



Submitted via <http://www.regulations.gov>

January 31, 2022

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

Re: Proposed Rule Regarding “Beneficial Ownership Information Reporting Requirements” (Docket Number FINCEN-2021-0005; RIN 1506-AB49)

To whom it may concern:

The Signatory Wall and Ceiling Contractors Alliance (“SWACCA”) appreciates the opportunity to comment on the proposed rule regarding “Beneficial Ownership Information Reporting Requirements” that the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”) published on December 8, 2021.¹ We hope that our feedback will continue to 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 based on quality services, efficient execution, and the thoughtful implementation of training and innovation.

¹ *Beneficial Ownership Information Reporting Requirements*, 86 Fed. Reg. 69920 (Dec. 8, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-12-08/pdf/2021-26548.pdf> (hereinafter, “NPRM”).

² National Defense Authorization Act for Fiscal Year 2021, P.L. 116-283 (2021).

Signatory Wall and Ceiling Contractors Alliance
3222 N Street NW, Suite 300
Washington, D.C. 20007
Phone: 202-935-6997
Email: info@swacca.org
Website: www.swacca.org

Robert Klugh | President
Martin Bros.
Gardena, California
Western Region

Gregg Brady | Vice President
Brady Company / Central CA
Castroville, California
Western Region

Shawn Burnum | Treasurer
Performance Contracting Inc.
Lenexa, Kansas
Central Region

John Strawser | Secretary
Valley Interior Systems Inc.
Cincinnati, Ohio
At-Large Director

Scott Casabona | Director
Sloan and Company
Mountain Lakes, New Jersey
Immediate Past President

Albert Carrillo | Director
Western Wall & Ceiling
Contractors Association
Orange, California
Regional Affiliate Executive

Geoff Furtaw | Director
Ceilings, Inc.
Norristown, Pennsylvania
Eastern Region

David Giorgi | Director
Giorgi Interior Systems, Inc.
Bedford Heights, Ohio
Eastern Region

Ron Johnson | Director
Berg Group
Chanhasen, Minnesota
Central Region

Greg Knutson | Director
GK Knutson
Bellingham, Washington
At-Large Director

Neil O’Connor | Director
Western Partitions Inc.
Wilsonville, Oregon
Western Region

Clark Townsend | Director
OCP Contractors
Columbus, Ohio
Central Region

Daniel Wies | Director
Wies Drywall and Construction
Corp.
St. Louis, Missouri
Central Region

As we noted in our comments³ on FinCEN's related April 5, 2021 advanced notice of proposed rulemaking ("ANPRM"),⁴ 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. Building on our prior comments, we generally support FinCEN's efforts to date and wish to highlight certain elements of the proposed rule of particular relevance to our organization. We also acknowledge that FinCEN intends to address in separate rulemakings additional elements of the ANPRM that we highlighted in our previous comments, including the "appropriate regulatory agencies" able to access beneficial ownership information.⁵ We look forward to providing additional comments on these issues to the extent that they are included in future proposed rules.

Use of Beneficial Ownership Information to Address Fraud Through Worker Misclassification

SWACCA's comments on the April 2021 ANPRM urged FinCEN to 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.⁶ These include, among others, serious tax fraud, human trafficking, and money laundering. To this end, FinCEN must remain vigilant regarding the tax and payroll fraud that unscrupulous actors engage in through the misclassification of workers as independent contractors, particularly 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.

In the construction industry, an increasingly pervasive business model is 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. In

**Signatory Wall and
Ceiling Contractors Alliance**
3222 N Street NW, Suite 300
Washington, D.C. 20007
Phone: 202-935-6997
Email: info@swacca.org
Website: www.swacca.org

³ SWACCA comments on FinCEN advance notice of proposed rulemaking regarding "Beneficial Ownership Information Reporting Requirements" (May 5, 2021), *available at* <https://www.swacca.org/media/1277/final-5-4-21-ben-ownership-comments.pdf> (hereinafter, "SWACCA ANPRM Comments").

⁴ *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>

⁵ See SWACCA ANPRM Comments, *supra* note 3, at 1.

⁶ *Id.* at 2.

developing their bids, these contractors do not worry about paying overtime to workers who labor over forty hours per week to get the job done on time or about the costs of employment taxes, workers' compensation, or unemployment insurance.

The impact of tax fraud and wage theft through misclassification of construction workers is so serious that Congress held a 2019 hearing on the issue at which SWACCA's then-President Matt Townsend testified.⁷ He explained that when competing against a SWACCA contractor that pays middle-class wages, sponsors training programs, and offers a retirement plan and health benefits, the misclassification model offers nearly a 50% cost advantage.⁸ The evidence is clear that 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 enjoy a tremendous competitive advantage.

This situation is relevant to the implementation of the CTA to the extent that perpetrators of these serious tax and payroll fraud schemes have intentionally used layers of LLCs to avoid detection and liability for their actions. These 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 make it hard to connect contractors to violations committed under predecessor LLCs. Moreover, 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. In the past, this has left 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 have seen contractors cited for misclassification and failure to pay taxes, unemployment, and other obligations subsequently operating under a new entity with the same workforce and no apparent change in their business model.

Our comments on FinCEN's April 2021 ANPRM asked the agency to address these issues associated with misclassification through expanded

**Signatory Wall and
Ceiling Contractors Alliance**
3222 N Street NW, Suite 300
Washington, D.C. 20007
Phone: 202-935-6997
Email: info@swacca.org
Website: www.swacca.org

⁷ 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>.

⁸ *Id.*

access to beneficial ownership information for such “appropriate regulatory agencies” as state and local contracting authorities.⁹ While we acknowledge that the scope of agencies that can access beneficial ownership data is beyond the scope of the present rulemaking, we thought it worthwhile to remind FinCEN of the blatant disregard for the law that is common in our industry. It bears on the issue of whether exemptions to beneficial ownership reporting will be claimed when they do not apply. In the absence of some means to audit or confirm exemptions, we fear that many bad actors in our industry will disregard the new beneficial ownership reporting requirements in the same cavalier way they misclassify workers as independent contractors. If the final regulations have no mechanisms to deter or prevent them from doing so, we are concerned that beneficial ownership reporting requirements for these entities will not bring needed transparency to our industry and ensure a level playing field for law-abiding companies.

Exemption to the Definition of “Reporting Company” for Tax-Exempt Entities

The proposed rule describes the 23 specific exemptions from the definition of “reporting company” under the CTA. Exempt entities are not required to comply with the proposed rule’s mandate to submit beneficial ownership information to FinCEN. Among the exemptions, 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. In our comments on the April 2021 ANPRM, SWACCA requested that FinCEN define the nonprofit exemption in a manner that makes clear that it extends to 501(c)(6) business associations, commonly referred to as trade associations.¹⁰

The proposed rule addresses our concern in section 5336(a)(11)(B)(xix) at proposed 31 CFR 1010.380(c)(2)(xix).¹¹ This provision exempts “tax-exempt entities,” broadly defined as all entities exempt from tax under section 501(a) of the Internal Revenue Code (IRC), political organizations exempt from tax under section 527(a) of the IRC, which includes 501(c)(6) business associations.¹² We support FinCEN’s approach that leaves no doubt 501(c)(6) business associations are covered by the nonprofit exemption.

**Signatory Wall and
Ceiling Contractors Alliance**
3222 N Street NW, Suite 300
Washington, D.C. 20007
Phone: 202-935-6997
Email: info@swacca.org
Website: www.swacca.org

⁹ See SWACCA ANPRM Comments, *supra* note 3, at 5.

¹⁰ *Id.*

¹¹ NPRM, *supra* note 1, at 69972.

¹² *Id.*

Exemption to the Definition of “Reporting Company” for “Large Reporting Companies”

Proposed 31 CFR 1010.380(c)(2)(xxi) outlines an exemption to the “reporting company” definition for “large operating companies.”¹³ This exemption applies if an entity, among other things, “[e]mploys more than 20 employees on a full-time basis in the United States.”¹⁴ Question #27 in the proposed rule specifically asks whether the term “full-time employee” is explained clearly.¹⁵

In our comments on the April 2021 ANPRM, we requested that FinCEN define “full-time employee” pursuant to the Affordable Care Act (ACA) and related regulations so that construction contractors and other employers with seasonal variations in their workforce could still qualify for an exemption from the reporting requirements.¹⁶ As we noted, determining the number of full-time workers employed by an entity can be a complex task, especially in project-based or seasonal industries like construction. 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.

In response, FinCEN is proposing to define “full-time employee” as anyone employed an average of at least 30 hours per week or 130 service hours per month based on Treasury Department regulations implementing the ACA that SWACCA cited in its previous comments.¹⁷ Specifically, Treasury regulation 26 CFR 54.4980H-3 – which FinCEN explicitly references in the proposed rule – includes two methods for determining full-time employee status (the monthly measurement method and the look-back measurement method¹⁸). It also provides rules for addressing the vagaries that can be created by variable hour employment, seasonal employment, and layoff periods. The agency states that it is adopting this approach to “promote regulatory consistency and because most large operating companies should already be familiar with it from compliance with the [ACA].”¹⁹ We believe that this is the correct approach and we support FinCEN’s decision to cross-reference these ACA-related regulations in the proposed rule to the extent that they provide a definition and method for identifying full-time employees

**Signatory Wall and
Ceiling Contractors Alliance**
3222 N Street NW, Suite 300
Washington, D.C. 20007
Phone: 202-935-6997
Email: info@swacca.org
Website: www.swacca.org

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 69947.

¹⁶ SWACCA ANPRM Comments, *supra* note 3, at 5.

¹⁷ NPRM, *supra* note 1, at 69972.

¹⁸ 26 CFR 54.4980H-3(a).

¹⁹ NPRM, *supra* note 1, at 69939.



with which our member employers and the Treasury Department have experience.

Conclusion

Responsible, law-abiding construction industry employers stand to benefit from a properly implemented CTA and FinCEN must ensure that the benefits of its regulations outweigh the burdens. While there are elements of the CTA that FinCEN has yet to address beyond the ANPRM stage, we believe that the provisions the agency has proposed to date are steps in the right direction. We look forward to the additional rulemakings FinCEN intends to issue regarding the CTA. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert Klugh", is written over a light blue horizontal line.

Robert Klugh
President

**Signatory Wall and
Ceiling Contractors Alliance**
3222 N Street NW, Suite 300
Washington, D.C. 20007
Phone: 202-935-6997
Email: info@swacca.org
Website: www.swacca.org