

Congress of the United States
Washington, DC 20515

February 7, 2022

The Honorable Janet Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

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

*Re: Beneficial Ownership Information Reporting Requirements
Docket Number FINCEN-2021-0005 and RIN 1506-AB49*

Dear Secretary Yellen and Acting Director Das:

We write in support of the Financial Crimes Enforcement Network’s (FinCEN) proposed rule implementing key sections of the Corporate Transparency Act (CTA).¹ As the principal authors and Democratic negotiators of the CTA, we applaud FinCEN for proposing a strong, broad, and flexible rule that hews closely to the statutory text and to congressional intent. We recognize that the proposed rule does not cover a number of important issues that FinCEN has indicated will be covered by additional rulemakings—such as access to FinCEN’s beneficial ownership database, and security and privacy protocols—and we look forward to working collaboratively with FinCEN on these additional rulemakings, implementing the remainder of the CTA.

While this letter will respond to specific questions posed in the proposed rule, we would like to start with a broader discussion of the three main issues addressed in the proposed rule: (1) the “beneficial owner” definition; (2) the scope of the “reporting company” definition; and (3) exemptions from the “reporting company” definition.

“Beneficial Owner” Definition

We commend FinCEN for proposing a broad, flexible definition of “beneficial owner,” which we believe plays a central role in the beneficial ownership information (BOI) reporting

¹ Pub. L. No. 116-283, Title LXIV (2021).

regime. In particular, we are pleased that FinCEN did not simply adopt the “beneficial owner” definition from the current Customer Due Diligence (CDD) rule, which we believe is seriously deficient and underinclusive.

1. Substantial Control

As we noted in our previous letter, the definition of “substantial control” is one of the most important definitions in the CTA. We believe that this definition must be both broad and flexible in order to capture every individual with functional control over a reporting company, no matter how that control is exercised.

We approve of FinCEN’s proposed definition of “substantial control” because it is broad enough, flexible, and principles-based. It is essential that this definition retain sufficient flexibility to capture individuals who exercise control in novel ways that would not otherwise be captured by a more rigid, formalistic definition.

In particular, we urge FinCEN to retain proposed 31 C.F.R. § 1010.380(d)(1)(iii), which states that “substantial control” includes the “[d]irection, determination, or decision of, or substantial influence over, important matters affecting the reporting company.” This comprehensive standard will ensure that all individuals with *de facto* control over a reporting company will be considered a beneficial owner. The flexibility of the term “important matters” adds a critical measure of protection because it can be applied to each reporting company’s specific facts and circumstances. In addition, the catch-all provision in proposed 31 C.F.R. § 1010.380(d)(1)(iv) will be a key to preventing evasion by sophisticated bad actors who are constantly seeking new ways to use shell companies to launder money. Accordingly, we believe that any definition of “substantial control” must include this or a similar catch-all provision.

2. Ownership Interest

In crafting the “beneficial owner” definition in the CTA, we deliberately used the phrase “ownership interest,” rather than a narrower phrase such as “equity interest,” because our goal was to capture *every* form of ownership—not just those represented by formal equity securities. The proposed rule faithfully adopts this approach by defining “ownership interest” in a way that is broader than mere equity ownership and includes a wide variety of forms of ownership. We are pleased that FinCEN has identified a reasonably comprehensive list of the most common forms of ownership interests, which we believe will help law-abiding business owners more easily comply with the beneficial ownership reporting requirement.

However, we are concerned about one particular omission from the proposed rule’s definition of “ownership interest.” The statutory definition of “beneficial owner” explicitly states that an individual can own or control an ownership interest “through any contract, arrangement, understanding, relationship, or otherwise.”² This is critical because it will prevent bad actors

² 31 U.S.C. § 5336(a)(3)(A).

from evading the beneficial ownership reporting requirement by owning or controlling ownership interests through informal means, such as an unspoken understanding or by virtue of the relationship between two individuals. While the proposed rule includes an incomplete version of that phrase in proposed 31 C.F.R. § 1010.380(d)(3)(ii)(C)(3)(ii),³ that provision only applies to “a trust or similar arrangement” and does not apply to ownership interests in any other entity. The statutory language is clear: This phrase must be applied to *any* ownership interest, in *any* reporting company. We strongly urge FinCEN to bring the definition of “ownership interest” into conformity with the statutory requirements of the CTA by making it clear that any ownership interest in any reporting company can be owned or controlled “through any contract, arrangement, understanding, relationship, or otherwise.”

Finally, we urge FinCEN to clarify the definition of the term “proprietorship interest,” found in proposed 31 C.F.R. § 1010.380(d)(3)(i)(C). It is unclear how “proprietorship interest” differs from “ownership interest.” Moreover, this term appears to have little precedent in either state or federal law and, without clarification, could cause confusion among those subject to the reporting requirement.

“Reporting Company” Definition

In our May 2021 letter, we stated that the definition of “reporting company” should capture any “entities that share many of the same characteristics as corporations and limited liability companies (LLCs) — in particular, entities that are formed through a filing with the state.” We are very pleased that FinCEN heeded our advice and proposed a rule that defines “reporting company” to include not only corporations and limited liability companies, but also any “[o]ther entity that is created by the filing of a document with a secretary of state or” equivalent office. We agree with FinCEN that this definition will likely include limited liability partnerships, limited liability limited partnerships, statutory trusts, and most limited partnerships, and we encourage FinCEN to maintain this scope of coverage in the final rule.

Exemptions

As we stated in our May 2021 letter, we intended for the scope of the bill to be construed as *broadly* as possible, and for the exemptions to be construed as *narrowly* as possible. While FinCEN chose not to clarify every exemption in the CTA, the exemptions that FinCEN did clarify in the proposed rule are among the most important and, according to FinCEN’s own analysis, are likely to be the most utilized exemptions in the CTA.

1. Large Operating Companies

One of the most heavily debated exemptions was the so-called “large operating company” exemption. This exemption could be subject to abuse and will need to be continuously

³ Notably, the proposed rule drops “or otherwise,” which limits this provision to just those four methods of owning or controlling ownership interests. This contradicts the clear statutory language in the CTA, and should be amended in the final rule to include the catch-all phrase “or otherwise.”

monitored to ensure that bad actors are not inappropriately relying on it. In interpreting this exemption, FinCEN clarified that an entity must show at least \$5 million in gross receipts or sales *in the United States*. This is precisely what we intended — companies should not be able to use foreign receipts or sales to satisfy the \$5 million threshold in this exemption. FinCEN correctly recognized “the CTA’s domestic focus,” and we believe that the final rule must continue to prohibit companies from using foreign receipts or sales in calculating whether they satisfy the \$5 million threshold in the large operating company exemption.

2. Dormant Entities

In the “dormant entities” exemption, FinCEN identified an ambiguity in the phrase “in existence for over 1 year.” We believe FinCEN correctly interpreted this phrase to mean “in existence for over 1 year as of the date of the CTA’s enactment.” The alternative interpretation — in existence for over 1 year at any time the statute is applied — would significantly broaden the exemption in a way that was not intended, and would allow bad actors to create shell companies that they could use for illicit purposes at a later date, once it qualifies for the “dormant entities” exemption.

3. Subsidiary Exemption

Importantly, the so-called “subsidiary exemption” captures entities whose “ownership interests are owned or controlled, directly or indirectly, by” certain exempt entities. FinCEN interpreted this exemption to apply only to *wholly* owned or controlled subsidiaries. In our negotiations over the subsidiary exemption, we considered — and rejected — proposals that would have extended this exemption to subsidiaries that are only partially owned or controlled by exempt entities. We believed that such proposals would have unduly expanded the subsidiary exemption in a way that would have substantially weakened the CTA. Accordingly, we applaud FinCEN for construing the subsidiary exemption as narrowly as possible by clarifying that only entities that are wholly owned or controlled by other exempt entities can take advantage of the subsidiary exemption.

Responses to Specific Questions

7. Does FinCEN have the authority under the CTA to require that a person filing a report or application with FinCEN pursuant to proposed 31 CFR 1010.380(b) certify that the report is accurate and complete?

Yes, we believe FinCEN has the statutory authority to require persons filing a report or application with FinCEN to certify that the report is accurate and complete. We intended for FinCEN to have broad authority to prescribe any regulations that are necessary to give effect to the CTA, which includes a requirement that reports be certified as accurate and complete. While we directed FinCEN to include certain items in its regulations, and identified specific goals that the agency should consider in drafting its regulations, we did not intend for FinCEN’s rulemaking authority to be limited to the items specifically mentioned in the statute.

Moreover, the statute requires that FinCEN develop regulations that ensure BOI reported is accurate, complete, and highly useful. In order to accomplish this, we urge FinCEN to consider including record-retention requirements for reporting companies and any accompanying procedures to enable FinCEN and law enforcement agencies to confirm, as necessary during investigations, that information submitted to FinCEN is accurate and complete.

11. Are the proposed requirements for obtaining a FinCEN identifier from FinCEN and using a FinCEN identifier sufficiently clear?

While the text of the proposed rule appears to faithfully implement the statutory requirements for a FinCEN identifier, we are concerned that certain language in the preamble to the proposed rule inappropriately broadens the permissible use of FinCEN identifiers. Specifically, the preamble states that an individual with a FinCEN identifier “can provide the identifier *to a reporting company* in lieu of the personal details required.”⁴

We do not believe that beneficial owners should be able to use a FinCEN identifier to hide their identity from the companies they beneficially own. FinCEN identifiers can be submitted *to FinCEN* in lieu of the required beneficial ownership information, but we never intended for individuals to submit their FinCEN identifiers to the companies they beneficially own. We urge FinCEN to clarify that beneficial owners cannot use FinCEN identifiers to obscure their identity from reporting companies.

30. In addition to the proposed exemptions from the definition of “reporting company,” are there any other categories of entities that are not currently subject to an exemption from the definition of “reporting company” that FinCEN should consider for exemption and, if so, why?

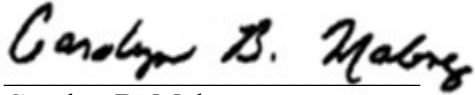
We do not believe that any other categories of entities currently merit an exemption from the definition of “reporting company.” As we stated in our May 2021 letter, the exemptions in the CTA were debated extensively over the course of many years of work on the CTA. We heard from innumerable companies and industries seeking exemptions during the legislative drafting process, and when such an exemption was warranted, we included it in the text of the CTA. As a result, we believe FinCEN should not, in the very first rulemaking pursuant to the CTA, exempt any additional categories of entities from the definition of “reporting company.”

We appreciate the thoroughness and care which FinCEN has demonstrated in moving forward promptly to implement this landmark legislation in a timely and effective way. We look forward to continuing to work with you in the months ahead to ensure full, effective implementation of the law.

⁴ 85 FR 69933 (emphasis added).

The Honorable Janet Yellen
Mr. Himamauli Das
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Sincerely,



Carolyn B. Maloney
Chairwoman
House Committee on Oversight and Reform



Maxine Waters
Chairwoman
House Committee on Financial Services



Sherrod Brown
Chairman
Senate Committee on Banking, Housing,
and Urban Affairs