

April 7, 2021

The Honorable Janet Yellen
Secretary
United States Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Yellen:

We write regarding the Department of Treasury and the Office of Financial Crimes Network (FinCEN)'s recent announcement to begin implementing Division F of the 2021 National Defense Authorization Act. Division F reflects the bipartisan agreement reached by House and Senate Republicans and Democrats to establish a new beneficial ownership reporting paradigm as part of the Department of Treasury's anti-money laundering program. As FinCEN fulfills its responsibilities to promulgate new regulations, we cannot over emphasize the importance of adhering to congressional intent.

To be clear, beneficial ownership information is the personally identifiable information (PII) of a company's beneficial owners. The bipartisan, bicameral provisions contained in Division F are specifically aimed at eliminating costly, onerous reporting requirements on small businesses while codifying strong protections to safeguard the PII of business owners. These provisions ensure the new reporting paradigm is focused on fighting bad actors such as human traffickers, money launderers, and State actors such as China. In fact, the Hudson Institute back in 2018 noted "[t]he CCP, like other adversarial regimes, routinely hides behind shell companies to exploit the global financial system in pursuit of geopolitical objectives."¹ Thus, it is critical that FinCEN implement the statute as intended, with a particular focus on the following.

I. Section 5336(b)(4)(B)(ii) - Minimize the Burdens on Small Businesses

First, FinCEN must ensure that any new reporting burdens on small businesses are minimal. Minimization under the statute includes rescinding the current beneficial ownership reporting regime set out currently in 31 CFR 1010.230(b)-(j). Congress intended only one reporting regime – thus, any new regulation must first rescind the current reporting paradigm before it is replaced with any new provision.

Relatedly, FinCEN should be cognizant of the impact any duplicative requirement(s) will have on a small business. At a time when small businesses are focused on recovering from the global pandemic, Congress expects FinCEN to focus on implementing reporting processes that are

¹ <https://www.hudson.org/research/15573-countering-chinese-communist-party-threats-with-corporate-transparency>.

simple, straightforward, and utilize existing reporting process. This includes allowing small businesses to report beneficial ownership information to the Internal Revenue Service.

The importance of evaluating the impact new processes will have on small businesses cannot be overemphasized. Section 5336(b)(6) requires FinCEN to evaluate the impact the new reporting requirements will have on small businesses and provide to Congress specific explanations why certain reporting burdens were promulgated compared to other alternatives that were not. This information will allow Congress to ensure that the reporting regime is effective in identifying bad actors, and any information collected from legitimate small businesses is not being misused or insecure.

2. Section 5336(c)(2)(A) – Ensure Small Businesses Personally Identifiable Information Remains Confidential Unless Disclosure Authorized

It is Congress' expectation that a small business' beneficial ownership information will be protected just like an individual's tax return information, and mirror or exceed the protections set out in 26 U.S.C 6103. Thus, Section 5336(c)(2)(A) prohibits the disclosure of this beneficial ownership information unless authorized by the statute in 5336(c)(2)(B) and (C) and subsequent regulation. Section 5336(c)(3) outlines the circumstances under which FinCEN may disclose beneficial ownership information to an authorized recipient. Those circumstances include:

1. **Agency Head Certification.** An agency head or designee must 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.** An agency head must 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.** State, local and tribal law enforcement officials must 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.** FinCEN is prohibited 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.** A requesting agency must establish and maintain a system of records to store beneficial ownership information provided directly by the Secretary of the Treasury.

Finally, the statute spells out the penalties for unauthorized disclosure. Moreover, the statute makes clear that FinCEN is required to reject any authorized request that does not meet the criteria set out above. The protocols promulgated through regulation should make clear to authorized users that unauthorized disclosure or use, is subject to criminal and civil penalties (up to five years in prison and \$250,000 fine), as well as reiterate that FinCEN is prohibited from disclosing beneficial ownership information to a requester that does not meet the above referenced disclosure requirements.

3. Section 5336 (c)(9) through (11) – Transparency and Accountability

We have been disappointed with FinCEN’s previous lack of responsiveness to questions posed and information requested by Members of this Committee. This lack of responsiveness may be the result of structural issues, an unwillingness to report to Congress, or some combination of the two. However, transparency and accountability are paramount responsibilities particularly as it relates to the new beneficial ownership reporting regime developed and maintained by FinCEN.

Section 5336(c)(9) and (10) require 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. It also 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.

In addition to the audits and reports, Section 5336(c)(11) specifically requires the Director of FinCEN, who is responsible for implementing this reporting regime, to testify annually for five years. This testimony is critical. For far too long FinCEN has evaded any type of congressional check on its activities. Yet, it has amassed a great deal of authority. Now, Congress will shine a light on its operations. It is our expectation that FinCEN will provide Congress with the necessary data to justify this new reporting regime and the burdens it is placing on legitimate companies.

We welcomed FinCEN’s announcement last Friday describing its change in leadership. We look forward to working with you and the new FinCEN Acting Director to ensure the new beneficial ownership reporting regime remains focused and an effective tool in countering bad actors like China who want to use our financial system for illicit purposes.

Sincerely,



Patrick McHenry



Blaine Luetkemeyer