A) a nonexpired passport issued by the United States;

"(B) a nonexpired identification document issued by a State, local government, or Indian Tribe to the individual acting for the purpose of identification of that individual;

"(C) a nonexpired driver's license issued by a State; or

"(D) if the individual does not have a document described in subparagraph (iii) (A), (B), or (C), a nonexpired passport issued by a foreign government.

"(2) *Reserved.*"

6. FinCEN Should Tailor the List of Officers Presumed to Have Substantial Control of a Reporting Company

Section 5336(a)(3) of title 31 defines the term "beneficial owner" to mean "with respect to an entity, an individual who, directly or indirectly . . . (i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity" with several specified exclusions. Section 5336 does not contain a definition of what "substantial control" means. Proposed 31 CFR 1010.380(d)(1)(i) defines "substantial control" over a reporting company to include "(i) Service as a senior officer of the reporting company" Then proposed 31 CFR 1010.380(f)(8) defines the term "senior officer":

(8) *Senior officer*. The term "senior officer" means any individual holding the position or exercising the authority of a president, secretary, treasurer, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function.

As FinCEN has stated, "[b]eneficial owners are of interest because of their economic status as persons who own or control a reporting company."¹⁸ The proposed rule presumes conclusively, and contrary to fact, that every senior officer of a reporting company exercises substantial control over the company. For example, secretaries and general counsels often have ministerial or advisory functions with very little control over the company. Chief executive, chief operating, or chief financial officers of companies have substantial authority that reaches throughout a company, but others do not. **Accordingly, NFIB requests and recommends that FinCEN revise proposed 31 CFR 1010.380(f)(8) to read as follows:**

"(8) *Senior officer*. The term "senior officer" means any individual who holds the position or exercises the authority in a reporting company of a chief executive officer, chief operating officer, or chief financial officer."

7. FinCEN Should Emphasize Assistance-with-Compliance Over Punishment-Through-Enforcement in Administering the BOI Regime

Small businesses engaged in do-it-yourself compliance, lacking the help of the expensive lawyers, accountants, and clerks that larger companies use for regulatory compliance, bear a heavy burden in trying to comply with the ever-growing volume of local, state, and federal regulation of their businesses, which soon will include new FinCEN BOI regulations implementing section 5336 of title 31 of the U.S. Code. FinCEN efforts to help small businesses become aware of and comply with those FinCEN regulations would better serve the goals of section 5336 than post-violation imposition of fines or referrals for prosecution for failures to comply. FinCEN should emphasize efforts to educate small businesses about such regulations.¹⁹ Also, FinCEN should provide a means by which reporting companies, beneficial owners, or applicants can obtain authoritative advisory opinions from FinCEN upon which they can rely in complying with 31 U.S.C. 5336 and 31 CFR 1010.380. Finally, small businesses acting in good faith should have an opportunity to correct a violation and come into compliance, without fines or enforcement actions.²⁰ **Accordingly, NFIB recommends**

¹⁸ 86 *Fed. Reg.* at 69930, col. 2.

¹⁹ Section 5336(e)(1) of title 31 requires the Secretary of the Treasury to take the first step in education of reporting companies by directing the Secretary to "take reasonable steps to provide notice to persons of their obligations to report beneficial ownership information" FinCEN should provide to reporting companies, beneficial owners, and applicants more than mere notice; FinCEN also should publish clear guidance, provide educational materials, provide on request answers to questions, and provide assistance as needed, including assistance to a person seeking to submit a corrected report, mandated by 31 U.S.C. 5336(h)(3)(C)(ii).

²⁰ A FinCEN enforcement policy based on prosecutorial discretion to allow small businesses that have acted in good faith to correct violations and treat that correction as sufficient to avoid enforcement action

and requests that FinCEN amend proposed section 31 CFR 1010.380 by adding at the end thereof the following new subsection:

***"(i) Education, advice, and enforcement policy.* In implementing this section 1010.380, the Director of FinCEN shall ensure that FinCEN:**

"(1) undertakes substantial efforts, subject to the availability of appropriations, to make reporting companies aware in a timely fashion of their duties under this section;

"(2) provides advisory opinions when requested by reporting companies, beneficial owners, or applicants, on which they may rely as authoritative; and

"(3) offers reporting companies acting in good faith a reasonable opportunity to correct a violation of this section in lieu of proceeding with enforcement action against the company."

8. FinCEN Should State Clearly that Exempt Entities and Sole Proprietors Have No BOI Reporting Duties

The term "reporting company" plays a central role in the statutory BOI reporting regime. Section 5336(b) of title 31 requires a "reporting company" to file reports with FinCEN. Any person that does not fall within the definition of "reporting company" has no duty to make any BOI report to FinCEN unless and until circumstances change such that the person falls within the definition of "reporting company." Two categories of persons who do not have BOI reporting duties merit attention in the proposed rules.

First, section 5336(a)(11)(B) excludes from the definition of "reporting company" 24 categories of entities, ranging from corporations with shares traded on securities exchanges to churches. Entities that fall within those 24 categories have no BOI reporting duties (unless and until circumstances change and they subsequently fall within the definition of "reporting company"). However, given the broad variation in size and sophistication among the exempt entities, confusion may arise about whether exempt entities have any BOI reporting obligation.

Secondly, under section 5336(a)(11)(A), the definition of reporting company applies only to "a corporation, limited liability company, or similar entity" A sole proprietorship is not a corporation, limited liability company, or similar entity and thus has no BOI

is consistent with the purposes of section 5336 of title 31. Note, for example, the statutory safe harbor provided in section 5336(h)(3)(C) for corrections within 90 days. The enforcement policy would be particularly important when a small business acting in good faith discovers an inaccuracy in a BOI report more than 90 days after filing the report.

reporting obligation. But sole proprietors often have the least knowledge and understanding of federal regulations.²¹

Accordingly, NFIB recommends and requests that FinCEN amend proposed section 31 CFR 1010.380 by adding at the end thereof the following new subsection (j):

"(j) Persons Without Beneficial Ownership Information Reporting Duties.

"(A) Any entity that falls within any of the 24 exclusions under section 5336(a)(11) of title 31 of the United States Code has no beneficial ownership information reporting duties under this section unless and until the entity ceases to fall within an exclusion and meets the definition of a reporting company.

"(B) A sole proprietorship has no BOI reporting duties under this section."

9. The President, the Secretary of the Treasury, and the Director of National Intelligence Should Apply to FinCEN, as an Agency Focused on Collection of Massive Amounts of Intelligence on American Citizens, the Safeguards That Apply to Other U.S. Intelligence Agencies

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,²² and section 3.5(h)(16) of Executive Order 12333, "United States Intelligence Activities," as amended.²³** 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. If the Department of the Treasury continues to grow the mission of FinCEN as an intelligence

²¹ The Secretary of the Treasury should consider exempting single-individual professional corporations and single-individual professional limited liability companies, which in essence are limited liability sole proprietorships for professionals such as doctors, lawyers, and architects, from the definition of "reporting company," eliminating any obligation for them to report BOI to FinCEN. See 31 U.S.C. 5336(a)(11)(xxiv) (authority for Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, to exempt from the definition of "reporting company" otherwise covered entities in certain circumstances).

²² 50 U.S.C. 3003(4)(L).

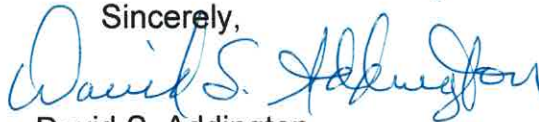
²³ Executive Order 12333, "United States Intelligence Activities," 50 U.S.C. 3001 note.

agency operating outside the safeguards that apply to the intelligence community, FinCEN will place the freedom and privacy of Americans at ever-greater risk.

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With the enactment of the Corporate Transparency Act, Congress and the President vastly expanded the mission of FinCEN, giving it an even stronger focus on collecting financial and business intelligence about Americans and, in particular, about Americans who have small businesses. The decision of Congress and the President to turn FinCEN into an intelligence agency aimed at Americans, in the hope that mass intelligence collection on the finances and businesses of Americans might help ferret out a few evildoers, undervalued the freedom and privacy of Americans. Within the limits of the President's duty to take care that section 5336 of title 31 be faithfully executed, the Secretary of the Treasury should, at the very least, minimize the practical burdens on small and independent businesses in complying with the ill-advised beneficial ownership information reporting regime and impose on FinCEN the safeguards for the liberty and privacy of Americans that Congress and the President have imposed on other U.S. intelligence agencies.

Sincerely,



David S. Addington

Executive Vice President and General Counsel