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Via Electronic Submission

Himamauli Das
Acting Director
Financial Crimes Enforcement Network
U.S. Department of Treasury
2070 Chain Bridge Road
Vienna, VA 22182

**Re: Beneficial Ownership Information Reporting Requirements
Notice of Proposed Rulemaking
FINCEN-2021-0005
RIN 1506-AB49**

Dear Acting Director Das:

The U.S. Chamber of Commerce (Chamber) appreciates the opportunity to comment on the Financial Crimes Enforcement Network's (FinCEN) Notice of Proposed Rulemaking regarding Beneficial Ownership Information Reporting Requirements (Proposed Rule) under the Corporate Transparency Act (CTA or Act). We understand that the Proposed Rule is the first of three rulemakings to implement the Act and focuses exclusively on the Act's beneficial ownership reporting requirements. The subsequent rulemakings will seek to implement the Act's "protocols for access to and disclosure of beneficial ownership information" and revise the existing Customer Due Diligence Rule as needed.[1] Accordingly, we focus our comments exclusively on the beneficial ownership reporting requirements and definitions set forth in the Proposed Rule.[2]

INTRODUCTION

[1] 86 Federal Register 69920, 69921 (Dec. 8, 2021).
[2] As with this proposed rulemaking, the Chamber intends to review and provide constructive comments on the two subsequent proposals.

The Chamber supported Congressional efforts in December 2020 to modernize the United States anti-money laundering requirements via the Corporate Transparency Act and appreciates the "efforts made by Congress to limit compliance burden[s] and mitigate privacy concerns for small businesses" that will need to report beneficial ownership information in the near future.[3] We support efforts to combat money laundering, including via targeted reporting of beneficial ownership information, so we welcome this rulemaking.[4]

The Act modified the United States anti-money laundering regulatory regime significantly by establishing a new requirement for small businesses to file reports (and updates) containing certain information about their beneficial owners to FinCEN directly, and for FinCEN to maintain a database of these reports. Given this important and challenging task, we appreciate that FinCEN first issued an Advanced Notice of Proposed Rulemaking (ANPR) and has considered the numerous comments received in formulating its initial proposal (including comments submitted by the Chamber).[5]

As discussed in our comment letter to the ANPR, the Chamber stands shoulder-to-shoulder with FinCEN in its mission to protect national security by preventing and punishing money laundering, terrorist financing, and other illicit activities.[6] We also stand with the millions of small, law-abiding American businesses who need clear, appropriately tailored requirements so that they can continue to build generational wealth and a brighter future for their families and the United States as a whole. As noted in the Proposed Rule, the Act may apply to more than 30 million businesses, and may require reports to be filed by at least two million new businesses every year.[7] Our comments are designed and intended to help FinCEN enact a final rule that is carefully calibrated to meet both goals, and which reflect the Act's mandate to "minimize the burden on reporting companies and to ensure that the information collected is accurate, complete, and highly useful."[8]

EXECUTIVE SUMMARY

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[3] Letter to the Members of the FY21 National Defense Authorization Act Conference Committee, US CHAMBER OF COMMERCE (Dec. 3, 2020), available at https://www.uschamber.com/assets/documents/201203_fy21ndaa_conferees.pdf.

[4] For instance, the Chamber publicly supported the "ILLICIT Cash Act," a precursor to the Corporate Transparency Act, in the summer of 2020. See U.S. Chamber Letter on S. 2563, the ILLICIT Cash Act,

U.S. CHAMBER (June 29, 2020), available at https://www.uschamber.com/improving-government/us-chamber-letter-s-2563-the-illict-cash-act.

[5] The Chamber submitted a comment for consideration on May 5, 2021, available at file:///C:/Users/cohends/Downloads/FINCEN-2021-0005-0168_attachment_1%20(1).pdf.

[6] Id. ("We hope FinCEN will continue to aggressively probe solutions that will meet CTA's requirements…").

[7] 86 Fed. Reg. at 69921, 69939.

[8] 15 U.S.C. § 5336(b)(1)(F)(iii).

In light of our shared goals and the clear directive by Congress to "minimize burdens on reporting companies associated with the collection of [beneficial ownership] information,"[9] we urge FinCEN to refine various aspects of the Proposed Rule. In particular, and as described in more detail below, we recommend the following modifications:

A. The "Other Similar Entities" that are Deemed Reporting Companies Should be Defined Clearly and Narrowly because Minimizing Burdens on Main Street Businesses is Critical.

The term "other similar entity" within the definition of Reporting Company should be defined explicitly and exclusively to include all the legal formations FinCEN believes are subject to the Act. If FinCEN believes that new legal formation types meet the definition of "other similar entity", FinCEN should issue clear guidance to that end, and should provide all such legal entities that are not exempt from the rule a twelve-month safe harbor to file a beneficial ownership report.

B. The Standards for Determining Who is a Beneficial Owner Should be Simple and Easy to Apply.

As currently drafted, the definitions of substantial control and Ownership Interests are too amorphous to be applied reasonably, consistently, and in a cost-effective manner that will provide decision-useful information to FinCEN. These concerns will be compounded if FinCEN uses these definitions to update the Customer Due Diligence (CDD) Rule, because financial institutions will similarly struggle to apply them in a cost-effective and consistent manner. To ensure that Reporting Companies understand who is a beneficial owner and can correctly identify and report such persons' (and only such persons) beneficial ownership information to FinCEN, we recommend various changes. Among others, FinCEN should limit the substantial control test to the CEO, CFO, COO (and their equivalents) and each member of the board of directors or similar governance body. Additionally, an individual should only be considered to exercise substantial control over a Reporting Company if it does in fact do so, rather than merely possess the potential to do so at some point. With respect to Ownership Interests, we urge FinCEN to limit the scope of convertible instruments to instruments immediately convertible to an Ownership Interest. FinCEN should ensure that these or similar changes are carried through to the revised CDD Rule so that financial institutions do not face similar challenges.

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[9] Id.

C. Reporting Companies and Company Applicants Should Only Report Information that the Corporate Transparency Act Requires or Authorizes FinCEN to Collect.

The Proposed Rule should simply, and exclusively, codify the beneficial ownership, Reporting Company, and Company Applicant information that the Act requires. Congress carefully selected the information to be reported as a result of significant negotiations over an extended period of time.[10] As reflected in the statute itself, a critical goal of the Act is to minimize burdens on small businesses by minimizing the scope of information to be reported and to promote strong data security so that small businesses' and their beneficial owners' privacy will be maintained. FinCEN should not expand Congress's mandate and, in the process, further risk the security and privacy of sensitive information about small businesses and their beneficial owners.

D. Reporting Companies Should be Obligated to Update their Reports Only Once They Know or Should Have Known an Update Is Necessary.

Overall, FinCEN's proposed reporting deadlines are appropriate, as they will provide Reporting Companies sufficient time to comply. In particular, the proposed deadlines for filing initial reports (1 year after the rule's effective date for existing Reporting Companies and 14 days for new Reporting Companies) and issuing corrections (14 days after the Reporting Company knew or should have known about the inaccurate information) are reasonable because Reporting Companies will be able to gather the necessary information and prepare the required forms without an undue burden within these time frames. The 30 calendar-day timeline to issue updated reports, including an update indicating that the Reporting Company is now exempt from the Act, is also reasonable. However, to minimize compliance burdens, FinCEN should commence the 30 calendar-day deadline only once a Reporting Company knew or should have known that the information in its report is out-of-date.

E. FinCEN Should Develop a Plan to Coordinate with the IRS, State, Local and Tribal Officials.

The Chamber strongly encourages FinCEN to provide concrete details on the methods through which FinCEN will obtain as much of the information that is required to be reported (and only such information) as possible, and to develop a clear roadmap explaining how FinCEN will establish partnerships with state, local, and Tribal government agencies. Among other things, we urge FinCEN to establish a partnership with the IRS and leverage the existing Form 8821 for this purpose.

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[10] *See, e.g.,* Press Release, "Historic Small Business Data Protections Included in NDAA" (Dec. 3, 2020), available at https://republicans-financialservices.house.gov/news/documentsingle.aspx?DocumentID=407847.

SPECIFIC RECOMMENDATIONS

A. The "Other Similar Entities" that are Deemed Reporting Companies Should be Defined Clearly and Narrowly because Minimizing Burdens on Main Street Businesses is Critical.

i. The Importance of Defining "Other Similar Entities" Clearly

FinCEN should explicitly clarify the meaning of Reporting Company by clearly defining which legal formations constitute an "other similar entity" subject to the Act. We encourage FinCEN to do so because the Act provides little (if any) information based on which non-corporations and non-LLCs can determine whether they are similar to a corporation or LLC, and FinCEN appears to have considered the potential scope of the term.

The Act defines a Reporting Company as a "corporation, limited liability company, or *other similar* entity," provided each such entity is:

> (i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe; or (ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe" (emphasis added).[11]

The Proposed Rule, however, does not define the term "other similar entity." Rather, it defines both a Domestic and Foreign Reporting Company as a "corporation, limited liability company, or *other entity* that is created by the filing of a document with a secretary of state..." (emphasis added).[12] FinCEN "proposes to focus on the act of filing to create the entity as the determinative factor in defining entities besides corporations and limited liability companies that are also reporting companies,"[13] rather than define "other similar entity" because "an unduly narrow interpretation of 'similar entity' could...impede a key objective of the CTA."[14]

The Chamber appreciates FinCEN's concern about impeding key objectives of the Act; however, this proposed approach is problematic because it does not comport with the Act nor provide any guidance to small businesses with alternative structures. The Proposed Rule deletes the word "similar" entirely. By doing so, the Proposed Rule effectively expands the Act to cover all companies that are not explicitly exempt or

[11] 31 U.S.C. § 5336(a)(11)(A)(i-ii).
[12] Proposed 31 CFR 1010.380(c)(1)(i-ii).
[13] 86 Fed. Reg. at 69938.
[14] Id.

subsequently exempt by FinCEN. Congress could have applied the Act to all businesses not expressly exempt by simply leaving out the word "similar" (as FinCEN has done), but it did not do so. Instead, Congress intentionally chose to confine the scope of Reporting Companies to entities that are "similar" to corporations. Thus, defining "similar entity" is critical to effectuating the Act consistently with its purpose and to providing necessary clarity as to its scope.

FinCEN itself appears to implicitly recognize this necessity as it cites several types of legal entities it believes would be subject to the rule as an "other entity" in its explanation of the Proposed Rule:

> [FinCEN] believes the proposed definition of domestic reporting company would likely include limited liability partnerships, limited liability limited partnerships, business trusts (a/k/a statutory trusts or Massachusetts trusts) and most limited partnerships…because such entities appear typically to be created by a filing with a secretary of state or similar office.[15]

Unfortunately, the Proposed Rule itself does not reflect this view. If FinCEN believes that such entities are categorically subject to the Proposed Rule, then the Proposed Rule should codify that expectation. Clearly defining the scope of "other similar entities" subject to the Corporate Transparency Act will minimize burdens on millions of small businesses while ensuring that FinCEN receives beneficial ownership information from Reporting Companies. Minimizing any confusion with respect to which entities are Reporting Companies through clear definitions will avoid unnecessary compliance costs, reduce litigation risk, and minimize extraneous reporting that would burden FinCEN's capacity and capability to monitor suspicious beneficial ownership data.

ii. The Risks of Failing to Define Other Similar Risks Clearly

Leaving the scope of "other similar entity" undetermined will result in confusion, leading to disclosures by entities that are not intended to be covered. If the term is undefined, companies and legal entities that need not apply will do so to avoid any risk of non-compliance.[16] Moreover, if FinCEN does not specify the scope of Reporting Companies, it runs the risk of becoming inundated with too many reports. FinCEN estimates that at least 25 million companies currently in existence will need to report[17]

[15] Id. at 69938–39.

[16] FinCEN estimates that each initial report will cost $45 but does not provide an estimate of the cost to update or correct reports. If an additional 200,000 companies provide reports due to confusion over whether they are "other similar entities" (this would be less than 10% of the expected number of new Reporting Companies formed every year), compliance costs would rise by $9,000,000 annually. FinCEN's IT development and monitoring costs would rise as well.

[17] 86 Fed. Reg. at 69922, n. 8.

and two million new Reporting Companies are projected to be formed every single year.[18] With each such company filing one or more reports every year, the Proposed Rule's lack of precision will lead to millions of additional reports that are not highly useful to FinCEN and, collectively, will cost small businesses tens of millions of dollars to submit.[19]

The ambiguous meaning of "other similar entity" also creates unnecessary risks of noncompliance, resulting in increased enforcement costs and penalties. Many legal entities that are not corporations or LLCs will make a good faith and reasonable determination that they are not Reporting Companies. To the extent these companies fall within FinCEN's current or future expectations, they face implicit material risk of significant civil and criminal penalties, despite a reasonable belief that the Act and its regulations do not apply to them. Such an outcome would be inequitable. As a practical matter, it would put FinCEN in the very difficult position of attempting to enforce an ambiguous rule against tens of millions of businesses located across the country.

Under such conditions, it is foreseeable that many lawsuits will be filed on the basis that the Proposed Rule does not apply to a certain plaintiff or class of plaintiffs, and/or the application of the Proposed Rule to such plaintiffs is arbitrary. Such litigation could take years to resolve, thus tying up significant resources that are better used detecting, deterring, and punishing financial criminals. Such litigation also could lead to a court defining the term, rather than FinCEN doing so.

iii. Recommendations

Our shared goal of more effectively and efficiently deterring and punishing financial crime will be better obtained by enacting a precise and clear rule, one that is not so vulnerable to legal challenge if applied so broadly. To that end, we urge FinCEN to clarify the ambiguous meaning of "other similar entity" under the statute to include all of the legal entities it expects should be covered (and only those entities).

We also urge FinCEN to issue guidance as frequently as needed (and do so publicly) identifying all legal formations that are deemed "other similar entities." Any legal entity that would meet the definition of Reporting Company because of the guidance should have a safe harbor from any violations for not issuing a report prior to issuance of the guidance and should have 1 year to file a report. Such legal entities are essentially in the same position as existing legal entities that will be required to report after the effective date of the Proposed Rule. FinCEN proposed a 1-year period for the latter set of legal entities, so, to promote parity, legal entities subject to the safe harbor also should have 1 year to report.

[18] Id. at 69921
[19] Id. at 59922, n. 8.

B. The Standards for Determining Who is a Beneficial Owner Should be Easy to Apply.

i. The Substantial Control Prong is Too Broad and Amorphous

The Proposed Rule divides individuals who exercise "substantial control" (and thus, are beneficial owners) into four categories, each of which are too broad or amorphous for the purposes of the Corporate Transparency Act. In designing these categories, FinCEN should be mindful of the risk that the lack of precision, simplicity, and clarity will ultimately undermine the utility of FinCEN's beneficial ownership database. The more difficult it is for Reporting Companies to evaluate the scope of individuals who exercise substantial control, the more difficult it will be for them to accurately report their beneficial owners, and the risk of inconsistency in reporting across Reporting Companies will increase.

The first category covers "senior officers,"[20] which are defined as "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."[21] FinCEN is right to specify which officials or equivalents constitute a senior officer to help mitigate confusion (the Chamber agrees that different businesses use different titles for similar roles and that titles should not be determinative); however, the scope of officers selected is too broad. Not all senior officers exercise the same authority over a Reporting Company and thus should not all be treated equally as beneficial owners.

The second category covers any individual who exercises "[a]uthority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors (or similar body)."[22] This formulation appears to be targeted toward a Reporting Company's board of directors, managers, or similar governance body, but the writing is both unclear and amorphous in scope. The meaning of "dominant minority" is unclear as that phrase is both undefined and is not commonly understood in business. Moreover, we are not sure which individuals would have authority over a majority or "dominant minority" of a board of directors (or similar governance body), which in turn would make it very difficult for Reporting Companies to assess who (if anyone) to report as a beneficial owner under this provision. We also note that the category appears to apply to at least certain senior officers (for instance, many CEOs can appoint or remove a senior officer), which would be duplicative.

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[20] Proposed 31 CFR 1010.380(d)(1)(i).
[21] Proposed 31 CFR 1010.380(f)(8).
[22] Proposed 31 CFR 1010.380(d)(1)(ii).

The third category applies to any individual who exercises "[d]irection, determination, or decision of, or substantial influence over, important matters affecting the reporting company, including but not limited to" a wide range of business operations, including mergers and acquisitions; major investments; and the selection or termination of business lines."[23] This category is complex and will be complicated to evaluate. It would be helpful to better understand who, if anyone, FinCEN believes this category would cover. We are concerned that this category will result in confusion and misreporting since key executives and board members are already defined as beneficial owners and employees are exempt. As a result, Reporting Companies will be obligated to spend additional time, labor, and funds to evaluate the litany of areas covered in the category, and may need to do so every time one of the specified activities arises or new personnel are on-boarded, but FinCEN is unlikely to receive any new useful information. To the extent it does capture any new persons, we are concerned that it would cover middle management (if possible, in light of the statutory exemption for employees). Such persons, however, are clearly not beneficial owners. In either event, the costs seem to far outweigh the benefits.

The fourth category is simply a catch all provision.[24] Catch all provisions are inherently vague and difficult to follow. Given that Congress has directed FinCEN to minimize burdens on Reporting Companies, we are concerned by the broad and undefined nature of this category. Moreover, the catch all provision would dilute the usefulness of the reported information by inundating FinCEN with information about persons that Congress did not intend. Voluminous and irrelevant information will obscure decision-useful information while increasing reporting burdens on Reporting Companies as well as increasing data management and security costs for FinCEN. Although maintenance of and access to FinCEN's database is outside the scope of this particular Proposed Rule, FinCEN should bear in mind these risks as they will be compounded by the challenge of securely maintaining a database of millions of personally identifying, sensitive records.

Similar risks arise if FinCEN proceeds with its proposal to assume that any individual who has the right or ability to exercise substantial control does in fact exercise substantial control.[25] The Act, on its face, applies only to individuals who exercise control, not to individuals who could exercise substantial control, so the Chamber is concerned that this assumption is beyond the scope of the Act.[26] Moreover, persons who might be able to exercise substantial control are categorically different

[23] Proposed 31 CFR 1010.380(d)(1)(iii).
[24] Proposed 31 CFR 1010.380(d)(1)(iv).
[25] Proposed 31 CFR 1010.380(d)(2).
[26] The Act states that a beneficial owner includes an individual who "exercises substantial control over the entity." 31 U.S.C. § 5336(a)(3)(A)(i).

than those who do because they are actually involved in determining the conduct of the Reporting Company.

These concerns apply with respect to the CDD Rule and would be compounded if FinCEN applies this same ambiguous definition of substantial control when it issues conforming amendments to the CDD Rule. As discussed, Reporting Companies will struggle to accurately and consistently identify all persons who meet the substantial control prong and compliance will be expensive. If this definition is applied to the CDD Rule, financial institutions would bear significant costs to comply, and compliance would still be uncertain as financial institutions are even less well positioned than Reporting Companies to make these determinations. Continuing to apply the CDD Rule on an account-opening basis in combination with this ambiguous, far-reaching definition of substantial control would be onerous. As a result, financial institutions could provide services to fewer persons and would roll those services out more slowly.

ii. Recommendations

To avoid the various risks, costs, and other concerns raised in this section, we propose a few ways that FinCEN could streamline and clarify the meaning of "substantial control." First, we recommend that FinCEN limit the scope of category one to the officers that are truly in charge of a business. To that end, we suggest limiting the definition to Chief Executive Officers, Chief Operations Officers, and Chief Financial Officers (or their equivalents if different titles are used). Second, we encourage FinCEN to streamline and clarify category two by limiting it to the actual members of a Reporting Company's board of directors or managers (or similar governance body. Such persons are easily identifiable and are a logical choice given their role in a Reporting Company. Third, we recommend removing categories three and four. The costs to comply with these amorphous categories will outweigh the benefits, and our proposed definitions for categories one and two will cover individuals intended to be covered in these categories. Fourth, FinCEN should not expand the scope of the Act to cover persons that could potentially exercise substantial control, but do not do so. Only individuals who actually exercise substantial control over a Reporting Company constitute a beneficial owner by the Act's own text and only such persons will be relevant to FinCEN since they (and only they) actually exercise substantial control. Fifth, FinCEN should make consistent conforming definitions to the CDD Rule as financial institutions would be unable to comply effectively if this definition of substantial control were adopted. Sixth, FinCEN should strongly consider updating the CDD Rule to apply on a customer basis rather than an account basis. Applying CDD obligations on an account basis imposes redundancies and material administrative costs, but it does not improve financial institutions' risk management capabilities. In contrast, a customer basis for CDD would be more efficient, easier to implement, and would provide the relevant information.

iii. The Ownership Interest Prong Should Not Include Interests that are Not Immediately Convertible

The Chamber appreciates FinCEN's efforts to clarify the meaning of Ownership Interests as the Act itself does not provide a definition. A clear and complete definition, as FinCEN has sought to provide, is a welcome proposal. Of the five proposed categories of Ownership Interests, we do not raise any particular concerns about the first three categories.[27] For clarity, these three categories are:

> (A) Any equity, stock, or similar instrument, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, interest in a joint venture, or certificate of interest in a business trust, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or represents voting or non-voting shares;
>
> (B) Any capital or profit interest in a limited liability company or partnership, including limited and general partnership interests;
>
> (C) Any proprietorship interest;

The proposed scope of the fourth and fifth categories is overly expansive, however.[28] These two categories cover:

> (D) Any instrument convertible, with or without consideration, into any instrument described in paragraph (d)(3)(i)(A), (B), or (C) of this section, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described in paragraph (d)(3)(i)(A), (B), or (C) of this section, regardless of whether characterized as debt; or
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> (E) Any put, call, straddle, or other option or privilege of buying or selling any of the items described in paragraph (d)(3)(i)(A), (B), (C), or (D) of this section without being bound to do so.

Only instruments that are immediately convertible should be covered as only such instruments are, for the purposes of exercising control, equivalent to equities, stocks, proprietorship interests and the other ownership interests described in the first three categories. Instruments that are convertible contingent exclusively on future trigger events do not provide the holder an equivalent Ownership Interest. Thus, they should

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[27] Proposed 31 CFR 1010.380(d)(3)(i)(A-C).
[28] Proposed 31 CFR 1010.380(d)(3)(i)(D-E).

not be treated as if they were beneficial owners. Including investors with such rights as beneficial owners may discourage such investors from deploying scarce capital. This concern ties in with our concern about assuming anyone who could exercise substantial control or own or control Ownership Interests does in fact do so. The statute (appropriately) applies only to persons who own or control Ownership Interests, not those who might be able to. Preserving this distinction is important to faithfully executing the statute and limiting compliance burdens.

FinCEN should also bear in mind the potential adverse effects frequent reporting could have on small companies seeking investors. If the scope of Ownership Interests is not tailored appropriately, small businesses could be required to report personally identifiable information for several investors. As investors cycle in and out, more information will need to be obtained and reported, and the risk of inadvertent disclosure rises. These risks and operational burdens could be a deterrent to seeking needed capital, or at least reduce the value of such capital.

iv. Recommendations

To apply the Act fairly, the Chamber recommends that the Proposed Rule's Ownership Interest prong apply only to categories A-C and instruments that are immediately convertible. This modification will promote parity among owners of a Reporting Company, will be easy to comply with, and will minimize the risk of discouraging various financing arrangements with investors who do not intend to be beneficial owners. FinCEN should also review the definitions of "directly or indirectly owning or controlling Ownership Interests." Some of the examples, particularly the second example ("through control of such ownership interest owned by another individual") may be too ambiguous or redundant to be constructive.

C. Reporting Companies and Company Applicants Should Only Report Information that the Corporate Transparency Act Requires or Authorizes FinCEN to Collect.

i. Proposed Expanded Information on Reporting Companies

While the Chamber appreciates FinCEN's practical need for sufficient information to correctly identify any given Reporting Company, we are concerned that the Proposed Rule would require Reporting Companies to disclose information about themselves that is not required by the Act, and the Act does not authorize FinCEN to impose this requirement. The Proposed Rule would require Reporting Companies to provide their legal name, all trade names, the address of their principal place of business, their jurisdiction of formation, and their TIN (or DUNS or LEI number, if no TIN has been issued).[29] The Act does not, as FinCEN recognizes, require any of this

[29] Proposed 31 CFR 1010.380(b)(1)(i).

information, and it is not clear to us that the Act necessarily implies that FinCEN may demand such information.[30]

This is a critical principle that we hope FinCEN applies to the final rule as well as to the two proposed rulemakings that will follow this Proposed Rule. Congress carefully selected what information should be disclosed, and there are many risks attendant to data collection, risks that should not be amplified. When FinCEN considers how to modify the CDD Rule to conform to the Act, we urge FinCEN to refrain from requiring or incentivizing financial institutions from obtaining information about their customers that is not required by the Act. Instead, FinCEN should, in its subsequent rulemakings, focus on ensuring the security and reliability of its database as well as the accuracy of the information required to be housed in it.

ii. Recommendations

To address FinCEN's concerns about accurately identifying a Reporting Company, the Chamber suggests that Reporting Companies provide their legal name and their TIN, DUNS, or LEI number. These two pieces of information are adequate to verify the Reporting Company's identity and to meet FinCEN's need to catalogue reports from a specific Reporting Company. Limiting the information collected about Reporting Companies in this manner would also reduce data privacy and security risks as well as minimize the amount of information housed in FinCEN's to-be-established database.

We commend FinCEN for including a clear directive that a Reporting Company may not report the beneficial ownership information of an exempt entity and that entity's beneficial owners if the exempt entity is a beneficial owner of the Reporting Company by virtue of direct or indirect control of 25 percent or more of the Reporting Company's Ownership Interests. This directive, which is explicitly included in the Act,[31] is an important addition to the rulemaking because it proactively mitigates risks that beneficial ownership information of exempt entities is nonetheless disclosed because of lawful corporate relationships with Reporting Companies via exempt entities. Moreover, expressly including this exemption will reduce the risk that FinCEN will obtain information that is, by statute, already determined to be unhelpful in addressing the national security risks posed by certain shell companies. Precluding such disclosures will further minimize risks of possible data breaches and unwieldy data management, as well as reduce unnecessary administrative burdens to companies and beneficial owners intentionally excluded from the statute. Accordingly, FinCEN should maintain this provision in the final rule.

FinCEN should also consider expanding this requirement to any exempt entities that exercise "substantial control" over a Reporting Company. As written, the directive

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[30] See 86 Fed. Reg. 69931.
[31] 31 U.S.C. § 5336(b)(2)(B).

applies only where an exempt company is a beneficial owner of a Reporting Company by virtue of direct or indirect ownership or control over 25 percent or more of the Reporting Company's ownership interests. It does not appear to apply to the exact same exempt entity if that entity exercised "substantial control" over the Reporting Company but did not own or control a sufficient percentage of Ownership Interest. Expanding this directive accordingly would serve the same purpose and would create appropriate parity. FinCEN may do so under its exemptive authority under the Act.

D. <u>Reporting Companies Should be Obligated to Update their Reports Only Once They Know or Should Have Known an Update Is Necessary.</u>

i. A Reasonableness Standard Would Promote Compliance Without Creating Inequitable Outcomes

FinCEN is right to focus on measures that would ensure the accuracy and reliability of its beneficial ownership database. As subsequent rulemakings will focus on these issues, the Chamber does not focus on them in this letter. However, we note our shared desire for the repository to be up-to-date as quickly as reasonable and to be accurate so that FinCEN and other authorized users can rely on it.

As an initial matter, we believe that FinCEN's proposed reporting deadlines are appropriate, as they will provide Reporting Companies sufficient time to comply. In particular, the proposed deadlines for filing initial reports and issuing corrections are reasonable. The 30 calendar-day timeline to issue updated reports, including an update indicating that the Reporting Company is now exempt from the Act, is also reasonable. This approach is preferable to periodic reporting because periodic reporting does not provide FinCEN with decision-useful information; rather, timely reporting of updated information is helpful.

We also agree with FinCEN that requiring (1) existing companies that are either expressly exempt from the Act or do not meet the definition of Reporting Company and (2) new companies that, at the time of formation, are not covered by the Act to submit a report or other form declaring that they are not subject to the Act would be a poor use of resources. Such a requirement would be unnecessary and FinCEN would receive millions of documents that would not help FinCEN detect financial crimes but would nonetheless need to be safeguarded. The practical burdens for FinCEN and non-Reporting Companies are more than enough reason to forego any such obligation.

ii. Recommendations

To minimize compliance burdens and to avoid inequitable outcomes, FinCEN should commence the 30calendar-day deadline only once a Reporting Company knew or should have known that the information in its report is out-of-date. A reasonableness standard for determining when the 30-calendar day period starts is appropriate, as it would reduce unnecessary liability without undermining FinCEN's need for up-to-date information. It also would reduce the window in which bad actors may seek to abuse the rules (including their ability to deploy "shelf companies").[32] A reasonableness standard, which FinCEN appropriately uses with respect to corrected reports, is important, because small business' beneficial owners are unlikely to make them quickly aware of relevant changes (such as a change in address). Thus, such businesses may fail to meet the 30-calendar day requirement because it was not reasonable for them to know that the countdown had started. Common law regarding the commencement of statutes of limitations/causes of actions is almost always triggered by a reasonableness standard to avoid inequitable outcomes, so there is a long-standing practice to consider.

Moreover, the policy considerations animating the need for updating information and correcting inaccurate information quickly are the same. In both cases, FinCEN needs to receive new information to maintain the accuracy and usefulness of its database. A reasonableness standard is appropriate for both, as it would encourage Reporting Companies in both situations to comply quickly (thus maintaining the accuracy and usefulness of FinCEN's database) without creating an unfair burden on Reporting Companies. FinCEN appropriately proposes a reasonableness standard for correcting inaccuracies and should do so with respect to updating reports.

E. FinCEN Should Develop a Plan to Coordinate with the IRS, State, Local and Tribal Officials.

i. Leveraging Existing Federal, State, Local, and Tribal Processes is a Critical Missing Element of the Proposed Rule

We are disappointed that the Proposed Rule does not describe FinCEN's plans to establish partnerships with state, local, and tribal agencies nor a process for collecting required information via existing federal, state, and local procedures, despite the Act's clear requirement that FinCEN do so "to the greatest extent possible."[33] Such partnerships and procedures are essential to executing the explicit directives of the statute, minimizing burdens on Reporting Companies, and enabling FinCEN to obtain all of the information necessary under the Act as federal, state, local and Tribal government entities possess much (if not all) of the beneficial ownership information through various documents. FinCEN should do as much as it can to obtain relevant information (and only such information) from government and Tribal agencies, rather than obligate Reporting Companies to make duplicative filings.

[32] FinCEN discusses this concern on page 69940 of the Federal Register publication.
[33] 31 U.S.C. § 5336(b)(1)(F)(i-ii).

ii. Recommendations

In the course of revising the Proposed Rule, the Chamber strongly encourages FinCEN to provide concrete details on the methods through which FinCEN will obtain as much of the information that is required to be reported (and only such information) as possible, and to develop a clear roadmap explaining how FinCEN will establish partnerships with state, local, and Tribal government agencies.

With respect to information sharing by other government entities, like the IRS, we understand FinCEN's stated concerns that applicable law might not allow FinCEN to access such information. However, as discussed in our comment letter to the ANPR:

> A FinCEN partnership with the IRS will capitalize on the familiarity small businesses have with our nation's tax and reporting agency and will ensure consistency in annual reporting requirements....Small businesses are already familiar with Form 8821 which allows third-party access to taxpayer filings for the purposes of providing financial services and authenticating identity, credit worthiness, and other information necessary for financial transactions.

Leveraging Form 8821 should alleviate FinCEN's concerns while comporting with the Act.

With respect to the practical challenges of establishing partnerships with state, local, and Tribal government agencies, a written roadmap can help identify issue areas and potential solutions. For instance, we understand that such counterparts have raised concerns about cost and their access to fragmented or incomplete beneficial ownership information. To that end, FinCEN should coordinate with the states' Secretaries of State, the IRS, SROs, and other relevant agencies to develop an efficient transmittal system that draws on multiple types of documents filed with state and local governments. Obtaining as much of the required information as possible from federal, state, and local governments, while reducing burdens on the tens of millions of Main Street businesses subject to the Act will improve the accuracy of FinCEN's database. Drawing on existing filings, even if they do not cover 100 percent of the required information, would benefit FinCEN and Reporting Companies.

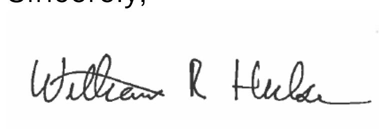
Let us not make the perfect the enemy of the good. To the extent there are any identified legal limitations for leveraging existing government processes and procedures, FinCEN should consider the tools available to it to address such limits. Let us also not shift burdens to small businesses, who are far less capable of bearing additional costs than FinCEN. We believe that FinCEN has the resources and authority to develop effective partnerships and should focus additional efforts on doing so.

CONCLUSION

It is critical that American businesses and the U.S. financial system are protected from money laundering, terrorist and illicit finance, and other financial crimes that pose national security risks. The Chamber supports FinCEN in its efforts to address these threats and to comply with its statutory obligation to enact rules implementing the Corporate Transparency Act to address such threats. However, FinCEN will only be successful in this endeavor and in compliance with its statutory directives if the final rules are carefully calibrated to target bad actors. To that end, FinCEN's rules should be clear and easy to apply; they should not cast a wide net that imposes challenging, ambiguous, and unnecessary compliance burdens on America's small businesses.

Our recommendations are designed to address these concerns so that FinCEN will be able to obtain highly useful information and American businesses and investors can continue to build our economy. Thank you for your attention to these important matters. Please do not hesitate to contact me if you have any questions or if the Chamber could provide any additional assistance.

Sincerely,



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