MAXINE WATERS, CA
CHAIRWOMAN

United States House of Representatives
Committee on Financial Services
Washington, DC 20515

PATRICK McHENRY, NC
RANKING MEMBER

March 2, 2022

The Honorable Janet Yellen
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C, 20220

Mr. Himamauli Das
Acting Director
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, Virginia 22183

Re: Department of the Treasury's Notice of Proposed Rulemaking Titled "Beneficial Ownership Information Reporting Requirements," RIN 1506-AB49, FINCEN -2021-0005, 86 Fed. Reg. 69920 (December 8, 2021)

Dear Secretary Yellen and Acting Director Das:

We write to express our serious concern with the Department of the Treasury's Notice of Proposed Rulemaking titled "Beneficial Ownership Information Reporting Requirements" (NPRM), released on December 8, 2021. The NPRM in its current form is too complex, overly broad, and deviates significantly in many ways from Congress' intent as it relates to the new beneficial ownership information reporting regime. Moreover, we are concerned that if the issues raised in this letter and by the hundreds of interested parties are not addressed, the final rule will not only harm legitimate small businesses but will undoubtedly create additional loopholes for bad actors to exploit.

Congress made clear its agreed-upon framework for reporting and collecting beneficial ownership information in Division F of the National Defense Authorization Act, Fiscal Year 2021. This statutory framework is intended to accomplish three objectives. The first is to stop bad actors from using "shell companies" to exploit the financial system to conduct terrorism or other illicit activities. In addition, the framework is intended to minimize any new burdens the new regime will have on reporting companies, particularly smaller companies. Finally, the statutory framework is intended to provide clear rules of the road for reporting companies regarding their beneficial ownership responsibilities.

Disconcertingly, the NPRM deviates from this statutory framework in several, significant ways. First, the NPRM is too complex and overly broad. Understanding the NPRM in its current form will take hours for many small reporting companies to understand. As a result, these entities will more likely than not require the help of an attorney, CPA, or other individual(s) to navigate their reporting obligation. For example, the NPRM's:

- Interpretation of substantial control is inconsistent with other federal statutes, confusing, and overly broad. As you know, Treasury already has significant experience determining "control" pursuant to Section 721 of the Defense Production Act (DPA). The DPA defines the term as "the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity." This definition itself was derived from longstanding Treasury regulations. The term "substantial control" is only coherent as a narrower subcategory of "control," particularly a form of control that is ultimate in nature and is tied to benefits enjoyed by a beneficial owner.

  In addition, prior to enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), controlling investments under the DPA did not necessarily encompass board membership or substantial influence ("substantive decision-making," per the amended DPA), requiring such contingencies – as Treasury itself advocated at the time – to be covered as examples of *non-control* under a new Section 721(a)(4)(D). Board membership and substantial influence are therefore not concepts that need to entail control at all, and they are certainly not identical to the narrower "substantial control." Having drafted FIRRMA, the Committee on Financial Services was aware of these important distinctions when drafting the framework.

  Finally, the proposed listing of senior officers of a reporting company is nonsensical. Such persons, in the absence of substantial ownership rights, violate any commonsense dictionary definition of the term "beneficial owner." Anyone with familiarity with the debate surrounding the new beneficial ownership information reporting regime will show that the statutory framework targeted beneficial ownership, not employment data.

- Definition of ownership or control of ownership is overly broad. Where appropriate, Congress intended those provisions of the current CDD be retained. The definition of ownership or control of ownership is one of the provisions that should be retained.

- Definition of company applicants is overly broad. Congress did not intend to capture an entire law firm or company in the simple filing of corporate documents.

- Requirement that reporting companies provide digital photographs of beneficial owners deviates from the statutory framework. Congress did not intend for reporting companies, particularly those with fewer than 20 employees, to submit digital photographs of their beneficial owners.

- Requirement of residential addresses is inconsistent with the statutory framework. Congress intended to give reporting companies a choice between filing a beneficial owners' business address or residential address. It was not intended to limit addresses to residential only.

- Definition of a reporting company is overly vague and inconsistent with the statutory framework. Congress did not explicitly include general partnerships, sole-proprietorships or trusts in the definition of reporting companies because it did not intend for them to be

included. The decision to include them, sua sponte, is another example of overreach that if left unaddressed will negatively impact tens of millions of small businesses.

- Suggested submission of TIN, DUNES, or LEI numbers is inconsistent with the statutory framework. Congress did not intend for any reporting company to submit this type of information even if voluntary. Congress was clear on the four pieces of beneficial ownership information that it intended reporting companies to submit: legal name; date of birth; current residential or business street address; and unique identification number from an acceptable identification document (i.e., driver's license or passport).

- Reporting rules for exempt entities is inconsistent with the statutory framework. Congress did not intend for any exempt entity to report to Treasury. Thus, the requirement that companies are required to submit notice to FinCEN that they are exempt from compliance deviates from the statutory framework.

- Discussion on when a FinCEN Identifier should be used is nonsensical. Simply stated Congress intended the Identifier to be a tool available to reporting companies to simplify their filings. The insinuation that reporting companies will use the Identifier for nefarious purposes, without any type of evidence, is concerning and should be removed immediately.

Notwithstanding the above concerns, the NPRM deviates significantly from the statutory deadlines for reporting information, updating information, and correcting inaccurate information. Congress was unambiguous that the timeframe for current reporting companies to provide the four pieces of beneficial ownership information was two years from the effective date of the reporting regulation. Moreover, Congress did not intend for new reporting companies to file within 14 days. A more reasonable timeframe for a new reporting company to file beneficial ownership information is 90 days from the time the entity files state organic documents. In addition, the 90-day time period should be applied to those companies that may no longer be exempt from filing beneficial ownership information.

Congress was also unambiguous that reporting companies providing updated information would have a year to provide this information. Moreover, Congress was very specific that any change to this deadline was contingent on the Department of Treasury, in consultation with the Department of Justice and the Department of Homeland Security, conducting a review of evidence demonstrating a legitimate need to shorten this time frame. Given that the new regulation is not even in effect and the Department of Treasury has no evidence demonstrating the need for a shorter time period, the statutory time period for updating information must remain one year.

The issues raised above only touch the surface. Yet, together with the concerns expressed by the hundreds of interested parties, deepen our concern about the Department's underlying motivation for the new beneficial ownership information reporting regime. Let us be clear, previous partisan attempts to reform the beneficial ownership reporting regime were rejected by Congress. In fact, proposals to: (1) establish an open and vast collection regime, like that established in the United Kingdom; (2) impose numerous and costly reporting requirements on small businesses; (3)

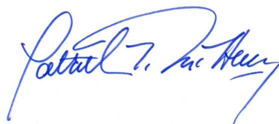
jeopardize the privacy and security of small businesses' personal identifiable information; and (4) enable small businesses' PII to be accessed with few limitations, were met with fierce resistance.

Adherence to the statutory framework set out in Division F of the NDAA is critical. The United States is not the United Kingdom. Legitimate small businesses in this country have the most to lose in this new reporting and collection regime. Small businesses historically operate on thin margins. The global health crisis over the last two years have only exacerbated these margins. Additional burdens will impact the approximately 25 million existing reporting companies and the 3 million new reporting companies formed each year (according to FinCEN's own estimates). In fact, according to FinCEN's own initial regulatory flexibility analysis (IRFA), the current NPRM will have a significant economic impact on small companies. FinCEN estimates there will be 32,800,422 burden hours in the first year and 9,468,510 burden hours each year thereafter. The total costs for this rule once in effect is expected to total $1.26 billion in the first year and $364 million thereafter. It is unacceptable to acknowledge and recognize, as you do in the NPRM, the impact on small businesses, and fail to draft a rule that adheres to congressional intent by minimizing the burdens on them.

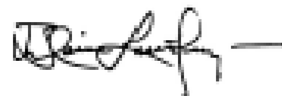
Given these potential costs, the Department of Treasury must ensure that any new reporting burdens on small businesses are minimal. This includes rescinding the current Customer Due Diligence Rule set forth in 31 CFR 1010.230 (b)-(j) immediately upon the effective date of this NPRM. We are disconcerted by references to the rescission being addressed in subsequent rulemaking. Congress intended these provisions to be rescinded immediately upon the effective date of this regulation not years after the fact. This is to ensure that there is one clear rule that sets out the responsibilities of reporting companies – not multiple reporting regimes. This error must be addressed immediately.

We are optimistic you understand the magnitude of our concern. The statutory framework reflects bipartisan consensus that the Department of the Treasury stay within the four corners of the statute, obtain evidence, and build out a new reporting and collection regime based on direct evidence rather than anecdotes that create more loopholes for bad actors to exploit at the expense of legitimate businesses. We urge you to go back to the statutory framework and revise the NPRM accordingly. We look forward to working with you to establish a beneficial ownership information reporting regime that Congress intended.

Sincerely,



Patrick McHenry
Ranking Member
House Committee on
Financial Services



Blaine Luetkemeyer
Ranking Member
House Committee on
Small Business