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May 5, 2021

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: *Beneficial Ownership Information Reporting Requirements* (Docket Number FINCEN-2021-0005; RIN 1506-AB49)

To whom it may concern:

The Signatory Wall & Ceiling Contractors Alliance ("SWACCA") appreciates the opportunity to comment on discreet issues raised in the Advance Notice of Proposed Rulemaking ("ANPRM") [1] issued by the United States Treasury Department's Financial Crimes Enforcement Network ("FinCEN"). We hope our comments will inform the implementation of the Corporate Transparency Act ("CTA") signed into law as part of the National Defense Authorization Act for Fiscal Year 2021.[2]

SWACCA is a national, 501(c)(6) non-profit trade association that advocates for the interests of union-signatory wall and ceiling construction industry employers. SWACCA represents approximately 400 wall and ceiling construction employers – including many of the largest employers in our industry – who perform commercial framing, drywall, and interior systems work nationwide. Our contractors employ thousands of carpenters, drywall finishers, plasterers, and other skilled building trades professionals throughout the United States. They accept responsibility for providing family-sustaining wages and benefits and abiding by labor and employment standards, workers' compensation laws, and unemployment insurance requirements. SWACCA is a voice for these responsible, law-abiding entrepreneurs competing in construction markets across America on the basis of quality services, efficient execution, and the thoughtful implementation of training and innovation.

The anti-money laundering reporting regime in the CTA is as unfamiliar to SWACCA and its members as many aspects of the construction industry are to FinCEN. This rulemaking is an opportunity for your agency and our Association to better understand each other and to collaborate to maximize the benefits and minimize the unintended consequences of CTA implementation. To this end, our comments focus primarily on two questions in the ANPRM as outlined in more detail below.

Question 37 Concerning the Term "Appropriate Regulatory Agency"

Question 37 of the ANPRM states: "One category of authorized access to beneficial ownership information from the FinCEN database involves "a request made by a Federal functional regulator or other appropriate regulatory agency." It

[1] *Beneficial Ownership Information Reporting Requirements*, 86 Fed. Reg. 17557 (April 5, 2021), *available at* https://www.govinfo.gov/content/pkg/FR-2021-04-05/pdf/2021-06922.pdf.
[2] National Defense Authorization Act for Fiscal Year 2021, P.L. 116-283 (2021).

goes on to request comment on how the term "appropriate regulatory agency" should be interpreted.

The term "appropriate regulatory agency" should be interpreted by regulation as a natural outgrowth of the authority federal agencies have to clarify undefined terms in statutes Congress directs them to implement. In defining this term, SWACCA suggests that FinCEN carefully consider the specific criminal conduct Congress enumerated in the legislative findings section of the CTA as offenses it hoped to ameliorate with this law. These include, among others, serious tax fraud, human trafficking, and money laundering. Given this, SWACCA requests that FinCEN extend the term "other appropriate regulatory agency" to include all federal, state, and local regulatory agencies engaged in investigations of serious tax and payroll fraud through the misclassification of workers as independent contractors—especially in the construction industry. Misclassification involves not only the theft of workers' wages, but also serious tax fraud against federal, state, and local tax authorities, as well as unemployment insurance and workers' compensation authorities across the nation.

Recent academic research confirms the costs these schemes impose on workers and taxpayers.[3] Serious tax and payroll fraud through worker misclassification in construction allows contractors to evade $2.98 billion per year in Social Security and Medicare taxes[4] and causes an estimated $1.74 billion annual shortfall in state workers' compensation programs. It also results in annual state unemployment insurance program shortfalls of over $700 million.[5] And under the "most conservative" estimates, misclassified construction workers are robbed of over $800 million per year in overtime.[6] Moreover, these schemes disproportionately impact immigrants and sometimes entail human trafficking.[7]

SWACCA members understand and support the goal of ensuring that law enforcement has the information it needs to combat tax fraud, human trafficking, money laundering, and other criminal activity the CTA is supposed to ameliorate. We commend FinCEN's efforts to protect law-abiding businesses from bad actors. But we cannot accept CTA regulations as a serious attempt to protect our industry from the illicit activity the CTA targets unless the beneficial ownership data can be shared with the full range of federal, state, and local agencies targeting the many facets of serious tax and payroll fraud through misclassification that are becoming pervasive in our industry. These include federal and state labor and employment

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[3] *See* Russell Ormiston, Dale Belman, and Mark Erlich, *An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry* (January 2020), *available at* https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf (last visited April 29, 2021).
[4] *Id.* at 5.
[5] *Ibid.*
[6] *Ibid.*
[7] *See* New Mexico Advisory Committee to the U.S. Commission on Civil Rights, *Advisory Memorandum, Wage Theft & Subminimum Wages,* 13 (March 2021), *available at* https://www.usccr.gov/files/2021/04-15-NM-Advisory-Memorandum-Wages.pdf (last visited April 29, 2021). *See also* Filberto Nolasco Gomez, *Contractor Ricardo Batres Charged with Labor Trafficking, Revealing Immigrant Worker Abuse*, WORKDAY MINNESOTA, *available at* https://workdayminnesota.org/contractor-ricardo-batres-charged-with-labor-trafficking-revealing-immigrant-worker-abuse/ (last visited April 29, 2021).

agencies, tax authorities, unemployment insurance bureaus, and workers' compensation agencies, as well as special task forces some jurisdictions have created to address misclassification.

Using beneficial ownership data to the maximum extent possible to investigate serious tax and payroll fraud through misclassification in construction is critical to the survival of SWACCA's contractors. Our members are hired through a cost-competitive bidding process administered by a general contractor or a construction manager that has been retained by a property owner. The most significant cost in any interior systems bid is the cost of labor. This includes the number of workers, how much time they will need, and to what degree they will have to be paid overtime to get the job done on schedule. If a bid is accepted and our estimates about labor costs are wrong, our profits evaporate quickly. We may even lose money. But our workers get paid for every hour worked. They get overtime when their work exceeds forty hours in a week. Social Security and employment taxes are withheld, and appropriate workers' compensation insurance is in force throughout the project. Like other honest business owners, SWACCA members bear the risk of an inaccurate bid—not their workers. This is the way it should be in a competitive, free enterprise system that rewards company owners for taking risks informed by intelligent planning and mitigated by the application of experience and innovation.

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Contrast this with the increasingly pervasive business model in our industry rooted in a decision to treat every worker doing framing, drywall, and ceiling work on a jobsite as an independent contractor without regard to the requirements of the Internal Revenue Code, the Fair Labor Standards Act, and other basic federal, state, and local workplace laws. Contractors using this model can always submit a lower bid knowing they will still pocket enormous profits. This is because in developing their bids these contractors do not worry about how many hours the workers will labor to complete the project or whether they will work over forty hours per week to get the job done on time. They do not worry about the costs of employment taxes, workers' compensation, or unemployment insurance. This is because under this illicit business model the actual onsite work is turned over to lower-tier subcontractors, who are just labor brokers paying their crews without any regard to applicable wage laws, tax withholdings, overtime, and other requirements.

Often, these misclassified workers are paid in unreported cash. Some may get a 1099 tax form consistent with the fiction that they are independent contractors. And it is not uncommon for such workers to be given papers showing an LLC was created in their name. But these paperwork formalities are simply another layer of insulation for the bad actors profiting from these arrangements. By disregarding employment taxes, wage requirements, and obligations related to workers' compensation, unemployment insurance, Social Security taxes, and many other costs that law-abiding contractors must include in their bids, these bad actors get a tremendous competitive advantage. The Ohio Attorney General has estimated that the misclassification of workers as independent contractors provides a 20-30% labor cost advantage against law-abiding employers.[8] When competing against a

[8] *See Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio* (Feb. 18, 2009), *available at*

SWACCA contractor that pays middle-class wages, sponsors training programs, and offers a retirement plan and health benefits, the misclassification model offers closer to a 50% cost advantage.[9] The impact of tax fraud and wage theft through misclassification of construction workers is so serious that Congress focused on it in a recent hearing.[10]

What makes this situation highly relevant to implementation of the CTA is that perpetrators of these serious tax and payroll fraud schemes intentionally use layers of LLCs to avoid detection and liability for their actions. As officials from Tennessee explained in a recent report detailing the challenges of bringing the actors behind these schemes to justice:

> "Often when [one of these] business owners learns their non-compliance has been identified and they are subject to a penalty, they shut down their businesses. The owner will reopen as a newly formed business entity that is a continuation of the closed business. By reopening under a new name, business owners avoid assessed monetary penalties for non-compliance . . . ."[11]

Serially closing and opening LLCs that amount to shell companies is easy because these entities have no employees, no assets, no benefit plans, and no training programs. There is no real value in these entities the way that there is with law-abiding companies. This leaves workers no recourse against these entities even when cases are pursued by federal, state, or local investigators. SWACCA members and the workers in the communities where we operate see contractors who have been cited for misclassification and failure to pay taxes, unemployment, and other obligations operating under a new entity with the same workforce and no apparent change in their business model.

In our experience, federal, state, and local tax, labor, unemployment insurance, and workers' compensation investigators are significantly hindered by the time and effort it takes to sift through trails of defunct LLCs to assign ultimate financial responsibility for unpaid taxes, overtime, unemployment insurance, and workers' compensation premiums. The dense layers of shell companies upon which misclassification schemes rely for the fiction that everyone on a jobsite is their own employer operating as an independent business also make it hard to connect contractors to violations committed under predecessor LLCs. This allows these bad actors to get work under government contracts despite past performance reporting

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https://iiiffc.org/images/pdf/employee_classification/OH%20AG%20Rpt%20on%20Misclass.Workers.2009.pdf (last visited April 29, 2021).

[9] Hearing on "Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy" Before the Workforce Protections Subcommittee, House Education and Labor Committee, 116th Congress (Sept. 26, 2019), Statement of Matt Townsend, President of the Signatory Wall and Ceiling Contractors Alliance at 3, *available at* https://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf (last visited April 29, 2021).

[10] *Id.*

[11] Tennessee Bureau of Workers' Compensation, *Annual Report on Employer Coverage Compliance*, 12 (Feb. 1, 2019), *available at* https://www.tn.gov/content/dam/tn/workforce/documents/injuries/2019ComplianceAnnualReport.pdf (last visited April 29, 2021).

systems used by many government contracting agencies. While the CTA will require the disclosure of beneficial ownership information in relation to federal contract solicitations, FinCEN should also provide the information to state and local contracting agencies to help them avoid including perpetrators of serious tax fraud and wage theft through misclassification in their contractor community.

Question 6 Concerning Exemptions to the Definition of a "Reporting Company"

Question 6 of the ANPRM notes that "[t]he CTA contains numerous defined exemptions from the definition of 'reporting company'" and requests comment on whether these exemptions are "sufficiently clear" and whether there are "aspects of any of these definitions that FinCEN should clarify by regulation." SWACCA requests that FinCEN clarify two issues related to exemptions to the definition of a "reporting company."

Exemption for Organizations Described in Section 501(c)

Section 5336(a)(11)(B)(xix) of the CTA exempts from the definition of a reporting company "any organization that is described in section 501(c) of the Internal Revenue Code of 1986." SWACCA and several of its regional affiliates are organized as tax exempt 501(c)(6) business leagues. As such, they should be exempt from the definition of a "reporting company" under section 5336(a)(11)(B)(xix). SWACCA requests that FinCEN enumerate the specific types of 501(c) entities that fall within this exemption and that the list specifically references 501(c)(6) business associations, commonly referred to as trade associations.

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Exemption for Organizations Employing More Than 20 Full-Tim Employees with More Than $5,000,000 in Gross Receipts and a Physical Operating Presence in the U.S.

The exemption at section 5336(a)(11)(B)(xxi) of the CTA contains terms FinCEN must define to ensure entities understand the scope and application of this exemption. Key among these is the term "20 employees on a full-time basis."

Determining the number of full-time employees employed by an employer can be a complex task, especially in project-based and/or seasonal industries. Construction industry employment is project based and many segments of the industry are seasonal. Construction industry employers typically employ a large percentage of their workforce to perform specific projects, and employee counts can and do fluctuate – sometimes significantly – as a result. SWACCA recommends that the Department authorize employers to use the method already established pursuant to the Affordable Care Act (ACA) to determine whether an employer employs 20 employees on a full-time basis.

"Full-time Employee" is defined for purposes of the Affordable Care Act as an employee who is employed on average at least 30 hours of service per week.[12]

[12] 26 U.S.C. 4980H(c)(4)(A)

SWACCA believes this is an appropriate definition that should be applied to the exemption at 5336(a)(11)(B)(xxi).

As the Department knows, it can be challenging to determine whether an employee is employed on average at least 30 hours of service per week. Treasury regulation 26 CFR § 54.4980H-3 sets forth rules for determining hours of service and status as a full-time employee that SWACCA believes are appropriate for application to the exemption at 5336(a)(11)(B)(xxi). The regulation includes two methods for determining full-time employee status – the monthly measurement method and the look-back measurement method[13] - and provides rules for addressing the vagaries that can be created by variable hour employment, seasonal employment, and periods of layoff, all of which can be commonplace in the construction industry.

The Affordable Care Act and related regulations provide a definition and method for identifying full-time employees with which employers and the Treasury Department are already familiar. SWACCA recommends that Treasury allow employers to apply this existing standard to determine whether an entity employs more than 20 employees on a full-time basis and therefore may qualify for the reporting company exemption at 5336(a)(11)(B)(xxi).

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Conclusion

The Corporate Transparency Act presents an opportunity to support enforcement activities against the serious tax and payroll fraud that occurs through worker misclassification in the construction industry. Responsible, law-abiding construction industry employers stand to benefit from a properly implemented CTA. And there are many steps FinCEN can take in implementing this law to ensure its benefits to the American people outweigh its burdens. Thank you for the opportunity to provide these comments.

Sincerely,

Scott Casabona
President

[13] 26 CFR 54.4980H-3(a)