FACTCOALITION
Financial Accountability & Corporate Transparency

May 5, 2021

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

Submitted electronically via http://www.regulations.gov

RE: **Beneficial Ownership Information Reporting Requirements**
Docket #: FINCEN-2021-0005; RIN: 1506-AB49; Document #: 2021-06922

Dear Acting Director Mosier:

This letter responds to the request by the Financial Crimes Enforcement Network (FinCEN) of the United States (U.S.) Department of the Treasury (Treasury) for comment on an advanced notice of proposed rulemaking (ANPR) to implement the beneficial ownership reporting requirements in the Corporate Transparency Act (CTA).[1] We appreciate the opportunity to comment on this important rulemaking and commend you for reaching out for ideas and setting the pace needed to meet the January 1, 2022 deadline.

The FACT Coalition is a non-partisan alliance of more than 100 state, national, and international organizations promoting policies to build a fair and transparent global tax system that limits abusive tax avoidance and to curb the harmful impacts of corrupt financial practices.[2]

Prior to passage of the Anti-Money Laundering Act (AML Act) and the CTA, decades had passed since our nation's anti-money laundering laws were significantly updated. Over time, the criminal and corrupt developed ever more sophisticated networks, while our law enforcement and national security officials have been working with outdated and insufficient tools to counter the emerging threats.

The International Monetary Fund (IMF) and United Nations Office on Drugs and Crime (UNODC) estimate the scale of global money laundering falls somewhere around two to five percent of global gross domestic product — approximately $1.5 trillion to $3.7 trillion in 2015.[3] According to the UNODC, less than one percent of global illicit financial flows are seized and

[1] Financial Crimes Enforcement Network (FinCEN), "Beneficial Ownership Information Reporting Requirements," *Federal Register*, 86 FR 17557 (Docket Number: FINCEN-2021-0005, RIN: 1506-AB49, Document Number: 2021-06922), April 5, 2021, https://www.federalregister.gov/d/2021-06922, pp. 17557-17565.
[2] A full list of FACT members is available at: Financial Accountability and Corporate Transparency (FACT) Coalition, "Coalition Members," 2021, https://thefactcoalition.org/about-us/coalition-members-and-supporters/.
[3] Financial Action Task Force (FATF), "Money Laundering," 2021, http://www.fatf-gafi.org/faq/moneylaundering/.

forfeited.[4] Companies with hidden owners have become ubiquitous tools used by wrongdoers to conceal and launder those illicit proceeds.[5] A bipartisan group of over 100 national security experts has also warned against U.S. adversaries misusing shell companies incorporated in the United States.[6] The House-Senate conference report on the CTA concludes: "Targeting bad actors who own or control businesses that act as 'fronts' or shell companies on behalf of those conducting illicit activities is essential to combating crime and safeguarding our national security."[7] As financial wrongdoing accelerates during the ongoing coronavirus disease 2019 (COVID-19) pandemic, it is more important than ever that we address these critical vulnerabilities to our economic defenses.

Negotiated and revised by the leadership of the House of Representatives Committee on Financial Services (House Financial Services Committee), the House of Representatives Committee on Oversight and Reform (House Oversight Committee), and the Senate Committee on Banking, Housing and Urban Affairs (Senate Banking Committee) along with critical input from relevant U.S. agencies, congressional leaders, and outside stakeholders, the CTA — if implemented effectively — represents an historic opportunity to curtail the misuse of anonymous shell companies for illicit purposes.

According to Senator Sherrod Brown, senior Democrat on the Senate Banking Committee and one of the chief architects of the legislation, in a statement he gave on the Senate floor just before the chamber passed the CTA, "The Anti-Money Laundering Act and the Corporate Transparency Act are the products of months and months of bipartisan negotiations between and among Members of the House and Senate."[8] The law reflects intensive, bipartisan congressional negotiations and compromises, so it is important for the rule to examine each provision carefully, both individually and in context with other provisions in the law, to carry out congressional intent.

One of the biggest vulnerabilities in our current anti-money laundering regime is the incorporation of U.S. shell companies with concealed owners. These opaque structures have a

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[4] Thomas Pietschmann et al., "Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes," United Nations Office on Drugs and Crime, October 2011, https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf, p. 7.

[5] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, pp. S7309-13; 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, https://openknowledge.worldbank.org/handle/10986/2363; *and* U.S. Senate Permanent Subcommittee on Investigations, "Failure to Identify Company Owners Impedes Law Enforcement," S.Hrg. 109-845, 109th Congress, 2nd Session, (November 14, 2006), https://www.congress.gov/event/109th-congress/senate-event/LC12671/text?s=1&r=45.

[6] John Agoglia et al., Letter to House Speaker Nancy Pelosi and Minority Leader Kevin McCarthy, July 20, 2020, https://thefactcoalition.org/wp-content/uploads/2020/07/National-Security-and-Foreign-Policy-Experts-Call-on-Congress-to-Tackle-Anonymous-Shell-Companies-1.pdf.

[7] U.S. Congress, "Joint Explanatory Statement of the Committee of Conference for H.R. 6395, Division F—Anti-Money Laundering," H.Rept. 116–617, 116th Congress, 2nd Session, (December 3, 2020), https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf, p. 2139.

[8] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7309.

well-documented history of being used to undermine our national security, hide bad actors, and launder the proceeds of a wide variety of crimes including sanctions evasion, terrorist financing, human trafficking, wildlife trafficking, drug trafficking, illegal arms dealing, tax evasion, fraud, the sale of counterfeit and pirated goods, and grand corruption.

A 2014 study by academics at the University of Texas-Austin, Brigham Young University, and Griffith University found that the United States was the easiest place for terrorists, criminals, and kleptocrats to form an anonymous company to launder their proceeds with impunity.[9] A March 2019 analysis by Global Financial Integrity revealed that — in all 50 states — "more personal information is needed to obtain a library card than to establish a legal entity that can be used to facilitate tax evasion, money laundering, fraud, and corruption."[10] At the same time, investigations like those that resulted from the 2016 Panama Papers leaks continued to reveal that drug cartels, human traffickers, arms dealers, corrupt foreign officials, sanctioned individuals, and other criminals regularly set up U.S. shell companies without providing any information about who owned or controlled those entities.[11] Criminals often layered these anonymous companies, with one owning another and so on across international borders, to make it even harder to "follow the money" and figure out who was directing their activities. These tactics enabled criminals to disguise their identities behind the anonymity provided to U.S. entities and to launder dirty money through the U.S. financial system.

The CTA directs FinCEN to take the simple but effective step of asking businesses operating in the United States to name their true owners — their "beneficial owners" — at the time of formation and provide updates as ownership information changes. Through effective implementation of the legislation, FinCEN has a historic opportunity to improve U.S. anti-money laundering (AML) and combating the financing of terrorism (CFT) safeguards, better protect local communities from criminal and corrupt activity, and better fortify the integrity of our financial system.

As you craft the CTA registry, we recommend that you consider the Principles for Effective Beneficial Ownership Disclosure (hereinafter "BOT Principles") issued by the London-based nonprofit OpenOwnership, which has worked with almost 40 countries on their beneficial ownership registries.[12] The nine Principles, which represent best international practice in this area, provide a useful framework for collecting and presenting high quality, reliable, actionable beneficial ownership data.

To assist FinCEN with its implementation of the CTA, the FACT Coalition offers the following ideas and recommendations in response to the questions presented in the ANPR. While

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[9] Michael Findley et al., *Global Shell Games: Experiments in Transnational Relations, Crime, and Terrorism* (New York: Cambridge University Press, 2014), http://bit.ly/2uTLptQ, p. 74.

[10] Global Financial Integrity (GFI), "Report Demonstrates Ease of Establishing Anonymous Shell Companies," March 21, 2019, https://www.gfintegrity.org/press-release/report-demonstrates-ease-of-establishing-anonymous-shell-companies/.

[11] International Consortium of Investigative Journalists (ICIJ), "The Panama Papers: Exposing the Rogue Offshore Financial Industry," April 2016, https://www.icij.org/investigations/panama-papers/.

[12] OpenOwnership, "Principles for Effective Beneficial Ownership Disclosure," November 2020, https://www.openownership.org/principles/.

we discuss many ideas in this comment letter, there are five essential items that are necessary to ensure effective implementation of the law:

1. Barring beneficial ownership reports that fail to identify any beneficial owners, treating "own," "control," and "substantial control" as irreducible legal concepts requiring no further definition in the rule, and ensuring accurate, complete, and highly useful beneficial owner and entity disclosures;
2. Broadly interpreting "other similar entities" to include partnerships, sole proprietorships, trusts, foundations, and business associations, unless a particular entity qualifies for an exemption;
3. Narrowly interpreting each exemption to prevent bad actors from exploiting them and to maximize beneficial ownership transparency;
4. Ensuring practical and meaningful access to the registry for all authorized users; and
5. Designing an effective database that utilizes strong validation and verification measures and prioritizes data quality and functionality.

Following the final ANPR question, the FACT Coalition offers two additional points of consideration related to constructing the beneficial ownership registry and coordinating its information with another U.S. database, the System for Award Management (SAM), which is also affected by the CTA.

Definitions

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

a. How should FinCEN interpret the phrase "other similar entity," and what factors should FinCEN consider in determining whether an entity qualifies as a similar entity?

Defining "Other Similar Entity." The purpose of the CTA is to enable the United States to identify the human beings using legal entities to conduct activities within the United States, including illicit activities.[13] The rule should

[13] Section 6402 of the CTA states:

acknowledge that the phrase "other similar entity" was included in the law to ensure that the law's beneficial ownership disclosure obligations apply broadly to a wide range of legal entities to achieve the objectives of the CTA, and prevent those objectives from being easily circumvented by individuals acting through an entity other than a corporation or limited liability company (LLC).

The CTA's inclusion of 23 different exemptions is evidence that Congress intended the law to have a broad sweep — otherwise there would be no need for so many exemptions. Those exemptions currently encompass, for example, churches, charitable trusts, and public utilities, as well as pooled investment vehicles, subsidiaries, dormant entities, and 20/5 entities, all of which may be structured in a variety of ways — not only as a corporation or LLC, but also as a partnership, sole proprietorship, trust, foundation, or association.[14] Many of the exemptions even incorporate the phrase "other similar entity" when describing the exempt entities, again in recognition of the CTA's broad scope.

To accomplish the law's transparency objectives, the rule should treat a business entity as a "similar entity" subject to the CTA's disclosure obligations if the entity is not exempt from the law under 31 U.S.C. 5336(a)(11)(B), and like the corporations and LLCs already subject to the CTA, it has submitted a filing with a government office seeking permission to conduct activities within the United States. Filing that document would then become the key event triggering the CTA's disclosure obligations for a "similar entity." That approach would make sense because it would identify entities that are essentially seeking permission to conduct activities within the United States and, in return, should be willing to disclose the human beings behind their efforts to obtain permission.

"It is the sense of Congress that … malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interests of the United States and allies of the United States[.] ... Federal legislation providing for the collection of beneficial ownership information for corporations, limited liability companies, or other similar entities formed under the laws of the States is needed to—

"(A) set a clear, Federal standard for incorporation practices;

"(B) protect vital United States national security interests;

"(C) protect interstate and foreign commerce;

"(D) better enable critical national security, intelligence, and law enforcement efforts to counter money laundering, the financing of terrorism, and other illicit activity; and

"(E) bring the United States into compliance with international anti-money laundering and countering the financing of terrorism standards[.]"

[14] *See* 31 U.S.C. 5336(a)(11)(B)(xvi), (xviii), (xix), (xxi), (xxii), and (xxiii), and FACT's discussion of each of those exemptions in response to Question 6.

b. What types of entities other than corporations and LLCs should be considered similar entities that should be included or excluded from the reporting requirements?

Specifying Categories of Similar Entities. Beneficial ownership reporting requirements should generally apply, not only to corporations and LLCs, but also to partnerships, sole proprietorships, trusts, foundations, and business associations, unless a particular entity qualifies for an exemption. In the United States, individuals employ a wide variety of entities to engage in business activities, many of which — but not all — file documents with a government office to gain permission to initiate operations. Since the purpose of the CTA is to enable the United States to ascertain the human beings using entities to conduct activities within the country, including illicit activities, it makes sense to subject a wide spectrum of business entities to the law's disclosure obligations.

If the rule were to adopt the approach described above, while all of the listed entity types would generally be covered, whether a specific entity would actually have to file information with the beneficial ownership registry would depend upon whether that entity filed a document similar to a formation or registration document with a government office. That entity-specific outcome follows from the fact that each of the 50 states (and other covered districts and territories) have their own laws and rules governing which types of entities are required or allowed to file documents with a government office to gain authorization to conduct business activities within U.S. borders.

For example, while most states do not require general partnerships to file a formation or registration document with the state, most require limited partnerships and limited liability partnerships to do so.[15] In addition, some states allow (but do not require) general partnerships to file a registration document at the state level,[16] while most require them to obtain a state license to conduct certain kinds of business activities within the state. Similar filing requirements apply to sole proprietorships. While most states do not require sole proprietorships to file an initial formation or registration document with the state, many require them to file a "Doing Business As" (DBA) or "fictitious name" form if they want to conduct activities within the state using a business name rather than a personal name.[17]

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[15] *See, e.g.,* Texas Secretary of State, "Formation of Texas Entities FAQs," accessed May 1, 2021, https://www.sos.state.tx.us/corp/formationfaqs.shtml#LLP3 ("The only way to create a Texas limited partnership (LP) is to file a certificate of formation with the secretary of state.").

[16] *See, e.g.,* California Secretary of State, "Starting a Business – Entity Types," 2020, https://www.sos.ca.gov/business-programs/business-entities/starting-business/types#gp. (In California, "[r]egistering a [general partnership] at the state level *is optional*.")(emphasis in original).

[17] *See, e.g.,* Florida Department of State, "Types of Business Entities/Structures," 2021, https://dos.myflorida.com/sunbiz/start-business/corporate-structure/ (In Florida, "[s]ole proprietorships, when not operating under the owner's legal name, must register a fictitious name with the Division of Corporations.").

The rule will need to decide whether to treat an application for a state or tribal license or DBA status as commensurate with filing a corporate formation or registration document. The FACT Coalition recommends treating them the same way, because an application for a state or tribal license is an effort by an entity to refashion itself and embark upon new activities within the state. Similarly, a DBA application is an effort by a sole proprietor to begin conducting business activities in a new way, walking away from the requirement to operate under the sole proprietor's own name.[18] Because in both instances, the entity in question voluntarily filed a document with a government office to initiate new business activities within the state or tribe, both types of filings should trigger the CTA's beneficial ownership disclosure obligation and thereby enable the United States to learn the identity of the human beings using entities to conduct activities within U.S. borders, including any illicit activities.

Another set of issues is posed by state filing requirements for trusts and foundations. A recent Congressional Research Service analysis determined that the 50 states have a wide variety of statutory and common law requirements related to when business trusts must file formation or registration documents with a state office.[19] When it comes to foundations, New Hampshire requires certain foundations to file a "certificate of formation" with its secretary of state and allows them to engage in non-charitable activities;[20] while other states have no formation filing requirements and may limit foundations to charitable activities. Finally, some states, like North Dakota, require business associations known as "cooperatives" to file documents with the state,[21] while other states do not.[22]

An additional issue involves which government offices should be considered equivalent to "a secretary of state or similar office under the law of a State or Indian Tribe." Some states allow or require business entities to file documents with a regional, county, or municipal office, rather than a state or tribal office. Since all are government offices, the rule should treat them equally when evaluating whether a specific business qualifies under the CTA as "similar" to a corporation or LLC. Again, the point of the term "other similar entity" is to ensure

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[18] Some sole proprietorships operating under a business name become large commercial enterprises with multiple employees, obscuring the identity of the sole proprietor behind the operation. *See, e.g.,* Paycheck Protection Program (PPP) data showing that PPP loans in excess of $150,000, awarded from April to August 2020, went to 8,860 sole proprietorships which reported an average of 42 employees. U.S. Small Business Administration, "PPP FOIA," April 13, 2021, https://data.sba.gov/dataset/ppp-foia.

[19] *See, e.g.,* Nicole Vanatko, "Memorandum: Business Trusts and the Corporate Transparency Act," Congressional Research Service, March 10, 2021, p. 2.

[20] NH Rev Stat §§ 564-F:3-301 and 564-F:6-601 (2017), https://law.justia.com/codes/new-hampshire/2017/title-lvi/chapter-564-f/.

[21] North Dakota Secretary of State, "Cooperative Association," 2021, https://sos.nd.gov/business/business-services/business-structures/cooperative-association ("North Dakota law defines a cooperative as 'an association…' incorporated by five or more adults, one of which must be a North Dakota resident. … A domestic cooperative is one that has filed articles of incorporation with North Dakota's Secretary of State.").

[22] In addition, some states treat joint ventures as business associations, partnerships, LLCs, or corporations, depending upon the facts.

the CTA covers a wide range of businesses, increase disclosure of who is conducting activities within U.S. borders, and prevent individuals from circumventing that disclosure obligation by using an entity other than a corporation or LLC.

Given the wide variation in state filing requirements, if the rule were to adopt the definition of "other similar entity" described above, some but not all partnerships, sole proprietorships, trusts, foundations, and business associations would be required to file disclosures with the beneficial ownership registry, depending upon the filing requirements of specific states or tribes. The rule could acknowledge that this approach would result in the disparate treatment of similar business entities, and perhaps that this disparate treatment would be troubling in light of the fact that businesses operate across state lines and the CTA was intended to create a single set of beneficial ownership transparency requirements applicable nationwide. At the same time, the rule could note that federal law has long respected state differences, seeing the states as working laboratories for effective government, and laws governing the formation, registration, and licensing of business entities have long lay within the province of the states.

The bottom line is that the rule will have to decide whether to adopt a broad definition of "other similar entity," including whether to treat as similar to corporations and LLCs a variety of business entities filing a variety of documents with a variety of government offices so long as the common denominator is the effort to gain government authorization to conduct activities within U.S. borders. The best course of action to carry out the CTA's transparency objectives and ensure the registry is highly useful to law enforcement, national security, and intelligence agencies as well as financial institutions would be for the rule to adopt a broad approach.

Broadly interpreting the term "other similar entities" to encompass a wide spectrum of businesses and subject them to the CTA's beneficial ownership disclosure requirements would also better align the U.S. registry with registries in allied countries including the United Kingdom (U.K.) and members of the European Union (E.U.) which apply their beneficial ownership disclosure rules to multiple types of entities.[23] Taking that approach would also comport with the BOT Principles calling for registry data to "comprehensively cover all relevant

[23] Money Laundering (England), Regulations 2007 (SI 2007/2157), https://www.legislation.gov.uk/uksi/2007/2157/regulation/6/made#:~:text=(c)any%20individual%20who%20exercises,of%20the%20entity%20or%20arrangement.&text=(9)%20In%20any%20other%20case,a%20transaction%20is%20being%20conducted (U.K. definition of beneficial owner, which includes beneficial owners of corporations, partnerships, trusts, and estates); European Parliament and the Council of the European Union, "Directive 2015/849, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing," Official Journal, L 141/73, May 20, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L0849&from=EN (E.U. definition of beneficial owner in Article 3, section 6, which includes beneficial owners of corporations, trusts, and foundations).

types of legal entities and natural persons."[24] In addition, it would match the approach taken by the Legal Entity Identifier (LEI) system which issues LEIs to all types of entities without exception.[25]

Excluding Entities. In response to the question about identifying entities excluded from the CTA's disclosure obligations, the rule should permit exclusions only for entities that fall within one of the law's 23 exemptions. The number and variety of those exemptions make it clear that Congress engaged in extensive negotiations over which entities should be exempt from the CTA's disclosure obligations and reached a series of compromises on that issue.[26] The law also establishes an exclusive process for creating new exemptions.[27] In light of the statutory framework, the rule should state plainly that any entity which, on its face, is covered by the CTA should be presumed subject to the CTA's disclosure obligations unless the entity affirmatively establishes that it qualifies for one of the enumerated statutory exemptions.

c. If possible, propose a definition of the type of "other similar entity" that should be included, and explain how that type of entity satisfies the statutory standard, as well as why that type of entity should be covered. For example, if a commenter thinks that state-chartered non-depository trust companies should be considered similar entities and required to report, the commenter should explain how, in the commenter's opinion, such companies satisfy the requirement that they be formed by filing a document with a secretary of state or "similar office."

Proposing A Definition of "Other Similar Entity." The rule should define "other similar entity" as any general, limited, or limited liability partnership; sole proprietorship; trust; foundation; or other business association that does not qualify for exemption under section 5336(a)(11)(B), and has filed a document with a government office that, like a corporate formation or registration form filed with a state or tribal office, seeks government authorization to conduct activities within the jurisdiction. That approach would not only mimic the treatment of corporations and LLCs under the CTA, but would also focus on entities seeking permission to conduct activities within U.S. borders, justifiably

[24] OpenOwnership, "Principles for Effective Beneficial Ownership Disclosure," November 2020, https://www.openownership.org/principles/.

[25] Global Legal Entity Identifier Foundation (GLEIF), "Questions and Answers," 2021, https://www.gleif.org/en/about-lei/questions-and-answers/ ("[T]he term 'legal entity' includes, but is not limited to, unique parties that are legally or financially responsible for the performance of financial transactions or have the legal right in their jurisdiction to enter independently into legal contracts, regardless of whether they are incorporated or constituted in some other way (e.g. trust, partnership, contractual).").

[26] *See also*, Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7309 ("The Anti-Money Laundering Act and the Corporate Transparency Act are the products of months and months of bipartisan negotiations between and among Members of the House and Senate.").

[27] 31 U.S.C. 5336(a)(11)(B)(xxiv).

requiring them, as a precondition, to disclose the human beings behind their efforts to gain entry to the United States.

In addition to providing a general definition of the term, the rule should provide guidance with respect to each named category of business entity and discuss the types of filings that would bring a specific member of that category within the definition of "other similar entity." The rule should issue general guidance, for example, that a filing by an entity to obtain a state license to conduct certain activities or to obtain permission to conduct activities under a business name should be treated as similar to a formation or registration document filed by a corporation or LLC with a state or tribal office, since it would be an essential precursor to the entity's initiating activities within the jurisdiction.

The rule should also provide specific guidance that the following entities qualify as "similar entities" subject to the CTA's disclosure obligations: limited and limited liability partnerships that file formation or registration documents with a government office or obtain a business license to conduct activities within the state; general partnerships that choose to file a registration form with a government office or obtain a business license to conduct activities within the state; sole proprietorships that file formation or registration documents with a government office, obtain a business license to conduct activities within the state, or file a "doing business as" or "fictitious name" document with a government office to conduct activities within the state or tribe under a business name; trusts and foundations that file formation or registration documents with a government office or obtain a business license to conduct activities within the state; and business associations such as cooperatives or joint ventures that file formation or registration documents with a government office or obtain a business license to conduct activities within the state. In each case, the key test would be whether the entity filed a document with a government office to gain government authorization to initiate activities within the jurisdiction.

State-Chartered Non-Depository Trust Company. In response to the specific question about a state-chartered non-depository trust company, the rule should require a two-step analysis to determine if it qualifies as a "similar entity." The first step would be to determine whether the trust company qualified for a statutory exemption. A number of exemptions might apply depending upon the facts, including if the trust company was a publicly traded corporation exempt under section 5336(a)(11)(B)(i); if it met the trust company requirements set out in the federal laws cited in section 5336(a)(11)(B)(iii) or operated in a state that treats state-chartered trust companies as state-chartered banks which are exempt under section 5336(a)(11)(B)(iii); if it met the physical presence, employee, and revenue requirements for exempt entities under section 5336(a)(11)(B)(xxi); or if it was owned by covered exempt entities under section 5336(a)(11)(B)(xxii).

If no exemption applied, the next step would be to evaluate whether the trust company was a corporation or LLC. If so, it would be subject to the CTA. If not, the issue would be whether it met the criteria used to define a "similar entity." As a state-chartered entity, the trust company must have filed documents with a state office to obtain a charter to conduct activities within the state. If so, its charter should be treated as similar to a formation or registration document filed with a state or tribal office, which means the trust company should be treated as a "similar entity" subject to the CTA. In sum, the final answer to this question will depend upon a fact-specific analysis that looks to both federal and state law and upon whether the rule adopts a broad interpretation of the filing requirement.

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

a. Does this language describe corporate filing practices and the applicable law of the states and Indian tribes sufficiently clearly to avoid confusion about whether an entity does or does not meet this requirement?

Please see FACT's response to Question 1 and Question 2(b).

b. If not, what additional clarifications could make it easier to determine whether this requirement applies to a particular entity?

Government Filing. Whether an entity has filed a document with a government office is an objective event — either the entity filed the document with the office, or it did not. At the same time, as explained above, guidance is needed to avoid confusion over whether certain types of documents filed with a state, tribal, regional, county, municipal or other government office should be treated as equivalent to a formation or registration document filed by a corporation or LLC with a state or tribal office. FACT recommends, for example, that the rule provide guidance clarifying that applications for state licenses, DBA and fictitious name authorizations, and state charters should be treated as equivalent to corporate formation and registration filings — and that filing documents with a regional, county, or municipal office is equivalent to filing them with a state or tribal office.

In addition to providing guidance on specific kinds of filings and offices, the rule could require the registry's beneficial ownership form to include a field requiring the reporting company to provide an electronic link to the government database containing the relevant document filed by the reporting company. That link could then be used not only to establish the existence of the key document, but also to help establish that the entity is, in fact, a covered entity under the CTA.

In addition, requiring that link would be in line with international best practices recommended by FATF.[28]

Still another step that Treasury, states, and tribes could take to clarify the law's coverage would be to post notices about the CTA's requirements on relevant websites and in appropriate formation and registration materials, as required by 31 U.S.C. 5336(e)(1–2). For more information about such notices, see FACT's responses to Questions 17 and 18, below. For more information on possible helpful state and tribal actions, see FACT's response to Question 46, below.

The law also requires Treasury, the Treasury Inspector General (IG), and GAO to conduct certain audits of the registry.[29] Those audits could include an analysis of the extent to which covered entities actually filed beneficial ownership forms with the registry. As part of that effort, the audits could compare the entities formed, registered, or licensed during a specified period of time within a particular state to the entities from that state that joined the registry during the same time frame. For entities that appeared in state records but not in registry records, the audits could select a randomized group to determine why the entities did not file with the registry, including whether they qualified for a statutory exemption and, if so, which one. Since the law contains a safe harbor permitting persons to correct inadvertent filing errors without penalty, entities that should have filed in the registry but accidentally failed to do so could correct their mistake. At the same time, the audits would help educate FinCEN, Treasury, the states and tribes, the corporate community, and others about any need to clarify further what entities must file with the registry.

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?

Defining Beneficial Owner. The CTA's definition of "beneficial owner" is the product of intense congressional negotiation, and the end result is sufficiently clear and detailed that the rule should adopt it verbatim, with no additions or alterations.

[28] FATF, "The FATF Recommendations," October 2020, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf, pp. 91-92 (Interpretative Note to Recommendation 24, section 4(a) stating that "the minimum basic information" for a company should include "proof of incorporation, legal form, and status").

[29] 31 U.S.C. 5336(b)(6), (h)(4), and (i). In addition, after the registry has been in operation for two years, Section 6501(a) and (c) of the AML Act requires GAO to conduct a study "assessing the effectiveness of incorporation practices implemented" in response to the CTA to combat wrongdoing and another study to review a variety of issues related to exempt entities.

The CTA definition includes both affirmative and negative provisions. The affirmative provision provides a two-part test seeking identification of individuals who, directly or indirectly, exercise “substantial control” over an entity or “hold or control” not less than 25 percent of the “ownership interests” of that entity. The law’s focus on control and ownership aligns not only with other beneficial ownership provisions in federal law,[30] but also with longstanding international best practice, epitomized in the beneficial owner definition promulgated by the Financial Action Task Force (FATF) on money laundering, the leading global anti-money laundering body which the United States helped found and continues to support.[31] The CTA approach also aligns with the definitions used by allies such as the U.K. and E.U. which, again, focus on control and ownership.[32]

Equally important is the CTA’s negative provision, which provides a list of individuals who may not be named as beneficial owners. That list includes minor children; a nominee, intermediary, custodian, or agent acting on behalf of another person; an employee; an individual who might one day inherit an ownership interest; and a creditor unless that creditor exercises substantial control over or owns at least 25 percent of the ownership interests of the entity in question. By identifying individuals who should not be treated as beneficial owners — in addition to those who should — the CTA provides a beneficial ownership definition that is both clear and practical.

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?

Comparing the CDD and CTA Definitions. The beneficial owner definitions in the CTA and CDD rule differ substantially, and are subject to an explicit CTA requirement that Treasury bring the CDD rule “into conformance” with the CTA.[33] For those reasons, the rule should replace the CDD definition with the statutory definition of beneficial owner in the CTA.

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[30] *See, e.g.,* 10 U.S.C. 2661(d) (Notes: Disclosure of Beneficial Ownership by Foreign Persons of High Security Space Leased by the Department of Defense), https://www.law.cornell.edu/uscode/text/10/2661.

[31] FATF uses the following definition: “‘Beneficial owner’ refers to the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.” FATF, “The FATF Recommendations,” October 2020, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf, p. 117.

[32] Money Laundering (England), Regulations 2007 (SI 2007/2157), https://www.legislation.gov.uk/uksi/2007/2157/regulation/6/made#:~:text=(c)any%20individual%20who%20exercises,of%20the%20entity%20or%20arrangement.&text=(9)%20In%20any%20other%20case,a%20transaction%20is%20being%20conducted (U.K. definition of “beneficial owner”); European Parliament and the Council of the European Union, “Directive 2015/849, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing,” Official Journal, L 141/73, May 20, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L0849&from=EN (E.U. definition of “beneficial owner” in Article 3, section 6).

[33] 31 U.S.C. 5336(d)(1).

The differences between the two definitions are many. The CDD rule, for example, allows an entity to name as a beneficial owner a company officer or senior manager, while the CTA explicitly prohibits naming an employee as a beneficial owner. The CDD rule allows an entity to name a “single individual” with “significant responsibility to control, manage, or direct” the entity as the entity’s beneficial owner, while the CTA does not restrict the beneficial owner list to a single individual. The CDD rule requires naming as beneficial owners individuals who own at least 25 percent of the “equity interests” of an entity, while the CTA specifies individuals who “own or control” at least 25 percent of the “ownership interests” of an entity. The CTA also requires the naming of individuals with “substantial control” over an entity, while the CDD rule never uses that phrase.

The differences continue. The CTA prohibits naming several types of individuals as beneficial owners including minor children, nominees, employees, and creditors; the CDD rule does not take that same approach. In addition, the CTA contains a list of exemptions that is longer and substantively different than the exemptions listed in the CDD rule. The CTA also contains novel exemptions that never appear in the CDD rule.

Another weighty consideration is that the CDD rule has no explicit statutory basis, while the CTA not only enacts a statutory definition of beneficial owner, but also directs Treasury to conform the CDD rule to the CTA, which necessarily includes conforming the CDD rule to the CTA’s beneficial owner definition.[34] Taken together, the many differences between the CTA and CDD beneficial owner definitions as well as the CTA’s statutory mandate to conform the CDD rule to the CTA’s provisions prevent the rule from simply re-using the CDD definition. Instead, the law plainly requires the rule to replace the CDD definition with the definition in the new statute.

Comparing the CTA and SEC Definitions. The beneficial owner definition in the CTA and the regulatory definition of beneficial owner used by the Securities and Exchange Commission (SEC) under 17 CFR §240.13d-3 also differ substantially. The CTA definition is intended to apply to a wide variety of entities, including corporations, LLCs, partnerships, trusts and more, while the SEC definition is restricted to beneficial owners of publicly traded corporations. The CTA specifically exempts publicly traded corporations from its coverage, thereby avoiding any problem with conflicting definitions of beneficial owners.

That is not the only difference. Beneficial owners identified under the CTA are listed in a non-public database administered by FinCEN, while beneficial owners identified under the SEC regulation are identified in an SEC database available to the public. Beneficial owners identified in the FinCEN database are intended to help law enforcement, regulators, and financial

[34] 31 U.S.C. 5336(d)(1).

institutions understand who owns or controls entities conducting activities in the United States and evaluate the money laundering and terrorist financing risks (among other risks) associated with those individuals and the reporting company. The beneficial owners identified in the SEC database are intended to help the investing public, as well as securities regulators, academics, and others, understand who owns or controls the country's publicly traded corporations and help ensure investors can make informed decisions when trading in U.S. capital markets.

In addition to the two definitions' widely divergent coverage, public access rules, and legal objectives, the SEC definition addresses a long list of complex corporate control issues related to proxies, powers of attorney, pooling arrangements, classes of securities, options, warrants, convertible securities, automatic terminations, national security exchanges, security pledgee agreements, underwriters, and more. If FinCEN were to adopt the SEC's regulatory definition, it would introduce a multitude of complex corporate control issues that may confuse rather than facilitate understanding of the CTA's beneficial ownership definition, especially since the CTA expressly excludes publicly traded corporations.

In addition, as explained above, the CTA explicitly requires Treasury to conform the CDD rule to the CTA, which necessarily includes conformance to the CTA's definition of beneficial owner. The CTA makes no reference to the SEC's alternate regulatory definition, even though the law demonstrates repeatedly that Congress knew how to cross-reference other federal definitions when defining terms used in the CTA. The bottom line is that there is no statutory basis for either ignoring the law's requirement that Treasury conform the CDD rule to the CTA's beneficial owner definition or for proposing that FinCEN adopt an SEC definition never mentioned in the CTA.

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?

Defining "Own" and "Control." The terms "own" and "control" represent basic, irreducible legal concepts that should not be further defined in the CTA implementing rule. In addition, since the purpose of the CTA differs substantially from the purposes animating federal securities and tax laws, the CTA should not adopt any statutory or regulatory definitions of those terms as used in those other laws. The purpose of the CTA is to enable the United States to identify the human beings using entities to conduct activities within the United States, including illicit activities. In contrast, federal securities laws seek to create vibrant capital markets, while federal tax laws seek to collect revenue for the United States. Those widely divergent objectives warn against trying to use the same terms in the same ways across the board. If Congress had wanted the CTA to use an existing definition from federal securities or tax law, it could have referenced that definition as it did for so many other terms in the CTA; Congress' decision not to reference an existing federal definition of "own" or "control" in the CTA was an affirmative decision, not an oversight, and should be respected by FinCEN and Treasury.

Defining Ownership Interest. A more useful exercise would be for the rule to provide guidance on the term "ownership interest," since it seems to be an undefined term in the U.S. Code. The rule should interpret the term broadly to enable it to apply to a wide variety of entities, including corporations, LLCs, partnerships, sole proprietorships, trusts, foundations, and business associations. To clarify the concept with respect to those entities, the rule could define an "ownership interest" as an entitlement to, for example, a corporation's shares; an LLC's membership units, capital, or profits; a partnership's capital or profits; a sole proprietor's capital or profits; a trust or foundation's corpus or capital; or a business association's shares, participation units, capital, or profits. This definition could be included in the revised CDD rule that will have to be brought into conformance with the CTA under 31 U.S.C. 5336(d).

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"?

Defining Substantial Control. The rule should not attempt to define "substantial control." It is a term that, like other key terms in federal law — "reasonable doubt" in criminal law, "scheme or artifice" in securities law, or "church" in tax law — has an irreducible meaning that does not warrant a more detailed, numerical, or mechanical test.

The authors of the CTA considered but rejected efforts to define "substantial control" in more detail. One of the chief architects of the CTA, Senator Sherrod Brown, spoke on the Senate floor just before the Senate voted to approve the Corporate Transparency Act and provided this explanation of the phrase "substantial control":

> "To determine whether an individual exercises 'substantial control' over an entity, FinCEN is not intended to devise a numerical, narrow, or rigid test. Instead, the standard is intended to function with flexibility to take into account the myriad ways that an individual may exercise control over an entity while holding minimal or even no formal ownership interest.
>
> "They include written and unwritten agreements, arrangements, or understandings, instructions to company directors or officers, letter of wishes, control over personnel decisions, economic pressure on company

> shareholders or employees, coercion, bribery, threats of bodily harm, and other legal and illegal means of exercising control.
>
> "Evidence that one or more individuals are exercising substantial control over a specific entity is expected to vary widely and may encompass such matters as emailed or telephoned instructions from the individuals suspected of being beneficial owners or their agents, employment or personnel decisions made at the direction or with the approval of such individuals, financial accounts that name such individuals as signatories, investment decisions made at the direction or recommendation of such individuals, or transfers of funds or assets to or at the direction of such individuals."[35]

This legislative history makes clear that Congress deliberately left the phrase "substantial control" undefined in order to provide a factfinder in an enforcement setting with the flexibility needed to reach a reasonable determination about who is ultimately controlling an entity engaged in illicit activity.

Leaving the phrase "substantial control" undefined would not impede the functioning of the CTA. In most cases in the United States, ownership is not a complex matter. Current data indicates that 99.9 percent of U.S. businesses are small businesses, defined by the Small Business Administration as businesses with fewer than 500 employees, and at 81 percent of those U.S. small businesses, a single individual owns, controls, and is the sole employee of the operation.[36] Another segment of U.S. businesses is owned and operated by married couples, a situation so commonplace it produced the "mom and pop" cliche. The beneficial owners of those businesses are easily identified based upon their ownership interests and clear authority to exercise substantial control over the business. It is in a minority of cases — when no single individual owns more than 25 percent of a legal entity — that the control prong becomes an especially important and determinative test. Even then, many of the more complicated businesses would likely qualify for an exemption, obviating the need for any interpretation of the phrase.

Of course, in a minority of cases, an entity required to file with the registry will have a complex ownership structure that does not involve any individual holding at least 25 percent of the ownership interests. In those cases, it's particularly important that the substantial control test delivers meaningful disclosures.

Ensuring Meaningful Disclosures. To ensure meaningful beneficial ownership disclosures in those instances, the rule should provide at least four

[35] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, pp. S7310-11.

[36] Small Business Administration, Office of Advocacy, "Frequently Asked Questions," October 2020, https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf.

guiding principles. First, the rule should state explicitly that the registry filing must identify the human beings who exercise substantial control over the entity even if no individual meets the 25 percent ownership threshold. Second, since as a practical matter no entity can operate without a human being in control, the rule should state explicitly that the registry will not accept a filing that fails to name any individual as a beneficial owner. Third, the rule should state that the filing should name every individual who exercises substantial control over the entity without restricting the disclosure to a single individual. That includes naming all members of a group of individuals who exercise collective control over an entity.[37] In addition, the rule should warn entities not to apply the substantial control test rigidly or narrowly, but to apply it expansively and consider naming more rather than fewer individuals in the case of a close call. These four guiding principles will help ensure the registry does not contain beneficial ownership disclosure documents that fail to disclose any beneficial owners, an outcome that would constitute a colossal waste of time and resources and defeat the very purpose of the CTA.

To ensure meaningful disclosures for each individual who "owns or controls not less than 25 percent of the ownership interests" of an entity,[38] the rule should require the registry's beneficial ownership form to require disclosure of the precise percentage of ownership interests that each beneficial owner "owns or controls"; and indicate the type of ownership interest using a checkbox list of options supplied by the registry. That list could include "shares," "voting interests," "membership units," "partnership units," and "other" which would require further information. The rule should also require the registry form to indicate whether the beneficial owner holds the ownership interests directly or indirectly, again using checkbox options, and if held indirectly, require delineation of the pathway through which the interests are held.

To ensure meaningful disclosures for individuals who exercise "substantial control" over an entity, the rule should provide a list of key control indicators. The rule could state, for example, that the registry's beneficial ownership form should require reporting companies to list all of the individuals who, directly or indirectly through any contract, arrangement, understanding, relationship, or otherwise, have the authority to: (1) vote or direct the voting of the entity's shares or other ownership interests; (2) appoint or remove the entity's board members or senior officers; (3) take possession or direct the ultimate disposition of the entity's funds and assets; (4) sell or direct the sale of the entity; or (5) terminate or direct the termination of the entity. The registry form could provide those factors in a checkbox list of options, and require the reporting

[37] *See, e.g.,* "cooperative associations" in North Dakota which are required to have at least five adults as shareholders or members and all of whom may "share equally in the control of the cooperative." North Dakota Secretary of State, "Cooperative Associations," 2021, https://sos.nd.gov/business/business-services/business-structures/cooperative-association.

[38] 31 U.S.C. 5336(a)(3).

company to check each factor that applies to a specific beneficial owner. Using a list of control indicators and requiring entities to identify the individuals who can exercise those authorities would also align the United States with the approaches already taken in the E.U. and U.K.[39]

To provide still more guidance on naming individuals who exercise "substantial control" over an entity, the rule should again draw attention to the CTA list of individuals who may not be named as beneficial owners, including minor children, nominees, intermediaries, agents, employees, and certain creditors. Reminding filers of those ineligible individuals will reduce the number of individuals who may be named. In the end, since it is impractical for thousands or even hundreds of individuals to exercise substantial control over the type of entity subject to reporting requirements under the CTA, the "substantial control" standard and the way businesses normally function will lead to the naming of a reasonable number of individuals as beneficial owners.

Naming More Than One Beneficial Owner. The rule should require companies to name every individual who meets the statute's ownership or substantial control criteria and state plainly that the statute nowhere permits businesses to limit themselves to naming only one beneficial owner. Some comment letters may assert that the law permits that outcome by pointing to the statutory definition of beneficial owner which describes "*an* individual."[40] That definition, however, is designed to describe the attributes of a singular beneficial owner; it does not attempt to determine how many beneficial owners must be disclosed by a reporting company when filing with the registry. That issue is instead addressed in the part of the statute that details the "required information" to be included in each beneficial ownership report.[41] That provision states plainly that a beneficial ownership report shall "identify *each* beneficial owner of the applicable reporting company."[42] The CTA would not have used the word "each" if it had intended only one beneficial owner to be named per business.

The CTA also demonstrates that Congress knew how to require the naming of only a single person with substantial control, when it wanted to do so. Section 5336(b)(2)(C), for example, spells out the reporting requirements for certain pooled investment vehicles (PIVs). It states that PIVs must file: "a written

[39] *See* U.K. Companies House and Department for Business, Energy & Industrial Strategy, "PSC requirements for companies and limited liability partnerships," February 15, 2018, https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships (U.K. guidance for companies and other entities, which includes direct and indirect ownership and control); *and* European Parliament and the Council of the European Union, "Directive 2015/849, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing," Official Journal, L 141/73, May 20, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L0849&from=EN (E.U. definition of beneficial owner in Article 3, section 6, which includes direct and indirect ownership and control).

[40] 31 U.S.C. 5336(a)(3)(A) (emphasis added).

[41] 31 U.S.C. 5336(b)(2).

[42] 31 U.S.C. 5336(b)(2)(A) (emphasis added).

certification that provides identification information of *an* individual that exercises substantial control over the pooled investment."[43] Congress wrote "an" rather than "each" individual to indicate that PIVs needed to name only one individual with substantial control over the entity. But lawmakers did not use that language when it came to filing a reporting company's beneficial owners. Instead, by using the word "each" in 31 U.S.C. 5336(b)(2)(A), lawmakers made clear that reporting companies must disclose *every* individual who exercises substantial control over the entity.

Naming Employees. Some comments may encourage Treasury to "provide guidance similar to the CDD rule" requiring the disclosure of a "single individual" under the substantial control test that "can be 'an executive officer or senior manager' or 'any other individual who regularly performs similar functions,' including the entity's 'Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer.'"[44] However, doing so would violate both the statute and congressional intent. As discussed in greater detail above, the CTA is explicit that "each" beneficial owner must be disclosed — halting after naming a single individual would not suffice.

Furthermore, as noted above, the law is explicit that "an individual acting solely as an employee of [an entity] and whose control over or economic benefits from such entity is derived solely from the employment status of the person" may not be named as a beneficial owner.[45] This statutory prohibition against naming employees disqualifies listing "an executive officer or senior manager" or "any other individual who regularly performs similar functions," including the entity's "Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer[,]" unless such individual substantially controls the entity through other means.

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

Handling Applicants. The statutory definition of the term "applicant" is clear and easily understood, since it refers to an individual filing an application with a state or tribal office to form or register a corporation, LLC, or other similar entity. The rule

[43] 31 U.S.C. 5336(b)(2)(C) (emphasis added).
[44] Chris Netram, "Re: Docket Number FINCEN-2021-0005; RIN 1506-AB49: Beneficial Ownership Information Reporting Requirements," National Association of Manufacturers, April 12, 2021, https://www.regulations.gov/comment/FINCEN-2021-0005-0013.
[45] 31 U.S.C. 5336(a)(3)(B)(iii).

should adopt the statutory definition verbatim, while noting that the CTA also applies to applicants filing similar types of applications on behalf of "other similar entities."

In addition, the rule should provide guidance on why the law requires "applicants" to disclose their identifying information and the special issues that may arise in connection with them. The rule could explain, for example, that persons filing a beneficial ownership form may have applied but still be waiting for final approval by a government office to form, register, license, or otherwise obtain a needed authorization for the intended entity to do business in the United States. In addition, some applicants may not intend to make personal use of the entity in question, but intend instead to form or register the entity for the sole purpose of selling or transferring it to a third party either in the near future or a much later date. For decades, in both the United States and abroad, a variety of businesses have routinely formed entities for sale or transfer to third parties, including corporate service providers, trust companies, notaries, accounting firms, law offices, and other formation agents. Some of those businesses make it a practice to form entities and place them "on the shelf" for later sale, in anticipation that the value of the entity will increase over time for buyers who prefer "aged" entities.[46]

Such off-the-shelf or aged entities are typically viewed by law enforcement as high risk, due to the potential for their owners to deceive others into thinking that the entity has been in operation for years longer than it actually has, and due to a track record of such entities engaging in illicit activities.[47] It is for that reason that the CTA imposes disclosure obligations on applicants; those disclosures will help ensure that specific individuals are associated with the entities they help form and later transfer to third parties, especially if the entities they sell are later used to engage in money laundering, terrorist financing, or other misconduct.

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

Bearer Share Entities. In line with international best practice,[48] the CTA for the first time imposes a nationwide prohibition on the formation of a bearer share

[46] *See, e.g.,* Wyoming Corporate Services, Inc., "4 Things You Should Know About Purchasing an Aged Shelf Corporation," accessed April 26, 2021, https://wyomingcompany.com/4-things-every-attorney-should-know-about-purchasing-an-aged-shelf-corporation/?keyword=&gclid=Cj0KCQjwyZmEBhCpARIsALIzmnJdhHVujhHEjkAWO82EYs1EhxTvMG8JRwazZbIGTXeS7j46Put6gEMaApJZEALw_wcB.

[47] *See, e.g.,* Jennifer Shasky Calvery, "Examining State Business Incorporation Practices: A Discussion of the Incorporation Transparency and Law Enforcement Assistance Act," U.S. Department of Justice, June 2009, https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2009/06/18/2009-06-18-dag-shasky-incorporation.pdf, p. 12.

[48] *See, e.g.,* FATF, "The FATF Recommendations," October 2020, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf, p. 94 (Interpretive Note to Recommendation 24, item (14) recommending countries either prohibit bearer share entities or restrict their use).

corporation, limited liability company, or other similar entity within the United States.[49] Due to this prohibition and U.S. policy condemning bearer share entities because of their hidden ownership and past association with illicit activities,[50] the rule should consider including a definition of bearer share entities and an explicit prohibition against including any bearer share entity in the U.S. registry, whether that entity was formed within or outside of the United States. A possible definition of a "bearer share entity" is an entity whose ownership is established by a certificate, security, or other document that does not name a specific person as the owner of the entity and that is not registered in any jurisdiction, but deems the owner of the entity to be anyone with physical possession of the ownership document.[51]

Other Similar Entity. See FACT's response to Question 1(c), above, for a suggested definition of this term.

Ownership Interest. See FACT's response to Question 3(b), above, for a suggested definition of this term.

Other Terms. Other terms requiring definition in the rule relate to implementation of the CTA's many exemptions, and are identified and discussed in FACT's response to Question 6.

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?

Defining CTA Exemptions. The purpose of the CTA is to enable the United States to identify the human beings using entities to engage in activities within the country, including illicit activities. The basic justification for the CTA's 23 exemptions is that the covered entities either already disclose their beneficial owners to U.S. federal, state, territorial, or tribal authorities; operate in a way that makes discovering their beneficial owners possible and relatively straightforward for U.S. law enforcement; or were deemed by Congress to pose a negligible risk of facilitating money laundering, terrorist financing, sanctions evasion, corruption, fraud, tax evasion, or other wrongdoing. For example, banks already disclose their true owners to bank regulators; there is no reason to require them to disclose the same information in the U.S. registry. In addition, entities with a physical U.S. presence, multiple U.S. employees, and substantial U.S.

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[49] 31 U.S.C. 5336(f).

[50] *See, e.g.,* Jennifer Shasky Calvery, "Examining State Business Incorporation Practices: A Discussion of the Incorporation Transparency and Law Enforcement Assistance Act," U.S. Department of Justice, June 2009, https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2009/06/18/2009-06-18-dag-shasky-incorporation.pdf, p. 15 (Congress "should require that all States that have not already done so pass legislation prohibiting so called "bearer shares" to bring the United States fully into compliance with the Financial Action Task Force recommendations on this issue.").

[51] *See also,* the FATF definition of "bearer shares" as "negotiable instruments that accord ownership in a legal person to the person who possesses the bearer share certificate." FATF, "The FATF Recommendations," October 2020, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf, p. 117.

operations offer many opportunities for U.S. law enforcement to discover the entity's beneficial owners, thereby reducing the need for those entities to provide beneficial ownership information to the U.S. registry.

Before addressing the specific exemptions contained in the CTA, it is important for the rule to establish as a guiding principle that the CTA's 23 exemptions should be narrowly construed. This proposed guidance rests on two foundations. First, it is in line with the purpose of the statute which is to increase corporate transparency, ensure the United States knows who is behind the business entities conducting activities within the country, and exclude only those entities that otherwise disclose their owners or make it relatively easy to discover them. Second, the proposed guidance is based upon the law's legislative history. On December 9, 2020, one of the CTA's chief architects, Senator Sherrod Brown, noted just before the Senate voted to enact the Corporate Transparency Act that "[e]ach of the exemptions should be interpreted as narrowly as possible to exclude entities that do not disclose their beneficial owners to the government."[52]

The CTA contains 23 specific statutory exemptions as well as a provision establishing an exclusive method for the Treasury Secretary, with the written concurrence of the Attorney General and Secretary of Homeland Security, to create additional exemptions.[53] FACT recommends that the rule offer guidance on all 23.

Publicly Traded Corporations, Section 5336(a)(11)(B)(i). This provision exempts publicly traded corporations that register and file regular reports with the Securities and Exchange Commission (SEC).

The reasoning behind this exemption is that the SEC already requires publicly traded corporations to supply information about their direct and indirect owners, including requiring public disclosure of beneficial owners who hold at least 5 percent of a corporation's shares.[54] In addition, under 17 CFR 240.13d-1, a corporation's beneficial owners (as determined by 17 CFR 240.13d-3) must maintain up-to-date SEC filings on the extent of their beneficial ownership holdings.

The CTA exemption is nearly identical to one in the CDD rule.[55] FinCEN noted at the time it created the CDD rule's exemption:

> "These issuers are excluded because they are required to publicly disclose the beneficial owners of five percent or more of each class of the issuer's voting securities in periodic filings with the SEC, to the extent the information is known to the issuer or can be ascertained from public filings. In addition, beneficial

[52] Senator Sherrod Brown, "National Defense Authorization Act, "Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311.
[53] 31 U.S.C. 5336(a)(11)(B).
[54] 17 CFR §§ 240.13d-1; 229.403; and 229.201(d).
[55] 31 CFR 1010.230(e)(2)(iii).

> owners of the issuer's securities may be subject to additional reporting requirements."[56]

Since publicly traded corporations already disclose their beneficial owners in a public database, the CTA exempts them from having to provide similar information in the registry. Because the U.S. registry requires disclosures from not only U.S. entities but also foreign entities that do business within U.S. borders, the rule may want to note that the exemption for publicly traded corporations is limited to entities that register and file reports with the SEC; it is not a blanket exemption for all publicly traded corporations no matter where listed or regulated.

Domestic Governmental Entities, Section 5336(a)(11)(B)(ii). This provision exempts entities which are "established under the laws of the United States, an Indian Tribe, a State, or a political subdivision of a State, or under an interstate compact between 2 or more States" and which exercise "governmental authority" on behalf of the United States, a state, political subdivision, or tribe.

The reasoning behind this exemption is that entities established by U.S. federal, state, local, or tribal governments to advance public service are likely to be already transparent to the public and unlikely to be involved with wrongdoing. The exemption itself requires a two-step analysis. The first step is to determine if the entity in question was formed under federal, state, local, or tribal law. The second is to determine whether the entity exercises "governmental authority" on behalf of the United States, a state, political subdivision, or tribe.

The CDD rule contains a similar exemption except that it excludes any mention of Indian tribes.[57] The more limited CDD rule's exemption applies to:

> "Any entity established under the laws of the United States, of any State, or of any political subdivision of any State, or under an interstate compact between two or more States, that exercises governmental authority on behalf of the United States or any such State or political subdivision."[58]

When FinCEN created that exemption, it explained that the entities were "appropriate for exclusion due to the amount of ownership and management information that is publicly available about such entities."[59] That reasoning still makes sense today for federal, state, and locally chartered entities that exercise authority on behalf of U.S. federal, state, or local governments.

Entities owned by an Indian tribe require additional analysis. According to the Department of the Interior's Bureau of Indian Affairs (BIA), tribes can own three classes

[56] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-173.
[57] 31 CFR 1020.315(b)(3).
[58] 31 CFR 1010.230(e)(2)(ii) via 31 CFR 1020.315(b)(3).
[59] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-178.

of entities: corporations formed through a federal charter under Section 17 of the Indian Reorganization Act (IRA); corporations or LLCs chartered under tribally enacted laws; or corporations or LLCs formed under a state's laws.[60]

IRA Section 17 corporations, for example, are authorized by Congress to "permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations."[61] Because those corporations are wholly owned by and act on behalf of a specific tribe, the rule should issue guidance stating that IRA Section 17 corporations exercise "governmental authority" on behalf of the tribe and qualify for exemption under this provision. The rule should also note that IRA Section 17 corporations submit their corporate charters to BIA and send any charter amendments to the Secretary of Interior for approval,[62] ensuring that the United States is fully informed of the tribe's ownership status.

Tribally-owned corporations or LLCs formed under state or tribal laws are less transparent. A 2019 report from Global Financial Integrity found that in the vast majority of cases, states do not require corporations or LLCs formed under their laws to disclose their beneficial owners.[63] Many corporations and LLCs chartered under tribal laws also disclose little or no beneficial ownership information. On its website, the BIA warns that tribally-chartered corporations and LLCs have "transparency concerns" that may hinder their access to capital and ability to attract joint venture partners.[64]

The rule should note that, while state or tribally chartered corporations and LLCs, when wholly owned by a tribe, would meet the CTA requirement that the entity exercise "governmental authority" on behalf of the tribe, the lack of any state or tribal mechanism to establish the tribe's ownership of the entity is problematic. Accordingly, the rule should allow state or tribally chartered corporations and LLCs to qualify for this exemption only if they are wholly owned by a tribe and only if the corporation or LLC submits a written certification with BIA disclosing the name of the federally recognized Indian tribe that wholly owns that entity. The rule should explain that once the entity discloses its ownership status to BIA, thereby confirming the entity is wholly owned by a specific federally recognized tribe and meets the "governmental authority" requirement in the CTA, the entity is eligible to claim this exemption.

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[60] Assistant Secretary—Indian Affairs, Division of Economic Development, "Choosing a Tribal Business Structure," U.S. Department of the Interior, accessed April 30, 2021, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/pdf/Choosing%20a%20Tribal%20Business%20Structure%204.8.19.pdf and Office of Indian Energy and Economic Development (IEED), "Choosing a Tribal Business Structure," U.S. Department of the Interior, accessed April 30, 2021, https://www.bia.gov/service/starting-business/choosing-tribal-business-structure, p. 3.

[61] IEED, "Choosing a Tribal Business Structure," U.S. Department of the Interior, accessed April 30, 2021, https://www.bia.gov/service/starting-business/choosing-tribal-business-structure.

[62] IEED, "Choosing a Tribal Business Structure," U.S. Department of the Interior, accessed April 30, 2021, https://www.bia.gov/service/starting-business/choosing-tribal-business-structure.

[63] Heather Lowe et al., "The Library Card Project: The Ease of Forming Anonymous Companies in the United States," Global Financial Integrity, March 21, 2019, https://gfintegrity.org/report/the-library-card-project/.

[64] IEED, "Choosing a Tribal Business Structure," U.S. Department of the Interior, accessed April 30, 2021, https://www.bia.gov/service/starting-business/choosing-tribal-business-structure.

The rule should make clear that this exemption is not available to entities owned by a tribe that lacks federal recognition. Nor is the exemption available to entities that are chartered under tribal laws but are owned by persons other than the tribe and, therefore, do not act on behalf of the tribe.

The rule may also want to call on BIA, under 31 U.S.C. 5336(d)(2) requiring federal agencies to cooperate with FinCEN on matters related to the beneficial ownership registry, to make available the information in its possession related to which federally recognized tribes have passed laws enabling them to form entities and to any list of existing corporations and LLCs that are wholly owned by a federally recognized tribe. If BIA does not yet have that information, Treasury could require BIA to assemble it, again using the authority provided in 31 U.S.C. 5336(d)(2). The rule could, in turn, direct BIA to provide access to that information on an automated basis if needed by FinCEN to ensure the registry database is accurate, complete, and highly useful, and to Treasury or GAO auditors conducting legally mandated reviews of the CTA's exemptions.[65]

Banks, Section 5336(a)(11)(B)(iii). This provision exempts a wide variety of state and federally regulated banks, as defined in the Federal Deposit Insurance Act, Investment Company Act, and Investment Advisers Act. Together, those definitions encompass federal and state chartered banks; federal savings associations; branches or agencies of foreign banks authorized to operate in the United States; and any other state or federally regulated banking institution or trust company whose business consists in substantial part of receiving deposits or exercising fiduciary powers.

The reasoning behind this exemption is that banks operating in the United States are highly regulated and already disclose their direct and indirect owners to their regulators which may include, on the federal level, the Federal Deposit Insurance Corporation (FDIC), Board of Governors of the Federal Reserve System (Federal Reserve Board), and Office of the Comptroller of the Currency (OCC), and on the state level, the banking regulators in all 50 states. Those federal and state regulators routinely collect extensive information about the banks they supervise, including ownership information, and conduct routine examinations and audits of their books and activities. Given this level of supervision, the CTA exempted banks from providing beneficial ownership information in the registry.

The CDD rule contains a similar exemption for any bank "regulated by a Federal functional regulator or a bank regulated by a State bank regulator."[66] FinCEN noted at the time it created this exemption: "These entities are excluded because they are subject to Federal or State regulation and information regarding their beneficial ownership and management is available from the relevant Federal or State agencies."[67]

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[65] Section 6502(c) of the AML Act; 31 U.S.C. 5336(i).
[66] 31 CFR 1010.230(e)(2)(i).
[67] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-173.

Because the U.S. registry requires disclosures from not only U.S. entities but also foreign entities that register to do business within U.S. borders, the rule may want to note that the bank exemption is limited to banks subject to U.S. federal or state regulators; it is not a blanket exemption for all banks worldwide no matter where formed or regulated.

Credit Unions, Section 5336(a)(11)(B)(iv). This provision exempts federal and state credit unions as those terms are defined in federal law.

Like banks, credit unions operating in the United States are highly regulated entities under the supervision, on the federal level, of the National Credit Union Administration (NCUA) and, on the state level, by banking regulators in all 50 states. These federal and state regulators routinely collect extensive information about the credit unions they supervise, including ownership information, and conduct routine examinations and audits of their books and activities. Given this level of supervision, the CTA exempted credit unions from providing beneficial ownership information in the registry.

The CDD rule contains a similar exemption for any credit union "regulated by a Federal functional regulator or ... State bank regulator."[68] At the time it created this exemption, FinCEN noted: "These entities are excluded because they are subject to Federal or State regulation and information regarding their beneficial ownership and management is available from the relevant Federal or State agencies."[69]

One concern about this exemption is that, over the years, some credit unions, like some banks, have become involved in money laundering schemes.[70]

Bank and S&L Holding Companies, Section 5336(a)(11)(B)(v). This provision exempts bank holding companies and savings and loan (S&L) holding companies as those terms are defined in federal law.

Bank and S&L holding companies operating in the United States are highly regulated entities under the supervision, on the federal level, of the Federal Reserve Board and FDIC and, on the state level, by the banking regulators in all 50 states. These federal and state regulators routinely collect extensive information about the bank holding companies they supervise, including ownership information, and conduct routine examinations and audits of their books and activities. Given this level of supervision, the CTA exempted bank and S&L holding companies from providing beneficial ownership information in the registry.

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[68] 31 CFR 1010.230(e)(2)(i).

[69] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-173.

[70] *See, e.g.,* U.S. Department of Justice, "Two Charged in High-Risk International Financial Scheme," April 14, 2021, https://www.justice.gov/opa/pr/two-charged-high-risk-international-financial-scheme.

The CDD rule contains a nearly identical exemption.[71] At the time it created this exemption, FinCEN noted:

> "At the suggestion of several commenters, bank holding companies, which include financial holding companies, have been excluded from the beneficial ownership requirement in the final rule because the Federal Reserve Board maintains beneficial ownership information on all of these companies. Savings and loan holding companies are excluded for the same reason."[72]

Because the U.S. registry requires disclosures from not only U.S. entities but also foreign entities that register to do business within U.S. borders, the rule may want to provide guidance that the bank holding company exemption is limited to bank and S&L holding companies subject to U.S. federal or state regulators; it is not a blanket exemption for all bank holding companies worldwide no matter where formed or regulated.

Registered Money Transmitting Businesses, Section 5336(a)(11)(B)(vi). This provision exempts money transmitting businesses (MTBs) that have "registered with the Secretary of the Treasury under section 5330."

MTBs are defined in section 5330(d)(1) as any business, other than a depository institution or the United States Postal Service, which "is required to file reports under section 5313" and that:

> "provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system."[73]

The rule may want to note that MTBs are a subset of the broader term, money service businesses, which encompasses additional business categories not included within the narrower MTB definition.

In past decades, MTBs have repeatedly been associated with money laundering, terrorist financing, organized crime, and drug trafficking, leading to a worldwide perception of them as high-risk entities.[74] We are not aware of any other registry around

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[71] *See* 31 CFR 1010.230(e)(2)(x).

[72] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-203.

[73] 31 U.S.C. 5330(d)(1).

[74] *See, e.g.,* U.S. House of Representatives, Committee on Financial Services, Subcommittee on Terrorism and Illicit Finance, "Managing Terrorism Financing Risk in Remittances and Money Transfers," H.Hrg. 115–32, 115th Congress, 1st Session, (July 18, 2017), https://www.govinfo.gov/content/pkg/CHRG-115hhrg29451/pdf/CHRG-115hhrg29451.pdf; *and* U.S. Department of Justice, "Two Charged in High-Risk

the world exempting MTBs from beneficial ownership disclosure obligations; nor was an MTB exemption included in the CDD rule. For that reason, the rule should approach this exemption cautiously and interpret it narrowly, as Congress intended.[75]

The reasoning behind the MTB exemption is that every MTB is already required to register with Treasury, and almost all also are required to obtain a money transmitter license from one or more states in order to operate within U.S. borders. The Treasury requirement for MTB registrations has been in place for years: "[a]ny person who owns or controls a money transmitting business shall register the business (whether or not the business is licensed as a money transmitting business in any State) with the Secretary of the Treasury."[76] FinCEN currently administers an MTB database with information on over 22,000 registered MTBs.[77] At the same time, studies have criticized the MTB database for double counting and clerical errors.[78] On the state level, 49 of the 50 states (except Montana) have enacted laws related to MTBs, many of which mandate money transmitter licenses and regulatory oversight.[79] However, those state laws vary dramatically in both their requirements and enforcement.

Wide variation also affects federal and state requirements related to MTB ownership disclosures. On the federal level, Treasury requires MTBs to provide identifying information for an "owner or controlling person,"[80] but also allows an MTB, in some circumstances, to name an entity rather than an individual as its owner or controlling person.[81] On the state level, some, like New York, require extensive ownership information while others, like Montana, require no ownership information at all. MTBs that have operations in at least five states and choose to participate in a Multistate Licensing Program[82] must also provide certain ownership information.

International Financial Scheme," April 14, 2021, https://www.justice.gov/opa/pr/two-charged-high-risk-international-financial-scheme.

[75] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 (The CTA's "exemptions are intended to be narrowly interpreted to prevent their use by entities that otherwise fail to disclose their beneficial owners to the federal government.").

[76] 31 U.S.C. 5330(a).

[77] FinCEN, "MSB Registrant Search," April 30, 2021, https://www.fincen.gov/financial_institutions/msb/msbstateselector.html.

[78] *See, e.g.,* Remittance Industry Observatory, "Data Release," July 2015, https://www.thedialogue.org/wp-content/uploads/2015/10/RIO-DR-July-2015-for-website.pdf.

[79] Andrew P. Scott, "Telegraphs, Steamships, Virtual Currency: An Analysis of Money Transmitter Regulation," Congressional Research Service, No. R46486, August 20, 2020, https://fas.org/sgp/crs/misc/R46486.pdf.

[80] FinCEN, "MSB Registrant Search," April 30, 2021, https://www.fincen.gov/msb-registrant-search.

[81] FinCEN, "Owner or Controlling Person," accessed May 1, 2021, https://www.fincen.gov/owner-or-controlling-person. Treasury should consider strengthening the MTB registration form to require beneficial ownership information matching the beneficial information required by the registry.

[82] Nationwide Multistate Licensing System (NMLS) Resource Center, "Multistate MSB Licensing Agreement Program," 2021, https://nationwidelicensingsystem.org/slr/Pages/Multistate-MSB-Licensing-Agreement-Program.aspx; NMLS, "Multistate MSB Licensing Program Phase One Application Checklist," February 4, 2021,

To mitigate concerns related to MTB money laundering and terrorist financing risks, while also protecting the important role that some MTBs play in some U.S. communities, the rule should call for research to determine whether this exemption is being properly claimed or needs to be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[83] to conduct audits of a statistically valid random sample of MTBs claiming this exemption to determine if they did so properly. Those audits could test, for example, how many entities claimed this exemption; whether they actually registered with Treasury; whether they disclosed beneficial ownership information to Treasury or in connection with a state or multistate license and, if so, how that information compared to the beneficial ownership information that has to be filed with the registry; and whether any of the MTBs claiming this exemption raised money laundering, terrorist financing, or similar concerns.

Broker-Dealers, Section 5336(a)(11)(B)(vii). This provision exempts "a broker or dealer ... that is registered" with the SEC under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o).

The reasoning behind this exemption is that broker-dealers operating in the United States are highly regulated entities subject to supervision on the federal level by the SEC and Financial Industry Regulatory Authority (FINRA), and on the state level by securities regulators in all 50 states. When they register with the SEC, broker-dealers are required to supply information about their direct and indirect owners, which is then included in a public database.[84] Broker-dealers are also subject to federal and state examinations and audits of their activities. Given this level of supervision and because the registration process provides the SEC with key ownership information, the CTA exempts broker-dealers from providing beneficial ownership information in the registry.

Broker-dealers are also exempt from ownership disclosure requirements in the CDD rule under a more general provision exempting any "financial institution regulated by a Federal functional regulator" (which includes the SEC).[85] At the time it created this exemption, FinCEN noted: "These entities are excluded because they are subject to Federal or State regulation and information regarding their beneficial ownership and management is available from the relevant Federal or State agencies."[86]

https://nationwidelicensingsystem.org/slr/Documents/Multistate%20MSB%20Licensing%20Program%20Phase%20One%20Checklist.pdf.

[83] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

[84] Securities and Exchange Commission (SEC), "Form BD," August 2019, https://www.sec.gov/about/forms/formbd.pdf; Financial Industry Regulatory Authority (FINRA), "Central Registration Depository (CRD)," 2021, https://www.finra.org/registration-exams-ce/classic-crd. The SEC and FINRA should review these forms to see if they should be revised to require additional beneficial ownership information matching the beneficial ownership information required by the registry.

[85] 31 CFR 1010.230(e)(2)(i).

[86] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-173.

One concern related to this exemption is that, over the years, some broker-dealers have engaged in money laundering and other misconduct.[87] The rule should take note of this recent history and the need for research to determine whether this exemption has been properly claimed or needs to be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[88] to conduct audits of a statistically valid random sample of registered broker-dealers claiming this exemption to determine if they did so properly. Those audits could test, for example, how many entities claimed this exemption; whether each actually registered with the SEC; whether they disclosed similar beneficial ownership information to the SEC compared to information required by the registry and, if not, what information was missing; and whether any of the broker-dealers claiming this exemption raised money laundering, terrorist financing, or similar concerns.

Because the U.S. registry requires disclosures from not only U.S. entities but also foreign entities that register to do business within U.S. borders, the rule may want to provide guidance that the broker-dealer exemption is limited to SEC-registered brokers and dealers subject to U.S. federal and state regulation; it is not a blanket exemption for all broker-dealers worldwide no matter where formed or regulated.

Exchanges and Clearing Agencies, Section 5336(a)(11)(B)(viii). This provision exempts "an exchange or clearing agency" that is "registered" with the SEC under section 6 or 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78f, 78q–1). Examples include the New York Stock Exchange and the clearinghouse known as Depository Trust and Clearing Corporation (DTCC).

The reasoning behind this exemption is that exchanges and clearing agencies are highly regulated by the SEC which, as part of the registration process, obtains detailed information about their owners. Because the registration process ensures that the SEC has key ownership information about every registered exchange and clearing agency, this provision exempts those entities from disclosing beneficial ownership information in the registry.

The CTA exemption for registered exchanges and clearing agencies is nearly identical to one contained in the CDD rule.[89] When it issued the final CDD rule, FinCEN noted: "These entities are excluded because the SEC registration process requires

[87] *See, e.g.,* U.S. Department of Justice, "Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice," August 30, 2013, https://www.justice.gov/opa/pr/three-former-broker-dealer-employees-plead-guilty-manhattan-federal-court-bribery-foreign; *and* Ed Treleven, "Former investment broker pleads guilty to fraud, money laundering," *Wisconsin State Journal*, September 26, 2017, https://madison.com/wsj/news/local/courts/former-investment-broker-pleads-guilty-to-fraud-money-laundering/article_a4a5b802-0dab-52ed-9ffd-d5d9876f46f3.html.

[88] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

[89] 31 CFR 1010.230(e)(2)(vi).

disclosure and regular updating of information about beneficial owners of those entities, as well as senior management and other control persons."[90]

In discussing this exemption, the rule could note that registered exchanges and clearing agencies have virtually never been associated with money laundering or terrorist financing, and pose low risks of becoming involved with that type of wrongdoing. The rule may also want to provide guidance that this exemption is limited to SEC-registered exchanges and clearing agencies subject to U.S. supervision; it is not a blanket exemption for all exchanges and clearing agencies worldwide no matter where formed or regulated.

Other SEC-Registered Entities, Section 5336(a)(11)(B)(ix). This provision exempts "any other entity not described in clause (i), (vii), or (viii) that is registered" with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.). Examples of these other SEC-registered entities are municipal securities dealers and advisors, government securities brokers and dealers, and credit rating agencies that register with the SEC as nationally recognized statistical rating organizations.

The reasoning behind this exemption is that these other SEC-registered entities are highly regulated by the SEC which, as part of the registration process, obtains detailed information about their owners.[91] Because the registration process ensures that the SEC has key ownership information about them, the CTA exempts those entities from disclosing beneficial ownership information in the registry.

This CTA exemption is nearly identical to one contained in the CDD rule.[92] In issuing the final CDD rule, FinCEN noted: "These entities are excluded because the SEC registration process requires disclosure and regular updating of information about beneficial owners of those entities, as well as senior management and other control persons."[93]

The rule may want to provide guidance that this exemption is limited to SEC-registered entities subject to U.S. supervision; it is not a blanket exemption for similar entities registered with non-U.S. securities regulators and operating outside of U.S. supervision.

Registered Investment Companies and Registered Investment Advisers, Section 5336(a)(11)(B)(x). This provision exempts investment companies "as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3)" and investment advisers "as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C.

[90] *See* FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-195. The SEC and FINRA should review these forms to see if they should be revised to require additional beneficial ownership information matching the beneficial ownership information required by the registry.

[91] The SEC and FINRA should review these forms to see if they should be revised to require additional beneficial ownership information matching the beneficial ownership information required by the registry.

[92] 31 CFR 1010.230(e)(2)(vii).

[93] *See* FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-195.

80b–2)" so long as they are registered with the SEC under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) or the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.).

The reasoning behind this exemption is that registered investment companies and registered investment advisers are highly regulated by the SEC which, as part of the registration process, obtains information about their owners, which is then included in a public database.[94] Because the registration process ensures that the SEC has key ownership information about every registered investment company and registered investment adviser, this exemption frees those entities from disclosing beneficial ownership information in the registry.

This CTA exemption is nearly identical to two exemptions included in the CDD rule.[95] When it issued the final CDD Rule, FinCEN noted: "These entities are excluded because registered investment companies and registered investment advisers already publicly report beneficial ownership in their filings with the SEC."[96]

One concern related to this exemption is that, over the years, some investment companies and investment advisers have engaged in money laundering and other misconduct.[97] For that reason, the rule may want to note the need for research to determine whether this exemption has been properly claimed or needs to be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[98] to conduct audits of a statistically valid random sample of registered investment companies and investment advisers claiming this exemption to determine if they did so properly. Those audits could test, for example, how many entities claimed this exemption; whether each actually registered with the SEC; whether they disclosed similar beneficial ownership information to the SEC compared to the information required by the registry and, if not, what information was missing; and whether any of the investment companies or investment advisers claiming this exemption raised money laundering, terrorist financing, or similar concerns.

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[94] SEC, "Investment Company Registration and Regulation Package," February 19, 2013, https://www.sec.gov/investment/fast-answers/divisionsinvestmentinvcoreg121504htm.html#P94_18533; SEC, "How to Register as an Investment Adviser," June 23, 2005, https://www.sec.gov/divisions/investment/iaregulation/regia.htm#:~:text=Form%20ADV%20is%20the%20application,SEC's%20investment%20adviser%20regulatory%20program. The SEC and FINRA should review these forms to see if they should require additional beneficial ownership information matching the beneficial ownership information required by the registry.

[95] 31 CFR 1010.230(e)(2)(iv) and 31 CFR 1010.230(e)(2)(v).

[96] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-191.

[97] *See, e.g.,* U.S. Attorney's Office for the Central District of Illinois, "Former Investment Adviser Pleads Guilty in $16 Million Mail Fraud, Money Laundering Scheme," U.S. Department of Justice, October 25, 2011, https://archives.fbi.gov/archives/springfield/press-releases/2011/former-investment-adviser-pleads-guilty-in-16-million-mail-fraud-money-laundering-scheme; *and* SEC, "SEC Institutes Administrative Proceedings Against Former Registered Investment Adviser Representative," March 2, 2021, https://www.sec.gov/enforce/ia-5694-s.

[98] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

Unregistered Venture Capital Investment Advisers, Section 5336(a)(11)(B)(xi). This provision exempts investment advisers "described in section 203(l) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(l))" so long as the investment adviser "has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor" form with the SEC.[99] Section 203(l) describes investment advisers who provide investment advice "solely to 1 or more venture capital funds" as that term is defined by the SEC.

The reasoning behind this exemption is that unregistered investment advisers to venture capital funds are required to complete a standard SEC form known as Form ADV.[100] Investment advisers that complete "Item 10, Schedule A, and Schedule B of Part 1A of Form ADV"[101] disclose certain information about their direct and indirect owners.[102] That information is then included in a public database.[103] Because ADV forms ensure that the SEC has some ownership information about these unregistered investment advisers, this provision exempts those entities from disclosing beneficial ownership information in the registry.

The rule should state plainly that this exemption is available only to unregistered investment advisers to venture capital funds that have disclosed their direct and indirect ownership to the SEC on Form ADV. This reading of the exemption is underscored by Congress referring not only to the specific section of the Form ADV that deals with ownership disclosures, but also to "any successor"[104] to that form, to take into account any changes that might be made to the form in the future. The rule may also want to acknowledge that this exemption is not confined to investment advisers based in the United States; it covers any investment adviser which has filed the specified sections of Form ADV.

The rule should also note that this exemption is unusual. No similar exemption appears in the CDD rule, and we are unaware of any registry around the world that offers a similar exemption.

Due to its novelty, the rule should call for research to determine whether this exemption has been properly claimed or needs to be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[105] to conduct audits of a statistically valid

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[99] 31 U.S.C. 5336(a)(11)(B)(xi).
[100] Investment Adviser Registration Depository (IARD), "Form ADV Part 1 Instructions," 2021, https://www.iard.com/part1instructions.
[101] 31 U.S.C. 5336(a)(11)(B)(xi)(II).
[102] *See* SEC, "Electronic Filing for Investment Advisers on IARD," September 7, 2016, https://www.sec.gov/divisions/investment/iard/ia-forms.shtml. The SEC and FINRA should review Form ADV to see if the form should require additional beneficial ownership information matching the beneficial information required by the registry.
[103] ADV forms are made publicly available in the IARD database administered by FINRA. See IARD, "What Is IARD?" 2021, https://www.iard.com/whatisiard.
[104] 31 U.S.C. 5336(a)(11)(B)(xi)(II).
[105] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

random sample of unregistered venture capital investment advisers claiming this exemption to determine if they did so properly. Those audits could test, for example, how many entities claimed this exemption; whether each actually filed the required ownership information in a Form ADV filed with the SEC; how that information compared to the beneficial ownership information that has to be filed with the registry; and whether any of the investment advisers claiming this exemption raised money laundering, terrorist financing, or similar concerns.

Insurance Companies, Section 5336(a)(11)(B)(xii). This provision exempts insurance companies "as defined in 15 U.S.C. § 80a-2." Section 80a-2 defines an insurance company as:

> "a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such a company, in his capacity as such." [106]

The reasoning behind this exemption is that these insurance companies are highly regulated by the states and already disclose similar ownership information to state authorities. For that reason, the CTA exempts insurance companies from supplying beneficial ownership information in the registry.

The CTA exemption is similar to an exemption in the CDD rule for any "insurance company that is regulated by a State."[107] In finalizing the CDD rule, FinCEN included a lengthy statement related to the insurance company exemption:

> "A few commenters sought exclusion of insurance companies from the definition of legal entity customer, with the requested exclusions ranging in scope from all insurance companies subject to an AML program requirement and all insurance companies regulated by a State of the United States, to those insurance companies that own or control an SEC registered broker-dealer or SEC registered investment adviser. We address these proposals in turn.
>
> "The commenters who proposed to exclude all insurance companies subject to an AML program requirement and all State-regulated insurance companies did not directly proffer a rationale for their request. We presume that the commenters believe that insurance companies subject to an AML program requirement and to State regulation present a lower risk profile, and should therefore be excluded. As to insurance companies subject to an AML program requirement, such status alone does not require insurance companies to disclose beneficial ownership information to their supervisors. Accordingly, an exclusion on that basis would not be warranted. With respect to insurance companies regulated by a State of the

[106] 15 U.S.C. 80a-2(a)(17).
[107] 31 CFR 1010.230(e)(2)(xii).

> United States, these companies must disclose and regularly update their beneficial owners, as well the identities of senior management and other control persons. For insurance firms that are a part of a publicly traded group, such disclosures would also be found in annual SEC filings. All State-regulated insurance companies are required to file an Annual Statement with their State regulators, identifying senior management, directors, and trustees. Schedule Y of this Statement shows the firm's corporate structure, including direct and indirect parents and subsidiaries of the insurer. Form B, an annual registration statement filed with state regulators, shows the executive officers, directors, and controlling shareholders of insurance companies. In the case of mutual insurance companies, which do not issue equity and are instead owned as a whole by their policyholders, Form B nevertheless shows their executive officers and directors. For these reasons, we believe an exclusion for State-regulated insurance companies is appropriate, and we have accordingly added to the final rule an exclusion for an insurance company that is regulated by a State as paragraph (e)(2)(xii).
>
> "Some commenters also sought an exclusion for insurance companies that own or control an SEC registered broker-dealer or SEC registered investment adviser, noting that their registration with the SEC results in the disclosure of all individuals and entities in the indirect chain of ownership of the broker-dealer or adviser with an ownership interest of 25 percent or more. FinCEN understands that in the vast majority of cases, an insurance company that owns or controls a registered broker-dealer or investment advisor would also be regulated by a State. Accordingly, FinCEN believes that this additional exclusion would be redundant."[108]

The rule should state plainly that the CTA exemption — like the CDD rule exemption — is available only to entities that are organized as insurance companies, whose primary and predominant business activity is insurance, and that are regulated by a state insurance commissioner or similar state official. That approach is consistent with the federal definition cited in the CTA exemption.

The rule should make plain that this exemption is not available to entities that have applied for but have not received a license to operate as an insurance company. Nor is it available to entities whose insurance licenses have lapsed or that are no longer in good standing with the state. In addition, the rule should provide guidance stating that the insurance company exemption is limited to insurance companies subject to U.S. state regulation; it is not a blanket exemption for all insurance companies worldwide no matter where formed or regulated.

Insurance Producers, Section 5336(a)(11)(B)(xiii). This provision exempts any entity that "is an insurance producer that is authorized by a State and subject to

[108] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/documents/2016/05/11/2016-10567/customer-due-diligence-requirements-for-financial-institutions, p. 29414.

supervision by the insurance commissioner or a similar official or agency of a State; and has an operating presence at a physical office within the United States."

This CTA exemption is a novel one, with no parallel in the CDD rule. It is also likely to see extensive use, since there are "more than 236,000 business entities licensed" as insurance producers within the United States.[109] To ensure efficient and effective implementation of this provision, the rule should provide guidance on several issues.

First, the rule should clarify the exemption's requirement that, to claim this exemption, an insurance producer must be "authorized by a State" and subject to supervision by the state insurance commissioner or similar state official. The rule should explain that for an insurance producer to be "authorized by a State" it must have obtained a state license to conduct insurance activities within the state. The rule should make plain that this exemption is not available to entities that have applied for but not received a license. Nor is it available to entities whose licenses have lapsed or that are no longer in good standing with the state.

Second, the rule should explain that Congress included this exemption in the CTA, because state insurance regulators require insurance producers to submit extensive ownership information to obtain a license. The reasoning behind this exemption is that because state-regulated insurance producers already disclose key ownership information to state authorities, they don't need to disclose similar beneficial ownership information in the registry.

Third, the rule should clarify the exemption's requirement that the insurance producer "has an operating presence at a physical office within the United States." Part of the justification for this exemption is that insurance producers that maintain a physical presence in the United States make it relatively easy for U.S. law enforcement to conduct a site visit, interview employees, review documents, and use that information to discover the insurance producer's beneficial owners, if not already known. The rule should interpret the requirement narrowly and make clear that, to claim this exemption, an entity must have its own, physical U.S. office where its employees work or report, and that citing the address of a post office box, corporate services provider, registration agent, law office, or other third party would not qualify. U.S. law enforcement efforts to interview employees and review documents will not work if an entity's only U.S. presence is a post office box or a plaque on the wall of a third-party firm. This requirement for a physical U.S. presence is repeated in the exemption for 20/5 entities, as described below.

When outlining the contours of this exemption, the rule should note that two separate, detailed criteria must be met to trigger its use. Accordingly, the rule should ensure that this exemption is available only to entities that are state regulated and have a U.S. physical presence as evidenced by a physical U.S. office. The rule should also state

[109] National Association of Insurance Commissioners (NAIC), "Producer Licensing," January 26, 2021, https://content.naic.org/cipr_topics/topic_producer_licensing.htm.

plainly that the insurance producer exemption is not a blanket exemption for all insurance producers worldwide no matter where regulated.

Due to the novelty of this exemption, the rule should call for research to determine whether it has been properly claimed or needs to be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[110] to conduct audits of a statistically valid random sample of insurance producers claiming this exemption to determine if they did so properly. Those audits could test, for example, how many entities claimed this exemption; whether they hold the necessary state license; whether they actually filed the required ownership information with the state and how that information compares to the beneficial ownership information required by the registry; whether they have a U.S. physical presence; and whether any of the insurance producers claiming this exemption raised money laundering, terrorist financing, or similar concerns.

Certain CFTC-Registered Entities, Section 5336(a)(11)(B)(xiv). This provision exempts certain categories of entities that are registered with the Commodity Futures Trading Commission (CFTC). Specifically, the CTA exempts:

> "(I) a registered entity (as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); or
>
> "(II) an entity that is—
>
> > "(aa)—
> >
> > > "(AA) a futures commission merchant, introducing broker, swap dealer, major swap participant, commodity pool operator, or commodity trading advisor (as those terms are defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a)); or
> > >
> > > "(BB) a retail foreign exchange dealer, as described in section 2(c)(2)(B) of that Act (7 U.S.C. 2(c)(2)(B)); and
> >
> > "(bb) registered with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.)."[111]

The key to this exemption is that it applies only to commodity-related entities that have registered with the CFTC. The reasoning behind this exemption is that those registered entities are highly regulated by the CFTC and National Futures Association (NFA) which, as part of the registration process, obtain information about their owners.[112] Because the registration process ensures that the CFTC has key

[110] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.
[111] 31 U.S.C. 5336(a)(11)(B)(xiv).
[112] *See, e.g.,* CFTC registration rules for intermediaries, Commodity Futures Trading Commission (CFTC), "Intermediaries," accessed May 1, 2021, https://www.cftc.gov/IndustryOversight/Intermediaries/index.htm. The National Futures Association, a CFTC-designated self-regulatory organization, administers the registration

ownership information about every registered entity, the CTA exempts those entities from disclosing beneficial ownership information in the registry.

All of these commodity-related entities were similarly granted exemptions under the CDD rule, albeit under two different exemptions in 31 CFR 1010.230(e)(2)(i) and (e)(2)(viii). When it issued the final CDD rule, FinCEN commented on the exemption of futures commission merchants and introducing brokers under 31 CFR 1010.230(e)(2)(i) by noting: "These entities are excluded because they are subject to Federal ... regulation and information regarding their beneficial ownership and management is available from the relevant Federal ... agencies."[113] FinCEN commented on the exemption of the other commodity-related entities under 31 CFR 1010.230(e)(2)(viii) by noting: "These entities are excluded because the CFTC registration process requires disclosure and regular updating of information about beneficial owners of those entities, as well as senior management and other control persons."[114]

Because the U.S. registry requires disclosures from not only U.S. entities but also foreign entities that register to do business within U.S. borders, the rule should provide guidance stating that this exemption is limited to CFTC-registered entities; it is not a blanket exemption for commodity-related entities worldwide no matter where formed, registered, or regulated.

The rule should also call for research to determine whether this exemption has been properly claimed or needs to be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[115] to conduct audits of a statistically valid random sample of commodity-related entities claiming this exemption to determine if they did so properly. Those audits could test, for example, how many entities claimed this exemption; whether they actually registered with the CFTC; whether they filed the required ownership information and how that information compares to the beneficial ownership information required by the registry; and whether any of the commodity-related entities claiming this exemption raised money laundering, terrorist financing, or similar concerns.

Public Accounting Firms, Section 5336(a)(11)(B)(xv). This provision exempts public accounting firms that have "registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7212)."

The reasoning behind this exemption is that public accounting firms are highly regulated by the Public Company Accounting Oversight Board (PCAOB) which, as part of its registration process, obtains information about the owners of the public accounting

system. The CFTC and NFA should review the forms to see if the forms should require additional beneficial ownership information matching the beneficial ownership information required by the registry.

[113] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-173.

[114] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-197.

[115] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

firms and requires each firm to file a registration form that is made part of a public database.[116] In addition, public accounting firms must register with the board of accountancy in each state where their professionals practice and, as part of that process, supply information about their owners. Because the combination of federal and state laws, regulations, and oversight ensure that government agencies have key ownership information for every public accounting firm, this provision exempts those firms from disclosing beneficial ownership information in the registry.

The CTA exemption is nearly identical to one contained in the CDD rule.[117] When it issued the final CDD Rule, FinCEN noted:

> "Such firms are those that audit publicly traded companies and SEC-registered broker-dealers. These firms are required to register with the Public Company Accounting Oversight Board (PCAOB), a nonprofit corporation established by Congress to oversee the audits of publicly traded companies, and are required to file annual and special reports with the PCAOB. In addition, States require public accounting firms to register and to file annual reports identifying their members (e.g., partners, members, or shareholders). Such information is often available online."[118]

One concern related to this exemption is that, over the years, partners in public accounting firms have engaged in money laundering and other misconduct.[119] For that reason, the rule should call for research to determine whether this exemption has been properly claimed or needs to be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[120] to conduct audits of a statistically valid random sample of public accounting firms claiming this exemption to determine if they did so properly. Those audits could test, for example, how many entities claimed this exemption; whether each actually registered with the PCAOB; whether they disclosed similar ownership information to the PCAOB or a state regulator and, if so, which regulator and how the

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[116] *See* Public Company Accounting Oversight Board (PCAOB), "Registration," 2021, https://pcaobus.org/oversight/registration. The PCAOB and SEC should review the public accounting firm registration forms to see if the forms should require additional beneficial ownership information matching the beneficial ownership information required by the registry.

[117] *See* 31 CFR 1010.230(e)(2)(ix).

[118] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-199 (footnote omitted).

[119] *See, e.g.*, U.S. Department of Justice, "Four Defendants Charged In Panama Papers Investigation," December 4, 2018, https://www.justice.gov/usao-sdny/pr/four-defendants-charged-panama-papers-investigation (indicting U.S. accountant, Richard Gaffey who later pled guilty; on Sept. 24, 2020, Gaffey was sentenced to 39 months imprisonment for money laundering, fraud, and other wrongdoing); Huw Jones and Peter Hobson, "British Court Awards $11 Million to EY Whistleblower Who Exposed Money Laundering," *Insurance Journal*, April 20, 2020, https://www.insurancejournal.com/news/international/2020/04/20/565508.htm; *and*
U.S. Attorney's Office for the Southern District of New York, "Former BDO Seidman Partner Pleads Guilty to Investment Fraud and Tax Shelter Charges," U.S. Department of Justice, July 30, 2009, https://archives.fbi.gov/archives/newyork/press-releases/2009/nyfo073009.htm.

[120] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

information compared to the beneficial ownership information required by the registry; and whether any of the firms claiming this exemption raised money laundering, terrorist financing, or similar concerns.

In addition, because the U.S. registry requires disclosures from not only U.S. entities but also foreign entities that register to do business within U.S. borders, the rule should state plainly that the public accounting firm exemption is available only to public accounting firms that have registered with the PCAOB; it is not a blanket exemption for all public accounting companies worldwide no matter where formed, registered, or regulated.

Public Utilities, Section 5336(a)(11)(B)(xvi). This provision exempts "a public utility that provides telecommunications services, electrical power, natural gas, or water and sewer services within the United States."

The reasoning behind this exemption is that domestic public utilities operating in the United States in the specified sectors (telecommunications services, electrical power, natural gas, and water and sewer services) are highly regulated by the government and already disclose ownership information to various local, state, regional, or federal authorities. In addition, domestic public utilities have business operations and employees physically located in the United States, making it relatively easy for U.S. law enforcement to discover their beneficial owners, if not already known.

This CTA exemption has no counterpart in the CDD rule. Nor is it a common exemption in other registries around the world. For that reason, the rule should proceed cautiously and interpret the exemption narrowly, as Congress intended.[121]

To ensure the effective implementation of this exemption, the rule should make clear that it may be claimed only by entities that have been granted a public utility franchise by a state and are subject to oversight by a state utility regulator. It is only those public utilities that provide the ownership disclosures, in-country operations, and low money laundering risks that justify the creation of this exemption. In addition, the rule should state plainly that the public utilities company exemption is not a blanket exemption for all public utilities worldwide no matter where formed, regulated, or doing business.

Because of the novelty of this exemption, the rule should call for research to determine whether it has been properly claimed or needs to be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[122] to conduct audits of a statistically valid random sample of public utilities claiming this exemption to determine if they did

[121] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 (The CTA's "exemptions are intended to be narrowly interpreted to prevent their use by entities that otherwise fail to disclose their beneficial owners to the federal government.").
[122] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

so properly. Those audits could test, for example, how many entities claimed this exemption; whether each exempt entity held a public utility franchise and, if so, in what sector; whether they disclosed similar ownership information to a regulator and, if so, which regulator and how that information compared to the beneficial ownership information required by the registry; and whether any public utilities claiming this exemption raised any money laundering, terrorist financing, or similar concerns.

Financial Market Utilities, Section 5336(a)(11)(B)(xvii). This provision exempts any "financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5463)." In 2012, the Financial Stability Oversight Council (FSOC) designated eight financial market utilities (FMUs) as systemically important, including the Chicago Mercantile Exchange, Inc., ICE Clear Credit LLC, National Securities Clearing Corporation, and The Options Clearing Corporation.

The reasoning behind this exemption is that FSOC-designated FMUs are highly regulated, disclose ownership information as part of the FSOC designation process, and also disclose their ownership to their primary U.S. federal regulator like the SEC or CFTC. Because the registration process ensures that FSOC has key ownership information about every FMU, this provision exempts them from disclosing beneficial ownership information in the registry.[123]

The CTA exemption is nearly identical to one contained in the CDD rule.[124] When it issued the final CDD rule, FinCEN noted:

> "One commenter requested that FinCEN exclude designated financial market utilities from the definition of legal entity customer, noting that such entities are already subject to extensive regulation. FinCEN understands that entities designated as financial market utilities by the Financial Stability Oversight Council pursuant to Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 are subject to extensive supervision and oversight by their Federal functional regulators, including the disclosure of beneficial ownership information. Accordingly, FinCEN believes that it is appropriate to exclude them from the definition."[125]

In discussing this exemption, the rule could note that U.S. financial market utilities have virtually never been associated with money laundering or terrorist financing, and pose low risks of becoming involved with that type of wrongdoing. The rule may also want to provide guidance stating that the financial market utilities

[123] The FSOC, SEC, and CFTC should review their FMU materials to see if they should require additional beneficial ownership information matching the beneficial ownership information required by the registry.
[124] *See* 31 CFR 1010.230(e)(2)(xiii).
[125] FinCEN, "Customer Due Diligence Requirements for Financial Institutions," *Federal Register*, 81 FR 29397, July 11, 2016, https://www.federalregister.gov/d/2016-10567/p-212.

exemption is limited to entities designated by FSOC; it is not a blanket exemption for all financial market utilities worldwide no matter where formed, registered, or regulated.

Pooled Investment Vehicles, Section 5336(a)(11)(B)(xviii). This provision exempts "any pooled investment vehicle that is operated or advised by a person described in clause (iii), (iv), (vii), (x), or (xi)." The enumerated clauses refer to banks, credit unions, registered broker-dealers, registered investment companies, registered investment advisers, and unregistered venture capital investment advisers that have filed a Form ADV disclosing certain ownership information to the SEC.

The CTA defines the term "pooled investment vehicle" (PIV) to mean: (1) "any investment company as defined in section 3(a) of the Investment Company Act of 1940," or (2) any company that would be an investment company "but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of that Act" and also "is identified by its legal name by the applicable investment adviser in its Form ADV" or a successor form filed with the SEC.

This definition encompasses hedge funds, private equity funds, venture capital funds, family office funds, and any other private fund seeking to claim status as a PIV and, thereby, exemption from the CTA's disclosure obligations. The exemption places no restriction on the type of business entity that can declare itself to be a PIV or on the type of investments the PIV can make, nor does it require the PIV to have been formed in the United States. The CTA exemption has no counterpart in the CDD rule, and we are unaware of any other registry in the world offering a similar exemption.

The CTA does impose a special reporting requirement on PIVs "formed under the laws of a foreign country."[126] It requires foreign PIVs to "file with FinCEN a written certification that provides identification information of an individual that exercises substantial control over" the PIV. In contrast to the beneficial ownership reports required elsewhere in the CTA, this special reporting requirement allows a PIV to name a single individual rather than each individual who exercises substantial control over its operations.

This exemption is perhaps the most troubling of the 23 in the CTA, because PIVs do not otherwise disclose their beneficial owners to the U.S. government, nor does the law require them to have a substantial U.S. presence that would facilitate U.S. law enforcement discovering their beneficial owners. It appears that this exemption was, instead, the product of intense lobbying to permit PIVs with hidden owners to make U.S. investments. It appears to have been granted despite the absence of offsetting disclosure obligations.

Worse, this exemption was granted amidst growing evidence that some pooled investment vehicles exempted by this clause — that is, private funds like hedge funds and private equity funds — are being used to launder criminal proceeds, including in the United States. That increasing evidence led to a 2020 Federal Bureau of Investigation

[126] 31 U.S.C. 5336(b)(2)(C).

(FBI) intelligence bulletin warning that "threat actors likely use the private placement of funds, including investments offered by hedge funds and private equity firms, to launder money."[127] Further, while certain PIVs like mutual funds have anti-money laundering, Bank Secrecy Act, and customer due diligence requirements, hedge funds and private equity funds are currently exempt from those requirements.[128] To try to prevent exploitation of the PIV exemption by bad actors, the rule should proceed cautiously, interpret the exemption narrowly as Congress intended,[129] and provide needed guidance on several issues.

First, the rule should note that the CTA exempts only pooled investment vehicles that are "operated or advised" by certain financial institutions. In the words of Senator Sherrod Brown, a key architect of the CTA:

> "The exemption for pooled investment vehicles is intended to be available only to PIVs that rely for investment advice and services on a regulated bank or on a securities broker-dealer, investment company or investment adviser that is registered with the SEC, has disclosed its own beneficial ownership information to the federal government, and has filed a Form ADV disclosing the PIV's legal name and any other information related to the PIV that the federal government may require."[130]

The rule should warn U.S. regulators, including the SEC, FINRA, state securities administrators, and federal and state bank regulators, about the money laundering risks associated with PIVs, and recommend heightened scrutiny of any bank, credit union, registered broker-dealer, registered investment company, or registered or unregistered investment adviser that chooses to operate or advise a PIV with concealed owners. The rule should also offer guidance on the type of heightened scrutiny that the regulator should provide, starting with requiring the financial institution to provide a list of any PIVs which it is operating or advising and which claims exemption from the CTA's disclosure obligations. The rule should further advise those regulators to demand information related to ensuring the financial institution is not managing or investing suspect or illicit funds on behalf of unknown individuals, including by asking the financial institution to disclose what enhanced due diligence measures it has applied to the PIV; its understanding of who is behind the PIV, the identity of its largest investors, and the source of their funds; what anti-money laundering controls, if any, the PIV has in

[127] FBI Criminal Investigative Division, "Threat Actors Likely Use Private Investment Funds To Launder Money, Circumventing Regulatory Tripwires," FBI Intelligence Bulletin, May 1, 2020, p. 1.

[128] FBI Criminal Investigative Division, "Threat Actors Likely Use Private Investment Funds To Launder Money, Circumventing Regulatory Tripwires," FBI Intelligence Bulletin, May 1, 2020, p. 8; 31 C.F.R. 103.170(b).

[129] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("Exemptions created for pooled investment vehicles, dormant companies, and certain nonprofits require especially narrow interpretations to limit those exemptions to entities that provide some level of ownership disclosure to the government.").

[130] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf.

place; and what enhanced monitoring mechanisms the financial institution is using to identify any suspicious activity, suspect investors, or suspect or unknown beneficial owners.

Second, the rule should clarify the exemption's requirement that the PIV's investment adviser provide the "legal name" of the PIV in the publicly available Form ADV that the investment adviser is required to file with the SEC. The publicly available Form ADV requires investment advisers to list, among other items, all private funds that the applicable investment adviser is managing. Normally, under SEC rules, this list can identify each fund either by its name or a numeric code generated by the SEC, but the CTA states that, to qualify for an exemption, the Form ADV must provide the entity's full legal name. If an adviser chooses instead to list a numeric code on Form ADV rather than the full legal name of the PIV, then that PIV would become ineligible for this exemption.

The Form ADV also requires limited information about the beneficial owners of each listed fund, including the total number of beneficial owners (but not their names) and the percentage of beneficial owners from outside of the United States, information that effectively requires the investment adviser to investigate and gather at least some information about the beneficial owners behind each private fund.[131] The rule could go further and explicitly require that, to take advantage of this exemption, an investment adviser must take affirmative steps to identify the beneficial owners and largest investors behind each PIV it operates or advises and be prepared to provide that information upon request from a U.S. regulator or law enforcement agency.

Third, as FACT notes in response to Question 15, the rule should make clear that the written certification filed by a foreign PIV to identify the individual who exercises "substantial control over" its activities must be filed with the CTA registry. The rule should provide a template form for the required certification requiring the same identifying information for the PIV and its controlling individual as the registry requires for other entities and their beneficial owners.[132] The PIV form should require the PIV to provide, for example, its official legal name; type of business entity, current headquarters address, country of formation, ownership structure, link to the relevant Form ADV on file with the SEC, and contact information for its U.S. registered agent or a PIV executive who can answer questions. With respect to the named individual exercising substantial

[131] Since 2001, the Bank Secrecy Act has required all investment companies to establish anti-money laundering programs which, at a minimum, would require them to take affirmative steps to know their customers and research the source of their funds, but that legal requirement has been "temporarily" suspended by Treasury for more than 20 years. In 2015, Treasury issued a proposed rule that would have required investment advisers to establish anti-money laundering programs, but has yet to finalize it. Despite the absence of a final rule implementing the 2001 Bank Secrecy Act requirement, this rule should consider measures to prevent the CTA's exemption from being exploited by a PIV that may be engaged in wrongdoing.

[132] *See* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("PIVs formed under the laws of a foreign jurisdiction must file with FinCEN a certification … providing the same information required for beneficial owners.").

control over the PIV, the PIV form should require the individual's name, birthdate, current business or residential address in the individual's country of residence; and a unique identifying number from an acceptable identification document. For more information about each of those information data points, see FACT's responses to Questions 10 and 12, below.

The PIV form should also require the same attestation required for other entities filing registry forms, that the individual submitting the certification on behalf of the PIV:

- understands he or she is obligated by law to submit this information to combat money laundering, terrorist financing, and other misconduct;
- understands that criminal and civil penalties may apply to the willful failure to file or to the willful submission of false, misleading, or incomplete information;
- has taken reasonable steps to verify the information being submitted; and
- affirms that, to the best of his or her knowledge, the information is accurate and complete.

For more information on the required certifications that must be filed by foreign PIVs, see FACT's response to Question 15, below.

Given the novelty and money laundering risks associated with the PIV exemption, the rule should call for research to determine whether the exemption should be modified or eliminated due to abuse. As Senator Sherrod Brown warned: "Because evidence shows that criminals, fraudsters, and U.S. adversaries are increasingly using PIVs to launder funds and commit other wrongdoing, this exemption is of special concern and should be subject to continuous, careful review by Treasury as provided in the new 31 U.S.C. 5336(i) to see whether it should be retained or removed."

Accordingly, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[133] to conduct audits of a statistically valid random sample of entities claiming the PIV exemption to determine if they did so properly. Those audits could test, for example, whether each PIV filed the required certification with the registry and supplied accurate information; whether the U.S. entity that operates or advises the PIV falls within one of the accepted categories under the CTA; whether the U.S. entity operating or advising the PIV properly filed the required Form ADV and listed the legal name and beneficial ownership information related to the PIV; whether the individual named as exercising substantial control over the PIV will confirm that role; and what steps were taken by the person managing the PIV to ensure it was not dealing with illicit funds or suspect individuals.

In addition, apart from the rule under consideration here, Treasury and FinCEN should finalize a 2015 proposed rule seeking to implement a 2001 legal

[133] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

requirement in the Patriot Act, never put into effect, requiring investment companies and investment advisers — including pooled investment vehicles — to establish anti-money laundering programs to guard against investing the proceeds of crime or terrorism.[134]

Nonprofit Exemption Generally, Section 5336(a)(11)(B)(xix). This provision exempts certain entities due to their charitable or nonprofit status. It describes the covered entities in three subsections. Senator Sherrod Brown, a chief architect of the CTA, offered this warning about the nonprofit exemption:

> "The exemption provided to certain charitable and nonprofit entities also merits narrow construction and careful review in light of past evidence of wrongdoers misusing charities, foundations, and other nonprofit entities to launder funds and advance criminal and civil misconduct. This exemption is intended to apply only to entities that are engaged in charitable or nonprofit activities, and not to entities engaged in for-profit businesses or for-profit activities.
>
> "The exemption is based, in part, upon provisions in U.S. and state laws that enable federal and state officials to regulate and investigate nonprofit organizations to ensure, for example, that the individuals behind them are not using the entity's assets to inappropriately enrich themselves, unfairly compete against businesses that pay taxes, or advance other inappropriate objectives."[135]

Senator Brown also said: "Exemptions created for ... certain nonprofits require especially narrow interpretations to limit those exemptions to entities that provide some level of ownership disclosure to the government."[136]

Nonprofit Organizations, Section 5336(a)(11)(B)(xix)(I). The first subclause in the exemption for charitable and nonprofit entities is the broadest, exempting:

> "[a]ny … organization that is described in section 501(c) of the Internal Revenue Code of 1986 (determined without regard to section 508(a) of such Code) and exempt from tax under section 501(a) of such Code, except that in the case of any such organization that loses an exemption from tax, such organization shall be

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[134] FinCEN, "Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers," *Federal Register*, 80 FR 52680, September 1, 2015, https://www.federalregister.gov/documents/2015/09/01/2015-21318/anti-money-laundering-program-and-suspicious-activity-report-filing-requirements-for-registered.

[135] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311.

[136] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311.

> considered to be continued to be described in this subclause for the 180-day period beginning on the date of the loss of such tax-exempt status."[137]

This provision is different from a partial exemption for nonprofit entities contained in the CDD rule. The CDD rule exempted: "[a]ny ... legal entity that is established as a nonprofit corporation or similar entity and has filed its organizational documents with the appropriate State authority as necessary."[138]

Congress did not employ the CDD definition, perhaps due to variations in state law over which entities qualified as exempt due to their nonprofit status. The CTA instead cites 26 U.S.C. 501(c) which provides a single, coherent definition of tax-exempt, nonprofit organizations, has nationwide application, and is subject to long-standing interpretations by the IRS and federal courts on how to apply the definition to specific facts. The rule should note that the CTA's explicit reference to the federal tax code means that the IRS will play a leading role in defining the nonprofits that can properly claim this exemption.

The rule should also explain that this exemption raises concerns, because as Senator Brown pointed out, some charitable and nonprofit organizations have engaged in money laundering, terrorist financing, and other misconduct over the years and have come to be perceived worldwide as imposing higher risks of money laundering and terrorist financing.[139] That is perhaps why we are unaware of any other registry offering this type of exemption. The rule should issue guidance that, in light of this history and the higher money laundering and terrorist financing risks posed by nonprofit organizations, this exemption should be interpreted very narrowly.

Due to the exemption's vulnerability to abuse, the rule should also direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[140] to conduct audits of a statistically valid random sample of section 501(c) organizations claiming this exemption to determine if they did so properly. Those audits could test how many and what type of 501(c) organizations claimed this exemption; whether they disclosed beneficial ownership information to the IRS or any state authority and, if so, how that information compared to the beneficial ownership information required by the registry; and whether they have engaged in any conduct raising money laundering terrorist financing, or similar concerns.

Political Organizations, Section 5336(a)(11)(B)(xix)(II). The next subclause exempts any "political organization" as that term is defined in section 527(e)(1) of the tax code and which is "exempt from tax under section 527(a) of such Code."

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[137] 31 U.S.C. 5336(a)(11)(B)(xix)(I).
[138] *See* 31 CFR 1010.230(e)(2)(ix).
[139] *See, e.g.,* FATF, "Risk of Terrorist Abuse in Non-Profit Organizations," June 2014, https://www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf.
[140] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

Section 527(e)(1) defines "political organizations" as entities "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function," while section 527(e)(2) defines an "exempt function" as "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization."[141]

The rule should take note of both tax code provisions and again explain that they require the IRS to play a leading role in defining the political organizations that can properly claim this exemption. The rule could observe that section 527 encompasses a variety of entities, including campaign committees associated with U.S. candidates for elected office; political party committees seeking to influence elections; political action committees (PACs) associated with candidates, parties, corporations, or labor unions; so-called unconnected PACs, which include leadership PACs and super PACs; and issue advocacy organizations. Many of these organizations register with the Federal Election Commission (FEC) and submit filings that become part of a publicly available database.[142] Many file Forms 8871 and 8872 with the IRS to secure their tax-exempt status.[143] Some also become the subject of intense media and public scrutiny.

This CTA exemption has no counterpart in the CDD rule, and we are unaware of other registries around the world offering a similar exemption. The rule should acknowledge concerns that have been expressed for decades about some 527 organizations concealing the true and ultimate sources of their contributions or serving as channels for foreign interests to influence U.S. elections.[144] The rule may also want to note that the FEC has long been criticized for ineffective oversight and poor enforcement of transparency requirements. On the other hand, the rule could note that 527

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[141] 26 U.S.C. 527(e)(1–2).

[142] Federal Election Commission (FEC), "Registration and reporting forms," accessed May 1, 2021, https://www.fec.gov/help-candidates-and-committees/forms/; Federal Election Commission, "Candidates and their authorized committees," accessed May 1, 2021, https://www.fec.gov/help-candidates-and-committees/guides/.

[143] Internal Revenue Service (IRS), "Tax Information for Political Organizations," March 19, 2021, https://www.irs.gov/charities-non-profits/political-organizations; IRS, "Filing Requirements," March 4, 2021, https://www.irs.gov/charities-non-profits/political-organizations/filing-requirements-1.

[144] *See, e.g.,* Josh Rudolph et al., "Covert Foreign Money: Financial Loopholes Exploited by Authoritarians to Fund Political Interference in Democracies," German Marshall Fund of the United States, August 18, 2020, https://securingdemocracy.gmfus.org/wp-content/uploads/2020/08/ASD-Covert-Foreign-Money.pdf, p. 2 ("Lev Parnas and Igor Fruman used an anonymous Delaware shell company to hide contributions funded by elite Russian businessmen"); *and* Michael Sozan, "Ending Foreign-Influenced Corporate Spending in U.S. Elections," Center for American Progress, November 21, 2019, https://cdn.americanprogress.org/content/uploads/2019/11/20082332/ForeignSpending-report.pdf, pp. 9–10 ("During [the 2018] election cycle, political committees that are required to disclose their direct donors reported receiving more than $176 million from shell corporations and other groups that do not further disclose their donors. Shell companies often can be organized as an LLC with little more than an opaque, nondescriptive name—that gives no clue as to its true owners—and a post office box address, which hides whether the owner is a foreign entity.").

organizations typically operate within U.S. borders, making it easier for U.S. law enforcement to discover their beneficial owners, should that become necessary.

Due to the novelty of this exemption and its vulnerability to abuse, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[145] to conduct audits of a statistically valid random sample of 527 organizations claiming this exemption to determine if they did so properly. Those audits could test how many and what type of 527 organizations claimed this exemption; whether they disclosed beneficial ownership information to any federal regulator and, if so, how that information compares to the beneficial ownership information required by the registry; and whether they have engaged in any conduct that raises money laundering, terrorist financing, or similar concerns.

Charitable Trusts & Charitable Split-Interest Trusts, Section 5336(a)(11)(B)(xix)(III). The last of the three subclauses exempts any "trust described in paragraph (1) or (2) of section 4947(a) of such Code." Like the prior two subclauses, this exemption relies on the federal tax code to define the entities that may claim the exemption. In addition, like the prior two subclauses, this exemption focuses on tax exempt entities engaged, in whole or in part, in charitable activities.[146]

Section 4947(a)(1) defines "charitable trusts" as trusts which are "devoted to" certain charitable activities described in 26 U.S.C. 170(c)(2)(B), and requires them to be treated as though they were tax exempt entities under section 501(c)(3). Section 4947(a)(2) defines "split interest trusts" using extremely complicated terms which boil down to trusts that engage in both the charitable activities described in 26 U.S.C. 170(c)(2)(B), and other activities as well.

This CTA exemption has no counterpart in the CDD rule. Nor are we aware of any registries around the world that offer this type of exemption.

This exemption is troubling, because charitable trusts and charitable split interest trusts do not, necessarily, disclose their beneficial owners — meaning their grantors/settlors, trustees, beneficiaries, and any trust protectors — to any U.S. federal or state authority. Nor do these trusts necessarily have a substantial U.S. presence. In addition, some charitable trusts have been used in the past to launder funds or engage in tax evasion.[147] FATF recommends that jurisdictions maintain ready access to the beneficial ownership information for trusts and other legal arrangements;[148] the E.U.

[145] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

[146] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act, "Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("This exemption is intended to apply only to entities that are engaged in charitable or nonprofit activities, and not to entities engaged in for-profit businesses or for-profit activities.").

[147] *See, e.g.,* FATF, "Money Laundering Using Trust and Company Service Providers," 2010, https://www.fatf-gafi.org/media/fatf/documents/reports/Money%20Laundering%20Using%20Trust%20and%20Company%20Service%20Providers..pdf.

[148] Financial Action Task Force, "FATF Guidance on Transparency and beneficial ownership," October 2014, http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf.

directs all of its member countries to report beneficial ownership information for trusts.[149] On top of that, split interest trusts, by definition, engage in some non-charitable activities, raising concerns about why they are exempt at all. For those reasons, the rule should proceed cautiously and interpret this exemption narrowly, as Congress intended.[150]

Due to the novelty of this exemption and its vulnerability to abuse, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[151] to conduct audits of a statistically valid random sample of trusts claiming this exemption to determine if they did so properly. Those audits could test how many trusts are claiming this exemption; whether those trusts met the tax code's criteria; whether they disclosed beneficial ownership information to any federal or state regulator and, if so, which regulator and how that information compared to the beneficial ownership information required by the registry; and whether they have engaged in any conduct raising money laundering, terrorist financing, or similar concerns. If the exemption appears to have been abused, Treasury or GAO could suggest appropriate modifications or its elimination.

Nonprofit Financing and Governing Entities, Section 5336(a)(11)(B)(xx). This provision exempts entities that meet four conditions. The entity operates exclusively to either provide financial assistance to, or hold governance rights over, a nonprofit exempt under section (xix); it is a "United States person" as that term is defined by the CTA; it must be beneficially owned and controlled, exclusively, by U.S. persons who are either U.S. citizens or lawfully admitted for permanent residence; and it must derive at least a majority of its funding or revenue from U.S. persons who are U.S. citizens or lawfully admitted for permanent residence.

This exemption has no counterpart in the CDD rule, and we are not aware of any other beneficial ownership registry offering a similar exemption. In addition, we are not aware of any other federal law that singles out this particular group of entities for special treatment. We are also unaware of any data on the number of the entities that might qualify for this exemption, where they are located, how long they have been in operation, what beneficial owners might be behind them, or what money laundering vulnerabilities they might raise. Accordingly, the rule should proceed carefully, interpret this exemption narrowly as Congress intended,[152] and provide guidance on several issues.

[149] European Parliament and the Council of the European Union, "Directive 2015/849, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing," Document 02015L0849-20180709, Article 31(1), May 20, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015L0849-20180709.

[150] *See* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("Exemptions created for ... certain nonprofits require especially narrow interpretations to limit those exemptions to entities that provide some level of ownership disclosure to the government.").

[151] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

[152] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p.

The first criterium in this exemption is that covered entities must operate "exclusively to provide financial assistance to, or hold governance rights over" one of the nonprofit organizations described in the previous exemption, section 5336(a)(11)(B)(xix). The use of the word, "exclusively" demonstrates congressional intent to restrict this exemption to entities that perform those specific functions. If an entity engages in any other type of activity, the rule should state plainly that it would not qualify for the exemption. The rule should also acknowledge that this criterium forbids entities claiming this exemption from owning (in whole or in part) any other entities, unless such owned entities are either (1) described in 31 U.S.C. 5336(a)(11)(B)(xix), or (2) likewise operate "exclusively to provide financial assistance to, or hold governance rights over" one of the nonprofit organizations described in 31 U.S.C. 5336(a)(11)(B)(xix).

In addition, the rule should provide guidance related to the statutory requirement that the exemption be reserved in part for entities that provide "financial assistance" to one or more of the nonprofits identified in the prior exemption. The rule should clarify, for example, whether "financial assistance" includes providing the nonprofit organization with gifts of cash or assets, loans, in-kind contributions, volunteer services, efforts to direct donations or loans from third parties, or only some subset of those activities. The rule should also offer guidance on what is meant by holding "governance rights over" a nonprofit. The rule should clarify, for example, whether that term applies to an entity that appoints the nonprofit's board members or executives, influences its by-laws or policymaking, or influences its spending decisions or activities. The guidance should also offer ways to distinguish between an entity that exercises "governance rights" versus other types of administrative authority over the nonprofit.

The next three criteria are designed to ensure that the exemption will not enable an entity with hidden owners to become a conduit for illicit funds supplied by foreign actors funneling money to a nonprofit whose owners are also concealed. Together, the three criteria require the exempt entity to be a "U.S. person" as defined in section 31 U.S.C. 5336(a)(14);[153] to be "beneficially owned or controlled exclusively" by U.S. citizens or lawful permanent residents — again using the word "exclusively" — and to "derive[] at least a majority of its funding or revenue" from U.S. citizens or lawful

S7311 ("Exemptions created for ... certain nonprofits require especially narrow interpretations to limit those exemptions to entities that provide some level of ownership disclosure to the government.").

[153] Section 5336(a)(14) defines a "United States person" by referencing section 7701(a) of the tax code, which, in turn, states that "[t]he term 'United States person' means—

"(A) a citizen or resident of the United States,
"(B) a domestic partnership,
"(C) a domestic corporation,
"(D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and
"(E) any trust if—
"(i) a court within the United States is able to exercise primary supervision over the administration of the trust, and
"(ii) one or more United States persons have the authority to control all substantial decisions of the trust."

permanent residents. Given those restrictions, the rule should make clear, as Senator Sherrod Brown put it, that this exemption:

> "is confined to entities that qualify as U.S. persons under U.S. tax law, have only U.S. citizens or residents as their beneficial owners, and derive 'at least a majority' of their funds from U.S. persons — meaning the exemption is not available under any circumstance for entities formed under foreign laws, established for foreign beneficial owners, or funded primarily with foreign funds."[154]

Given the exemption's wording and this legislative history, the rule should make clear that if even one non-U.S. person is a part owner of the entity at issue, it cannot claim this exemption. If the entity derives 50.1 percent of its revenues or profits from non-U.S. sources, it cannot claim the exemption. The rule should also note that the wording of the financing limitation is so expansive that it requires an entity to derive at least a majority of its total funding or revenue from U.S. sources over the period of its entire existence, not just over one year.

Given the novelty of the exemption, the rule should call for research to determine whether this exemption should be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[155] to conduct audits of a statistically valid random sample of entities claiming this exemption to determine if they did so properly. Those audits could test, for example, how many entities claimed this exemption; whether those entities met the requirements of the law — that they were organized in the United States, owned or controlled exclusively by U.S. citizens or permanent residents, and financed primarily by U.S. citizens and residents. The work would necessarily include confirming the identity of the entity's beneficial owners and funders and the origins of their funding. The audits could also address whether these entities raised any money laundering, terrorist financing, or similar concerns.

20/5 Entities, Section 5336(a)(11)(B)(xxi). This provision exempts any entity that:

> "(I) employs more than 20 employees on a full-time basis in the United States;
>
> "(II) filed in the previous year Federal income tax returns in the United States demonstrating more than $5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of—
>
>> "(aa) other entities owned by the entity; and
>>
>> "(bb) other entities through which the entity operates; and

[154] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311.
[155] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

"(III) has an operating presence at a physical office within the United States."

This exemption was established in response to requests by privately-owned companies with large operations in the United States. These companies noted that they were engaged in legitimate business activities, employed large numbers of U.S. workers, routinely filed U.S. taxes, and posed little or no money laundering or terrorist financing risks. In response, Congress created this exemption for business entities that have a substantial U.S. physical presence, at least 20 employees located in the United States, and substantial business operations documented in its federal income tax return, since each of those factors makes it relatively easy for U.S. law enforcement to discover the beneficial owners of the firm.[156]

To ensure efficient and effective implementation of this provision, which is likely to be employed by numerous businesses, the rule should provide guidance on several issues as well as reiterate the general principle that the exemption will be narrowly construed, in line with congressional intent.[157]

First, the rule should clarify the exemption's requirement that an exempt entity "employ more than 20 employees on a full-time basis in the United States." The rule should state that, to meet this requirement, entities must use the long-standing IRS definition of "full-time" employee.[158] That definition states that, to qualify as full-time, an employee must work on average at least 30 hours of service per week or 130 hours per month. The IRS also prohibits treating independent contractors or comparable agents as "employees," which means that entities seeking to claim this exemption may not count any independent contractor or agent to reach the 20-employee minimum.

In addition, the rule should make clear that those full-time employees must be physically located within U.S. borders to meet the requirement that they work "in the United States." A key justification for this exemption is that U.S. law enforcement can easily locate and interview employees who are physically within U.S. borders to ask about their employer's true owners, but that reasoning would not apply to employees who were physically located in other countries and claimed to be working "in the United States" solely because, for example, they sold goods to or performed services for U.S. residents, bought goods or services from U.S. businesses, utilized U.S. computer servers,

[156] *See also,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("The justification for the exemption of entities that have both physical operations and at least 20 employees in the United States is that those entities' physical U.S. presence will make it easy for U.S. law enforcement to discover those entities' true owners.").

[157] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 (The CTA's "exemptions are intended to be narrowly interpreted to prevent their use by entities that otherwise fail to disclose their beneficial owners to the federal government.").

[158] IRS, "Identifying Full-time Employees," January 22, 2021, https://www.irs.gov/affordable-care-act/employers/identifying-full-time-employees#:~:text=Definition%20of%20Full%2DTime%20Employee,hours%20of%20service%20per%20month.

or interacted with one company employee physically located in the United States. The rule may also want to clarify that "in the United States" includes the 50 states, the District of Columbia, and the other commonwealths, territories, and possessions specified in 31 U.S.C. 5336(a)(12).

The rule may also want to adopt the guiding principle articulated by Senator Brown just before enactment of the CTA, that "this exemption should be narrowly construed to exclude entities that do not have an easily located physical presence on an ongoing basis in the United States, or use strategies that make it difficult for U.S. law enforcement to contact their workforce or discover the names of their beneficial owners."[159]

Second, the rule should clarify the requirement that exempt entities must have "previous year Federal income tax returns in the United States demonstrating more than $5,000,000 in gross receipts or sales in the aggregate." The rule should state plainly that only information reported in a federal income tax return covering the specified period of time may be counted — not any state, local, or non-U.S. return — and that the return must include gross receipts or sales exceeding $5 million, using IRS definitions for those terms. The rule should also note that Congress expressly considered other potential indicators of economic activity such as "revenue," "income," or "assets," but excluded those metrics from the statutory exemption.

The rule should also make clear that if an entity wants to include gross receipts or sales from an entity that it "owned" or from an entity "through which the entity operates," those other entities must also have a U.S. physical presence, meaning a physical U.S. office where their employees physically work or report. Since the justification for the exemption is, again, the ease with which U.S. law enforcement can use an entity's physical U.S. presence to discover that entity's beneficial owners, the rule should not permit an entity to meet the exemption's requirements using subsidiaries or affiliates located outside of the United States and beyond the reach of U.S. law enforcement.

In addition, the rule should make clear that the phrase "entities owned by the entity" refers to subsidiaries that are wholly owned by the entity, and does not include subsidiaries in which the entity has only a partial ownership interest. For example, an entity should not be able to claim this exemption by counting sales receipts from an entity in which it has a 1 percent ownership interest — or, indeed, from any entity in which it owns less than 100 percent. As explained below in connection with the exemption granted to certain subsidiaries,[160] FinCEN has no statutory basis for inserting a partial numerical ownership figure into an exemption in order to widen its scope, when no such figure appears in the statute.

Third, the rule should clarify the requirement that the entity "has an operating presence at a physical office within the United States." The rule should state plainly that,

[159] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311.
[160] *See* FACT's comments in response to Question 6 regarding section 5336(a)(11)(B)(xxii), below.

to claim this exemption, an entity must have its own, physical U.S. office where its employees work or report, and that citing the address of a post office box, corporate services provider, registration agent, or other third party would not qualify. Again, the justification for this exemption is a robust U.S. presence that enables U.S. law enforcement to interview the employees and review the documents needed to discover the entity's beneficial owners; that discovery can't take place if an entity's only U.S. presence is a small post office box or a plaque on the wall of a third-party firm.

When outlining the contours of this exemption, the rule should note the existence of three different, detailed criteria needed to trigger its use, evidence of congressional intent that this exemption be given a very narrow scope. Accordingly, the rule should ensure that this exemption is available only to entities with a substantial U.S. physical presence as evidenced by a physical U.S. office, multiple U.S. employees, and millions of dollars in gross receipts and sales reported in a U.S. federal income tax return.

The rule should also note the need to examine the extent to which this exemption is vulnerable to abuse and, as a result, should be modified or eliminated.[161] Careful review of this exemption is merited in light of reports that sophisticated criminal networks and other rogue actors sometimes utilize "front companies" — fully functioning companies with employees and the characteristics of legitimate businesses — to mask the movement of illicit funds. A 2011 World Bank analysis noted:

> "The misuse of legal entities is often regarded almost exclusively as being a problem of non-operational companies. This study's analysis of the grand corruption cases, however, reveals that a significant proportion of the schemes (approximately one in seven) misuse operational companies (that is, "front companies"). Operational entities have inflows and outflows of assets, which enables streams of illicit assets to be mingled with legitimate funds and thereby laundered. Thus, substantial amounts of money can be transferred without raising suspicion. One supervisory authority interviewed for this project indicated that the misuse of operational entities for money laundering purposes is a significant and growing problem."[162]

To address these issues, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[163] to conduct audits of a statistically valid random sample of entities claiming this exemption to determine if they did so properly. Those audits could test whether the entities, for example, listed at least 20 employees in a state workers compensation system or forwarded payroll taxes for at least 20 employees

[161] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("This exemption should be subject to continuous, careful review by Treasury under the new 31 U.S.C. 5336(i) to detect and prevent its misuse.").

[162] 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, https://openknowledge.worldbank.org/handle/10986/2363, p. 39.

[163] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

with valid social security numbers; filed a federal income tax return for the prior year; and, if so, reported more than $5 million in gross receipts or sales. The audits could also conduct site visits to verify the existence of the entities' U.S. offices and U.S. employees, and their ownership of any entity whose receipts or sales were used to trigger the exemption. The audits could also address whether these entities raised any money laundering, terrorist financing, or similar concerns.

Subsidiaries, Section 5336(a)(11)(B)(xxii). This provision exempts from the CTA's disclosure obligations "any corporation, limited liability company, or other similar entity of which the ownership interests are owned or controlled, directly or indirectly, by 1 or more entities described" in 18 earlier exemptions. Those 18 exempt entities are publicly traded corporations, government-chartered entities, banks, bank holding companies, broker-dealers, registered exchanges, registered investment advisers, insurance companies, registered commodity firms, registered public accounting firms, public utilities, and the 20/5 entities described above.

A key issue in defining the scope of this exemption is identifying the extent to which a "corporation, limited liability company, or other similar entity" — collectively referred to here as a "subsidiary" — must be "owned or controlled, directly or indirectly," by one or more of the 18 exempt entities. Consistent with the principle that the rule should narrowly interpret the law's exemptions in order to give the greatest possible effect to the law's disclosure obligations,[164] the rule should interpret the language as exempting only subsidiaries that are "wholly" owned or controlled, directly or indirectly, by one or more or the 18 exempt entities. To proceed otherwise would unreasonably expand the exemption against congressional intent and without any statutory basis.

How Congress intended this exemption to be interpreted was expressed by Senator Sherrod Brown, one of the CTA's chief architects, on the Senate floor just before the chamber passed the legislation. After stating that the exemption was "intended to be interpreted as narrowly as possible," Senator Brown explained: "The exemption is intended to apply only to subsidiaries that are wholly owned or controlled by one or more of the exempt categories of entities; that's why the provision does not contain any reference to the 25% ownership figure that appears in the definition of beneficial owner."[165]

The text of the CTA is consistent with that explanation. The CTA demonstrates that when Congress wanted to make a CTA term reliant on a specific, partial ownership figure, it knew exactly what to do. As Senator Brown noted, when the CTA defined the term, "beneficial owner," the definition stated that the term applied to individuals who "own or control" not more than "25 percent" of an entity's ownership interests. That 25

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[164] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 (The CTA's "exemptions are intended to be narrowly interpreted to prevent their use by entities that otherwise fail to disclose their beneficial owners to the federal government.").

[165] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311.

percent figure is precisely spelled out in the statute. No comparable numerical percentage appears in section 5336(a)(11)(B)(xxii) or, indeed, in any exemption. The statute could have specified a numerical ownership threshold to trigger the subsidiary exemption, but did not.

In addition, lawmakers chose to utilize the definite article "the" to specify that this exemption applies only to entities where "the ownership interests" — that is *all* of the ownership interests — "are owned or controlled, directly or indirectly, by 1 or more entities described" in the 18 earlier exemptions. Congress could have left it ambiguous by removing the word "the," but lawmakers chose to include that word, further indicating that 100 percent of the ownership interests of an entity must be owned or controlled by one or more of the other 18 specified classes of entities in order for an entity to qualify for this exemption.

Some comment letters may urge FinCEN to insert a numerical ownership percentage into the exemption to widen its scope, so that it exempts subsidiaries in which the exempt entities hold just 51 percent of the ownership interests, or 25 percent, or even less. But none of those figures has any basis in the law — they are pulled from thin air. Manufacturing a numerical ownership percentage in this exemption is no more justified than inserting a percentage in some other exemption or, indeed, in some other CTA provision. In the absence of a numerical ownership percentage spelled out in the statute, lawmakers' use of the definite article "the," and a key legislator's statement on the Senate floor that these subsidiaries "be wholly owned or controlled" to qualify for the exemption, the rule should proceed cautiously, interpret the exemption narrowly, and in this case restrict its reach to only those subsidiaries that are "owned or controlled" — meaning wholly owned or controlled — by the 18 specified exempt entities.

To proceed otherwise would be for the rule to enable tens of thousands — perhaps hundreds of thousands — of additional entities to hide the names of their beneficial owners, the exact opposite of the purpose of the CTA. If the rule were to set a 51 percent ownership minimum, for example, an exempt entity that admitted to owning 51 percent of an entity could then conceal whomever owns the other 49 percent.

To illustrate the consequences of that approach, consider one example taken from a 2004 Senate investigation into U.S. banking and money laundering issues related to Equatorial Guinea (E.G.), a country infamous for oil corruption. Senate investigators discovered several business entities jointly owned by U.S. oil companies active in the country and E.G. corporations whose beneficial owners were rumored to include the country's corrupt leader, President Teodoro Obiang. A report released by the Senate Permanent Subcommittee on Investigations described two of those entities:

> "ExxonMobil entered into a business venture with Abayak S.A., the construction and real estate company controlled by the E.G. President, to form Mobil Equatorial Guinea Inc. ("MEGI"). According to ExxonMobil, Mobil International Petroleum Corporation owns 85 percent of MOGE and Abayak owns 15 percent. … Guinea Equatorial Oil & Gas Marketing Ltd. (GEOGAM) is a special purpose,

state-owned corporation that was established in 1996, and may be partially privately held by E.G. officials. Marathon has entered into two business ventures with GEOGAM. The first is Atlantic Methanol Production LLC (AMPCO), a company which owns and operates a methanol plant in Equatorial Guinea. Marathon and one other oil company each own 45% of AMPCO, while 10% is owned by GEOGAM. Between 2002 and May 2004, AMPCO paid dividends to GOEGAM totaling over $4 million."[166]

ExxonMobil, a publicly traded corporation, should not be able to conceal the beneficial owners of MEGI and AMPCO — thereby possibly hiding the ownership status of President Obiang — but an interpretation of the CTA subsidiaries exemption, if expanded to include subsidiaries in which exempt entities own or control less than 100 percent, would produce that result. And, again, it would do so with no supporting statutory language.

Limiting this exemption to wholly owned or controlled subsidiaries would not impose much of a burden on the 18 exempt entities, which are among the most sophisticated financial institutions and corporations in the world and fully capable of arranging their affairs to take advantage of the law's exemptions if they wish to do so. For example, to avoid the CTA's disclosure obligations, all a bank would need to do is form its own wholly owned subsidiary or, instead, split ownership of that subsidiary with a broker-dealer, hedge fund, accounting firm, or publicly traded corporation. The flexibility built into the exemption is already sufficient to accommodate the needs of the 18 exempt entities.

At the same time, should disclosure be required, it would not be burdensome. For example, suppose one of the 18 exempt entities ("Parent A") owns 51 percent of an entity ("Entity B") and an individual ("Individual C") owns the other 49 percent. Entity B would need to disclose to FinCEN just two names — the name of Parent A and the identity of Individual C — in line with the special reporting requirement in the CTA "for exempt entities having an ownership interest."[167] No more flexibility is needed or appropriate given the intense congressional negotiations that produced this exemption.[168]

Senator Brown made another suggestion for this exemption that the rule should consider. During the Senate review of the CTA, he recommended the following:

"The Federal Reserve, Treasury, OCC, SEC, CFTC, FDIC, and other federal regulators should review their filing requirements to ensure that the entities that

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[166] U.S. Senate Permanent Subcommittee on Investigations, "Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act," S.Hrg. 108-633, 108th Congress, 2nd Session, (July 15, 2004), https://www.hsgac.senate.gov/imo/media/doc/REPORT-Money%20Laundering%20&%20Foreign%20Corruption%20(July%202004).pdf, p. 205.

[167] 31 U.S.C. 5336(b)(2)(B)

[168] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7309 ("The Anti-Money Laundering Act and the Corporate Transparency Act are the products of months and months of bipartisan negotiations between and among Members of the House and Senate.").

report to them, such as banks, publicly traded corporations, securities dealers, exchange operators, or commodity brokers, include requirements to disclose the subsidiaries they wholly own or control."

Regulatory filings that include a listing of an entity's wholly-owned subsidiaries would not only increase ownership transparency for those subsidiaries, it would also provide a way for Treasury and GAO to gauge whether this exemption is being properly asserted.

The rule should also note that subsidiaries claiming to be exempt under this provision have a special reporting obligation under section 5336(b)(2)(D), should their status change. That section requires any subsidiary that loses its exempt status under section 5336(a)(11)(B)(xxii) — presumably by being sold or transferred in whole or in part to someone outside of the 18 exempt entities — must "at that time" submit a report to the registry disclosing its beneficial owners. The rule should clarify that this special filing provision requires the entity to file the beneficial ownership report with the registry immediately upon losing its exempt status — preferably specifying a 24-hour period to file the required report. The purpose of that immediate reporting requirement is to prevent wrongdoers from acquiring control of an exempt subsidiary and then using the subsidiary's bank account to transfer illicit funds or assets without disclosing who is behind the transfers.

Finally, given the novelty of the exemption — which does not appear in the CDD rule and does not appear to be used in any other registry around the world — the rule should call for research to examine whether the exemption has been properly invoked or should be modified or eliminated to prevent abuse. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[169] to conduct audits of a statistically valid random sample of subsidiaries claiming this exemption to determine if they did so properly. Those audits could test how many subsidiaries claimed this exemption; whether they were, in fact, wholly owned by one or more of the 18 qualified exempt entities; and whether the subsidiaries raised any money laundering, terrorist financing, or similar concerns.

Grandfathered Dormant Entities, Section 5336(a)(11)(B)(xxiii). This provision exempts an entity that:

(I) has been "in existence for over one year;"

(II) is "not engaged in active business";

(III) is "not, directly or indirectly, owned by a foreign person;" and

(IV) has not, in the preceding twelve-month period:

- "experienced a change in ownership," or

[169] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

- "sent or received funds in an amount exceeding $1,000 (including all funds sent to or received from any source through a financial account or accounts in which the entity, or an affiliate of the entity, maintains an interest);" and

(V) "does not otherwise hold any kind or type of assets, including an ownership interest in any corporation, limited liability company, or other similar entity."

This exemption was established in response to concerns expressed by certain members of the real estate industry that, over the years, many real estate and construction firms had formed countless corporations or LLCs to finance or take temporary ownership of real estate properties during development of residential or commercial buildings, alleging that those companies then went dormant upon sale or transfer of the properties. Certain real estate interests claimed that those many dormant companies were too difficult to locate either to register under the CTA or terminate. While sympathetic to the real estate industry's opposition to requiring an expensive effort to find and register dormant companies from years past, Congress was also cognizant of the significant money laundering risks posed by dormant companies, especially those left to age "on the shelf" for later sale or transfer.[170] In an effort to distinguish between low-risk and high-risk dormant companies, Congress created this narrow exemption to allow only low-risk dormant companies to escape the CTA's disclosure obligations.

The final provision, a compromise between supporters and opponents, is an extremely unusual exemption; it does not appear in the CDD rule, and we are unaware of any registry around the world offering a similar exemption from beneficial ownership disclosures. In allowing it to be included, one of the chief architects of the CTA warned that it "require[s] especially narrow" interpretation.[171]

To prevent this exemption from being exploited by bad actors, the rule should provide guidance on several issues. First, it should articulate the guiding principle that this "especially narrow" exemption is intended to function as a grandfathering provision for companies in existence prior to the CTA's enactment. The rule should take note of a related statutory provision establishing special reporting obligations for these exempt entities entitled, "Reporting Requirement for Exempt Grandfathered Entities."[172] In addition, the CTA's legislative history includes this statement by Senator Brown, one of the law's chief architects:

> "The exemption for dormant companies is intended to function solely as a grandfathering provision that exempts from disclosure only those dormant companies in existence prior to the bill's enactment …. No entity created after the

[170] For more information about those money laundering risks, see FACT's response to Question 25.
[171] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("Exemptions created for ... dormant companies ... require especially narrow interpretations to limit those exemptions to entities that provide some level of ownership disclosure to the government.").
[172] 31 U.S.C. 5336(b)(2)(E).

> date of enactment of the bill is intended to qualify for exemption as a dormant company."[173]

Second, the rule should acknowledge that the wording of the exemption makes it functionally impossible for any entity that was formed after enactment of the CTA to claim it. The very first criteria specified in the exemption is that it is available only to entities that have been "in existence for over 1 year." The rule should clarify that this one-year period is to be measured back in time from the CTA's date of enactment: January 1, 2021. Using that date ensures that 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 in order to take advantage of this exemption and escape the CTA's disclosure obligations. That interpretation would also ensure that no newly formed entity could claim this exemption.

Third, the rule should ensure that the exemption's next criteria, which states that the exemption is available only to an entity "that is not engaged in active business," is interpreted narrowly to ensure this exemption is available only to truly "dormant" entities — entities that have no discernable business activity of any type.

Fourth, the rule should provide guidance with respect to the exemption's next criteria, which states that the exemption is available only to an entity that is "not owned, directly or indirectly, by a foreign person." This prohibition reflects Congress' acute concern about the heightened risks posed by foreign ownership of entities seeking to evade the CTA's disclosure obligations, especially entities that lack a physical presence in the United States. The rule should state plainly 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 this exemption.

Fifth, the rule should address the next criteria which limits 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 rule should explain that this prohibition guards against an unidentified person taking ownership of a long dormant U.S. company and then using its bank account to transfer illicit funds, all while hiding the new owner's identity. The rule could also explain that the selection of the $1,000 threshold was chosen to permit a dormant company to pay any de minimis tax or state incorporation fees without losing its exempt status.

Sixth, the rule should provide guidance on the final 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." The rule should take note of the exemption's expansive term, "any kind or type of assets," to ensure, again, that this exemption is available only to dormant companies that do not function as holding companies for any intangible, real, or personal property. In addition, the rule should take note of the prohibition against the exempt

[173] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311.

entity's holding an ownership interest in another entity, which is designed to prevent it from acting as an intermediary with hidden owners in an ownership chain otherwise subject to the CTA's beneficial ownership disclosure obligations.

The rule should note that the existence of five different, detailed limits on its use constitutes additional evidence of congressional intent that this exemption should have a very narrow reach. In defining its contours, the rule should note explicitly Congress' extensive efforts to limit the exemption's availability to truly dormant companies formed long before the CTA was enacted into law.

The rule should also note that entities that claim exemption under this provision have a special reporting obligation under section 5336(b)(2)(E), should their status change. That section requires any entity that loses its exempt status under section 5336(a)(11)(B)(xxiii) must "at that time" submit a report to the registry disclosing its beneficial owners. The rule should clarify that this special filing provision requires a dormant company to file a beneficial ownership report with the registry immediately upon losing its exempt status — preferably specifying a 24-hour period to file the required report.[174] The purpose of that immediate reporting requirement is to prevent wrongdoers from acquiring control of a dormant company from a real estate agent or formation agent and then using the company's pre-existing bank account to transfer illicit funds or assets without disclosing who is behind the transfers.

In addition, the registry should ensure that the filing of a report by a formerly dormant company generates an automatic alert to an appropriate FinCEN employee for immediate review. That immediate review is warranted because of the money laundering and terrorist financing risks generally associated with dormant companies and the risk that arises when a long dormant company loses its dormancy. The objective of the review should be to prevent the transfer of illicit funds through any bank account belonging to the formerly dormant company.

Given the novelty of this exemption and its vulnerability to abuse by criminals, tax evaders, and other wrongdoers, the rule should call for research to examine whether the exemption has been abused and should be modified or eliminated. To address that issue, the rule should direct Treasury and GAO, as part of their mandatory reviews of the CTA's exemptions,[175] to conduct audits of a statistically valid random sample of dormant entities claiming this exemption to determine if they did so properly. Those audits could test how many dormant entities claimed this exemption; whether they were, in fact, dormant; and whether they raised any money laundering, terrorist financing, or similar concerns.

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[174] *See,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("[G]randfathered entities are also required to immediately disclose their beneficial owners to FinCEN as soon as their ownership changes hands, they become active entities, or they otherwise lose their exempt status.").

[175] 31 U.S.C. 5336(i); Section 6502(c) of the AML Act.

7) In addition to the statutory exemptions from the definition of reporting company," the CTA authorizes the Secretary, with the concurrence of the Attorney General and the Secretary of Homeland Security, to exempt any other entity or class of entities by regulation, upon making certain determinations.[176] Are there any categories of entities that are not currently subject to an exemption from the definition of "reporting company" that FinCEN should consider for an exemption pursuant to this authority, and if so why?

Creating New Exemptions. The Corporate Transparency Act is the product of lengthy and intense congressional negotiations.[177] After hearing from myriad stakeholders, interests, experts, and viewpoints, Congress settled on 23 exemptions to the CTA's disclosure obligations. That lengthy list of exemptions has not yet been put into effect. The rule should complete that implementation process and allow FinCEN to gain experience with the existing 23 exemptions before using FinCEN's limited resources to embark upon an effort to invoke the statutory process for creating new exemptions.

Due to concerns about the merits of some of the existing exemptions, Congress created two different processes for reviewing them, neither of which has yet taken effect:

- The new 31 U.S.C. 5336(i) tasks Treasury with conducting a "Continuous Review of Exempt Entities" to determine whether any should be revoked.
- Section 6502(c) of the AML Act tasks GAO with studying each CTA exemption and assessing the extent to which it poses "significant risks of money laundering, the financing of terrorism, proliferation finance, serious tax fraud, and other financial crime."

FinCEN should not encourage initiation of the process to create additional exemptions before gaining a greater understanding of the risks posed by the existing ones.

Should Treasury and FinCEN nevertheless move forward with considering additional exemptions and perhaps including them in the proposed rule, we note the statutory requirement that the Secretary must consult with and obtain the written concurrence of the Attorney General and the Secretary of Homeland Security before proceeding. In addition, while not explicitly required by statute, FACT urges the Treasury Secretary to consult with other government departments and agencies, Congress, allied countries, and civil society before proceeding with any new exemption. Depending upon the nature of the exemption, parties that might merit consultation include the intelligence community; the Departments of Commerce, Defense, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, and State; the Internal Revenue Service; federal functional regulators (as defined in 15 U.S.C. § 6809(2)); the Consumer Financial Protection Bureau; the Commodity Futures Trading

[176] 31 U.S.C. 5336(a)(11)(B)(xxiv), added by CTA Section 6403(a).

[177] *See, e.g.,* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7309 ("The Anti-Money Laundering Act and the Corporate Transparency Act are the products of months and months of bipartisan negotiations between and among Members of the House and Senate.").

Commission; the Federal Trade Commission; the U.S. Agency for International Development; the Environmental Protection Agency; the U.S. Comptroller General; the Council of the Inspectors General on Integrity and Efficiency; state Attorneys General, financial regulators, and tax authorities; key congressional committees such as the House Committees on Financial Services, Foreign Affairs, and Judiciary; the Senate Committees on Banking, Housing, and Urban Affairs, Foreign Relations, and Judiciary; the Commission on Security and Cooperation in Europe (Helsinki Commission); and civil society stakeholders.

We also urge Treasury to provide public notice of any proposal to establish a new exemption and provide an opportunity for notice and comment before making a final decision.

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

Including Trusts. Depending upon how the rule defines the term "other similar entity" as discussed in response to Question 1, above, all trusts that file formation, registration, or similar documents with a government office should be subject to the CTA's disclosure obligations, unless they qualify for an exemption. That the CTA already includes exemptions for charitable trusts and charitable split interest trusts[178] demonstrates that the CTA intended to cover trusts; otherwise, there would be no need for those exemptions. Including trusts would also be in line with the CDD rule,[179] FATF's beneficial ownership recommendation,[180] and international practice as demonstrated by, for example, the E.U. directive for its member countries' beneficial ownership registries.[181]

If the rule were to define the term "other similar entity" to include trusts that file formation, registration, or similar documents with a government office, the rule should require the trust to identify in its registry filings the precise government database containing the relevant document, not only to verify its existence but also to help establish that the trust is, in fact, subject to the CTA's disclosure obligations and not qualified to claim the exemption pertaining to trusts. The rule should also acknowledge

[178] 31 U.S.C. 5336(a)(11)(B)(xix)(III).
[179] 31 CFR 1010.230(d)(3).
[180] FATF, "The FATF Recommendations," October 2020, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf, (FATF Recommendation 25: "countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries").
[181] European Parliament and the Council of the European Union, "Directive 2015/849, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing," Document 02015L0849-20180709, Article 3(6)(b) and 31(1), May 20, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015L0849-20180709; *see also* Money Laundering (England), Regulations 2007 (SI 2007/2157), https://www.legislation.gov.uk/uksi/2007/2157/regulation/6/made#:~:text=(c)any%20individual%20who%20exercises,of%20the%20entity%20or%20arrangement.&text=(9)%20In%20any%20other%20case,a%20transaction%20is%20being%20conducted (U.K. definition of "beneficial owner").

the wide variance among states and tribes in requiring the filing of trust documents.[182] While it is troubling for the registry to treat similar trusts differently depending upon the state where they were formed or do business, that type of variance among the 50 states is a longstanding feature of the U.S. system. The rule should also state that a covered trust should identify as its beneficial owners: its trustee, grantors or settlors, all trust beneficiaries (with the exception of minor children), and any trust protector or other person exercising substantial control over the trust. The rule should apply the same approach to non-charitable foundations.

Including Special Purpose Vehicles. Special purpose vehicles (SPVs) that file formation, registration, or similar documents with a government office should be subject to the CTA's disclosure obligations, unless they qualify for an exemption. An SPV is a legal entity created for a specific purpose. Today, many SPVs are formed to raise capital for a specific project, entity, security, or other investment, and serve as a funding locus that collects and maintains contributions from investors. SPVs may take the form of a corporation, LLC, or trust; may be formed within or outside of the United States; and may have filed one or more documents with a government office as part of its formation process or to gain government authorization to do business within the United States.

An SVP may qualify for an exemption from the CTA's disclosure obligation in several ways. First, it may qualify as a pooled investment vehicle under 31 U.S.C. 5336(a)(11)(B)(xviii). Second, an SPV may qualify as the subsidiary of exempt entities under 31 U.S.C. 5336(a)(11)(B)(xxii). A third possibility is that an SPV may qualify for an exemption if established as a registered investment company under 31 U.S.C. 5336(a)(11)(B)(x). Still another alternative is that an SPV may qualify as a dormant entity under 31 U.S.C. 5336(a)(11)(B)(xxiii), if it was formed before enactment of the CTA and never used. For more information, please see FACT's comments on the relevant exemptions in response to Question 6, above.

SPVs established by highly regulated entities within the United States, including banks, broker-dealers, accounting firms, and public utilities, pose relatively low risks of money laundering or other wrongdoing, which is why these highly regulated entities are exempt from the CTA. SPVs established by unregulated or unidentified persons, however, pose higher risks[183] which is why they are subject to the CTA's beneficial ownership disclosure requirements. Given the many SVPs active within the United States, the rule should provide explicit guidance about this entity's reporting obligations.

[182] *See, e.g.,* Nicole Vanatko, "Memorandum: Business Trusts and the Corporate Transparency Act," Congressional Research Service, March 10, 2021, p. 2.

[183] *See, e.g.,* FBI Criminal Investigative Division, "Threat Actors Likely Use Private Investment Funds To Launder Money, Circumventing Regulatory Tripwires," FBI Intelligence Bulletin, May 1, 2020, ("threat actors exploit this vulnerability to integrate illicit proceeds into the licit global financial system.").

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

a. What information should FinCEN require companies to provide to qualify for these exemptions, and what verification process should that information undergo?

See FACT's response to Question 9(c), below.

b. Should there be different information requirements for operating companies and holding companies, for active companies and dormant companies, or are there other bases for distinguishing between types of companies?

See FACT's response to Question 9(c), below.

c. Should exempt entities be required to file periodic reports to support the continued application of the relevant exemption (e.g., annually)?

Evaluating Exemption Claims. The CTA's 23 exemptions are expected to exempt hundreds of thousands of entities from the registry each year. At the same time, an obvious problem is how to handle businesses that improperly claim exemptions in order to keep their beneficial owners hidden.

To address that issue, the rule could take several steps. First, the revised CDD rule should consider requiring financial institutions performing due diligence reviews to obtain from any entity claiming exemption from the U.S. registry a written statement from the entity identifying the precise exemption being claimed, the factual basis for claiming it, and the entity's attestation to the accuracy of the information provided. The rule could treat obtaining this exemption statement as part of a financial institution's know-your-customer due diligence obligations necessitated by the new beneficial ownership law.

Second, the rule could provide financial institutions with a safe harbor exemption form that could be used with customers. The form could be designed to minimize the reporting burden on entities claiming exemptions as well as on financial institutions, regulators, and law enforcement agencies attempting to ensure CTA exemptions are properly claimed and the registry data is accurate, complete, and highly useful. To accomplish those objectives, the form could provide a checkbox list of the law's 23 exemptions plus a box for any "other" exemption, and allow entities to mark the relevant box and attest to their determination that they qualify for the exemption. The financial institution could then follow up by verifying the factual basis for the exemption, using information provided by the entity and public databases. For example, the financial institution could double-check that a publicly traded corporation is listed with the SEC or an MTB has registered with Treasury. Using the form would not only minimize the reporting burden but also enable financial institutions and others to keep track of the exemptions being claimed. The rule could also require financial institutions to re-examine the validity of a claimed CTA exemption as part of the institution's routine ongoing customer due diligence reviews, whose frequency and depth will depend upon the risk assigned to the particular client.

Third, the rule could consider imposing an additional requirement on three types of exempted entities that pose especially difficult verification problems. Specifically, the rule could require those three types of entities to file affirmative exemption notification forms with the U.S. registry. Using the same checkbox format described above, the registry's exemption form could require those entities to identify the specific exemption being claimed, describe the factual basis for claiming it, attest to their determination that they qualify for the exemption, and provide a link to any database that could help verify their eligibility for the exemption. FinCEN would also have to establish automated procedures to verify key information provided in the exemption forms.

The three categories are: (1) dormant companies, which could be required to explain the reason for their dormancy, attest to their inactivity, and identify any accounts opened at a financial institution, after which those accounts could be verified; (2) subsidiaries owned or controlled by 18 specified types of exempt entities, which could be required to identify the entities that own or control them, attest to being wholly owned by those entities, and whose exempt status could then be verified by checking relevant LEI and U.S. databases to confirm the existence of the eligible entities and their connection to the subsidiary; and (3) 20/5 entities, each of which could be required to provide its employer identification number, approximate number of employees, and U.S. address, which could then be verified by checking the IRS EIN database, the relevant state unemployment insurance database to confirm at least 20 U.S. employees, and U.S. Postal Service records to confirm the U.S. address. While these verification efforts would not be conclusive, they could help expose entities that are misusing an exemption. The exemption notification forms could also provide timely data showing how many entities are claiming those exemptions and trigger audits into whether they are doing so properly.

Still another step the rule could take would be to spell out the measures that should be undertaken to evaluate entity exemption claims through the registry audits required by law. The CTA requires both Treasury and GAO to conduct audits related to exempt entities, including whether the exemptions are being abused or the exempt entities are engaged in misconduct.[184]

To carry out those audit obligations, the rule could require Treasury — perhaps through the Treasury IG — and GAO to conduct monthly or quarterly audits to identify registry filings for new entities during the covered period compared to similar filings over the same period with state and tribal offices that form or register entities to do business in the United States. The audits could use

[184] 31 U.S.C. 5336(i); Section 6501(c) of the AML Act.

that data to identify entities that appear in state or tribal records but are missing from registry records, and then conduct a statistically valid, randomized audit of the missing entities to examine their exemption claims. The audits could evaluate the percentage of missing entities that claim to be exempt from the registry's disclosure obligations; identify the specific exemptions being claimed; evaluate the extent to which those exemptions were properly or improperly asserted; and evaluate any evidence indicating that the entities missing from the registry were engaged in suspicious activity. Those audits could then help Treasury and FinCEN determine how to handle exemption-related forms, procedures, and related issues and make recommendations for reforms.

Together, limits on the exemptions that may be claimed, financial institution due diligence reviews, required registry exemption forms for certain entities, and ongoing registry audits would help curb misuse of the CTA exemptions and help ensure the registry's beneficial ownership information is accurate, complete, and highly useful.

Reporting of Beneficial Ownership Information

10) What information should FinCEN require a reporting company to provide about the reporting company itself to ensure the beneficial ownership database is highly useful to authorized users?

Reporting Beneficial Ownership Information. The rule should require reporting companies filing in the U.S. registry to provide: (1) the entity's official legal name; (2) the type of entity using a checkbox list of options provided by the registry; (3) the entity's current address for its principal place of business in the United States or, if none, its non-U.S. headquarters (but NOT the address of a formation agent, corporate service provider, nominee, or other third party); (4) the state, tribe, or non-U.S. jurisdiction where the entity was formed, licensed, or registered, using a checkbox list of jurisdiction codes provided by the registry; and (5) the name of the entity's U.S. registered agent, if any, or the name and email of an executive who can answer questions.

If the rule requires an individual to attest that he or she is authorized to submit the registry filing, the information being submitted is accurate, and false, misleading, or incomplete information is punishable by both civil and criminal penalties, the rule should also require that individual to provide identifying information. That information could include the attesting individual's (a) name; (b) birthdate; (c) job title; (d) company name and address; (e) telephone number; and (f) email address. FinCEN may also want to consider issuing FinCEN identifiers to individuals who file a lot of registry reports or updates in order to expedite the filing process for those individuals.

This information about the reporting company itself carries out the requirements of the CTA, while also paralleling the "business card" information that the Global LEI Foundation (GLEIF) has found to be necessary to identify a specific business entity and verify at least some of the information being provided.[185] To enable the U.S. registry to perform a similar verification function and ensure the information provided to the U.S. registry is accurate, complete, and highly useful, the rule will need to require reporting companies to disclose where they were formed, licensed or registered. Identification of that jurisdiction, using registry codes for the relevant state, tribe, or non-U.S. country, when combined with the entity's name and type of business, should be enough to enable an automated verification process to confirm the entity's basic information.[186] Requiring the reporting company to provide contact information for its registered U.S. agent or an executive would enable FinCEN to quickly contact the reporting company and verify additional information, if needed. Since the information required above should be readily available to the reporting company, the form should take only a few moments to complete, thereby meeting FinCEN's statutory obligation to minimize the registry's reporting burden.

In addition to providing identifying information about itself, every reporting company must provide identifying information for each of its beneficial owners. For each beneficial owner, the registry should require the reporting company to provide the individual's: (1) full legal name; (2) birthdate; (3) current business or residential address in the individual's country of residence; (4) unique identifying number from an acceptable identification document using a checkbox list of options provided by the registry to indicate the type of number provided (U.S. passport number; state identification number; driver's license number; or, if none of those are available, a non-U.S., nonexpired passport number) and the state or country that issued it; (5) ownership interest in the entity, if any, including the nature of the interest, the percentage of ownership interests owned or controlled by the beneficial owner, and whether the interest is held directly or indirectly; and (b) any ability to exercise substantial control over the entity, using a checkbox list of key control indicators supplied by the registry.[187]

Providing this beneficial ownership information would comply with the CTA's disclosure requirements, help avoid confusion about the specific individuals being named, and enable the registry to verify some of the information being provided using automated software protocols. The rule should clarify that the address provided for a beneficial owner must be located in the individual's current country of residence, not only to help clarify the individual being named but also to assist registry users to contact that individual if needed. Delineating each beneficial owner's ownership interests and ability to control the reporting company is also in line with best practice according to guidance by OpenOwnership, which has worked with almost 40 countries to design effective beneficial ownership registries.[188] While completing this information may take a few minutes for reporting companies to provide for each beneficial owner, since that

[185] *See* Global Legal Entity Identifier Foundation (GLEIF), "Level 1 Data: Who is Who," 2021, https://www.gleif.org/en/lei-data/access-and-use-lei-data/level-1-data-who-is-who.

[186] For more information on how that would work, see FACT's response to Question 2.

[187] For more information related to disclosing ownership interests and substantial control indicators, see FACT's response to Question 3(c).

[188] Peter Low and Tymon Kiepe, "Beneficial ownership in law: Definitions and thresholds," OpenOwnership, October 2020, https://www.openownership.org/uploads/definitions-briefing.pdf, p.18.

identifying information is the central purpose of the CTA, it is appropriate to impose those modest reporting obligations.

Two other key factors in reporting beneficial ownership involve the reporting company's ownership structure as discussed in FACT's responses to Questions 11 and 30; and the use of any FinCEN identifier addressed in FACT's responses to Questions 26 to 31. Performing real-time verifications of the information provided — prior to submission of a filing with the registry — is also key to ensuring that the registry's information is accurate, complete, and highly useful. FACT describes appropriate and needed verification procedures in response to Questions 23(c), 47(c) and in Additional Issue (1), below.

A final step that the rule should take is to require the registry, on an automated basis prior to accepting any filing, to determine whether the name of an entity, beneficial owner, applicant, or attesting individual listed in the filing also appears on a sanctions list administered by OFAC. If the name does appear on a sanctions list, the registry should notify the filer of the problem and also send a notification to OFAC and the relevant state or tribal office.

Rejecting Incomplete or Incorrect Submissions. An additional issue that should be addressed in the rule is how the registry should handle submissions by reporting companies that fail to complete requested fields or provide obviously false information such as indicating that an individual's identifying number is a series of zeros. In those instances, the rule should provide that the registry will automatically prevent submission of the form and send the filer a pop-up message identifying the error and requesting correction of the problematic entries, as FACT notes in response to Question 23(c). Similarly, the rule should specify that the registry will prevent the submission of any form that fails to identify a single beneficial owner, as discussed in FACT's response to Question 3(c), above. This approach would be in line with how FinCEN now handles BSA reports in which FinCEN e-filing protocols help ensure useful responses, including by prohibiting filings with certain blank fields or fields with unacceptable formatting.

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

See FACT's response to Question 12, below.

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

Disclosing Ownership Structures. The rule should require reporting companies to disclose information about their ownership structures as a matter of course when filing beneficial ownership disclosures with the U.S. registry. Disclosures should include the official legal name and LEI of any parent organization, direct subsidiary, and direct affiliate. In addition, if any beneficial owner holds ownership interests in a reporting company on an indirect basis, the reporting company should be required to disclose the complete ownership chain related to that beneficial owner.

The vast majority of reporting companies that file information in the registry are unlikely to have complex ownership structures. Current data indicates that 99.9 percent of U.S. businesses are small businesses, defined as businesses with fewer than 500 employees, and at 80 percent of those U.S. small businesses, a single individual owns, controls, and is the sole employee of the operation.[189] Another segment of U.S. businesses is owned and operated by married couples, so-called “mom and pop” enterprises. The result is that complex ownership structures affect only a small percentage of filers.

Entities that do have complex ownership structures are more likely to have sophisticated owners capable of providing required information about their structures. In addition, experience has shown that, in some cases, entities with complex ownership structures — ones that involve layered corporations, trusts, and other owners in multiple jurisdictions — may have been designed to evade accountability and pose a higher risk of illicit activity. But there is no way for law enforcement, regulators, or financial institutions to identify those entities and evaluate their risk without first having a meaningful picture of their ownership structure. Because complex ownership structures affect relatively few entities and because ownership information will provide exactly the type of due diligence assistance the CTA registry was designed to provide, the rule should require all entities to disclose their ownership structures as a matter of course.

In addition, to streamline this disclosure process, a reporting company could ensure that all of the beneficial owners and entities in its ownership chain acquire FinCEN identifiers. That would enable the reporting company to provide a series of numbers in its report rather than detailed identifying information. Using existing software techniques, the registry could then convert that information into a diagram depicting the entity’s corporate structure.

Requirements to disclose ownership structures have already been developed and are in operation in multiple registry systems around the world, including the LEI system and registries operated by members of the European Union. Belgium, for example, has designed software that, on an automated basis, converts information about specific beneficial owners, parent organizations, subsidiaries, and affiliates into an ownership diagram.[190] In addition, OpenOwnership has developed forms and models that a beneficial ownership registry can use to obtain and diagram a company’s ownership

[189] Small Business Administration, Office of Advocacy, “Frequently Asked Questions,” October 2020, https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf.

[190] Alexandre Taymans and Sébastien Guillaume, “Looking Back, and the Road Ahead: A Prospective Analysis of the Belgian UBO Register,” Belgium Treasury, February 2021, https://finances.belgium.be/sites/default/files/thesaurie/20210208_LookingBackAndTheRoadAhead_Final.pdf, pp. 9-10.

structure.[191] FinCEN should draw upon those resources to design its own system for acquiring information about an entity's ownership structure.

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

See FACT's response to Questions 10–12, above.

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

a. Should FinCEN allow electronic filing of required information about reporting companies (including the termination of such companies), beneficial owners, and applicants under the CTA?

Yes.

b. Should FinCEN allow or support any mechanisms other than direct electronic filing?

No.

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

Yes. Assuming that all of the information that is being submitted to the registry is complete and accurate and that the registry has the necessary technical capabilities, FinCEN should allow bulk filing of required information in batches. See FACT's response to Question 40 for more information.

d. Should there be any differences among the mechanisms used for different types of information or different types of filers?

No.

[191] OpenOwnership, "Beneficial ownership declaration forms: Guide for regulators and designers," accessed May 3, 2021, https://www.openownership.org/uploads/boform-notes.pdf *and* OpenOwnership, "[Example] Beneficial Ownership Declaration Form," accessed May 4, 2021, https://docs.google.com/spreadsheets/d/1oPJpRserD8AQAii1pRmrfpKekVqgwpM6Dl-kfybpD3o/edit#gid=1777743984.

e. Should any additional or alternative reporting system involve the collection of information from the states and Indian tribes, and if so how?

When reporting companies file beneficial ownership information with the registry, the registry should cross-check state and tribal registries to ensure that, among other information, the full legal name, jurisdiction of formation, and entity classification (i.e., corporation, LLC, etc.) of the reporting company matches with an entity on file with the appropriate state or tribe.

f. Should the filing mechanisms for reporting companies be different for entities that were previously exempt for one reason or another (including exempt subsidiaries and exempt grandfathered entities under section 5336(b)(2)(D) and (E)) and lose that exemption? If so how?

The CTA imposes specialized reporting obligations on two types of entities — subsidiaries and grandfathered dormant entities — when they lose their exempt status.[192] Both are required to file a registry report "at the time" they lose their exemption. FACT recommends in response to Question 6, above, that the rule require those reports to be filed within 24 hours of the change in status. Other than this 24-hour filing deadline, the reports filed by those entities should contain the same information as in other beneficial ownership reports. In addition, the registry should ensure that the filing of a report by a formerly dormant company automatically generates an alert sent to an appropriate FinCEN employee for immediate review. That special review is warranted because of the money laundering and terrorist financing risks generally associated with dormant companies and the risk that arises when a long dormant company loses its dormancy. The objective of the review should be to prevent the transfer of illicit funds through any bank account belonging to the formerly dormant company. For more information about dormant companies, see FACT's response to Question 6, above, on the dormant company exemption.

In the case of the other 21 exemptions, the rule should treat the loss of an entity's exempt status as triggering an immediate obligation by that entity to file a beneficial ownership form with the registry. The rule should consider specifying a time period within which that form should be filed, such as 10 days.

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

a. By what method should these certifications be filed?

The rule should require each pooled investment vehicle (PIV) that is formed under the laws of a foreign country and claims exemption from the CTA's disclosure obligations under section 5336(a)(11)(B)(xviii) to file a certification

[192] 31 U.S.C. 5336(b)(2)(D) and (E).

with the registry in the same manner and via the same process in which beneficial ownership reports are submitted by reporting companies. This approach would comply with the statutory requirement that the PIV certifications be filed "in the same manner as required under this subsection."[193]

b. What information should be included in these certifications?

The rule should provide a specialized PIV form to serve as the required certifications by foreign PIVs. That form should require the same identifying information for the PIV and the individual exercising substantial control over the PIV as the registry requires for reporting companies and their beneficial owners, again in compliance with 31 U.S.C. 5336(b)(2)(C). The PIV form should therefore require the PIV to provide its official legal name; type of business entity, current address, jurisdiction where formed, and contact information for its U.S. registered agent, if any, or a PIV executive who can answer questions. In addition, the form should require the PIV to provide information on its ownership structure in the same manner as reporting companies, listing any direct parent, direct subsidiary, or direct affiliate. The form could also require the foreign PIV to provide a link to the relevant Form ADV on file with the SEC to confirm that it's been filed. It could also require the PIV to provide its LEI number, if any, to facilitate verification of its CTA data by cross-checking it against information in the LEI database. With respect to its controlling individual, the PIV form should require the individual's full legal name, birthdate, current business or residential address in the individual's country of residence; and unique identifying number from an acceptable identification document, in the same manner required for beneficial owners.

Each PIV form should also include the same attestation used in the registry forms filed by reporting companies, requiring the individual filing on behalf of the PIV to attest that he or she:

- understands the PIV is obligated by law to submit this information to combat money laundering, terrorist financing, and other misconduct;
- understands that criminal and civil penalties may apply to the willful failure to file or to the willful submission of false, misleading, or incomplete information;
- has taken reasonable steps to verify the information it is about to submit; and
- affirms that, to the best of his or her knowledge, the information is accurate and complete.

[193] 31 U.S.C. 5336(b)(2)(C).

The registry should require this attestation prior to and in connection with accepting the filing of the PIV form, and minimize the burden on the PIV by permitting the filing individual to make the attestation by checking a box. The rule should also require the attesting individual to provide identifying information, including the attesting individual's (a) name; (b) birthdate; (c) job title; (d) company name and address; (e) telephone number; and (f) email address.

For more information on each of these information data points, see FACT's responses to Questions 10 and 12, above.

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

The CTA states explicitly that PIV certifications must be filed directly with FinCEN rather than with any foreign authority. Section 5336(b)(2)(C) states that each PIV which is formed under the laws of a foreign country and claims exemption from the CTA's disclosure obligations, "*shall file with FinCEN* a written certification that provides identification information of an individual that exercises substantial control over the pooled investment vehicle *in the same manner as required under this subsection*." [Emphasis added.] Given this unambiguous statutory provision, PIV certifications must be filed directly with the registry administered by FinCEN, just like beneficial ownership reports.

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

See FACT's response to Question 15(b), above.

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

Yes, PIV certifications should be made accessible to all database users on the same terms as beneficial ownership information filed by reporting companies.

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

While lawmakers designed the CTA to minimize potential burdens on reporting companies subject to its disclosure requirements, Congress also recognized that certain costs, while minimal, would be incurred. Congress was also aware of studies in other countries demonstrating the implementation costs were both minimal and reasonable.

In 2019, for example, the United Kingdom performed a careful analysis of the tasks required of reporting companies required to file beneficial ownership information in the U.K. beneficial ownership registry. The U.K. Department for Business, Energy & Industrial Strategy (BEIS) identified the following tasks — which generally fell into two buckets — required by businesses associated with the registry's reporting requirements:

"Tasks related to the initial submission of [beneficial ownership] information:

- "Familiarisation with the requirements of the [beneficial ownership] register;
- "Identifying the business's [beneficial owners];
- "Collecting and collating information about the business's [beneficial owners]; and
- "Submitting information about the business's [beneficial owners].

"Tasks related to the maintenance of information held on the [beneficial ownership] register:

- "Checking the information about the business's [beneficial owners];
- "Identifying new [beneficial owners];
- "Collecting and collating information about new [beneficial owners]; and
- "Submitting information about new [beneficial owners]."[194]

As noted in our response to Question 39, these burdens imposed relatively minor costs on reporting companies — especially for small businesses. The U.K. study calculated that the median overall cost of compliance was less than $200 per entity.

The costs and burdens associated with the CTA registry are likely to be on par with those realized by the U.K. registry, as the two economies have similar business constituencies. Researchers at Global Witness examined the data in the U.K. registry and found that the average number of beneficial owners for each reporting company totaled just 1.13, while the "mode (most common) number of owners for reporting companies was one."[195] Of "the companies reporting owners, 99% of them declared they had six

[194] U.K. Department for Business, Energy & Industrial Strategy (BEIS), "Review of the implementation of the PSC Register," BEIS Research Paper Number 2019/005, August 2, 2019, https://www.gov.uk/government/publications/people-of-significant-control-psc-register-review-of-implementation, p. 20.

[195] *See* Global Witness, "Hard Data on Lessons Learned from The U.K. Beneficial Ownership Register," May 2019, https://thefactcoalition.org/wp-content/uploads/2019/06/GW.Fact-Sheet-on-UK-Register-Data-for-US.May302019-1.pdf.

owners or less," [and] well "over half of these companies reported having two owners or fewer."[196] At the same time, current data from the U.S. Small Business Administration indicates that 99.9 percent of U.S. businesses are small businesses, defined by SBA as businesses with fewer than 500 employees, and at 81 percent of those U.S. small businesses, a single individual owns, controls, and is the sole employee of the operation.[197] This data suggests that the per-business costs associated with a registry in the U.S. will be similar to those in the United Kingdom.

While Congress intended to limit unnecessary burdens for reporting companies, it is important to note that Congress was just as insistent that the registry:

> "(iv) collect [beneficial ownership information] in a form and manner that ensures the information is highly useful in—
>
> > "(I) facilitating important national security, intelligence, and law enforcement activities; and
> >
> > "(II) confirming beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law."[198]

Please consult the FACT Coalition's responses to Questions 19, 20, 23, 25, 31, and 47, in which we outline ideas — in line with 31 U.S.C. 5336 (b)(1)(F)(iii–iv) — for streamlining the reporting requirements to minimize potential burdens on businesses while ensuring that the registry collects beneficial ownership information in a form and manner that is highly useful for law enforcement, national security, and intelligence activities as well as for financial institutions to assist with their due diligence compliance obligations.

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

a. What steps should be taken to provide such notice?

Providing Notice of Registry Requirements. The beneficial ownership database will only be "highly useful" in combating financial malfeasance and assisting financial institutions with their customer due diligence obligations if reporting companies are aware of their disclosure obligations under 31 U.S.C. 5336 and comply with the CTA. As such, the Secretary of the Treasury should

[196] *See* Global Witness, "Hard Data on Lessons Learned from The U.K. Beneficial Ownership Register," May 2019, https://thefactcoalition.org/wp-content/uploads/2019/06/GW.Fact-Sheet-on-UK-Register-Data-for-US.May302019-1.pdf.
[197] Small Business Administration, Office of Advocacy, "Frequently Asked Questions," October 2020, https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf.
[198] 31 U.S.C. 5336 (b)(1)(F)(iv).

take several steps to provide notice to persons of their reporting obligations, as required by law.[199]

First, the Treasury Secretary — through the Internal Revenue Service (IRS) — has ongoing relationships with the vast majority of businesses operating in the United States and should direct the IRS to provide appropriate notices informing those businesses of their potential CTA disclosure obligations using the IRS website, tax forms and instructions, and mailed and electronic communications. Treasury should focus in particular on reaching new businesses applying for an Employer Identification Number (EIN). As part of the EIN application process, the IRS should include CTA notices in the online EIN application and accompanying instructions. The IRS should also consider requiring businesses applying for an EIN to indicate whether they've filed beneficial ownership information with the registry or are exempt, and decline to issue an EIN if the question is left blank or completed with negative responses. Further, in the case of a negative response, the IRS should immediately direct the entity to the FinCEN registry (perhaps even opening an online pop-up window for electronic filers).

In addition, the IRS should include CTA notices on its website and in its online instructions related to business tax filings, including annual corporate, partnership, trust, and foundation tax returns (including for unrelated business income taxes), payroll taxes, and estimated quarterly taxes. The IRS should also consider updating these forms to directly ask entities whether they need to file or update their information with the CTA registry. If an entity checks a box indicating it may need to file or update its CTA information, the IRS should immediately direct the entity to the FinCEN registry (perhaps even opening an online pop-up window for electronic filers).

When mailing tax-related materials or notices to businesses, the IRS should include notices or even flyers alerting those businesses to their potential CTA obligations.

The IRS should also print paper notices and post them visibly in their field offices around the country, informing anyone who enters the buildings of the new CTA beneficial ownership disclosure requirements.

Once the CTA is fully implemented, the IRS should continue to post online notices reminding new and existing businesses filing tax returns online about their CTA disclosure obligations, including the need to update their beneficial ownership information in the FinCEN registry if it has changed. The IRS should also revise its printed tax filing instructions to include a notice informing businesses filing their taxes on paper about their CTA disclosure obligations and the need to update their beneficial ownership information in the

[199] 31 U.S.C. 5336(e)(1).

FinCEN registry if that information changes. Such notices should also include instructions for how to file and update the information in the registry, including providing a direct electronic link to the registry.

In addition to those notices, the IRS should create an informational hub on its website explaining the CTA, answering frequently-asked-questions, and directing businesses to the registry to file their beneficial ownership information. Creating this informational hub and implementing modern search engine optimization techniques will enable businesses to find information about the CTA directly on the IRS website — a trusted source — whether using IRS search functions or search engines like Google, Bing, or Yahoo.

Second, the Secretary of the Treasury — through FinCEN — has ongoing relationships with a vast array of financial institutions, as that term is defined in 31 U.S.C. 5312(a)(2). Treasury should direct FinCEN to use its existing capabilities, including appropriate webpages, advisories, bulletins, and mailed and electronic communications, to notify financial institutions across the country of the CTA's disclosure obligations and the law's potential application to their clients. In addition, Treasury and FinCEN should direct all types of financial institutions operating in the United States to inform their business clients about their potential CTA beneficial ownership disclosure obligations.

Like the IRS, FinCEN should also create an informational hub on its website explaining the CTA, answering frequently-asked-questions, and directing businesses to the registry where they can file beneficial ownership disclosure forms. Again, like the IRS, FinCEN should implement modern search engine optimization techniques to make it easy to find its CTA informational hub. Creating this informational hub will enable financial institutions and businesses to find information about the CTA directly on the FinCEN website, a trusted source.

Third, Treasury also has relationships with many financial institutions through its ongoing interactions with the OCC, Federal Reserve Board, FDIC, SEC, and CFTC. Under section 5336(d)(2) requiring federal agency cooperation, Treasury should direct each of those agencies to use its existing capabilities, including appropriate webpages, advisories, bulletins, and mailed and electronic communications, to notify the financial institutions they regulate of the CTA's disclosure obligations and the law's potential application to their clients. Treasury should also ask these agencies, like the IRS and FinCEN, to create an informational hub on their websites explaining the CTA, answering frequently-asked-questions, and directing businesses to the registry where they can file beneficial ownership disclosure forms. Those agencies should also implement modern search engine optimization techniques to make it easy to find their CTA informational hubs, enabling financial institutions to find that information directly on their websites, a trusted source.

Fourth, under the CTA statutory requirement that states and tribes cooperate with Treasury,[200] Treasury should convene representatives from all 50 states, the District of Columbia, and representatives from appropriate territories and federally recognized tribes that form, register, or license entities to do business in the United States, to discuss implementation of the CTA. During this convening, Treasury could distribute materials, explain the functioning of the registry and available exemptions, describe expected audits to detect entities that fail to file with the registry, identify available funding options to help with state and tribal implementation of the law, answer questions, and solicit suggestions.

In addition, Treasury should work with the states, the District of Columbia, tribes, and territories to establish links to their databases containing the resident agent and address of record for every corporation, limited liability company, or other similar entity that has filed formation, registration, or licensing forms with one of those jurisdictions. Then, one year before the statutory deadline requiring existing entities to begin reporting their beneficial ownership information to the registry, the Secretary should mail a one-time, paper notice directly to the mailing addresses in the relevant databases informing each business of its possible CTA disclosure obligations and the nearing deadline to file disclosure forms with the registry. Treasury could also use those database links to verify information filed with the beneficial ownership registry and to conduct the statutorily mandated audits of the registry and the CTA exemptions in collaboration with GAO and the Treasury IG.[201]

Fifth, Treasury should partner with the Small Business Administration (SBA) to get the word out about the CTA to the small business community. Under section 5336(d)(2) requiring federal agency cooperation, Treasury should ask SBA to distribute electronic and paper notices to every small business on record with the agency informing each entity of its potential CTA disclosure obligations. In addition, like other agencies, SBA should create an informational hub on its website explaining the CTA, answering frequently-asked-questions, and directing small businesses to the registry website where they can file their beneficial ownership forms. SBA should also utilize modern search engine optimization techniques to make its CTA informational hub easy to find, enabling small businesses to find that information directly on the SBA website, a trusted source.

Sixth, Treasury should partner with the Department of the Interior's Bureau of Indian Affairs (BIA) to get the word out about the CTA to businesses active in the Native American community. Under section 5336(d)(2) requiring federal agency cooperation, Treasury should first ask BIA to contact every federally recognized Indian Tribe to determine which tribes form, register, or license entities to do business in the United States, identify the relevant tribal laws or regulations with links to find them, and identify any tribal databases containing

[200] 31 U.S.C. 5336(d)(2).
[201] 31 U.S.C. 5336(i); section 6502(c) of the AML Act.

formation, registration, or licensing forms. When complete, BIA should provide FinCEN with that information or an electronic link to it to facilitate CTA implementation. Treasury should also ask BIA to direct the relevant tribes to notify any business they formed, registered, or licensed about their potential CTA disclosure obligations. In addition, Treasury should ask BIA to distribute electronic and paper notices to every business on file with the agency, informing each entity of its potential CTA disclosure obligations.

Like other agencies, BIA should also create an informational hub on its website explaining the CTA, answering frequently-asked-questions, and directing businesses to the registry website where they can file beneficial ownership forms. BIA should also utilize modern search engine optimization techniques to make its CTA informational hub easy to find, enabling businesses serving the Native American community to find information about the CTA directly on the BIA website, a trusted source.

Seventh, Treasury should partner with the State Department to get word out about the CTA to American Chambers of Commerce abroad and to members of foreign business communities. Under section 5336(d)(2) requiring federal agency cooperation, Treasury should ask the State Department to instruct U.S. Embassies to distribute electronic and paper notices to relevant business groups and trade associations about the potential CTA disclosure obligations of foreign businesses registered or licensed to do business in the United States and of U.S. entities in which Americans abroad or non-U.S. individuals may have an ownership interest. In addition, the State Department and U.S. Embassies should create informational hubs on their websites explaining the CTA, answering frequently-asked-questions, and directing businesses to the registry website where they can file beneficial ownership forms. Creating these informational hubs will enable Americans abroad and foreign business communities to find information about the CTA directly on a State Department or embassy website, both trusted sources.

Eighth, Treasury should reach out to business trade associations — such as the American Sustainable Business Council, Main Street Alliance, National Federation of Independent Businesses, National Small Business Association, National Small Business Network, Small Business Majority, and U.S. Chamber of Commerce — and ask them to provide CTA information on their websites and consider sending electronic or paper notices to their members about their potential CTA disclosure obligations. Providing information on their websites will enable their members to learn about the CTA from a trusted source.

Finally, the Treasury Secretary should alert the media — including mainstream television, radio, print, and electronic media companies; business news outlets; and trade publications — to the new CTA, and urge journalists to inform their audiences about the potential new beneficial ownership disclosure obligations.

b. Should those steps include direct communications such as mailed notices, and if so to whom should notices be mailed?

Yes, efforts to publicize the CTA should include physical mailings. The beneficial ownership database will only be effective in combating financial malfeasance if reporting companies are aware of their obligations and comply with the CTA. While an increasing number of individuals are online, many people still rely on printed materials sent through the traditional mail system.[202] At the same time, even individuals that engage digitally are more likely to trust mail that physically arrives via the U.S. Postal Service.[203]

As we note in our response to Question 17(a), above, Treasury should instruct federal agencies to send direct paper or electronic communications, including printed, mailed notices, to the mailing address on record for each business that has a relationship with them. Treasury should do the same with states and tribes. In addition, Treasury should ask financial institutions and business trade associations to send a direct communication, such as a mailing, to each business that has an account or membership with them, again to get out word about potential CTA disclosure obligations.

c. What type of information should be included in such a notice, for example, the purposes and uses of the data, and how to access and correct the information?

Content. CTA notices should explain the goals of the CTA; how registry data will be used; which entities are covered and what exemptions are available; how registry data will be used; how to file, access, and correct registry information; when and how to update registry information; any deadlines for filing; the safe harbor; and the penalties for failing to file or filing false, misleading, or incomplete information.

Translation. At a minimum, each mailed paper notice should be printed in both English and Spanish.

Electronic notices and relevant pages related to the CTA which are added to IRS, FinCEN, SBA, State Department, and embassy websites should be translated into additional languages as well. We note that the IRS already translates its online resources into Chinese (Simplified), Chinese (Traditional), Haitian Creole, Korean, Russian, Spanish, and Vietnamese — predominantly so that it can communicate with immigrant taxpayers in the United States that speak those languages and may not fully understand English. Given that the CTA

[202] Over 140 billion units of mail were sent through the U.S. Postal Service in 2019. Drew Desilver and Katherine Schaeffer, "The state of the U.S. Postal Service in 8 charts," Pew Research Center, May 2020, https://www.pewresearch.org/fact-tank/2020/05/14/the-state-of-the-u-s-postal-service-in-8-charts/

[203] U.S. Postal Service, "U.S. Postal Service Tops List Again as Americans' Favorite Government Agency," April 15, 2020, https://about.usps.com/newsroom/national-releases/2020/0415-usps-tops-list-again-as-americans-favorite-government-agency.htm.

applies to all foreign companies that register to do business in the United States and to all foreign nationals who are beneficial owners of U.S. entities, the CTA disclosure obligations affect a more diverse audience than the IRS typically addresses, which justifies translation of CTA related information into a broader set of languages.

Since Arabic, French, German, Hindi, Japanese, and Portuguese are among the 13 most-spoken languages in the world, translations of CTA related information should also be made available online in those languages. Translating CTA related information into those additional languages will increase the likelihood that foreign reporting companies and foreign beneficial owners will learn of their potential CTA disclosure obligations. The beneficial ownership database will only be "highly useful" — in line with 31 U.S.C. 5336 (b)(1)(F)(iv) — in combating financial malfeasance and assisting financial institutions if foreign entities and individuals are aware of their obligations, understand those obligations, and comply with the CTA.

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

No, it is unnecessary to require that reporting companies, applicants, or beneficial owners respond directly to CTA informational notices.

However, as noted in the response to Question 23, every entity or individual filing a form or update with the beneficial ownership registry should be required to attest that the filing individual:

- understands he or she is obligated by law to submit this information to combat money laundering, terrorist financing, and other misconduct;
- understands that criminal and civil penalties may apply to the willful failure to file or to the willful submission of false, misleading, or incomplete information;
- has taken reasonable steps to verify the information about to be submitted; and
- affirms that, to the best of his or her knowledge, the information is accurate and complete.

The registry should require this attestation prior to and in connection with accepting the filing of a beneficial ownership disclosure form or update, and minimize any burden on the filing individual by permitting the attestation to be made by checking a box on the electronic filing.

18) Section 5336(e)(2) requires states and Indian tribes, as a condition of receiving certain funds, to have their Secretary of State or a similar office in each state or Indian tribe periodically provide notice of reporting obligations and a copy of, or internet link to, the reporting company form created by FinCEN.

a. How should this requirement be implemented?

States and tribes should include CTA related notices and registry links on their official governmental websites related to forming, registering, or licensing entities to do business in the United States, and on their web pages related to the payment of formation, registration, or renewal fees. States and tribes should also include CTA related notices on their webpages related to obtaining a state license to conduct certain types of business within the state, obtaining a "Doing Business As" or "fictitious" business name for a sole proprietorship, and forming or registering a business trust, foundation, cooperative, or other business association. In addition, states and tribes should post CTA related notices on their web pages related to online business tax filings, including corporate, partnership, sole proprietorship, trust, and foundation tax returns, payroll taxes, and estimated quarterly taxes. States and tribes should consider directly asking entities whether they need to file or update their information with the FinCEN registry when these entities submit any tax filings or annual corporate filings, file forms to create or register businesses, or submit applications to obtain or renew licenses. If an entity checks a box indicating it may need to file or update its CTA information, states and tribes should immediately direct the entity to the FinCEN registry (perhaps even opening an online pop-up window for electronic filers). All of these postings will help ensure that their businesses get word of the new CTA disclosure obligations.

In addition, as explained above in FACT's response to Question 17(a), states and tribes should create an informational hub on their websites explaining the CTA, answering frequently-asked-questions, and directing entities to the registry to file their beneficial ownership information. Creating informational hubs and utilizing modern search engine optimization techniques will enable businesses to find information about the CTA directly on a state or tribal website, a trusted source.

When mailing paper copies of other notices, documents, or other materials to the businesses formed or registered by the state or tribe, the relevant state or tribal office should include information, possibly in the form of a flyer, alerting those businesses to their potential CTA disclosure obligations, including the need to update any beneficial ownership information that has changed.

States and tribes should also print paper notices and post them visibly in their offices to inform anyone entering their buildings of the new CTA beneficial ownership disclosure requirements for certain entities.

To inform states and tribes of their notice obligations, in addition to convening a special gathering as suggested in FACT's response to Question 17(a), Treasury should consider the following ways to reach out to them.

- **States**. Treasury should reach out to the National Association of Secretaries of State to obtain contact information for the relevant offices that handle entity formations, registrations, and licensing in each state, the District of Columbia, and U.S. territories. If the IRS does not already maintain contact information for the relevant tax authorities in each of those jurisdictions, Treasury should reach out to the Federation of Tax Administrators (FTA) to obtain that information. Treasury should then inform the relevant offices in each jurisdiction of its obligations under the CTA in the manner discussed above.

- **Indian Tribes**. As noted in our response to Question 17, Treasury should partner with the Department of the Interior's Bureau of Indian Affairs (BIA) which maintains the list of all federally recognized Indian Tribes. Treasury should ask BIA to contact each of those tribes, inform them of the CTA disclosure obligations that will apply to business entities active in the Native American community, and ask each such tribe to identify which tribal office, if any, handles entity formations, registrations, and licensing and how many entities have been formed by the tribe over the last five years. BIA should also compile a list and contact information for those tribal offices that could be shared with Treasury. At the appropriate time, as discussed above, Treasury should ask BIA to contact the key tribal offices to notify the entities formed, registered, or licensed under tribal laws or rules of their potential CTA disclosure obligations.

b. What form should the notice take?

See FACT's response to Question 17, above.

c. Should this notice be provided yearly, or on some other periodic schedule?

CTA related notices should appear on state and tribal websites at all times; paper notices should be sent when other notices or mailings are scheduled to be sent to businesses formed or registered by the states or tribes, but must be sent on at least an annual basis.

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

Updating Registry Information. Updated, timely information is key to ensuring that the beneficial ownership registry is accurate, complete, and highly useful to registry users. Section 5336(b)(1)(D) states that "a reporting company shall, in a timely manner, and not later than 1 year after the date on which there is a change with respect to any information … submit to FinCEN a report that updates the information relating to the change." Section 5336(b)(3)(A)(ii) requires individuals and entities with FinCEN identifiers to update their registry information "in a timely manner consistent with" the updating requirement that applies to reporting companies.

To implement these legal requirements in an effective manner, the rule should provide guidance on several issues. First, the rule should make clear who is legally obligated to update their registry information in a timely manner. The statute identifies three different groups. First are "reporting companies" which include all of the business entities required to file beneficial ownership information with the registry.[204] Second are individuals and entities holding FinCEN identifiers.[205] Third are exempt entities with special reporting obligations, including pooled investment vehicles,[206] exempt subsidiaries,[207] and dormant entities.[208] The rule could also clarify the three types of registry filings requiring updates: beneficial ownership reports, including reports filed by exempt entities immediately after they lose their exempt status; FinCEN identifier filings; and pooled investment vehicle certifications.

Equally important is for the rule to provide guidance on how to interpret the statutory requirement that registry information be updated "in a timely manner, and not later than 1 year" after a change occurs. To ensure this provision isn't interpreted to mean updates are due one year after a change occurs — ignoring the "timely manner" requirement altogether — the rule should establish at least four guiding principles.

First, the rule should state that the legal requirement to update registry information "in a timely manner" means that, as a general practice, registry information should be updated as soon as practical after a change occurs.

[204] 31 U.S.C. 5336(b)(1)(D).
[205] 31 U.S.C. 5336(b)(3)(A)(ii).
[206] 31 U.S.C. 5336(b)(2)(C).
[207] 31 U.S.C. 5336(b)(2)(D).
[208] 31 U.S.C. 5336(b)(2)(E).

Second, the rule should state that registry information should generally be updated within 30 days of a change, unless a reasonable justification exists for taking longer. The rule should advise that a change in the identity *or* identifying details of a beneficial owner should be reported within this 30-day window, again, unless a reasonable justification exists for taking longer. Interpreting "in a timely manner" to impose a 30-day deadline for reporting a new or replacement beneficial owner (unless a reasonable justification exists for taking longer) would ensure that information at the core of the CTA registry is accurate, complete, and highly useful.

Third, the report should warn against anyone taking a full year to update registry information, unless that person can offer a reasonable justification for the delay if challenged by FinCEN, a regulator, law enforcement agency, or financial institution.

Fourth, while we hope that FinCEN will adopt the 30-day formula proposed above, under no circumstances should the rule adopt an updating period that extends beyond 90 days. In order for the registry to be highly useful to law enforcement, national security and intelligence agencies, and financial institutions,[209] the database needs to maintain up-to-date information. Every additional day that goes by without proper updates could slow down investigations, significantly decreasing the utility of the information for registry users.[210] At the same time, nearly every legitimate business already interacts with some governmental process or procedure within a 90-day window — either through their quarterly payroll taxes or quarterly estimated taxes. When these entities file their quarterly taxes with the Internal Revenue Service or state tax authorities, the IRS and state tax authorities could, as part of the tax return process, remind these entities to update their beneficial ownership information in the registry if it has changed, and these agencies could then direct the entity to the FinCEN registry (perhaps even opening an online pop-up window for electronic filers), as FACT discusses further in response to Questions 17 and 18. This would meet the statutory requirements to collect information through existing processes and procedures[211] while also minimizing burdens on reporting companies.[212]

The rule should also make clear that the CTA's requirement for timely updates applies to each information change as it occurs, and does not permit persons to wait and provide, for example, a single yearly update regardless of the number of intervening changes over the prior year.

It is also critical that, regardless of the duration between updating periods, *each* change in beneficial ownership information be subsequently logged and dated in the registry so that law enforcement, national security and intelligence agencies, regulators, and financial institutions can eventually connect suspicious activity tied to an entity to the appropriate beneficial owner on any particular date and time. Failing to capture each change in the registry would violate the statutory requirements that "a reporting company

[209] In line with 31 U.S.C. 5336 (b)(1)(F)(iv).
[210] Contrary to 31 U.S.C. 5336 (b)(1)(F)(iv).
[211] In line with 31 U.S.C. 5336 (b)(1)(F)(ii).
[212] In line with 31 U.S.C. 5336 (b)(1)(F)(iii).

shall, … after the date on which there is a change with respect to any information…, submit to FinCEN a report that updates the information relating to the change."[213] It is notable that lawmakers chose to require that updates be filed related to each "change" in ownership, rather than requiring that companies simply file reports on a periodic basis which indicated their current beneficial ownership status at one particular moment in time. This term helps ensure that *each* change was logged in the registry to prevent bad actors from simply selling an entity the day before it needed to file its beneficial ownership report, thereby evading all disclosure under the CTA.

Next, the rule may want to provide guidance related to how an individual or entity provides updated information to the registry. To minimize burdens on filers, the registry should consider designing a form that enables filers to update specific information without having to re-file an entire report or other filing. If multiple changes in beneficial ownership have occurred since the previous filing, the form should allow the filer to easily submit a log of beneficial ownership updates detailing each update on the same form and indicating when each change occurred. That update form should also record the date it is submitted, identifying information for the individual providing the update, and an attestation by that individual that he or she has the authority to make the update and understands the penalties for filing inaccurate, incomplete, or misleading information.

To encourage prompt updates, the rule may want to provide guidance on the penalties that apply for failing to do so. The CTA creates a "safe harbor" barring the imposition of penalties on anyone who "has reason to believe" a report they submitted to the registry contains inaccurate information and "voluntarily and promptly, and in no case later than 90 days" submits a corrected report.[214] By analogy, the rule should bar imposing penalties on anyone who knows that their registry filing contains outdated information and "voluntarily and promptly, and in no case later than 90 days" files updated information. The report should also apply the exception that permits a penalty to be imposed if the person acted purposely to "evad[e]" the CTA's reporting requirements and had "actual knowledge" the information at issue was "inaccurate."[215]

The rule may also want to note that if the safe harbor does not apply, persons who "willfully fail to report … updated beneficial ownership information" to the registry can incur a wide range of civil or criminal penalties.[216] Possible penalties include a civil fine of up to $500 "for each day that the violation continues or has not been remedied," a criminal fine of up to $10,000, and imprisonment for not more than two years.[217]

The rule should clarify that the 90-day period specified in the section related to imposing civil and criminal penalties does not negate the statute's requirement that updates be filed "in a timely manner" — which normally would require updates much

[213] 31 U.S.C. 5336(b)(1)(D).
[214] 31 U.S.C. 5336(h)(3)(C)(i)(I).
[215] 31 U.S.C. 5336(h)(3)(C)(i)(II).
[216] 31 U.S.C. 5336(h)(1)(B). The law also states that, in the penalty section, "the term 'willfully' means the voluntary, intentional violation of a known legal duty." 31 U.S.C. 5336(h)(6).
[217] 31 U.S.C. 5336(h)(3)(A).

sooner than 90 days. To deter persons from ignoring the legal requirement for timely filings, the rule should cite Treasury's authority under 31 U.S.C. 5336(b)(4)(B)(ii) to establish administrative penalties for delayed filings. For example, if an individual creates a pattern of delayed filings and fails to respond to FinCEN warnings, FinCEN should be able administratively to bar that individual from submitting future filings.

Finally, the rule may want to note that the CTA requires the Treasury Secretary, in consultation with the Attorney General and Secretary of Homeland Security, to evaluate whether registry updates "related to a change in ownership" should be made within a shorter period of time than what is specified in section 5336(b)(1)(D).[218] The CTA also authorizes and directs Treasury, based upon that evaluation, to incorporate appropriate changes into the regulations implementing the CTA by January 1, 2023.

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

Yes, the rule should require all registry filers to affirmatively confirm the accuracy of its registry information on an annual basis. This annual confirmation should be required for all registry filings, including beneficial ownership reports, FinCEN identifier filings, and pooled investment vehicle certifications. Annual updates would not only help ensure compliance with the law's requirement for timely updates, but also help ensure registry data is accurate, complete, and highly useful. FinCEN should design the registry to send an automated reminder to each filer when a year has elapsed from the filing's submission that its confirmation is due and make it easy to file by checking a box if no changes are required and providing a link to an update form for any needed changes, as described in FACT's response to Question 19. This approach would mirror the LEI system that also requires an annual confirmation of the information in its database.

21) For those reporting companies without FinCEN identifiers, what should be considered a "timely manner"[219] for updating a change in beneficial ownership?

See FACT's response to Question 19, above.

a. Should this period differ based on the type of reporting company?

No. The law creates one standard for reporting companies filing information updates and provides no statutory basis for setting different standards for different types of entities. In addition, given the statutory language requiring FinCEN identifier filings to be treated in a "consistent" manner with beneficial ownership reports, those filings should be subject to the same standard for filing updates, whether the update is provided by an individual or entity.

[218] 31 U.S.C. 5336(b)(1)(E).
[219] 31 U.S.C. 5336(b)(3)(A)(ii), added by CTA Section 6403(a).

b. What factors should be taken into account in determining this period?

See FACT's response to Question 19, above.

c. How much time should reporting companies be given to update beneficial owner information upon a change of ownership?

See FACT's response to Question 19, above.

d. What are the benefits or drawbacks of allowing a longer period to report a change of beneficial ownership?

See FACT's response to Question 21(a), above. In addition, as mentioned above, the CTA already requires the Treasury Secretary, in consultation with the Attorney General and Secretary of Homeland Security, to evaluate whether registry updates "related to a change in ownership" should be made within a shorter — not longer — period of time than what is specified in section 5336(b)(1)(D).[220] The CTA also authorizes and directs Treasury, based upon that evaluation, to incorporate appropriate changes into the regulations implementing the CTA by January 1, 2023.

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

Providing a Safe Harbor. Reporting companies must have an easy, quick way to correct errors in information filed with the registry such as misspelled names, transposed numbers, wrong addresses, or even inadvertently omitted beneficial owners. Facilitating data correction is essential to creating a database that is accurate, complete, and highly useful.

For that reason, the CTA includes a "safe harbor" provision which allows persons to correct registry data without incurring any penalty. Section 5336(h)(3)(C)(i)(I) states:

> "(I) In general.—Except as provided in subclause (II), a person shall not be subject to civil or criminal penalty under subparagraph (A) if the person—
>
> > "(aa) has reason to believe that any report submitted by the person in accordance with subsection (b) contains inaccurate information; and
> >
> > "(bb) in accordance with regulations issued by the Secretary, voluntarily and promptly, and in no case later than 90 days after the date on which the

[220] 31 U.S.C. 5336(b)(1)(E).

> person submitted the report, submits a report containing corrected information."[221]

Essentially, the safe harbor protects anyone who voluntarily and promptly corrects registry information that they have reason to believe is inaccurate.

At the same time, to guard against the law's safe harbor being exploited by bad actors, the CTA disallows its protections in certain circumstances:

> "(II) Exceptions.—A person shall not be exempt from penalty under clause (i) if, at the time the person submits the report required by subsection (b), the person—
>
> > "(aa) acts for the purpose of evading the reporting requirements under subsection (b); and
> >
> > "(bb) has actual knowledge that any information contained in the report is inaccurate."[222]

These provisions make clear that the law's safe harbor does not protect persons who knowingly submit inaccurate information to the registry for the purpose of evading the law's disclosure requirements.

To implement the safe harbor, the rule should recognize both its role in ensuring registry accuracy — making it safe for persons to revise incorrect data — and its vulnerability to abuse, especially by persons who might deliberately submit false data, engage in suspicious activity, and then correct the data afterward.

The rule should provide guidance indicating that, while the safe harbor applies expressly to beneficial ownership reports, the same approach should be taken by FinCEN with respect to other registry filings, including FinCEN identifier filings, pooled investment vehicle certifications, and registry updates, as explained in FACT's response to Question 19.

An entity or individual would likely seek to invoke the safe harbor only if a federal, state, or tribal law enforcement agency, including FinCEN, were to initiate an investigation into or seek to impose penalties related to inaccurate information in a registry filing. The rule should consider providing guidance and procedures related to how a reporting company can invoke the safe harbor, while leaving decisions on whether and how to apply the safe harbor to law enforcement offices exercising their normal prosecutorial and enforcement discretion and their normal criminal and civil enforcement procedures.

Three Alternatives for Reporting Inaccurate Data. The rule may also want to acknowledge that registry users have at least three alternatives for reporting potentially inaccurate information in the registry. Those alternatives include filing a data discrepancy

[221] 31 U.S.C. 5336(h)(3)(C)(i)(I).
[222] 31 U.S.C. 5336(h)(3)(C)(i)(II).

report, informing the Treasury IG, or filing a SAR. The rule should consider providing guidance about which alternative is appropriate under what circumstances, while also making clear that, no matter which alternative is used, the person that filed the incorrect information may invoke the safe harbor to contest a penalty assessment.

In E.U. beneficial ownership registries, if potentially inaccurate data is detected, financial institutions are required to file an electronic data "discrepancy" report with the registry.[223] The registry then automatically notifies the reporting company of the potential problem (without disclosing who identified it), and provides the reporting company with an opportunity to correct the information or otherwise resolve the apparent discrepancy. E.U. partners have indicated this system has been highly effective in improving the accuracy of their registries; a similar system should be established for the U.S. registry.[224]

FinCEN should ensure that every registry filing permits a registry user to file a data discrepancy report, which should be as easy as pushing a button and identifying the specific error. Filing data discrepancy reports should be mandatory for all registry users who spot potentially inaccurate information, whether the error is minor like a misspelled name or more serious like the failure to name a beneficial owner. To minimize the reporting burden, the discrepancy report should be limited to identifying the error without requiring speculation about the gravity of the error, its cause, or legal implications. The discrepancy report should take only minutes to complete and file, and the filer should be given absolute protection against incurring any liability for its submission.

Equally important to the filing of a discrepancy report is a procedure for resolving potential discrepancies. FinCEN personnel, perhaps working with the Treasury IG's office, will have to design a procedure to review and resolve potential discrepancies in order to ensure the registry's data is accurate, complete, and highly useful.

The second alternative for registry users detecting potentially inaccurate data would be to report the problem to the Treasury IG which is statutorily charged with establishing a "complaint process" for registry users, including complaints about inaccurate, misleading, or incomplete registry data.[225] The rule should provide guidance about when this second alternative should be used, perhaps confining it to situations where the data error appears to be more than an inadvertent or minor mistake, and making clear that such complaints should be filed in addition to and not in place of a data discrepancy report. The rule should also provide guidance on how the Treasury IG complaint process should work, including, for example, specifying that it should enable persons to provide complaints online, by telephone, or in person, and offer the opportunity to do so anonymously. The rule should also require the registry to establish a mechanism for the Treasury IG to alert FinCEN personnel to a data problem and track its

[223] European Parliament and the Council of the European Union, "Directive 2015/849, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing," Document 02015L0849-20180709, Articles 30(4) and 31(5), May 20, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015L0849-20180709.
[224] *See* FACT's response to Question 28 and Additional Issue (1), Designing an Effective Database, below.
[225] 31 U.S.C. 5336(h)(4).

resolution. Equally important is for FinCEN to design a procedure for resolving data problems reported by the IG.

A third alternative for a financial institution that detects potentially inaccurate registry information is to file a Suspicious Activity Report (SAR). To do so, the financial institution would have to meet the standard for reporting suspicious activity. In addition, to facilitate SAR reporting, FinCEN should amend the SAR form by adding a field allowing the filer to cite a beneficial ownership registry problem as the basis for filing the SAR. Because only financial institutions may file SARs, the rule may want to characterize the Treasury IG complaint process as a way for registry users other than financial institutions to report data discrepancies that signal suspicious activity.

Invoking the safe harbor against civil and criminal penalties for filing false, incomplete, or misleading registry information should be available whether the incorrect information was flagged via a discrepancy report, Treasury IG complaint, or SAR. The rule should also state plainly that, regardless of how inaccurate registry data is reported, the safe harbor remains an option for the filer to contest a penalty assessment.

The rule should also consider discussing the penalties for submitting, inaccurate, incomplete or misleading information if the safe harbor is not available.[226] The rule should note that a range of civil and criminal penalties are available to ensure the penalty chosen is commensurate with the misconduct at issue.

Terminating Entities that Refuse to Register. The rule should also consider whether Treasury, using statutory authority provided in 31 U.S.C. 5336(b)(1)(F), (b)(4)(B)(ii), and (d)(2) and (d)(3), should work with the states and tribes to establish an automated process that, when manually triggered by FinCEN, would result in an entity that willfully refuses to file with the registry being terminated by the relevant state or tribe and barred from doing business in the United States. Terminating a U.S. entity or barring a foreign entity from doing business in the United States should be established by the rule as a potential administrative action that could be taken in tandem with or perhaps in place of imposing a civil or criminal penalty on the offending entity. Taking that action would depend upon an objective fact — either an entity has filed a beneficial ownership report with the U.S. registry or it has not — which FinCEN could authoritatively determine. Related disputes, such as whether the entity is entitled to an exemption, should be resolved using FinCEN's existing procedures.

This administrative action would not only be commensurate with action taken by an entity to defy U.S. law, it is essential to ensuring that Treasury, in compliance with the CTA, can prevent entities with hidden owners from operating within the United States. The threat of automatic termination of an unregistered U.S. entity or revocation of its authority to do business within the United States upon request by FinCEN would also create a powerful incentive for entities to comply with their beneficial ownership disclosure obligations.

[226] 31 U.S.C. 5336(h)(3).

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

a. Should reporting companies be required to certify the accuracy of their information when they submit it?

Yes, requiring reporting companies to certify or attest to the accuracy of the information submitted to the registry will improve the quality of the database. The same requirement should apply to all forms containing information submitted to the registry. The presence of this certification or attestation would also make it easier to impose criminal or civil penalties on persons who willfully submit false, misleading, or incomplete information.

b. If so, what should this certification cover?

The registry should require an attestation by an individual authorized to provide it. That individual should be required to attest that he or she:

- understands the information is obligated by law to combat money laundering, terrorist financing, and other misconduct;
- understands that criminal and civil penalties apply to the willful failure to file or the willful submission of false, misleading, or incomplete information;
- has taken reasonable steps to verify the information about to be submitted; and
- affirms that, to the best of his or her knowledge, the information is accurate and complete.

The attestation should be required to be submitted in tandem with submitting information to the registry. To minimize the burden on the individual submitting the attestation, registry forms should enable the attesting individual to check a box. The form should also require identifying information for the attesting individual, including the individual's full legal name, birthdate, address, job title, employer, telephone number, and email address. FinCEN could consider utilizing an existing government-issued sign-in service like login.gov, with strong authentication and identity verification protocols, which could pre-populate these identifying fields for the attesting individual upon subsequent filings. Doing so could help minimize burdens on filers,[227] utilize existing federal processes and procedures,[228] and protect the security of the registry.

[227] In line with 31 U.S.C. 5336 (b)(1)(F)(iii).
[228] In line with 31 U.S.C. 5336 (b)(1)(F)(ii).

c. Should reporting companies be required to submit copies of a beneficial owner's acceptable identification document?

Submitting copies of a beneficial owner's acceptable identification document may be necessary in certain circumstances, but in the majority of situations it would be unnecessary, burdensome, and duplicative, and would significantly increase data storage costs for FinCEN.

Statutory Requirements. The CTA mandates that in "promulgating the regulations […] the Secretary of the Treasury shall, to the greatest extent practicable—

> "(i) establish partnerships with State, local, and Tribal governmental agencies;
>
> "(ii) collect information described in paragraph (2) through existing Federal, State, and local processes and procedures;
>
> "(iii) minimize burdens on reporting companies associated with the collection of the information described in paragraph (2) …; and
>
> "(iv) collect information described in paragraph (2) in a form and manner that ensures the information is highly useful in—
>
>> "(I) facilitating important national security, intelligence, and law enforcement activities; and
>>
>> "(II) confirming beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law."[229]

The CTA also requires federal, state, and tribal agencies, "to the extent practicable, and consistent with applicable legal protections," to "cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information."[230]

Acceptable Identification Document. According to the CTA, "the term 'acceptable identification document' means, with respect to an individual—

> "(A) a nonexpired passport issued by the United States;

[229] 31 U.S.C. 5336 (b)(1)(F).
[230] 31 U.S.C. 5336(d)(2).

> "(B) a nonexpired identification document issued by a State, local government, or Indian Tribe to the individual acting for the purpose of identification of that individual;
>
> "(C) a nonexpired driver's license issued by a State; or
>
> "(D) if the individual does not have a document described in subparagraph (A), (B), or (C), a nonexpired passport issued by a foreign government."[231]

U.S. Passports. With regard to subparagraph (A),[232] the Department of State already maintains a database — known as the Consular Consolidated Database (CCD) — which stores (among other data) the names, birthdates, home/business addresses, passport numbers, and biometric data (including fingerprints and facial images) corresponding to the individual associated with each U.S. passport.[233]

Should a beneficial owner choose to rely on their U.S. passport as their acceptable identification document, rather than requiring the reporting company to upload a copy of the passport directly to the registry, FinCEN should enter into a partnership with the Department of State giving the FinCEN registry automated direct access to the CCD (or another similar system) to verify submitted information. FinCEN should also establish automated software procedures that use the information in the CCD to verify — in real time — that the name, birthdate, and passport number submitted to the U.S. registry match the records on file with the CCD.

Should a reporting company — wittingly or unwittingly — attempt to submit beneficial ownership information in a registry filing utilizing passport information that does not match the Department of State's database, the registry should cause a pop-up message to appear alerting the reporting company that the information does not match and must be corrected before proceeding, and the registry should not accept submission of the filing until the passport information matches the CCD information.

The Department of State already has partnerships with other federal agencies in which it has granted them access to the CCD, including the Department of Homeland Security, Department of Commerce, Department of Defense, Department of Justice, and Office of Personnel Management.[234] In addition, software already exists to create a real-time automated verification

[231] 31 U.S.C. 5336 (a)(1).
[232] 31 U.S.C. 5336 (a)(1)(A).
[233] *See* U.S. Department of State, "Privacy Impact Assessment, Consular Consolidated Database (CCD)," May 2019, https://www.state.gov/wp-content/uploads/2019/05/Consular-Consolidated-Database-CCD.pdf.
[234] *See* U.S. Department of State, "Privacy Impact Assessment, Consular Consolidated Database (CCD)," May 2019, https://www.state.gov/wp-content/uploads/2019/05/Consular-Consolidated-Database-CCD.pdf.

system to compare the data in CCD versus the registry and block acceptance of a filing until the two match. Those types of systems are already in use in some beneficial ownership registries as well as in U.S. business settings when, for example, a buyer must type in the correct credit card information before being allowed to submit a purchase order.

A FinCEN partnership with the Department of State, as suggested above, would utilize existing Federal processes and procedures to verify beneficial ownership information in line with 31 U.S.C. 5336 (b)(1)(F)(ii), and requesting this level of departmental cooperation would be in line with requirements for federal agency cooperation in 31 U.S.C. 5336(d)(2). Verifying beneficial ownership information in real-time prior to acceptance of a registry filing would also reduce costs for reporting companies — in line with 31 U.S.C. 5336 (b)(1)(F)(iii) — as it should:

- take less time for reporting companies to correct errors when first submitting a registry filing than have to visit the registry a second time to correct or refile prior information; and
- ensure accurate information, thereby speeding up the account opening process when a financial institution cross-checks the registry information.

In addition, verifying beneficial ownership information in real-time prior to the acceptance of a filing in the registry would reduce database errors and noise, reduce time spent by financial institutions and others identifying and seeking data corrections, and help ensure that existing, natural persons are behind the names of beneficial owners listed in registry filings — helping FinCEN meet the statutory requirements of 31 U.S.C. 5336 (b)(1)(F)(iv).

Identification Documents and Driver's Licenses. With regard to subparagraphs (B) and (C),[235] states, local governments, and tribes already maintain databases with names, birthdates, addresses, and photographs corresponding to the individual associated with the identification documents and driver's licenses they issue. These databases, like the CCD passport database, could help ensure the accuracy of the beneficial ownership data in the FinCEN registry.

States have already established secure, automated systems — such as Nlets — that can be used to access their databases. According to its website, Nlets:

> "is a private not for profit corporation owned by the States that was created more than 50 years ago by the 50 state law enforcement agencies. The user population is made up of all of the United States and its territories, all Federal agencies with a justice component, selected

[235] 31 U.S.C. 5336 (a)(1)(B–C).

> international agencies, and a variety of strategic partners that serve the law enforcement community-cooperatively exchanging data.
>
> "The types of data being exchanged varies from motor vehicle and drivers' data, to Canadian and Interpol database located in Lyon France, to state criminal history records and driver license and corrections images. Operations consist of more than 1.6 billion transactions a year to over 1 million PC, mobile and handheld devices in the U.S. and Canada at 45,000 user agencies and to 1.3 million individual users."[236]

Among other features, Nlets allows users to securely query data to confirm an individual's name, birthdate, address, and identification number from a driver's license, permit, or identification card issued by a state, the District of Columbia, or a territory of the United States.[237]

Should a reporting company choose to rely on a beneficial owner's identification document or driver's license issued by a state, local, or tribal office as the individual's acceptable identification document, rather than requiring the reporting company to upload a copy of each such document directly to the registry, FinCEN should create a partnership with a system like Nlets. FinCEN should then establish automated software procedures that verify in real time via Nlets (or a similar system) that the name, birthdate, and unique identification number of a beneficial owner submitted to the registry match the record on file for that individual with the relevant Department of Motor Vehicles or similar office.

Should a reporting company — wittingly or unwittingly — attempt to submit a registry filing utilizing identifying information that does not match the information in the relevant Department of Motor Vehicles (or similar office) database, the registry should send a pop-up message alerting the reporting company that the information does not match and must be corrected before proceeding. In addition, the registry should not accept the filing until its identifying information matches the information in the relevant state, local, or tribal database.

Nlets already has partnerships with multiple federal agencies, including the Department of Defense, Department of Interior, Department of Justice, Department of Veterans Affairs, Immigration and Customs Enforcement, and the Postal Inspection Service.[238] It should be open to a similar partnership with FinCEN.

Establishing partnerships with state, local, and tribal agencies through systems like Nlets would meet the statutory requirements of 31 U.S.C. 5336

[236] Nlets, "Who We Are," 2021, https://www.nlets.org/about/who-we-are.
[237] Nlets Wiki, "Section 13: Driver License Transactions," February 13, 2021, https://wiki.nlets.org/index.php/Section_13:_Driver_License_Transactions.
[238] Nlets, "Our Members," 2021, https://www.nlets.org/our-members/members.

(b)(1)(F)(i), and it would utilize existing state and local processes and procedures to verify beneficial ownership information in line with 31 U.S.C. 5336 (b)(1)(F)(ii). Requesting this level of cooperation from state, local, and tribal agencies would also be in line with the requirements for agency cooperation in 31 U.S.C. 5336(d)(2). In addition, verifying beneficial ownership information in real-time prior to acceptance of a registry filing would reduce costs for reporting companies — in line with 31 U.S.C. 5336 (b)(1)(F)(iii) — as it should:

- take less time for reporting companies to correct errors when first submitting a registry filing than requiring the company to visit the registry a second time to correct or refile prior information; and
- ensure accurate information, thereby speeding up the account opening process when a financial institution cross-checks the registry information.

Verifying beneficial ownership information in real-time prior to the acceptance of a filing in the registry would also reduce database errors and noise, reduce time spent by financial institutions and others identifying and seeking data corrections, and help ensure that existing, natural persons are behind the names of beneficial owners listed in registry filings — thereby helping FinCEN meet the statutory requirements of 31 U.S.C. 5336(b)(1)(F)(iv).

Foreign Passports. Given the increased difficulties associated with verifying information described in subparagraph (D),[239] Congress explicitly required reporting companies to use a foreign passport number as a beneficial owner's acceptable identification document ONLY when the individual did not have a document described in subparagraphs (A), (B), or (C).[240] The rule should make that statutory requirement clear in the implementing regulations and require the registry to include that prohibition in the beneficial ownership registry forms.

In addition to data on U.S. passport holders, the Department of State maintains information on many foreign nationals (such as nonimmigrant and immigrant visa applicants) — including copies of their foreign passport information — in its Consular Consolidated Database (CCD). The CCD stores (among other data) the names, birthdates, home/business addresses, passport numbers, and biometric data (including fingerprints and facial images) corresponding to the individual associated with each foreign national in the database.[241] The U.S. registry should be configured to draw upon that CCD information to verify information on as many occasions as possible for beneficial owners holding foreign passports.

[239] 31 U.S.C. 5336 (a)(1)(D).
[240] 31 U.S.C. 5336 (a)(1)(A–C).
[241] U.S. Department of State, "Privacy Impact Assessment, Consular Consolidated Database (CCD)," May 2019, https://www.state.gov/wp-content/uploads/2019/05/Consular-Consolidated-Database-CCD.pdf.

To increase the opportunity to use the CCD for verification purposes, the registry could require that any foreign national who holds passports from multiple countries and previously applied for a U.S. visa must utilize the passport used during the visa application process. That restriction would make it more likely that the individual's foreign passport information is contained in the CCD.

In collaboration with the Department of State, FinCEN should also work to establish partnerships with foreign governments, especially close allies, to verify the accuracy of the names, birthdates, addresses, and passport numbers of beneficial owners from those countries. If both countries have beneficial ownership registries, FinCEN could work with the Department of State to exchange passport verification data on a reciprocal basis.

If FinCEN were unable to establish partnerships with some foreign governments to verify passport identification information, the rule should consider imposing additional verification requirements for beneficial owners from those countries. For example, if a reporting company names a beneficial owner whose identity cannot be verified in the CCD, and if that beneficial owner or reporting company resides or is formed or headquartered in a high-risk jurisdiction that has declined to permit automated verification of its passport information, then the rule should require the reporting company to submit a copy of the pages from an unexpired foreign passport containing the beneficial owner's name, birthdate, address, and photograph. Requiring that additional information would help ensure that the registry collects information that is "highly useful in—

> "(I) facilitating important national security, intelligence, and law enforcement activities; and
>
> "(II) confirming beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law."[242]

Verifying Addresses. Because passports, identification documents, and driver's licenses may not contain up-to-date residential addresses or business addresses, they may not provide useful information to verify addresses supplied to the registry for some beneficial owners. To reduce address errors, the registry should utilize common software options to ensure that addresses submitted to the registry exist and comply with U.S. Postal Service standards. Again, verifying this information in real time prior to acceptance of a registry filing would meet the statutory requirements of 31 U.S.C. 5336 (b)(1)(F)(i) and 31 U.S.C. 5336 (b)(1)(F)(ii), as described above. Requesting cooperation from the U.S. Postal Service would be in line with the requirements for agency cooperation in 31 U.S.C. 5336(d)(2). In addition, ensuring correct addresses would reduce reporting

[242] 31 U.S.C. 5336 (b)(1)(F)(iv).

company costs as explained earlier as well as reduce database errors and noise, reduce time spent by financial institutions and others identifying and seeking data corrections, and help ensure that registry filings cite addresses that really exist, thereby helping FinCEN meet the statutory requirements of 31 U.S.C. 5336 (b)(1)(F)(iv).

All of the measures just described would help ensure that the data provided to the registry is accurate, complete, and highly useful. In addition to establishing procedures to require the verification of certain data before accepting a registry filing, the registry should use FinCEN's existing e-filing protocols that prohibit the acceptance of filings with certain blank fields and automatically format certain fields to ensure information is entered correctly.

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

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

Yes, in addition to using the same e-filing protocols used for BSA reports, FinCEN should invest in a wide range of independent, automated verification techniques as described in response to Question 23(c).

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

See FACT's responses to Questions 23(c), 31, and 47(c) as well as FACT's comments regarding Additional Issue (1), Designing an Effective Database. Investing in robust verification and validation mechanisms is critical to ensuring incoming registry data is accurate, complete, and highly useful, and should be a priority.

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

Handling Applicants and Shelf Companies. Applicant information should be disclosed to the registry in an initial beneficial ownership filing. Applicant information does not need to be included in subsequent filings, since the registry should retain a historical record of that first filing. If beneficial owners are later changed, the reporting company should file an updated report with the relevant information; the updated report should not be required to name the original applicant, since that information should remain on file within the registry and be readily accessible to registry users.

As we discuss later in our response to Question 38, applicant information can be extremely valuable data from an anti-money laundering, terrorist financing, anti-corruption, national security, intelligence, and tax compliance perspective and — following enactment of the CTA — is likely to become even more valuable. It is especially useful when applicants seek to form or register a company for the purpose of putting it "on the shelf," allowing it to age in a dormant state, and then selling or transferring it to a third party.

Shelf companies are a common form of legal entity often misused by money launderers and corrupt actors. According to the World Bank's Stolen Asset Recovery Initiative:

> "The term "shelf company" is typically (although not uniformly) applied to a company that (a) is incorporated with a standard memorandum or articles of association; (b) has inactive shareholders, directors, and secretary; and (c) is left dormant—that is, sitting "on a shelf "—for the purpose of later being sold (see box 3.3). When the shelf company is sold, the inactive shareholders transfer their shares to the purchaser, and the directors and secretary submit their resignations. Upon transfer, the purchaser may receive the company's credit and tax history. It is possible that the company director(s) will continue in function as nominees, in which case, the outside world only sees a change of ownership—assuming, that is, that the change in ownership is actually registered somewhere, which is not necessarily the case."[243]

Law enforcement officials have long expressed concern about the abuse of shelf companies. In 2009, former FinCEN Director Jennifer Shasky, then serving as Senior Counsel to the Deputy Attorney General, testified before the Senate Committee on Homeland Security and Governmental Affairs, stating:

> "[M]any problem companies encountered by law enforcement are so-called "shelf", or aged, companies. Law enforcement has seen time and again that criminals can easily throw investigators off the trail by purchasing shelf companies and then never officially transferring the ownership. In such cases the investigation often leads to a formation agent who has long ago sold the company with no records of the purchaser and no obligation to note the ownership change."[244]

The CTA sought to curb the abuses associated with shelf companies by requiring the persons who establish them — the lawyers, accountants, trust companies, corporate

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[243] 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, https://openknowledge.worldbank.org/handle/10986/2363, p. 37.

[244] Jennifer Shasky, "Business Formation and Financial Crime: Finding A Legislative Solution," U.S. Department of Justice, November 5, 2009, https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/11/05/09/11-05-09-shasky-business-formation-financial-crime.pdf.

service providers, and other formation agents — to file identifying information with the registry in their role as "applicants," persons applying to establish an entity. In order to prevent bad actors from utilizing "shelf companies" to evade the CTA's disclosure obligations, the rule should mandate that applicant information be reported to the registry in the initial beneficial ownership filing so that a record of the applicant remains available should the reporting company become involved with wrongdoing.

FinCEN Identifier

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

Using FinCEN Identifiers. FinCEN identifiers have the potential to increase the efficiency and reduce the filing burdens associated with the registry. The key to the FinCEN identifier system's achieving those objectives is using a number rather than a name to identify entities and individuals, since numbers are less vulnerable to the spelling and formatting problems that often plague the transcription of entity and individual names.[245] The CTA requires FinCEN to assign a FinCEN identifier to any individual or entity who requests one and who has provided the required beneficial ownership information.[246] The rule should publicize the availability of FinCEN identifiers and, even more, urge individuals and entities to take advantage of that option.

The rule should also state explicitly that the purpose of the FinCEN identifier system is to make the registry more efficient and less burdensome for reporting companies, beneficial owners, and registry users, but is not intended to make it more difficult to obtain usable beneficial ownership information from the registry. In other words, the purpose of FinCEN identifiers is not to increase privacy but to increase registry effectiveness; adding "privacy" as a new regulatory objective in the design of the FinCEN identifier system has no statutory basis, is not mentioned in the authoritative legislative history of the statute, and should not now be characterized as a key concern.[247]

[245] *See* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7311 ("FinCEN identifiers are intended to simplify beneficial ownership disclosure by eliminating spelling and naming issues that can cause confusion or mistakes related to the precise individuals or entities in an ownership chain.").

[246] 31 U.S.C. 5336(b)(3)(A).

[247] 31 U.S.C. 5336(b)(4) states that the regulations implementing the FinCEN identifier system must seek to minimize reporting burdens and increase registry accuracy and usefulness; the law nowhere cites increased privacy as a permissible regulatory objective:

"(4) Regulations.—The Secretary of the Treasury shall—

"(A) by regulation prescribe procedures and standards governing any report under paragraph (2) and any FinCEN identifier under paragraph (3); and

"(B) in promulgating the regulations under subparagraph (A) to the extent practicable, consistent with the purposes of this section—

Instead, the registry should be designed to make it quick and easy for registry users — including law enforcement, regulators, and financial institutions — to link a FinCEN identifier to the specific individual or entity associated with that number.

In response to the question about when an individual or entity might wish to use a FinCEN identifier, here are two scenarios that should be considered when designing the FinCEN identifier system. The first scenario involves an individual who is the beneficial owner (among others) of multiple entities in the registry. Suppose that individual moves to a new address and wants to record the address change in the registry. The FinCEN identifier system should be designed so that an individual with an identifier does not have to track down and make the same address change in multiple registry filings, but instead would be able to make the address change on a single form linking that individual to a specific FinCEN identifier. Then anyone seeking information about that FinCEN identifier should be able to view one form to immediately view the beneficial owner's name, latest address, and other identifying information. The same considerations apply to an entity that has a FinCEN identifier and is seeking to make an information change, whether that involves a new entity address or a change in beneficial owners.

A second scenario involves a law enforcement agency that wants to identify all entries in the registry that name a particular entity or individual. The FinCEN identifier system should be set up in such a way that the law enforcement agency could easily determine if the entity or individual of interest has a FinCEN identifier number. If so, the law enforcement agency should be able to use that number to locate and view all relevant registry filings. The same considerations apply to regulators and financial institutions, all of which should have ready access to the identifying information for individuals or entities that use a FinCEN identifier. This scenario, like the first one, focuses on establishing a FinCEN identifier system that reduces the registry's filing burdens and effectiveness, but does not address "privacy interests" which, again, are not a permissible regulatory objective.

27) What form should the FinCEN identifier take?

a. How long should it be?

See FACT's response to Question 27(f), below.

b. Should it be alphabetical, numeric, or alphanumeric?

See FACT's response to Question 27(f), below.

"(i) minimize burdens on reporting companies associated with the collection of beneficial ownership information, including by eliminating duplicative requirements; and
"(ii) ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful."

Indeed, the word "privacy" does not appear anywhere in the text of the CTA.

c. Should it contain embedded information such as a filing year, a geographic code, a sequential number, or numbers shared among related persons or entities, or should it be generated independently for each individual or entity?

See FACT's response to Question 27(f), below.

d. Should it resemble or be derived from another identifier provided by another authority?

See FACT's response to Question 27(f), below.

e. Should it resemble the document numbers of other reports filed with FinCEN under the BSA?

See FACT's response to Question 27(f), below.

f. Should the form of FinCEN identifiers for individuals and legal entities be different? If so, how and why?

Using LEIs. FACT has no general comments on the best way to format the FinCEN identifier, but would like to address the questions asking whether FinCEN identifiers should differ for individuals versus entities, and whether they should resemble or be derived from identifiers provided by another authority.

Developing and maintaining new numbering systems can be expensive and time consuming, with sometimes onerous ongoing obligations. In addition, they may impede rather than assist beneficial ownership transparency by introducing a numbering system that no one else uses and that may require cross-checking against other numbering systems. A better, less expensive approach would be for FinCEN identifiers to use an existing numbering system or one derived from it.

Entity Identifiers. With respect to developing a FinCEN identifier for entities, for example, FinCEN should consider making use of the Legal Entity Identifier (LEI) system that has been developed over a period of years by the Global LEI Foundation (GLEIF), a nonprofit international body endorsed and supported by the United States.[248] The LEI system, used in over 200 countries, assigns a unique identifying number to any type of legal entity requesting one, and maintains a database recording those number assignments. For a small fee, a decentralized online registration system assigns an LEI number within minutes of a request, and ensures annual updates of the associated information by instituting an automatic "lapse" of any LEI that has not been affirmatively updated. The LEI

[248] GLEIF, "Introducing the Legal Entity Identifier (LEI)," 2021, https://www.gleif.org/en/about-lei/introducing-the-legal-entity-identifier-lei.

system also conducts monthly data quality reports that review and score the accuracy of the data in the system.[249]

LEI information is made publicly available in a "Global LEI Index" which provides what it calls "business card" information about each LEI holder — the entity's official name, address, LEI number, and limited information on its ownership structure.[250] Because this information is similar to the data required by the U.S. registry, FinCEN could use not only existing LEIs as FinCEN identifiers, but also utilize the Global LEI Index, a cost-free public database, as a tool to verify the accuracy and completeness of U.S. registry information. Another factor in favor of using LEIs is that, because a variety of laws and rules in the United States and elsewhere already require entities to obtain LEIs to engage in various activities, many entities already possess an LEI.[251]

FinCEN should consider using LEIs in the FinCEN identifier system in one of two ways, either by directly designating LEIs as FinCEN identifiers, or by adding a short additional code to each LEI number to distinguish FinCEN identifiers from LEI identifiers. That additional code could be as short as adding a "US" to the LEI or the year in which a particular FinCEN identifier was issued.

Using LEIs to produce FinCEN identifiers would save FinCEN substantial time and expense by avoiding development and maintenance of a new numbering system. Using LEIs would also allow the United States to benefit from a well-functioning system that meets all of the FinCEN identifier's legal requirements, and would simultaneously fortify U.S. support for the LEI system. Another possible bonus: using LEIs might make cross-border inquiries easier, since so many other countries also require entities to obtain LEIs. It is also worth noting that no entity filing beneficial ownership information in the U.S. registry would be obliged to obtain an LEI; only those wishing to use a FinCEN identifier would have cause to do so.

Individual Identifiers. The situation is different for individuals requesting a FinCEN identifier, since an individual cannot obtain an LEI and no comparable international numbering system applies to individuals regardless of nationality. A possible approach for individuals might be for FinCEN to use some part of the identifying number that every beneficial owner is already required by law to supply to the registry. Beneficial owners must supply a U.S. passport, driver's license, or state identification number, or if the beneficial owner has none, a nonexpired foreign passport number.[252] To derive a FinCEN identifier

[249] GLEIF, "GLEIF Data Quality Management," 2021, https://www.gleif.org/en/lei-data/gleif-data-quality-management.
[250] GLEIF, "Level 1 Data: Who is Who," 2021, https://www.gleif.org/en/lei-data/access-and-use-lei-data/level-1-data-who-is-who.
[251] *See rules listed at* GLEIF, "Regulatory Use of the LEI," 2021, https://www.gleif.org/en/lei-solutions/regulatory-use-of-the-lei.
[252] 31 U.S.C. 5336 (a)(1).

from those types of pre-existing numbers, FinCEN could select, for example, a specific set of digits — maybe the first or last five — and then to prevent duplicative numbers, add a geographic code for the state or country that issued the underlying number and perhaps the year in which the FinCEN identifier was issued. The U.S. registry could then be programmed to generate derivative FinCEN identifiers using the identifying information provided by individuals requesting a FinCEN identifier. Using that type of derivative approach would also relieve FinCEN from having to devise and maintain an entirely new numbering system for individuals.

28) How can FinCEN best ensure a one-to-one relationship between individuals or entities and their FinCEN identifiers, in light of the possibility that individuals and entities may mistakenly or intentionally attempt to apply for more than one FinCEN identifier?[253]

Ensuring Unique FinCEN Identifiers. The CTA explicitly prohibits FinCEN from assigning more than one number to an individual or entity who requests a FinCEN identifier.[254] The CTA included that prohibition to try to prevent problems that have arisen in other federal programs where individuals or entities were able to obtain multiple federal identification numbers and use them to engage in illicit activity and evade accountability.[255]

Individual Safeguards. To implement the prohibition on assigning more than one FinCEN identifier per individual, FinCEN should create a form used exclusively to request a FinCEN identifier. That form should require the same identifying information that must be provided by a reporting company for a beneficial owner of the entity, including the individual's full name, birthdate, current business or residential address in the individual's country of residence, and a unique identifying number from an acceptable identification document. Instead of being submitted by a reporting company, however, the registry should require the individual seeking use of a FinCEN identifier to complete the form personally and attest to its accuracy.

[253] According to the ANPR: "For example, this could happen when different employees of the same organization, without realizing, apply independently for a FinCEN identifier, or when an individual applies more than once using identity numbers from different forms of identification mistakenly thinking it is necessary to obtain a separate FinCEN identification for each company of which the individual is a beneficial owner."

[254] 31 U.S.C. 5336(b)(3)(iii) states: "Exclusive identifier.—FinCEN shall not issue more than 1 FinCEN identifier to the same individual or to the same entity (including any successor entity)." *See also,* Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. 7312 ("It is critical that, from the beginning, FinCEN issue rules that ensure only one identifying number is assigned to each individual and to each entity, including all successors to a specific entity.").

[255] *See, e.g.,* Marshall Allen, "Health Insurers Make It Easy for Scammers to Steal Millions," *ProPublica*, July 19, 2019, https://www.propublica.org/article/health-insurers-make-it-easy-for-scammers-to-steal-millions-who-pays-you (documenting an individual who secured multiple federal National Provider Identifiers that were supposed to be assigned only to licensed physicians, and used them improperly to obtain millions of dollars in health insurance payments).

To ensure accurate and complete information is provided, FinCEN could develop procedures to prevent the generation of a FinCEN identifier if any required information is missing from the form, fails verification, or violates certain parameters. Those procedures could also prevent the generation of a new FinCEN identifier if the registry detects any evidence that the requestor already possesses a FinCEN identifier. Possible measures could include automatic electronic searches of a FinCEN identifier database to detect similar names paired with other similar identifying information; if detected, those search results could block generation of a new FinCEN identifier until a FinCEN employee reviews the filing and approves the request.

The registry should also take a number of steps to prevent an individual from accidentally or intentionally applying for one FinCEN identifier using their passport and another using their driver's license or state identification card. The same is true for individuals holding more than one foreign passport. To begin with, the rule should explicitly warn individuals against obtaining more than one FinCEN identifier and include that warning at appropriate places in the registry website as well as on the FinCEN identifier form. Next, the registry should utilize existing systems like the State Department's CCD database and Nlets to automatically cross-check driver's license numbers, state identification numbers, and passport numbers against each other to ensure that the same individual does not apply for multiple FinCEN identifiers by utilizing multiple different acceptable identification documents. For more information on the Nlets system and the State Department's CCD database, see FACT's response to Question 23.

Another set of safeguards could be designed to apply after a FinCEN identifier form is successfully filed but a registry user, such as a law enforcement agency, regulator, or financial institution, identifies a potential error or omission related to the individual's identifying information in the FinCEN identifier form, such as a wrong name or birthdate, wrong address, or incorrect identifying number. Registry users who detect that type of problem should be required to report the discrepancy to the registry. The registry should then generate an automatic notice to the individual that a question was raised about a possible error (without identifying who detected the problem) and request a correction or explanation within 10 days. Pending resolution of the problem, the registry could place a cautionary "yellow flag" on the FinCEN identifier filing as well as any other filing that names the individual or uses their FinCEN identifier, and bar any new filing that attempts to include the individual's name or FinCEN identifier.[256] A similar cautionary flag could be imposed if a registry user identifies the individual behind a FinCEN identifier as someone who may be involved with suspicious activity.

If the problem is not cured within the 10-day period, the registry could automatically escalate notice of the problem to a more senior FinCEN employee and also automatically ask the relevant state or tribal office that maintains records related to any reporting company that names the individual to make its own inquiry. If the problem remains unresolved, the registry could place a "red flag" on the FinCEN identifier form,

[256] Use of filing flags is discussed in more detail in response to Questions 22 and 46 and Additional Issue (1), Designing an Effective Database.

block any use of the number, flag any reporting company filing that contains the FinCEN identifier, and perhaps automatically replace any use of the FinCEN identifier number with the individual's name. In addition, the registry could advise the state or tribal office about the problem to determine if that office should initiate proceedings to review and possibly terminate the related entity's existence or its registration to do business within the United States.

The European Union provides a model for this approach, requiring registry users to report information discrepancies to the registry, automatically notifying the relevant entity or individual of the problem, and requiring discrepancies to be resolved.[257]

Aside from setting up these types of automated procedures to respond to FinCEN identifier problems identified by registry users, Treasury should develop an audit program that affirmatively searches for evidence of FinCEN identifiers being used by more than one individual or entity. This audit effort could be carried out as part of Treasury's statutorily mandated FinCEN identifier study[258] or as part of its mandatory annual review of the registry's beneficial ownership procedures and standards.[259] It could also be delegated to the Treasury Inspector General as part of its mandated periodic reports on complaints by registry users,[260] or included in the annual audits that GAO is required by law to conduct for seven years.[261]

Entity Safeguards. Treasury should consider using similar tactics to implement the statutory prohibition on multiple FinCEN identifiers being assigned to entities. One key difference is that, unlike individuals, entities can change corporate identities and structures over time through name changes, mergers, sales, and successions. To address those challenges, FinCEN may want to study the procedures used by the Global LEI Foundation (GLEIF) to prevent the assignment of more than one LEI to a particular entity. Those procedures address, for example, how to assign LEIs when an entity changes its name, when two entities merge, when one is sold to another, or when one entity is replaced by a successor entity.[262] FinCEN may want to adopt similar procedures to govern how it assigns FinCEN identifiers to entities. Moreover, if FinCEN decides to use LEIs to generate FinCEN identifiers, FinCEN may want to ask GLEIF to notify it of any entity that appears to be using more than one LEI so that FinCEN can determine whether the same entity is using more than one FinCEN identifier.

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[257] *See* European Parliament and the Council of the European Union, "Directive 2015/849, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing," Document 02015L0849-20180709, Articles 30(4) and 31(5), May 20, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015L0849-20180709.
[258] Section 5501(b) of the AML Act.
[259] 31 U.S.C. 5336(b)(6).
[260] 31 U.S.C. 5336(h)(4)(B).
[261] 31 U.S.C. 5336(c)(10).
[262] *See, e.g.,* Bloomberg LEI, "Legal Entity Identifier (LEI) Frequently Asked Questions," 2021, https://lei.bloomberg.com/docs/faq# ("How do various corporate actions affect an LEI record?" and "What are the definition of the enumerations provided in the Registration Status and Validation Sources fields?").

In all of its efforts to prevent the assignment of more than one FinCEN identifier per individual or entity, FinCEN should be mindful of the law's safe harbor provision barring civil or criminal penalties for inadvertent mistakes. At the same time, should FinCEN uncover evidence of deliberate misconduct, it should follow its existing procedures for referring matters for civil or criminal investigation. The rule should also establish an administrative action that could be taken by FinCEN, in event of deliberate misconduct, to inactivate a FinCEN identifier number and bar the relevant individual or entity from procuring a new one. That administrative action could be taken in tandem with or in place of any civil or criminal penalty; its purpose would not be to punish a wrongdoer but to protect the integrity of the registry and comply with the requirements of the CTA.

Ensuring that individuals and entities possess only one FinCEN identifier is key to the effectiveness of the registry's beneficial ownership disclosures. Addressing this issue with warnings, affirmative electronic protocols, audits, cross-border measures to detect and minimize problems before they intensify, and an effective administrative safeguard is worth a substantial investment.

29) How can FinCEN best protect FinCEN identifiers from being used without individuals' and entities' authorization? Should protections include specific regulatory requirements or prohibitions?

Preventing Unauthorized Use. Preventing unauthorized use of FinCEN identifiers, like preventing the misuse of other registry data, is a subject addressed at length in the CTA. The law provides a variety of civil and criminal penalties that can be assessed by FinCEN for the submission of false, misleading, or incomplete information to the registry or for the unauthorized disclosure of registry information. FinCEN should develop principles for applying those penalties in ways that ensure they are commensurate with the misconduct but also have a deterrent effect. Those principles must also take into account the safe harbor established in the CTA for persons whose misdeeds were inadvertent rather than deliberate. The law also requires a variety of registry audits and reviews by FinCEN, Treasury, the Treasury Inspector General, GAO, and the law enforcement agencies and financial institutions that use the registry. Those audits and reviews could be designed, in part, to detect and report unauthorized use of FinCEN identifiers.

FinCEN could add to those statutory safeguards by including warnings in registry filings against the submission of false, misleading, or incomplete information, unauthorized data disclosures, or misuse of FinCEN identifiers or other registry information. The Treasury IG, who is required by law to establish a process for accepting, reviewing, and conveying user "complaints" about the registry, could set up systems to make it easy for persons to report problems, including the unauthorized use of

FinCEN identifiers, and bring those problems to the attention of appropriate FinCEN personnel.[263]

FinCEN could also set up a system that automatically notifies (either electronically or via paper mail) anyone with a FinCEN identifier whenever someone uses or updates their FinCEN identifier. Those notifications could include instructions on how to report any suspected unauthorized use of a FinCEN identifier.

The resulting mix of a well-functioning complaint process, express warnings in registry filing documents, registry audits and reviews, a menu of appropriate penalties to deter and punish misconduct, and automatic notifications to users should — if paired with vigilant FinCEN oversight — provide a layered set of protections against registry misuse.

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

Reducing Financial Institution Burdens. The vast majority of reporting companies that file information in the registry are unlikely to have complex ownership structures. Current data indicates that 99.9 percent of U.S. businesses are small businesses, defined by the Small Business Administration as businesses with fewer than 500 employees, and at 81 percent of those U.S. small businesses, a single individual owns, controls, and is the sole employee of the operation.[264] Another segment of U.S. businesses are owned and operated by married couples, so-called "mom and pop" enterprises. The result is that most reporting companies will find it quick and easy to identify their beneficial owners, because they will have to supply information for only a few individuals.

A small minority of reporting companies, however, will have to disclose more complex ownership structures that may include more FinCEN identifiers. While it is true that any reporting company, whether describing a simple or complex ownership structure, may use a FinCEN identifier, it is also true that companies with more beneficial owners and more complex ownership chains are more likely to report more FinCEN identifiers.

In response to the question about reducing the burden on financial institutions using the registry to analyze reporting companies that have complex ownership structures with embedded FinCEN identifiers, one initial consideration is that financial institutions can research only those entities that are their clients and grant permission to conduct registry searches; that means those financial institutions should be able to ask their clients any questions that come up. Second, to minimize financial institution burdens when using

[263] 31 U.S.C. 5336(h)(4).
[264] Small Business Administration, Office of Advocacy, "Frequently Asked Questions," October 2020, https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf.

the registry, the registry should make it quick and easy for all registry users — including financial institutions — to link a specific FinCEN identifier to a specific person. That means the registry should allow all registry users — including financial institutions — to access the identifying information related to each individual or entity behind a FinCEN identifier, since the purpose of FinCEN identifiers is to increase registry efficiency, not protect anyone's privacy, as FACT explains in response to Question 26, above. For more information on why the registry should take that approach, see FACT's response to Question 34, below.

A third step, as explained earlier in response to Question 12, is for the rule to require all reporting companies — not just entities using FinCEN identifiers — to disclose not only their beneficial owners, but also any direct parent organization, direct subsidiary, or direct affiliate needed to get a complete picture of the reporting company's ownership structure. The registry should also use existing software techniques to convert a list of beneficial owners and entities into an ownership diagram. Visualizing a reporting company's ownership structure would ease the analytical burden of financial institutions conducting a due diligence review of that entity.

Still, another measure the registry could take to reduce the burden on financial institutions examining entities with complex ownership structures bearing embedded FinCEN identifiers would be to narrowly interpret the CTA's registry exemptions. Limiting those exemptions would expand the number of entities providing beneficial ownership information to the registry. In particular, the rule could limit the use of the exemption for entities owned or controlled by certain exempt entities, the so-called subsidiary exemption under 31 U.S.C. 5336(b)(11)(xxii). If the rule were to limit that exemption to entities that are wholly owned by the specified exempt entities, as advocated in our response to Question 6, the rule would reduce the number of entities with hidden owners and help clarify any complex ownership structures including those subsidiaries.

Finally, the burden on financial institutions might be lessened if FinCEN were to adopt the LEI as the FinCEN identifier. Many financial institutions are already familiar with the LEI system and may have LEI numbers on file for multiple entities. That familiarity could help streamline a financial institution's analysis of complex ownership structures using embedded LEIs.

Together, making it easy to link FinCEN identifiers to the persons using them, readily disclosing those persons' identifying information, requiring reporting companies to provide complete ownership information, using diagrams to visualize ownership structures, narrowly interpreting registry exemptions to maximize the amount of information in the registry, and using LEIs and the FinCEN identifiers offer a series of measures that the registry could take to assist financial institutions and minimize their burdens when examining reporting companies with complex ownership structures and multiple embedded FinCEN identifiers.

31) What should the process be to obtain a FinCEN identifier?

Obtaining a FinCEN Identifier. The rule should require any individual or entity seeking to obtain a FinCEN identifier to file a separate registry form designed exclusively for that purpose. For individuals, the form should require the same information that must be supplied for a beneficial owner, including the individual's full name, birthdate, current residential or business address in the requester's current country of residence, and a unique identifying number from an acceptable identification document as set forth in the CTA. In the case of an entity, the form should require the entity to identify its beneficial owners along with its own identifying information, including the entity's official legal name, its business type, the address of its headquarters, the jurisdiction where it was formed or registered to do business in the United States, its corporate structure, and contact information for its U.S. registered agent or an entity executive who can answer questions.

The FinCEN identifier request form should be subjected to appropriate automated verification measures on a real-time basis, before the form is accepted by the registry. Most important is to ensure that any entity seeking a FinCEN identifier has already submitted full beneficial ownership information to the registry.[265] Next, depending upon what is included in the FinCEN identifier form itself, the registry could, for example, verify any passport, driver's license, or state identification number with existing systems like Nlets and the State Department's CCD database;[266] verify identifying information such as an individual's name and birthdate through similar systems; verify any address with the U.S. Postal Service to ensure it is not fabricated and is properly formatted; verify the entity's name and address; and verify information related to an entity with records in the LEI database, including its LEI number and corresponding identifying information.

In addition, the registry should check to see whether any other FinCEN identifier has been assigned to the individual or entity, using software that searches the FinCEN identifier database to detect similar names, addresses, and other identifying information, in order to prevent the issuance of more than one FinCEN identifier to the same individual or entity. Additionally, the registry should automatically cross-check information via systems like Nlets and the CCD database to ensure that individuals do not intentionally or accidentally obtain multiple identifiers by utilizing multiple forms of acceptable identification documents. If an automated verification system identifies an error or a required field is left blank or completed in an incorrect manner, the registry

[265] *See* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7312 ("FinCEN should first ensure that the entity has already disclosed its beneficial ownership information to FinCEN. An entity that has not disclosed its beneficial ownership information to FinCEN does not qualify and should not be granted a FinCEN identifier.").

[266] For more information on Nlets and the State Department's CCD database, see FACT's response to Question 23(c).

should provide a pop-up message to the filer that an error exists and must be corrected before proceeding.[267]

Upon successful submission of the form, the registry could inform the requester that a FinCEN identifier will be assigned within a specified period of time unless additional information is needed, and perhaps provide a means for the requestor to check on the progress of the FinCEN identifier request.

Once the automated verification process is complete, if no problems have arisen, the registry should generate a FinCEN identifier number and tag the relevant form as part of a FinCEN identifier database. If a problem arises such as a mismatch with information in another database, missing state incorporation papers, or a possible prior FinCEN identifier assignment, the registry could send a notice to the requesting individual or entity, identify the problem, and request that it be cured within 10 days. Ideally, FinCEN would also have personnel available who could speak by phone or via the internet to resolve specific issues. If a problem remains unresolved for 30 days, the registry could reject the FinCEN identifier request and require the individual or entity to reapply.

a. Should the FinCEN identifier be secured by an applicant or beneficial owner prior to filing an application to form a corporation, LLC, or other similar entity under the laws of a state or Indian tribe?

> **Scheduling a FinCEN Identifier Request.** The U.S. registry should permit an individual to request a FinCEN identifier at any time, unrelated to whether a reporting company has filed or plans to file information with the registry listing that individual as a beneficial owner or applicant. In contrast, the registry should assign a FinCEN identifier to an entity only after first verifying that the entity has itself filed all required beneficial ownership within the registry or that the entity is exempt from the CTA's disclosure requirements. In addition, as indicated previously, the registry should not assign a FinCEN number until all required information is submitted, automated verification procedures are satisfied that the submitted information is accurate, and automated software protocols find no evidence that a FinCEN identifier has been previously assigned to the requester.
>
> Once a requester receives a FinCEN identifier, the registry should permit all reporting companies to update their registry filings by replacing the name of any individual or entity with their corresponding FinCEN identifier. The rule should make clear, however, that updating existing registry filings with FinCEN identifiers is the responsibility of the relevant reporting companies and not the responsibility of FinCEN.

[267] For more information on ensuring that FinCEN only grants one FinCEN identifier to each person, see FACT's response to Question 28.

b. How, if at all, should FinCEN verify an individual's identity before providing a FinCEN identifier?

See FACT's responses to Questions 23, 29, and 31, above.

c. If an applicant or beneficial owner chooses not to apply for a FinCEN identifier, should FinCEN create any limitations — in addition to those in the statutory definition of "acceptable identification document" — on the types of unique identifying numbers that can be submitted?

Limiting Identifying Numbers. The rule should permit applicants and beneficial owners to supply only the types of identifying numbers specified in the CTA — a U.S. passport, driver's license number, or state identification number, or if none of those is available, an identifying number from a nonexpired foreign passport.[268] Those categories of identifying numbers were selected due to extensive government procedures already in place to issue, secure, and maintain the relevant databases and ensure the accuracy of the identifying information, and because U.S. law enforcement can readily check the relevant database for the first three categories of numbers to verify not only an individual's name, birthdate, and address, but also in most cases access the individual's photograph. The statute does not authorize FinCEN to accept any type of unique identifying number other than those specified in the CTA and a FinCEN identifier. For example, the law does not authorize the registry to use social security numbers or taxpayer identification numbers on a routine, widespread basis.

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?

Providing Registry Access for Criminal, Civil, Other Law Enforcement Activities. Before addressing the specific question posed here, it is important to discuss registry access issues more generally. The purpose of the U.S. beneficial ownership registry is to enable the United States to identify the human beings using legal entities to conduct activities within the United States, including illicit activities. To achieve that objective, Congress constructed the CTA to permit a wide variety of law enforcement offices, regulators, and financial institutions to gain access to registry information for use in criminal and civil inquiries, for use in national security and intelligence matters, and to improve financial institution compliance with their customer due diligence obligations.

During negotiations over the CTA, some legislators attempted to limit registry access to federal law enforcement personnel conducting criminal investigations, but that

[268] 31 U.S.C. 5336 (a)(1).

approach was rejected as overly restrictive. As Senator Brown explained on the Senate floor:

> "FinCEN should allow federal, state, local, and tribal law enforcement to access the beneficial ownership data for both criminal and civil purposes, including law enforcement activities designed to combat terrorism, money laundering, trafficking, corruption, evasion of sanctions, noncompliance with tax law, fraud, counterfeit goods, market manipulation, insider trading, consumer abuse, cybercrime, election interference, and other types of criminal and civil wrongdoing."[269]

The CTA itself does not contain any restrictive language limiting its use to criminal matters. Instead, its provisions demonstrate that a wide variety of law enforcement and regulatory agencies investigating a wide variety of activities — whether involving criminal, civil, tax, administrative, national security, or intelligence matters — are intended to have access to registry information. One CTA provision states, for example, that it is the sense of Congress that U.S. entities are misused to conduct "illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interests of the United States and allies of the United States."[270] The key phrase is "illicit activity," not "criminal activity," and the litany of wrongdoing encompasses not just crimes, but also misconduct often pursued through civil proceedings such as the counterfeiting or piracy of goods, securities fraud, and tax fraud. The same section of the law states that the registry "is needed" to "protect vital United States national security interests," "protect interstate and foreign commerce," and "better enable critical national security, intelligence, and law enforcement efforts to counter ... illicit activity." That sweeping language characterizes the registry's information as needed in national security, commercial, intelligence, and law enforcement efforts to counter "illicit activity." The statutory language does not limit the use of the registry to countering criminal activity.

Federal Agency Requests. Several CTA provisions expressly give registry access to a wide variety of federal law enforcement personnel. For example, one provision gives the Internal Revenue Service (IRS) direct access to the registry.[271] Another grants access to all Treasury officers and employees, which includes personnel at FinCEN, the Office of Terrorism and Financial Intelligence, Office of Foreign Assets Control, Committee on Foreign Investment in the United States, and Office of the Comptroller of the Currency, among others — none of which handle criminal prosecutions.[272]

[269] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7312.
[270] Section 6402 of the CTA.
[271] 31 U.S.C. 5336(c)(5)(B).
[272] 31 U.S.C. 5336(c)(5)(A).

Still another CTA provision gives registry access to any "Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity."[273] That last provision, the broadest of those authorizing federal agency access, is clearly intended to cover a wide range of federal agency personnel. To ensure its broad reach, the rule should explicitly interpret the phrase "federal agency engaged in … law enforcement activity" to encompass federal agency personnel engaged in civil, criminal, tax, administrative, national security, or intelligence activities to enforce federal law.

The rule should not attempt to provide a list of the specific federal agencies authorized to access registry information under section 5336(c), since the list would be too long and detailed to be useful and would change over time. For example, at a minimum, a specific access list would need to include the Departments of State, Defense, Justice, Homeland Security, Commerce, Health and Human Services, Interior, and Energy, the intelligence agencies, Securities and Exchange Commission, Commodity Futures Trading Commission, Federal Trade Commission, federal banking regulators, Consumer Financial Protection Bureau, Drug Enforcement Agency, Environmental Protection Agency, and more, since all of those agencies engage in activities to enforce federal law. Rather than offer a list of agencies, the better approach for the rule would be to provide the guidance suggested above — 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 — which incorporates the flexibility and broad scope intended by the CTA.

The rule should also make clear that agency personnel engaged in law enforcement activities may access registry information not only when they have an official case with an official case number, but also when they are conducting initial inquiries, preliminary investigations, grand jury proceedings, financial analyses, intelligence reviews, national security inquiries, and related "activities." The rule should note in particular that the CTA grants access to federal agency personnel engaged in law enforcement "activities" rather than "investigations," "inquiries," or work on specific "cases."

Another important issue requiring clarification in the rule involves the requirement that federal agencies obtain a "certification" prior to initiating a search for registry information. Section 5336(c)(3)(E) of the CTA directs Treasury to establish protocols requiring the head of an agency, or a designee, to provide a "written certification" supporting a request for registry information under section 5336(c)(2)(B)(I) and indicating why the information "is relevant to an authorized investigation or other activity." The CTA conference report states:

> "For requests made by Federal agencies, the conference agreement requires that only the head of an agency or a designee may certify access to the beneficial ownership database for an investigation, or other authorized national security,

[273] 31 U.S.C. 5336(c)(2)(B)(i)(I).

> intelligence, or law enforcement activity. The conferees expect that the process of delegating authority for designees to make a written certification under section [5336](c)(3)(E) will be consistent with the existing processes to delegate authority to designees to carry out 26 U.S.C. 6103 requests, while taking into account the unique organizational structures of each requesting agency."[274]

To ensure a workable approval system that will not impede law enforcement, national security, or intelligence activities, the rule should provide guidance on several issues. First, the rule should clarify that agency heads may delegate approval authority to access the registry to multiple subordinate designees, including agency personnel responsible for directing the agency's investigations and related activities. As Senator Sherrod Brown, one of the CTA's chief architects, put it while speaking on the Senate floor: "agencies can extend that delegation as far down in their organizational chain as they like" and "delegations can be made on a bulk basis, so groups or classes of employees can be authorized to access the data as needed."[275]

Second, the rule should clarify that federal agencies do not have to submit a copy of the certification to FinCEN or the registry, but may instead retain the certificate in agency records. The CTA already details extensive protocols that federal agencies must follow to access any registry information.[276] Each agency must enter into an agreement with the Treasury Secretary, establish formal standards and procedures for making registry requests and securing registry information, set up an automated system to track every instance in which the agency accesses the registry, train its personnel to use the registry, and conduct annual audits to confirm agency compliance with the protocols. Those CTA protocols closely correlate with longstanding protocols used by FinCEN to manage federal agency access to the SAR database; they have proven over time to be both effective and workable.

To further document compliance with the protocols, the rule could require federal agency personnel, as part of the registry access process, to check a box certifying that the agency has obtained the required certification, list the name of the agency official who provided authorization, and provide a brief description of the matter requiring the registry search. Requiring federal agencies to also submit a copy of the certification would not only impose an unnecessary burden on federal agencies, require more software coding, and consume valuable registry storage capacity, but would also signal a distrust of federal agency personnel that is unwarranted and has no evidentiary basis in their years-long interactions with FinCEN conducting searches of SAR data.

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[274] U.S. Congress, "Joint Explanatory Statement of the Committee of Conference for H.R. 6395, Division F—Anti-Money Laundering," H.Rept. 116–617, 116th Congress, 2nd Session, (December 3, 2020), https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf, p. 2140.

[275] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7312.

[276] *See* 31 U.S.C. 5336(c)(2)(B)(i)(I) covering registry requests by federal agencies, and 5336(c)(3) establishing the protocols that apply to such requests.

The rule should also make clear that the certificate itself does not have to be a separate document bearing the signature of the approving agency official, but may instead be combined with other related materials such as a memo authorizing the investigation or opening a case, so long as approval to access the registry is, in fact, secured. The rule should also make clear that the certification may employ standard language affirming that the request is "relevant to an authorized investigation or activity" and present a brief justification of the information request that does not compromise national security or an active enforcement effort should it need to be made public.

Third, the rule should state plainly that federal agencies are not required to obtain a new certification each time agency personnel want to access the registry to search for information related to the same inquiry. Instead, the rule should expressly authorize federal agencies to obtain a single certification covering multiple registry queries related to the same matter. As Senator Brown has explained, "federal agency heads or their designees … can provide access to the database to appropriate law enforcement authorities once per investigation, so they do not need to keep repeating that authorization for the same investigation."[277] For example, if a federal investigator were examining allegations of commercial piracy involving multiple companies and individuals, that investigator should be able to obtain a single certification for the commercial piracy matter and use it to access the registry on multiple occasions to search for information related to the entities and individuals of interest. The rule should provide that and other examples to illustrate for both FinCEN and federal agencies how the certifications are intended to work and how one certification may support accessing the registry on multiple occasions related to a specified topic.

In each of these matters, the rule should ensure that Treasury facilitates rather than impedes the ability of a wide variety of federal law enforcement, national security, and intelligence agencies to use registry information to advance federal criminal, civil, national security, and intelligence activities.

State, Local, and Tribal Agency Requests. In response to the question about whether FinCEN should establish procedures to authenticate or confirm that a state, local, or tribal agency has received authorization from a court of competent jurisdiction to seek registry information in a criminal or civil investigation, the answer is no, because such procedures are unnecessary, lack a statutory foundation, and would be both burdensome and expensive.

The CTA already details extensive protocols that state, local, and tribal agencies must follow to access any registry information.[278] Each agency must enter into an agreement with the Treasury Secretary, establish formal standards and procedures for making registry requests and securing registry information, set up an automated system to track every instance in which the agency accesses the registry, train its personnel to use

[277] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7312.

[278] *See* 31 U.S.C. 5336(c)(2)(B)(i)(II) covering registry requests by state, local, or tribal agencies, and 5336(c)(3) establishing the protocols that apply to such requests.

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 protocols. The CTA protocols closely correlate with longstanding protocols used by FinCEN to manage state, local, and tribal access to the SAR database; they have proven over time to be both effective and workable.

To further document compliance with the protocols, the rule could require state, local, and tribal agency personnel, as part of the registry access process, to check a box certifying that they have obtained appropriate authorization from a court of competent jurisdiction and list the name of the court and court officer who provided authorization. Requiring anything more, however, especially any process directing FinCEN personnel to actively double-check whether authorization was obtained, would signal a distrust of state, local, and tribal personnel that is unwarranted and has no evidentiary basis in the years-long record of state, local, and tribal agencies accessing SAR data. Imposing an extensive authentication process requiring multiple actions by FinCEN personnel would also create a procedural hurdle that has no basis in the detailed statutory framework that emerged from the congressional negotiations over registry access.

In addition to being unnecessary and lacking a statutory foundation, imposing a live FinCEN authentication process would be extremely costly and — due to FinCEN resource limitations — inevitably slow down state, local, and tribal access to the registry and thereby impede the important investigations, prosecutions, and civil enforcement proceedings conducted by those agencies. It would also consume significant FinCEN resources better directed to other tasks.

In short, requiring FinCEN to authenticate or confirm that state, local, or tribal agencies actually obtained required court authorizations would burden both law enforcement and FinCEN for no apparent benefit.

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?

Clarifying Authorization by a Court of Competent Jurisdiction. Because the CTA's requirement that state, local, and tribal agencies obtain court authorizations prior to accessing registry information appears to be unique in federal law, the rule should provide guidance on at least three issues, identifying the courts and court officers eligible to provide the authorizations and establishing a reasonable authorization process.

First, the rule should define the term "court of competent jurisdiction." That term was the product of extended congressional negotiations which rejected requiring authorizations to be issued by "federal courts" and instead selected a term that could be broadly interpreted to cover an array of courts across the country, including state, county, municipal, and tribal courts.[279] By spreading out the authorization burden among multiple judicial venues nationwide, Congress sought to avoid creating court bottlenecks that could slow or impede law enforcement activities. To achieve those practical objectives, the rule should define a "court of competent jurisdiction" as any federal, regional, state, local, municipal, tribal, or territorial court that has actual or potential jurisdiction over the matter being examined by the law enforcement agency seeking authorization to obtain information related to the matter from the beneficial ownership registry.

Second, the rule should define the term "any officer" of a court of competent jurisdiction. This statutory term was also the product of extensive congressional negotiations which rejected permitting only "judges" to provide the needed authorization.[280] Instead, Congress settled on a broad, flexible term that would enable a variety of court personnel to issue registry authorizations. The CTA further highlighted the provision's broad reach by inserting the word "any" before "officer."

To avoid unduly burdening courts by restricting who is eligible to issue CTA authorizations, the rule should define "any officer" broadly to include any person involved with court administration, including a judge, magistrate, clerk, bailiff, sheriff, or other full or part time court personnel who can expedite issuance of the authorizations required by the CTA.[281] The rule should also make clear that, in line with the normal operation of state, local, and tribal courts which vary in size and administration, each court may make its own determination about which and how many court officers may issue CTA authorizations, but the rule should also caution against making personnel decisions that could lead to backlogs of registry requests or slow or impede law enforcement activities under the CTA.

Third, the rule should define the term "authorized" in the context of section 5336(c)(2)(B)(i)(II) as applied to state, local, and tribal law enforcement agencies seeking information from the beneficial ownership registry. Like other CTA terms, this term was the outcome of extended congressional negotiations which rejected efforts to compel law enforcement agencies to obtain a formal "court order," "subpoena," or "warrant" to

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[279] *See* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7312 (discussing the decision by lawmakers not to require the involvement of federal courts or federal judges).

[280] *See* Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7312.

[281] *See also,* Black's Law Dictionary (11th ed. 2019), which defines an "officer of the court" as "[s]omeone who is charged with upholding the law and administering the judicial system. Typically, officer of the court refers to a judge, clerk, bailiff, sheriff, or the like, but the term also applies to a lawyer, who is obliged to obey court rules and who owes a duty of candor to the court." Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (Thomson Reuters, 2019). *See also,* U.S. Congress, "Joint Explanatory Statement of the Committee of Conference for H.R. 6395, Division F—Anti-Money Laundering," H.Rept. 116–617, 116th Congress, 2nd Session, (December 3, 2020), https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf, p. 2140 ("'Court of competent jurisdiction,' for purposes of this measure, includes an officer of such a court such as a judge, magistrate, or a Clerk of Courts. This does not include attorneys who are party to a proceeding.").

support a registry information request.[282] Instead, Congress chose the term "authorized" to establish a quicker, less formal, and more practical procedure for granting law enforcement agencies permission to proceed with a registry request.

To facilitate that approach, minimize burdens on law enforcement and the courts, and ensure compliance with statutory requirements, the rule should create a standard form for courts to use to process CTA requests. The form should be designed to be used in either electronic or paper format. In terms of content, the form should require the requesting agency to identify itself, name the specific law enforcement officer seeking the registry information, provide a box that the agency can check to certify that the law enforcement agent is "directly engaged in an authorized investigation or activity" and their "duties or responsibilities require" registry access,[283] provide a brief description of the authorized investigation or activity, and provide the date on which the authorization request was submitted to the court.

In addition, the form should provide boxes that can be checked by a court officer to authorize access to the registry, deny it, or seek more information. The form should also require the court officer's name, job title, court, and the date on which the request was processed, but should not require a signature. If possible, the court should establish automated procedures to expedite the processing of these forms and return them immediately to the agencies that submitted them. FinCEN may want to work with the courts to design a software template to enable expedited, bulk processing.

The rule should make clear that, when presented with a law enforcement request for authorization to access the beneficial ownership registry, courts should not engage in an evidentiary inquiry, conduct a hearing, or issue findings. Instead, the court should treat the request as a procedural matter whose primary purpose is to block unauthorized requests. The rule should offer as a guiding principle that court officers should approve a request for registry access unless there is reason to believe that the request or the agent making the request is unauthorized or improper.

The rule should recommend that courts post the standard form on the court's website to make it readily accessible to state, local, and tribal law enforcement agencies.[284] Courts should also establish procedures for submitting the form electronically or in paper form, routing it to the appropriate court officer, and enabling that court officer promptly to process the form and return it to the relevant law enforcement agency. The rule should also recommend that courts and law enforcement

[282] For example, the House Financial Services Committee considered and rejected an amendment offered by Representative Warren Davidson seeking to require state, local, and tribal agencies to obtain a "court-issued subpoena or warrant" before accessing the registry. U.S. House Committee on Financial Services, "Markups, H.R. 2513, the 'Corporate Transparency Act of 2019,'" June 11, 2019, https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403829.

[283] 31 U.S.C. 5336(c)(2)(B)(i)(II).

[284] FinCEN could also post the form on its website or the registry website along with an explanation of how the form may be used.

agencies arrange for completed forms to be stored under existing procedures for document retention.

The rule should expressly enable courts to use either the standard form or, in cases where time is of the essence, alternate methods to authorize a registry request, including by allowing a court officer to authorize a request via a handwritten note, email message, telephone conversation, text message, or online chat option, so long as the request is subsequently documented by completing the standard form within a brief period of time.

The rule should also indicate that state, local, and tribal agencies are not required to obtain a separate authorization each time their personnel want to access the registry. Instead, the rule should expressly authorize courts to issue a single authorization that covers multiple registry queries related to the same matter. For example, if a state investigator were examining a financial fraud involving multiple companies and individuals, that investigator should be able to obtain a single court authorization naming the financial fraud inquiry and then use that authorization to access the registry on multiple occasions to search for registry information related to entities and individuals of interest. The rule should provide that and other examples to illustrate for both the courts and law enforcement agencies how the authorizations are intended to work and how one authorization may support accessing the registry on multiple occasions to conduct searches related to a specified topic or inquiry.

State, local, and tribal law enforcement personnel are America's first responders in many critical areas of law enforcement, including efforts to combat crime, financial fraud, tax evasion, human trafficking, counterfeit goods, and other illicit activity that may utilize shell companies or other entities. Estimates are that more than 90 percent of the nation's law enforcement operates at the state and local level.[285] The rule should support state, local, and tribal law enforcement by providing them with a low cost, quick, and practical way to gain access to the registry's beneficial ownership data.

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

Ensuring A Secure Database. The rule should state that FinCEN will apply the same security protections to the beneficial ownership registry information as it does to

[285] *See* Patrick Yoes, "Another Open Letter to Our Nation's Governors," National Fraternal Order of Police, April 10, 2020, https://fop.net/letter/our-nations-governors-urging-them-to-amend-their-state-and-local-workmans-compensation-laws/, ("With more than 90% of law enforcement officers serving at the local and State level…").

SAR and CTR information. While many countries, including many of our allies, have made beneficial ownership information generally available to the public,[286] the CTA has designated U.S. registry information "sensitive" but not classified, and barred it from public disclosure.[287] Information in FinCEN's SAR and CTR databases is also barred from public disclosure and should be seen as equally if not more sensitive than the beneficial ownership information destined for the registry. Because all three databases contain sensitive but unclassified information, and because FinCEN has years of experience administering the SAR and CTR databases, the security protocols developed for the SAR and CTR databases should also be applied to the beneficial ownership registry.

It is important for the rule to recognize that the CTA directs FinCEN to ensure the "security" of the registry data but not the "privacy" of the individuals and entities supplying data to the registry.[288] The CTA nowhere establishes any privacy protections for persons who supply data to the registry;[289] to the contrary, the CTA repeatedly directs FinCEN to create a "database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators,"[290] all of which will be accessing registry data. The CTA also directs FinCEN, when developing regulations to implement the law, to accomplish two key objectives, "minimize burdens on reporting companies" and "ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful."[291] Protecting the privacy of persons who submit information to the registry is nowhere mentioned, and the rule should not inadvertently insert into the regulatory process a new registry objective with no statutory foundation.

In response to the question of whether FinCEN should design registry protections in addition to the existing penalties for violations of the BSA and FinCEN regulations, the rule should acknowledge and implement the CTA's new civil and criminal penalties for the submission of false, misleading, or incomplete information or for unauthorized use of registry information.[292] Those new penalties are in addition to existing penalties for violations of the BSA or FinCEN regulations. The rule should also explicitly

[286] The United Kingdom and European Union, for example, require their beneficial ownership registries to be open to the public, and the Beneficial Ownership Principles state that beneficial ownership data "should be accessible to the public." OpenOwnership, "OpenOwnership Principles," Version 1.0, December 2020, https://www.openownership.org/uploads/Open%20Ownership%20Principles%20V1.0.pdf. In April, Canada announced its intent to establish its own public beneficial ownership registry. Organized Crime and Corruption Reporting Project, (OCCRP), "NGOs Praise Canada's New Corporate Ownership Registry," April 23, 2021, https://www.occrp.org/en/daily/14277-ngo-s-praise-canada-s-new-corporate-ownership-registry.

[287] Section 6204(6) and (7) of the CTA which state: "beneficial ownership information collected under the amendments made by this title is sensitive information" and must be maintained "in a secure, nonpublic database, using information security methods and techniques that are appropriate to protect nonclassified information systems at the highest security level." *See also,* 31 U.S.C. 5336(c)(8) mandating certain security protections for the database.

[288] *See, e.g.,* 31 U.S.C. 5336(c)(8) detailing "security protections," but not "privacy" protections for the registry.

[289] The word "privacy" does not even appear in the legislative text of the CTA.

[290] CTA Section 6204(8).

[291] 31 U.S.C. 5336(b)(4)(B).

[292] 31 U.S.C. 5336(h).

recognize the law's safe harbor that protects reporting companies against civil or criminal penalties for inadvertent errors or omissions.

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

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

Yes, financial institutions should be able to use beneficial ownership information retrieved from the registry in their customer identification, customer due diligence, anti-money laundering, anti-terrorist financing, sanctions compliance, tax compliance, anti-corruption, anti-fraud, and other risk-based monitoring and compliance programs. Barring financial institutions from using registry information for those purposes would not only violate common sense, but also render the registry less useful in combating illicit activity and create restrictions that have no statutory basis.

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

Yes, reporting companies should be allowed to pre-authorize specific financial institutions to which beneficial ownership information should be made available.

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

Providing Financial Institution Access to the Registry. After extended negotiations, Congress determined that financial institutions with customer due diligence obligations should be able to access information in the beneficial ownership registry, so long as they obtain client consent to examine related information. In fact, the CTA requires Treasury to establish a registry that is "highly useful" to financial institutions, among other registry users.[293] The rule should ensure that financial institutions gain the access that Congress and the CTA have authorized.

The rule should state plainly that, after a financial institution signs an agreement with the Treasury Secretary, establishes formal registry protocols and

[293] 31 U.S.C. 5336(b)(1)(F)(iv).

procedures, clears them with FinCEN, sets up an automated system to track every instance in which the financial institution accesses the registry, sets up systems for annual audits to confirm compliance with the registry protocols and procedures, and trains and obtains certifications for its personnel to access and search the registry, financial institutions should be given immediate, direct, and full access to the beneficial ownership database to examine information authorized by their clients.

Just like federal agencies that have to secure certifications to gain access to the registry; state, local, and tribal agencies that have to secure court authorization to gain access; and foreign agencies that have to secure U.S. agency support to gain access, financial institutions must secure customer consent to gain access to the registry and request information related to that customer. Accordingly, the rule should establish the same type of access procedures that apply to other registry users. Here, the rule could require the financial institution, as part of the access process, to check a box certifying that it has secured customer consent to access registry information related to that customer and provide the customer's name.

At that point, its certified personnel should be able to log into the registry to see all of the information related to that customer. Assuming the customer is a reporting company seeking to open an account with the financial institution, the financial institution should be able to see all of the beneficial ownership information for the reporting company, all of the applicant information for the reporting company, all identifying information related to the reporting company itself, all information about the reporting company's ownership structure, information about any other entity (including parents, affiliates, and subsidiaries) with which the reporting company is associated, information about any other entity with which each beneficial owner is associated, and information about any other entity with which the applicant is associated. This level of access will ensure that the registry is highly useful to financial institutions conducting anti-money laundering, anti-terrorist financing, and customer due diligence reviews, and will also help them evaluate prospective clients for risk.

Financial institutions should be able to see complete listings of the reporting company's past and present beneficial owners and any applicant, as well as past and present identifying information for the entity itself, so that the financial institution can review the full history of the reporting company and use that information to calibrate the customer's risk level. Financial institutions should also have full and immediate access to any diagrams depicting a reporting company's ownership structure and be able to query the registry database regarding any of the entities or beneficial owners appearing in that ownership structure. Financial institutions should also be able to search the database by multiple variables, including by beneficial owner, applicant, entity, address, FinCEN identifier, and more.

Concerns that financial institutions might abuse direct registry access and examine registry filings beyond those authorized by a client merit careful consideration, but do not justify blocking direct financial institution access to the registry. In addition to the fact that financial institutions are generally subject to regulatory oversight and will not want to endanger their ability to access the registry, the registry itself will discourage unauthorized use by maintaining automated tracking features that record each time a registry filing is reviewed by a financial institution. To increase the deterrent effect of those features, the registry should be designed to easily and quickly retrieve information showing what actions were taken by any particular registry user, including a financial institution. To heighten deterrence further, Treasury and GAO should — as part of their mandatory registry audits — conduct reviews to gauge the extent of any unauthorized use by financial institutions. The registry's tracking features, in tandem with periodic audits by Treasury and GAO, will help ensure that no registry user will be able to hide their activities. The rule should also make clear that unauthorized use of the registry by a financial institution will be identified and punished, including by terminating the offender's registry access.

If financial institutions are given immediate, direct, and full access to the registry database, FinCEN will not have to play any intermediate role and will not have to respond to financial institution requests for beneficial ownership information. Requiring FinCEN personnel to respond to specific financial information requests would be impractical in any event and would likely immediately overwhelm FinCEN's resources and render the registry unusable in the financial community.

Providing financial institutions with direct access to registry information authorized by their clients would also benefit small business and other legal entities seeking to open accounts with those financial institutions as it should:

- expedite the due diligence reviews financial institutions conduct, thereby speeding up the account opening process; and
- strengthen the ability of financial institutions to identify and exclude suspect entities that may compete unfairly with honest businesses or initiate illicit activities that may damage the U.S. financial system.

In addition, giving financial institutions direct access to the registry will enlist them directly in the effort to correct data discrepancies, detect suspicious persons or patterns of ownership, and help ensure the registry information is accurate, complete, and highly useful.

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

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

Yes, but only if the registry user has "opted in" and requested notifications. Registry users such as regulators, law enforcement, and financial institutions may want to receive notice of information changes for higher risk entities but not for lower risk entities, and should be able to make those choices. The registry should enable any registry user to request notice of any information updates for a specific entity, beneficial owner, applicant, FinCEN identifier, or pooled investment vehicle.

Having the ability to request automatic notifications of information updates has the potential to provide valuable information to law enforcement, national security and intelligence agencies, regulators, and financial institutions, making the registry even more useful in "facilitating important national security, intelligence, and law enforcement activities" and facilitating the compliance of "financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law" in line with the statutory requirements of 31 U.S.C. 5336(b)(1)(F)(iv).

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

Requested notifications should be sent to registry users immediately, electronically, and in a machine-readable format. The registry should be designed to store information about what updates were provided to which registry users on what dates. In the case of financial institutions, FinCEN may want to work with the financial sector to create mechanisms that will enable updated beneficial ownership information to be automatically incorporated into the relevant records of a financial institution that has opted into that arrangement.

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

Yes. To ensure that registry users are not flooded with unnecessary or duplicative updates, they should be required to "opt-in" to receive notifications regarding a particular entity, beneficial owner, or applicant.

Additionally, registry users should have the ability to stop receiving notifications at any time with respect to a particular entity or individual. For example, while updates could be initially useful, a law enforcement agency could close an investigation, rendering continued beneficial ownership data updates unnecessary and bothersome, potentially distracting the agency from current investigations. Or an entity could close all of its accounts with a financial institution, rendering continued updates to the financial institution unnecessary and inappropriate. Providing registry users with the ability to stop receiving information updates would prevent those problems.

37) One category of authorized access to beneficial ownership information from the FinCEN database involves "a request made by a Federal functional regulator or other appropriate regulatory agency."[294] How should the term "appropriate regulatory agency" be interpreted? Should it be defined by regulation? If so, why and how?

Defining Appropriate Regulatory Agency. Yes, the rule should provide a clarifying definition of the phrase "other appropriate regulatory agency" as used in 31 U.S.C. 5336(c)(2)(B)(iv), due to uncertainty about how that term could be interpreted. The provision in question is the last in a series of provisions granting access under certain circumstances to registry information. The prior provisions grant access to federal agencies; state, local, and tribal law enforcement agencies; foreign law enforcement agencies; and financial institutions. The final access provision applies solely to regulators, providing access to both federal functional regulators — a well-defined group of agencies identified in 15 U.S.C. 6809(2) — plus personnel from an "appropriate regulatory agency," which is left undefined.

To clarify the reach of the final access provision, the rule needs to resolve two related issues: (1) whether the phrase "appropriate regulatory agency" provides registry access only to additional U.S. federal agencies, or also to U.S. state, local, and tribal agencies as well as non-U.S. agencies; and (2) what types of agencies may take advantage of this access provision which is designed especially for regulators.

On the issue related to what types of agencies should gain access to the registry under the final access provision, it is important to note that section 5336(c)(2)(B)(iv) authorizes registry access for agency personnel "consistent with the requirements of subparagraph (C)." Subparagraph (C) is the next provision in the law and deals with regulators of "financial institutions" that request registry information to facilitate their compliance with customer due diligence obligations. That limiting language reduces the scope of regulatory agencies that can utilize the final access provision to agencies that regulate "financial institutions." To clarify the term "financial institution," the rule should use the longstanding definition in U.S. anti-money laundering law which encompasses a broad range of entities such as banks, securities firms, insurers, money service businesses, and others that deal in large amounts of cash posing anti-money laundering risks.[295]

[294] 31 U.S.C. 5336(c)(2)(B)(iv), added by CTA Section 6403(a).
[295] *See* 31 U.S.C. 5312(a)(2) for the complete list of financial institutions with anti-money laundering obligations, a subset of which have affirmative customer due diligence obligations.

To ensure effective implementation of the regulator access provision and resolve the two issues identified above, the rule should provide an expansive interpretation of section 5336(c)(2)(B)(iv). The rule should define the term “appropriate regulatory agency” to encompass regulators at all levels that supervise one or more “financial institutions” as that term is defined in 31 U.S.C. 5312(a)(2), including federal, state, local, and tribal agencies in the United States as well financial regulators in foreign countries at the national, regional, provincial, and local levels.

Taking that broad approach would be in line with the CTA’s statutory mandate that the registry reduce burdens for registry users. In addition, with respect to foreign financial regulators, it would provide a level of comity and reciprocity, since many are in countries that provide public beneficial ownership databases that all U.S. financial regulators can access without restraint.

In addition, taking that broad approach would not greatly increase access to the registry, since virtually all financial regulators can already request registry data under one of the prior access provisions. The significance of the final access provision designed to accommodate financial regulators, however, is that it would enable those regulators, pursuant to 31 U.S.C. 5336(c)(2)(C), to access registry information — not about a reporting company or beneficial owner — but about the financial institutions they supervise. The types of information that regulators could gather might include information on the extent to which a financial institution queried the registry, what entities and beneficial owners it reviewed, and what accounts were opened.

If the rule were to grant financial regulators direct access to the registry for requests made under 31 U.S.C. 5336(c)(2)(B)(iv), the rule would help them gain more timely access to the registry data, because state, local, and tribal financial regulators would not have to get authorization from a court of competent jurisdiction and non-U.S. financial regulators would not have to invoke an international agreement or find a U.S. agency to request information on their behalf. Instead, after establishing proper access protocols with FinCEN, those financial regulators would be able to access the registry directly for information about the financial institutions they supervise.

The law indicates that a particular financial regulator using section 5336(c)(2)(B)(iv) to obtain registry information may do so only for the financial institutions it regulates. Section 5336(c)(2)(B)(iv) would not afford regulators with wholesale access to the registry. That restricted approach is similar to the access provision for financial institutions which restricts those financial institutions to reviewing information related to consenting clients. The rule should make clear that section 5336(c)(2)(B)(iv) imposes a similar restriction on financial regulators seeking information under that section: financial regulators are restricted to reviewing information related to the financial institutions they supervise.

To ensure compliance with that restriction, the registry could require a financial regulator, as part of the registry access process, to provide the name of its agency and where it is located; the name, job title, agency, and contact information of the individual accessing the registry; the name, type, and address of the financial institution that the agency regulates; and a brief description why the registry search is being made.

Concerns that financial regulators might seek registry information unrelated to the financial institutions they supervise — like concerns about financial institutions reviewing registry information unrelated to their consenting clients — should be carefully considered, but would not justify blocking regulators' direct access to the registry. In addition to the fact that financial regulators are bound by the legal prohibition on unauthorized access and would not want to endanger their ability to access the U.S. registry, the registry itself will discourage unauthorized use by maintaining automated tracking features that record each time a registry filing is reviewed by a financial regulator. To increase the deterrent effect of those features, the registry should be designed to easily and quickly retrieve data showing exactly what information was accessed by a particular financial regulator. To heighten deterrence further, Treasury or GAO should — as part of their mandatory registry audits — conduct reviews to gauge the extent of any unauthorized registry access by financial regulators.

The registry's tracking capabilities, in tandem with Treasury or GAO periodic audits, will help ensure that no registry user will be able to hide their activities, and that unauthorized use of the registry by a financial regulator will be identified and punished, including by terminating an offender's registry access.

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

Providing Applicant Information. All parties authorized to access the beneficial ownership registry — whether federal, state, local, or tribal law enforcement, national security or intelligence agencies, financial regulators, federal agencies seeking information on behalf of foreign law enforcement, or financial institutions — should have full access to applicant information associated with any entity they are examining.

The beneficial ownership reporting requirements in the Corporate Transparency Act will make it harder for criminals, money launderers, tax cheats, terrorists, and other bad actors to access the legitimate financial system through the formation of anonymous companies.

Prior to the CTA's enactment, a criminal could ask any law firm, accounting firm, corporate services provider, or other formation agent to set up myriad companies for them without the "gatekeeper" asking any questions and with little to no repercussions for the persons forming the entities as long as they could claim plausible deniability. The CTA has now made plausible deniability much more difficult to attain. Applicants that form entities and file disclosures with the new U.S. registry will be required to provide detailed information about each new entity and the entity's beneficial owners. Having to attest to that information increases the stakes for formation agents, and makes it far less likely that legitimate actors will proceed with forming high-risk entities with suspect beneficial owners.

Bad actors will increasingly have to turn to a smaller subset of less-scrupulous gatekeepers willing to form entities on their behalf and perhaps delay the naming of suspect beneficial owners. That reality will make applicant information in the registry exponentially more valuable, as particular formation agents become increasingly associated with higher risk entities or suspect beneficial owners, are more likely to be named in Suspicious Activity Reports, and become more vulnerable to targeting by law enforcement tracing networks of entities involved with wrongdoing.

By enabling law enforcement, regulators, and financial institutions — not to mention national security and intelligence experts — to identify suspected "mob lawyers" or offshore trust companies willing to incorporate companies for drug lords or sex traffickers, applicant information could, over time, help uncover patterns of suspicious ownership and wrongdoing, expose dirty formation agents, strengthen the ability of financial institutions to identify high-risk potential clients, and contribute to law enforcement investigations and prosecutions.

Clarifying Foreign Access. Before leaving registry access issues, the rule must also address implementation of the provision related to foreign countries.[296] This provision may be the most complex of the access provisions. It states that FinCEN may disclose registry information only upon receipt of:

> "(ii) a request from a Federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation), under an international treaty, agreement, convention, or official request made by law enforcement, judicial, or prosecutorial authorities in trusted foreign countries when no treaty, agreement, or convention is available—
>
> > "(I) issued in response to a request for assistance in an investigation or prosecution by such foreign country; and
> >
> > "(II) that—
> >
> > > "(aa) requires compliance with the disclosure and use provisions of the treaty, agreement, or convention, publicly disclosing any beneficial ownership information received; or

[296] 31 U.S.C. 5336(c)(2)(B)(iii).

> "(bb) limits the use of the information for any purpose other than the authorized investigation or national security or intelligence activity[.]"

The rule needs to resolve at least four issues.

First, the rule should resolve what foreign countries may initiate a request for registry information under the law. The foreign access provision identifies two groups of eligible requesters: (1) "a law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation)"; and (2) "law enforcement, judicial, or prosecutorial authorities in trusted foreign countries." The first group can only make requests "under an international treaty, agreement, or convention," while the second group can make requests "when no treaty, agreement, or convention is available."

Both descriptions of eligible foreign requesters use extremely broad language, encompassing not only foreign law enforcement agencies and authorities, but also prosecutors, judges, and, in the first group, central authorities and competent authorities. Neither category is restricted to foreign agencies and authorities on the national level; the language also encompasses foreign agencies and authorities on the regional, provincial, and local levels. In addition, consistent with the CTA's treatment of U.S. agencies, the CTA does not restrict registry access to foreign agencies and authorities conducting criminal investigations. The provision's use of the phrase "competent authority," which is often used to refer to foreign tax authorities, provides additional evidence that the CTA intends to provide registry access to a broad range of foreign agencies and authorities.

This broad interpretation of the access provision for foreign requesters is consistent with congressional intent. Senator Brown made this observation on the Senate floor just prior to Senate approval of the CTA:

> "FinCEN should also provide appropriate access to beneficial ownership data for foreign law enforcement requesting the information for criminal or civil purposes … keeping in mind that U.S. law enforcement will be seeking similar information from those same foreign law enforcement agencies on a reciprocal basis. FinCEN should endeavor to design a system that will provide appropriate beneficial ownership information to foreign law enforcement without excessive delays or red tape."[297]

In light of this legislative history and the absence of any explicit statutory limitations, the rule should state clearly that requests may be made on behalf of foreign agencies and authorities pursuing criminal, civil, tax, administrative, national security, or intelligence matters.

[297] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7312.

As Senator Brown noted, the breadth of the foreign access provision should be understood in the context of the United States' need for similar registry information. In many countries today, beneficial ownership registries are open to the public and therefore accessible to all U.S. agency personnel, without exception. The CTA's extremely broad foreign access provision should be seen as an effort to provide reciprocal access to the U.S. registry. The rule may want to acknowledge the United States' interest in promoting reciprocity and comity in international information-sharing arrangements as a guiding principle when interpreting the CTA's foreign access provision.

Despite being very broad, the two groups of eligible foreign requesters are not identical. The key difference is that the first group includes all countries with which the United States has entered into a treaty, agreement, or convention, while the second group encompasses only "trusted countries," an unusual term that does not have any existing statutory definition and so will require clarification.

Defining these two groups will be key to implementing the foreign access provision in an effective way. With respect to the first group, the rule could state that the foreign access provision permits registry requests by all countries with which the United States has a treaty, agreement, or convention. The rule should also clarify that the phrase "international treaty, agreement, or convention" will be interpreted broadly to encompass a wide variety of written documents, including Mutual Legal Assistance Treaties (MLATs), tax treaties, tax information exchange agreements, Foreign Account Tax Compliance Act (FATCA) intergovernmental agreements, and other bilateral and multilateral documents. That approach is in line with the provision's broad scope.

With respect to the second group, the rule could indicate that even when no treaty, agreement, or convention is available, "trusted countries" remain eligible to make requests for registry information under section 5336(c)(2)(B)(iii). Rather than try to develop a list of trusted countries beforehand, however, since that list is likely to be very long and change over time, the rule could direct FinCEN to develop instead a list of countries requiring an inquiry with appropriate U.S. officials before providing that country with any registry information outside of an available treaty, agreement, or convention. If one of the countries on that inquiry list actually makes such a registry request, the rule could require FinCEN to check at that time with the Secretaries of the Treasury and State Departments, as well as with other appropriate federal departments and agencies, to determine if that country qualifies as a "trusted country."

The second issue that the rule should resolve is which U.S. federal agencies may make registry requests on behalf of a foreign agency or authority. It is this aspect of the foreign access provision that is most likely to function as a limit on foreign requests. While a wide range of foreign country agencies and authorities would be eligible to request registry information under a broad interpretation of the foreign access provision, none of those requests would actually succeed unless forwarded by a U.S. federal agency.

To clarify which U.S. agencies may make requests for the first group of countries, the rule may want to make a general statement that foreign law enforcement requests made "under an international treaty, agreement, or convention" must comply with existing procedures applicable to foreign requests for information under those documents. For example, MLATs already require foreign agencies to send information requests to the U.S. Department of Justice; while tax treaties and tax information exchange agreements already require foreign tax authorities to direct their information requests to the IRS. While there is no need for FinCEN to spell out those or other existing arrangements, the rule should articulate the general principle that U.S. agencies are bound by the procedures that apply to foreign information requests made under an international treaty, agreement or convention, and only the federal agencies identified in the relevant procedures may submit registry requests on behalf a foreign country.

When it comes to the second group of countries, the law does not place any limits on the federal agencies that may submit registry information requests on behalf of a trusted country. The rule should acknowledge the lack of limits and select one of two options. The first option would be to state plainly that, if no treaty, agreement, or convention applies to the information request, any federal agency may make a registry request on behalf of a trusted country, if that country can convince it to do so. The rule could also require FinCEN to consult with the State Department, Justice Department, and others to determine whether the United States should also establish a screening process for information requests made under this part of the foreign access provision. A second option would be for the rule to identify a specific agency such as the State Department or Justice Department to handle all registry requests from trusted countries acting outside the confines of an international treaty, agreement, or convention.

In addition, the rule should highlight and explain FinCEN's expected role in making registry requests on behalf of foreign countries. For many years, FinCEN has participated in agreements and arrangements to share information with other financial intelligence units (FIUs) around the world.[298] The rule should state clearly that, under Section 5336(c)(2)(B)(iii), FinCEN itself can make registry information requests on behalf of a foreign law enforcement agency, and that FIUs qualify as foreign law enforcement agencies for purposes of the foreign access provision. The rule may also want to indicate the extent to which FinCEN must have a written information exchange agreement or well-functioning information-sharing system in place before making a request on behalf of an FIU. The rule may also want to note that FinCEN has been and will continue to be careful to ensure that its FIU information-sharing activities do not usurp or interfere with other information sharing agreements and arrangements that the United States maintains with other countries including through MLATs, tax agreements, FATCA agreements, and other arrangements. In addition, the rule may want to clarify the

[298] *See* FinCEN's explanation of its work with the Egmont Group and the global network of FIUs: FinCEN, "Support of Law Enforcement," accessed May 4, 2021, https://www.fincen.gov/resources/law-enforcement/support-law-enforcement *and* FinCEN, "The Egmont Group of Financial Intelligence Units," accessed May 4, 2021, https://www.fincen.gov/resources/international/egmont-group-financial-intelligence-units.

extent to which FinCEN may make registry requests for foreign law enforcement agencies other than FIUs.

The third matter that the rule should resolve is the process to be used when a U.S. federal agency seeks to submit a registry information request on behalf of a foreign agency or authority. In designing that process, the rule should seek to minimize the burden on the requesting parties, facilitate the ability of the United States to provide accurate and complete beneficial ownership information to foreign authorities, and minimize costs to FinCEN. To achieve those objectives, the rule could specify, for example, that U.S. federal agencies must use an electronic form designed exclusively to request registry information on behalf of a foreign requester. That form, which could be made part of the process to gain access to the registry, should require, at a minimum, identification of the U.S. agency making the request; the specific foreign agency or authority seeking the information; any treaty, agreement, or convention relevant to the request; and the names and contact information for individuals at both the U.S. and foreign agencies.

The form may also require a foreign official to attest that the request is in compliance with the CTA, or attest even more specifically, as required by the CTA, that: (1) the request is pursuant to an "investigation or prosecution by such foreign country;" and (2) the country will: (a) comply with any disclosure and use provisions in a relevant treaty, agreement, or convention, or (b) limit use of the registry information for any purpose other than the authorized investigation or national security or intelligence activity. To minimize the burden on the foreign requester, the attestation could be provided next to a box that could be checked, followed by the foreign official's identifying information. Alternatively, the rule could permit the foreign official to submit its attestation directly to the U.S. federal agency acting on its behalf and keep the attestation outside of registry records.

Fourth, the rule should make clear that the U.S. federal agency making the request on behalf of a foreign country must conduct the actual search for the registry information. The rule could observe that the U.S. agency may then supply the relevant information to the appropriate foreign agency or authority, all without routinely involving FinCEN personnel.

The foreign access provision is a key information-sharing mechanism that will affect U.S. relationships and standing in the world. It can help prevent or stop the misuse of U.S. entities engaged in wrongdoing within the United States and abroad, and it can help detect foreign entities that register to do business in the United States and then use their U.S. operations to engage in illicit activity. FinCEN must take the time needed to create an effective process.

Cost, Process, Outreach, and Partnership

39) What specific costs would CTA requirements impose – in terms of time, money, and human resources – on small businesses? Are those costs greater for certain types of small businesses than others? What specifically can FinCEN do to minimize those costs, for all small businesses or for some types in particular?

While any reporting requirement will inevitably impose a certain cost (in terms of time, money, and human resources), evidence suggests that the costs to businesses associated with the CTA will likely be minimal — especially for small businesses.

Following the implementation of a similar beneficial ownership registry in the United Kingdom, the U.K. government conducted a thorough review of the specific tasks and costs imposed on reporting companies by their disclosure requirements. The U.K. Department for Business, Energy & Industrial Strategy (BEIS) identified the following tasks required by businesses associated with the reporting requirements:

"Tasks related to the initial submission of [beneficial ownership] information:

- "Familiarisation with the requirements of the [beneficial ownership] register;
- "Identifying the business's [beneficial owners];
- "Collecting and collating information about the business's [beneficial owners]; and
- "Submitting information about the business's [beneficial owners].

"Tasks related to the maintenance of information held on the [beneficial ownership] register:

- "Checking the information about the business's [beneficial owners];
- "Identifying new [beneficial owners];
- "Collecting and collating information about new [beneficial owners]; and
- "Submitting information about new [beneficial owners]."[299]

BEIS officials then utilized a three-phase approach to derive the financial costs associated with each task:

[299] U.K. Department for Business, Energy & Industrial Strategy (BEIS), "Review of the implementation of the PSC Register," BEIS Research Paper Number 2019/005, August 2, 2019, https://www.gov.uk/government/publications/people-of-significant-control-psc-register-review-of-implementation, p. 20.

1. "Respondent businesses estimated the number of staff at senior manager, middle manager and administrative level that were involved in a task;
2. "Respondent businesses estimated the amount of time spent by each staff level to complete a task; [and]
3. "Respondent businesses estimated the cost of any additional financial spend directly related to a task (e.g. the cost of using a third party)."[300]

According to BEIS researchers, "To convert the results of stages 1 and 2 into a financial cost, the number of staff involved at each level was multiplied by the number of hours spent on the task. This figure was then multiplied by the average hourly wage for the relevant staff level…. To calculate the overall cost of a task, this figure was then added to any additional financial spend directly related to a task."

The BEIS report lays out the total mean and median costs associated with each task, and it also breaks down the data by the size of the business as well as by the complexity of the business structure.

The study defined "micro or small" businesses as "businesses with less than 50 employees."[301] For these entities, the median[302] overall cost of compliance was just GBP125.00 (~$175.00). This number was broken down into a median, one-time cost of GBP112.00 (~$157.00) for "[t]asks related to the initial submission of [beneficial ownership] information," followed by an ongoing median cost of just GBP2.00 (~$2.80) for "[t]asks related to the maintenance of information held on the [beneficial ownership] register."[303] The bottom line is an overall per business cost of less than $200.

The costs associated with the U.S. registry are likely to be on par with those realized by the U.K. registry, as the two economies have similar business constituencies. Researchers at Global Witness took a look at the data in the U.K. registry and found that the average number of beneficial owners for each reporting company totaled just 1.13,

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[300] BEIS, "Review of the implementation of the PSC Register," BEIS Research Paper Number 2019/005, August 2, 2019, https://www.gov.uk/government/publications/people-of-significant-control-psc-register-review-of-implementation, p. 20.

[301] BEIS, "Review of the implementation of the PSC Register," BEIS Research Paper Number 2019/005, August 2, 2019, https://www.gov.uk/government/publications/people-of-significant-control-psc-register-review-of-implementation, p. 9.

[302] The U.K. government's report notes that "the median is considered a more useful metric than the mean for the cost of compliance. This is because, due to a relatively small sample size, a small number of outliers (typically amongst the large and more complex businesses) has caused the mean averages to be skewed upwards." *See* BEIS, "Review of the implementation of the PSC Register," BEIS Research Paper Number 2019/005, August 2, 2019, https://www.gov.uk/government/publications/people-of-significant-control-psc-register-review-of-implementation, p. 5.

[303] *See* "Table 3.9: Overall cost of compliance with PSC regulations," BEIS, "Review of the implementation of the PSC Register," BEIS Research Paper Number 2019/005, August 2, 2019, https://www.gov.uk/government/publications/people-of-significant-control-psc-register-review-of-implementation, p. 28.

while the "mode (most common) number of owners for reporting companies was one."[304] Of "the companies reporting owners, 99% of them declared they had six owners or less," [and] well "over half of these companies reported having two owners or fewer."[305] At the same time, current data from the U.S. Small Business Administration indicates that 99.9 percent of U.S. businesses are small businesses, defined by SBA as businesses with fewer than 500 employees, and at 81 percent of those U.S. small businesses, a single individual owns, controls, and is the sole employee of the operation.[306] This data suggests that costs associated with the U.S. registry will be similar to those incurred by the U.K. registry.

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

Bulk Reporting. Assuming that all of the information that is being submitted to FinCEN is complete and accurate and that the registry has the necessary technical capabilities, small businesses and other reporting companies as well as applicants should be able to submit or update reports to the registry on a bulk basis involving multiple entities at a time, such as through uploading an Excel spreadsheet with the required information or via other bulk uploading methods. Bulk uploads may help reduce the burdens on small business and other reporting companies and should be developed, but should not be made a priority and should be worked on only after the registry's initial software and procedures are put into place.

41) How can FinCEN best reach out to members of the small business community to ensure the efficiency and effectiveness of the filing process for entities subject to the requirements of the CTA?

Consulting Small Business. FinCEN should reach out to a broad swath of the small business community, including trade associations that represent the entire small business community rather than associations that represent a narrow segment of that community. For example, small business trade associations like Small Business Majority, the Main Street Alliance, and the American Sustainable Business Council are well-respected representatives of small business and already have expertise on the Corporate Transparency Act.

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[304] *See* Global Witness, "Hard Data on Lessons Learned from The U.K. Beneficial Ownership Register," May 2019, https://thefactcoalition.org/wp-content/uploads/2019/06/GW.Fact-Sheet-on-UK-Register-Data-for-US.May302019-1.pdf.

[305] Global Witness, "Hard Data on Lessons Learned from The U.K. Beneficial Ownership Register," May 2019, https://thefactcoalition.org/wp-content/uploads/2019/06/GW.Fact-Sheet-on-UK-Register-Data-for-US.May302019-1.pdf.

[306] Small Business Administration, Office of Advocacy, "Frequently Asked Questions," October 2020, https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf.

In addition, Small Business Majority[307] and Main Street Alliance[308] both conducted scientific polls of the small business community related to the beneficial ownership registry and would be well equipped to conduct small business polling related to the effectiveness of the registry's filing process.

42) Are there other business constituencies to which FinCEN should reach out, and if so, who are they?

Consulting Other Business Constituencies. A variety of business constituencies have expressed interest in ensuring that the beneficial ownership registry functions well with minimal burdens. Aside from small business and financial groups discussed in response to other questions, FinCEN should consult with businesses that are concerned about the integrity of the international business environment[309] and work to counter the illicit trade in counterfeit and pirated goods often sold through anonymous shell companies.[310] Key groups include the B Team, the National Foreign Trade Council, and the U.S. Council for International Business. Additionally, representatives from the real estate sector have expressed interest in effective implementation of the Corporate Transparency Act.[311] We encourage FinCEN to consult with the National Association of Realtors and the American Land Title Association.

43) How can FinCEN best reach out to financial institutions to ensure the efficiency and effectiveness of the process by which financial institutions could potentially access the beneficial ownership information held by FinCEN?

Consulting the Financial Community. A number of trade associations representing financial institutions have closely followed enactment of the Corporate Transparency Act and are now advocates of its effective implementation. We encourage FinCEN to reach out to — among others — the Bank Policy Institute, the Coalition Against Insurance Fraud, the Emerging Markets Investors Alliance; the Institute of International Finance, the National Association of Federally-Insured Credit Unions

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307 Small Business Majority, "Small Business Owners Support Legislation Requiring Transparency in Business Formation," April 2018, https://smallbusinessmajority.org/our-research/government-accountability/small-business-owners-support-legislation-requiring-transparency-business-formation.

308 Main Street Alliance, "New Poll: Overwhelming Majority of Small Business Owners Support Corporate Transparency to Protect Against Fraud," October 2020, https://mainstreetalliance.org/press-releases/new-poll-overwhelming-majority-of-small-business-owners-support-corporate-transparency-to-protect-against-fraud.

309 *See, e.g.,* The B Team, "Re: The Anti-Money Laundering Act of 2020," June 29, 2020, https://thefactcoalition.org/wp-content/uploads/2020/06/CEOs-BTeam-Letter-AML-Act-NDAA-20200629-1.pdf.

310 *See, e.g.,* National Foreign Trade Council, SafeProof Foundation, The B Team, and United States Council for International Business, "RE: Anti-Money Laundering Act of 2020 (S.Amdt.2198 to S.4049)," June 26, 2020, https://thefactcoalition.org/wp-content/uploads/2020/06/USCIB-NFTC-BTeam-SafeProof-AML-Bill-NDAA-Letter-20200626.pdf.

311 *See, e.g.,* American Escrow Association, American Land Title Association, CRE Finance Council, National Association of REALTORS®, and Real Estate Services Providers Council, Inc. (RESPRO®), Joint Letter to U.S. Senate Armed Services Committee, October 16, 2020, https://thefactcoalition.org/wp-content/uploads/2020/10/Real-Estate-Associations-Beneficial-Ownership-Letter-to-the-Armed-Services-Committee-Oct-16-2020-1.pdf.

(NAFCU), and the Securities Industry and Financial Markets Association (SIFMA) to consider their views.

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

The FACT Coalition encourages Treasury to consult with relevant state, local, and tribal governmental agencies regarding the costs associated with implementing the CTA.

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

See FACT's response to Question 46.

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

Partnering with States, Tribes, and Localities. The original beneficial ownership legislation sought to require all 50 states to collect beneficial ownership information as part of their processes to form or register entities to do business within their borders. The final law, however, placed the responsibility to create and administer the nation's beneficial ownership registry on FinCEN alone, thereby greatly reducing the burdens that otherwise would have fallen on the states.

At the same time, "to the extent practicable, and consistent with applicable legal protections," the law requires states and tribes to "cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information."[312] The law also requires states and tribes to provide notice to their constituencies of the beneficial ownership registry requirements in four places: (1) appropriate websites; (2) forms relating to formation of a new entity; (3) the physical premises of appropriate offices; and (4) in periodic notices sent to third parties related to "initial formation or registration of an entity, assessment of an annual fee, or renewal of any license to do business in the United States and in connection with State or Indian Tribe corporate tax assessments or renewals."[313] The law instructs states and tribes to include in those notices a statement that "the notification is on behalf of the Department of the Treasury for the purpose of preventing money laundering, the financing of terrorism, proliferation financing, serious

[312] 31 U.S.C. 5336(d)(2).
[313] 31 U.S.C. 5336(e)(2).

tax fraud, and other financial crime by requiring nonpublic registration of business entities formed or registered to do business in the United States."[314]

To implement the law, each state and tribe must locate the most appropriate websites, forms, offices, and periodic notices to reach persons who need to know about the beneficial ownership registry requirements; and post the appropriate notice and link to the registry. FinCEN could help minimize this burden on states and tribes by developing standard language for them to use in their notices and by allocating Treasury resources, including at FinCEN and the Treasury Office of Technical Assistance, to help them identify where those notices should appear or be sent. For more on these notices, see FACT's responses to Questions 17 and 18.

Furthermore, as the custodians of databases related to driver's license and identification documents, states and tribes have a responsibility[315] to make that information available to FinCEN in a timely manner to allow the registry to verify relevant information related to filers' acceptable identification documents. A practicable method for doing this would be to grant FinCEN automatic and immediate access to state and tribal databases through Nlets, which has existing processes and procedures for similar requests.[316]

In addition, every state and tribe needs to establish procedures to enable its law enforcement agencies to use the beneficial ownership registry. As indicated in our response to Question 33, the law requires state, tribal, and local agencies to first obtain authorization from a court of competent jurisdiction.[317] That means the states and tribes will have to set up procedures that work for both their courts and law enforcement agencies. The rule could help reduce the burden on states and tribes by providing them with a standard form to make registry requests, clarifying key terms, and providing guiding principles for the authorization process.

A fourth responsibility of states and tribes is to establish procedures to monitor and encourage entity compliance with the beneficial ownership registry requirements. The rule could, again, reduce this burden on states and tribes by developing helpful periodic automated audits, such as an automated monthly or quarterly report comparing the number of new entities added to the registry during the covered period to the number of entities formed or registered by particular states or tribes over the same timeframe. If possible, the report could also analyze a statistically valid number of entities missing from the registry to estimate how many claimed exemptions versus how many went rogue, how many of the claimed exemptions appeared valid, and how many appeared to have been abused. FinCEN could also develop a monthly or quarterly report for individual states and tribes indicating how many entities from their states were the

[314] 31 U.S.C. 5336(e)(2)(B).
[315] Under 31 U.S.C. 5336(d)(2).
[316] For more information on Nlets, see FACT's response to Question 23(c), above.
[317] 31 U.S.C. 5336(c)(2)(B)(i)(II).

subject of discrepancy reports or law enforcement flags, if the registry were to include those devices.

Another key responsibility of states and tribes is to establish a system to handle entities that should file beneficial ownership information in the registry but refuse to do so. In those cases, the ultimate action that states and tribes should take is to terminate the ability of noncompliant entities to do business in the United States either by striking them from state or tribal rolls or by rescinding registrations to transact business. The rule could perhaps reduce this burden on the states and tribes by establishing a system to send automated notices to noncompliant entities requesting them to file beneficial ownership information and warning them of the consequences for failing to do so, with copies also sent to the relevant state or tribe. If a particular entity defies the law and refuses to file beneficial ownership information with the registry, FinCEN should be able to ask the relevant state or tribe to terminate the U.S. entity or revoke its authorization to do business in the United States. For this system to work, states and tribes would have to work with FinCEN to establish this process.

In addition, the rule should alert the public to the ability of FinCEN, the states, and the tribes to take this administrative action in tandem with or instead of any other civil or criminal penalty imposed on the offending entity. This type of administrative action would not only be commensurate with the conduct of a defiantly unregistered entity, it would also ensure the United States can exclude entities with hidden owners from conducting activities within U.S. borders and ensure federal compliance with the requirements of the CTA.

The expenses associated with implementing these notice, verification, access, audit, and termination procedures are likely to vary with the number of entities that a particular state or tribe forms or registers each year. To develop comparative data, Treasury could use its authority under section 5336(d)(2) to ask the states and tribes to provide relevant statistics for an appropriate period of years. Treasury could then use that information to seek funding for states and tribes to implement the CTA.

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

a. Would FinCEN use of such processes or procedures be practicable and appropriate?

The CTA states that "each reporting company shall submit to FinCEN" their beneficial ownership information.[318] That language makes clear that beneficial ownership information must be directly submitted to FinCEN and not any other agency. While some comment letters may contend that beneficial ownership information may instead be submitted to other agencies, such as the IRS, no statutory language supports that contention.

[318] 31 U.S.C. 5336(b)(1)(A).

Congress thoughtfully considered various approaches to collecting beneficial ownership information before settling on the approach taken in the CTA. Congress considered, for example,[319] but did not take the approach advocated in the True Incorporation Transparency for Law Enforcement Act (TITLE Act) to require beneficial ownership reports to be filed with state (rather than federal) authorities.[320] Some versions of the Corporate Transparency Act proposed a hybrid approach, whereby the federal government would collect beneficial ownership information only for entities formed in states that were not already collecting it,[321] but that hybrid approach failed to advance. During committee consideration of the CTA in 2019, amendments to require beneficial ownership information to be filed with the IRS rather than FinCEN were unsuccessful.[322]

Congress finally enacted into law the CTA provisions requiring all beneficial ownership information to be filed directly with FinCEN, while also instructing FinCEN to partner with federal, state, local and tribal agencies to take advantage of "existing Federal, State, and local processes and procedures" to:

- notify reporting companies of their obligations under the CTA (as FACT discusses in response to Questions 17, 18, and 19);
- direct reporting companies to the registry to file or update their beneficial ownership information (as FACT discusses in response to Questions 17, 18, and 19); and
- quickly and efficiently verify the information submitted to the registry, as FACT discusses further in response to Questions 23(c), 46, and 47(c) as well as in Additional Issue (1), Designing an Effective Database.

b. Would FinCEN use of or reliance on existing processes and procedures help to lessen the costs to state, local, and tribal government agencies, or would it increase those costs?

The FACT Coalition defers to state, local, and tribal agencies for their analysis of the costs that such an arrangement would impose upon them. That

[319] U.S. Congress, "Joint Explanatory Statement of the Committee of Conference for H.R. 6395, Division F—Anti-Money Laundering," H.Rept. 116–617, 116th Congress, 2nd Session, (December 3, 2020), https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf, p. 2137.
[320] *See* S.1889, 116th Congress.
[321] *See* H.R.3089, 115th Congress — Corporate Transparency Act of 2017.
[322] *See, e.g.,* an amendment offered by Representative French Hill (no. 2e) to submit beneficial ownership filings to the IRS and then forwarded to FinCEN, rather than submitting them directly to FinCEN. The House Financial Services Committee ruled the amendment non-germane, and it was not included in the Corporate Transparency Act of 2019. U.S. House Committee on Financial Services, "Markups, H.R. 2513, the 'Corporate Transparency Act of 2019,'" June 11, 2019, https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=403829.

said, as a prerequisite for receiving certain federal funds, the CTA mandates that state, local, and tribal agencies work with FinCEN to:

> "(I) notify filers of their requirements as reporting companies under this section, including the requirements to file and update reports under paragraphs (1) and (2) of subsection (b); and
>
> "(II) provide the filers with a copy of the reporting company form created by the Secretary of the Treasury under this subsection or an internet link to that form."[323]

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

Verifying Beneficial Ownership Information. An important way that FinCEN could help ensure the accuracy of registry information, while also reducing burdens on small business, other reporting companies, states and tribes, would be by developing automated mechanisms to ensure accurate beneficial ownership information is supplied to the registry from the time it is first submitted. For example, when a reporting company submits a report to the registry, the database could check in real time whether a passport, driver's license, or state identification number is correct by verifying the number against the appropriate database and refusing to accept filings with incorrect identifying numbers. The registry could also verify an individual's name and birthdate as it appears in the registry compared to the appropriate database and refuse to accept misspelled names or incorrect birthdates. The registry could use the same technology that many businesses use today to ensure filings contain addresses that exist and are in a format acceptable to the U.S. Postal Service. Other beneficial ownership registries have found that using these verification techniques — which ensure accurate information goes into the registry — are key to ensuring high quality data and a well-functioning registry and minimizing the need to send data discrepancy notices to reporting companies and require data corrections.[324]

[323] 31 U.S.C. 5336(e)(2)(A)(i).
[324] For more on verification, see FACT's responses to Questions 23(c) and 46 as well as Additional Issue (1), Designing an Effective Database.

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

As the FACT Coalition noted in the introduction to this comment letter, it is vitally important that FinCEN and Treasury consult with various civil society stakeholders as it implements the CTA.

First, the FACT Coalition led the external campaign to enact the CTA and has a wealth of knowledge on the topic of beneficial ownership transparency and anti-money laundering policies. Treasury and FinCEN should continue their engagement with FACT.

Second, FinCEN and Treasury should reach out to additional stakeholders, including:

- anti-corruption organizations like the Coalition for Integrity, Financial Transparency Coalition, Global Financial Integrity, Global Witness, Natural Resource Governance Institute, Project on Government Oversight (POGO), and Transparency International;
- anti-human trafficking organizations like Polaris and Liberty Shared;
- environmental organizations like EarthRights International, Environmental Investigation Agency, Friends of the Earth, and the World Wildlife Fund for Nature;
- faith-based groups like Jubilee USA Network and Christians United for Israel;
- global development organizations like Oxfam America and the ONE Campaign;
- human rights organizations like Freedom House, Human Rights First, Human Rights Watch, International Corporate Accountability Roundtable (ICAR), and The Sentry;
- labor unions like the AFL-CIO, AFSCME, and Public Services International;
- national security experts at the Atlantic Council, Carnegie Endowment for International Peace, Center for American Progress, Center for a New American Security, Center for Strategic and International Studies, Foreign Policy for America, Foundation for the Defense of Democracies, German Marshall Fund of the United States, Hoover Institution, and Hudson Institute;
- public interest organizations like Fair Share, Public Citizen, and U.S. PIRG; and

- tax experts at the Institute on Taxation and Economic Policy, Global Alliance for Tax Justice, and Tax Justice Network.

Third, Treasury and FinCEN should consult with members of the Anti-Corruption Advocacy Network (ACAN), which includes academics, advocates, and others with significant expertise on relevant matters. To connect with ACAN, contact Layla Hashemi (lhashem2@gmu.edu) with the Terrorism, Transnational Crime, and Corruption Center at George Mason University.

Fourth, Treasury and FinCEN should consult with organizations — like the Association of Certified Anti-Money Laundering Specialists (ACAMS), Association of Certified Financial Crime Specialists (ACFCS), and TRACE International, Inc. — which have deep AML/CFT, CDD, and anti-corruption expertise.

Fifth, Treasury and FinCEN should reach out to organizations that have experience forming corporate directories, like OpenOwnership, OpenCorporates, and the Global Legal Entity Identifier Foundation (GLEIF).

Finally, Treasury and FinCEN should reach out to academics that research money laundering, transnational crime, corruption, national security, tax policy, and the abuse of corporate structures. These academic experts include, among others:

- Nancy Boswell at American University;
- Vanessa Bouché at Texas Christian University;
- Michael Carpenter at the University of Pennsylvania;
- Charles Dainoff at the University of Idaho;
- Michael Findley at the University of Texas at Austin;
- Chye-Ching Huang at New York University;
- Matthew Murray at Columbia University;
- Daniel Nielson at Brigham Young University;
- Jonathan Rusch at American University;
- Jason Sharman at the University of Cambridge;
- Stephen Shay at Boston College Law School;
- Louise Shelley at George Mason University;
- Matthew Stephenson at Harvard Law School; and
- Gabriel Zucman at the University of California, Berkeley.

Two Additional Issues

Two additional sets of issues that the ANPR does not address, but are critical to effective implementation of the Corporate Transparency Act, involve designing an effective database and coordinating its implementation with the beneficial ownership requirements affecting the System for Award Management (SAM) database.

(1) Designing an Effective Database

The beneficial ownership database being designed by FinCEN is the single most important aspect of its implementation of the CTA. It is critical that the database operate in an efficient and effective way to achieve the CTA's objective of creating a beneficial ownership database that minimizes burdens on reporting companies and provides information that is accurate, complete, and highly useful. The following features, all of which currently appear in one or more beneficial ownership registries around the world and can be incorporated into the U.S. registry using existing software, should be built into the U.S. registry from the beginning, when installing the features will be most cost-effective.

Structured, Machine-Readable Data. The U.S. registry should be designed to provide structured, machine-readable data that can be easily searched and analyzed on both a per record and bulk basis. When data is machine readable and available in bulk, multiple disclosures can be analyzed together enabling law enforcement, regulators, and financial institutions to apply data science and machine learning techniques to identify, for example, high risk entities and beneficial owners, suspicious patterns of ownership, or entities with hidden connections.

Interoperable Data. The registry should be structured in a way that enables registry users to easily compare and integrate U.S. data with beneficial ownership data from other registries around the world. Interoperable data makes it easier for law enforcement, regulators, and financial institutions to track entities and beneficial owners active in multiple countries, evaluate money laundering risks, and identify suspicious ownership patterns, as well as use a greater range of verification procedures to test the accuracy and completeness of the U.S. data. Interoperable data can also facilitate comparing beneficial owners to names that appear on non-U.S. datasets of interest, such as sanctions lists.

Changes Over Time. The registry must be able to track each and every change made over time to any U.S. registry filing. The changes must be recorded and tracked in a way that indicates the specific changes made, who made them, and when. There is no need for the database to label specific changes in any way, such as minor or major, routine or suspicious. It is simply necessary to keep track of the changes in a format that makes it easy for law enforcement, regulators, and financial institutions to understand and demonstrate what happened. Preserving this data will facilitate the prosecution of persons who willfully submit false, incomplete, or misleading data or make unauthorized data disclosures. OpenOwnership has been working on this registry feature for years and can provide specific assistance.

Automated Verification. The registry should establish a range of automated features that perform a variety of verification tasks in real-time, before a filing is accepted, to ensure the information in the filing is "accurate, complete, and highly useful."[325] Incorporating effective, real-time verification procedures is critical to creating a "highly useful" registry and should be assigned the highest development priority to prevent inaccurate information from degrading the database, triggering discrepancy reports, necessitating corrective action, burdening reporting companies, and impeding use of the registry.[326] Useful verification procedures include, for example, procedures to ensure the accuracy of passport, state identification, driver's license, and LEI numbers; verify individual and entity names; ensure addresses are properly formatted and not fabricated; verify the type of entity, cross-check the names of individuals and entities against sanctions lists; and perform other data improvement tasks. The registry should also establish protocols that prevent filings with blank fields or incorrectly formatted information. If a problem arises in a particular filing, the registry should be designed to send a pop-up message to the filer indicating the error and requesting correction; if no correction is made, the registry should decline to accept the filing and ask the filer to reapply.

Multiple Variables. Registry users should be able to search the database by a variety of independent variables and by sets of variables. At a minimum, registry users should be able to search the data by entity name, address, and entity type; by beneficial owner name, birthdate, address, and identifying number; by applicant name, birthdate, address, and identifying number; by name of the individual signing an attestation; by the U.S. registered agent; by FinCEN identifier; by country; by U.S. state; by tribe; by government agency; and by financial institution. In addition, if the registry chooses to deploy them, registry users should be able to search the data by discrepancy reports, risk scores, change notifications, and law enforcement flags. Each of those variables will enable registry users, including law enforcement, national security and intelligence agencies, regulators, financial institutions, GAO, Treasury IG, and FinCEN to conduct a variety of searches and audits that can be used, for example, to evaluate the accuracy and completeness of the data, identify entities that should have registered but failed to do so, evaluate exemption claims, identify high-risk entities and beneficial owners, uncover suspicious patterns of ownership, detect entities with hidden connections, detect instances of unauthorized access, investigate unauthorized disclosures of registry information, or identify states, tribes, or financial institutions where beneficial ownership reporting is substandard or where suspicious entities or beneficial owners may be conducting illicit activities.

Multiple Forms. The registry should design and use a variety of forms to facilitate the smooth functioning, analysis, and audit of registry data. For example, the

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[325] As required by 31 U.S.C. 5336 (b)(4)(B)(ii).
[326] As required by 31 U.S.C. 5336 (b)(4)(B) and 31 U.S.C. 5336 (b)(1)(F)(iii–iv).

registry should offer a general beneficial ownership form for reporting companies; a FinCEN identifier form that individuals and entities can use to apply for the identifier, and the registry can use to create a FinCEN identifier database and provide registry users with access to FinCEN identifier information; a pooled investment vehicle certification that PIVs can file to claim an exemption; an update form to quickly update earlier filings; a data discrepancy form that registry users can use to flag potentially inaccurate information; and a Treasury IG form to report and resolve problematic information. In addition, the registry's access procedures must be designed to accommodate a range of registry users required to supply different types of information to gain access to registry information. Those access procedures may want to incorporate or link to forms specialized for requests made by federal agencies; state, local, and tribal agencies; U.S. agencies acting on behalf of foreign law enforcement agencies; appropriate regulators; and financial institutions. All of those forms and specialized access procedures should be reviewed by experts from the Treasury IG, GAO, DOJ, DOD, DHS, and intelligence community to facilitate data searches and audits.

Audit Functions. The registry should be designed to facilitate a variety of database audits, including by producing automated reports to facilitate the mandatory registry audits by Treasury and GAO.[327] Automated reports could be designed, for example, to track the number of new entities added to the registry during a specified period compared to the number of new entities added to state and tribal rolls during the same period and identify entities missing from the registry; track the number of FinCEN identifiers, who requested them, and any evidence of multiple identifiers being assigned to the same person; search for evidence of unauthorized use of registry data or access violations; track the number and nature of any data discrepancy reports or registry complaints, and whether and how long it took to resolve them; and identify high risk entities, applicants, or beneficial owners, the nature of the associated risks, and any evidence of suspicious ownership patterns or misconduct. Given that the United States forms roughly 2 million entities per year,[328] all of these automated reports would need to be issued on a monthly basis and actively reviewed by FinCEN, Treasury IG, or GAO auditors to evaluate and improve the functioning of the registry and ensure its data is accurate, complete, and highly useful.

Ownership Structures. Once an entity lists its beneficial owners and any parent organization, subsidiary, or affiliate (see FACT response to Question 12), the registry should establish automated procedures that convert that list into a diagram depicting the reporting company's ownership structure. This information should be presented in a structured, machine-readable format that permits registry users to analyze whether and how entities in the registry database may be connected through common beneficial owners, entities, applicants, or other features.

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[327] *See, e.g.,* Section 6402(7)(B) of the CTA, 31 U.S.C. 5336(c)(3)(J), and 31 U.S.C. 5336(c)(10).

[328] Rena S. Miller and Liana W. Rosen, "Beneficial Ownership Transparency in Corporate Formation, Shell Companies, Real Estate, and Financial Transactions," Congressional Research Service, July 8, 2019, https://crsreports.congress.gov/product/pdf/R/R45798, p. 3.

Treasury IG Complaint System. The CTA requires the Treasury Inspector General (IG) to set up a process to accept complaints from registry users about the functioning of the registry and whether its data is accurate, complete, and timely.[329] The registry needs to be designed to accept, store, and alert appropriate FinCEN personnel to complaint information supplied by the Treasury IG, perhaps by using the data discrepancy and flag functions described below. The registry also needs to establish a system for tracking resolution of specific complaints. The registry's designers must not ignore this opportunity to benefit from the law's mandatory complaint system and the Treasury IG's legal duty to help improve the database.

Discrepancy Reports. The registry should build into all of its forms a discrepancy "button" that enables a registry user to identify potentially inaccurate information in the form, such as an incorrect name, address, number, or other problem (see FACT's response to Questions 22, 28, and 46). The registry should be designed to store that discrepancy report and send an automated notice to the reporting company alerting it to the data discrepancy (without disclosing who identified it) and requesting correction within, perhaps, 10 days. The registry should also be designed to automatically track any change made to the information after the notice was sent and, if appropriate, designate the discrepancy report as resolved. If the discrepancy is not resolved within 10 days, the registry should be designed to automatically send escalating notices over time to the reporting company, the FinCEN office charged with resolving data discrepancies, the relevant state or tribal office, and any relevant financial institution. If the discrepancy remains unresolved for 60 days, the registry should be designed to "flag" some or all of the reporting company's filings within the registry, and send additional alerts to the reporting company, FinCEN, and the relevant state or tribal office. At that point, the registry could also send notices to trigger penalty reviews by both FinCEN and the relevant state or tribal office. Discrepancy reports, which are used in many E.U. registry offices, offer a powerful mechanism to correct problematic data and ensure registry information is accurate, complete, and highly useful. Designing an effective data discrepancy resolution function for the U.S. registry, with related notices, should be a high development priority.

Flags. The registry should consider developing two different types of flags. The first, a forwarding flag, should be available to all registry users who, if they activate the flag, would then receive an automated push notification anytime a change was made to the information in the flagged form. Registry users should also be able to deactivate that flag at any time, as explained in FACT's response to Question 36. The second type of flag function could be activated only by FinCEN, the Treasury IG, or a law enforcement, national security, or intelligence agency to designate a particular entity, applicant, or beneficial owner with a red flag indicating higher risk. Users should have to affirmatively activate the red flag feature and should be able to deactivate it at any time. That red flag should be made visible only to FinCEN, Treasury agencies, and some or all U.S. law enforcement, national security, and intelligence agencies.

[329] 31 U.S.C. 5336(h)(4).

Risk Scoring. FinCEN should also consider designing a registry scoring feature which would enable the registry to automatically assign a high-risk rating to a specific reporting company, applicant, or beneficial owner, and also enable FinCEN personnel to manually impose or remove that high-risk rating. To use the automated scoring feature, FinCEN would have to develop criteria to trigger the high-risk rating. Those criteria might include, for example, a reporting company that was formed in, or whose beneficial owners reside in, or is dealing with a financial institution located in a high-risk jurisdiction; has a complex ownership structure that involves multiple jurisdictions; or has been red flagged by law enforcement. FinCEN could use those and other fact-specific factors to manually impose or remove a high-risk rating. FinCEN would also have to determine whether to make those high-risk ratings available to all or some registry users or confine it to Treasury personnel.

Access Protections. The registry should be designed to carefully track and record each instance in which a registry user views registry information. Those tracking mechanisms should record who accessed which record at what date and time. This information is key to identifying access violations and uncovering who might be responsible for an unauthorized disclosure of registry information. FinCEN already has years of experience with these types of data protections and may want to utilize the same or enhanced versions of the tracking devices it already uses in other databases. In addition, the registry should be designed to enable FinCEN, Treasury IG, or GAO auditors to identify all of the records viewed by a particular financial institution, state, local, or tribal office, foreign financial regulator, or on behalf of a foreign law enforcement agency to determine whether any registry user conducted any unauthorized inspections of registry information.

Security Features. The registry must be designed to secure registry data against cyberattacks. FinCEN has decades of experience protecting information in its SAR and CTR databases from those types of attacks, and should apply the same robust security protocols to the beneficial ownership registry. At the same time, the registry should not be designed to somehow ensure the "privacy" of individuals and entities supplying data to the registry. As explained earlier in response to Question 34, the CTA nowhere establishes privacy protections for persons who supply data to the registry; to the contrary, the CTA repeatedly directs FinCEN to create a "database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators"[330] as well as "highly useful in…confirming beneficial ownership information provided to financial institutions to facilitate the compliance of the financial institutions with anti-money laundering, countering the financing of terrorism, and customer due diligence requirements under applicable law."[331] That requires providing registry users ready access to registry data. FinCEN's objectives here should focus on security, not privacy, protections.

[330] CTA Section 6204(8). In fact, the word "privacy" never appears in the CTA.
[331] 31 U.S.C. 5336 (b)(1)(F)(iv).

No Reinventing the Wheel. Designing an effective beneficial ownership registry, with the features just identified, is a difficult task. In making its software decisions, FinCEN should not attempt to reinvent the wheel or use taxpayer dollars to pay for the development of an entirely new, untested, customized, and expensive registry. Instead, to minimize taxpayer expense and take advantage of existing software advances, FinCEN should research and — to the greatest extent practicable — make use of existing registry software. In particular, FinCEN should consider using some or all of the Beneficial Ownership Data Standard, a well-developed, battle-tested, no-cost software designed specifically for beneficial ownership registries.[332] That data standard has been three years in the making, incorporates many of the features identified above, and is available to the public at no cost. It was developed by OpenOwnership — a London-based nonprofit funded by the United Kingdom's Foreign, Commonwealth & Development Office, the World Bank, and BHP Foundation — which has worked with almost 40 countries to help design their beneficial ownership registries.[333] It uses a format (JSON) that can be read and understood by computer systems around the world, thereby meeting the interoperability objective identified above, and can be modified to address a variety of objectives. FinCEN should consider beginning with the free Beneficial Ownership Data Standard as the core of its registry system and then make a series of modifications and additions that address the legal and practical requirements for the U.S. registry. FinCEN should also work with countries like France, Belgium, and others that have successfully set up extensive verification procedures to ensure the accuracy of their registry data.

(2) Coordinating with SAM Profiles

The ANPR concentrates, as it should, on issues related to establishing the beneficial ownership registry required by the CTA. But the CTA contains an important provision that requires the same beneficial ownership information that is provided to the registry to be added to a completely separate and publicly available federal database, the System for Award Management (SAM). Due to the close connections between the CTA and SAM beneficial ownership requirements, the proposed rule should also address several issues related to the SAM database.

SAM is a federal database administered by the General Services Administration (GSA). It is designed, in part, to present identifying information about every entity seeking to bid on a federal contract in order to ensure the U.S. government and American public are informed about who is seeking to do business at taxpayer expense. In fact, no bidder may bid on a federal contract unless it has registered with and provided the identifying information required by SAM. The required identifying information for each potential federal contract bidder is presented in what is called a "SAM profile." Currently, SAM profiles require such information as an entity's name, address, business type, type of goods or services provided, size metrics, data universal numbering system

[332] OpenOwnership, "Beneficial Ownership Data Standard (v0.2)," accessed May 4, 2021, http://standard.openownership.org/en/0.2.0/.
[333] OpenOwnership, "What we do," accessed May 4, 2021, https://www.openownership.org/what-we-do/.

(DUNS) number, taxpayer identification number, contact information, and certain affirmative representations required by law.[334]

For the first time, the CTA requires certain SAM profiles to include beneficial ownership information. Section 6402(c) of the CTA states:

> "(c) Reporting Requirements for Federal Contractors.—
>
> > "(1) In general.—Not later than 2 years after the date of enactment of this Act, the Administrator for Federal Procurement Policy shall revise the Federal Acquisition Regulation maintained under section 1303(a)(1) of title 41, United States Code, to require any contractor or subcontractor that is subject to the requirement to disclose beneficial ownership information under section 5336 of title 31, United States Code, as added by subsection (a) of this section, to provide the information required to be disclosed under such section to the Federal Government as part of any bid or proposal for a contract with a value threshold in excess of the simplified acquisition threshold under section 134 of title 41, United States Code.
> >
> > "(2) Applicability.—The revision required under paragraph (1) shall not apply to a covered contractor or subcontractor, as defined in section 847 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116–92), that is subject to the beneficial ownership disclosure and review requirements under that section."[335]

Senator Brown, one of the CTA's chief architects, made these comments about this provision while on the Senate floor, just prior to Senate approval of the legislation:

> "[T]he Administrator for Federal Procurement Policy should take immediate steps to revise the Federal Acquisition Regulation to require covered federal contractors and subcontractors, at an early stage in the federal procurement process, to disclose to the federal government in writing, and to update over time, information on their beneficial owners.
>
> "To carry out this provision in the law, the Administrator should work with the General Services Administration to add a beneficial ownership disclosure requirement to the database authorizing entities to bid on Federal contracts."[336]

Section 6402(c) essentially requires federal contractors and subcontractors that are subject to the CTA's disclosure obligations to disclose the same beneficial ownership information in their SAM profiles before they can bid on a federal contract. Because the law makes coverage under section 5336(a) establishing the registry coterminous with

[334] System for Award Management (SAM), "Quick Start Guide for Contract Registrations," accessed May 4, 2021 https://www.sam.gov/SAM/transcript/Quick_Guide_for_Contract_Registrations.pdf.

[335] Section 6402(c) of the CTA.

[336] Senator Sherrod Brown, "National Defense Authorization Act," Congressional Record 166: 208 (December 9, 2020), https://www.congress.gov/116/crec/2020/12/09/CREC-2020-12-09-pt1-PgS7296.pdf, p. S7312.

coverage under Section 6402(c) requiring prospective contractor disclosures, decisions about which entities have to disclose beneficial ownership information in the CTA registry will also determine which entities have to disclose beneficial ownership information in their SAM profiles. In addition, decisions on the specific information entities have to disclose in their registry filings will also determine what they will have to disclose in their SAM profiles.

The CTA places two additional limits on the entities that have to disclose beneficial ownership information in their SAM profiles. First, contractors and subcontractors subject to beneficial ownership disclosure requirements under section 847 of the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116–92) are exempt from the requirements of section 5336(c); that exemption protects defense contractors and subcontractors against having to comply with two sets of duplicative and possibly conflicting beneficial ownership disclosure requirements. Second, section 5336(c) applies only to entities that want to bid on federal contracts with a value in excess of the simplified acquisition threshold under 41 U.S.C. 134, currently set at $250,000. That restriction ensures that public disclosure of beneficial ownership information affects only entities seeking to win larger federal contracts. If an entity plans to bid only on contracts below the $250,000 threshold, it would be able to do so without disclosing beneficial ownership information in its public SAM profile.

Section 6402(c) requires the Administrator for Federal Procurement Policy to lead implementation of that provision, presumably with help from the Federal Acquisition Regulation (FAR) Council.[337] The deadline for completing the FAR revisions needed to mandate inclusion of beneficial ownership information in some SAM profiles is January 1, 2023.[338]

The implications for the proposed rule at issue here are fourfold.

First, the proposed rule should acknowledge that its determinations will impact not only the registry, but also many entities seeking to bid on federal contractors.

Second, the proposed rule should note that entities bidding on federal contracts will be required to make their beneficial ownership information public in their SAM profiles, without any of the access restrictions that apply to the registry. Had Congress wished for beneficial ownership information related to contractors and subcontractors to be kept confidential, lawmakers could have stated that procurement authorities would have access to the FinCEN registry, with all of its access restrictions. Instead, Congress made an explicit statement that contractors and subcontractors must affirmatively disclose their beneficial ownership information again to a separate GSA database which is publicly accessible. The rule could observe that Congress may have decided to make

[337] "FAR Council membership consists of: the Administrator for Federal Procurement Policy and — (A) the Secretary of Defense, (B) the Administrator of National Aeronautics and Space; and (C) the Administrator of General Services." *See* Federal Acquisition Regulatory Council, "FAR Council Members," May 4, 2021, https://www.acquisition.gov/far-council-members.

[338] January 1, 2023 is two years after the date of enactment of the CTA, which was January 1, 2021.

beneficial ownership information public in SAM profiles because the affected entities are seeking to do business with the United States and should be transparent about their true owners — not only with the U.S. government, but also with the taxpayers paying the contract costs.

Third, the rule should consider requiring the registry to set up an automated verification system to cross-check — prior to acceptance by the registry — the beneficial ownership information contained in a registry filing against the information contained in a SAM profile prepared by the same entity. Since entities seeking federal contracts have strong incentives to provide accurate information in their public profiles, this verification tool will help ensure the accuracy of the information submitted to the registry. GSA should be a willing partner in this effort as the CTA requires federal agencies to "cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information."[339]

A fourth consideration is whether the registry should allow federal contracting officers, with consent from prospective bidders, to examine relevant registry information as part of the contracting officers' legal obligation to ensure that only responsible prospective contractors bid on federal contracts.

Conclusion

We thank you, again, for the opportunity to comment on the implementation of the CTA. The establishment of a beneficial ownership registry represents the most significant upgrade to U.S. anti-money laundering safeguards in a generation — it is critical that FinCEN seize this opportunity to implement the CTA in the most effective manner.

Should you have any questions, please feel free to contact Erica Hanichak at ehanichak@thefactcoalition.org.

Sincerely,

Ian Gary
Executive Director

Erica Hanichak
Government Affairs Director

[339] 31 U.S.C. 5336(d)(2).