

# Coalition for Integrity

May 3, 2021

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

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

RE: **Beneficial Ownership Information Reporting Requirements**  
Docket #: FINCEN-2021-0005; RIN: 1506-AB49

Dear Acting Director Mosier:

This letter responds to Financial Crimes Enforcement Network's (FinCEN) request for comment on an advanced notice of proposed rulemaking (ANPR) to implement the beneficial ownership reporting requirements in the Corporate Transparency Act (CTA). Coalition for Integrity (C4I) submits the following comments:

Coalition for Integrity is a non-partisan 501(c)(3) organization. We work with a broad network of individuals and organizations to combat corruption and promote integrity in the public and private sectors both in the United States and internationally.

We welcome Financial Crimes Enforcement Network's (FinCEN) Notice of a Proposed Rulemaking on beneficial ownership reporting requirements.<sup>1</sup> We support the efforts of the U.S. Treasury and specifically FinCEN's efforts to address the need to collect beneficial owner information on the natural persons behind legal entities. Requiring beneficial ownership information on legal entities is critical to keep the proceeds of corruption and other crimes from being laundered through the U.S. financial system. It is common for money launderers and people trying to find ways of sending or receiving funds or assets, while concealing their involvement in bribery and other forms of corruption, to hide their identities behind complex webs of shell companies. According to the World Economic Forum, the global cost of corruption

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<sup>1</sup> *Beneficial Ownership Info. Reporting Requirements*, 86 Fed. Reg. 17557 (Apr. 5, 2021).



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is at least \$2.6 trillion, or 5 percent of the global gross domestic product (GDP)<sup>2</sup>, and according to the World Bank, businesses and individuals pay more than \$1 trillion in bribes every year.<sup>3</sup> Often shell companies are used to steal these public funds and the culprits mask their true identities such that the beneficial owner is not known.

**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?**

The CTA’s definition of “beneficial owner” is sufficiently clear and is in line with international best practices such as the definition of beneficial owner by the Financial Action Task Force (FATF), the global money laundering, and terrorist financing watchdog which sets international standards that aim to prevent these illegal activities and the harm they cause to society.

FATF defines beneficial owner as: the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.<sup>4</sup> We believe that the CTA’s definition of beneficial owner is clear, in line with international standards, and should be adopted without changes.

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

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<sup>2</sup> World Economic Forum, *Corruption is costing the global economy \$3.6 trillion dollars every year*, WEFORUM, (Dec. 13, 2018), <https://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n>.

<sup>3</sup> Daniel Kaufmann, *The Cost of Corruption*, WORLD BANK (2004), [http://www1.worldbank.org/publicsector/anticorrupt/fp\\_summer97.pdf](http://www1.worldbank.org/publicsector/anticorrupt/fp_summer97.pdf). See also, Mario Marcel, *Illicit Financial Flows: A Wake-Up Call to Action*, WORLD BANK BLOG, (Oct. 27, 2014), <https://blogs.worldbank.org/governance/illicit-financial-flows-wake-call-action>.

<sup>4</sup> FATF, *Int’l Standards on Combating Money Laundering and the Fin. of Terrorism & Proliferation*, FATF, Paris, France, (2012-2020), at 117, [https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations\\_2012.pdf](https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf).

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CTA includes a statutory definition of beneficial owner and is the result of several years of bipartisan negotiations with input from several stakeholders (including financial institutions, law enforcement, and Secretaries of State). Hence, Treasury should conform the CDD rule to the CTA's beneficial owner definition. The CTA also plainly requires the Treasury rule to replace the CDD definition with the definition in the new CTA statute. The SEC definition is restricted to beneficial owners of publicly traded corporations. The CTA specifically exempts publicly traded corporations and hence FinCEN cannot use the SEC definition of beneficial owners which is mainly intended to help the investing public and securities regulators and addresses corporate control issues.<sup>5</sup> Further, the CTA requires the collection of beneficial owners in a non-public database by FinCEN and the beneficial owners for the SEC regulation are publicly available.

- 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”?**

FinCEN does not need to define the terms because the CTA provides a definition. It defines a 'beneficial owner' of a reporting company as an individual who, directly or indirectly – through any contract, arrangement, understanding, relationship, or otherwise – exercises substantial control over the entity or owns or controls no less than 25% of the ownership interests of the entity.

There are few important issues that the implementing rules should clarify:

- The rule should require entities to name every individual (not just one) who meets the statute's ownership or substantial control criteria.
- Even if no individual meets the 25 percent ownership threshold, the registry filing must identify the human beings who exercise substantial control over the entity. Entities should not be allowed to make filings that fail to name any individual as a beneficial owner.

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<sup>5</sup> 17 C.F.R. § 240.13d-3 (2011).

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- Rather than defining substantial control which may lead to a check the box exercise, FinCEN should provide guidance on substantial control which could include the following:
  - holding the right to appoint or remove a majority of the board of directors.
  - exercising significant influence or control over the company such as being able to make personnel decisions, investment decisions, being a signatory on a bank account.
  - deriving economic benefits from a company

## **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?**

FinCEN should not expand exemptions beyond the 23 exemptions expressly identified in the legislation. The exemptions should be narrowly interpreted because the congressional intent for these exemptions was that several of the entities that fall under the categories already report ownership information to the Government.

Below are some of our recommendations on how to interpret the exemptions for high-risk entities.

### **Subsidiaries:**

- To qualify for the exemption, subsidiaries should be interpreted as "wholly owned" and not by a percentage base of ownership.

### **Grandfathered" dormant companies:**

- The exemption is available only to an entity “that is not engaged in active business.”
- Ensure the exemption is tightly defined to companies in existence at least 1 year before CTA passage; that are not conducting business activity (the exemption can be claimed only by dormant companies that pre-date the law by at least a year, and not by companies formed just before the law’s enactment or just after it).
- The rules should clarify that if a dormant company is owned to any extent (either directly or indirectly) by a foreign individual or entity, it falls outside the scope of the exemption.
- The rules should clarify the criteria which limit the availability of the exemption to companies that have “not, in the preceding 12-month period, experienced a change in ownership or sent or received funds in an amount greater than \$1,000.”
- The rules should clarify the criteria limiting the availability of this exemption to companies that do not “hold any kind or type of assets, including an ownership interest in any corporation, limited liability company, or other similar entity.”

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- Finally, as soon as a formerly dormant company becomes active, it should be required to file its beneficial ownership information in an expeditious timeframe.

## Money Transmitting Businesses (MTB)

Every MTB is already required to register with Treasury.

- Therefore, all MTBs claiming this exemption should provide links to their Treasury registration.
- Also, consider amending FinCEN’s MTB registration form to require listing of a beneficial owner, or at least a natural person. Currently, MTBs are only required to disclose their “owner or controlling person,” FinCEN’s definition of which varies depending on the MTB’s legal form. There is no limitation preventing MTBs from naming another legal entity. Updating FinCEN’s form would provide clarity in the “ownership” definition and bring the definition into better alignment with international standards.

## Pooled Investment Vehicles (PIV):

This category includes hedge funds, private equity funds, venture capital funds which pose significant money laundering risks. A leaked bulletin prepared by the U.S. Federal Bureau of Investigation in May 2020 states that firms in the nearly \$10-trillion private investment funds industry are being used as vehicles for laundering money at scale.<sup>6</sup>

- CTA exempts only pooled investment vehicles that are “operated or advised” by certain financial institutions. FinCEN should suggest that regulators require financial institutions to provide a list of any PIVs which they are operating or advising, and which claim to be exempt from the CTA’s disclosure obligations.
- The investment adviser should provide the “legal name” of the PIV in the publicly available Form ADV that the investment adviser is required to file with the SEC.
- Financial institutions should be applying enhanced due diligence measures to the PIV including diligence on the identities of its largest investors and the sources of their funds.

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<sup>6</sup> Timothy Lloyd, *FBI concerned over laundering risks in private equity, hedge funds -leaked document*, REUTERS (July 14, 2020), <https://www.reuters.com/article/bc-finreg-fbi-laundering-private-equity/fbi-concerned-over-laundering-risks-in-private-equity-hedge-funds-leaked-document-idUSKCN24F1TP>; See also Neil Weinberg, *Hedge Funds Risk Biden-Era End to Money-Laundering Loophole*, BLOOMBERG (Feb. 5, 2020), <https://www.bloomberg.com/news/articles/2021-02-05/hedge-funds-risk-biden-era-closing-of-money-laundering-loophole>.

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- FinCEN should revisit, strengthen, and finalize the rule it proposed in 2015, that prescribed minimum standards for anti-money laundering programs for all registered investment advisers.<sup>7</sup>

## *SECURITY AND USE OF BENEFICIAL OWNERSHIP AND APPLICANT INFORMATION*

**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?**

**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?**

**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?**

Investigating cases of corrupt officials requires law enforcement to have timely access to beneficial ownership information. Therefore, FinCEN’s implementing rules should ensure timely and effective access. This is also required by FATF standards.<sup>8</sup>

The implementing rules should make clear that the CTA provides access to a wide cross-section of federal agency personnel engaged in civil, criminal, tax, administrative, national security, or intelligence activities to enforce federal law.

The CTA already includes extensive protocols that state, local, and tribal agencies must follow to access any registry information. Each agency has to enter into an agreement with the Treasury Secretary, establish formal procedures for making requests to access the registry and securing

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<sup>7</sup> *Fin. Crimes Enforcement Network: Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisors*, 80 Fed. Reg. 52680 (Sept. 1, 2015) (Notice of Proposed Rule). [https://www.fincen.gov/sites/default/files/shared/1506-AB10\\_FinCEN\\_IA\\_NPRM.pdf](https://www.fincen.gov/sites/default/files/shared/1506-AB10_FinCEN_IA_NPRM.pdf).

<sup>8</sup> FATF, *Int’l Standards on Combating Money Laundering and the Fin. of Terrorism & Proliferation*, FATF, Paris, France, (2012-2020), at 93, [https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations\\_2012.pdf](https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf).

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registry information, train its personnel to use the registry, require its personnel to certify each time they access the registry that they are “directly engaged in an authorized investigation or activity” and their “duties or responsibilities require such access,” and conduct annual audits to confirm agency compliance with the statutory protocols. Imposing an extensive FinCEN authentication process would inevitably slow down access to the registry and thereby impede the important investigations, prosecutions, and civil enforcement proceedings conducted by those agencies.

The rule should clarify that a “court of competent jurisdiction” includes any federal, regional, state, local, municipal, tribal, or territorial court that has actual or potential jurisdiction over the matter being examined by the agency seeking authorization to obtain information from the registry.

The rule should make clear that “any officer” includes any person involved with court administration, including a judge, magistrate, clerk, bailiff, sheriff, or other full or part-time court personnel.

The rule should also make clear that federal, state, local, and tribal agency personnel engaged in law enforcement activities may access registry information when they have an official case as well as when they are conducting initial inquiries, preliminary investigations, analyses, and where relevant intelligence reviews, and national security inquiries.

The rules should ensure that financial institutions once they have received customer consent, have timely and appropriate access to the registry to be able to support their customer due diligence and AML obligations. The access should include the beneficial ownership information for the relevant reporting entity, all of the applicant information for the reporting entity, information about any other entity with which each beneficial owner is associated, information about any other entity with which the applicant is associated, and information about any other entity (including affiliates and subsidiaries) with which the reporting company is associated.

The database should also be searchable in various ways including by beneficial owner, by applicant, by entity, by address, by FinCEN identifier, and more.

The registry should be designed to have machine-readable data that can be easily searched and analyzed. This would be useful to law enforcement and regulators to apply data analytics to identify suspicious patterns.



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## Other issues

### **Audit Functions.**

FinCEN should track the number of new entities added to the registry during a specified period compared to the number of new entities formed or registered to do business in the United States by state and tribal offices during the same period and identify entities missing from the registry to ensure that the data in the registry is complete and accurate.

### **Due diligence requirements of Financial institutions**

Other than replacing the beneficial ownership definition in the Customer Due Diligence requirements with the definition in the new CTA statute, FinCEN should not dilute the rule that requires that financial institutions maintain “appropriate risk-based procedures for conducting ongoing customer due diligence,” including “[u]nderstanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile” and “[c]onducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information,” including beneficial ownership information for legal entity customers.<sup>9</sup>

Over the years, the United States has committed to implementing beneficial ownership transparency in several different fora. The establishment of a beneficial ownership registry FinCEN would be a strong signal that the U.S. is taking the necessary steps to uphold its commitments, and we thank you in advance for your continued action to ensure strong and effective implementation of the Corporate Transparency Act.

Please do not hesitate to contact me at [sshah@coalitionforintegrity.org](mailto:sshah@coalitionforintegrity.org) if you have any questions.

Sincerely,

*Shruti Shah*

Shruti Shah

President & CEO

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<sup>9</sup> *Customer Due Diligence Requirements for Fin. Institutions*, 81 Fed. Reg. 29398 (May 11, 2016); See also 31 C.F.R. Parts 1010, 1020, 1023, 1024, and 1026.