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and U.S. First Class Mail

March 22, 2021

The Honorable Janet L. Yellen  
Secretary of the Treasury  
Department of the Treasury  
1500 Pennsylvania Ave. NW  
Washington, DC 20220

Dear Madam Secretary:

The National Defense Authorization Act for Fiscal Year 2021 enacted a new section 5336 in title 31 of the U.S. Code to compel America's small and independent businesses to report their beneficial ownership to the Department of the Treasury bureau called the Financial Crimes Enforcement Network (FinCEN). FinCEN collects vast amounts of information on Americans for financial law enforcement, intelligence, counterintelligence, and counterterrorism purposes. Under section 5336, FinCEN will add to its databases information on the beneficial owners of small and independent businesses all across America. The National Federation of Independent Business (NFIB) writes to assist with your duty to reach out to the small business community in promulgating regulations to implement section 5336 and your duty to minimize to the greatest extent practicable the burdens of the beneficial ownership reporting regime on America's small and independent businesses.<sup>1</sup>

NFIB is an incorporated nonprofit association representing small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies. Section 5336 applies to many members of NFIB and other small and independent businesses. NFIB petitions<sup>2</sup> you to ensure that the regulations to implement the beneficial ownership reporting statute incorporate the following protections for America's small and independent businesses:

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<sup>1</sup> Section 6403 of the National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283, January 1, 2021) (enacting 31 U.S.C. 5336); 31 U.S.C. 310 (FinCEN functions); 31 U.S.C. 5336(b)(1)(F)(iii) (Secretary of the Treasury duty to minimize burdens); and 31 U.S.C. 5336(g) (Secretary of the Treasury duty to reach out to small business community).

<sup>2</sup> U.S. Constitution, First Amendment ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.") and 5 U.S.C. 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

1. Facilitate Awareness of Reporting Obligation. The law requires the Secretary of the Treasury to "take reasonable steps to provide notice to persons of their obligations to report beneficial ownership information."<sup>3</sup> NFIB asks the Department to include in the regulations implementing section 5336 a detailed list of the specific and continuing steps the Department will take to make sure small and independent businesses, both those in existence and those established in the future, learn of the beneficial ownership reporting duties and deadlines.

2. Provide Electronic and Written Filing Options. In the modern era, many Government agencies tend to prefer that the public file forms and reports electronically, which may often benefit both the Government and the filer. But some small businesses lack the knowledge or equipment to accomplish electronic filing. NFIB asks the Department to provide in the regulations implementing section 5336 that beneficial ownership reporting entities may choose to accomplish filing of required reports either electronically or in written form.

3. Help, Not Punish, Small Businesses Acting in Good Faith. Small businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher complex regulations. Small businesses mostly engage in do-it-yourself compliance, in which business owners themselves work to learn of and comply with regulations affecting their businesses.<sup>4</sup> When FinCEN helps small businesses comply with regulations, FinCEN serves the goals of federal anti-money laundering and related laws much better than when it immediately imposes fines or refers for prosecution. NFIB asks the Department to include in the regulations implementing section 5336 provisions that (a) give small business owners acting in good faith an opportunity to correct a violation and come into compliance, without fines or enforcement actions, and (b) state that fines or enforcement action against small businesses will occur only in cases of willful, repeated violations.

4. Limiting Constructions for Imprecise Statutory Terms. Many provisions in section 5336 of title 31 are imprecise in their meaning. For example (and there are many other examples), the definition of "applicant" includes a person who files an application to form a corporation, limited liability company, "or other similar entity."<sup>5</sup> Similarly, the definition of "beneficial owner" includes a person who "exercises substantial control over" an entity, whether "directly or indirectly."<sup>6</sup> The implementing Treasury regulations need reasonable, limiting constructions for less-than-precise statutory terms, such as "similar entity," "substantial control," and

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<sup>3</sup> 31 U.S.C. 5336(e)(1).

<sup>4</sup> Of the federal, state, and local levels of government, the federal level of government creates the most serious regulatory problems for small and independent businesses. NFIB Research Foundation, *National Small Business Poll: Regulations* (2017), Question 4 and Responses, page 7 (available at <http://www.411sbfacts.com/files/Regulations%202017.pdf>).

<sup>5</sup> 31 U.S.C. 5336(a)(2).

<sup>6</sup> 31 U.S.C. 5336(a)(3)(A).



"indirectly." NFIB asks the Department to include in the regulations implementing section 5336 provisions that give reasonable, limiting constructions for imprecise terms (for example, making clear that "similar entity" excludes sole proprietorships and partnerships) and that give specific examples of how the imprecise terms apply in a given situation.

5. Provide Advisory Opinion Service. Given the imprecision of a number of terms used in section 5336 (for example, "similar entity," "substantial control," and "indirectly") and the complexity of that section, many small and independent businesses may need to be able to ask FinCEN about the applicability of imprecise terms and complex provisions to their particular situations. Also, it appears that the law already encourages written rulings from FinCEN in response to requests from the public.<sup>7</sup> NFIB asks the Department to include in the regulations implementing section 5336 provisions that require FinCEN to establish an advisory service through which a person can seek, and rely upon for legal purposes, an opinion given by FinCEN about the applicability or inapplicability of beneficial ownership reporting provisions to the person or the meaning of such a provision.

6. Use Familiar Processes with Minimal Burdens. The law provides that the Secretary's beneficial ownership reporting regulations "shall, to the greatest extent practicable" collect the beneficial ownership information "through existing Federal, State, and local processes and procedures" and "minimize burdens on reporting companies" associated with the reporting.<sup>8</sup> NFIB asks the Department to include in the regulations implementing section 5336 provisions to ensure that beneficial ownership reporting entities have the option to file the requisite beneficial ownership information directly with FinCEN (electronically or in written form) or can report the information through processes in which they already engage periodically, such as in already-required annual reports to corporations divisions of State agencies or in already-required annual tax filings (with FinCEN then assuming the burden to obtain the information from the State agency or tax authority). Also, section 5336 grants the Secretary of the Treasury authority to exempt an entity or class of entities from beneficial ownership reporting when the entity's or class's reporting "would not serve the public interest" and "would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes."<sup>9</sup> NFIB asks the Department to exercise this exemption authority to the maximum extent possible with respect to small and independent businesses, so as to eliminate unnecessary reporting burdens.<sup>10</sup>

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<sup>7</sup> 31 U.S.C. 5329. See 31 CFR 1010.710 and 711. See also FinCEN, "Regulatory Releases," undated (available at <https://www.fincen.gov/sites/default/files/shared/regrelease.pdf>) (administrative rulings in response to specific requests).

<sup>8</sup> 31 U.S.C. 5336(b)(1)(F)(ii) and (iii).

<sup>9</sup> 31 U.S.C. 5336(a)(11)(B)(xxiv).

<sup>10</sup> Section 5336(b)(1)(E) of title 31 requires the Secretary of the Treasury to conduct a review of whether to shorten the timeframe within which a reporting company must report any change in beneficial



7. Set Up Promptly the IG Comment/Complaint System. Section 5336 requires the Department of the Treasury Inspector General to provide "public contact information to receive external comments or complaints regarding the beneficial ownership information notification and collection process."<sup>11</sup> NFIB asks the Department to include, in the regulations implementing section 5336, direction: (a) to the Inspector General to (i) ensure that the public may provide comments or complaints by U.S. mail, electronic mail, facsimile transmission, or telephone, (ii) publicize appropriately the availability of the opportunity to provide comments or complaints to the Inspector General, (iii) provide a prompt acknowledgement of, and subsequently a timely substantive response to, a comment or complaint, and (iv) monitor FinCEN activity as necessary to ensure that no retaliation occurs for submission of comments or complaints to the Inspector General, and (b) to the Assistant Secretary for Management to ensure that departmental annual budget proposals fully and effectively fund the functions of the Inspector General relating to external comments or complaints regarding the beneficial ownership information notification and collection process.

8. Conduct Small Business Impact Analyses of Proposed Treasury Regulations. In enacting the Regulatory Flexibility Act,<sup>12</sup> Congress declared that "laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities" and that "uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources." To address those identified evils (and others), the law requires an agency that proposes a rule to include with the proposal an initial regulatory flexibility analysis, and to include with the final rule a final regulatory flexibility analysis, both of which describe in specified detail the impact of the rule on small entities.<sup>13</sup> These small business impact analyses, and especially the initial analysis, in conjunction with the public notice and comment rulemaking process,<sup>14</sup> will help the Secretary of the Treasury succeed in her statutory duty to minimize the burdens of the beneficial ownership reporting regime. NFIB asks the Department to include in the regulations implementing section 5336 that the Department (a) shall comply with the rulemaking and analysis requirements in sections 553, 603, and 604

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ownership. NFIB asks the Secretary to consider carefully in that review the increased compliance burden on small and independent businesses that would accompany a shortened timeframe.

<sup>11</sup> 31 U.S.C. 5336(h)(4).

<sup>12</sup> Public Law 96-354 (September 19, 1980) (5 U.S.C. 601 note), subsections 2(2) and (3).

<sup>13</sup> 5 U.S.C. 603 and 604.

<sup>14</sup> 5 U.S.C. 553.



of title 5 of the U.S. Code when proposing or issuing regulations implementing section 5336, and (b) shall not dispense with otherwise applicable requirements in sections 553, 603, and 604 of title 5 (for example, by using "good cause" exceptions in section 553(b)(B) or (d)(3) or waiver or delay authority under sections 605(b) or 608 of title 5) without the Secretary of the Treasury's prior written approval to do so, which shall not be delegated.

9. Make Public the List of Trusted Countries. The law provides for FinCEN disclosure of beneficial ownership information in certain circumstances in response to a request from a Federal agency that is, in turn, in response to "an official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries."<sup>15</sup> Whenever the U.S. Government collects information on American citizens for the use of the U.S. Government, American citizens are rightly concerned about risks to their liberty and privacy. But American citizens are rightly even more concerned about risks to their liberty and privacy when the U.S. Government then turns over that information on American citizens to a foreign country. American citizens should have at least some opportunity to understand the risks to their liberty and privacy of FinCEN's turning over information on Americans to trusted foreign countries, by knowing what the Department of the Treasury considers to be "trusted foreign countries." The view of Americans with respect to the acceptability of FinCEN sharing of information on Americans with foreign countries may vary depending upon the extent to which a foreign country respects liberty and privacy. For example, Americans might accept FinCEN sharing of information on Americans with the Government of the United Kingdom of Great Britain and Northern Ireland (a democracy), but blanch at FinCEN sharing of information on Americans with the Government of the People's Republic of China (a communist state). If American citizens know the list of trusted foreign countries, they can express their views on the acceptability of that list to the Secretary of the Treasury and, if necessary, to their elected officials. NFIB asks the Department to include in the regulations implementing section 5336 a requirement that FinCEN identify periodically (and not less often than annually) in the *Federal Register* the list of foreign countries that constitute "trusted foreign countries" for purposes of section 5336.

10. State in Treasury Regulations That Beneficial Ownership Reports are FOIA-Exempt. The National Defense Authorization Act for Fiscal Year 2021 placed the beneficial ownership reporting provisions in section 5336 of title 31 of the U.S. Code, as part of subchapter II of chapter 53 of title 31. An existing provision of that subchapter II (31 U.S.C. 5319) states in part, in reference to "a report filed under this subchapter," that "a report and records of reports are exempt from search and disclosure under section 552 of title 5, and may not be disclosed under any State, local, tribal, or territorial 'freedom of information', 'open government', or similar law." A beneficial ownership report filed under section 5336 is a "report filed under this subchapter." Accordingly, a section 5336 beneficial ownership report is exempt from disclosure under the federal Freedom of Information Act (5 U.S.C. 552) by operation of 31 U.S.C. 5319 (alone or in conjunction with 5 U.S.C. 552(b)(3)) and from disclosure under any similar State law. NFIB asks the Department to include in the

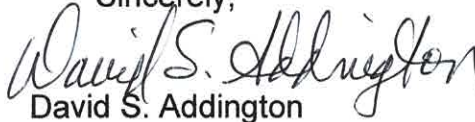
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<sup>15</sup> 31 U.S.C. 5336(c)(2)(B)(ii).

regulations implementing section 5336 a statement that "beneficial ownership reports submitted in accordance with section 5336 of title 31 of the U.S. Code, and records of such reports, are exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) and any similar State law (see 31 U.S.C. 5319)."

Incorporation of the above ten protections for America's small and independent businesses into the Treasury Department regulations implementing the beneficial ownership reporting statute (31 U.S.C. 5336) would both benefit those businesses and facilitate effective implementation of the statute. NFIB will continue to work with the Department to minimize the burdens of the beneficial ownership reporting regime on small and independent businesses and looks forward to helping the Department take full and proper account of the concerns of those businesses in the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Addington", written in a cursive style.

David S. Addington

Executive Vice President and General Counsel

cc: Mr. Rob Fairweather, Acting Director  
c/o Acting Director, Office of Information  
and Regulatory Affairs  
Office of Management and Budget