



Robert C. Lanham, Jr, President
Dan K. Fordice, III, Senior Vice President
Lester C. Snyder, III, Vice President
Jeffrey L. DiStefano, Treasurer
Stephen E. Sandherr, Chief Executive Officer
Jeffrey D. Shoaf, Chief Operating Officer

February 7, 2022

VIA ELECTRONIC SUBMISSION
www.regulations.gov

Himamauli Das
Acting Director, Financial Crimes Enforcement Network (FinCEN)
Policy Division, FinCEN
P.O. Box 39
Vienna, VA 22183

RE: Notice of Proposed Rulemaking titled "Beneficial Ownership Information Reporting Requirements" Docket Number FINCEN-2021-0005 and RIN 1506-AB49

Dear Acting Director Das,

On behalf of the Associated General Contractors of America (AGC), I respectfully submit the following comments in response to the notice of proposed rulemaking concerning beneficial ownership information (BOI) reporting requirements (referred to as the "proposed regulations").

The Associated General Contractors of America (AGC) is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings and industrial facilities, highway and public transportation infrastructure, water and wastewater systems, flood control and navigation structures, defense installations, multi-family housing, and more. The construction industry has played a powerful role in sustaining economic growth in the United States, in addition to producing structures that add to productivity and quality of life.

AGC has serious concerns about the necessity and consequences of the mass collection of personally identifiable information by FinCEN to store in a database that can be accessed by nearly 18,000 law enforcement agencies across the country, including some without a warrant.¹ As such, AGC opposed passage of the *Corporate Transparency Act* included in the *William (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*. While the underlying statute

¹ 31 USC § 5336(c)(B)(i)(I) and (II) allow FinCEN to disclose BOI to "Federal agenc[ies] engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity," and to "State, local, or Tribal law enforcement agenc[ies] if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation" respectively. According to the U.S. Department of Justice *National Sources of Law Enforcement Employment Data*, "Law enforcement in the United States is made up of about 18,000 federal, state, county, and local agencies."

remains problematic, in many ways the proposed regulations actually go *further* than required by law, calling for additional information not required by statute, and shortening prescribed grace periods for furnishing information.

At the heart of FinCEN’s proposed regulation is an imbalance between the convenience of law enforcement, national security and intelligence agencies, and the inconvenience of regulated businesses. The proposed regulation’s preamble spends a great deal of time outlining the challenges law enforcement face in conducting “time consuming”² investigations, and how FinCEN expects the collection of BOI to “reduce the amount of time currently required to research who is behind anonymous shell companies.”³ The preamble does not, however, even acknowledge an equally significant, if not greater, challenge facing American businesses on a daily basis: cybercrime and identity theft.

According to the Department of Justice Bureau of Justice Statistics, in 2018 (most recent data available) about nine percent of persons age 16 or older had been victims of identity theft during the prior 12 months, with monetary losses totaling \$15.1 billion.⁴ This number is expected to increase substantially over time. Increasingly, construction companies are now faced with having to purchase expensive cyber insurance with identity theft coverage to combat the daily onslaught attacks on their internal systems.

While FinCEN does an admirable job estimating the regulatory cost of the paperwork burden associated with the proposed regulations, it does not estimate, or even acknowledge, that through the process of FinCEN collecting personally identifiable information from companies’ beneficial owners, hundreds, if not thousands of individuals will be subject to identity theft. Already, AGC has heard about companies receiving unsolicited emails from scammers, offering to help companies get into compliance with the *Corporate Transparency Act* and soliciting their employees’ personal—and sensitive—information. This illicit activity will undoubtedly increase as awareness of companies’ disclosure obligations becomes more widespread, and will follow a well-worn path of fraud blazed by criminals claiming to represent the Internal Revenue Service (IRS) or Social Security Administration (SSA).⁵

Additionally, while AGC expects FinCEN to take every precaution to ensure that its database of BOI is secure, any database—especially one that can be accessed by nearly 18,000 distinct entities—will face security vulnerabilities. In recent years, high profile breaches of sensitive federal databases such as the 2015 exfiltration of personnel files from the Office of Personnel Management (OPM), the 2020 “SolarWinds” hack of multiple federal Departments and Agencies, and the high

² 86 *Fed. Reg.* 69926, col. 3: “The process of obtaining BOI through grand jury subpoenas and other means can be time consuming and of limited utility in some cases. Grand jury subpoenas, for example require an underlying grand jury investigation into a possible violation of law.” Some might argue that this is an important procedural safeguard to protect the innocent.

³ 86 *Fed. Reg.* 69926, col. 2.

⁴ Available at: <https://bjs.ojp.gov/library/publications/victims-identity-theft-2018>

⁵ See IRS Tax Tip 2022-15 *Taxpayers beware: Tax season is prime time for phone scams*. See also: <https://www.ssa.gov/scam/>

profile (unlawful) release of thousands of Suspicious Activity Reports (SARs) from FinCEN itself,⁶ reinforce the view that no database is fully secure, and that the BOI database will become a prime target of hackers and/or governmental employees “blinded by [their] own apparent sense of self-righteousness.”⁷

While FinCEN is obligated to comply with the statutory language of the *Corporate Transparency Act*, in balancing the competing interests of law enforcement and regulated businesses, the proposed regulations consistently side with disclosing *additional* information from *additional* individuals. AGC makes the following recommendations to take some small steps towards rebalancing the interests of law enforcement and reporting companies:

- 1) FinCEN Should Make Explicit Any Penalties Associated with Fraudulently Obtaining BOI, and Hold Victims of Fraud Harmless
- 2) FinCEN Should Publicly Commit to Pay for Identity Theft Monitoring to Any Individual(s) Harmed by Unauthorized Disclosure of BOI
- 3) FinCEN Should Limit Collection of BOI to That Which is Required by Statute
- 4) FinCEN Should Lengthen the Deadlines for Businesses to Report BOI to FinCEN
- 5) FinCEN Should Allow Submission of BOI Through the Mail and Make Explicit that Submissions Are Considered On-Time if Postmarked by the Due Date
- 6) FinCEN Should Make Explicit that BOI Submitted as Part of a Bid for a Federal Contract is Redundant
- 7) FinCEN Should Clarify That Employees Participating in an Employee Stock Ownership Plan (ESOP) Are Not Beneficial Owners

FinCEN Should Make Explicit Any Penalties Associated with Fraudulently Obtaining BOI, and Hold Victims of Fraud Harmless

As noted earlier, AGC expects some business owners to become victims of identity theft and fraud because of the new BOI reporting requirements. Unfortunately, such scams are commonplace with, for example, the Internal Revenue Service and Social Security Administration. In such a scenario, a well-intentioned business owner could unwittingly send their BOI to an impostor with the expectation that the impostor would submit their BOI to FinCEN on their behalf, and thus

⁶ See: <https://www.buzzfeednews.com/article/jasonleopold/fincen-files-financial-scandal-criminal-networks>. “The unauthorized disclosure of SARs is a crime that can impact the national security of the United States, compromise law enforcement investigations, and threaten the safety and security of the institutions and individuals who file such reports,” *Statement by FinCEN Regarding Unlawfully Disclosed Suspicious Activity Reports* available at: <https://www.fincen.gov/news/news-releases/statement-fincen-regarding-unlawfully-disclosed-suspicious-activity-reports>.

See also: June 3, 2021 Press Release by DOJ U.S. Attorney’s Office for the Southern District of New York: “Audrey Strauss, the United States Attorney for the Southern District of New York, announced that NATALIE MAYFLOWER SOURS EDWARDS...a former Senior Advisor at the Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”), was sentenced to six months in federal prison for unlawfully disclosing Suspicious Activity Reports (“SARs”) and other sensitive information” available at: <https://www.justice.gov/usao-sdny/pr/former-senior-fincen-employee-sentenced-six-months-prison-unlawfully-disclosing>

⁷ See *A Former Treasury Official Was Sentenced To 6 Months In Prison For Giving Documents To BuzzFeed News*, available at <https://www.buzzfeednews.com/article/davidmack/fincen-natalie-mayflower-sours-edwards-sentencing>, quoting prosecutors, “blinded by her own apparent sense of self-righteousness, the defendant remains unwilling to acknowledge the gravity of what she did.”

unknowingly be out of compliance with their responsibilities under the *Corporate Transparency Act*.

AGC recommends that the proposed regulations include an additional section that makes explicit any penalties associated with unlawfully and/or fraudulently obtaining BOI by means of impersonating a service provider or agent of the government.⁸ AGC also recommends holding harmless any victims of BOI fraud from the penalties associated with failure to timely submit BOI to FinCEN.

FinCEN Should Publicly Commit to Pay for Identity Theft Monitoring to Any Individual(s) Harmed by Unauthorized Disclosure of BOI

The Corporate Transparency Act authorizes “such sums as may be necessary” to be appropriated to implement the legislation. As such, and as part of the proposed regulations, FinCEN should publicly commit to pay for credit monitoring and identity theft protections for any victims of unauthorized BOI disclosure, either through an unauthorized data breach, or through unauthorized disclosure of BOI from an agent or employee of the government.

This would mirror the commitment made by Congress and multiple Administrations to provide at least 10 years of protective services for victims of the 2015 OPM data breach.⁹ It would also ease the fears of reporting companies that they could, by providing BOI to FinCEN, become victims of identity theft. AGC believes that such a commitment would increase voluntary compliance, and “ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful.”¹⁰

FinCEN Should Limit Collection of BOI to That Which is Required by Statute

The *Corporate Transparency Act* requires that reporting companies submit to FinCEN, for each beneficial owner, their (i) full legal name; (ii) date of birth; (iii) current, as of the date on which the report is delivered, residential *or* (emphasis added) business street address; (iv)(I) unique identifying number from an acceptable document; or (II) FinCEN identifier.¹¹

As such, FinCEN does not have the authority to request (through voluntary means or otherwise) information that goes above and beyond what the statute requires, such as what is proposed in 31 CFR 1010.380(b)(1) (the “Initial report”). This includes requiring reporting companies to provide a residential street address rather than a business street address; a scanned copy of beneficial owners’ driver’s license, passport, or other identification; or a taxpayer identification number (TIN), or TIN alternatives (Dunn & Bradstreet Data Universal Numbering System Number, or Legal Entity Identifier).

⁸ See, for example, 18 USC § 912: “Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.”

⁹ See: <https://www.usaspending.gov/award/76586417>

¹⁰ 31 USC § 5336 (b)(4)(B)(ii)

¹¹ 31 USC § 5336 (b)(2)(A)

Reducing the amount of information required to be submitted to FinCEN by reporting companies will promote better compliance and reduce opportunities for fraud.

FinCEN Should Lengthen the Deadlines for Businesses to Report BOI to FinCEN

The proposed regulations substantially reduce the length of time allowed in statute for reporting companies to furnish BOI to FinCEN.

Existing reporting companies are asked to file their initial reports “one year from the effective date of the final regulations,”¹² while the statute allows for up to “2 years after the effective date of regulations.”¹³ AGC anticipates that there will be significant challenges for both FinCEN and Secretaries of State to communicate with all non-exempt reporting companies about their obligations to furnish BOI to FinCEN, and ask that FinCEN follows the implicit statutory guidance by allowing for 2 years to furnish their initial reports.

Additionally, the proposed regulations ask reporting companies to furnish an *updated report* to FinCEN within 30 calendar days,¹⁴ when the statute allows for up to “1 year after the date on which there is a change with respect to any information.” AGC is concerned that, unless prompted, it will not occur to the beneficial owners of a reporting company to report any changes in beneficial ownership to FinCEN in the normal course of running their business. AGC strongly recommends that FinCEN explore the possibility of adding a prompt to appropriate business tax returns (such as for forms 1120, 1120-S, or 1065) asking owners if they experienced a change in beneficial ownership in the past year. The link between BOI and tax returns is already connected by virtue of the fact that a reporting company is exempt from furnishing BOI if the company exceeds \$5,000,000 in gross receipts or sales on “IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120-S, IRS Form 1065, or other applicable IRS form”.¹⁵ AGC believes that including a prompt or reminder to business owners to consider any changes in ownership that occurred over the previous 12 months, as part of the tax filing process, will improve compliance, and accuracy of FinCEN’s BOI database.

Regardless of any coordination with the IRS, FinCEN should defer to the implicit statutory guidance and allow for up to one calendar year for reporting companies to furnish an updated report to FinCEN.

FinCEN Should Allow Submission of BOI Through the Mail and Make Explicit that Submissions Are Considered On-Time if Postmarked by the Due Date

The preamble of the proposed regulations states that:

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

¹² 31 CFR § 1010.380(a)(1)(iii)

¹³ 31 USC § 5336(b)(1)(B)

¹⁴ 31 CFR § 1010.380(a)(2)

¹⁵ 31 CFR § 1010.380(c)(xxi)(C)

beneficial ownership information, and a third to revise the existing CDD 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.¹⁶

It is unclear from the proposed regulations if FinCEN intends to allow reporting companies to submit BOI via a paper form (i.e. a “hard copy”), or if FinCEN intends to limit the submission through electronic means only. It is also unclear if this issue will be addressed in future rulemakings, or if this was an oversight of the proposed regulations.

Regardless, AGC strongly recommends allowing for a “mail-in” option for reporting companies. Furthermore, AGC recommends that FinCEN make explicit that a reporting company will be considered in compliance with the deadlines associated with filing an initial report, updated report, or corrected report, based on the postmarked date. This would mirror the IRS “postmark rule” whereby a tax return is considered filed on time if the envelope is properly addressed, has enough postage, is postmarked, and is deposited in the mail by the due date.¹⁷

FinCEN Should Make Explicit that BOI Submitted as Part of a Bid for a Federal Contract is Redundant

The preamble of the proposed regulations state:

FinCEN recognizes that the CTA requires the Administrator for Federal Procurement Policy to revise the Federal Acquisition Regulation maintained under 41 U.S.C. 1303(a)(1) to require any contractor or subcontractor that is subject to the reporting requirements of the CTA and proposed rule to disclose the same information to the Federal Government as part of any bid or proposal for a contract that meets the threshold set in 41 U.S.C. 134. (195) FinCEN would collaborate with the Administrator for Federal Procurement Policy and other Government agencies as necessary to reduce, to the extent possible, any duplication of the CTA requirements. Additionally, Section 885 of the NDAA includes a separate beneficial ownership disclosure requirement in the database for federal agency contract and grant officers.¹⁸

AGC represents many federal contractors, and appreciates FinCEN acknowledging the potential for them to be subject to duplicative requirements for disclosing BOI. To the extent practicable, AGC encourages FinCEN and the Administrator for Federal Procurement Policy to ensure that federal contractors (or subcontractors) submitting BOI as part of the procurement process have satisfied their obligation to disclose BOI, barring any changes in ownership that would require the reporting company to submit an updated report.

¹⁶ 86 Fed. Reg. at 69921, col. 2

¹⁷ See IRS *Topic No. 301 When, How, and Where to File*, available at <https://www.irs.gov/taxtopics/tc301>

¹⁸ 86 Fed. Reg. at 69953, col. 1

FinCEN Should Clarify That Employees Participating in an Employee Stock Ownership Plan (ESOP) Are Not Beneficial Owners

According to the National Center for Employee Ownership (NCEO), there are approximately 6,482 ESOPs in the United States covering 13.9 million participants, of whom 10.2 million are active participants. In the construction industry, ESOPs are an important and popular succession planning tool, with construction firms accounting for 15 percent of all ESOP companies.¹⁹

ESOPs present a unique set of circumstances that could make compliance with the proposed regulations challenging. Under an ESOP, the employees' ownership interest is represented by a trustee. While the trustee may exercise "substantial control" as defined in the proposed regulations, it is unlikely, however, that individual employees participating in the ESOP can exercise substantial control acting on their own.

AGC recommends that FinCEN revise the proposed regulations to note that, for the purposes of furnishing BOI under the proposed regulations, a reporting company will be considered to have satisfied its reporting requirements by furnishing the name of the ESOP trustee (with an exception for rare or unusual circumstances) rather than having to submit names and identifying information of all the participants in the ESOP.

Conclusion

On behalf of AGC, thank you for considering our comments on the proposed regulations. AGC hopes that FinCEN will consider these suggestions to balance the needs of construction firms and the needs of law enforcement. If you have any questions please direct them to Matthew Turkstra, Senior Director, Building and Infrastructure Finance at 202-547-4733, or matthew.turkstra@agc.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Turkstra". The signature is written in a cursive, slightly slanted style.

Matthew Turkstra
Senior Director, Building and Infrastructure Finance

¹⁹ See <https://www.nceo.org/articles/employee-ownership-by-the-numbers>