

May 5, 2021

By electronic submission (via the Federal E-rulemaking Portal)

Michael Mosier
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury
P.O. Box 39
Vienna, VA 22183

Re: Advance Notice of Proposed Rulemaking on Implementation of the Corporate Transparency Act, RIN 1506-AB49, Docket Number FINCEN-2021-0005

Dear Director Mosier,

The U.S. office of Transparency International (“TI-US”) appreciates the opportunity to provide comments on the Financial Crimes Enforcement Network’s (“FinCEN”) Advance Notice of Proposed Rulemaking (“ANPRM”) on questions pertinent to the implementation of the Corporate Transparency Act (“CTA”), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (“NDAA”).

TI-US is part of the largest global coalition dedicated to fighting corruption. With over 100 national chapters around the world, Transparency International (“TI”) partners with businesses, governments, and citizens to promote transparency and curb the abuse of power in the public and private sectors.

All around the world, TI chapters are actively involved in efforts to establish robust, effective, and accountable beneficial ownership registries as a means of curbing corruption, increasing government accountability and financial transparency, and building public confidence in the integrity of financial and political systems.¹ Corruption poses a unique, multidimensional threat to society in that it destabilizes economies, breaks down the rule of law, threatens political stability, and injects rent-seeking behaviors and other inefficiencies into free markets.² It is a globally resonant problem,³ and efforts to reduce it—including the establishment of highly useful

¹ For more information on TI’s work on global illicit finance, see Transparency International, “Dirty Money,” available at <https://www.transparency.org/en/our-priorities/dirty-money>.

² See generally U.S. Department of State, “International Narcotics Control Strategy Report, Volume II, Money Laundering,” March 2019, available at <https://www.state.gov/wp-content/uploads/2019/03/INCSR-Vol-INCSR-Vol.-2-pdf>.

³ For example, more than two-thirds of the 180 countries scored on TI’s 2020 “Corruption Perceptions Index”—which scores countries from 0 (very corrupt) to 100 (very clean)—received scores below 50. Transparency International, “Corruption Perceptions Index,” available at

beneficial ownership directories—can have truly global resonance.

A canvassing of over a decade of FinCEN advisories, relevant U.S. Department of the Treasury (“Treasury”) communications, including National Risk Assessments, and information from law enforcement and other government agencies shows that corruption is a top illicit finance threat.⁴ In February of last year, for example, Treasury’s National Strategy for Combating Terrorist and Other Illicit Financing identified corruption as one of the most significant illicit finance threats facing the U.S.⁵ Six months later, FinCEN issued a statement titled “Addressing the money-

<https://www.transparency.org/en/cpi/2020/index/nzl>.

⁴ See, e.g., Financial Crimes Enforcement Network, “Updated FinCEN Advisory Warns Against Continued Corrupt Venezuelan Attempts to Steal, Hide, or Launder Money,” May 3, 2019, available at <https://www.fincen.gov/news/news-releases/updated-fincen-advisory-warns-against-continued-corrupt-venezuelan-attempts>; Financial Crimes Enforcement Network, “FinCEN Advisory Warns of Risks Linked to Corruption in Nicaragua,” Oct. 4, 2018, available at <https://www.fincen.gov/news/news-releases/fincen-advisory-warns-risks-linked-corruption-nicaragua>; Financial Crimes Enforcement Network, “FinCEN Warns Financial Institutions to Guard Against Corrupt Venezuelan Money Flowing to U.S.,” Sept. 20, 2017, available at <https://www.fincen.gov/news/news-releases/fincen-warns-financial-institutions-guard-against-corrupt-venezuelan-money>; Financial Crimes Enforcement Network, “Advisory to Financial Institutions and Real Estate Firms and Professionals,” Aug. 22, 2017, available at <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a003>; Financial Crimes Enforcement Network, “Certain South Sudanese Senior Political Figures May Seek to Abuse the Financial System,” Sept. 6, 2017, <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a004>; Financial Crimes Enforcement Network, “FinCEN Issues Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and Their Financial Facilitators,” June 12, 2018, <https://www.fincen.gov/news/news-releases/fincen-issues-advisory-human-rights-abuses-enabled-corrupt-senior-foreign#:~:text=FinCEN%20is%20issuing%20this%20advisory,said%20Treasury%20Undersecretary%20Sigal%20Mandelker>; Financial Crimes Enforcement Network, “Updated Guidance to Financial Institutions on Recent Events related to the Departure of Victor Yanukovych and Other Ukrainian Officials,” Mar. 6, 2014, <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2014-a002>; Financial Crimes Enforcement Network, “Certain South Sudanese Senior Political Figures May Seek to Abuse the Financial System,” Sept. 6, 2017, available at <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2017-a004>; Financial Crimes Enforcement Network, “FinCEN Issues Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and Their Financial Facilitators,” June 12, 2018, available at <https://www.fincen.gov/news/news-releases/fincen-issues-advisory-human-rights-abuses-enabled-corrupt-senior-foreign#:~:text=FinCEN%20is%20issuing%20this%20advisory,said%20Treasury%20Undersecretary%20Sigal%20Mandelker>; Financial Crimes Enforcement Network, “Updated Guidance to Financial Institutions on Recent Events related to the Departure of Victor Yanukovych and Other Ukrainian Officials,” Mar. 6, 2014, available at <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2014-a002>.

⁵ U.S. Department of the Treasury, “National Strategy for Combating Terrorist and Other Illicit Financing, 2020” 2020, 8, available at <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf>.

laundering threat posed by corruption of foreign officials continues to be a national security priority for the United States.”⁶ And in testimony given to the U.S. Senate Banking Committee in November 2018, FinCEN twice identified corruption as an “important illicit finance and national security issu[e].”⁷

In particular, corrupt officials, rogue nations, terrorists, and other criminals routinely hide behind anonymous companies to launder the proceeds of their crimes with impunity. For example, anonymous companies were used in approximately 70 percent of all grand corruption cases over a 30-year period reviewed by the World Bank and the United Nations Office on Drugs and Crime.⁸ Iran was infamously able to evade U.S. sanctions for years by purchasing real estate in New York City through an anonymous company.⁹ A notorious illegal arms dealer, Viktor Bout, used anonymous companies, including several in the U.S., to move weapons and money to conflict zones and corrupt leaders around the world.¹⁰ And the U.S. Department of Defense unwittingly entered into contracts with anonymous companies that were later revealed to be secretly owned by individuals associated with the Taliban.¹¹

As the world’s largest economy, the U.S. is a favored target for corrupt and other illicit funds. As detailed in several studies and evaluations that call out the U.S. as a top secrecy jurisdiction, the inadequacy of our current laws compounds the problem. By providing a safe haven for corrupt and criminal actors and their stolen funds, we undermine our own safety and security.

The CTA therefore provides a once-in-a-generation opportunity to combat these and other threats by providing highly useful information to law enforcement and the financial institutions charged with anti-money laundering responsibilities that can help protect the U.S. financial system and

⁶ Financial Crimes Enforcement Network, “Agencies Issue Statement on Bank Secrecy Act Due Diligence Requirements for Customers Who May Be Considered Politically Exposed Persons,” Aug. 21, 2020, available at <https://www.fincen.gov/news/news-releases/agencies-issue-statement-bank-secrecy-act-due-diligence-requirements-customers>.

⁷ Testimony for the Record of Kenneth A. Blanco, Director, Financial Crimes Enforcement Network, U.S. Department of the Treasury, Nov. 29, 2018, available at <https://www.fincen.gov/news/testimony/testimony-fincen-director-kenneth-blanco-senate-committee-banking-housing-and-urban>.

⁸ See Transparency International, “Recommendations on Beneficial Ownership Transparency for Open Government Partnership National Action Plan,” November 2019, available at <https://www.transparency.org/en/publications/recommendations-on-beneficial-ownership-transparency-for-ogp-national-actio>.

⁹ See The FACT Coalition, “How Rogue Nations & Sanctioned Groups Use Shell Companies,” Feb. 14, 2019, available at thefactcoalition.org/how-rogue-nations-sanctioned-groups-use-shell-companies/.

¹⁰ See Casey Michel, “The U.S. Is a Good Place for Bad People to Stash Their Money,” *The Atlantic*, Aug. 10, 2017, available at www.theatlantic.com/business/archive/2017/07/us-anonymous-shell-companies/531996/.

¹¹ See Karen DeYoung, “U.S. Trucking Funds Reach Taliban, Military-Led Investigation Concludes,” *The Washington Post*, July 24, 2011, available at www.washingtonpost.com/world/national-security/us-trucking-funds-reach-taliban-military-led-investigation-concludes/2011/07/22/gIQAmMDUXI_story.html?utm_term=.361db33ec736.

ameliorate the consequences of corruption across the globe. FinCEN must now adopt strong, effective implementing rules that meet and respond to the seriousness and urgency of these threats.

Question 1

The CTA requires reporting of beneficial ownership information by “reporting companies,” which are defined, subject to certain exceptions, as including corporations, LLCs, or any “other similar entity” that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe or formed under the law of a foreign country and registered to do business in the United States by the filing of such a document.

- a. How should FinCEN interpret the phrase “other similar entity,” and what factors should FinCEN consider in determining whether an entity qualifies as a similar entity?**
- b. What types of entities other than corporations and LLCs should be considered similar entities that should be included or excluded from the reporting requirements?**
- c. If possible, propose a definition of the type of “other similar entity” that should be included, and explain how that type of entity satisfies the statutory standard, as well as why that type of entity should be covered. For example, if a commenter thinks that state-chartered non-depository trust companies should be considered similar entities and required to report, the commenter should explain how, in the commenter’s opinion, such companies satisfy the requirement that they be formed by filing a document with a secretary of state or “similar office.”**

During the negotiations leading up to the final text of the CTA, the issue of exemptions was discussed and debated extensively. A wide variety of constituencies was consulted, and exemptions were added throughout the process. To this end, the rationale for not including a specific exemption was far more likely to be a negotiated decision from policymakers than an absence of forethought. While some commenters may choose to relitigate the types, number, and scope of exemptions, Treasury and FinCEN should be aware that these arguments were very likely considered, and subsequently rejected, by Congress. Among other concerns, Members of Congress were concerned throughout the policymaking process about creating additional loopholes—whether intentionally or inadvertently—that could and surely would be exploited by corrupt and/or criminal actors.

FinCEN should also be aware of the extensive discussions leading to the understanding that the inclusion of a certain type of entity does not, in any way, suggest that that vehicle is itself corrupt. Many legitimate individuals and ownership structures may employ certain business vehicles. Rather, included vehicles were determined to be potential targets for abuse by corrupt and criminal actors because of their lack of transparency.

Constituencies seeking exemptions have made reasonable arguments that their members are not corrupt. However, it does not follow that the type of *vehicle* cannot be used by corrupt

actors. Therefore, FinCEN should consider the risk for exploitation of the vehicle itself when considering any exemption under the implementing rules. For example, certain private investment vehicles have suggested that a multi-year time horizon for investments make them a low risk for money laundering.¹² But such a suggestion does not take into account the changing nature of corrupt and criminal networks. For example, the president of Equatorial Guinea passed his stolen fortune onto his son,¹³ and money stolen by a former president of Angola made his daughter possibly the wealthiest woman in Africa.¹⁴ Longer-term planning with diversified portfolios is now intrinsic to the investment strategies of corrupt actors and criminal networks.

Critically, FinCEN must also not repeat mistakes acknowledged by other countries when setting up their beneficial ownership directories. The United Kingdom (“UK”) originally exempted certain types of partnerships, only to see the use of those vehicles skyrocket after the UK database went into effect. Lawmakers were forced to revisit the issue and, based on a second risk assessment, chose to revoke the relevant exemptions.¹⁵

This is important context as FinCEN determines how broadly or narrowly to interpret reporting company language. And given the CTA’s legislative history, final implementing rules interpreting “reporting companies” and “similar entities” broadly, beyond the specific exemptions detailed in the legislative text, would more closely reflect the intent of the drafters.

In particular, FinCEN should define the phrase “other similar entity” to include *all* types of entities that are “created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe” or “registered to do business in the United States by filing a document with a secretary of state or a similar office under the laws of a State or Indian Tribe” and *not* specifically exempted in the CTA. At a minimum, this phrase must include limited liability partnerships, non-charitable trusts and foundations, joint-stock companies, joint ventures, societies, clubs, funds, and business associations that do not qualify for an exemption. Furthermore, sole proprietorships that operate under a “doing business as” or “fictitious name” registration should be covered, as these vehicles create an opaque layer to separate the individual and the entity. And finally, where exemptions do exist, FinCEN must appropriately tailor them in order to minimize risk of abuse or exploitation. See our answer to Question 6, which addresses exempt entities, below.

¹² See Heather Vogell, “Why Aren’t Hedge Funds Required to Fight Money Laundering?” Jan. 23, 2019, available at <https://www.propublica.org/article/why-arent-hedge-funds-required-to-fight-money-laundering>.

¹³ See Transparency International, “On trial for corruption: Teodoro Obiang, son of the president of Equatorial Guinea,” June 19, 2017, available at <https://www.transparency.org/en/news/on-trial-for-corruption-teodoro-obiang-son-of-the-president-of-equatorial-g>.

¹⁴ See Laure Brillaud, Transparency International EU, “Why the EU needs to rethink its approach to asset recovery,” July 13, 2020, available at <https://transparency.eu/rethink-asset-recovery/>.

¹⁵ See BBC News, “Crackdown plan on Scottish limited partnerships,” Apr. 29, 2018, available at <https://www.bbc.com/news/uk-scotland-scotland-business-43935839>.

Question 2

The CTA limits the definition of reporting companies to corporations, LLCs, and other similar entities that are “created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe” or “registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe.”

- a. Does this language describe corporate filing practices and the applicable law of the states and Indian tribes sufficiently clearly to avoid confusion about whether an entity does or does not meet this requirement?**
- b. If not, what additional clarifications could make it easier to determine whether this requirement applies to a particular entity?**

The CTA’s inclusion of the phrase “with a secretary of state *or a similar office*” reflects the fact that while filings or registrations are made with a secretary of state’s office in many states, they are not made with such offices in every state. For example, in Arizona, most companies register with the Arizona Corporations Commission; and in Michigan, registration is with the Michigan Department of Licensing and Regulatory Affairs. The CTA thus deliberately includes “or a similar office” to make clear that it is the *role* that a state or tribal office plays with regard to covered entities, not the formal title or denomination of that office, that is determinative of what should be considered a “similar office.” To this end, an office like the Arizona Corporations Commission or Michigan Department of Licensing and Regulatory Affairs are clearly “similar” offices because of their role with regard to covered entities.

Along the same line, in some states, many entities (including sole proprietorships, limited liability companies (“LLCs”), corporations, and other similar entities) file a “doing business as” or “fictitious name” registration with a local or county office,¹⁶ while others, including partnerships, file for a state license with a separate state office.

Altogether, it is immaterial whether such offices (or any other office where entities are created or registered) happen to share any additional similarities with secretaries of state offices; an office need only play a similar role with regard to covered entities to be properly considered a “similar office.”

Question 3

The CTA defines the “beneficial owner” of an entity, subject to certain exceptions, as “an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise” either “exercises substantial control over the entity” or “owns or controls not less than 25 percent of the ownership interests of the entity.” Is this definition, including the specified exceptions, sufficiently clear, or are there aspects of this definition and specified exceptions that FinCEN should clarify by regulation?

- a. To what extent should FinCEN’s regulatory definition of beneficial owner in this context be the same as, or similar to, the current CDD rule’s definition or the**

¹⁶ See Legalinc, “Facts About Fictitious Business Name Filing,” June 8, 2019, available at <https://legalinc.com/blog/dba-name-filing/>.

standards used to determine who is a beneficial owner under 17 CFR §240.13d-3 adopted under the Securities Exchange Act of 1934?

- b. Should FinCEN define either or both of the terms “own” and “control” with respect to the ownership interests of an entity? If so, should such a definition be drawn from or based on an existing definition in another area, such as securities law or tax law?**
- c. Should FinCEN define the term “substantial control”? If so, should FinCEN define “substantial control” to mean that no reporting company can have more than one beneficial owner who is considered to be in substantial control of the company, or should FinCEN define that term to make it possible that a reporting company may have more than one beneficial owner with “substantial control”?**

The definition of “beneficial owner” is among the most critical aspects of the CTA, and embodies a number of key considerations and important decision points by its drafters. FinCEN must maintain the integrity of this definition in its implementing rules, in particular by adopting a broad interpretation of the “control” prong that specifies the indicators of company control.

First, the drafters deliberately included both the 25 percent “ownership” provision and the “substantial control” provision in recognition of alternative arrangements and of how ownership stakes can be manipulated or masked.

To the average person, the owner of a company is a straightforward matter. In fact, approximately 78 percent of all U.S. companies are nonemployer firms.¹⁷ For the plumbers, tax preparers, and many others who set up these companies, there is, generally, one person who is the owner, boss, and sole employee. But companies can divide up ownership interests of a company in many ways, including ways that mask the person(s) who controls how funds are allocated, and who benefits from the proceeds of the company. A company can easily, for example, create a class of nonvoting shares specifically to decouple equity ownership from company control. Or, imagine a company created and controlled by a corrupt official with a brother, spouse, and two children. If each has an equal “ownership” stake of 20 percent, then no one would have to be reported as owning the company.

Understanding these possibilities, the CTA does not simply rely on a percent ownership threshold. Instead, it also requires a reporting company to provide identifying information for every individual who exercises “substantial control” over the company, *beyond* any written ownership structure and whether or not the person owns any stock.

In fashioning this definition, Congress understood the difference between requiring identifying information for *one* individual that exercises substantial control over a corporation, LLC, or other similar entity, and requiring such information for *each* individual that does so. Awareness of this difference is made clear in the subsection on reporting requirements for certain pooled investment vehicles (“PIVs”), which reads in relevant part:

¹⁷ U.S. Census Bureau, “Nonemployer Statistics by Demographics (NES-D): Using Administrative and Census Records Data in Business Statistics,” Jan. 2019, available at <https://www2.census.gov/ces/wp/2019/CES-WP-19-01.pdf>.

Any corporation, limited liability company, or other similar entity that is an exempt entity described in subsection (a)(11)(B)(xviii) and is formed under the laws of a foreign country shall file with FinCEN a written certification that provides identification information of *an individual* that exercises substantial control over the pooled investment vehicle in the same manner as required under this subsection.¹⁸

In addition, the CTA states explicitly that a company cannot name an agent, nominee, or other stand-in as a beneficial owner. That means a company can't name a lawyer, employee, or corporate formation agent unless that person also has ultimate control over the company.

Second, the drafters of the CTA designed the definition of “beneficial owner” to close loopholes in the U.S. Customer Due Diligence (“CDD”) rule. Currently, the CDD rule defines “beneficial owner” as a person who owns 25 percent or more of the shares of a company. If no one meets that threshold, the CDD rule allows the company to name an officer or manager instead. But an officer or manager is not necessarily a company owner. That is why the CTA intentionally closes this loophole by requiring the disclosure of persons who either own *or* control the company—compelling disclosure of the individuals with actual, ultimate control of the company, and not simply an employee who can be fired by the true owners.

Third, the definition of “beneficial owner” was specifically designed to meet international standards. The Financial Action Task Force (“FATF”)—the multilateral body that sets international anti-money laundering standards—defines beneficial owners by looking at both ownership and control.¹⁹

Control is also included in definitions of ownership in the United Kingdom (“UK”)²⁰ and European Union (“EU”)²¹ rules for beneficial ownership reporting. Both rules require companies to consider not just the ownership of company shares, but also who has power to vote, direct votes, replace board members, and direct the selling of securities—all indicators of company control. Only if a company claims that no one meets either the ownership threshold or exercises those types of control over its operations do the UK and EU laws allow the company to list a senior manager instead. But, again, a manager who can be fired is not a beneficial owner. The better approach is to follow the FATF—and now U.S.—standard requiring the company to name who controls it, because someone always does. Especially companies engaged in wrongdoing.

Defining “control” of an entity broadly is also consistent with other U.S. federal laws where it is

¹⁸ Emphasis added.

¹⁹ See Inter-American Development Bank (“IDB”) and the Organisation for Economic Cooperation and Development (“OECD”), “A Beneficial Ownership Implementation Toolkit,” March 2019, available at <https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf>.

²⁰ The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (2017 Regulations), SI 2017/692, art. 5 (UK).

²¹ See Transparency International, “European Union Beneficial Ownership Transparency,” 2015, available at, https://www.transparency.org/files/content/publication/2015_BOCountryReport_EU.pdf.

important to identify beneficial ownership of an entity. For example, the regulations governing the Committee on Foreign Investment in the United States (“CFIUS”)—an interagency committee overseen by Treasury—include an expansive definition of “control” to assert jurisdiction over a wide range of foreign influence over a U.S. business, reflecting CFIUS’s important mandate to protect U.S. national security. FinCEN’s mandate to safeguard the U.S. financial system and promote U.S. national security likewise counsels in favor of inclusive definitions of “substantial control” to determine beneficial ownership. In particular, the CFIUS regulations provide that “control” is the “power whether or not exercised” by any “means” to determine, direct, or decide important matters affecting an entity.²² Such a definition of “control” also makes clear that it is separate and distinct from “own[ing]” an interest in an entity, which incorporates elements of possession and legal title that are not necessary to exercise *control* over an entity. The CTA also requires that FinCEN define “substantial control” in a manner that permits more than one person to exert substantial control. Using the CFIUS regulations as an analogue, it is recognized that more one than one person can exert control over an entity through “formal or informal arrangements to act in concert.” In such circumstances, each person has the ability to exercise “substantial control” over the entity.

Finally, clarifying the indicia of company control is a necessary and important step toward the effective enforcement of the CTA’s strong definition of “beneficial owner.” At a minimum, the implementing rules should state that the term “control” means the power to vote, direct votes, appoint and replace board members, decide on the sale or termination of a company, and direct who takes possession of company funds or assets.

Question 4

The CTA defines the term “applicant” as an individual who “files an application to form” or “registers or files an application to register” a reporting company under applicable state or tribal law. Is this language sufficiently clear, in light of current law and current filing and registration practices, or should FinCEN expand on this definition, and if so how?

What is central to the definition of “applicant” is the *role* that this individual plays in the formation or registration process. To this end, FinCEN should make clear that an applicant need not be cabined to a person who plays such a role yet does not happen to “fil[e] an application” or “register”, or perform another equivalent action or process, in order to form or register the entity. Instead, “applicant” should be defined broadly to encompass any individual that files an application to form, or registers or files an application to register, or performs any functionally similar action or role with regard to forming or registering a reporting company. Such a definition will be structured to capture current and evolving filing, registration, and related practices as iterated in jurisdictions across the country—regardless of formalities or terminology.

Bottom line, every entity subject to the reporting requirement has a person who plays the functional role of the “applicant,” and so FinCEN’s implementing rules must make sure that for every reporting entity there is an accompanying “applicant,” regardless of their formal title.

²² See 31 CFR Sec. 800.

Question 5

Are there any other terms used in the CTA, in addition to those the CTA defines, that should be defined in FinCEN’s regulations to provide additional clarity? If so, which terms, why should FinCEN define such terms by regulation, and how should any such terms be defined?

Yes, see our answers throughout.

Question 6

The CTA contains numerous defined exemptions from the definition of “reporting company.” Are these exemptions sufficiently clear, or are there aspects of any of these definitions that FinCEN should clarify by regulation?

TI’s global network of experts and advocates have extensively documented how even small gaps in U.S. anti-money laundering laws can allow corrupt actors to exploit the U.S.’s financial system. The continuous emergence of ever-more complex and sophisticated financial vehicles and networks makes certain that if the U.S. fails to stay ahead of evolving illicit finance threats, it will be permitting corrupt actors to adapt and thrive outside its reach. The carefully limited exemptions to the CTA’s baseline reporting requirement are therefore among the most important aspects of the new law.

Overall, while appearing to contain disparate and varied requirements, the elements of many of the most consequential exemptions in fact reflect clear and consistent themes, key decision points, and deliberate prerequisite conditions for exemption. Informed by this common background and approach, their further articulation should be relatively straightforward.

To accurately reflect the language and intent of the CTA, and to ensure a comprehensive regulatory regime that is sufficiently fortified against corruption and abuse, FinCEN’s interpretation of the CTA’s exemptions from the definition of “reporting company” must include the following components:

(vi)—Money transmitting businesses properly, actively, and continuously registered with Treasury

The CTA exempts money transmitting businesses (MTBs), as defined in 31 U.S.C. § 5330(d)(1), if they are properly, actively, and continuously registered with the Secretary of the Treasury according to 31 U.S.C. § 5330 and its accompanying regulations. For example, the MTBs must provide all the information required under 31 U.S.C. § 5330(b), including the name and address of every deposit institution at which the business maintains a transaction account.

(xiii)—Affirmatively and continuously authorized insurance producers

To qualify for this exemption, an insurance producer must be “authorized by a state.” This operative term, “authorized,” reflects the fact that insurance producers are regulated at the state level, and that such regulators, by practice, must affirmatively license an insurance

producer before it can, for example, sell, negotiate, effect, or deliver insurance.²³

Reflecting this industry practice, exemption (xiii) requires that an entity be *affirmatively and continuously* authorized—essentially precleared and actively licensed—by a state in order to be exempt. It is therefore insufficient that, for example, an entity has simply applied or filed the paperwork for a state insurance producer license, or that an entity was once properly authorized but has since fallen out of compliance for such authorization. Instead, the state must have issued an affirmative, final, and formal determination that the entity is authorized to operate as an insurance producer in the state, and that authorization must be active, ongoing, and in good standing.

(xviii)—Pooled investment vehicles publicly identified by name

To qualify for this exemption, an entity must be operated or advised by certain entities or persons (e.g., a bank, a federal or state credit union, a registered broker or dealer) and must either be an “investment company” (as defined in section 3(a) of the Investment Company Act of 1940) or a company that would be an investment company but for the exclusion provided from that definition by paragraph (1) or (7) of that section *and* that is identified by its legal name by the applicable investment adviser in its Form ADV or successor form filed with the Securities and Exchange Commission (“SEC”).

The publicly available Form ADV requires, among other items, a list of all private funds that the adviser manages. Though this list can include *either* the names of the private funds or numbers generated by the SEC that represent the names of these private funds, the CTA makes clear that to qualify for exemption xviii, an entity *must* be identified by its legal name. FinCEN must in turn ensure that this context and choice is reflected in its implementing rules.

(xix(III))—Charitable and Split-Interest Trusts

Trusts are a high-risk vehicle for money laundering, a fact that has been documented extensively. In particular, in 2010, the FATF authored a report titled “Money Laundering Using Trust and Company Service Providers,”²⁴ that documents these risks as they relate to corrupt officials and criminal networks. The organization also called for additional studies concerning the use of trusts for terror financing.²⁵

Through over a decade of negotiations, Congress articulated 23 highly specific and exactly detailed types of entities for exemption from the CTA’s reporting requirements. Such informed and precise determinations, and resulting text, reflect the obvious, but worthy of restatement here, reality that the drafters of the CTA were well versed on the available

²³ See National Association of Insurance Commissioners, “State Insurance Regulation,” 2011, available at https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf.

²⁴ Financial Action Task Force, “Money Laundering Using Trust and Company Service Providers,” Oct. 2010, available at <https://www.fatf-gafi.org/documents/documents/moneylaunderingusingtrustandcompanyserviceproviders.html>.

²⁵ *Id.*

universe of entities for both inclusion and exemption. Here, from the larger universe of trusts, Congress specified two subcategories for exemption: *charitable* trusts and *split-interest* trusts. FinCEN must respect and reflect this granular demonstration of congressional intent by making clear that other types of trusts, namely, *non-charitable* trusts, are to be considered “similar entities” that are subject to the CTA’s reporting requirements.

Thus, while FinCEN cannot reverse the legislative text, which expressly exempts charitable and split-interest trusts, its implementing rules can ensure the harm done by exemption (xix(III)) is cabined to those specific kinds of trusts.

The implementing rules should make clear that the phrase “other similar entity” includes non-charitable trusts that are “created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe” or “registered to do business in the United States by filing a document with a secretary of state or a similar office under the laws of a State or Indian Tribe”—including those that file or register with a local or county office. Non-charitable trusts may file with a secretary of state office if, for example, they engage in business activity, but not necessarily. Trusts engaged in business activities may file a “doing business as” registration with a local or county office. Some trusts may file with a local, county or state court. This is the same reason, as raised earlier, that FinCEN should think expansively about filings with offices that are “similar” to that of a secretary of state.

(xx)—U.S.-funded and owned financiers or governance rights holders of (xix) entities

Exemption (xx) is available to an entity that meets four express conditions: It must operate *exclusively* to either provide financial assistance to, or hold governance rights over, an xix-exempted entity; it must be a United States person; it must be beneficially owned and controlled, *exclusively*, by one or more U.S. persons that are either U.S. citizens or lawfully admitted for permanent residence; and it must derive at least a majority of its *funding* or *revenue* from one or more U.S. persons that are U.S. citizens or lawfully admitted for permanent residence.

To illustrate the boundaries of this exemption: If a company engages in any activity whatsoever other than providing financial assistance to, or holding governance rights over, an xix entity, it would not qualify for the exemption. This includes the provision of any financing, however small, to any entity other than an xix entity.

The entity must also be exclusively beneficially owned, or exclusively controlled, by one or more U.S. citizens or green card holders. Thus, an entity that was exclusively beneficially owned by a U.S. citizen—but controlled by a second person who was not either a U.S. citizen or green card holder—would not qualify for the exemption.

Finally, the exemption was carefully drawn so as to make sure that exempted entities could not be used as conduits of unlimited illicit funds from foreign corrupt or criminal actors. Without a qualification that speaks to where an entity’s money is coming from, a foreign bad actor could launder unlimited illicit funds through an xix-exempted entity without any beneficial ownership information ever being reported. To foreclose such a possibility, a

majority of the entity’s “funding” or “revenue” must come from one or more U.S. citizens or green card holders. Note that “funding or revenue” connotes a source of cash flow either by contribution (funding) or sales of goods or services (revenue). Funding or revenue is distinct from “gross receipts,” a term used in an adjacent subsection, making clear that “funding or revenue” is not to be interpreted or defined in the same manner as “gross receipts.” “Gross receipts,” rather, are defined in the Internal Revenue Code to mean a broader array of income sources, including (a) amounts received from the sale or lease of property, (b) dividends and interest, and (c) commissions.²⁶ Accordingly, an entity would not be exempt under subsection (xx), for example, if it derived a majority of its available cash from the sale of property, as such cash would be a gross receipt, not funding or revenue. Similarly, an entity that derives a majority of its *assets*, or simply its *profits*, from U.S. citizens or green card holders would not qualify for the exemption.

In the same vein, the CTA makes clear that an entity must derive at least a majority of its *total* funding or revenue from such sources—not simply its funding or revenue for, say, the previous tax year.

(xxi)—Large U.S.-operating companies with over \$5 million in receipts or sales

Exemption (xxi) is available to an entity that:

- (I) employs more than 20 employees on a full-time basis in the United States;
- (II) filed in the previous year Federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of—
 - (aa) other entities owned by the entity; and
 - (bb) other entities through which the entity operates; and
- (III) has an operating presence at a physical office within the United States.

To qualify for this exemption, an entity must employ more than 20 *full-time*—meaning, according to the IRS, an employee employed on average at least 30 hours of service per week or 130 hours per month²⁷—*employees*, meaning that independent contractors and comparable agency relationships are not to be counted toward the threshold.

Additionally, an entity must demonstrate *in its previous year’s federal income tax returns*—not return(s) reflecting any other time period, and not income tax returns filed with any other political subdivision—that they had gross *receipts or sales* that exceeded \$5 million. Just as in exemption (xx), these terms have established and precise legal contours. Drafters of the CTA considered other potential demonstrations of economic activity such as “revenue,” “income,” and “assets,” and intentionally excluded these metrics from exemption (xxi).

(xxii)—Entities wholly owned by certain exempt entities

²⁶ See 26 CFR § 1.993-6.

²⁷ Internal Revenue Service, “Identifying Full-Time Employees,” Jan. 22, 2021, available at <https://www.irs.gov/affordable-care-act/employers/identifying-full-time-employees>.

Similar to the “dormant company” exemption discussed below, exemption (xxii) is available to an entity of which the ownership interests are 100 percent owned or controlled, directly or indirectly, by one or more certain entities exempted elsewhere.

Big picture, to exempt subsidiaries that are, say, *majority* owned, but not wholly owned, would not only exponentially increase the total universe of exempted entities, but would introduce serious risks that bad actors will gain access to the U.S. financial system through jointly owned entities or other types of joint ventures. Doing so would provide bad actors with a clear road map for penetrating the U.S. financial system: Simply find an exempt company to serve as a partner, or as a majority owner in a joint venture, and you can escape detection. Since the exempt entity has no responsibility to know who is behind a potential layer of shell companies, there is plausible deniability should law enforcement suspect illicit activity on behalf of the partner entity.

Instead, interpreting “owned or controlled” to mean that an entity is only exempt if *all* its ownership interests are owned or controlled by one or more certain entities exempted elsewhere by the CTA would be textually consistent with the statute. Where Congress intended to identify an ownership interest less than 100 percent, it did so, as in the definition of “beneficial owner,” where Congress specified that the term includes an individual who “owns or controls *not less than 25 percent* of the ownership interests of the entity.” In the absence of such a qualifier, as in exemptions xix and xxii, Congress plainly intended such ownership or control to mean 100 percent of the entity’s ownership interests.

Others may suggest that Treasury arbitrarily interpret “owned or controlled” to mean *majority* ownership, yet nowhere does the CTA indicate such an intent of Congress. Moreover, it would be inappropriate for Treasury to interpret the CTA’s exemptions broadly, as a tried-and-true canon of statutory interpretation presumes that exceptions are to be interpreted narrowly in order to preserve the primary operation of the provision.²⁸ Indeed, Treasury relies on a majority ownership policy when it intends to be *inclusive*, not exclusive, as in the Office of Foreign Assets Control’s (“OFAC”) “50 Percent Rule.” That policy provides that any entity owned 50 percent, directly or indirectly, by a person listed on OFAC’s “Specially Designated National and Blocked Persons List” is treated in the same manner as the listed person.²⁹ That expansive policy promotes OFAC’s mandate to reach as broadly as possible to persons and entities that threaten U.S. financial and security interests. An inclusive “50 Percent Rule” in the context of the CTA’s exemptions, therefore, has no place.

(xxiii)—*Dormant companies*

²⁸ See *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989)). See also, e.g., *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (“Any exemption from...remedial legislation must...be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.”).

²⁹ U.S. Department of the Treasury, “Frequently Asked Questions: Entities Owned by Blocked Persons (50% Rule),” available at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1521>.

Exemption (xxiii) is available to an entity that has been in existence for over one year, is not engaged in “active business,” is not owned, directly or indirectly, by a foreign person, and has not, in the preceding 12-month period, experienced a change in ownership or sent or received funds in an amount greater than \$1,000 (including all funds sent to or received from any source through a financial account or accounts in which the entity, or an affiliate of the entity, maintains an interest).

In defining the contours of this exemption, FinCEN must first make clear that it is intended for qualifying entities in existence *prior* to CTA implementation. In fact, the exemption is crafted in such a way as to make it functionally impossible for an entity formed *after* implementation to claim it.

FinCEN must then ensure that the term “active business” is interpreted broadly to reflect the drafters’ intent that it be available only to truly “dormant” entities—that is, entities that have zero discernable business activities whatsoever.

Finally, FinCEN must be mindful that this exemption incorporates one of the most important throughlines in the CTA: That Congress was acutely concerned about the risks posed by *foreign* ownership and/or an entity’s lack of a physical presence in the United States. Reflecting this concern, and just as in exemption (xx), which requires that an entity be exclusively beneficially owned or controlled by one or more U.S. citizens or green card holders, exemption xxiii states that an entity is exempt only if it is “*not owned, directly or indirectly, by a foreign person.*”³⁰ This is an intentionally narrow, zero-threshold bar for foreign-owned or -controlled entities, and FinCEN must reiterate Congress’s clear intent on the matter: To receive this exemption, an entity cannot have *any* ownership interest owned or controlled by a foreign individual or entity.

Question 7

In addition to the statutory exemptions from the definition of “reporting company,” the CTA authorizes the Secretary, with the concurrence of the Attorney General and the Secretary of Homeland Security, to exempt any other entity or class of entities by regulation, upon making certain determinations. Are there any categories of entities that are not currently subject to an exemption from the definition of “reporting company” that FinCEN should consider for an exemption pursuant to this authority, and if so why?

FinCEN should not create any novel exemptions this soon after the adoption of the CTA itself, and absent the required determinations and formal notice-and-comment process associated therewith. Some exemptions that have already been suggested, such as an exemption for small businesses, would disregard congressional intent, undermine the effectiveness of the law, and weaken its national security benefits.

Going forward, FinCEN must not engage in rulemakings that result in the creation of new, unjustified exemptions for favored or powerful constituencies that will lead to future abuse or exploitation.

³⁰ Emphasis added.

In the twelve years since the original version of a corporate transparency bill was introduced by Senators Carl Levin and Norm Coleman, the issue of exemptions from the reporting requirements has been among the most debated of any of the law's provisions. As discussed above, the final law settled on 23 highly specific and exactly detailed types of entities for exemption.

When Congress included the beneficial ownership reporting requirements in the NDAA, it did so in recognition of the national security threat posed by anonymous companies. The extensive record of abuse of anonymous entities was determinative in moving Congress to include the CTA in the annual defense bill.³¹ From that record, FinCEN must draw the conclusion that it should employ a risk-based approach to exemptions, and as such, any future exemptions must be strictly limited to entities that already report beneficial ownership information to a government agency or that are sufficiently supervised and examined by an appropriate regulator.

In assessing such risk, FinCEN must not look to any magic number of instances of abuse within a type, class, or category of entity, but the overall potential risk. When the Iranian government, through its national bank, used a U.S. shell company to purchase property in New York City in violation of economic sanctions, it was only one instance, but an illustrative example of serious risk.

Question 8

If a trust or special purpose vehicle is formed by a filing with a secretary of state or a similar office, should it be included or excluded from the reporting requirements?

The CTA includes specific exemptions for *charitable* and *split-interest* trusts. How trusts were to be treated under the CTA was considered extensively during bill negotiations. The choice to omit *non-charitable* trusts from the list of exempted trusts makes clear that these entities were to be included as reporting companies.

Including trusts that are not otherwise expressly exempted would also be consistent with emerging international norms: The FATF, for example, includes trusts among its recommendations, and the EU includes trusts in their anti-money laundering directive on beneficial ownership reporting.

Special purpose vehicles ("SPVs") must also be included as reporting companies unless they otherwise claim an exemption, as a blanket exclusion of these types of entities could create a loophole for unscrupulous actors. SPVs often take the form of an LLC, limited partnership, or trust. SPVs formed by well-regulated entities such as public utilities or large financial institutions are of low risk and would be able to claim an exemption already detailed in the law. However, not all SPVs are low risk. SPVs, when filing with a secretary of state, submit very little

³¹ See The FACT Coalition, "Beyond Anecdotes: Data Demonstrate Anonymous Companies Are Dangerous and Prevalent," May 14, 2019, available at <https://thefactcoalition.org/beyond-anecdotes-data-demonstrate-anonymous-companies-are-dangerous-and-prevalent/>.

information, such as the name of the business and the address, and little to no information about the SPV's owner(s) or shareholders. SPVs can also be formed offshore and then file limited information in order to do business in the United States. This low threshold of reporting could make SPVs prime vehicles for the type of criminal and illicit activity the CTA was designed to guard against. A classic example of this is Enron Corporation's use of SPVs to falsify holdings, maintain off-the-books entities to hide its debt, and artificially inflate the company's stock price.³²

Question 9

How should a company's eligibility for any exemption from the reporting requirements, including any exemption from the definition of "reporting company," be determined?

- a. What information should FinCEN require companies to provide to qualify for these exemptions, and what verification process should that information undergo?**
- b. Should there be different information requirements for operating companies and holding companies, for active companies and dormant companies, or are there other bases for distinguishing between types of companies?**
- c. Should exempt entities be required to file periodic reports to support the continued application of the relevant exemption (e.g., annually)?**

The CTA requires that if an exempt entity no longer meets the relevant criteria for exemption, it must submit its beneficial ownership information to FinCEN "at the time" it no longer qualifies. This specific language—"at the time"—clearly means *simultaneously*. Timely update requirements are important as money laundering transactions can move through the system quickly. FinCEN should not open a door for otherwise legitimate financial gatekeepers to unwittingly assist criminals who seek to exploit gaps in the rules.

FinCEN must ensure that its implementing rules do not allow for a time frame that contrasts with such a clear directive (e.g., within 30 days, within six months, or even "promptly"). Instead, an entity must be required to submit its ownership information at the precise time that it no longer meets exemption criteria.

Finally, FinCEN should keep in mind that negligence is not punishable under the law. That is to say that a delay or omission would have to be willful to result in penalties (for example, not submitting a report for the purpose of evading detection after using a previously exempt company to launder illicit funds).

Question 10

What information should FinCEN require a reporting company to provide about the

³² See Adam Hayes, Investopedia, "Enron", Apr. 12, 2021, available at <https://www.investopedia.com/terms/e/enron.asp> ("The company set up special purpose vehicles (SPVs), also known as special purposes entities (SPEs), to formalize its accounting scheme that went unnoticed for a long time").

reporting company itself to ensure the beneficial ownership database is highly useful to authorized users?

The CTA requires that every reporting company provide a report that identifies “*each* beneficial owner” of the company “and *each* applicant” with respect to that reporting company by full legal name, date of birth, current—as of the date the report is delivered—a physical (not P.O. box) residential or business street address, and either a unique identifying number from an acceptable identification document or a FinCEN identifier.

Inherent in the text, intent, and common-sense operation of the law is also the requirement that reporting companies report the name of the entity itself. Since duplicative company names can exist across jurisdictions, it is also reasonable, for the most basic identification purposes, for FinCEN to request the jurisdiction in which the reporting company was formed. For U.S. companies, FinCEN should provide a drop-down menu for filers to select the appropriate state or other U.S. jurisdiction (such as tribe or territory). For foreign companies registering to do business in the U.S., FinCEN should request the jurisdiction in which the company was formed, or in which the company has its headquarters or principal place of business.

Question 11

What information should FinCEN require a reporting company to provide about the reporting company’s corporate affiliates, parents, and subsidiaries, particularly given that in some cases multiple companies can be layered on top of one another in complex ownership structures?

While it is not incumbent upon a reporting company to provide such information, the database itself must be able to link beneficial owners to corporate affiliates, parents, and subsidiaries in order to ensure the information is highly useful. The database should also be able to link beneficial owners to all the entities that that person owns in a single search. Mapping the corporate structure is important for creating useful reports for database users, including law enforcement officials and financial institutions. This is not particularly difficult or unusual technology (Facebook, with more than one billion users, for example, maps relationships with every search).

Denmark’s beneficial ownership directory, for example, allows users who search an individual’s name to see every company in which that individual is named as a beneficial owner. The Danish directory also allows users to see all the business listed at the same address. Search engines operate in Belgium, France, and other EU member states that allow users to find multiple data points as well. FinCEN should speak with these countries to learn what is most useful and to avoid mistakes that needed to be corrected later in the development process.

Given the steps required of users in order to receive approval for a single query to the U.S. database, it would be impractical and time consuming for users to only receive a single datapoint with each search (e.g., a single match of an owner and a company) if additional data exists. The directive in the CTA to make the information highly useful instead requires

FinCEN to create a database that will provide *all* relevant data with each search.

To illustrate the need for this interoperability, when Venezuelan General Vladimir Padrino laundered millions of dollars stolen from the public Venezuelan treasury, he established a front company in the United States and installed nominee owners.³³ Without a comprehensive view of the web of interconnected shell companies linked to a front company, law enforcement would find it nearly impossible to gain an understanding of an illicit network.

FinCEN should also ensure that the database is capable of linking beneficial owners to all corporate affiliates, parents, and subsidiaries. That information can in turn be used to automatically assign a unique identifier that links to all related entities in order to facilitate investigations and ensure the data is highly useful to users.

FinCEN should keep in mind that the vast majority of companies in the U.S. have simple structures. More than 99 percent of U.S. companies are considered small by the Small Business Administration (“SBA”).³⁴ Approximately 80 percent are nonemployer firms.³⁵ Larger firms that qualify for exemption (xxi) would not have to submit reports.

For those companies that do have more complex structures, FinCEN should be able to “connect the dots” with proper use of FinCEN identifiers. Beneficial owners can only receive one identifier, regardless of the number of entities with which they are associated. Subsidiaries of companies that receive identifiers will use the parent identifier, thus providing a map of the corporate structure.

There are inherent risks posed by small companies with complex structures (e.g., shell companies). Companies that are a part of a multilayered chain and that have parent companies who choose not to obtain a company identifier should be asked to list their parent companies. Similarly, parent companies without identifiers should be asked to name their subsidiaries. This is likely to be a very small percent of reporting companies, as legitimate companies will likely obtain identifiers for ease of compliance.

When designing the database and asking for information necessary for mapping corporate structure, FinCEN should consider that it is unreasonable for a firm to have the resources to afford lawyers or other agents to create a complex corporate structure, but then claim to not also have the resources to name those at the top of the structure.

³³ See Organized Crime and Corruption Reporting Project, “Vladimir Padrino has links to companies, real estate worth million,” Miami Herald, Apr. 13, 2020, available at <https://www.miamiherald.com/news/nation-world/world/americas/venezuela/article241970616.html>.

³⁴ See U.S. Small Business Association, Frequently Asked Questions, September 2012, available at https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

³⁵ See U.S. Small Business Association, “A Look at Nonemployer Businesses,” August 2018, available at <https://www.sba.gov/sites/default/files/advocacy/Nonemployer-Fact-Sheet.pdf>.

Question 12

Should a reporting company be required to provide information about the reporting company's corporate affiliates, parents, and subsidiaries as a matter of course, or only when that information has a bearing on the reporting company's ultimate beneficial owner(s)?

See our answer to Question 11 above.

Question 13

What information, if any, should FinCEN require a reporting company to provide about the nature of a reporting company's relationship to its beneficial owners (including any corporate intermediaries or any other contract, arrangement, understanding, or relationship), to ensure that the beneficial ownership database is highly useful to authorized users?

See our answer to Question 11 above.

Question 14

Persons currently obligated to file reports with FinCEN overwhelmingly do so electronically, either on a form-by-form basis or in batches using proprietary software developed by private-sector technology service providers.

d. Should FinCEN allow or support direct batch filing of required information?

Assuming that all covered entities provide timely, complete, and accurate information, we would not object to a database that permits and encourages batch filings.

Question 15

Section 5336(b)(2)(C) requires written certifications to be filed with FinCEN by exempt pooled investment vehicles described in section 5336(a)(11)(B)(xviii) that are formed under the laws of a foreign country.

a. By what method should these certifications be filed?

Exempt pooled investment vehicles ("PIVs") that are formed under the laws of a foreign country should be required to file written certifications with FinCEN via the same means and process that beneficial ownership reports are submitted.

b. What information should be included in these certifications?

In addition to the standard identifying information required of all reporting company beneficial owners, FinCEN should require that all such written certifications filed include the PIV's original (or reproduced original) incorporation documents, or jurisdiction-specific corollary, as evidence of its proper, qualifying formation under the laws of a foreign country.

- c. **Should there be a mechanism through which such filings could be made to foreign authorities and forwarded to FinCEN, or should such filings have to be directly to FinCEN?**

Section 5336(b)(2)(C) requires certifications to be filed directly with FinCEN.

- d. **What information should be included in these certifications (e.g., what information would allow authorities to follow up on certifications containing false information)?**

See our answer to part (b) above.

- e. **Should these certifications be accessible to database users, and if so, should they be accessible on the same terms as beneficial ownership information of reporting companies?**

Yes. The provisions in the CTA establish a set of protocols for accessing the database, with penalties for misuse. There are ample mechanisms to protect the security of the information. Appropriate users should have complete access to all the information relevant to their investigation or CDD compliance programs. Creating additional roadblocks to data serves only to limit the usefulness of the data that users do receive.

Question 16

What burdens do you anticipate in connection with the new reporting requirements? Please identify any burdens with specificity, and estimate the dollar costs of these burdens if possible. How could FinCEN minimize any such burdens on reporting companies associated with the collection of beneficial ownership information in a manner that ensures the information is highly useful in facilitating important national security, intelligence, and law enforcement activities and confirming beneficial ownership information provided to financial institutions, consistent with its statutory obligations under the CTA?

Since cost estimates will vary widely, FinCEN should look to the actual, documented experiences of business owners who are filing very similar ownership information with other countries.

For example, after the UK established a beneficial ownership directory, businesses reported on their experiences.³⁶ The relevant data shows that for small/micro businesses, defined as those with less than 50 employees, there was an average initial cost of approximately \$155 and an ongoing annual compliance cost of approximately \$3.³⁷ According to one study of the UK directory, “The most common number of [beneficial owners] reported was one (43%), followed

³⁶ UK Department for Business, Energy & Industrial Strategy, “People of Significant Control (PSC) Register: review of implementation,” March 2019, available at <https://www.gov.uk/government/publications/people-of-significant-control-psc-register-review-of-implementation>.

³⁷ *Id.*

by two (37%). Only 13% of business had three or more.”³⁸ FinCEN should reach out to those who designed the UK beneficial ownership registration system to discuss specific ways they made it easy and efficient for business owners to comply with the UK law.

Comparing the UK law with the CTA, we should expect compliance costs to be slightly less in the United States. The CTA caps reporting companies’ total employment at 20 full-time employees, so the U.S. will not have any of the potential complexity introduced by UK companies that employ between 21 and 50 employees. The UK law also requires slightly more information than the U.S. law. And the U.S. and UK both have a high percentage of companies that are nonemployer firms—approximately 80 percent of all U.S. businesses and approximately 76 percent of all UK businesses.

While there will not be a significant burden on the vast majority of reporting companies, there are a number of ways FinCEN can design the data collection process that will make it easier for companies to comply.

FinCEN should quickly reach out to state business licensing agencies to develop partnerships for state portals that link to the FinCEN database. While states are not required by law to collect information, incorporating a link to the FinCEN database into existing state incorporation and registration processes will become an important sign that states are trying to be business friendly. In fact, if states want to be most helpful to their in-state businesses, they would make filling out the FinCEN form mandatory to complete the incorporation or registration processes. To accommodate anyone who found their way directly to the FinCEN website or who files the information on paper, states could also add a checkbox through which those filers could confirm they have already provided the required information. States will not be held responsible if someone checks the box when they should not have, or if they simply do not check the box.

In addition, FinCEN should create a similar partnership with the Internal Revenue Service (“IRS”). This partnership would be quite helpful for informing reporting companies of the need to update their beneficial ownership information in the event it changes. Businesses filing quarterly or annual taxes would also have a ready reminder. For the vast majority of businesses, this will not be necessary, but for those who do have a change in beneficial ownership, it would be a way to offer an easy, “in the course of regular business,” way of staying in compliance.

FinCEN should creatively think about additional partnerships, but the above two are the most important at this point for helping with the mandate to ease burdens on businesses.

Question 17

Section 5336(e)(1) requires the Secretary to take reasonable steps to provide notice to persons of their reporting obligations.

- a. What steps should be taken to provide such notice?**
- b. Should those steps include direct communications such as mailed notices, and if so to whom should notices be mailed?**
- c. What type of information should be included in such a notice, for example, the**

³⁸ *Id.*

- purposes and uses of the data, and how to access and correct the information?**
- d. Should the notice be followed by an explicit acknowledgement of the reporting company, or consent of the beneficial owner or applicant if the owner or applicant is submitting the information, to the handling of beneficial ownership information as stated in the notice and applicable law?**

See our answer to Question 16 regarding notice to businesses. FinCEN should also partner with the SBA, with small business trade organizations who provide services to their members, and with the American Bar Association (“ABA”), whose members often assist with corporate formation.

Question 19

What should reporting companies or individuals holding FinCEN identifiers be required to do to satisfy the requirement of section 5336(b)(1)(D) that they update in a timely manner the information they have submitted when it changes, such as when beneficial owners or holders of FinCEN identifiers (i) transfer substantial control to other individuals; (ii) change their legal names or their reported residential or business street addresses; or (iii) die; or (iv) when a previously acceptable identification document expires? For example, should the reporting companies or individuals be required to file a new report, or provide notice only of the information that has changed?

The CTA requires that a reporting company “in a timely manner, and not later than one year after the date on which there is a change with respect to any information...submit to FinCEN a report that updates the information relating to the change.” FinCEN should make clear that this updated information has to be reported as soon as possible after a change has been made.

Furthermore, in determining what constitutes “a timely manner,” FinCEN should look to directories like those of France³⁹ and Luxembourg,⁴⁰ which require companies to update the directory within 30 days of any change to their beneficial ownership. In some countries, like Ireland, the update requirement is within fourteen days.⁴¹

We believe 30 days is a reasonable interpretation of “timely,” and matches an emerging global standard. However, if FinCEN chooses not to follow the direction of these countries, the implementing rules could allow instead for a 90-day update requirement. The vast majority, if not all, reporting companies file quarterly payroll taxes or estimated taxes. If FinCEN partners with the IRS, reporting companies can be provided a link during the tax filing process that takes the filer to their FinCEN account to review and provide any necessary updates. This would

³⁹ See Ashurst LLP, “Beneficial owner(s) disclosure requirement in France,” Apr. 18, 2018, available at <https://www.ashurst.com/en/news-and-insights/legal-updates/beneficial-owners-disclosure-requirement-in-france/>.

⁴⁰ See Dechert LLP, “Luxembourg Register of Beneficial Owners Has Arrived,” Jan. 18, 2019, available at <https://www.jdsupra.com/legalnews/luxembourg-register-of-beneficial-77362/>.

⁴¹ See Central Register of Beneficial Ownership, “FAQs, 11.16 How often do I have to file my Beneficial Ownership details?” <https://rbo.gov.ie/faqs/using-the-rbo-register-portal/how-often-do-i-have-to-file-my-beneficial-ownership-details.html>.

minimize any burden as reporting companies would be able to provide updates through their routine completion of existing compliance responsibilities without having to remember their FinCEN obligations separately. A 90-day update requirement was included in the bipartisan Senate corollary to the CTA, the ILLICIT CASH Act.

In addition, FinCEN must state clearly that *each and every change* must result in a report to FinCEN that updates an entity's information, and should consider making clear that it would be insufficient for an entity to submit, for example, one report each year, regardless of the number of intervening changes over that period.

Finally, there should be one standard that applies to all covered entities. Smaller companies are more likely to forego an identifier and, as the UK experience illustrates, updates will be straightforward and quick. There is no reason to provide additional time to those with more complex corporate structures, especially since a FinCEN identifier is available.

Question 20

Should reporting companies be required to affirmatively confirm the continuing accuracy of previously submitted beneficial ownership information on a periodic basis (e.g., annually)? How should such confirmation be communicated to FinCEN?

Reporting companies should confirm annually the accuracy of the previously submitted beneficial ownership information. Annual updates are not only necessary for law enforcement purposes, but these updates will ensure accuracy (and therefore ease the process) should owners apply for loans or open new bank accounts. Reporting companies without changes should be able to link to their FinCEN account as part of other interactions with state and federal government agencies. Reporting companies could then quickly review the data, make any necessary changes, and check a box to certify the information is accurate. Companies interact with the federal government, state government(s), and/or Tribal governments each year, as some states require companies to file an annual report, and as companies file annual (and most often quarterly) federal tax returns. FinCEN should establish links on these websites so that both initial reporting and updates can be completed when fulfilling other existing compliance requirements.

Question 21

For those reporting companies without FinCEN identifiers, what should be considered a “timely manner” for updating a change in beneficial ownership?

- a. Should this period differ based on the type of reporting company?**
- b. What factors should be taken into account in determining this period?**
- c. How much time should reporting companies be given to update beneficial owner information upon a change of ownership?**
- d. What are the benefits or drawbacks of allowing a longer period to report a change of beneficial ownership?**

See our answer to Question 19 above. Reporting companies or individuals without FinCEN identifiers must satisfy the same requirements as those with FinCEN identifiers.

Question 22

Section 5336(h)(3)(C) contains a safe harbor for persons who seek to correct previously submitted but inaccurate beneficial ownership information pursuant to FinCEN regulations. How should FinCEN’s regulations define the scope of this safe harbor? Should the nature of the inaccuracy (e.g., a misspelled address versus the complete omission of a beneficial owner) be relevant to the availability of the safe harbor?

FinCEN should define this safe harbor narrowly to avoid exploitation by bad actors. The implementing rules should not differentiate between inaccurate spellings and complete omissions. Negligence is never punishable under the CTA, so the addition of a safe harbor provision for negligence would be duplicative and unnecessary. For a business owner to be liable under the law, even a misspelling would have to be willful. Any broad interpretation would only invite bad actors to hide behind its protection.

The safe harbor should be reserved only for those who correct the reported information within the time allotted and, critically, update the information for *all* persons who were beneficial owners during the period in which the absent, outdated, incomplete, or otherwise inaccurate information was reported. The implementing rules should make clear that if a reporting company does not know or cannot provide the complete and accurate record, it is ineligible for the safe harbor, and could also state that such activity could be considered a potential red flag that requires further investigation.

Question 23

What steps should reporting companies be required to take to support and confirm the accuracy of beneficial ownership information?

- a. Should reporting companies be required to certify the accuracy of their information when they submit it?**
- b. If so, what should this certification cover?**
- c. Should reporting companies be required to submit copies of a beneficial owner’s acceptable identification document?**

Reporting companies should have to certify that the information is accurate and complete. This need not be complex or burdensome. A simple, check-the-box certification ensures that filers are aware of the legal implications of the willful provision of misinformation.

Question 24

What steps should FinCEN take to ensure that beneficial ownership information being reported is accurate and complete?

- a. With respect to other BSA reports, FinCEN e-filing protocols prohibit filings from being made with certain blank fields, and automatically format certain fields to ensure that letters are not entered for numbers and vice versa, etc. The filing protocols, however, do not involve independent FinCEN verification of information filed. Should FinCEN take similar or additional steps in connection with the filing of beneficial ownership information?**

b. If so, what similar or additional steps should FinCEN take?

Writ large, to ensure that the data is highly useful, FinCEN must adopt processes and mechanisms that require all fields to be populated and that sufficiently detect errors in entries.

FinCEN should also, where appropriate, create drop-down menus with prepopulated options for data fields such as date of birth, city, state, and zip code.

Importantly, FinCEN should use existing data to verify accuracy of reported information. FinCEN should create a partnership with the U.S. State Department to electronically check names and passport numbers. The State Department already has partnerships with other agencies including the Department of Homeland Security, the Department of Commerce, the Department of Defense, the Department of Justice, and the Office of Personnel Management.

In addition, FinCEN should create a partnership with the National Law Enforcement Telecommunications System (“Nlets”). Nlets is a data exchange platform that is, according to their website, “owned by the States [and] is a 501(c)(3) nonprofit organization that was created over 50 years ago by the principal law enforcement agencies of the States.”⁴² Through Nlets, FinCEN could access a national directory of state drivers’ licenses and state identification numbers. Nlets already has partnerships with the Department of Defense, the Department of the Interior, the Department of Justice, the Department of Veterans Affairs, Immigration and Customs Enforcement, and the Postal Inspection Service.

FinCEN could also explore additional partnerships with the U.S. Postal Service to check up-to-date addresses.

These checks should be automated and done in real-time (similar to instant confirmations of credit card information used by online merchants). These actions will provide a minimal level of assurance that the beneficial ownership data matches other existing data sources. Such measures have the additional and important benefit of making the process easier for businesses to correct inadvertent errors in the data so that they would not face delays in opening bank accounts or applying for loans.

Question 25

Should a reporting company be required to report information about a company’s “applicant” or “applicants” (the individual or individuals who file the application to form or register a reporting company) in any report after the reporting company’s initial report to FinCEN? Why or why not?

Applicant identifying information is important as it may be the only contact information available to law enforcement for a company used for corrupt or criminal purposes. This information, per the express language of the CTA, must be reported to FinCEN in the reporting company’s initial report, and must be maintained by FinCEN. However, the reporting company need not submit applicant identifying information in any subsequent report if that information

⁴² Nlets, “Who We Are,” available at <https://www.nlets.org/about/who-we-are>.

does not change. Should this information change, it would need to be reported within the time frame discussed in our answer to Question 19 above.

Question 26

In what situations will an individual or entity wish to use the FinCEN identifier? How can FinCEN best protect both the privacy interests underlying an individual's or entity's desire to use the FinCEN identifier, and the identifying information that must be provided to FinCEN by an individual or entity wishing to obtain and use the FinCEN identifier?

The original reason for granting an individual a FinCEN identifier (included in the U.S. House of Representatives' Corporate Transparency Act) was to reduce compliance costs for those beneficial owners who have multiple entities. Those individuals would have to enter or upload the beneficial ownership data for each company they own only one time, and then enter or upload subsequent changes only once. The identifier would then link to all companies registered under the individual's name using the identifier, and auto-populate the appropriate data fields.

The FinCEN entity identifier was included to prevent, in the very rare instance that this would be an issue, a subsidiary company from knowing the full corporate chain.

The FinCEN identifiers were *never* meant to be used to mask the identity of beneficial owners or the makeup of corporate structures from FinCEN itself, from law enforcement engaged in an investigation, or from financial institutions engaged in customer due diligence. FinCEN must not block access to beneficial ownership information or corporate structures from investigators, bank officers, or other certified users.

It should be noted that there are also advantages for the users of the data to incorporate identifiers. For example, there are likely to be fewer errors if a single identifier links affiliated companies.

However, this system works only if each individual receives only one identifier regardless of the number of entities in which the person is affiliated. Additionally, the identifier must only be issued upon its provision of beneficial ownership information to FinCEN. Earlier drafts of legislation similar to the CTA allowed for identifiers to be issued before beneficial ownership information was provided, and that model was debated and rejected by lawmakers. Similarly, reporting companies can only be issued identifiers if the beneficial ownership information has been reported to FinCEN. Once an identifier is issued, subsidiaries can then use that number in lieu of beneficial ownership information.

The use of identifiers provides FinCEN with a relatively straightforward way to link parents and subsidiaries and ultimate beneficial owners in order to map corporate structures.

Identifiers ease business burden, improve accuracy, and, if designed to help map corporate structures, make the information more useful for users of the data. Yet to be clear, there was never a debate, understanding, or expectation that identifiers could be used to preclude certified

users from accessing necessary information.

Question 28

How can FinCEN best ensure a one-to-one relationship between individuals or entities and their FinCEN identifiers, in light of the possibility that individuals and entities may mistakenly or intentionally attempt to apply for more than one FinCEN identifier?

There is no circumstance under which an individual should be able to obtain a second FinCEN identifier. Such a possibility would defeat the purpose of having a *unique* identifier to link businesses and their affiliates. Those who willfully seek multiple numbers may well be engaged in illicit activity. They could be looking to divide and isolate risk (like cells of a criminal network). The rules should clearly state that obtaining a second identifier is a violation of the law and can result in criminal and/or civil penalties.

The request for an identifier should include clear instructions and appropriate warnings. If someone inadvertently requests a second number, they will likely enter the same identification number and the database should be able to inform the filer that an account already exists. This is common technology and an important anti-fraud protection. If FinCEN does create partnerships with Nlets and the State Department, a fairly simple crossmatch of data could catch those who willfully or inadvertently seek double identifiers.

Question 30

As noted in the CTA, in some cases multiple companies can be layered on top of one another in complex ownership structures. Given that there may be multiple entities within an ownership structure of a reporting company that are identified by FinCEN identifiers, how can FinCEN implement the FinCEN identifier in a way that reduces the burden to financial institutions of using the FinCEN database when reporting companies with complex ownership structures seek to open an account?

Financial institutions should have access to the full record of the reporting company and its beneficial owners applying for an account, including any parent, subsidiary, or affiliate entities as linked through the FinCEN identifier. Keep in mind that it is the reporting company, not the individual, that is the potential client providing permission. The reporting company can give the bank permission to see its affiliates. It is inarguably highly useful for a bank to know that a reporting company applying for a bank account may have, say, Russian or Iranian parents. This is analogous to the reporting company permitting the bank to see all of its beneficial owners and not just one. In particular, this would assist banks significantly with their CDD requirements. And as a bank can only access the database with a customer's permission, and as the bank is legally barred from sharing database information or using it for any purpose other than due diligence, there should not be any corresponding security concerns.

Question 31

What should the process be to obtain a FinCEN identifier?

- a. Should the FinCEN identifier be secured by an applicant or beneficial owner prior to filing an application to form a corporation, LLC, or other similar entity under the laws of a state or Indian tribe?**
- b. How, if at all, should FinCEN verify an individual's identity before providing a FinCEN identifier?**
- c. If an applicant or beneficial owner chooses not to apply for a FinCEN identifier, should FinCEN create any limitations—in addition to those in the statutory definition of “acceptable identification document”—on the types of unique identifying numbers that can be submitted?**

FinCEN should allow requests for an identifier for a beneficial owner at any time—prior to or after company formation. This is a benefit for all stakeholders and should not be restricted by time of request. A company identifier cannot be assigned until after the beneficial owners have registered complete and accurate information for all the beneficial owners.

Beneficial ownership information should be verified in real-time for everyone who files, not just for those requesting a FinCEN identifier. As discussed elsewhere in this comment, partnerships with other agencies and organizations can accomplish this with readily available technology.

If the beneficial ownership information cannot be verified, FinCEN should deny assigning an identifier to the beneficial owner(s).

Acceptable identification documents are defined in the CTA. FinCEN should not look to create new or unauthorized methods of identification. With the exception of foreign owners, through the verification process, FinCEN should be able to cross-check an individual's use of different identification documents and limit a filer to one FinCEN identifier.

For foreign filers, FinCEN should prohibit the use of multiple identification documents. For example, if someone holds multiple passports and is affiliated with more than one reporting company, they should be required to choose one passport for use with all filings. Given the challenges of verifying a foreign passport, FinCEN should, at the least, require foreign owners of U.S. companies to upload a copy of the information page (with photo) of the foreign passport. FinCEN should also speak with Danish authorities who have implemented a sophisticated check on foreign ownership which includes, and even goes beyond, scanning passports.

Question 32

When a state, local, or tribal law enforcement agency requests beneficial ownership information pursuant to an authorization from a court of competent jurisdiction to seek the information in a criminal or civil investigation, how, if at all, should FinCEN authenticate or confirm such authorization?

The CTA makes clear that the Secretary of the Treasury must decline to provide information requested by a certified user when that request has not been submitted in the proper form and manner, and *may* decline a request submitted in the proper form and manner *only* upon finding that:

- (i) the requesting agency has failed to meet any other requirement of this subsection;
- (ii) the information is being requested for an unlawful purpose; or
- (iii) other good cause exists to deny the request.

Read together with the CTA’s access language for state, local, or tribal law enforcement agencies, it is clear that if such an agency avers that a court of competent jurisdiction has authorized it to seek the information in a criminal or civil investigation, the inquiry stops there. *The CTA does not permit FinCEN to independently authenticate or confirm such an authorization*, let alone to condition release or receipt of the information on an actual demonstration or evidencing of such authorization. During legislative negotiations, the need for a subpoena (even an administrative subpoena) or summons was raised and rejected. Instead, FinCEN should simply ask that the certified user check a box to certify that they have obtained the authorization.

The three delineated findings upon which the Secretary of the Treasury may decline to provide the information is also instructive as to the degree of misuse that must be present to reject a request. The second finding is that “the information is being requested for an unlawful purpose.” This context must inform and instruct the proper interpretation of the preceding and subsequent findings. Namely, that only in situations of extreme misuse, misconduct, or impropriety can “good cause” exist to deny a request, or can a requesting agency be found to have determinatively “failed to meet” a requirement. Any alternative interpretation and application will not only hinder timely access to the database—thus jeopardizing investigations—but disincentivize agencies from using it in the first place.

Question 33

Should FinCEN provide a definition or criteria for determining whether a court has “competent jurisdiction” or has “authorized” such an order? If so, what definition or criteria would be appropriate?

Yes. First, a “court of competent jurisdiction” should be defined to encompass any court of any political subdivision (federal, state, municipal, county, territorial, tribal, or otherwise) that, in proximity, practice, and/or by law, has or may have actual or potential jurisdiction over the relevant inquiry or investigation, or over any examination, investigation, prosecution, or other government action that could result in any way from the request.

FinCEN should similarly articulate a clear definition for “authorized.” It is important to note that Congress considered, and rejected, alternative access schemes, including the requirement that a requesting agency first obtain a court order, the requirement that a requesting agency first obtain a subpoena, and the requirement that a requesting agency’s request be reasonably relevant and

material to an investigation.

Instead, Congress chose an access scheme that permits law enforcement to request and receive beneficial ownership information so long as that request is authorized by an “officer of such a court.” Thus, the term “authorized” was deliberately chosen out of a spectrum of available options for its low barrier and lack of judicial formalism. Quite distinct from a court order from a judge or a subpoena from a prosecutor, *authorization* from a *court officer* was chosen to allow for a wide range of access options that required minimum involvement from the relevant court or tribal equivalent. Critically, the CTA does not limit an “officer of such a court” to a *judicial* officer, meaning it must be interpreted more broadly than just a judge or magistrate. Therefore, this requirement could be satisfied via a front-window court employee, such as a clerk, “authorizing” a request via email, phone, or online messaging function, among other options. And ultimately, the relevant law enforcement agency personnel must only be required to aver—to check a box—stating that a request has been so “authorized.”

FinCEN must also define the term “officer of such a court.” The lead negotiators of the CTA decided on this term knowing that Black’s Law Dictionary defines “officer of the court” as “[s]omeone who is charged with upholding the law and administering the judicial system. Typically, officer of the court refers to a judge, clerk, bailiff, sheriff, or the like, but the term also applies to a lawyer, who is obliged to obey court rules and who owes a duty of candor to the court.”⁴³ In defining “court officer,” FinCEN should expressly include this list of terms, along with a term that encompasses other officers with similar functions or authorities.

Question 34

As a U.S. Government agency, FinCEN is subject to strict security and privacy laws, regulations, and other requirements that will protect the security and confidentiality of beneficial ownership and applicant information. What additional security and privacy measures should FinCEN implement to protect this information and limit its use to authorized purposes, which includes facilitating important national security, intelligence, and law enforcement activities as well as financial institutions’ compliance with AML, CFT, and CDD requirements under applicable law? Would it be sufficient to make misuse of such information subject to existing penalties for violations of the BSA and FinCEN regulations, or should other protections be put in place, and if so what should they be?

No additional protections are needed. Additional security would likely yield few if any benefits and would hinder timely access to the database.

Writ large, investigating cases involving corrupt officials and other wrongdoers requires timely access to basic information, including the identities of hidden owners of legal entities. Drug cartels, human traffickers, illegal weapons dealers, kleptocrats, and others often have sophisticated financial networks in which time is critical to uncover, stop, and punish wrongdoing. Delayed or restricted access to beneficial ownership information or other unnecessary hurdles would mean cases cannot move forward and criminals may escape justice.

⁴³ Black’s Law Dictionary (11th ed. 2019), officer of the court.

The CTA employs precise language enabling law enforcement and financial institutions to access beneficial ownership data. In order to ensure effective access in practice, the CTA’s implementing rules, in turn, must reflect the plain language and intent of the law.

Ensuring timely access to beneficial ownership information is also required by the international standards promulgated by the FATF, of which the U.S. is a founding member.

FinCEN already operates secure databases that house suspicious activity report (“SAR”) and currency transaction report (“CTR”) data. Protections for such data are already in place and work well. However, the CTA is quite specific regarding additional protections for accessing beneficial ownership information, and FinCEN should implement those protocols with care. In fact, in considering issues of access, FinCEN should consider the equally important mandate that this information be *highly useful*. In order for the data to be useful, it must be accessible.

Big picture, federal agencies, state, local, tribal and foreign law enforcement, financial institutions, and regulatory agencies should have access to the *full* record of ownership—including a list of all previous owners of the entities dating back to the first filing.

In particular, *federal agencies* need not be formally or informally deemed national security, intelligence, or law enforcement agencies; they need only be “engaged in” those activities. “Law enforcement” activities include criminal, civil, and administrative enforcement duties. Agencies need not have opened a formal investigation to access the database, but only an authorized investigation “*or activity*.”⁴⁴ Agency heads may delegate written certification requirements to subordinates and delegate certification-making authority to entire agency departments, subgroups, or classes of employees. To avoid duplicative and unnecessary requests and certifications, agency heads and delegees may submit one request and certification *per investigation*.

State, local, and tribal law enforcement access procedures should be modeled after existing state, local, and tribal procedures used to engage with FinCEN and other federal law enforcement agencies—such as the Federal Bureau of Investigation (“FBI”), Drug Enforcement Administration (“DEA”), Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), SEC, and Federal Trade Commission (“FTC”)—to access information on secure federal databases with sensitive information, including FinCEN’s SAR and CTR databases. As with federal agencies, state, local, and tribal agencies may be engaged in criminal, civil, or administrative enforcement investigations or activities. And in order to avoid duplicative and unnecessary requests and certifications, agency heads and delegees must be permitted to submit one request and certification *per investigation*.

Foreign law enforcement agencies and officials may access the database in furtherance of either *general* investigations or *specific* criminal, civil or administrative proceedings. Overall, the implementing rules should acknowledge and instruct federal agencies to assist foreign law enforcement information requests in order to facilitate similar information requests by U.S. law enforcement to their foreign counterparts. The rule should make clear that foreign agencies and

⁴⁴ Emphasis added.

officials may utilize an existing agreement (such as a mutual legal assistance treaty, extradition treaty, or international tax agreement) or, when such existing agreements are not available, may simply initiate a new official request from a law enforcement, judicial, or prosecutorial authority—so long as that request comes on behalf of a “trusted” foreign country. FinCEN should define the term “trusted” in this context to mean any country that is not subject to sanctions, as determined by OFAC. OFAC, FinCEN’s sister agency, already maintains a list of countries of concern⁴⁵—there is no need for FinCEN to “reinvent the wheel” by attempting to create its own list of “trusted” countries or by making its own determinations about which countries are not trusted. And, more broadly, such an interpretation is consistent with, and promotes, the CTA’s purposes by facilitating the sharing of beneficial ownership information with as many other countries as reasonably possible.

In developing the database, FinCEN should consult with countries in the EU and UK about the structure of their beneficial ownership databases. FinCEN should consider compatibility with such countries, should there be a future need for bulk transfer or exchange of information.

Again, to ensure the information is highly useful, timely access to the full record is extremely important. The certified users listed here—those who meet the law’s delineated protocols and certify that they have read and understand the penalties for misuse—must be able to see all of the entities connected to an individual beneficial owner, all of the beneficial owners of a given entity, and all of the parent and subsidiary entities of the entity under investigation. Without the full picture, law enforcement at all levels cannot effectively do their job, and narrower rules would potentially undermine the mandate in the law that the information be highly useful.

Question 35

How can FinCEN make beneficial ownership information available to financial institutions with CDD obligations so as to make that information most useful to those financial institutions?

- a. Please describe whether financial institutions should be able to use that information for other customer identification purposes, including verification of customer information program information, with the consent of the reporting company?**

Financial institutions should be able to use the data as an additional assurance/verification check. That being said, they cannot satisfy their CDD responsibilities by relying solely on the data provided by the database.

- b. Please describe whether FinCEN should make financial institution access more efficient by permitting reporting companies to pre-authorize specific financial institutions to which such information should be made available?**

Yes, FinCEN should permit reporting companies to pre-authorize specific financial

⁴⁵ See U.S. Department of the Treasury, “Sanctions Programs and Country Information,” available at <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information>.

institutions to which beneficial ownership information should be made available.

c. In response to requests from financial institutions for beneficial ownership information, pursuant to 31 U.S.C. 5336(c)(2)(A), what is a reasonable period within which FinCEN should provide a response? Please also describe what specific information should be provided.

Financial institutions, including banks, security firms, insurance companies, money service businesses, and more, must be granted real-time access to the database to fulfill their CDD obligations.

With approximately two million companies formed in the United States each year, and most needing to open bank accounts, it would take unimaginable resources for FinCEN to review requests manually with personnel and respond in any reasonable time period. The assumption has always been that the system would be automated and, as such, it would operate like other automated queries to a database and responses would be instantaneous.

The implementing regulations should make clear that financial institutions may designate frontline or back-office personnel to obtain training and certification, and to satisfy access requirements established by FinCEN. Similar to the certified users listed in Question 34, those who meet the delineated protocols and certify that they have read and understand the penalties for misuse should have full access to the records they need to effectively do their legally mandated customer due diligence. FinCEN would undermine its own anti-money laundering efforts if it created a robust database of information and then denied necessary access to that information to those our government officially deputizes to assist in enforcement.

As law enforcement officials must attest that any search is for an authorized investigation, bank officers could be required to attest, with full knowledge of the penalties for violating the law, that any search is for customer due diligence with the consent of the customer. That should provide any additional assurance needed that the data is secure.

Once the criteria for access is met, designated personnel at financial institutions should have access to the *full* records of clients, including any data on other companies or company affiliations such beneficial owners may have in the database. When an individual gives consent to the financial institution, the individual is not giving consent for themselves; rather, they are acting as an agent of the potential client (i.e., the entity) giving consent on behalf of the entity. Bank personnel should have access to all beneficial owners of the entity, all entities affiliated with those owners, and all parent and affiliate entities of the entity seeking an account.

One idea that was raised and rejected by lawmakers during the negotiations was for financial institutions to send in data provided by the client and to receive back a notice of a match or mismatch. Such an approach would fail to meet even the most basic requirements of customer due diligence and would likely be in conflict with mandates in the law. Misspellings or transposed numbers from an identification document would return as a mismatch. A so-called “red light/green light” approach does nothing to assist the financial institution (it does not provide useful information) in determining the appropriateness of the client, and raises a red

flag that they may determine requires them to file a SAR, creating new, entirely avoidable problems for the client seeking an account. Ultimately, the account opening or loan closing would be delayed, creating unnecessary burdens on the client who may be relying on timely financial services to start or expand a business. Finally, such a system would not provide banks with any assistance in the ongoing monitoring of suspicious accounts as required by the Bank Secrecy Act and implementing regulations.

Question 36

How should FinCEN handle updated reporting for changes in beneficial ownership when beneficial ownership information has been previously requested by financial institutions, federal functional regulators, law enforcement, or other appropriate regulatory agencies?

- a. If a requestor has previously requested and received beneficial ownership information concerning a particular legal entity, should the requester automatically receive notification from FinCEN that an update to the beneficial ownership information was subsequently submitted by the legal entity customer?**

Yes. The timely receipt of updated reporting information will be highly useful to law enforcement for ongoing investigations, and to banks in order to fulfill their CDD duties, including their ongoing monitoring of accounts.

- b. If so, how should this notification be provided?**

This notification should be provided to the requester through all of the means that previous requests were sent by FinCEN and/or received by the requester.

- c. Should a requesting entity have to opt in to receive such notification of updated reporting?**

No. As stated in our answer to part (a) above, this information is highly useful, and having an automated system is both easier and less expensive for FinCEN as it will reduce database administration costs and other associated costs.

Question 37

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.” How should the term “appropriate regulatory agency” be interpreted? Should it be defined by regulation? If so, why and how?

The CTA provides that disclosure to an “appropriate regulatory agency” shall be consistent with subparagraph (C), which provides that such:

- agency (i) is authorized by law to assess, supervise, enforce, or otherwise determine the compliance of the financial institution with the requirements described in [subparagraph (B)(iii) with respect to CDD requirements] and (ii)

uses the information solely for the purpose of conducting the assessment, supervision, or authorized investigation or activity described in clause (i).

Therefore, an “appropriate regulatory agency” must include any agency of a U.S. state, Tribe, or of a foreign country that assesses, supervises, enforces, or otherwise determines a financial institution’s compliance with CDD requirements.

The existing definition of “Federal functional regulator” provides additional guidance, as it is defined to include:

[T]he Board of Governors of the Federal Reserve System; (B) the Office of the Comptroller of the Currency; (C) the Board of Directors of the Federal Deposit Insurance Corporation; (D) the Director of the Office of Thrift Supervision; (E) the National Credit Union Administration Board; and (F) the Securities and Exchange Commission.⁴⁶

An “appropriate regulatory agency” necessarily ought to also include each U.S. state, Tribe, and each foreign country counterpart to each of the identified U.S. federal regulators of banks, savings and loans, credit unions, and any entity that is subject to securities and/or “blue sky” laws.

Question 38

In what circumstances should applicant information be accessible on the same terms as beneficial ownership information (i.e., to agencies engaged in national security, intelligence, or law enforcement; to non-federal law enforcement agencies; to federal agencies, on behalf of certain foreign requestors; to federal functional regulators or other agencies; and to financial institutions subject to CDD requirements). If financial institutions are not required to consider applicant information in connection with due diligence on a reporting company opening an account, for example, should a financial institution’s terms of access to applicant information differ from the terms of its access to beneficial ownership information?

Applicant information should be accessible on the same terms as beneficial ownership information, as many times, in situations involving illicit or criminal activity, an applicant may be the only contact, link, or data point available to law enforcement.

Such access plays a similarly significant role for banks—in order for them to effectively perform due diligence, banks need as much information as appropriately available, including information regarding the applicant who formed or registered an entity under examination.

Question 39

What specific costs would CTA requirements impose – in terms of time, money, and human resources – on small businesses? Are those costs greater for certain types of small

⁴⁶ 15 USC § 6809(2).

businesses than others? What specifically can FinCEN do to minimize those costs, for all small businesses or for some types in particular?

As noted in Question 16, the proven experience of businesses complying with a very similar law in the UK found very little annual costs for small businesses (less than \$3 per year) after an initial filing as the vast majority of reporting companies will involve simple, straightforward, and obvious structures.

For those reporting companies with more complex structures, as noted in Question 11, it is not possible for such a firm to have the resources to create a complex structure but then not have the resources to name the ultimate beneficial owners who are at the top of the corporate chain. Small companies with complex structures, including shell companies with numerous offshore affiliates and parents, represent some of the highest risk entities for hiding corrupt and criminal financial activity. It would undermine the core purpose of the law to exempt or make special accommodations for such entities.

Meaningful assistance to small businesses would focus on three areas:

1. FinCEN should establish public education partnerships with state secretary of state offices and other state corporate registration officers, the IRS and state revenue offices, small business organizations, the SBA, the ABA and state bar associations, corporate formation agents and corporate service providers, professional accounting associations, and others to publicize the new law. This will help educate businesses and those that assist them in compliance on the requirements of the new law.
2. FinCEN should engage the IRS and state revenue offices and state corporate registration offices to include a link to FinCEN's beneficial ownership registration system on their websites for businesses to submit and update information in the course of other business transactions with these agencies. This will help businesses seamlessly register and provide updates without separately having to remember to do so outside of existing practices.
3. FinCEN should partner with the State Department and Nlet, as other federal agencies have done, to utilize their systems of instant verification of information provided by reporting companies. This would not only improve the quality of the data but would provide a great benefit to small businesses seeking to open bank accounts or obtain financing or other financial services. Verification at the point of entry reduces instances of typographical errors that would slow access to financial services and require reporting companies to re-enter data before proceeding with applications for services.

Question 40

Are there alternatives to a single reporting requirement for all reporting companies that could create a less costly alternative for small businesses?

Assuming that all covered entities provide timely, complete, and accurate information, we would not object to a database that permits and encourages batch uploads.

Question 44

What burdens would CTA requirements impose on state, local, and tribal governmental agencies? In particular, what additional time, money, and human resources would state, local, and tribal governments have to secure and expend – or reallocate from other duties, and if the latter what duties would be compromised or services impaired? How, if at all, would any of these burdens or allocations of time or money vary according to the size or other characteristics of a jurisdiction – would smaller jurisdictions find it easier or harder to handle the costs associated with CTA requirements?

The CTA does enlist states to help inform reporting companies of the new requirement. There are no mandates or requirements that states collect any information or participate beyond a narrow requirement to make the reporting form either directly available to filers or to offer a link to the form on state websites. This was not seen as a significant burden by states, as they value being business friendly and often boast about certain measures they have taken to provide a positive environment for entrepreneurs. Providing information on the new law and easy access for compliance would be in keeping with a business-friendly environment. Even state officials who disagree with the law should want to assist reporting companies with compliance.

Question 45

How should FinCEN minimize any burdens on state, local, and tribal governmental agencies associated with the collection of beneficial ownership information, while still achieving the purposes of the CTA?

While the CTA does not require action from the states beyond a link on a website, FinCEN should reach out to states to establish partnerships as discussed in Question 44 above in order to educate reporting companies about the new law and to create links to FinCEN's beneficial ownership registration system on state websites. FinCEN should create sample materials for the states to adapt to explain the law and compliance requirements. FinCEN should also explore if any special software for adoption by states is needed.

FinCEN should also include in its budget request to Congress an estimate of costs for these partnerships and should pay for the costs borne by states.

Question 46

How can FinCEN best partner with state, local, and tribal governmental agencies to achieve the purposes of the CTA?

See our answer to Question 44.

Question 47

How can FinCEN collect the identity information of beneficial owners through existing Federal, state, local, and tribal processes and procedures?

- a. Would FinCEN use of such processes or procedures be practicable and**

appropriate?

FinCEN cannot collect this information through existing processes because no government agency currently collects this information. This was studied and discussed in the negotiations over the CTA. In fact, some proposals were introduced in Congress to seek the information from existing databases, but it was determined that for the covered reporting companies, the information was not collected by any agency or jurisdiction.

Even if other agencies changed their laws to collect the appropriate information, it would not necessarily be practical for FinCEN to use that information. One proposal was for the IRS to update one of its forms to collect this information, but access to IRS data has an additional set of rules, thereby complicating access for some FinCEN-certified users. And it is unlikely that, for example, all 50 states would, on their own, adopt the same standard, making for a diverse and unusable dataset.

FinCEN, with existing relationships with law enforcement agencies at all levels of government and with financial institutions, is best positioned to collect and manage the unique dataset.

c. Would FinCEN use of existing Federal, state, local, and tribal processes and procedures help to lessen the costs to small businesses affected by CTA requirements, or would it increase those costs?

As mentioned earlier, real-time verification of filers' information, including passport and driver's license information, would reduce costs and burdens on small businesses. An instant check of the name and identification number with a rejection for mismatched data would lower costs and reduce future problems for small businesses.

Question 48

The process of forming legal entities may have ramifications that extend beyond the legal and economic consequences for legal entities themselves, and the reporting of beneficial ownership information about legal entities may have ramifications that extend beyond the effect of mobilizing such information for AML/CFT purposes. How can FinCEN best engage representatives of civil society stakeholders that may not be directly affected by a beneficial ownership information reporting rule but that are concerned for such larger ramifications?

Civil society stakeholders have extensively documented the problems created by the lack of transparency of beneficial ownership information. Beyond the national security and terrorist financing issues, civil society organizations ("CSOs") like TI have researched and clearly demonstrated the impact of the abuse of anonymous companies, including the bankrupting of necessary public services, environmental degradation, a squeeze on affordable housing, proliferation of the opioid crisis, human rights abuses, and more. We have seen a wide variety of structures used for illicit activity and have studied the strengths and weaknesses of different directories established in nations all over the globe.

We would encourage you to not only carefully consider our comments for this ANPRM but to maintain a regular dialogue with the CSO community over time in order to gain insights into best practices for stemming the harms that result from the abuse of corporate structures.

By incorporating the above recommendations, FinCEN can make a tremendous and immediate impact on the threats posed by illicit finance and corruption to U.S. interests both at home and abroad. If you have any questions, or for additional information on TI's work in this regard, please contact Gary Kalman, Director of TI-US, at gkalman@transparency.org.

Thank you for the opportunity to present these comments.

Respectfully submitted,

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