Dear Senators Warner, Cotton, Jones, and Rounds,

On behalf of NFIB, the nation’s leading small business advocacy organization, I write to offer comments on the draft ILLICIT CASH Act.\(^1\) This letter focuses on Title IV, Beneficial Ownership Disclosure Requirements (Title IV).\(^2\) NFIB strongly opposes Title IV of this draft legislation. It imposes burdensome and intrusive requirements on small business owners who must file yet more reports with the federal government or face substantial penalties, and it threatens the constitutionally-protected privacy rights of millions of law-abiding small business owners. The Wall Street Journal’s editorial from July 16, 2019, expresses our concerns with this legislative concept best,

“The reality is that the law would hit small businesses with another compliance burden, their confidential information would become less secure, and real criminals are unlikely to be deterred.”\(^3\)

\(^1\) S. ___., the Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings Act, or the ILLICIT CASH Act (draft of June 10, 2019).
\(^2\) Title IV of the bill contains a proposed new section 5336 of Title 31 of the U.S. Code, Transparent incorporation practices.
\(^3\)The Wall Street Journal, A New Small Business Burden, July 16, 2019
A Significant New Regulatory Burden Targeting Small Business

Federal regulatory requirements, such as new paperwork burdens, are a chronic and problematic issue for small business owners. According to the 2016 NFIB Small Business Problems and Priorities report, “unreasonable government regulations” ranks as the second most important problem small business owners face. In a Small Business Poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulations as a “very serious” (25 percent) or “somewhat serious” (24 percent) problem.

Historically, federal legislation has exempted smaller businesses from mandates and regulatory requirements, as small business owners possess less time and fewer resources for compliance purposes than larger businesses. This draft legislation does the opposite; it targets small businesses and exempts larger businesses from a new periodic paperwork burden. The draft ILLICIT CASH Act would capture nearly every corporation or LLC with 20 or fewer employees and $5 million in gross receipts or sales. According to the U.S. Bureau of the Census, there are over 5.3 million small employers with 20 or fewer employees.

As drafted, this legislation would require these small business owners and managers to register their full legal names, dates of birth, home or business addresses, Employer Identification Numbers (EINs), dates of business formation, and unexpired driver’s license numbers or passport numbers with FinCEN within two years of enactment. The proposal dramatically expands the universe of businesses impacted by the final Customer Due Diligence (CDD) Rule, which only requires businesses that open new bank accounts after May 11, 2018, to fill out paperwork with their financial institutions. New businesses would have to file paperwork at incorporation. It would also require updates within no later than 90 days of any changes to that information.

---

7 Department of the Treasury, Financial Crimes Enforcement Network, “Customer Due Diligence Requirements for Financial Institutions,” Final Rule, 81 Fed. Reg. 29398 (May 11, 2016). The rule requires covered financial institutions to identify and verify the beneficial owners of 25% or more of the equity interest of a legal entity, and individuals with authority to control the legal entity (such as the chief executive officer), at the time the legal entity opens an account at the financial institution, with some exceptions.
8 See proposed 31 U.S.C. 5336(b)(C).
9 See proposed 31 U.S.C. 5336(b)(D).
When NFIB surveyed small business owner members on this specific type of proposal in August of 2018, opposition was clear. Eighty percent of respondents opposed Congress requiring small business owners to file paperwork with the Treasury Department each time they form or change ownership in a business.\(^\text{10}\)

**Unprecedented Privacy Concerns**

This draft legislation creates serious new privacy concerns for small business owners. Collecting and storing business owners’ personally-identifiable information in FinCEN’s database is troubling. This database had more than 10,000 authorized users in 2012.\(^\text{11}\)

As drafted, nearly any local, state, tribal, or federal agency would be able to access business owners’ personally-identifiable information without a subpoena.\(^\text{12}\) Under the CDD Rule, law enforcement agencies are required to obtain a subpoena for access to a company’s beneficial ownership information from a financial institution unless that information is submitted to FinCEN with a suspicious activity report (SAR).\(^\text{13}\)

The draft’s collection and disclosure regime is antithetical to current statutes which – even for sensitive national security matters such as protection against international terrorism or clandestine intelligence activities – require the federal government to focus its investigative interest on someone in particular, some business in particular, or some account in particular before compelling a bank or other business to produce relevant information.\(^\text{14}\)

**Enforcement: Criminal and Civil Penalties and Business Revocation**

---

\(^\text{10}\) When asked, “Should Congress require small business owners to file paperwork with the Financial Crimes Enforcement Network each time they form or change ownership of a business?” a mere 11% said “yes” and a resounding 80% said “no,” with 9% undecided. (NFIB survey, August 2018).


\(^\text{12}\) See proposed 31 U.S.C. 5336(c)(1)(B) (disclosure upon request from local, tribal, state, or federal agency). Indeed, the legislation raises the specter of having the U.S. Government spy on Americans for foreign governments, as it requires disclosure of the beneficial ownership information in certain circumstances to assist foreign agency investigations and foreign tribunals. See proposed 31 U.S.C. 5336(c)(1)(B)(ii).

\(^\text{13}\) Department of the Treasury, Financial Crimes Enforcement Network, “Customer Due Diligence Requirements for Financial Institutions,” Final Rule, 81 Fed. Reg. 29398, (May 11, 2016). See Section IV. Regulatory Analysis, “Adoption of the final rule would reduce law enforcement agencies' search costs because the information would be collected by covered financial institutions for new legal entity accounts and become more readily accessible to law enforcement agency investigators with a subpoena.”

Failure to comply with legislation would result in civil penalties of up to $10,000 per day, criminal penalties up to 3 years in prison, or both.15 Considering that this draft legislation targets the smallest businesses in the United States, the proposed penalty regime is excessive.

Even the de minimis violation penalties of $500 per day would be damaging to small businesses. Moreover, “repeated violations” of de minimis penalties can result in a “willful violation.”16 De minimis noncompliance should not be penalized.

The draft legislation also allows FinCEN to recommend that state Attorneys General revoke business authorizations.17

**Name-and-Shame Noncompliance Database**

This draft legislation would require FinCEN to keep a public list of noncompliant companies, persons that it “reasonably believes” are noncompliant, and descriptions of the nature of the noncompliance.18 NFIB strongly opposes any public database containing small business owners’ personally-identifiable information.

Failure to update paperwork should not expose a business ownership structure and business owners’ personally-identifiable information to a public database. This subsection lacks any willful, knowing, or de minimis qualifying protections. NFIB, financial institutions,19 and national security experts20 agree there should never be a public database containing small business owners’ personally-identifiable information.

---

19 See testimony by Mr. Greg Baer before the Senate Committee on Banking, Housing, and Urban Affairs hearing, “Outside Perspectives on the Collection of Beneficial Ownership Information,” “Sixth, the privacy of the information submitted should be protected” (emphasis added). Under the current bills, the directory as currently envisioned would only be accessible by law enforcement and financial institutions; it would not be a public directory like those employed in other countries such as the United Kingdom.” (June 20, 2019), https://www.banking.senate.gov/hearings/outside-perspectives-on-the-collection-of-beneficial-ownership-information
Further, this type of database could be expanded into a public database for all business owners in future legislation or regulation, an idea advanced by certain stakeholders that support the CDD Rule and the draft *ILLICIT CASH Act.*

**Summons Authority**
This draft legislation would grant the Secretary and FinCEN authority to summon any person, company, or any director, officer, or employee of a reporting company to appear and produce books, records, and testimony that may be relevant to identifying the completeness and accuracy of a beneficial ownership report. This authority has the potential for misuse and abuse.

**Notifications**
Few law-abiding small business owners have familiarity with FinCEN. Some have only become familiar as a result of headlines about an internal information breach. In the CDD Rule, FinCEN did not attempt to estimate the value of privacy loss to law-abiding small business owners, which again only requires businesses that open new bank accounts after May 11, 2018, to fill out paperwork with their financial institutions.

In the draft legislation, small business owners learn about this new reporting requirement through periodic communications from financial institutions and Secretaries of State. The draft notification strategy would bewilder small business owners as they will receive notice from private entities and state agencies to report to an unfamiliar federal enforcement agency.

**Federal Contracting**

---

21 See Financial Accountability and Corporate Transparency (FACT) Coalition comment letter to the CDD Notice of Proposed Rulemaking, “the government must require all American companies to disclose information about their beneficial owners at the time of incorporation and keep it up to date, and this information must be available to the public,” (October 3, 2014), available online at https://www.regulations.gov/document?D=FINCEN-2014-0001-0096.
22 See proposed 31 U.S.C. 5336(d).
25 See proposed 31 U.S.C. 5336(e)-(f).
The draft legislation requires small businesses that bid for federal contracts to disclose beneficial ownership information to the federal agency. This requirement would significantly broaden the scope of reporting beneficial ownership information beyond FinCEN’s law enforcement purpose.

NFIB appreciates the opportunity to comment on this draft legislation. NFIB strongly opposes this draft legislation because it imposes another significant new reporting burden on millions of small businesses and represents an unprecedented new intrusion into their privacy.

Sincerely,

Juanita D. Duggan
President & CEO
NFIB

---

26 See proposed 31 U.S.C. 5336(d). This subsection (d) appears to be the second (d) in the draft legislation and may actually be subsection (l).