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

February 7, 2022

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

**Re: Beneficial Ownership Information Reporting Requirements, Docket No.: FINCEN-2021-0005 and RIN 1506-AB49**

Dear Acting Director Das:

The U.S. office of Transparency International (“TI-US”) appreciates the opportunity to provide comments on the Financial Crimes Enforcement Network’s (“FinCEN”) Notice of Proposed Rulemaking (“NPRM”)<sup>1</sup> on issues 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”).<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup> Acknowledging the raw power, scale, and consequence of corruption, the Biden Administration has, for the first time in U.S. history, designated the fight against foreign corruption as a core U.S. national security interest.<sup>5</sup>

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<sup>1</sup> Financial Crimes Enforcement Network, “Beneficial Ownership Information Reporting Requirements,” Dec. 8, 2021, available at <https://www.federalregister.gov/documents/2021/12/08/2021-26548/beneficial-ownership-information-reporting-requirements>.

<sup>2</sup> Corporate Transparency Act, Title LXIV of the National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283, January 1, 2021). Section 6403 in the CTA enacted section 5336 in title 31 of the U.S. Code, requiring beneficial ownership transparency.

<sup>3</sup> 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>.

<sup>4</sup> 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>.

<sup>5</sup> See The White House, “Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest,” June 3, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

Corruption is a globally resonant problem,<sup>6</sup> and as such, efforts to reduce it—including the establishment of highly useful beneficial ownership directories—can have corresponding global impacts. The recommendations below, if adopted, will help ensure as much.

## **Background**

Corrupt officials, rogue nations, terrorists, and other criminals routinely hide behind anonymous companies in order to launder the proceeds of their crimes with impunity. Examples of such abuse are now legion and notorious.<sup>7</sup> And as the world's largest economy, the United States has become a favored target for corrupt and other illicit funds. As made clear from multiple studies and evaluations that call out the U.S. as a top secrecy jurisdiction, as well as from criticisms from the Financial Action Task Force (“FATF”)—the international anti-money laundering standards-setting body to which the U.S. is a founding member, and which for years has called out the United States over significant gaps in our financial rules<sup>8</sup>—the inadequacy of our current laws contributes to and compounds this problem. In doing so, we provide a safe haven for corrupt and criminal actors and their stolen funds, contribute to the global wealth drain that leaves countries struggling to pay for critical government services and rationing access to medicine, clean water, electricity, and more, and we undermine our own national security and safety.<sup>9</sup>

The consequences of corruption for America are familiar to this bureau, the Department of the Treasury (“Treasury”), and other U.S. agencies. A canvassing of over a decade of FinCEN advisories, relevant Treasury communications (including National Risk Assessments) and information from federal law enforcement and other U.S. agencies shows that corruption remains a leading threat to the

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<sup>6</sup> For example, more than two-thirds of the 180 countries and territories scored on TI's 2021 “Corruption Perceptions Index”—which scores countries from 0 (very corrupt) to 100 (very clean)—received scores below 50. *See* Transparency International, “Corruption Perceptions Index,” available at <https://www.transparency.org/en/cpi/2021>.

<sup>7</sup> According to the World Bank and the United Nations Office on Drugs and Crime, anonymous companies were used in over 70 percent of grand corruption cases they reviewed to either carry out the corrupt activity or to hide its proceeds. *See* Emile van der Does de Willebois et al., “The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It,” World Bank, 2011, available at <https://openknowledge.worldbank.org/handle/10986/2363>. *See also* Transparency International, “Panama Papers Four Years On: Anonymous Companies and Global Wealth,” Apr. 9, 2020, available at <https://www.transparency.org/en/news/panama-papers-four-years-on-anonymous-companies-and-global-wealth>.

<sup>8</sup> *See, e.g.*, Financial Action Task Force, “Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism,” June 23, 2006, table 2, ¶¶ 5.1, 5.2, available at <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf>.

<sup>9</sup> For example:

- Iran was infamously able to evade U.S. sanctions for years by purchasing real estate in New York City through an anonymous company. *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/](http://thefactcoalition.org/how-rogue-nations-sanctioned-groups-use-shell-companies/).
- 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. *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/](http://www.theatlantic.com/business/archive/2017/07/us-anonymous-shell-companies/531996/).
- 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. *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](http://www.washingtonpost.com/world/national-security/us-trucking-funds-reach-taliban-military-led-investigation-concludes/2011/07/22/gIQAmMDUXI_story.html?utm_term=.361db33ec736).

integrity of our financial system.<sup>10</sup> And this past June, Treasury named corruption as a government-wide priority for anti-money laundering and countering the financing of terrorism.<sup>11</sup>

Yet just five months after the close of the comment window for the CTA's first Advance Notice of Proposed Rulemaking ("ANPRM"), the most disturbing and high-profile exposé of global financial data in history, known as the Pandora Papers,<sup>12</sup> revealed to a world audience how the United States operates as one of the world's leading secrecy jurisdictions—permitting it to be exploited by corrupt actors and other criminals. For example:

- South Dakota, Nevada, Delaware, Florida, and New Hampshire have emerged as global hotspots for those seeking to hide their assets and minimize their tax burdens. In total, the Pandora Papers revealed 206 U.S.-based trusts in 15 different states that held assets of more than \$1 billion, "including nearly 30 trusts that held assets linked to people or companies accused of fraud, bribery, or human rights abuses."<sup>13</sup> Trusts continue to thrive as go-to vehicles for ill-gotten and tainted wealth precisely because they are not subject to meaningful government transparency and oversight rules.

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<sup>10</sup> See, e.g., 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>; 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> (FinCEN-issued statement titled "Addressing the money-laundering threat posed by corruption of foreign officials continues to be a national security priority for the United States"); 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>; 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> (twice identifying corruption as an "important illicit finance and national security issu[e.]"); 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 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>; 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, "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, "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, "Updated Guidance to Financial Institutions on Recent Events related to the Departure of Victor Yanukovich and Other Ukrainian Officials," Mar. 6, 2014, available at <https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2014-a002>.

<sup>11</sup> Financial Crimes Enforcement Network, "Anti-Money Laundering and Countering the Financing of Terrorism National Priorities," June 30, 2021, available at [https://www.fincen.gov/sites/default/files/shared/AML\\_CFT%20Priorities%20\(June%2030%2C%202021\).pdf](https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf).

<sup>12</sup> See International Consortium of Investigative Journalists, "Pandora Papers," available at <https://www.icij.org/investigations/pandora-papers/>.

<sup>13</sup> Will Fitzgibbon, Debbie Cenziper, and Salwan Georges, "Suspect foreign money flows into booming American tax havens on promise of eternal secrecy," International Consortium of Investigative Journalists, Oct. 4, 2021, available at <https://www.icij.org/investigations/pandora-papers/us-trusts-offshore-south-dakota-tax-havens/>.

- A Catholic order, disgraced by an international pedophilia scandal, secretly held nearly \$300 million in U.S. real estate and other assets through a network of trusts and an investment company in Florida, according to the Pandora Papers.<sup>14</sup> The funds were reportedly amassed at the same time victims of the sexual abuse were seeking compensation for the harm.<sup>15</sup>

The CTA, which itself found that “malign actors seek to conceal their ownership” of companies in order to facilitate illicit activity, including “acts of foreign corruption,”<sup>16</sup> 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 ameliorate the consequences of corruption across the globe. FinCEN must adopt strong, effective implementing rules that meet and respond to the seriousness and urgency of these threats. Such rules would be supported by an ideologically diverse community of civil society organizations whose commitment to eliminating corruption has never been stronger, as made clear in an October 2021 letter to you signed by over 30 civil society organizations that stressed the need for rules that are “comprehensive, avoid unintended loopholes, and accurately reflect the intent of Congress.”<sup>17</sup>

### **Overview**

Writ large, the proposed rule largely reflects the plain language of the CTA and follows the intent of Congress. As detailed below, the proposed rule largely accounts for appropriate coverage of beneficial owners and entities in order to minimize opportunities for evasion of the law, minimize burdens on filers, and ensure the information is highly useful for those who will access the data for investigations, to meet Bank Secrecy Act (“BSA”) responsibilities, and for other law enforcement purposes.

Some commenters may suggest that the CTA and the rule “overreach” for what they seem to see as a relatively small problem.<sup>18</sup> That is certainly not the case for U.S. troops in Afghanistan who faced increased threats due to the flow of U.S. Department of Defense funds through anonymous entities to Taliban sympathizers.<sup>19</sup> Nor is it a small matter for rural Malaysians who lost safe drinking water projects, healthcare facilities, and other critical infrastructure projects as a result of funds stolen and laundered through anonymous companies in the 1MDB case.<sup>20</sup> Altogether, examples of anonymous legal entities being used to hide and launder funds or otherwise facilitate illegal activity are all too common, and the value of beneficial ownership information to law enforcement and financial institutions with anti-money laundering responsibilities is well-documented.<sup>21</sup>

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<sup>14</sup> Spencer Woodman, “As Catholic order fought sex abuse claims, secret trusts devoted to it poured millions into American rental properties,” Oct. 5, 2021, available at <https://www.icij.org/investigations/pandora-papers/legion-of-christ-us-property-evictions-offshore/>.

<sup>15</sup> *See id.*

<sup>16</sup> *See* The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. (2020) § 6403.

<sup>17</sup> *See* “CSO Letter of Support on the Corporate Transparency Act Rulemaking,” Oct. 21, 2021, available at <https://us.transparency.org/resource/cso-letter-of-support-on-the-corporate-transparency-act-rulemaking/>.

<sup>18</sup> *See* National Federation of Independent Business, “NFIB Pushes Back on Treasury Department Regulatory Overreach Regarding Beneficial Ownership Reporting Rules,” Jan. 26, 2022, available at <https://www.nfib.com/content/press-release/homepage/nfib-pushes-back-on-treasury-department-regulatory-overreach-regarding-beneficial-ownership-reporting-rules/>.

<sup>19</sup> *See* Global Witness, “Hidden Menace,” July 2016, available at [https://ifbec.info/wp-content/uploads/2013/07/Briefing\\_-\\_Hidden\\_Menace\\_-\\_12072016.pdf](https://ifbec.info/wp-content/uploads/2013/07/Briefing_-_Hidden_Menace_-_12072016.pdf).

<sup>20</sup> *See* The Economist, “Congress edges closer to cracking-down on anonymous shell corporations,” Dec. 3, 2020, available at <https://www.economist.com/united-states/2020/12/05/congress-edges-closer-to-cracking-down-on-anonymous-shell-corporations>.

<sup>21</sup> *See, e.g.*, U.S. Department of the Treasury, “Report to Congress on Beneficial Ownership Information Practices at the Multilateral Development Banks,” June 2020, available at <https://home.treasury.gov/system/files/206/2020-Beneficial-Ownership-Report.pdf>; Financial Action Task Force & Egmont Group of Financial Intelligence Units, “Concealment of Beneficial Ownership,” July 2018, available

In the discussion of the proposed rule, FinCEN cites a Treasury study that found that shell companies were commonly used in tax evasion cases.<sup>22</sup> FinCEN should also consider citing two additional studies that found that a lack of beneficial ownership information played a significant role in the laundering of illicit funds:

- A study by the World Bank and the UN Office of Drugs and Crime, mentioned above, that reviewed 150 cases of grand corruption over several decades and found that “Most large-scale corruption cases involve using legal entities to conceal ownership and control of corrupt proceeds.”<sup>23</sup>
- A study by the anti-human trafficking group Polaris which found that “[o]f [the] 6,000 [illicit massage] parlors [reviewed], only 28 percent had an actual person listed on the business records.”<sup>24</sup> Furthermore, only 21 percent of the 6,000 business records specified the name of the owner—and even in those cases, there is no way to know if the information provided is legitimate.”<sup>25</sup>

FinCEN also properly explains the unique vulnerability of the United States to money laundering via U.S. entities, stating:

Because of the ease of setting up legal entities and the minimal amount of information required to do so in most U.S. states, combined with the investment opportunities the United States presents, the United States continues to be a popular jurisdiction for legal entity formation.<sup>26</sup>

To support this statement, FinCEN references a report by the nongovernmental organization Global Financial Integrity that details how more information is required to obtain a library card in all 50 U.S. states than is required to establish a company that can be used for laundering the proceeds of drug or human trafficking, terror financing, or tax evasion.<sup>27</sup> FinCEN might consider also citing a 2014 study by researchers at the University of Texas-Austin, Brigham Young University, and Griffith University that found that of 103 countries studied, the U.S. was the easiest in which to establish a legal entity for suspicious reasons without naming anyone who owns or controls the entity.<sup>28</sup>

FinCEN lists a number of benefits of the proposed rule, including the protection of “the U.S. financial system from illicit use.”<sup>29</sup> It further explains that access to the information will “impede malign actors from abusing legal entities to conceal proceeds from criminal acts that undermine U.S. national security, such as corruption, human smuggling, drug and arms trafficking, and terrorist financing.”<sup>30</sup>

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at <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Egmont-Concealment-beneficial-ownership.pdf>.

<sup>22</sup> NPRM at 69925.

<sup>23</sup> Emile van der Does de Willebois et al., “The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It,” The World Bank, 2011, available at <https://openknowledge.worldbank.org/handle/10986/2363>.

<sup>24</sup> Polaris Project, “Corporate Secrecy Fuels Human Trafficking in United States,” Apr. 19, 2018, available at <https://polarisproject.org/press-releases/corporate-secrecy-fuels-human-trafficking-in-united-states/>.

<sup>25</sup> *See id.*

<sup>26</sup> NPRM at 69921.

<sup>27</sup> *Id.*

<sup>28</sup> *See* Michael Findley et al., “Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism,” Mar. 24, 2014, 74, available at <http://bit.ly/2uTLptQ>.

<sup>29</sup> NPRM at 69922.

<sup>30</sup> *See id.*

These statements are backed by commentary from respected academics and by extensive investigative journalism.<sup>31</sup>

Business concerns were also a point of discussion throughout the legislative debate. The proposed rule eases business concerns where possible without undermining other mandates in the law. As the proposed rule will provide numerous benefits to businesses, FinCEN might consider including research<sup>32</sup> demonstrating those benefits to the business community.

## **Specific Provisions**

### ***Definition of “Beneficial Owner”***

The definition of “beneficial owner” is among the most important aspects of the rule and is critical to the successful implementation of the CTA. We believe that FinCEN provided the appropriate scope with regard to who all should properly be considered a “beneficial owner.” FinCEN’s clarifying language remains true to the plain text and intent of the law, and the language is comprehensive, while remaining clear. Big picture, the definition will not complicate compliance for honest small businesses but will minimize opportunities for evasion by bad actors.

In particular, the CTA states that a beneficial owner is someone who “exercises substantial control” over the entity. In considering the scope of “substantial control,” the ANPRM entertained the potential interpretation that no entity could have more than one beneficial owner who is considered in “substantial control” of the entity.<sup>33</sup> Fortunately, the proposed rule rejects this approach, and instead outlines a non-exhaustive list of those types of individuals who will be considered to exercise such substantial control, including, but not limited to, those who serve as senior officers of the company; those with authority over the appointment or removal of any senior officer of the company; and those with direction, determination, or decision of, or substantial influence over, important matters affecting the company, including “any other form of substantial control over the company.”<sup>34</sup> This rule must be maintained, as it would cast an appropriately sized net and help ensure that information regarding all relevant decisionmakers is properly reported.

Family-owned restaurants, dry cleaners, neighborhood grocery stores, and other similar entities will not struggle to identify who directs, determines, or decides “important matters” of their business. If changes occur, a spouse, adult child, sibling, or other partner can easily be added if they join the company as a decisionmaker. However, bad actors regularly use complex corporate structures involving co-conspirators to mask ownership. A 2018 report by FATF and the Egmont Group of Financial Intelligence Units (“Egmont Group”) documented hundreds of case studies that detail why a multiple-owner reporting approach is necessary to avoid easy obfuscation of the law.<sup>35</sup> In one instance, two U.S. citizens established 5,000 shell companies through which to they ran a series of

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<sup>31</sup> See generally Gregory B. Poling, Tabitha Grace Mallory, Harrion Pretat, and The Center for Advanced Defense, “Pulling Back the Curtain on China’s Maritime Militia,” Center for Strategic & International Studies, November 2021, available at [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/211118\\_Poling\\_Maritime\\_Militia.pdf?Y5iaJ4NT8eITSIAKTr.TWxtDHuLIq7wR](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/211118_Poling_Maritime_Militia.pdf?Y5iaJ4NT8eITSIAKTr.TWxtDHuLIq7wR); International Consortium of Investigative Journalists, “The Panama Papers: Exposing the Rogue Offshore Finance Industry,” Apr. 3, 2021, available at <https://www.icij.org/investigations/panama-papers/>; Organized Crime and Corruption Reporting Project, “‘Laundromats,’ Explained: How Shell Companies Are Used to Launder Money,” Sept. 24, 2019, available at <https://www.occrp.org/en/laundromats/>.

<sup>32</sup> See, e.g., The B Team, “Ending Anonymous Companies: Tackling Corruption and Promoting Stability Through Beneficial Ownership Transparency,” January 2015, available at <https://bteam.org/assets/reports/B-Team-Business-Case-Ending-Anonymous-Companies-Report.pdf>.

<sup>33</sup> ANPRM at 17562.

<sup>34</sup> Proposed 31 CFR 1010.380(d)(1).

<sup>35</sup> Financial Action Task Force & Egmont Group of Financial Intelligence Units, “Concealment of Beneficial Ownership,” July 2018, available at <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Egmont-Concealment-beneficial-ownership.pdf>.

fraudulent investment, price manipulation, and tax evasion schemes.<sup>36</sup> In another case, a family (both parents and their son) and their lawyer “created numerous legal entities, including trusts, corporations/LLCs to open bank accounts to manage the illicit funds and conceal the ownership and involvement in the [loan fraud] scheme.”<sup>37</sup> The proposed rule, as written, will more effectively disrupt money laundering schemes and make the information highly useful to law enforcement.

Furthermore, FinCEN relies on language that has appropriate precedent. FinCEN notes that the “substantial control” prong of the beneficial ownership definition has precedent in “the common law of agency and corporate law and the usage of that term in other federal statutes...”<sup>38</sup> Additional support for the definition comes from a review of international standards, including FATF and the UK’s People with Significant Control register.

To provide guidance to filers, FinCEN appropriately narrows the “substantial control” definition to exclude those employees whose responsibilities only include the “ordinary execution of day-to-day managerial decisions with respect to one part of a reporting company’s assets or employees...”<sup>39</sup> In doing so, FinCEN is specifying the limits to the reporting requirement.

The UK definition of “control” is somewhat similar to what FinCEN proposes. If there were significant confusion, one would expect to find honest businesses paying for assistance to help them avoid running afoul of the law. Yet the documented experience of company compliance in the UK affirms FinCEN’s position that the definition does not create confusion that leads to a costly burden for filers. Specifically, UK research showing roughly \$3 (£2) median annual compliance costs suggests that small businesses are not hiring professional assistance to help them navigate updates.<sup>40</sup> Those who have suggested that the CTA will sow confusion and call for further clarification have not provided any evidence to question the UK data or conclude that the U.S. experience will be substantially different.

In further defining the ownership interest prong, FinCEN again takes a comprehensive approach to limit loopholes that would otherwise allow for avoidance. Since most small, “mom and pop” enterprises will have simple ownership structures, the clarification will not create confusion or complexity. For those entities that have created structures that utilize more complex equity or other ownership instruments, they are, by their own practice, familiar with the terms laid out in the NPRM.

### ***Requiring At Least One Beneficial Owner***

Given the appropriate definition of “beneficial owner” proposed in the NPRM, FinCEN is right to expect that every reporting company would report at least one beneficial owner. While ownership shares may be spread across more than four shareholders and, therefore, may fall outside the ownership prong of the CTA’s definition of “beneficial owner,” the CTA’s substantial control prong is written in such a way as to mitigate attempts to circumvent the rule. Congress thoroughly debated the definition of “beneficial owner,” and specifically and deliberately settled on both ownership and substantial control prongs in order to address potential gaming of the law by bad actors. It would be antithetical to the intent of Congress to allow for reporting companies to claim zero beneficial owners.<sup>41</sup>

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<sup>36</sup> *See id.* at 64.

<sup>37</sup> *Id.* at 59.

<sup>38</sup> NPRM at 69934.

<sup>39</sup> *Id.*

<sup>40</sup> 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>.

<sup>41</sup> *See, e.g.*, Comment letter from Reps. Carolyn B. Maloney & Maxine Waters in response to FinCEN ANPRM, May 25, 2021, available at [https://www.banking.senate.gov/imo/media/doc/brown\\_waters\\_maloney\\_comment\\_letter\\_on\\_boi.pdf](https://www.banking.senate.gov/imo/media/doc/brown_waters_maloney_comment_letter_on_boi.pdf).

Furthermore, FinCEN’s requirement for “any” beneficial owner to be listed addresses the circumstance in which multiple individuals equally share in the decision-making. Shared responsibility over “important matters affecting [a] reporting company”<sup>42</sup> is still a reportable responsibility and should be clarified as meeting the definition of “beneficial owner” under the substantial control prong of the law.

While we cannot know the ownership structures of every potential reporting company, we do know that the vast majority of U.S. companies are small, non-employer firms. FinCEN cites an analysis of beneficial ownership data in the UK—an early implementer of beneficial ownership transparency—that found that 89 percent of firms had simple structures with three or fewer owners.<sup>43</sup> When cross-referenced with data from the U.S. Small Business Administration on the size and revenues of firms in the United States, there is every reason to expect that U.S. reporting companies will have similar characteristics to those of UK companies.

Importantly, for those entities that do have more complex ownership structures, FinCEN properly explains that “the few that do previously chose their structures recognizing that costs associated with legal and tax advice and other filing and compliance obligations might be higher as a result.”<sup>44</sup> As a practical matter, it is difficult to see how owners with the resources to afford professional assistance (e.g., lawyers, accountants, and others) when establishing a complex ownership structure then do not have the resources for those same individuals to identify the owners to FinCEN. During the legislative debate, there was some conflating of burden on small, single-owner businesses with those that had complex structures. In fact, no real-world example of such a situation was ever entered into the public record.

It is worth noting that entities that have few or no employees, no physical location in the U.S., and yet move large sums of money through the entity, are among the highest risk for money laundering. As far back as 2006, FinCEN recognized the risks associated with “shell” companies.<sup>45</sup> In that advisory, FinCEN warned:

The use of shell companies provides an opportunity for foreign or domestic entities to move money by means of wire transfers or other methods, whether directly or through a correspondent banking relationship, without company owners having to disclose their true identities or the nature or purpose of transactions. A review of Suspicious Activity Report data reveals that shell companies in the United States have been used to move billions of dollars globally.<sup>46</sup>

FinCEN is right to minimize opportunities for avoidance to ensure the data is highly useful to law enforcement and other users. Listing all who meet the definition of “beneficial owner” is a reasonable and critical safeguard against easy avoidance.

### ***Definition of “Similar Entity”***

FinCEN appropriately explains that while legal entities are valuable tools that help us organize and develop our economy, they are also used to by a wide variety of bad actors to launder illicit finance.<sup>47</sup> As such, in the comment submitted by our office in response to the ANPRM (“ANPRM comment”),<sup>48</sup>

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<sup>42</sup> Proposed 31 CFR 1010.380(d)(1).

<sup>43</sup> See NPRM at 69937.

<sup>44</sup> NPRM at 69936.

<sup>45</sup> Financial Crimes Enforcement Network, “Potential Money Laundering Risks Related to Shell Companies,” Nov. 9, 2006, available at <https://www.fincen.gov/resources/statutes-regulations/guidance/potential-money-laundering-risks-related-shell-companies>.

<sup>46</sup> *Id.*

<sup>47</sup> NPRM at 69921.

<sup>48</sup> Transparency International U.S. Office, “TI-US Comment: ANPRM on Corporate Transparency Act Implementation,” May 5, 2021, available at <https://us.transparency.org/resource/anprm-cta/>.



we encouraged Treasury to broadly define the phrase “other similar entity” to ensure that the rule adequately covered the corruption threats and other problems posed by anonymous shell companies.

We appreciate FinCEN’s thoughtful consideration of various methods for determining the scope of “other similar entity.” We believe FinCEN takes the correct approach, one that reflects both the intent of Congress and the plain language of the CTA. The decision to “focus on the act of filing to create the entity as the determinative factor,”<sup>49</sup> ensures broad coverage, while minimizing opportunities for avoidance or evasion. Grounding the interpretation in *how* an entity is created (by the filing of a document with a Secretary of State or similar office) refrains from limiting the law’s scope to some finite list of specific types or kinds of entities. Had FinCEN decided to instead list specific entity *types*, it would have opened the door for cottage industries of entities not on such a list to emerge, thus greenlighting the use of alternative corporate vehicles as means of evading transparency and ensuing accountability. Again, the UK experience is instructive. Initially, the UK law did not require Scottish Limited Partnerships (“SLPs”) to report their beneficial owners to the national directory. As a Scottish news service reported:

Their popularity has surged in the past decade, with the number of registered SLPs rising by 23,625 (430%) between 2007 and 2016. Experts believe the rise in prominence of SLPs since 2007—dubbed “the UK’s homegrown secrecy vehicle” by campaign group Transparency International—is due to their attractiveness to money launderers wishing to funnel illicit cash, particularly out of the former Soviet Union. SLPs are unique among other limited partnership business models in the UK in that they have their own “legal personalities” allowing them to hold assets, borrow money from banks and enter into contracts. This is despite the fact that in the vast majority of cases, the real owners of SLPs are not listed in company filings, despite recent legislation by the UK Government requiring them to be identified.<sup>50</sup>

The above excerpt was part of a longer story on a particular case of abuse of SLPs. Concerns of a large loophole ultimately led the UK government to amend their beneficial ownership reporting law to include SLPs. FinCEN is right to avoid any similar and potentially costly mistake.

As a result, the proposed rule provides the appropriate flexibility and applicability, as determined by state practice. And, critically, the scope of the proposed rule would appear to address some of the above-mentioned examples of abuses of trusts spotlighted by the Pandora Papers.

Lastly, so as to help minimize confusion, FinCEN should make clear that sole proprietorships that are “DBAs” (“doing business as”) are required to report their beneficial ownership information, as such entities are formed in relevant part via such a filing.

### ***Definition of “Applicant”***

FinCEN also provides a faithful definition of the term “company applicant,” interpreting it as “any individual that creates the domestic reporting company....including anyone who directs or controls the filing of such document by another person.”<sup>51</sup> What is central to the definition of “company applicant” is the *role* that such an individual plays in the formation or registration process. To this end, FinCEN makes clear that an applicant need not be cabined to a person who physically files an application to form or register the entity. Instead, “company applicant” is 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 is structured to capture current and evolving filing, registration, and related practices as iterated in jurisdictions across the country—regardless of formalities or terminology.

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<sup>49</sup> NPRM at 69938.

<sup>50</sup> STV News, “Scot firms with business model tied to \$1bn fraud probed,” Jan. 11, 2018, available at <https://archive.news.stv.tv/politics/1406010-scots-firms-with-business-model-tied-to-1bn-fraud-probed.html>.

<sup>51</sup> Proposed 31 CFR 1010.380(e)(1)-(2).

The CTA appropriately allows no exemptions, be it by profession, industry, or relation to the reporting company, for company applicants having to report their beneficial ownership information. While some commenters may suggest otherwise, there is nothing in the CTA to justify any such exemptions.

### ***Higher Risk Entities Are Covered***

Curiously, FinCEN states that the CTA targets “lightly regulated entities” and exempts those that are more “heavily regulated.”<sup>52</sup> But it is quite unclear if covered entities are, in general, lightly or heavily regulated. Coverage under the CTA generally follows a risk-based approach informed by available evidence. For example, the U.S.-sanctioned Venezuelan Defense Minister secretly owned a web of 24 companies, including U.S.-based companies; his investments included shell companies that owned other U.S. companies (e.g. real estate firms).<sup>53</sup> These types of entities may be more or less regulated writ large, but they do tend to have fewer on-site examinations and supervision than exempt entities, and, importantly, they do not report their beneficial owners to competent authorities elsewhere. These characteristics place them in a higher risk category and, therefore, represent precisely the kinds of entities Congress intended to cover with the CTA.

As such, FinCEN should strike its commentary on the CTA’s correspondence with lightly or heavily regulated entities.

### ***Address of Beneficial Owner***

FinCEN’s recommended use of a residential street address used for tax residency purposes<sup>54</sup> for each beneficial owner is an important clarification. Beneficial owners may have multiple addresses, including second homes or business addresses, that serve specific and potentially limited purposes. Without clarification, honest filers would try to interpret which address is most appropriate, and bad actors may try to obfuscate by using an address that is less connected or traceable to themselves or their assets. A hodgepodge of address information would, generally, also be less useful to law enforcement and other users of the data.

Requiring the residential street address used for tax residency purposes simplifies the process for filers, as they will already have used this address in other government filings. By making this clarification, FinCEN is taking steps to minimize the burden on filers. It does not require further interpretation, and it will help minimize questions from filers.

### ***Address of Legal Entity***

FinCEN properly proposes to require a domestic street address for reporting companies.<sup>55</sup> But this requirement must be sharpened to make clear that a P.O. Box—which would not be useful to law enforcement—is not acceptable. And since companies may have multiple locations, FinCEN should also clarify that the domestic street address provided must be the entity’s principal place of business. Such clarity would reduce guessing and gaming on the part of the filer, and would provide clear direction for businesses.

For foreign-based companies doing business in the U.S, FinCEN should require both a foreign street address and a domestic street address, if one exists. Both addresses should be the principal place(s) of business in the respective countries.

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<sup>52</sup> NPRM at 69928.

<sup>53</sup> See Organized Crime and Corruption Reporting Project, “The General and His Corporate Labyrinth,” Apr. 10, 2020, available at <https://www.occrp.org/en/revolution-to-riches/the-general-and-his-corporate-labyrinth>.

<sup>54</sup> Proposed 31 CFR 1010.380(b)(1)(ii).

<sup>55</sup> Proposed 31 CFR 1010.380(b)(1)(i)(C).

Identifying the most appropriate addresses for companies should be considered among the most fundamental of all reporting requirements in order to maximize the usefulness of the information to law enforcement and other users.

### *Scanned Identification Documents*

FinCEN's proposed requirement that filers include a scanned copy of an acceptable identification document<sup>56</sup> will help ensure the information provided is accurate and highly useful to users of the data. FinCEN rightfully explains that the CTA's prohibition against submitting a false photograph indicates that FinCEN could ask to collect this type of information.<sup>57</sup> Such documentation mitigates the risks experienced in other jurisdictions where obviously false, but unverifiable, data was submitted.

For example, when the UK-based organization Global Witness did a deep dive into the beneficial ownership data in the UK registry, they found that there were "2,160 beneficial owners born in 2016."<sup>58</sup> And when the Tax Justice Network looked at a few complex companies, it found that:

[O]ne of these 23-layered companies in Companies House....declared wrong information (entities as beneficial owners) and even contradictory information on the addresses and shareholders (when comparing information available on the accounts, annual returns and other registered data).<sup>59</sup>

Accurate data is a cornerstone of highly useful information for law enforcement. Scanned identification documents is a low-cost method for achieving that goal.

FinCEN should also indicate an intention to engage in additional verification, including real-time checks against existing data. Our ANPRM comment suggested that FinCEN partner with other government agencies and utilize the National Law Enforcement Telecommunications System ("Nlets") and other systems. We wrote:

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.<sup>60</sup>

Furthermore, over 30 civil society organizations wrote you in October to:

[E]ncourage you to clarify FinCEN's intent to verify the beneficial ownership data provided to the directory. The United Kingdom's experience with a non-verified directory provides overwhelming evidence of the need to verify the data with simple, real-time checks against other existing government databases.<sup>61</sup>

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<sup>56</sup> Proposed 31 CFR 1010.380 (a)(1)(ii)(E).

<sup>57</sup> See NPRM at 69930.

<sup>58</sup> Global Witness, "What does the UK beneficial ownership data show us?" Nov. 22, 2016, available at <https://www.globalwitness.org/en/blog/what-does-uk-beneficial-ownership-data-show-us/> (emphasis added).

<sup>59</sup> Tax Justice Network, "Exploring UK companies' legal ownership chains to detect red flags and verify beneficial ownership information: Part 1," July 6, 2020, available at <https://taxjustice.net/2020/07/06/exploring-uk-companies-legal-ownership-chains-to-detect-red-flags-and-verify-beneficial-ownership-information/>.

<sup>60</sup> ANPRM comment at 26.

<sup>61</sup> See "CSO Letter of Support on the Corporate Transparency Act Rulemaking," Oct. 21, 2021, available at <https://us.transparency.org/resource/cso-letter-of-support-on-the-corporate-transparency-act-rulemaking/>.

Even FATF, in October 2021, proposed revisions to its Recommendation 24 regarding standards for beneficial ownership transparency. The proposed revision includes the following language on verification:

Accurate information is information which has been verified to confirm its accuracy by verifying the identity and status of the beneficial owner using reliable, independent source documents, data or information. The extent of verification measures may vary according to the specific level of risk.<sup>62</sup>

Verification through partnerships will take additional resources and may require certain design features in the database. FinCEN should signal its intention now so that Congress and contractors can account for these elements in funding and design bids.

### ***FinCEN Identifiers***

Writ large, the use of FinCEN identifiers will significantly reduce the burdens on filers with ownership stakes in multiple reporting companies. The use of identifiers will also likely reduce inadvertent errors such as typographical errors in names or street addresses—making the data more useful for law enforcement, regulators, financial institutions, and other users. However, the proposed rule regarding the use of FinCEN identifiers for *intermediaries* unfortunately includes a provision (the “intermediary provision”) that appears to conflict with the broader proposed rule. The provision states:

If an individual is or may be a beneficial owner of a reporting company by an interest held by the individual in an entity that, directly or indirectly, holds an interest in the reporting company, and if such intermediary entity has obtained a FinCEN identifier and provided the entity’s FinCEN identifier to the reporting company, then the reporting company may include such entity’s FinCEN identifier in its report in lieu of the information required under paragraph (b)(1) of this section with respect to such individual.<sup>63</sup>

The intermediary provision effectively states that if an individual owns or controls a reporting company, through an intermediary or multiple intermediaries, the reporting company may submit the intermediaries’ FinCEN identifiers *in lieu of* beneficial ownership information.

This construction could work if all beneficial owners in a corporate chain are identified at some point in the chain and users have access to all the information in that chain. If that were not the case, this intermediary provision introduces a significant, exploitable loophole. For example, if an individual holds below-the-threshold ownership percentages of multiple parent companies, yet accumulates, through a complex ownership chain, a 25 percent or more *net* ownership stake of the child company, that individual will nevertheless not be listed as a beneficial owner of the parent companies or the child company. Instead, only the FinCEN identifier of the parent company will be reported. To prevent this possibility, FinCEN should make clear that the point at which an individual first meets the definition of “beneficial owner”—regardless of whether it is “by an interest held” in reporting companies through a complex ownership structure—that individual must be reported as a beneficial owner in addition to any FinCEN identifiers of parent companies.

Additionally, if users of the database only have access to the FinCEN identifier of a parent company one, two, or more levels up in a corporate chain (rather than to the entire corporate chain and the ultimate beneficial owners), such a limitation would frustrate law enforcement investigations and be

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<sup>62</sup> Financial Action Task Force, “Revisions to Recommendation 24 and the Interpretive Note – Public Consultation,” October 2021, available at [https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/Pdf-file\\_R24-Beneficial-Ownership-Public-Consultation.pdf](https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/Pdf-file_R24-Beneficial-Ownership-Public-Consultation.pdf).

<sup>63</sup> Proposed 31 CFR 1010.380(a)(2)(ii).

of little use to financial institutions with customer due diligence responsibilities. Users would see only numbers, and never find the names of the individuals behind the entities. In short, without appropriate changes and access, the beneficial ownership directory would be of little use to users and would undermine the core purpose of the law.

Because few, if any, beneficial owners or corporate structures would meet the criteria of complex ownership chains and overlapping investors, such clarifications to the proposed rule would not create widespread complexity, and yet are critically important. Such changes would not burden legitimate small business owners that have straightforward structures and would close potentially dangerous loopholes that bad actors could uncover and seek to exploit.

### ***Legal Entity Identifiers***

FinCEN properly explains that because businesses may have similar names and/or addresses, a unique identifying number is “critical to enabling the unique identification of a reporting company and effectively searching the database to identify the beneficial ownership information reported for a particular company.”<sup>64</sup> Requiring reporting companies to provide a Legal Entity Identifier (“LEI”) would not only address this concern, but would provide additional benefits. For one, it would make the information highly useful to law enforcement, as investigators would now have a way to cross-reference accurate identifying information with other databases. Additionally, as some of the greatest threats to our financial system involve cross-border activity, LEIs would assist with investigations that involve multiple jurisdictions.

LEIs are becoming a global norm and are increasingly used for a variety of purposes. As such, FinCEN is correct to say that obtaining and providing an LEI would not create a substantial burden for filers.

At the outset of the LEI program in 2012, the Treasury Department wrote:

[The LEI program is] a significant achievement in responding to the vulnerabilities of the global financial system and will provide meaningful long-term benefits for both the public and private sectors....the financial crisis exposed the depth of the problem of identifying financial connections and underscored the long-standing need for a global system to identify and link data, which will enable financial regulators and firms to better understand the true nature of risk exposures across the financial system....The global LEI will enhance the ability of regulators to monitor and analyze threats to financial stability and the ability of risk managers to evaluate their companies’ risks.<sup>65</sup>

The purpose of the LEI global system aligns with that of the CTA and the beneficial ownership directory. It is appropriate and, in fact, necessary to include an LEI as a required input to the directory.

### ***Timing of Filings***

The CTA states that a newly formed or newly registered entity must report its beneficial ownership information “at the time of formation or registration.”<sup>66</sup> It also states that in the event of any change in information submitted in prior reports to FinCEN, updated information must be reported “in a timely manner, and not later than one year after the date on which there is a change with respect to any information.”<sup>67</sup>

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<sup>64</sup> NPRM at 69932.

<sup>65</sup> U.S. Department of the Treasury, “Frequently Asked Questions: Global Legal Entity Identifier (LEI),” August 2021, available at [https://www.treasury.gov/initiatives/wsr/ofr/documents/lei\\_faqs\\_august2012\\_final.pdf](https://www.treasury.gov/initiatives/wsr/ofr/documents/lei_faqs_august2012_final.pdf).

<sup>66</sup> 31 U.S.C. § 5336.

<sup>67</sup> 31 U.S.C. § 5336(b)(1)(D).

The proposed rule states that newly formed or newly registered entities will have 14 days to file their initial report.<sup>68</sup> This is a recognition of the practical application of the law, as the vast majority of businesses will file their CTA information along with their corporate registration. FinCEN should partner with Secretaries of State and other similar offices to help facilitate compliance.

During the legislative debate, secretaries of state raised concerns regarding versions of the bill that gave them primary responsibility for implementation. However, once legislation identified FinCEN as the appropriate repository for the data, secretaries of state did not raise concerns about assisting local business owners with compliance. In fact, as states traditionally compete to be the most “business-friendly,” they have an incentive to help ease the compliance process, including by working with FinCEN to provide online access (e.g., hyperlinks) to relevant filing forms. It will be incumbent upon FinCEN to ensure state, local, and tribal jurisdictions have adequate information and other resources to assist filers.

With regard to changes in beneficial ownership information, our ANPRM comment encouraged Treasury to look to the beneficial ownership directories in France and Luxembourg, which require entities to update their information within 30 days of any changes.<sup>69</sup> Fortunately, the rule adopts this approach, specifying that covered entities with changes have 30 calendar days “after the date on which there is any change with respect to any information previously submitted to FinCEN,” including “any change with respect to information reported for any particular beneficial owner or applicant.”<sup>70</sup> The rule also states that if and when an entity that qualifies for an exemption to the law loses that exemption, it similarly will have 30 days to report its ownership information.<sup>71</sup>

Some commenters may suggest changing the time at which the clock starts from when a change is made to when a company discovers a change. This is unnecessary and unwise. Timely updates are important to keep the data highly useful to users. This change might also introduce an easy-to-exploit loophole to protect those further back (and potentially higher up) in the corporate chain. Additionally, the CTA’s generous safe harbor provision allowing persons who inadvertently submit inaccurate information in a report to FinCEN to promptly and voluntarily file a corrected report within 90 days after the submission of the inaccurate report will result in a balanced enforcement scheme that ensures that the data is sufficiently timely and thus highly useful to law enforcement and other users.

Finally, we reiterate FinCEN’s recognition that more-complex entities created their structures well aware that they would need more-sophisticated compliance monitoring and programs. Reporting appropriate compliance information should not be difficult for those who originally created such structures.

### ***Subsidiary Exemption/Exemption (xxii)***

In our ANPRM comment, we noted that:

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.<sup>72</sup>

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<sup>68</sup> Proposed 31 CFR 1010.380(a)(1)(i)-(ii).

<sup>69</sup> See ANPRM comment at 23.

<sup>70</sup> Proposed 31 CFR 1010.380(a)(2).

<sup>71</sup> Proposed 31 CFR 1010.380(a)(1)(iv).

<sup>72</sup> ANPRM comment at 5.

With one exception, the proposed rule largely adheres to considerations of risk, and does not add any new exemptions or expand exemptions written into the CTA. But FinCEN must amend the wording of exemption (xxii).

The CTA creates an exemption that exempts entities “of which the ownership interests are owned or controlled, directly or indirectly, by 1 or more” other specific exempt entities (including certain nonprofit organizations, political organizations, or trusts, along with many other types of entities).<sup>73</sup> In our ANPRM comment, we encouraged FinCEN to narrowly limit this dangerous exemption to those entities of which the ownership interests are wholly owned or wholly controlled by such specific exempted entities.<sup>74</sup> The rule adopts this limitation—but only for the ownership prong, stating “Any entity of which the ownership interests of such entity are controlled or wholly owned”<sup>75</sup> by the specific exempted entities.

Where Congress intended to identify an interest as less than 100 percent, it did so expressly, as in the definition of “beneficial owner.” In forgoing such qualifying language for exemption (xxii), Congress plainly intended such ownership or control to mean 100 percent. A fundamental canon of statutory interpretation presumes that exemptions to a law are to be interpreted narrowly in order to preserve the primary operation of the law.<sup>76</sup> It would thus be highly inappropriate for FinCEN to interpret exemption (xxii) broadly.

There are also grave policy implications for the proposed language: **If preserved in the final rule, this language could permit an entity that is one percent controlled by a specific exempted entity to fall outside the law.** To do so, as we wrote in our ANPRM comment, “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,” and would “provide bad actors with a clear road map for penetrating the U.S. financial system.”<sup>77</sup>

### ***Updating the Customer Due Diligence Rule***

FinCEN indicated that the required update to the Customer Due Diligence Rule (“CDD Rule”) for financial institutions will be addressed in a separate rulemaking. This order of operations is appropriate, as the CTA expressly states that the CDD rule must conform to the CTA, and not the reverse. The clear objectives of the CTA call for more expansive coverage than was envisioned by the CDD rule, and changes to the CDD rule must reflect that coverage. For example, the NPRM calls for all individuals who meet the definition of “beneficial owner” (both the ownership and control prongs) to be listed by a reporting company, and states that listing a single manager—in lieu of others who also meet the definition of “beneficial owner”—is not consistent with the intent of the CTA.

Conforming the two rules will provide more-complete information that is highly useful to law enforcement, and will reduce potential confusion or complexity that might arise from different standards. This was an important consideration for all stakeholders during the legislative development of the CTA. In fact, at one point, anticorruption experts agreed in discussions with the financial services community that the two rules should conform, even if a revised CDD rule meant a more comprehensive definition of beneficial ownership.

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<sup>73</sup> See § 5336(a)(11)(xxii).

<sup>74</sup> ANPRM comment at 14.

<sup>75</sup> Proposed 31 CFR 1010.380(c)(2)(xxii).

<sup>76</sup> 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.”).

<sup>77</sup> ANPRM comment at 14.

### ***Cost Analysis***

FinCEN's proposed cost analysis is detailed and thoughtful, and its assumptions appear reasonable. Using the numbers in the NPRM's costs analysis section, one can calculate that the estimated *per entity* cost to update beneficial ownership information when changes occur is approximately \$20. FinCEN also estimates that the vast majority of filers (roughly 20 million in any given year) will have no filing costs. These numbers reflect both the CTA authors' and FinCEN's successful efforts to minimize the burden on filers.

Regarding the number of entities covered by the rule, FinCEN begins by estimating that there are approximately 30 million businesses in the United States.<sup>78</sup> They then estimate that 4.4 million of those would be exempt from the CTA, leaving 25.7 million covered entities.<sup>79</sup> Such a large number appears to include sole proprietorships, even though they are generally not formed by filing with a secretary of state office or similar office. The National Small Business Association estimates that 12 percent of small businesses (which account for 99.9 percent of all businesses in the U.S.) are sole proprietorships,<sup>80</sup> which amounts to a little over 3 million businesses. To this end, FinCEN should either reduce its overall cost estimates or acknowledge that they very likely overstated the aggregate cost to businesses.

FinCEN also estimates that "initial IT development costs would be \$33 million with an additional \$31 million per year required to maintain the new BOI systems and the underlying FinCEN technology being leveraged to support the new capabilities."<sup>81</sup> It is unclear if these estimated costs include costs associated with the audits required by the CTA, which include evaluating registry operations, examining exempt entities, assessing state incorporation practices, and determining whether additional entities should disclose their beneficial owners.

Furthermore, FinCEN's cost estimates must include the provision of adequate resources to partner with and support state, local, and tribal jurisdictions. These should include funding for materials (e.g., fact sheets, FAQs), for the availability of FinCEN domestic liaisons for relevant jurisdictions, and for other supports to ensure seamless implementation.

All of the above are important to the ongoing effectiveness of the CTA, and as such FinCEN must ensure its cost estimates account for these functions.

### **Conclusion**

The Administration's national security study memorandum designating the fight against corruption as a core national security interest puts bluntly why combating corruption fundamentally matters to the United States: Because doing so is "essential to the preservation of our democracy" and allows the United States to secure a "critical advantage" for itself and other democracies.<sup>82</sup>

We sincerely hope that FinCEN seizes the opportunity now before it to finalize a comprehensive rule that has the potential to more effectively counteract corruption across the world, and that reflects the designation of the fight against foreign corruption as a true national security priority.

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<sup>78</sup> NPRM at 69939.

<sup>79</sup> NPRM at 69966.

<sup>80</sup> See National Small Business Association, "2017 Year-End Economic Report," 2018, available at <https://nsba.biz/wp-content/uploads/2018/02/Year-End-Economic-Report-2017.pdf>.

<sup>81</sup> NPRM at 69948.

<sup>82</sup> The White House, "Statement by President Joseph R. Biden, Jr. on the National Security Study Memorandum on the Fight Against Corruption," June 3, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/statement-by-president-joseph-r-biden-jr-on-the-national-security-study-memorandum-on-the-fight-against-corruption/> (emphasis added).



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](mailto:gkalman@transparency.org).

Thank you for the opportunity to present these comments.

Respectfully submitted,

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