



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

February 10, 2023

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

Re: Proposed Rule Regarding “Beneficial Ownership Information Access and Safeguards, and Use of FinCEN Identifiers for Entities” (Docket Number FINCEN-2021-0005; RIN 1506-AB49/AB59)

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 Access and Safeguards, and Use of FinCEN Identifiers for Entities” (“Proposed Rule”) that the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”) published on December 16, 2022.¹ 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 Access and Safeguards, and Use of FinCEN Identifiers for Entities*, 87 Fed. Reg. 77404 [Dec. 16, 2022], available at <https://www.govinfo.gov/content/pkg/FR-2022-12-16/pdf/2022-27031.pdf> (hereinafter, “Proposed Rule”).

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

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As we have noted in past comments on FinCEN's related April 5, 2021 advanced notice of proposed rulemaking ("ANPRM")³ and December 8, 2021 proposed rule regarding "Beneficial Ownership Information Reporting Requirements,"⁴ FinCEN's implementation of the CTA presents an opportunity for your agency and our association to better understand each other and to collaborate to maximize the benefits and minimize unintended consequences of CTA-related rulemakings. We generally support FinCEN's CTA implementation efforts to date and write to address certain discrete elements of this latest Proposed Rule aimed at ensuring that agencies at all levels of government have access to and appropriate authority to utilize the beneficial ownership information ("BOI") that FinCEN intends to collect.

Access to Beneficial Ownership Information for Agencies Engaged in Civil Law Enforcement Activity

Noting that the CTA permits access to BOI for "federal functional regulator[s] and other appropriate regulatory agenc[ies]," SWACCA's comments on FinCEN's April 2021 ANRPM urged the agency to 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. In the construction industry, an increasingly pervasive business model is to treat every worker performing 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 ("FLSA"), 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 developing 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.

We are pleased that the Proposed Rule, in outlining the federal agencies eligible to receive BOI, makes clear that engaging in "law

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³ *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> *and* SWACCA comments (May 5, 2021), *available at* <https://www.swacca.org/media/1277/final-5-4-21-ben-ownership-comments.pdf>.

⁴ *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> *and* SWACCA comments (Jan. 31, 2022), *available at* <https://www.swacca.org/media/1302/2022-01-31-swacca-beneficial-ownership-comments.pdf>.

enforcement activity” (a condition for BOI access) includes “investigative and enforcement activities relating to civil or criminal violations of law.”⁵ The Proposed Rule goes on to clarify that this extends to both criminal *and* civil investigations and actions to impose or enforce civil penalties, civil forfeiture actions, and civil enforcement through administrative proceedings.⁶ We support this interpretation to the extent that it will allow agencies like the U.S. Department of Labor’s Wage & Hour Division and other federal agencies to directly query the beneficial ownership database in investigations of wage theft and other legal violations commonly associated with the misclassification of workers in our industry.

This interpretation is wholly consistent with the language and intent of the CTA, which does not limit “law enforcement activity” to criminal investigations or actions.⁷ Although some legislators, in developing the CTA, sought to limit access to BOI to federal law enforcement personnel conducting criminal investigations, this approach was ultimately rejected as overly restrictive. As Sen. Sherrod Brown (D-OH), one of the CTA’s chief architects, explained in remarks on the Senate floor:

“FinCEN should allow federal, state, local, and Tribal law enforcement to access the beneficial ownership data for both criminal and civil purposes, including law enforcement activities designed to combat terrorism, money laundering, trafficking, corruption, evasion of sanctions, noncompliance with tax law, fraud, counterfeit goods, market manipulation, insider trading, consumer abuse, cybercrime, election interference, and other types of criminal and civil wrongdoing.”⁸

Congress provided in the CTA, as ultimately enacted, that “malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity,” including (among other things) “serious tax fraud” and “human and drug trafficking.”⁹ As we have emphasized in our prior comments, worker 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

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⁵ Proposed Rule, *supra* note 1, at 77412.

⁶ *Id.*

⁷ *Id.*

⁸ Sen. Sherrod Brown, “National Defense Authorization Act,” Congressional Record 166: 208 (Dec. 9, 2020), p. S7312 *available at* <https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf>.

⁹ CTA, Section 6402(3).

nation. Tax and payroll fraud through worker misclassification in construction allows contractors to evade \$2.98 billion per year in Social Security and Medicare taxes and causes an estimated \$1.74 billion annual shortfall in state workers' compensation programs.¹⁰ It also results in annual state unemployment insurance program shortfalls of over \$700 million.¹¹ Under the "most conservative" estimates, misclassified construction workers are robbed of over \$800 million per year in overtime.¹² Moreover, these schemes disproportionately impact immigrants and sometimes entail human trafficking.¹³

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.¹⁴ In particular, he explained that the "shell company" contractors that frequently engage in misclassification are able to "serially" close and reopen their businesses because these entities have no employees, no assets, no benefit plans, and no training programs.¹⁵ This allows them to easily evade sanctions and other penalties associated with noncompliance with the FLSA and other laws because it is very hard and time consuming for investigators to trace the individuals responsible for such constantly shifting arrays of LLCs and other legal entities used in construction industry worker misclassification schemes. We believe that allowing federal agencies access to BOI for both criminal and civil investigations and proceedings regarding wage theft, fraud, and tax violations associated with the misclassification of construction workers as independent contractors will facilitate more effective and efficient enforcement, resulting in greater recoveries for workers and tax authorities.

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¹⁰ 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) at 5, available at <https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>.

¹¹ *Id.*

¹² *Id.*

¹³ See New Mexico Advisory Committee to the U.S. Commission on Civil Rights, *Advisory Memorandum, Wage Theft & Subminimum Wages* (March 2021) at 13, available at <https://www.usccr.gov/files/2021/04-15-NM-Advisory-Memorandum-Wages.pdf>. See also Filberto Nolasco Gomez, *Contractor Ricardo Batres Charged with Labor Trafficking, Revealing Immigrant Worker Abuse*, WORKDAY MINNESOTA (Sept. 26, 2018), available at <https://workdayminnesota.org/contractor-ricardo-batres-charged-with-labor-trafficking-revealing-immigrant-worker-abuse/>.

¹⁴ See 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, available at <https://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf>.

¹⁵ *Id.* at 3.

It will also help to level the playing field for honest contractors, like SWACCA's members.

State, Local, and Tribal Access to Beneficial Ownership Information

Beyond federal agencies, the Proposed Rule would specifically permit FinCEN to disclose BOI upon request to state, local, and Tribal law enforcement agencies if a court of competent jurisdiction has authorized such law enforcement agency to seek the information in a criminal or civil investigation.¹⁶ As discussed in our prior comments, SWACCA believes it is critical to permit access to BOI beyond the federal level. More than 90 percent of the nation's law enforcement is estimated to operate at the state and local level.¹⁷ We also believe it is critical for any final rule to clearly state what it means for a court to "authorize" a law enforcement agency to seek BOI. We are pleased that FinCEN has requested feedback on the mechanisms that state, local, and Tribal authorities use to gather evidence in criminal and civil cases and the extent to which court authorization is involved.¹⁸

The Proposed Rule would allow a state, local, or Tribal law enforcement agency (including a prosecutor) to access BOI where a court specifically authorizes access in the context of a criminal or civil proceeding, for example, through a court's issuance of an order or approval of a subpoena.¹⁹ SWACCA urges FinCEN to go further and to interpret a court's "authorization" as broadly as possible. The term "authorization" was included in the CTA after extended congressional negotiations which rejected efforts to compel law enforcement agencies to obtain a formal "court order," "subpoena," or "warrant" to request access to BOI. To this end, the House Financial Services Committee expressly rejected an amendment offered by Rep. Warren Davidson (R-OH) seeking to require state, local, and Tribal agencies to obtain a "court-issued subpoena or warrant" before accessing BOI.²⁰

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¹⁶ Proposed Rule, *supra* note 1, at 77413.

¹⁷ See Patrick Yoes, "Another Open Letter to Our Nation's Governors," NATIONAL FRATERNAL ORDER OF POLICE (Apr. 10, 2020), *available at* <https://fop.net/letter/our-nations-governors-urging-them-to-amend-their-state-and-local-workmanscompensation-laws/>.

¹⁸ Proposed Rule, *supra* note 1, at 77425 (Question #7 discussing how state, local, and Tribal law enforcement agencies are authorized by courts to seek information in criminal and civil investigations).

¹⁹ *Id.* at 77413.

²⁰ U.S. House Committee on Financial Services, "Markups, H.R. 2513, the 'Corporate Transparency Act of 2019'" (June 11, 2019), *available at* <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403829>.

SWACCA supports defining “authorization” to cover grand jury subpoenas in the criminal context. SWACCA agrees with the law enforcement agencies, prosecutors, and court officials that FinCEN cites in the Proposed Rule highlighting the importance of obtaining BOI in connection with grand jury investigations.²¹ SWACCA further supports FinCEN allowing access to BOI at the early stages of an investigation. This will further the CTA’s statutory objectives by helping state, local, and Tribal authorities uncover links between bad actors and entities they may be using to conceal illicit behavior, including tax fraud, wage theft, and other pernicious activities associated with worker misclassification.²²

FinCEN has separately requested feedback on whether state *regulatory* agencies should qualify as “state, local, or Tribal law enforcement agencies” under the Proposed Rule and therefore have access to BOI subject to court authorization.²³ SWACCA members understand and support the goal of ensuring that law enforcement has the information it needs to combat tax violations, fraud, human trafficking, money laundering, and other activity the CTA seeks to ameliorate. FinCEN must ensure that BOI can be shared with a full range of state and local agencies to protect meaningfully against the illicit activities the CTA targets. These include such regulatory bodies as state labor and employment agencies, contracting authorities, tax authorities, unemployment insurance bureaus, and workers’ compensation agencies—all of which are focused on the varied facets of serious tax and fraud through misclassification that are becoming pervasive in the construction industry.

Finally, to ensure that state regulatory agencies can efficiently access BOI, SWACCA request that FinCEN interpret courts that may authorize access to BOI to include state, local, and Tribal administrative courts that have the power to impose criminal or financial sanction for the types of conduct the CTA is intended to deter. Such an interpretation is not inconsistent with the CTA. Broadly speaking, administrative courts exist at every level of government to review the exercise of public power. Their role is to ascertain that official acts are consistent with the law. There is no reason they should not be allowed to serve this function in the context of assessing a state, local, or tribal enforcement agency’s need to access BOI.

“Re-Disclosure” of Beneficial Ownership Information

The Proposed Rule also addresses the “re-disclosure” of BOI, noting that the CTA does not specify the circumstances under which an authorized

²¹ Proposed Rule, *supra* note 1, at 77413.

²² *Id.*

²³ *Id.* at 77426 (Question #19 discussing state regulatory agencies).

recipient of BOI may disclose it to another person or organization and instead leaves it to FinCEN to establish appropriate re-disclosure protocols.²⁴ In particular, the Proposed Rule would allow a federal, state, local, or Tribal law enforcement agency to disclose BOI to a court of competent jurisdiction or parties to a criminal or civil proceeding²⁵ and requests comments on this authorization.²⁶ SWACCA supports this approach regarding re-disclosure to the extent that it is consistent with the emphasis FinCEN has placed on ensuring agency access to BOI in both the criminal and civil law enforcement contexts.

We also note that FinCEN “considered” requiring law enforcement agencies (including state and local bodies) to request permission from FinCEN to redisclose BOI on a case-by-case basis.²⁷ SWACCA agrees with the agency’s conclusion that requiring case-by-case authorization from FinCEN would impede fulfilling the intent of the CTA (which expressly authorizes the use of BOI in civil and criminal proceedings). Such an approach would create significant delays and inefficiencies that would benefit only bad actors. This would extend the life of illicit schemes conducted through legal entities and delay bringing the bad actors behind them to justice.

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Conclusion

Responsible, law-abiding construction industry employers stand to benefit from a properly implemented CTA. SWACCA urges FinCEN to ensure that the full spectrum of federal, state, and local agencies have access to and can properly utilize BOI to support criminal and civil investigations and enforcement activities against those engaged in worker misclassification. SWACCA believes that the Proposed Rule represents a step in the right direction and urges adoption of the additional clarifications discussed above. We appreciate your consideration of our comments.

Sincerely,



Robert Klugh
President

²⁴ *Id.* at 77417.

²⁵ *Id.* at 77418.

²⁶ *Id.* at 77426 (Question #17 discussing re-disclosure of BOI by agencies).

²⁷ *Id.* at 77418.