February 7, 2022

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

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

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

Dear Acting Director Das:

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 a notice of proposed rulemaking (NPRM) to implement the beneficial ownership reporting requirements in the Corporate Transparency Act (CTA).[1]

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]

FinCEN is to be commended for proposing a rule that hews closely to the CTA, thoughtfully implements its major provisions, and would significantly increase beneficial ownership transparency for a wide range of entities operating in the United States. At the same time, the proposed rule would benefit from a number of strengthening measures described in the remainder of this comment letter. The most important of the suggested improvements would:

(1) **Verification mechanisms.** Clarify the registry will deploy real-time and automated verification mechanisms to ensure that certain submitted data, including names, birth dates, addresses, and identification numbers, are consistent with other government-held records.

(2) **FinCEN identifier transparency.** Clarify that the FinCEN identifier is intended to minimize reporting burdens and increase registry accuracy, completeness, and usefulness, but is not intended to diminish ownership transparency or create an ultra vires secrecy mechanism enabling beneficial owners to hide their identities from reporting companies. Additionally clarify how the registry may use FinCEN identifiers by: (a) deleting inappropriate passages in

[1] Financial Crimes Enforcement Network (FinCEN), "Beneficial Ownership Information Reporting Requirements," Federal Register, 86 FR 69920-74 (Docket Number: FINCEN-2021-0005, RIN: 1506-AB49), Dec. 8, 2021, https://www.govinfo.gov/content/pkg/FR-2021-12-08/pdf/2021-26548.pdf. References to "page numbers" or "sections" herein are to the proposed rulemaking unless otherwise specified.
[2] A full list of FACT members is available at: Financial Accountability and Corporate Transparency (FACT) Coalition, "Coalition Members," 2022, https://thefactcoalition.org/about-us/coalition-members-and-supporters/.

the preamble allowing FinCEN identifiers to be used by beneficial owners to hide their identities from reporting companies; (b) giving all registry users easy access to identifying information about the person assigned to each FinCEN identifier; (c) clarifying that entities applying for a FinCEN identifier must disclose all of their direct and indirect beneficial owners in the application submitted to FinCEN; (d) requiring reporting companies to delineate the ownership chain linking each of their indirect beneficial owners to the reporting company, including by identifying all intermediate entities; (e) clarifying the circumstances under which a reporting company may use FinCEN identifiers for intermediary entities to avoid incomplete or misleading disclosures; and (f) adding examples to the final rule to illustrate how FinCEN identifiers are supposed to work.

(3) **Indirect beneficial owners.** Require reporting companies to disclose the ownership chain connecting each indirect beneficial owner to the company to meet the CTA's requirement for registry information that is accurate, complete, and highly useful.

(4) **Privacy.** Delete provisions in the preamble addressing general privacy issues, since protecting privacy is not an authorized statutory objective and contradicts the CTA's primary purpose of increasing beneficial ownership transparency.

(5) **Beneficial ownership status.** Require reporting companies to indicate whether a beneficial owner's status is due to an ownership interest, substantial control, or both, to help identify those who control, but do not own, entities active in the United States.

(6) **Subsidiary exemption.** Correct the provision establishing the subsidiary exemption by inserting the word "wholly" before "controlled" so that the exemption applies only to subsidiaries that are wholly controlled or wholly owned by a specified exempt entity, in line with the statute and the proposed preamble.

(7) **Organizational and optional filings.** Clarify that an entity which files an organizational or optional filing with a State or Tribal agency, the legal effect of which results in an entity otherwise subject to the CTA, must disclose its beneficial owners to the registry unless it is otherwise exempt.

(8) **Novel entities and substantial control.** Clarify the definition of "substantial control" to take into account novel entities like series limited liability companies and decentralized autonomous organizations.

(9) **Exemption certificates.** Permit exempt entities to voluntarily file exemption certificates with the registry and consider mandating them to enable FinCEN and registry auditors to better identify entities that are unlawfully claiming exempt status.

(10) **Mandatory TINs, TIN updates, and LEIs.** Require reporting companies to provide taxpayer identification numbers (TINs) for their beneficial owners and update registry filings if TINs are acquired later in time to ensure the usefulness of registry data for the IRS and other law enforcement agencies. Also require reporting companies to provide LEIs on a mandatory instead of voluntary basis, to facilitate data verification and international cooperation.

(11) **Doing business exceptions.** Require each State and Tribe to identify to FinCEN any of its laws that permit non-U.S. entities to avoid registration (and, thus, the beneficial ownership registry) if their in-state activities involve maintaining a bank account, owning real estate, or acquiring a mortgage, since those excluded activities can be used to launder money or engage in other misconduct.

(12) **Company terminations.** Authorize FinCEN to request immediate state termination of an entity that willfully refuses to file beneficial ownership information with the registry despite a legal requirement to do so, using existing state procedures.

(13) **BOSS cost analysis.** Enhance the BOSS cost estimates by specifying: (a) the extent to which FinCEN plans to utilize existing, cost-free beneficial ownership data standards that could save millions of taxpayer dollars; (b) BOSS' major features and whether those features are covered by the $33 million and $31 million development and maintenance cost estimates; and (c) a line item amount to be spent on registry auditing costs, including the cost of incorporating automated audit data features into the BOSS software.

The CTA states that it is the sense of Congress that more than 2 million corporations and limited liability companies (LLCs) are formed each year under the laws of the 50 States, yet "most or all States" do not require information about the human beings who own or control those entities.[3] The CTA also states it is the sense of Congress that "malign actors seek to conceal their ownership" of entities operating within U.S. borders "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 our allies.[4] The CTA states further it is the sense of Congress that federal legislation "providing for the collection of beneficial ownership information" for entities active within the United States is "needed" for multiple reasons, including to "set a clear, Federal standard for incorporation practices," "protect vital United States national security interests," "protect interstate and foreign commerce," strengthen efforts to combat money laundering, terrorism finance, and other illicit activity, and "bring the United States into compliance" with international standards combatting money laundering and the financing of terrorism.[5]

While the 50 States have, throughout U.S. history, dominated the formation and registration of corporations, LLCs, and other entities seeking to operate within U.S. borders, the Constitution charges Congress itself with the responsibility to "provide for the common Defence and general Welfare of the United States" and to "regulate Commerce with foreign Nationals, and among the several States, and with the Indian Tribes."[6] Those Constitutional responsibilities provide ample legal authority for Congress to enact the disclosure obligations embodied in the CTA. Establishing a nationwide standard for beneficial ownership transparency is particularly important given actions by a handful of States, including Delaware, Nevada, South Dakota, and Wyoming, to enact state laws enhancing the ability of individuals to conceal their ownership and

[3] CTA § 6402(1), (2).
[4] CTA § 6402(3).
[5] CTA § 6402(5).
[6] U.S. Constitution, Article 1, Section 8.

control of entities conducting activities across state lines, within U.S. borders, and in other countries, threatening both interstate and foreign commerce with illicit activity.[7]

The CTA — if implemented effectively — represents an historic opportunity to curtail the misuse of anonymous entities for illicit purposes. Negotiated on a bipartisan basis 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 congressional leaders, U.S. agencies, and outside stakeholders, the CTA empowers FinCEN to design implementing rules that respect the compromises reached by the legislature while advancing beneficial ownership transparency.

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 those bipartisan and bicameral compromises, so it is important for the implementing rules to do the same, examining each provision carefully, both individually and in context with other provisions in the law, to carry out congressional intent.

The preamble to the proposed rule does an excellent job of describing how entities with concealed owners have been used to undermine U.S. national security,[9] hide bad actors, and launder the proceeds of a wide variety of crimes. It also does an excellent job of citing U.S. reports and agencies that acknowledge the scope of the problem within the United States. The proposed rule takes note of a 2014 study by academics at the University of Texas-Austin, Brigham Young University, and Griffith University which found that the United States was the easiest place for terrorists, criminals, and kleptocrats to form an anonymous entity to launder their proceeds with impunity.[10] In addition, it cites a 2019 analysis by Global Financial Integrity which revealed that — in all 50 States — "more personal information is needed to obtain a

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[7] See, e.g., "Delaware corporate secrecy again proves popular in 'Pandora Papers,'' (October 7, 2021), PBS radio station WHYY, https://whyy.org/articles/delaware-corporate-secrecy-again-proves-popular-in-pandora-papers/; "What Are The Advantages Of Setting Up A Trust In South Dakota?" (March 2, 2020), Goosmann Law Team, podcast (South Dakota law firm touting the State's secrecy laws related to trusts), https://blog.goosmannlaw.com/estate-planning-laywer-on-your-side/when-do-you-need-to-start-or-update-your-estate-plan-0#article; "Where You Should Incorporate," (undated), Wyoming Corporate Services Inc. (listing secrecy factors as reasons to choose Wyoming for forming or registering an entity: "Go to the Secretary of State of Nevada's website and type in a person's last name and/or the first name. You will see a list of all companies that person is a part of in Nevada. Go to the Secretary of State of Wyoming's website and you will find that the only way to search on a company is by company name. You cannot search using a person's name."), https://wyomingcompany.com/nevada-corporation/?keyword=&gclid=Cj0KCQiA_c-OBhDFARIsAIFg3expDqg13z9cHpRemmxh0i8H69LwCzKpmML_cudXcBZakSeZGaXt3M4aAjh1EALw_wcB.

[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.

[9] Open Ownership, "Using beneficial ownership data for national security." December 2021, https://www.openownership.org/resources/using-beneficial-ownership-data-for-national-security/.

[10] 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.

library card than to establish a legal entity that can be used to facilitate tax evasion, money laundering, fraud, and corruption."[11]

Investigations stemming from the 2016 Panama Papers, 2017 Paradise Papers, and 2021 Pandora Papers, as well as other scandals reveal that drug cartels, human traffickers, arms dealers, corrupt foreign officials, sanctioned individuals, tax cheats, and other wrongdoers frequently set up U.S. entities without providing any information about who owns or controls those entities.[12] Evidence shows that those wrongdoers often layer anonymous companies, with one owning another and the frequent mixing of foreign and domestic entities, to make it virtually impossible to "follow the money" and determine who is directing their activities. These tactics have 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 follow the example set in other countries and initiate a new transparency effort requiring entities operating in the United States to identify their true owners — their "beneficial owners" — at the time of formation or registration and provide timely updates as ownership information changes. Through effective implementation of this disclosure obligation, FinCEN has a historic opportunity to improve U.S. anti-money laundering and terrorist financing safeguards, better protect U.S. and foreign communities from criminal and corrupt activity, and better fortify the integrity of the U.S. and global financial systems. The FACT Coalition previously weighed in on best practices for implementing the CTA[13]; this letter is directly related to FinCEN's strong proposed rulemaking and ensuring that any final rulemaking implements the best read of the CTA.

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[11] 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/.

[12] See, e.g., International Consortium of Investigative Journalists (ICIJ), "The Panama Papers: Exposing the Rogue Offshore Financial Industry," April 2016, https://www.icij.org/investigations/panama-papers/; ICIJ, "Paradise Papers: Secrets of the Global Elite," November 2017, https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/; ICIJ, "Pandora Papers," December 2021, https://www.icij.org/investigations/pandora-papers/.

[13] Re: Beneficial Ownership Reporting Requirements, FACT Coalition (May 5, 2021), available at https://thefactcoalition.org/wp-content/uploads/2021/05/FACT-CTA-ANPRM-Comment-20210505-0329am-FINAL.pdf.

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I. Information To Be Reported (Questions 3, 4, 6)

In general, the proposed rule takes a conservative, yet sensible approach to implementing CTA requirements related to the information to be reported to the new registry. In its first set of measures governing disclosures by beneficial owners, company applicants, and reporting companies, the proposed provisions are tied closely to the statute, offer clear rules, and would help produce accurate, complete, and highly useful information. One exception involves provisions related to FinCEN identifiers; some of those statements use language that not only has no statutory foundation, but could be interpreted as authorizing an ultra vires secrecy mechanism never intended by the CTA. As discussed further below, we respectfully recommend several changes to those FinCEN identifier provisions to bring them back into alignment with the CTA.

A. Information on Beneficial Owners (Questions 3, 4 & 6)

The proposed rule's required disclosures for beneficial owners faithfully implement the CTA, requiring disclosure of a beneficial owner's name, birth date, current address, and a unique identifying number, as well as an image from the identifying document and, on a voluntary basis, the Taxpayer Identification Number (TIN) of the beneficial owner. Section 1010.380(b)(1)(ii).

The proposed rule clarifies that the address to be provided by a beneficial owner is the "residential street address that the individual uses for tax residency purposes." Section 1010.380(b)(1)(ii)(C)(2). This clarification outlines the best approach to securing meaningful and accurate address information, since some individuals have multiple residences and businesses, but typically only one residential address for tax residency purposes.[14] In addition, as former Senate investigator Elise Bean has explained to FACT, knowing an individual's residential address for tax purposes helps to ensure correct identification of that individual, facilitates contacting the individual, and identifies relevant government officials who may be of assistance in confirming the individual's identity and residency.[15] Still another advantage is that this proposed approach would tap into a well-established, detailed body of U.S. tax law related to identifying the correct residential address for tax purposes so that no new rules would have to be developed for the CTA and would ensure residential address issues would be treated consistently across FinCEN and the IRS.

In further compliance with the statute, the proposed rule requires reporting companies to provide for each beneficial owner a unique identifying number from a U.S. non-expired passport or a state-issued, non-expired drivers license or identification card. If the beneficial owner does not possess any of those documents, the proposed rule allows the reporting company to disclose an identifying number from a non-U.S. non-expired passport. Section 1010.380(b)(1)(ii)(D). Those proposed provisions faithfully implement the statute.

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[14] FinCEN might consider clarifying whether the designated address should be provided for U.S. federal tax residency purposes or, instead, for unspecified tax residency purposes.
[15] Ms. Bean worked for Senator Carl Levin on the U.S. Senate Permanent Subcommittee on Investigations for fifteen years leading inquiries into money laundering, corruption, corporate misconduct, and offshore tax abuse. From 2003 to 2014, she served as his staff director and chief counsel on the subcommittee.

1. Corroborating Image

The proposed rule also requires the reporting company to submit to the registry an "image" from the underlying identification document and for that image to include both the identifying number and a "photograph in sufficient quality to be legible or recognizable" in depicting the beneficial owner. Section 1010.380(b)(1)(ii)(E). The CTA anticipates and supports that requirement by stating "[i]t shall be unlawful for any person to … willfully provide, or attempt to provide … a false or fraudulent identifying *photograph* or document, to FinCEN."[16] Requiring reporting companies to submit a corroborating image to the registry is the best approach to ensuring accurate, complete, and highly useful registry information.[17]

Including a photograph of the beneficial owner will help ensure that the registry identifies the correct individual and not someone with the same or a similar name. Requiring a corroborating image of the unique identifying number will facilitate verification of the identifying information, improve the accuracy and completeness of the registry data, and discourage submission of mistaken or false information by necessitating concurrent supporting evidence for the information being submitted. Many financial institutions already require customers to provide images from their identification documents as part of their due diligence process, attesting to the usefulness of the information. In addition, the lack of verification mechanisms has been a principal criticism of beneficial ownership registries in other countries.[18] According to former Senate investigator Elise Bean, investigators value obtaining a photograph of an individual and a copy of the key page from the individual's official government-issued identification document, because it helps to avoid errors and misidentifications. Submitting a falsified photograph of a government document would also require much more effort than submitting an incorrect identifying number, necessitating deliberate misconduct which would make prosecution of a wrongdoer easier.

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[16] 31 U.S.C. 5336(h)(1)(A) (emphasis added).

[17] The CTA repeatedly requires registry information to be accurate, complete and highly useful. See CTA § 6402(8)(C) (requiring the Treasury Secretary, "in prescribing regulations to provide for the reporting of beneficial ownership information," to "collect information in a form and manner that is reasonably designed to generate a database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators"); 31 U.S.C. § 5336(b)(1)(F) (requiring the Treasury Secretary, in "promulgating the regulations required" for submitting reports to FinCEN, to "collect 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"); 31 U.S.C. § 5336(b)(4)(B)(ii) (requiring the Treasury Secretary, when implementing "procedures and standards governing any report" under the CTA, to "ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful"). Those provisions, whose directives to the Treasury Secretary are magnified by their repetition, furnish adequate statutory support for FinCEN's decision to require submission of a corroborating image.

[18] See, e.g., Exploring UK companies' legal ownership chains to detect red flags and verify beneficial ownership information: Part 1, Tax Justice Network, https://taxjustice.net/2020/07/06/exploring-uk-companies-legal-ownership-chains-to-detect-red-flags-and-verify-beneficial-ownership-information.

2. TINs (Question 6)

Finally, the proposed rule encourages but does not require reporting companies to provide a Taxpayer Identification Number (TIN) for each beneficial owner, after obtaining the individual's consent. As FinCEN notes, this voluntary additional information provides still another means for ensuring identification of the correct individual and would also facilitate data analysis and cross-references to other databases.

Because TIN disclosures are highly useful to U.S. law enforcement, **in response to Question 6**, the FACT Coalition respectfully recommends that TIN disclosures be made mandatory, rather than voluntary, as the best approach available to ensuring that registry identifying information is accurate, complete, and highly useful. TINs would be particularly useful for domestic registry users like state and federal law enforcement agencies and the IRS by presenting a centralized identification number that many beneficial owners are likely to possess and that may enable those agencies to link the registry information to other U.S. information and enforcement databases. Requiring TINs would also help fulfill the statutory requirement that FinCEN establish a registry that is highly useful to Treasury and the IRS which commonly use TINs in meeting their administrative and enforcement obligations.[19] Moreover, as FinCEN acknowledges by rightly requiring a photograph, the statute authorizes FinCEN to require additional information for beneficial owners on a mandatory basis if it is the best approach to producing a registry that is more accurate, complete, and highly useful.[20]

Providing TINs will not be any more onerous than reporting other types of identifying information, and requiring TIN disclosures has substantial precedent. The IRS and U.S. Department of Labor have long required small businesses to collect TINs in connection with certain payment and employment activities, such as in connection with collecting W-9s and various W-8s and producing and disseminating W-2s.[21] Any security concerns around TINs should be allayed by the fact that businesses have routinely collected and safeguarded TINs for years without incident, as is also true for FinCEN.

3. Control-ownership-both checkbox (Question 3(b))

In response to **Question 3(b)** asking whether FinCEN should collect any other category of information about beneficial owners, it is respectfully suggested that one more datapoint be

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[19] See 31 U.S.C. §5336(c)(5).

[20] From its inception, the Bank Secrecy Act (BSA) has authorized Treasury to obtain records that "have a high degree of usefulness" in criminal, tax, regulatory, or intelligence proceedings or activities, 31 U.S.C. 5311, and FinCEN has relied upon that standard to detail the types of information that must be included in particular reports such as Suspicious Activity Reports filed with FinCEN. See, e.g., Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations – Requirement That Mutual Funds Report Suspicious Transactions, 71 Fed. Reg. 26213, 26214 (May 4, 2006). Since the term "high degree of usefulness" in the BSA is analogous to the term "highly useful" in the CTA, FinCEN stands on solid ground when interpreting the CTA as authorizing it to detail the types of information that should be included in registry reports, including TINs and corroborating images.

[21] See IRS Form W-9, https://www.irs.gov/forms-pubs/about-form-w-9; IRS Form W-8, https://www.irs.gov/instructions/iw8; IRS Form W-2, https://www.irs.gov/pub/irs-pdf/iw2w3.pdf. In addition, the U.S. Treasury already automatically collects and shares certain beneficial ownership information for tax purposes.

required: whether a beneficial owner's status is due to an ownership interest, substantial control over the reporting company, or both factors. The registry form could easily provide a checkbox to indicate which elements apply to a particular individual. Reporting companies could provide the information at virtually no cost since it would be readily available to them.

At the same time, the data would provide highly useful information to registry users, especially national security, intelligence, law enforcement, and tax analysts. Given that criminals, corrupt officials, tax cheats, and other wrongdoers often control – but do not officially own – shell entities, the checkbox could help shine a spotlight on that category of beneficial owners who are otherwise extremely difficult to identify, and thereby enable better tracking and analysis of suspect individuals who control shell entities in the United States and abroad. Further, this information could actually generate substantially reduced compliance burdens for many entities and owners, because the improved information would facilitate improved targeting of compliance activity towards higher-risk entities and owners. Better targeting tends to reduce burdens on compliant taxpayers, as it reduces the incidence of unnecessary compliance activities such as tax audits.[22] In summary, this data requirement would be the best approach to ensure ownership information is collected in a manner aligned with the CTA, since it would make the registry information more accurate, complete, and highly useful.[23]

B. Information on Company Applicants (Questions 3 & 6)

The proposed rule's required disclosures for company applicants faithfully implement the CTA, requiring company applicants to disclose the same identifying information as beneficial owners: their name, birth date, current address, and a unique identifying number. Section 1010.380(b)(1)(ii). The same analysis of those disclosure requirements applies here as for beneficial owners.

The proposed rule provides one additional option for reporting the address of a company applicant compared to a beneficial owner. The rule proposes that if the company applicant is filing registry reports "in the course of such individual's business," the applicant can list the "business street address of such business." This option is the best approach under the statute since, in many cases, a company applicant may be acting solely as an employed professional and so should be able to use a business rather than personal address. This approach offers a workable, bright line rule to determine who can use a business address – either the company applicant is employed by a business and is acting pursuant to that business or not.

Some have suggested that attorneys should be exempted from the company applicant disclosures, because it would somehow violate the attorney-client privilege or attorney confidentiality requirements. That contention is without merit, however, since the attorney-client privilege does not prevent identifying either the attorney at issue or the names of the attorney's

[22] See Charles P. Rettig, *Written Testimony of Charles P. Rettig, Commissioner, Internal Revenue Service, Before the Senate Appropriations Committee, Subcommittee on Financial Services and General Government on IRS Operations*, Internal Revenue Service (May 19, 2021), https://www.irs.gov/newsroom/written-testimony-of-charles-p-rettig-commissioner-internal-revenue-service-before-the-senate-appropriations-committee-subcommittee-on-financial-services-and-general-government-on-irs-operations.
[23] See supra notes 17 and 20.

clients. As a general rule, a client's identity and fee information are not privileged. See, e.g., Taylor Lohmeyer Law Firm PLLC v. United States, 957 F.3d 505 (5th Cir. 2020), cert. denied (2021); In re Grand Jury Subpoena Served Upon John Doe, Esq., 781 F.2d 238, 247 (2d Cir. 1986) (en banc). Additionally, federal law already requires lawyers representing foreign agents, for example, to file extensive information about their clients under the Foreign Agent Registration Act.[24] Those precedents indicate that no exception for attorneys should be added to the final rule. To the contrary, because attorneys may play an important role in forming and registering reporting companies, the best approach would be to require them to disclose their role in the same manner as other professionals. This issue is discussed further below in connection with the proposed definition of the term "company applicant."

C. Information on Reporting Companies (Questions 5, 8 & 9)

The proposed rule's required disclosures for reporting companies faithfully implement the CTA, requiring disclosure of the company's full name, any trade name, its business street address, the State or Tribal jurisdiction where the company was formed or registered, and a TIN or, if none, the company's Dun & Bradstreet Data Universal Number System (DUNS) number or Legal Entity Identifier (LEI). Section 1010.380(b)(1)(i).

Although the CTA does not include a starting point for identifying reporting companies in the same manner as beneficial owners, the statutory scheme would be unable to function without a precise identification of each reporting company filing information with the registry. Accurate identifying information is key to knowing which entities have met their reporting obligations under the CTA and which entities are owned or controlled by specific individuals. The CTA also states repeatedly that registry information must be accurate, complete, and highly useful, providing a ready statutory foundation for the proposed reporting requirements.[25] Logic, the statute, and case law affirming reasonable statutory interpretation[26] all support the proposed disclosure requirements for reporting companies.

1. Company Names

Requiring disclosure of a company's full name is essential, since so many entities, their subsidiaries, and affiliates have similar names, risking confusion over which entities have fulfilled their reporting obligations and which have not. In addition, even minor naming discrepancies have been factors in major corruption cases. For example, in the well-known 1MDB scandal, a legal entity with the name of Aabar Investments PJS Limited was used by the alleged fraudsters to divert money raised by 1MDB's initial bond offering. The entity's name was virtually the same as Aabar Investments PJS, a legitimate subsidiary of the International Petroleum Investment Corporation, an investment fund wholly owned by the Abu Dhabi

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[24] 22 U.S.C. 612(a)(requiring FARA registrants, including lawyers, to provide each client's name, address, and, if an entity, who owns or controls the client, the nature of the client's business, a copy of any agreement with the client, and a list of all activities and expenditures undertaken on behalf of the client).
[25] See supra note 17.
[26] See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (". . .interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); Public Citizen v. Young, 831 F.2d 1108, 1112 (D.C. Cir. 1987) ("A court must look beyond the words to the purpose of the act where its literal terms lead to absurd or futile results.") (cleaned up).

government and one of the key underwriters of 1MDB's bond offering. Federal prosecutors asserted in court that this entity "was created and named to give the impression that it was associated with Aabar Investments PJS," so that other parties to the transaction would assume the companies were the same or related and thus more likely to be low-risk, when in fact the companies had no direct connection.[27] Given the evidence of wrongdoers deliberately using similarly named entities to commit crimes, the final rule might benefit from further clarifying the proposed requirement by inserting the word "legal" in the final rule, requiring each reporting company to disclose its "full legal name."

2. **Trade Names**

Requiring disclosure of any trade name or "doing business as" (DBA) name is equally important to determining which reporting companies have met their reporting obligations under the law and which have not. Today, many entities operate under trade and DBA names that differ substantially from their legal names, and a single business is free to employ multiple trade and DBA names.[28] Enabling intelligence analysts, law enforcement agencies, regulators, financial institutions, and others to search the beneficial ownership registry using a trade or DBA name (rather than requiring them to track down the legal business name associated with that DBA or trade name) would substantially increase the usefulness of the registry, which is a key regulatory objective established by the CTA. See, e.g., 31 U.S.C. section 5336(b)(1)(F).

3. **Company Addresses (Questions 8 & 9)**

Requiring disclosure of a reporting company's business street address is another critical piece of information to ensure that the registry has sufficient information to identify a specific entity. Former Senate investigator Elise Bean has indicated that, in her experience, knowing a business' street address is key to verifying its identity through online maps, websites, advertisements, and news articles. It also facilitates contacting the business directly to answer questions, which could include verifying specific data in a filing. A business street address is also a common mechanism used by law enforcement and others to locate individuals who use the same address and may turn out to be business employees, owners of record, or beneficial owners. Business street addresses can also be used to identify State, Tribal, or non-U.S. officials who may provide assistance in locating the business and verifying its identifying information.

In response to **Question 8**, the final rule should be clarified by substituting the term "street address of the reporting company's principal place of business," as it is a more precise description of the required business address. Shady operations are more likely to use a post office box or the address of a third party like a formation agent, corporate service provider, or attorney – addresses that would likely be of little or no use in locating the actual business or verifying its information. The better approach is to require the reporting company to identify its principal office using a street address.

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[27] Complaint for Forfeiture in Rem at 7, United States v. "The Wolf of Wall Street" Motion Picture, No. CV 16-16-5362 (C.D. Cal Jul. 20, 2016), available at https://www.justice.gov/archives/opa/page/file/877166/download.
[28] See, e.g., "Can Corporations Have More Than One DBA?" Ben Gran, Incfile (July 23, 2018), https://www.incfile.com/blog/post/can-corporations-have-more-than-one-dba.

Other beneficial ownership registries with less specific rules have faced challenges in ensuring data quality with respect to addresses. In 2018, for example, the U.K.-based nonprofit organization, Global Witness, conducted a data analysis of beneficial ownership data submitted to the U.K.'s registry.[29] The analysis identified data discrepancies due to the lack of standardized input formats and requirements: "We found a number of PSCs [Persons of Significant Control] with impossible or highly unlikely dates of birth, including someone who has not yet been born. Although the number of impossible dates of birth was small, it suggests there may be a wider problem of data validation. We found similar issues with misspellings and inconsistencies in both the nationality and *address country fields*, making it hard to summarize information using these fields."[30] Global Witness reported that the U.K. government, once made aware of these concerns, "addressed this issue by introducing data validation from the outset in the new incorporation form, using age prompts and restricted menus rather than free text input fields."[31]

Given this and other potential challenges stemming from the lack of standardized data fields, to prevent submission of fictitious addresses, it is respectfully recommended that the registry use standardized, digital, web-based forms that ensure submissions conform to known values by requiring standardized address formats used in the United States and other countries and that permit the submission of only verifiable locations in the United States or abroad. Doing so would be the best approach to ensure address information submitted to the registry is accurate, complete, and highly useful for law enforcement and other registry users, fulfilling a key objective of the CTA.

In response to **Question 9** asking about business addresses for foreign reporting companies, the best approach would be to require such companies to specify both a U.S. business street address, if available, and a principal place of business outside the United States. This approach would enable U.S. law enforcement to visit the U.S. location if one exists and at the same time to understand where the company's principal place of business is outside of the United States. Knowing the reporting company's principal place of business abroad would be highly useful in verifying its identity, facilitating direct communication with the business, and identifying foreign officials who may be of assistance to registry users, as explained above.

4. **State and Tribal Jurisdictions**

Requiring disclosure of the State or Tribal jurisdiction where a reporting company was formed or registered is also essential to ensuring that the registry has sufficient information to identify a specific entity. That information would also be also highly useful in that it would help registry users to identify State or Tribal officials who may be of assistance in verifying the entity's identity and data, providing copies of formation or registration documents, and

[29] This data analysis was possible because the U.K. registry data has been available to the public from inception.
[30] Global Witness. "The Companies We Keep." July 2018 (emphasis added). https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/companies-we-keep/#chapter-6/section-0; Open Ownership, "Early Impacts of Public Registers of Beneficial Ownership: United Kingdom." April 2021: https://www.openownership.org/resources/early-impacts-of-public-registers-of-beneficial-ownership-united-kingdom/
[31] *Ibid.*

indicating whether the entity is in good standing or, alternatively, has raised concerns about suspicious activity. Providing relevant State and Tribal information for reporting companies is one of the best ways to increase the registry's accuracy and usefulness for registry users.

5. **TINs, DUNS, and LEIs**

Requiring reporting companies to provide a TIN or, if none, a DUNS number or LEI is another useful way to ensure that the registry has sufficient information to identify a specific entity. Providing unique identifying numbers would also assist law enforcement and others to conduct efficient data analysis and more easily cross-reference other databases.

The final rule would be further strengthened, however, if instead of making LEIs optional, it made them mandatory. LEIs are inexpensive to obtain, are used in over 100 countries (including the United States), and have created a worldwide database of basic entity information that anyone may use at no cost. Intelligence analysts, law enforcement agencies, regulators, and financial institutions could use the LEI database to verify the information supplied to the registry. In addition, since misconduct involving entities often crosses international borders, including LEIs in the U.S. registry would advance U.S. efforts to work with non-U.S. agencies and facilitate effective data analysis by government personnel around the world.

6. **TIN Updates**

Further, the final rule would be strengthened if it included the clarification that reporting companies will update the registry if and when they obtain a TIN, in the event that the reporting company does not have a TIN in its original filing. Some companies may seek a TIN due to a change in circumstance or subsequent reorganization, and it is essential that changes to TIN information be added to their registry filing. Allowing a reporting company to sidestep reporting a TIN just by delaying acquisition of the TIN would open up an ill-advised loophole that would invite abuse. We agree with FinCEN's analysis that obtaining TINs for reporting companies would make the database more accurate, complete, and highly useful to authorized users of the database, and this clarification of the obligation of reporting companies to disclose a TIN acquired later in time is the best approach to ensure that the information in the database is as accurate as possible in real time.

D. Attestation (Question 7)

The proposed rule provides in section 1010.380(b) that "each person" filing a report with the registry "shall certify that the report is accurate and complete." In response to **Question 7**, FinCEN has clear authority to impose such a requirement. The CTA repeatedly requires the registry information to be accurate, complete, and highly useful, providing a statutory foundation for the proposed attestation requirement.[32] In addition, federal law makes it a crime to make "any materially false, fictitious, or fraudulent statement or representation" to the executive branch, and specifies that violators are subject to imprisonment and monetary fines. 18 U.S.C.

[32] See supra note 17.

section 1001. Given this potential criminal liability, the federal government has an obligation to notify persons to take care to ensure that information submitted to the registry is accurate and complete. The federal government already requires similar attestations in other comparable filing systems. See, e.g., FinCEN Form 107, Registration of Money Services Business; System for Award Management (SAM) Profile.

FinCEN might also consider clarifying in the final rule that: "False, fictitious, or fraudulent information may result in criminal prosecution under 18 U.S.C. section 1001." That warning would not only help discourage misconduct, but also give fair notice of the penalties for doing so.

E. FinCEN Identifiers (Questions 11 & 12)

The proposed rule and its preamble contain several passages related to the FinCEN identifiers that must be removed or clarified, not only because they have no statutory foundation and potentially undermine beneficial ownership transparency and the accuracy of the registry, but because they could be interpreted as authorizing an ultra vires secrecy mechanism never intended by the CTA.

1. **Improper Authorization of a Secrecy Mechanism**

On page 69929, the preamble to the proposed rule states that "the FinCEN identifier provides a substitute to individuals who do not wish to provide their names, birth dates, or addresses to a reporting company." This statement is both surprising and troubling, since creating an affirmative mechanism to enable individuals to avoid disclosing their identities to a U.S. entity they own or control is alien to, if not unprecedented in, U.S. law. An additional troubling statement appears in the preamble on page 69933:

> "[O]nce an individual or legal entity has a FinCEN identifier, the individual or legal entity can provide the identifier to a reporting company in lieu of the personal details required under paragraph (b)(1)."

And on pages 69964-65:

> "[T]he primary incentives for individual beneficial owners to apply for a FinCEN identifier are likely data security (an individual may desire not to send personal information to a reporting company but rather prefer to file that data with FinCEN directly); administrative efficiency where an individual is likely to be identified as a beneficial owner of numerous reporting companies; and anonymity from reporting companies that are not directly owned, but are indirectly owned through another entity, by the individual. FinCEN assesses that there may be less incentive for individuals who only directly own reporting companies to obtain FinCEN identifiers because their identity is already known to the reporting company."

These passages in the preamble misread the CTA to permit an individual to supply a FinCEN identifier to a reporting company and at the same time withhold from that reporting company such identifying information as the individual's name, birth date, and address. Worse, the preamble states that an acceptable "incentive" for obtaining a FinCEN identifier is an individual's desire for "anonymity from reporting companies that are not directly owned." Looming over these troubling statements is the proposed rule's failure to make clear that entities seeking to obtain a FinCEN identifier must first disclose their beneficial owners and that all registry users can promptly access the identifying information for each person assigned a FinCEN identifier, as further discussed below.

The FinCEN identifier was never intended to create, for the first time in U.S. federal law, an affirmative legal mechanism enabling individuals to hide their identities from the entities they own or control. The Corporate Transparency Act was designed to increase ownership transparency, not diminish it by enabling persons to prevent entities from knowing who is in their ownership chain. One obvious consequence of this misguided approach is that it would enable a corrupt official, criminal, tax evader, or terrorist to form a wholly owned shell entity, use that entity to hold a direct ownership interest in a U.S. reporting company, and then prevent that reporting company from knowing who is behind the shell entity, even though the wrongdoer would essentially be holding a direct ownership stake in the reporting company.

Neither the text nor the legislative history of the CTA support this misinterpretation of the law. No statutory language authorizes FinCEN to construct a regulation to help beneficial owners conceal their identities from reporting companies. To the contrary, 31 U.S.C. 5336(b)(4) states that the regulation implementing the FinCEN identifier system must ensure registry information is "accurate, complete, and highly useful"; the statute nowhere states that "anonymity" or even "privacy" is a permissible regulatory objective when implementing the FinCEN identifier system:

> "(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—
> >
> > > "(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 words "anonymity" and "privacy" do not appear anywhere in the text of the CTA, much less in connection with FinCEN identifiers.[33]

The CTA's legislative history is consistent with the statutory language and cites simplicity and accuracy, rather than anonymity or privacy, as the intended purposes for the FinCEN identifier. For example, Senate Banking Chair Brown, one of the chief architects of the

[33] More broadly, the purposes of the Anti-Money Laundering Act are to protect the U.S. financial system from "criminal abuse"; safeguard national security; and establish appropriate frameworks for information sharing among financial institutions, regulators, law enforcement, and industry groups. Codifying secrecy is inconsistent with all of those purposes.

law, explains on the Senate floor just prior to passage of the CTA: "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."[34] No legislator speaking on the House or Senate floor, no committee report, and no part of the NDAA conference report talks about using FinCEN identifiers as a way for individuals to hide their identities from reporting companies – an objective at odds with the very purpose of the CTA which is to enhance, not diminish, ownership transparency.

FinCEN identifiers were included in the CTA because they have the potential to increase accuracy and efficiency and reduce filing burdens. The key to achieving those objectives is that FinCEN identifiers use numbers rather than names to identify individuals and entities, and numbers are less vulnerable to the spelling and formatting problems that often plague the transcription of individual and entity names. By avoiding those transcription problems, FinCEN identifiers make the registry more accurate, more reliable, and more useful to registry users.[35] FinCEN identifiers can also lessen the reporting burden on individuals and reporting entities who change their names or addresses by enabling them to update a single FinCEN identifier form rather than having to track down and revise multiple registry company reports. In addition, FinCEN identifiers can increase the usefulness of the registry for intelligence analysts, law enforcement personnel, regulators, and financial institutions by enabling them to easily determine if a person of interest has a FinCEN identifier and, if so, use that number to quickly locate and view all relevant registry filings, again avoiding the transcription problems associated with naming conventions. These scenarios explain how FinCEN identifiers can reduce the registry's filing burdens while increasing its accuracy and usefulness, without advancing any "anonymity" or "privacy" objectives which, again, are unauthorized and impermissible regulatory goals when implementing a law designed to enhance, not diminish, ownership transparency.

If the preamble and proposed rule were to be finalized as currently worded, it appears that they might permit a reporting company with a complex ownership structure to file an initial report and a FinCEN identifier application without ever knowing or disclosing to the registry its beneficial owners. Preventing reporting companies from knowing and disclosing their beneficial owners to the registry would contradict the very purpose of the CTA which is to increase, not diminish, beneficial ownership transparency and would result in incomplete filings of little or no use to registry users. The approach has no statutory foundation or support in the legislative history. Preventing reporting companies from knowing all of the beneficial owners in their ownership chain also raises questions about the functioning of the registry itself, since the CTA is clearly predicated on the critical role that reporting companies are expected to play in ensuring registry filings are accurate and complete. Finally, that approach would be out of alignment with other beneficial ownership registries around the world, and would not appear to benefit anyone

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[34] 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.

[35] Carry-out restaurants, for example, often use customers' telephone numbers to store information about them, not to conceal anyone's identity but simply because using numbers rather than names is more reliable and efficient.

other than those attempting to maintain their secrecy while exercising substantial control or ownership of entities active within the United States.

2. Proposed Changes to the Final Rule

The final rule should clarify how reporting companies may use FinCEN identifiers by: (1) deleting inappropriate passages in the preamble allowing FinCEN identifiers to be used by beneficial owners to hide their identities from reporting companies; (2) giving all registry users easy access to identifying information about the person assigned to each FinCEN identifier; (3) clarifying that entities applying for a FinCEN identifier must disclose all of their direct and indirect beneficial owners in the application submitted to FinCEN; (4) requiring reporting companies to delineate the ownership chain linking each of their indirect beneficial owners to the reporting company, including by identifying all intermediate entities; (5) clarifying the circumstances under which a reporting company may use FinCEN identifiers for intermediary entities to avoid incomplete or misleading disclosures; and (6) adding examples to the final rule to illustrate how FinCEN identifiers are supposed to work.

a) Changes to Preamble

To prevent wrongdoers from misusing FinCEN identifiers to reduce beneficial ownership transparency, the proposed rule should be revised by striking all of the preamble provisions cited above and replacing them with a statement that the purpose of the FinCEN identifier system is to minimize burdens on reporting companies and make registry information more accurate, complete, and useful, but is not intended to diminish ownership transparency or make it more difficult for registry users to obtain beneficial ownership information from the registry. Since the preamble to the final rule will affect how the rule is interpreted and implemented by regulators, financial institutions, courts, and others, revising it is the best way to bring the preamble into alignment with the law and prevent unwarranted outcomes.

b) Access to FinCEN Identifier Information

In addition to changing the preamble, it is respectfully recommended that the regulatory provisions themselves also be changed in several ways. Most important is that the final regulation be clarified and strengthened by adding a new section 1010.380(b)(5)(ii)(E) stating: "All registry users, without exception, may promptly view all information identifying the individual or entity assigned to a specific FinCEN identifier using a directory or other mechanism provided by the registry." Adding this provision to the final rule would make clear that FinCEN identifiers may not be misused to conceal beneficial ownership information from any registry user.

c) FinCEN Identifier Applications

Next, it is respectfully recommended that proposed section 1010.380(b)(5)(i)(B) be revised to make clear that a reporting company may obtain a FinCEN identifier only after submitting to FinCEN an application that provides identifying information for all of its beneficial owners – and without using any FinCEN identifier that would obscure any beneficial owner's identity.[36] That clarification would ensure that the application requirement for entities parallels the application requirement already in place for individuals and that reporting companies disclose to the registry identifying information for both their direct and indirect beneficial owners before getting a FinCEN identifier. It would also prevent FinCEN identifiers from being used to block rather than enhance beneficial ownership transparency for entities active within the United States.

To achieve those goals, the final section 1010.380(b)(5)(i)(B) could be revised to read as follows:

> (i)(B) A reporting company may obtain a FinCEN identifier by submitting to FinCEN an application containing the information required under paragraph (b)(1) of this section for each of its direct and indirect beneficial owners without the use of any FinCEN identifier under subparagraph (ii), and may submit such application at or after the time that the entity submits an initial report required under paragraph (b)(1) of this section.

The law and the proposed rule already make clear that entities, as well as individuals, must submit an application to obtain a FinCEN identifier. The recommended additional language is the best way to clarify that a reporting company wishing to obtain a FinCEN identifier must first fully disclose in its application all of its beneficial owners without using any FinCEN identifier that would circumscribe that disclosure. Statutory support for this clarification is the CTA's requirement that FinCEN "prescribe procedures and standards governing" the use of FinCEN identifiers to "ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful." 31 U.S.C. 5336(b)(4)(B)(2).

If the final rule fails to make this change, it is possible that a reporting company could file an initial report and a FinCEN identifier application – for most reporting companies, the only filings that they will need to submit or update for the registry – without ever identifying or disclosing its beneficial owners. That would be an absurd result under the CTA whose very purpose is to require entities to disclose their beneficial owners to the registry. It would also contradict the proposed rule's later statement that all reporting companies must report at least one beneficial owner to the registry. Page 69933. The final rule must be designed to prevent the absurdity of an entity's never disclosing its beneficial owners to the registry. See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); Public Citizen v. Young, 831 F.2d 1108, 1112 (D.C. Cir. 1987) ("A court must look beyond the words to the purpose of the act where its literal terms lead to absurd or futile results." (cleaned up)). To avoid that absurdity, the final rule must state

[36] The proposed section 1010.380(b)(5) now provides the following:
"(5)(i) Application for FinCEN identifier.
(A) An individual may obtain a FinCEN identifier by submitting to FinCEN an application containing the information about themselves required under paragraph (b)(1) of this section.
(B) A reporting company may obtain a FinCEN identifier by submitting to FinCEN an application at or after the time that the entity submits an initial report required under paragraph (b)(1) of this section." Page 69971.

explicitly that entities are required to disclose their beneficial owners – both direct and indirect – in either an initial report or a FinCEN identifier application filed with the registry.

d) **Ownership Chains**

As explained later in this comment letter in response to a request for comment by FinCEN on page 69932, it is respectfully recommended that the final rule require reporting companies to delineate the ownership chain linking each of its indirect beneficial owners to the reporting company, including by identifying all intermediate entities. As FinCEN suggests in the proposed rule and as explained in more detail below, delineating the ownership chain of each indirect beneficial owner is essential to ensuring the registry's accuracy, completeness, and usefulness as required by the CTA. See CTA section 6402(8)(C); 31 U.S.C. section 5336(b)(1)(F). Delineating the ownership chain for each indirect beneficial owner is particularly important when a reporting company is using FinCEN identifiers, since without that delineation, it may become virtually impossible for registry users to identify a reporting company's indirect beneficial owners and some reporting companies might try to manipulate their registry disclosures to produce incomplete or misleading filings, as further explained below.

e) **Preventing Manipulation of FinCEN Identifiers**

Both the preamble and proposed section 1010.380(b)(5)(ii)(C) should be strengthened by clarifying the circumstances under which a reporting company may use entity-related FinCEN identifiers in the reporting company's registry filings. Revisions should clarify, in particular, the phrases "by an interest" and "if such intermediary entity has obtained a FinCEN identifier" in ways that would prevent a reporting company from using complicated ownership structures and entity-related FinCEN identifiers to file incomplete or misleading reports with the registry.

The two phrases in question appear in both 31 U.S.C. 5336(b)(3)(C) and the proposed section 1010.310.(b)(5)(ii)(C), both of which state:

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

The first issue is how the phrase, "by an interest," is intended to affect the FinCEN identifiers or other identifying information that a reporting company must disclose to the registry if an indirect beneficial owner holds ownership interests in the reporting company through more than one intermediary entity or through a combination of direct and indirect ownership interests. Without further clarification, some reporting companies might misinterpret the phrase to allow the disclosure of the FinCEN identifier for only one intermediary entity, even if its beneficial owner holds ownership interests in the reporting company through multiple intermediaries or through a combination of direct and indirect ownership interests. If that misinterpretation were allowed, a reporting company might be tempted to play games in selecting the single intermediary entity whose FinCEN identifier will be disclosed in its reporting to the registry and use the opportunity to create potentially misleading filings.

An example helps to illustrate the problem. Suppose individuals A and B form a limited liability company, LLC1. A takes a 10% membership interest in LLC1, and B takes the remaining 90% interest. Suppose that A, B, C, and D also form a limited liability company, LLC2, and that A takes a 10% ownership interest, B takes a 50% interest, C takes a 30% interest, and D takes the final 10%. Suppose further that LLC1 and LLC2 then form Corp1, with each holding 50% of Corp1's shares. Assume also that everyone involved, individuals and entities alike, has a FinCEN identifier. What should Corp1 disclose in its initial report to the registry?

In the example, B is an indirect beneficial owner of Corp1 through both LLC1 and LLC2, since B's ownership interest in Corp1 exceeds the 25% reporting threshold in both cases (45% + 25% for a total of 70% ownership interest in Corp1). No other beneficial owner of the two LLCs holds an indirect beneficial ownership interest in Corp1 exceeding 25% so there is no other reportable beneficial owner of Corp1 (assuming no other owner exercises substantial control over Corp1). The ideal result then, in terms of meeting the CTA's objectives to enhance beneficial ownership transparency and provide accurate, complete, and highly useful information to registry users, would be for Corp1 to disclose the FinCEN identifiers of both LLC1 and LLC2 in its initial filing, rather than choose between them. In addition, the final rule should require Corp1 to disclose B as its sole indirect beneficial owner in its initial report (using B's FinCEN identifier) and delineate both of the ownership chains that connect B to the reporting company.

If, however, Corp1 were to misinterpret the phrase "an interest" as allowing it to disclose only one intermediary entity through which B holds its ownership interest, it could decide to disclose just one of the two limited liability companies. If Corp1 selected LLC1, it would disclose the FinCEN identifier for LLC1. Since LLC1 necessarily filed with the registry to acquire a FinCEN identifier, it should have disclosed B as its beneficial owner in its own initial report or in its FinCEN identifier application, but not A since A's ownership stake in LLC1 falls below the 25% reporting threshold and the example assumes A does not exercise substantial control over Corp1. Even if LLC1 filed its own report with the registry, Corp1 should be required to disclose B's FinCEN identifier as its sole beneficial owner and explain that B holds an indirect beneficial ownership interest through LLC1.

In contrast, if Corp1 selected LLC2, it would disclose LLC2's FinCEN identifier. Since LLC2 must have also filed with the registry in order to acquire a FinCEN identifier, LLC2 should have disclosed in its initial report or FinCEN identifier application not only B, but also C, since C's 30% ownership interest in LLC2 exceeds the 25% reporting threshold. Selecting LLC2 would, thus, result indirectly in the disclosure of two individuals in Corp1's ownership chain instead of just one. It is important to note, however, that in this example, Corp1 itself would disclose B as an indirect beneficial owner in its initial report, but would not disclose C, since C's ownership stake in Corp1 (30% of a 50% ownership interest, or a 15% ownership stake in Corp1) is too small for Corp1 to disclose C in its initial report.

Given the CTA's objective of increasing ownership transparency, the final rule should clarify that Corp1 does not have the discretion to choose between providing the FinCEN identifier of LLC1 or LLC2 – it must disclose both. In addition, Corp1 should disclose B as its sole beneficial owner, using B's FinCEN identifier, and indicate that B's holds "an interest" through both LLC1 and LLC2, again using their FinCEN identifiers. Registry users could then check the filings made by both B and the limited liability companies to learn more about Corp1's beneficial owners.[37]

A second aspect of the proposed rule requiring clarification is the phrase "if such intermediary has obtained a FinCEN identifier." The proposed rule and the statute do not make clear that the beneficial owner in question must be associated with the intermediary that obtained the relevant FinCEN identifier. Again, bad actors could misinterpret the proposed language and seek to use selective disclosure of applicable intermediaries to file potentially incomplete or misleading filings.

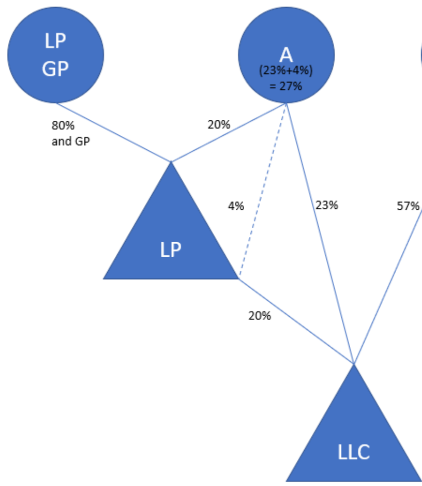
Consider the following example. A is a non-controlling limited partner with a 20% ownership interest in a limited partnership, LP. LP obtains a FinCEN identifier without reporting A as a beneficial owner, since A's ownership interest falls below the 25% reporting threshold. LP, A, and an unrelated individual C then form a limited liability company, LLC, with LP, A, and C taking a 20%, 23%, and 57% ownership interest in LLC respectively. As a result, A holds a direct ownership interest of 23% in LLC as well as an indirect ownership interest of 4% (20% of LP's 20% ownership interest in LLC) for a total of 27%. Since A's ownership stake in LLC exceeds 25% through A's combined direct and indirect ownership interests, A qualifies as a beneficial owner of LLC. But under the current proposed rule, it is unclear whether LLC could interpret the rule as allowing it to report A's ownership stake simply by reporting LP's FinCEN identifying number and never name A directly since A's direct ownership stake falls below the reporting threshold.[38]

The following diagram may help to illustrate this example.

[37] If registry users are not permitted to view the identifying information for the persons assigned to the FinCEN identifiers disclosed by Corp1, they would be left with three numbers and nothing more – making a mockery of both the registry and the CTA.

[38] It would also be unclear without further clarification if A could provide the FinCEN identifying number of LP given its indirect ownership of LLC through LP, even if A owned a separately reportable interest in LLC (directly or indirectly) independent from its ownership through LP, as the language is currently *so* ambiguous in the intermediary FinCEN identifier rule and because A might own its reportable interest, in part, through LP.

Figure 1:



The key problem here is that the current proposed language fails to make clear whether direct holdings may go unreported if the intermediary FinCEN identifier rule also applies and allows a beneficial owner's name to be omitted from the reporting company's registry filing. Omitting A's name would be particularly problematic in the example, since A would not be listed in any registry filing by LP due to A's 20% holding which is below the 25% reporting threshold. A's beneficial ownership in LLC would effectively disappear if the reporting company were allowed to take that gambit. Using an intermediate FinCEN identifier to hide the identity of a beneficial owner holding both direct and indirect ownership stakes in the reporting company is an "absurd" result that cannot be the correct interpretation of the CTA.[39]

To prevent gamesmanship in the use of intermediary FinCEN identifier numbers, the preamble and final rule should make clear that a reporting company must disclose all of its reportable beneficial owners – direct and indirect – to the registry, using FinCEN identifiers when applicable, and identify each and every intermediary entity through which an indirect beneficial owner holds an ownership stake in the reporting company. As provided elsewhere in the proposed rule on how to calculate a beneficial owner's total ownership interests, a reporting company must count a beneficial owner's holdings through multiple intermediary entities and in any combination of direct and indirect interests. It is also critical for the preamble and final rule to make clear that if a beneficial owner's ownership stake exceeds the 25% reporting threshold through any combination of direct or indirect ownership interests, the reporting company must disclose in its initial report the name or FinCEN identifier of that beneficial owner and not rely solely on disclosing the FinCEN identifier of one or more intermediary entities.

This approach is also the best way to fortify the requirement that each individual and entity be assigned only one FinCEN identifying number as required by 31 U.S.C.

[39] See supra note 26 and accompanying text.

5336(b)(3)(A)(iii). As discussed above, that requirement is intended to prevent the potential abuse or manipulation of FinCEN identifiers. As demonstrated by the above examples, without chain of ownership disclosures and clarification around the proposed rules, unscrupulous parties could try to use entity-related FinCEN identifiers to obscure the ownership stakes of some beneficial owners. It would be inappropriate if the final rule were to allow potential conflicts to arise between the requirements of section 1010.310(b)(5)(ii)(C) and 31 U.S.C. 5336(b)(3)(A)(iii) related to FinCEN identifiers.

To provide needed clarity and head off troubling interpretations of proposed section 1010.310.(b)(5)(ii)(C), the preamble to the final rule should clarify the interpretation issues just described. In addition, section 1010.310.(b)(5)(ii)(C) could be changed to read as follows:

> "If an individual is or may be a beneficial owner of a reporting company in whole or in part as a result of holding an interest in one or more entities that, directly or indirectly, hold an interest in the reporting company, and if one or more of such intermediary entities has obtained a FinCEN identifier and provided that FinCEN identifier to the reporting company, then the reporting company may include each such entity's FinCEN identifier in its report in lieu of the information required under paragraph (b)(1) of this section with respect to such individual; provided, however, that the reporting company electing to do so has submitted and updated as needed a FinCEN identifier application containing identifying information for all of its direct and indirect beneficial owners and delineating the ownership chain through which each indirect beneficial owner holds (indirectly or directly) an ownership interest in the reporting company."[40]

In the second of the two examples provided above, if the recommended changes were made to the final rule, Corp1 would be required to disclose B's FinCEN identifier and explain that B held an indirect ownership interest in the reporting company through both LLC1 and LLC2, also using their FinCEN identifiers. If afforded access to the identifying information associated with each of those FinCEN identifiers, registry users would then be able to learn the identity of Corp1's beneficial owners as well as any other beneficial owners reported by LLC1 or LLC2 – exactly the result the CTA was intended to achieve.

The example also helps to illustrate why it is critical for all registry users to have prompt and full access to the information identifying the person assigned to each FinCEN identifier. Without that access, if a reporting company chose to report FinCEN identifiers in place of the names of its beneficial owners and intermediary entities, intelligence analysts, law enforcement agencies, regulators, financial institutions, and other registry users would be unable to link the numbers to any person and, thus, would be unable to use the registry to identify Corp1's beneficial owners, even though that information would be available to FinCEN. Worse yet would be if Corp1 itself were unable to identify its own beneficial owners, even though that

[40] For comparison purposes, the statutory language reads as follows: "If an individual is or may be a beneficial owner of a reporting company by an interest held by the individual in an entity that, directly or indirectly, holds an interest in the reporting company, and if such intermediary entity has obtained a FinCEN identifier and provided the entity's FinCEN identifier to the reporting company, then the reporting company may include such entity's FinCEN identifier in its report in lieu of the information required under paragraph (b)(1) of this section with respect to such individual." 31 U.S.C. 5336(b)(5)(ii)(C).

information was disclosed to FinCEN. Both results would contravene the CTA's primary purpose of enhancing beneficial ownership transparency for entities active in the United States.

f) **Explanatory examples**

The explanation just given illustrates how examples can help clarify how the registry is intended to work. While most reporting companies will have simple ownership structures requiring them to report only a few direct beneficial owners, a minority of reporting companies will have complex ownership structures. The availability of FinCEN identifiers for both intermediaries and beneficial owners will raise additional disclosure issues for reporting companies with complex ownership structures. To help those reporting companies understand their disclosure obligations, the preamble to the final rule would benefit from offering a few explanatory examples involving FinCEN identifiers. Here are possible examples that might be helpful.

> **Example 1.** Suppose a reporting company, Corp1, is wholly owned by a limited liability company, LLC1, which is, in turn, owned by two individuals, A and B, who each hold a 50% ownership interest in LLC1. Suppose LLC1, A, and B each have a FinCEN identifier. What should Corp1 disclose in its initial report to the registry? Assuming the final rule is revised as recommended above, Corp1 should disclose: (1) the FinCEN identifier of LLC1 since LLC1 wholly owns the reporting company; and (2) the FinCEN identifiers of A and B, explaining that both are indirect beneficial owners whose ownership stakes each exceed the 25% reporting threshold and are held through LLC1, again using LLC1's FinCEN identifier. In this case, as equal owners of LLC1, both A and B would also likely exercise substantial control over Corp1.
>
> **Example 2.** Suppose a reporting company, Corp1, is wholly owned by a limited partnership, LP1, which is, in turn, owned by two individuals, A and B. A holds a 10% ownership interest in LP1, while B holds a 90% ownership interest in LP1. Suppose LP1, A, and B each have a FinCEN identifier. What should Corp1 disclose in its initial report to the registry? Assuming the final rule is revised as recommended above, Corp1 should disclose: (1) the FinCEN identifier of LP1 since LP1 wholly owns the reporting company; and (2) the FinCEN identifier of B, explaining that B is an indirect beneficial owner whose ownership stake exceeds the 25% reporting threshold and is held through LP1, again using LP1's FinCEN identifier. In this example, Corp1 would not have to disclose A since A's ownership stake falls below the 25% reporting threshold, unless A exercises substantial control over Corp1 in which case Corp1 would have to provide A's FinCEN identifier and explain A's indirect beneficial ownership stake through LP1.
>
> **Example 3.** Suppose a reporting company, Corp2, is owned by a limited partnership, LP2, and by individuals A and C. Suppose that LP2, A, and C each hold one-third of Corp2's shares. Suppose that LP2 is owned, in turn, by two individuals, A and B, who each hold a 50% ownership interest in LP2. Finally, suppose that all parties have a FinCEN identifier. What should Corp2 disclose in its initial report to the registry? Assuming the final rule is revised as recommended above, Corp2 should disclose: (1) the FinCEN identifiers of LP2, A, and C, since the ownership stakes of all three exceed the

25% ownership reporting threshold; and (2) explain that the FinCEN identifier of A refers to an individual who holds both a direct ownership stake in the reporting company and an indirect ownership stake through LP2, again using LP2's FinCEN identifier. Corp2 would not have to disclose B, because B's indirect ownership interest in Corp2 (50% of a 33% interest or a 16.5% ownership interest in Corp2) falls below the 25% reporting threshold, unless B exercises substantial control over Corp2 in which case Corp2 would also have to provide B's FinCEN identifier and explain B's indirect beneficial ownership stake through LP2.

Example 4. Suppose a reporting company, Corp4, is wholly owned by Corp3, which is wholly owned, in turn, by a trust, Trust1, which was formed in South Dakota, filed a formation document with the South Dakota Secretary of State, and so filed an initial report with the registry. Suppose that individual A is the sole grantor, trustee, and beneficiary of Trust1 and is using Trust1 as a business trust to own and control multiple entities, including Corp3 and Corp4. Suppose further that all parties have a FinCEN identifier. What should Corp4 disclose in its initial report to the registry? Assuming the final rule is revised as recommended above, Corp4 should disclose: (1) the FinCEN identifier of Corp3 since it wholly owns Corp4's shares; and (2) the FinCEN identifier of A, explaining that A is an indirect beneficial owner whose ownership stake is held through Trust1 which owns Corp3, using the FinCEN identifiers for Trust1 and Corp3.

These examples address complex ownership structures that will not apply to the vast majority of reporting companies subject to the CTA, since most companies will have only a few direct beneficial owners. Disclosing those direct beneficial owners, if they have FinCEN identifiers, will be straightforward. For that reason, the vast majority of reporting companies will not have to contend with FinCEN identifiers belonging to intermediate entities or indirect beneficial owners. Nor will they have to deal with disclosing indirect beneficial ownership chains. For the minority of reporting companies that do have complex ownership or entity structures, however, more detailed disclosure requirements are well tailored, because these groups of entities pose significantly greater money laundering and terrorist financing risks and because the underlying complex arrangements are indicative of an ability and intent to engage with more sophisticated legal rules.

FinCEN identifiers were never intended to enable individuals to conceal their beneficial ownership status from the entities they own or control, from other reporting companies, or from registry users. Instead, FinCEN identifiers are intended to serve as helpful numerical tags in the same way as taxpayer identification numbers or legal entity identifiers. FinCEN should ensure that the final rule does not misinterpret the law to create an ultra vires secrecy mechanism never intended by the CTA.

3. **Other FinCEN Identifier Provisions (Question 12)**

The remaining FinCEN identifier provisions do not raise the same concerns. In section 1010.380(b)(5)(ii), the proposed rule enables individuals to apply for and obtain a FinCEN identifier at essentially any time after completing an application disclosing their identifying information. Individuals are allowed to submit that application, disclose their identifying information, and obtain a FinCEN identifier without regard to whether or when a specific reporting company has submitted a filing to the registry containing that individual's name. Reporting companies are permitted to apply any time "at or after the time that the entity submits an initial report" to the registry, an approach which works if the final rule is clarified as indicated above to require the reporting company to submit a FinCEN identifier application that fully identifies its beneficial owners without the use of any FinCEN identifier. With that requested clarification, the proposed approach maximizes flexibility while also ensuring that individuals and entities cannot obtain a FinCEN identifier until after they disclose their beneficial ownership information to the registry.

Another proposed FinCEN identifier provision states clearly, with no exceptions or equivocations, that "each such individual or reporting company may obtain only one FinCEN identifier." Section 1010.380(b)(5)(i)(C). That restriction complies with the law and is essential to preventing the types of frauds and misinformation experienced by other federal databases that have issued more than one identification number to the same person. To enforce this provision, the final rule will need to establish automated audit reports that identify and track every individual or entity who is assigned a FinCEN identifier so that FinCEN can find anyone who has more than one identifier or shares the same FinCEN identifier with another person. FinCEN can then use that audit information to remedy any inadvertent mistakes and identify any wrongdoers or suspicious activity.

In response to **Question 12** asking whether FinCEN should require rather than permit reporting companies to use FinCEN identifiers assigned to their beneficial owners, the approach taken in the proposed rule should remain unchanged. The CTA does not require use of FinCEN identifiers, and some reporting companies may find it easier or prefer to identify their beneficial owners by name rather than number, especially if the rule fails to provide the recommended clarifications related to FinCEN identifier applications, information access, and disclosure of indirect beneficial ownership chains. As explained above, FinCEN identifiers do increase the efficiency and accuracy of the registry by reducing the transcription errors that arise when names rather than numbers are used in filings. So, FinCEN should encourage use of FinCEN identifiers by explaining their usefulness, while also taking steps to prevent FinCEN identifiers from being used to conceal the beneficial owners of entities operating within U.S. borders.

F. Special Rules (Questions 13 & 14)

Included in the proposed rule is a set of proposed "special" disclosure rules addressing certain situations covered by the statute. Section 1010.380(b)(3). The proposed preamble slightly expands on the proposed special disclosure rules, discussing how to disclose information related to ownership interests held by exempt entities, the parent or guardian of a minor child, foreign pooled investment vehicles, and deceased company applicants. Pages 69932-33. The proposed rules reasonably implement the CTA with appropriate clarifications, although one provision might benefit from a change in wording.

The proposed special rule for "foreign pooled investment vehicles" takes a reasonable approach in deeming them "reporting companies," since they are required by the statute to submit filings to the registry. Section 1010.380(b)(3)(iii). That approach also ensures that foreign pooled investment vehicles are generally subject to the same disclosure rules as other reporting companies, maximizing consistency across all types of entities. Because the CTA allows foreign pooled investment vehicles, unlike other reporting companies, to disclose the name of only one individual with substantial control over the vehicle, the special rule also provides a needed clarification on who must be disclosed. The special rule proposes requiring foreign pooled investment vehicles to disclose identifying information "with respect to the individual who has the greatest authority over the strategic management of the entity." Section 1010.380(b)(3)(iii). It is respectfully suggested, however, that since the primary purpose of a pooled investment vehicle is to collect funds for investment purposes and the primary associated money laundering and corruption risks involve the misuse of those funds, the special rule might be improved by focusing specifically on who controls the funding. Accordingly, the special rule could mandate disclosure of "the individual who has the greatest authority to collect, invest, distribute, return, and otherwise direct the funds of the entity."

G. Standardized Forms

On page 69943, the preamble to the proposed rule states: "FinCEN will prescribe the forms and instructions for filing the required reports, consistent with the final rules. Reporting companies will not have to submit their own letters to report information to FinCEN." Providing standardized registry forms is a welcome development. Standardized forms subject to automated verification measures[41] offer the best approach to ensuring submitted registry information is accurate, complete, and highly useful. Well-designed standardized forms will also facilitate collecting structured data which, in turn, will aid in running data queries and bulk analyses (for example, to identify patterns); facilitate the automation of processes; reduce costs to link to other systems and datasets; improve the usability of the data (for example, to automate the visualization of ownership structures); increase data and system flexibility; and reduce costs caused by expected system changes over time. In addition, standardized forms offer the best approach to designing software that can produce the automated audit reports needed to carry out the CTA's many mandatory audits.

It is respectfully recommended that the best approach in designing the standardized forms will take into account the revisions recommended in this comment letter, including checkbox or defined fields that can be used to identify whether a beneficial owner holds that status due to an ownership interest, substantial control, or both; and disclose ownership chains linking specific indirect beneficial owners through specific intermediary entities to the reporting company. In addition, it is recommended that fields containing beneficial ownership and FinCEN identifier information be set up in a way that permits registry users to generate, on an automated basis, ownership diagrams for specific entities, as is now possible in some beneficial ownership registries.[42]

[41] Those measures might include, for example, ensuring that submitted information conforms to a specified range of values, complies with a required format, or matches information held in other government databases before being accepted into the registry.

[42] See, e.g., the Belgium beneficial ownership registry which includes software that, on an automated basis, converts information about specific beneficial owners, parent organizations, subsidiaries, and affiliates into an ownership diagram. Alexandre Taymans and Sébastien Guillaume, "Looking Back, and the Road Ahead: A Prospective

Standardized forms for FinCEN identifier applications should also be established and set up in a way that completed applications can, on an automated basis, generate a directory of FinCEN identifiers permitting registry users to see the identifying information for each individual or entity assigned to a particular FinCEN identifier. As explained earlier, this information is critical to preventing FinCEN identifiers from being turned into secrecy devices used to conceal beneficial ownership information from registry users and to ensuring registry filings are accurate, complete, and highly useful. In addition, standardized forms should be developed for foreign pooled investment vehicle filings and for exemption certificates.

When designing the standardized forms, FinCEN may wish to consult with Open Ownership, an non-governmental organization that provides expert advice on beneficial ownership transparency and has published technical guidance on beneficial ownership form design.[43] Open Ownership's expertise can help ensure that the standardized forms used by the U.S. registry produce data that is compatible with our allies' registries and will help advance ongoing international efforts to combat money laundering and terrorist financing.

II. ***Beneficial Owner***

Overall, the proposed rule faithfully implements the CTA provisions defining who qualifies as a beneficial owner and must be disclosed to the registry.

The CTA states that a beneficial owner is ''any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25% of the ownership interests of the entity.'' 31 U.S.C. 5336(a)(3)(A). The proposed rule repeats that statutory language while providing additional clarification of the terms "substantial control" and "ownership interests." Section 1010.380(d).

Equally important, the CTA 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; employees acting solely in an employment capacity; individuals who might one day inherit an ownership interest; and certain creditors. By identifying individuals who should not be treated as beneficial owners — in addition to those who should — the CTA and the proposed rule provide a beneficial ownership definition that is both clear and practical.

A. **Three Principles of Statutory Interpretation (Question 19)**

Before going into the definition's details, the preamble to the proposed rule articulates several general principles for interpreting and applying the CTA's beneficial owner definition. First, the preamble states that the law requires reporting companies to identify "any individual

Analysis of the Belgian UBO Register," Belgium Treasury, February 2021, pp. 9-10, https://finances.belgium.be/sites/default/files/thesaurie/20210208_LookingBackAndTheRoadAhead_Final.pdf.

[43] Open Ownership, "Beneficial ownership declaration forms: Guide for regulators and designers." March 2021, https://www.openownership.org/resources/beneficial-ownership-declaration-forms-guide-for-regulators-and-designers/

who satisfies *either*" the control or ownership test. Page 69933 (emphasis added). Acknowledging the law's two independent qualifying criteria reflects the plain language of the statute and ensures its broad reach, as intended by the CTA. It also aligns with other beneficial ownership provisions in federal law,[44] international standards,[45] and definitions used by allies such as the United Kingdom and European Union[46] which similarly rely on the twin tests of ownership and control.

Second, the preamble clarifies that every reporting company must identify at least one beneficial owner when reporting to the registry, given the "breadth of the substantial control component." Page 69933. This principle is based on the practical reality that no entity can function without at least one human being behind it, even if no one individual holds 25 percent or more of the entity's ownership interests. The proposed principle also aligns with the primary purpose of the CTA which is to increase ownership transparency for entities operating within U.S. borders and prevent those entities from concealing who is motivating their actions. Moreover, it ensures that the registry will meet the CTA's statutory imperative to create a "highly useful" database;[47] a registry filled with reports that fail to identify any beneficial owners at all would be a waste of time and resources. Logic and the statutory language combine to support the proposed rule's reasonable conclusion that every reporting company must disclose at least one beneficial owner to the registry. They also answer **Question 19**, demonstrating that the expectation that every reporting company disclose at least one beneficial owner is not only reasonable, but mandated by the CTA's purpose and statutory directives.

Third, on pages 69934-35, the preamble acknowledges another overarching principle for reporting beneficial owners under the CTA, that reporting companies must disclose all of their beneficial owners to the registry and may not stop after disclosing just one individual. That approach represents a change from FinCEN's customer due diligence rule which allowed entities to report a "single individual." It is a change required by the statute. The CTA states plainly that a beneficial ownership report shall "identify *each* beneficial owner of the applicable reporting company" in its registry filing. 31 U.S.C. 5336(b)(2)(A) (emphasis added). The CTA would not have used the word "each" if it had intended only one beneficial owner to be named per entity.

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[44] 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.

[45] See, e.g., "The FATF Recommendations," (October 2020), Financial Action Task Force (FATF), p. 117 ("'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."), https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.

[46] 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).

[47] See supra note 17.

The preamble states that the extra time involved in reporting all beneficial owners versus a single individual is expected to be "minimal," since entities will no longer have to spend time "assessing which of its beneficial owners would be the most appropriate to report as being in substantial control" and because entities "are already aware of their own ownership structures … and should be able to readily identify their beneficial owners." Page 69934. The proposed rule's analysis is sound, taking into consideration both past practice and how entities operate.

B. Improper Privacy Analysis

Near the end of its discussion of the obligation of reporting companies to disclose all of their beneficial owners, the preamble to the proposed rule contains one troubling passage that should be excised from the final rule. On page 69934, the proposed preamble states:

> "While FinCEN's approach could be viewed to raise concerns about the disclosure of personal information about a broader range of individuals, the privacy impact of reporting BOI to FinCEN is relatively light, because, unlike beneficial ownership registries in many other countries, FinCEN's database will not be public and will be subject to stringent access protocols."

This passage should be deleted, because protecting privacy is not a CTA statutory objective. To the contrary, privacy stands in direct opposition to the CTA's primary purpose which is to increase beneficial ownership transparency for entities operating within U.S. borders and to prevent those entities from concealing the identities of their true owners.[48] Congress did not include the word "privacy" anywhere in the CTA, which is why it would be improper for the final rule's preamble to "raise concerns" about disclosing the "personal information" of beneficial owners and inject a "privacy impact" analysis with no statutory foundation. The CTA does require FinCEN to take steps to prevent third parties from breaching the security of the registry and prevent authorized registry users from accessing information to which they are not entitled, but those provisions are intended to protect the security of the database, not the privacy of individual beneficial owners. For those reasons, the passage cited above should be removed from the final rule.

C. Substantial Control (Question 16)

The CTA does not define the term "substantial control." FACT advised in its earlier comment letter that the proposed rule follow suit and treat the term as a basic, irreducible legal concept similar to "reasonable doubt" in criminal law, "scheme or artifice" in securities law, or "church" in tax law. In support, our comment letter quoted these remarks by Senator Brown, one of the CTA's chief architects, just prior to Senate adoption of the legislation:

> "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

[48] Advancing privacy also conflicts with the transparency objectives of the Anti-Money Laundering Act and the Bank Secrecy Act as a whole. Federal anti-money laundering laws are founded on transparency principles; protecting the privacy of persons engaged in suspicious activity has never been a federal statutory objective.

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."[49]

This legislative history acknowledges the difficulties inherent in delineating the concept of control and supports leaving "substantial control" undefined to provide the flexibility needed to take into account all relevant facts to determine who is ultimately controlling a particular entity.

1. Substantial Control Test

While the proposed rule chose not to leave "substantial control" undefined as recommended by FACT, it did follow Senator Brown's advice to avoid the use of a "numerical, narrow, or rigid test." Instead, the proposed rule offers a broad definition that affords the flexibility required by the CTA and its legislative history. The proposed definition states that "[s]ubstantial control over a reporting company includes:

"(i) Service as a senior officer of the reporting company;

(ii) Authority over the appointment or removal of any senior officer or a majority or dominant minority of the board of directors (or similar body);

(iii) Direction, determination, or decision of,[50] or substantial influence over, important matters affecting the reporting company, including but not limited to:

(A) The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;

(B) The reorganization, dissolution, or merger of the reporting company;

(C) Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;

[49] 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.
[50] The phrase "decision of" seems awkward and might benefit from being changed to "decision regarding".

> (D) The selection or termination of business lines or ventures, or geographic focus, of the reporting company;
>
> (E) Compensation schemes and incentive programs for senior officers;
>
> (F) The entry into or termination, or the fulfillment or non-fulfillment of significant contracts; and
>
> (G) Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; and
>
> (iv) Any other form of substantial control over the reporting company."

Section 1010.380(d)(1).

In addition, the proposed definition encompasses control factors asserted through both direct and indirect means:

> "An individual may directly or indirectly exercise substantial control over a reporting company through a variety of means, including through board representation; through ownership or control of a majority or dominant minority of the voting shares of the reporting company; through rights associated with any financing arrangement or interest in a company; through control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company; through arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees, or through any other contract, arrangement, understanding, relationship, or otherwise."

Section 1010.380(d)(2).

The proposed definition is long and nuanced, and allows appropriate consideration of a wide range of factors to determine who is ultimately controlling an entity. It also provides fair notice of the control factors that could trigger a CTA disclosure obligation. At one point, the preamble to the proposed rule describes those factors as a "non-exhaustive list of examples" intended to clarify the scope and application of the definition. Page 699334. The preamble also explains that the proposed approach is designed to take into account U.S. common law and statutory provisions related to establishing when a party controls an entity, including laws and administrative practices related to federal tax, securities, corporate, partnership, and Committee on Foreign Investment in the United States (CFIUS) matters. The preamble states further that the proposed approach takes into account the control factors identified by FATF, the leading international anti-money laundering body, and our ally, the United Kingdom, in its People with Significant Control Register. Page 69934. The broad reach of the definition is the best approach to implement the CTA.

2. Improper Means of Control (Question 16(ii))

Key to ensuring the effectiveness of the proposed definition are its two catch-all provisions which permit consideration of "*[a]ny other form* of substantial control over the reporting company" and control asserted through any "contract, arrangement, understanding, relationship, or *otherwise*." (Emphasis added.) In response to **Question 16(ii)**, both catch-all provisions are essential to permit consideration of not only legal, but also improper means of control, which as Senator Brown warned, might include economic pressure on company shareholders or employees, coercion, bribery, or threats of bodily harm. Such wrongful means of control may be common among the entities that most threaten U.S. national security and financial integrity. In recognition of that fact, the preamble to the final rule would be strengthened if it were to explicitly acknowledge that the substantial control definition is intended to encompass not just "control exercised in novel and unorthodox ways"[51] but also control mechanisms that are "unethical, improper, or illegal."

3. Novel entities (Questions 16(i) and 16(iii))

In response to **Questions 16(i)** and **16(iii)** it is respectfully recommended that the final rule consider how the substantial control definition should apply to relatively novel types of entities that are just beginning to be designed and created or that present unique challenges to traditional entity governance rules.

The proposed rule is drafted to contemplate entities that respect traditional notions of an indivisibility of rights, powers, or duties that apply to each entity as a whole.[52] However, increasingly flexible governance structures exist or may evolve that no longer respect this normative concept. For example, Texas and Delaware, among other states, authorize the creation of "series limited liability companies."[53] Their laws permit the creation of a "series" of separate memberships within the same entity, each series of which can hold its own assets, have its own members, conduct its own operations, and pursue different business objectives, while remaining insulated from claims – including claims by creditors or other members – relating to other series. The effect is to essentially allow the creation of mini-entities within a single entity.

Traditional concepts relating to "principal" assets, "significant" contracts, and "substantial" governance documents may not easily translate to these modern subdivided entities. One might imagine a burgeoning industry where malign actors might be able to anonymously invest in "minority" series in a way that evades the CTA, but does not create any liability for the "majority" investors in other series.

To avoid ambiguity and dubious planning, the preamble to the final rule could explicitly explain how the substantial control definition should be applied to novel entities, including series limited liability companies or decentralized autonomous organizations, using the catchall

[51] Page 69934.
[52] See section 1010.380(d)(1)(iii). The examples provided in the proposed rule focus on, among other things, concepts like "principal" assets (section 1010.380(d)(1)(iii)(A)) and "significant" contracts (section 1010.380(d)(1)(iii)(F)) of the reporting company.
[53] 6 DE Code § 18-215; 18-218; 3 Tex. Bus. Org. Code § 101.601-636.

provisions. Alternatively, or in addition, the final rule may want to consider adding a new subsection, section 1010.380(d)(1)(iii)(H), to the definition stating that substantial control includes direction (and otherwise) over: "(H) The creation or composition of, or the rights, powers, or duties with respect to, distinguished or identified transactions, assets, accounts, obligations, profits, or capital within a single entity, including but not limited to a series limited liability company."[54] Pursuing either alternative would ensure FinCEN is employing the best approach available to craft a definition of substantial control that is faithful to the statute and accommodates evolving types of control over new types of entities.

4. Senior Officer *Per Se* Provision (Question 16)

It is also respectfully suggested, in response to **Question 16,** that the final rule consider whether to retain the first proposed element of the definition stating that substantial control includes "[s]ervice as a senior officer of the reporting company." Section 1010.380(d)(1)(i). The proposed rule later defines "senior officer" to mean "any individual holding the position or exercising the authority of a president, secretary, treasurer, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function." Section 1010.380(f)(8).

The preamble to the proposed rule states that FinCEN "considered but rejected a *per se* rule that would have deemed all officers of a reporting company to be in 'substantial control' of the entity," because the CTA "consistent[ly] focus[es] on individuals that are in actual substantial control of a reporting company" and rejects reliance "on titles alone." Page 69935. Despite that statement, the proposed rule seems to establish a *per se* rule requiring reporting companies to name all of their "senior officers" as beneficial owners.

Designating every senior officer of a reporting company as a beneficial owner may be overinclusive. For example, while some senior officers may make fundamental decisions about an entity's operations and course of action, others may routinely do the bidding of the board of directors, a dominant shareholder, a general partner, or the chief executive officer. In the case of an entity involved in wrongdoing, the senior officers may obey orders issued by a criminal who holds no formal position of authority at the entity. Relying instead on the rest of the substantial control provisions, which focus on the types of decisions made and levels of influence exerted by a specific individual, may better comport with widely-varying fact patterns.

An additional consideration is the difficulty inherent in reconciling the proposed requirement to name all senior officers as beneficial owners with the CTA's explicit prohibition against naming employees as beneficial owners when their control over the reporting company "is derived solely" from their employment status. The proposed rule attempts to distinguish

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[54] Separately, the state of Wyoming has recently recognized the legal status of decentralized autonomous limited liability companies. Wyo. Stat. § 17-31-106(a). These entities rely on block-chain technology to "self-execute" transactions that may range from contract execution to governance changes. Presently, these entities typically require individuals to "vote" on proposed transactions, which the entity can then self-execute. These entities should be covered by the current definition of "substantial control," based on an individual's right to vote prior to important entity actions; however, further clarification in the preamble relating to the current catch-all provision in the proposed regulations and its application to novel entities may be merited.

"senior officers" from "employees," but the proposed rule separately defines the term "employee" using federal tax rules which provide that the term "includes officers."[55] It is respectfully suggested that the final rule consider ways to avoid this potential legal contradiction.

D. Ownership or Control of Ownership Interests (Question 17)

The proposed rule provides useful and welcome guidance on how to interpret the CTA term "ownership interests" when identifying beneficial owners, but would benefit from the addition of a needed catch-all provision and clarification on how it will apply to ownership interests held through an entity, as indicated below.

The CTA states that a beneficial owner is ''any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise … owns or controls not less than 25% of the ownership interests of the entity.'' 31 U.S.C. 5336(a)(3)(A). The proposed rule repeats the statutory language verbatim, but also proposes two new provisions to clarify the scope of the term "ownership interests." Section 1010.380(d).

The first provision in the proposed rule resolves a host of likely questions on the scope of the law by clarifying how it would apply to a panoply of mechanisms that have been used in the United States to establish ownership of various types of entities. The proposed rule states:

"(i) The term 'ownership interest' means:

> (A) Any equity, stock, or similar instrument, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, interest in a joint venture, or certificate of interest in a business trust, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or represents voting or non-voting shares;
>
> (B) Any capital or profit interest in a limited liability company or partnership, including limited and general partnership interests;
>
> (C) Any proprietorship interest;[56]
>
> (D) Any instrument convertible, with or without consideration, into any instrument described in paragraph (d)(3)(i)(A), (B), or (C) of this section, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described in paragraph (d)(3)(i)(A), (B), or (C) of this section, regardless of whether characterized as debt; or

[55] Section 1010.380(f)(1) defines the term "employee" using the definition in 26 C.F.R. 54.4980H–1(a)(15). That provision, in turn, incorporates the definition of "employee" in 26 C.F.R. 31.3401(c)-1(a) which states explicitly that the term "includes officers."

[56] Since the phrase "proprietorship interest" is rarely used, the final rule may want to clarify this meaning.

> (E) Any put, call, straddle, or other option or privilege of buying or selling any of the items described in paragraph (d)(3)(i)(A), (B), (C), or (D) of this section without being bound to do so."

Section 1010.380(d)(3).

The proposed provision provides useful references to the many ways that persons have chosen to hold an ownership interest in an entity in the United States, providing fair notice that virtually all of those ownership mechanisms can be used to establish that a specific individual is a beneficial owner under the CTA. The proposed provision makes clear that the implementing rule is intended to have a broad reach and prevent persons from dodging CTA coverage by employing exotic ownership mechanisms or unusual types of entities. It anticipates and resolves a wide range of possible questions about the scope of the law and provides notice to reporting companies that they must "consider all facts and circumstances when making determinations about who owns or controls ownership interests." Page 69935. Its wide-ranging language may also help discourage beneficial owners from trying to employ complex measures to cloak their identities. In the words of the proposed rule, the provision will help ensure "that the underlying reality of ownership, not the form it takes, drives the identification of beneficial owners" and will also "thwart[] the use of complex ownership structures and ownership vehicles … to obscure a reporting company's real owners." Page 69935.

1. **Catchall Provision (Question 17)**

While the proposed rule provides welcome guidance for many types of legal mechanisms (including equity shares, profit interests, convertible instruments, debt instruments, puts, calls, and straddles) and many types of entities (including corporations, partnerships, proprietorships, and trusts), it does not and cannot address all of them. For example, the proposed rule fails to address ownership interests held by or through foundations or cooperatives, even though those entities have been used for decades to conduct activities in the United States. It also cannot address new ownership mechanisms and entities that may be created in future years by States, Tribes, and non-U.S. jurisdictions.

To eliminate that gap in coverage, while responding to **Question 17,** the proposed rule should be strengthened by adding a needed catch-all provision to section 1010.380(d)(3)(i). Similar to the approach taken when defining "substantial control," the final rule should include a catch-all provision in its definition of ownership interests as the best way to implement the law. In fact, the statute's use of the phrase "or otherwise," could be read as mandating the inclusion of an effective catch-all provision. 31 U.S.C. 5336(a)(3)(A). Catch-all language could be added to the opening provision ("The term 'ownership interest' includes but is not limited to") or to a new (i)(F) at the end ("Any other instrument, contract, arrangement, understanding, relationship, or other mechanism used to establish ownership of any type of entity."). The current absence of an effective catch-all provision would invite the unscrupulous to devise new mechanisms and entities to try to bypass the CTA.

2. **Indirect Beneficial Ownership**

The second provision in the proposed rule offers welcome guidance on applying the law to beneficial owners who hold their ownership interests via indirect means. Proposed section 1010.380(d)(3) states in pertinent part:

> "(ii) An individual may directly or indirectly own or control an ownership interest of a reporting company through a variety of means, including but not limited to:
>
> > (A) Joint ownership with one or more other persons of an undivided interest in such ownership interest;
> >
> > (B) Through control of such ownership interest owned by another individual;
> >
> > (C) With regard to a trust or similar arrangement that holds such ownership interest:
> >
> > > (1) As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;
> > >
> > > (2) As a beneficiary who:
> > >
> > > > (i) Is the sole permissible recipient of income and principal from the trust; or
> > > >
> > > > (ii) Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or
> > >
> > > (3) As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust:
> > >
> > > > (i) Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company; or
> > > >
> > > > (ii) Through any other contract, arrangement, understanding, or relationship.
>
> (iii) In determining whether an individual owns or controls 25 percent of the ownership interests of a reporting company, the ownership interests of the reporting company shall include all ownership interests of any class or type, and the percentage of such ownership interests that an individual owns or controls shall be determined by aggregating all of the individual's ownership interests in comparison to the undiluted ownership interests of the company."

Like the prior provision, this provision makes clear that the implementing rule is intended to have a broad reach and apply to a variety of direct and indirect ownership arrangements to prevent persons from escaping beneficial ownership disclosures under the CTA. It anticipates and resolves a wide range of possible questions about the scope of the law and provides notice to reporting companies that they must "consider all facts and circumstances when making determinations about who owns or controls ownership interests." Page 69935. In addition, section 1010.380(d)(3)(ii) ensures its effectiveness by including a catch-all provision that is likely statutorily created by the use of the phrase "or otherwise" when describing ownership or substantial control ("An individual may directly or indirectly own or control an ownership interest of a reporting company *through a variety of means, including but not limited to*")(emphasis added). See also CTA section 5336(a)(3)(A).

3. **Ownership through an Entity**

It is respectfully recommended, however, that this provision be strengthened in one important respect by revising the proposed section 1010.380(d)(3)(ii) to address one of the most common arrangements for indirect ownership – when an individual owns an entity which, in turn, owns an interest in a reporting company. As currently drafted, the proposed section does not explicitly address that situation, other than with respect to trusts. To remove any ambiguity the proposed section 1010.380(d)(3)(ii)(B) could be reworded to read as follows: "(B) Through direct or indirect ownership of an entity that owns such interest, or through control of such ownership interest owned by another person."

To explain why the suggested language should be added, consider the following example. A is a non-controlling limited partner with a 40% ownership interest in a limited partnership, LP. LP, A, and an unrelated individual, C, form a limited liability company, LLC, with LP, A, and C taking a 20%, 23%, and 57% ownership interest in LLC respectively. As a result, A holds a direct ownership interest of 23% in LLC as well as an indirect ownership interest of 8% (40% of LP's 20% ownership interest in LLC) for a total of 31%. Because A's ownership interest exceeds the 25% reporting threshold, the recommended additional language makes clear that LLC, as a reporting company, must disclose A as a beneficial owner due to A's combined direct and indirect ownership interests, even though A does not control either LP or LLC. Without the proposed addition, section 1010.380(d)(3)(ii) would not provide explicit guidance addressing that indirect ownership scenario.

The final rule may also want to substitute the word "person" for "individual" as the last word in the proposed revision of section 1010.380(d)(3)(ii)(B) so that the language applies not only to the case where one individual controls the ownership interest held by another individual, but also to the case where the individual controls the ownership interest held by an entity.

4. **Trusts and Foundations (Question 17(i))**

Particularly welcome is the proposed language making it clear that individuals may qualify as beneficial owners subject to CTA disclosure when holding ownership interests in an entity "through a trust or similar arrangement." Page 69935. This clarification is both timely and important given the rapid growth of state laws authorizing the formation of U.S. trusts and foundations with hidden owners and the capacity to conduct a wide range of activities within

U.S. borders.[57] Key is the proposed rule's application to individuals with the authority to control and dispose of trust assets, whether that authority derives from an individual's status as a grantor, trustee, or beneficiary. In response to **Question 17(i)**, given the recent rise of State laws authorizing foundations with hidden owners in New Hampshire, Wyoming, and elsewhere, the proposed rule might be further strengthened by specifically mentioning "foundations" as well as "trusts" in the operative language. The resulting language could read: "through a trust, foundation, or similar arrangement."

E. The 25 Percent Threshold

In addition to clarifying the term "ownership interests," the proposed rule provides useful guidance on how to calculate when an individual has reached the 25 percent reporting threshold specified in the CTA. The proposed rule sensibly requires consideration of all forms of an individual's ownership interests, including joint interests and indirect interests; the aggregation of all of those interests to derive the total amount of an individual's ownership stake; and a comparison of those aggregated holdings "to the undiluted ownership interests" of the entity in question. This is the best read of the statute to prevent gamesmanship, such as by using complex ownership structures to try to circumvent the 25 percent reporting threshold.

F. Indirect Beneficial Ownership Chains

On page 69932 of the proposed rule, FinCEN invites comment on whether the final rule should require a reporting company to disclose "additional information about itself and about intermediate legal entity owners through which ultimate natural person beneficial owners of the reporting company own their interests." FinCEN recognizes that this added information "could substantially enhance the transparency of companies' ownership structures and make the collected data more useful for law enforcement, financial institutions, and other authorized users," but also requests comment on whether the law supports requiring that added information. The short answer to those inquiries is that the final rule should require that additional information, and such a requirement would be fully supported by the CTA.

The CTA repeatedly requires its implementing rules to produce registry information that is accurate, complete, and highly useful.[58] The accuracy and completeness of registry information for a beneficial owner holding an indirect ownership interest in a reporting company is necessarily enhanced if the reporting company discloses not only the individual's identifying information, but also how that individual is connected to the reporting company, including the identity of any intermediary entities. Identifying a beneficial owner without also disclosing that the relevant ownership interest is indirect and furnishing the specific ownership chain would not only present registry information that is incomplete, but could also lead to misunderstandings, misidentifications, delays, and even manipulation of registry disclosures.

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[57] See, e.g., South Dakota Codified Laws, Fiduciaries and Trusts, SDCL § 55-1-1 et seq.; New Hampshire Foundation Act, NH Rev Stat § 564-F:1-101 et seq.; Wyoming Statutory Foundation Act, WY Stat § 17-30-102 et seq.

[58] See supra note 17.

Providing ownership chains for indirect beneficial owners is even more important to ensure registry information is "highly useful" to national security and intelligence analysts, law enforcement agencies, federal functional regulators, and financial institutions. CTA section 6402(8)(C); 31 U.S.C. section 5336(b)(1)(F). Most U.S. entities are small businesses with no employees, likely owned by a single individual or a married couple holding direct ownership interests;[59] those businesses operate without any indirect owners. The minority of U.S. businesses that do have complex ownership structures — with indirect beneficial owners whose holdings run through a corporation, trust, or other arrangement, possibly involving one or more non-U.S. jurisdictions — pose a higher risk of illicit activity.[60] Providing a meaningful picture of how those indirect beneficial owners connect to their reporting companies is an essential first step for national security and intelligence analysts, law enforcement agencies, regulators, financial institutions, and others to evaluate the attendant risks. Identifying intermediate entities would also help those same registry users to unearth and trace otherwise hidden connections among entities operating in the United States.

The European Union already requires its members' beneficial ownership registries to disclose the ownership structures of registered entities.[61] OpenOwnership, a leading organization setting international standards for beneficial ownership transparency, already offers beneficial ownership visualization design guidelines,[62] open source software,[63] and template forms (at no cost) that a registry can use to obtain and automatically diagram an entity's ownership structure.[64] The Legal Entity Identifier (LEI) database, which provides identifying information for over two million entities worldwide, already requires them to identify their ownership structures as a matter of course.[65] The U.S. registry should follow suit.

The importance of providing indirect beneficial ownership chains is particularly acute when reporting companies disclose FinCEN identifiers in place of one or more entities' names, and, ultimately, in place of providing information for any particular beneficial owner, a practice unique to the U.S. beneficial ownership registry. If contrary to the recommendations made in this comment letter, the final rule allows reporting companies to use FinCEN identifiers for

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[59] See 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.
[60] See the proposed preamble at page 69936, where FinCEN states that conclusion and the "Reporting Burden" discussion below supporting FinCEN's analysis.
[61] See, e.g., Belgium which has designed registry software that, on an automated basis, converts information about specific beneficial owners, parent organizations, subsidiaries, and affiliates into an ownership diagram. Alexandre Taymans and Sébastien Guillaume, "Looking Back, and the Road Ahead: A Prospective Analysis of the Belgian UBO Register," Belgium Treasury, February 2021, pp. 9-10, https://finances.belgium.be/sites/default/files/thesaurie/20210208_LookingBackAndTheRoadAhead_Final.pdf.
[62] Open Ownership, "Beneficial Ownership Visualisation System (BOVS)," https://www.openownership.org/visualisation/.
[63] Open Ownership, "Visualisation Tool Github Directory," https://github.com/openownership/visualisation-tool
[64] OpenOwnership, "Beneficial ownership declaration forms: Guide for regulators and designers," https://www.openownership.org/uploads/boform-notes.pdf and "[Example] Beneficial Ownership Declaration Form," https://docs.google.com/spreadsheets/d/1oPJpRserD8AQAii1pRmrfpKekVqgwpM6Dl-kfybpD3o/edit#gid=1777743984.
[65] "Introducing the Legal Entity Identifier (LEI)," (undated), Global Legal Entity Identifier Foundation ("Each LEI contains information about an entity's ownership structure and thus answers the questions of 'who is who' and 'who owns whom'."), https://www.gleif.org/en/about-lei/introducing-the-legal-entity-identifier-lei.

entities holding ownership interests in the reporting company and allows those entities to hide their beneficial owners from the reporting company, the reporting company would be unable to list its indirect beneficial owners – an outcome at odds with the purpose of the CTA which is to increase ownership transparency.

If the final rule eliminates that problem and entities are required to disclose any indirect beneficial owners to the reporting company, a different problem may arise. Suppose the entity holding an ownership interest in the reporting company lists multiple indirect beneficial owners of the reporting company, but does not disclose anything more about them. The reporting company then simply lists those individuals in its initial report to the registry, again without any details. National security and intelligence analysts, law enforcement agencies, regulators, financial institutions, and other registry users will be unable to determine, without additional costly inquiry, how those beneficial owners are connected to the reporting company – whether they hold their ownership interest directly or through one or more layers of intermediary entities. Confusion will likely result regarding the identity of those beneficial owners, how they are connected to the reporting company, and how they relate to each other. Again, registry users will be left in the dark unless indirect beneficial ownership chains are provided. Worse still, it is possible that some reporting companies may try to manipulate the FinCEN identifier rules to obscure the identity of one or more beneficial owners as explained earlier with respect to "Preventing Manipulation of FinCEN Identifiers." This result is inconsistent with the plain language and clear purpose of the CTA.[66]

To short-circuit the confusion, frustration, and expense that would otherwise follow from minimal disclosures about beneficial owners and to increase the registry's legally required usefulness, the final rule should require reporting companies to: (1) explicitly identify any beneficial owner who holds an indirect ownership interest; and (2) delineate the exact ownership chain linking that indirect beneficial owner to the reporting company, including by identifying each and every intermediary entity through which the indirect beneficial owner holds an ownership interest. The statutory basis for requiring that level of detail is especially strong in the context of reporting companies that use FinCEN identifiers, since the CTA explicitly directs FinCEN to "prescribe procedures and standards governing" FinCEN identifiers to "ensure the beneficial ownership information reported to FinCEN is accurate, complete, and highly useful." 31 U.S.C. section 5336(b)(4)(B)(ii).[67]

Some might object that requiring reporting companies to identify the ownership chains of indirect beneficial owners would defeat the purpose of using entity-related FinCEN identifiers,

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[66] For example, the CTA explicitly bars the issuance of multiple FinCEN identifying numbers to individuals and entities to enhance the utility of these identifying numbers, prohibit fraudulent schemes that result when the same person uses multiple numbers, and prevent the manipulation of the identifying numbers to create incomplete or misleading filings. See 31 U.S.C. § 5336(b)(3)(A)(iii). It is not possible to reconcile these principles with the ability under the proposed rules to use FinCEN identifiers to create incomplete or intentionally misleading filings. On the other hand, it is reasonable to allow and encourage the use of FinCEN identifying numbers when any filing relying on such numbers provides an accurate description of the chain of ownership capable of accurately identifying the relevant beneficial owner.

[67] Notably, none of our several recommendations would result in "duplicative" filings for either beneficial owners or reporting companies since each reporting company has a unique relationship with each of its beneficial owners. See 31 U.S.C. 5336(b)(4).

since the CTA states explicitly that reporting companies can use FinCEN identifiers for entities without also disclosing information about the entity's beneficial owners. But that would misread the statute. FinCEN identifiers are intended not to limit beneficial ownership disclosures, but to make the registry more accurate and efficient and to minimize burdens on reporting companies by allowing them to use numbers instead of names that often produce transcription errors.[68] Those objectives would still be met by reporting companies that use FinCEN identifiers to describe the entities and individuals who hold their ownership interests, while also providing ownership chains showing how their indirect beneficial owners are linked to the reporting company. Both types of disclosures are designed to strengthen the registry's accuracy, completeness, and usefulness; they do not work at cross-purposes. In contrast, failing to require more detailed ownership information might result in inaccurate filings in contravention of the very purpose of the CTA. In addition, requiring a reporting company to delineate the ownership chain of a specific beneficial owner holding an ownership stake through an intermediary is not the same as compelling disclosure of that intermediary's full complement of beneficial owners; the intermediary may have multiple owners who will not be disclosed, because their ownership stakes fall below the 25 percent reporting threshold and they do not exercise substantial control over the reporting company. Again, the two types of disclosure are complementary, not contradictory.

As discussed above with respect to identifying the nature of ownership via check-box information, ownership chains could actually generate substantially reduced compliance burdens for many entities and owners, because the improved information would facilitate improved targeting of compliance and enforcement activities towards higher-risk entities and individuals. Better targeting would reduce the burdens on lower risk entities and individuals by, for example, reducing the incidence of unnecessary tax audits.[69]

CTA provisions requiring accurate, complete, and highly useful registry information provide adequate statutory authority for the final rule to require reporting companies to delineate the ownership chains that connect each indirect beneficial owner to the reporting company. Requiring this additional information is a logical, foreseeable, and reasonable way to achieve the CTA's overall objective of increasing beneficial ownership transparency for entities operating within U.S. borders.

G. **Reporting Burden**

The proposed rule's inclusion of provisions addressing complex ownership issues may be misinterpreted as imposing a significant burden on reporting companies. In fact, the vast majority of U.S. entities covered by the CTA are small businesses with no employees and likely owned by a single individual or a married couple and so will have to disclose only one or two

[68] As explained earlier, a useful analogy is to carry-out restaurants that use customers' telephone numbers instead of their names to store information about them, not to conceal anyone's identity, but simply because using numbers in place of names is more accurate, efficient, and reliable.
[69] See supra note 22 and accompanying text.

direct beneficial owners.[70] For that reason, the proposed rule's provisions addressing complex ownership structures will have no impact on the vast majority of reporting companies.

For the minority of reporting companies that do have complex ownership structures, the preamble to the proposed rule acknowledges that some of the disclosure provisions will place more of a reporting burden on them than on other reporting companies. But the preamble also correctly notes that the relatively few small businesses with complex ownership structures "previously chose their structures recognizing that costs associated with legal and tax advice and other filing and compliance obligations might be higher as a result." Page 69936. In addition, the preamble states that "in FinCEN's experience administering the BSA and other AML efforts, small-but-complex entities often are the highest risk for money laundering, terrorist financing, and other illicit financial activity." Id. Former U.S. Senate investigator Elise Bean, who led multiple anti-money laundering and anti-corruption inquiries over the course of a decade, confirms that observation, saying that it is also her experience that small businesses with complex ownership structures pose higher risks and warrant operating under rules that compel detailed disclosure of their beneficial owners, especially those holding indirect ownership interests through intermediary entities.

The proposed rule, as amended by the recommendations set forth in this letter, represents the best approach in balancing the straightforward disclosures required from most reporting companies which operate with a minimal number of direct owners versus the minority of reporting companies which operate with complex ownership structures requiring the disclosure of additional data to ensure the registry's information is accurate, complete, and highly useful.

H. **Five Exceptions (Question 18)**

In addition to identifying individuals who qualify as beneficial owners, the CTA identifies five types of individuals who do not qualify as beneficial owners and should not be disclosed in the registry. The CTA's five exceptions play a critical role in ensuring an accurate and highly useful registry by answering common questions about who should be listed and by preventing the naming of individuals who have no ownership stake or substantial control over the entity in question. The proposed rule faithfully implements the five exceptions, hewing closely to the statutory language, with one exception discussed below.

In 31 U.S.C. 5336(a)(3)(B), the CTA states that the term "beneficial owner" does not include:

> ''(i) a minor child, as defined in the State in which the entity is formed, if the information of the parent or guardian of the minor child is reported in accordance with this section;
>
> (ii) an individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;

[70] See 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. See also the discussion below of this SBA data and related data at the Census Bureau's Business Register.

> (iii) an individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person;
>
> (iv) an individual whose only interest in a corporation, limited liability company, or other similar entity is through a right of inheritance; or
>
> (v) a creditor of a corporation, limited liability company, or other similar entity, unless the creditor meets the requirements of subparagraph (A)."

The proposed rule essentially repeats the statutory language when implementing most of the five exceptions, but also adds welcome technical clarifications. In one case, the proposed rule slightly deviates from the statutory text in a way that seems confusing and risks conflicting statutory interpretations.

1. **Minor Child Exception**

The proposed rule implements the exception for minor children by essentially repeating the statutory language and clarifying two aspects of the law. First, the proposed wording makes clear that when a reporting company is considering whether to disclose the name of a minor child's parent or legal guardian in the registry, it must use the law of the State or Tribe where the reporting company filed its formation document or where it first filed a registration form to operate in the United States to resolve any legal issues, rather than using the law of the State or Tribe where the minor child, its parent, or guardian may reside. This interpretation of the CTA reduces the burden on the reporting company by allowing it to use the law of the jurisdiction where it chose to operate rather than having to determine if the laws of another jurisdiction apply instead. Second, the proposed exception clarifies that reporting companies must provide the same information for a minor child's parent or legal guardian as would be provided for a beneficial owner. Both clarifications faithfully implement the CTA. A separate "special" disclosure rule also reasonably requires that if a reporting company discloses a parent or guardian in place of a minor child, the status of the individual serving as the parent or guardian must also be disclosed. Section 1010.380(b)(3)(ii).

2. **Nominee Exception**

The proposed rule implements the nominee exception by repeating the statutory language verbatim. This provision is critical to the CTA's efforts to prevent reporting companies from disclosing the names of nominees, agents, or other intermediaries instead of their true owners. The proposed rule appropriately implements the provision with no changes as it is not ambiguous.

3. **Employee Exception**

The proposed implementation of the CTA's employee exception is more problematic. The proposed rule states that the exception applies to "[a]n employee of a reporting company, acting solely as an employee and not as a senior officer, whose substantial control over or economic benefits from such entity are derived solely from the employment status of the employee." Section 1010.380(d)(4)(iii). The CTA does not use the term "senior officer," but the proposed rule includes the term due to its definition of "substantial control" which requires all senior officers to be treated as exercising substantial control over the relevant reporting company and so must be named as beneficial owners. Section 1010.380(d)(1)(i).

The exception's proposed wording seeks to distinguish an "employee" who may not be named as a beneficial owner under the CTA from a "senior officer" who must be named as a beneficial owner under the proposed substantial control provision. To illuminate the difference, the proposed preamble explains that senior officers direct the affairs of an entity and act as its "principals" compared to employees who carry out day-to-day management duties and act as "agents" of the entity. Page 69937. That distinction contradicts, however, another part of the proposed rule which defines the term "employee" in a way which includes "officers."[71] The proposed definition indicates that senior "officers" are "employees," and that no distinction can be made between the two.

To understand the dimensions of this issue, it is important to consider why the CTA prohibits naming employees as beneficial owners if their control over a reporting company is derived "solely" from their employment status. The CTA treats beneficial owners as a category separate and apart from employees. The two concepts began to be confused when governments were stymied by secrecy jurisdictions from learning who was behind a shell entity operating within their borders. Many governments, including the United States, decided that if they couldn't find out who secretly owned or controlled a shell entity, they would instead compel disclosure of the entity's manager or officer. Since many shell entities used managers or officers supplied by third party trust or corporate service providers, disclosing those names did not compromise the secrecy of the still hidden beneficial owners. It soon became easier for a government to call for disclosing the name of a manager or officer rather than the true owner of an entity, while entities were content to provide that information since it enabled them to keep operating despite continued concealment of their true owners. The CTA was enacted in part to put a stop to the practice of naming employees instead of beneficial owners and mandate greater beneficial ownership transparency. That's why the CTA prohibits naming an employee who is merely performing a job and getting paid for it.

To carry out the CTA as intended, it is respectfully suggested that the proposed rule consider whether the phrase "acting solely as an employee and not as a senior officer" creates unnecessary ambiguity in interpreting the CTA.

4. **Inheritance Exception**

The proposed rule implements the inheritance exception by essentially repeating the statutory language, while making one clarification. The wording of the proposed rule makes clear that the exception applies only to individuals holding a "future interest" in a reporting

[71] See discussion of the proposed definition of substantial control above, which notes that § 1010.380(f)(1) on page 69973 defines the term "employee" using the definition of "employee" in 26 C.F.R. 54.4980H–1(a)(15). That provision, in turn, incorporates the definition of "employee" in 26 C.F.R. 31.3401(c)-1(a) which states explicitly that the term "includes officers."

company through a right of inheritance. Since the CTA is meant to exclude from the registry's reporting requirements only individuals who hold a future, not a present, ownership interest, this clarification offers the best approach to implementing the statute.

5. **Creditor Exception**

The proposed rule implements the final creditor exception by making several useful clarifications. The preamble to the proposed rule also provides important principles for interpreting and limiting the scope of this exception. The preamble begins its explanation of the creditor exception by appropriately noting the following: "Based on FinCEN's understanding that the overarching intent of the CTA is to identify real parties in interest, FinCEN interprets this exception to mean that the mere fact that an individual is a creditor cannot make that individual a beneficial owner of the reporting company: What is relevant is whether the individual exercises substantial control of the reporting company or owns or controls 25 percent of the reporting company's ownership interests." This observation is critical to effective interpretation of the statute, and the proposed rule would be strengthened if the key language were also added to the text of the proposed exception. The proposed exception could begin by stating, for example, that the exception "applies only to creditors that do not exercise substantial control of the reporting company and do not own or control 25 percent or more of the reporting company's ownership interests."

The preamble also explains that the proposed exception draws from federal tax law to define an exempt creditor as an individual who would be a beneficial owner solely through holding rights or interests in the reporting company "for the payment of a predetermined sum of money, such as a debt and the payment of interest on that debt." Section 1010.380(d)(4)(v). This part of the preamble and the corresponding text in the proposed exception appropriately focus on the defining characteristic of a creditor – that the creditor is owed a specific debt. Both the preamble and the proposed exception warn that individuals who hold other types of rights or interests in a reporting company – including capital or equity interests or any right or interest in the value of the reporting company or its profits – do not qualify as creditors and cannot claim the creditor exemption.

The preamble to the proposed rule also provides a useful description of how the law would apply to creditors with so-called "equity kickers" that allow them to share in a reporting company's cash flow or capital gains. Page 69937. The preamble states that such arrangements would not trigger the creditor exception, because the payments would not be for a predetermined sum owed to a creditor. It explains that allowing equity kicker arrangements to trigger the creditor exception might encourage wrongdoers to use complex arrangements with equity-like attributes to try to avoid disclosing their identities to the registry. The proposed explanation provides welcome clarity to the scope of the creditor exception.

III. <u>Company Applicant</u> (Question 20)

The proposed rule's definition and explanation of the phrase "company applicant" faithfully implements the CTA.

The CTA defines "applicant" to mean "any individual who (A) files an application to form a corporation, limited liability company, or other similar entity under the laws of a State or Indian Tribe; or (B) registers or files an application to register a corporation, limited liability company, or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe." 31 U.S.C. 5336(a)(2).

The proposed rule substitutes the term "company applicant," defining it to mean "any individual who files the document that creates a domestic reporting company" or "first registers" a "foreign reporting company," "including any individual who directs or controls the filing of such document by another person." Section 1010.380(e).

The proposed definition appropriately incorporates the proposed terms "domestic reporting company" and "foreign reporting company," discussed below, which already address filing formation or registration documents with a State or Tribal agency and already cover "other entities" aside from corporations and LLCs. The proposed definition makes clear that the term "company applicant" applies to both types of reporting companies. Since foreign reporting companies may register in multiple states, the proposed rule also clarifies that the term "company applicant" applies only to the individual who "first registers" the foreign entity with a particular State or Tribal agency.

The proposed definition also appropriately applies to "any individual," as required by the CTA, and to both the individuals who actually file the key documents with a State or Tribal agency and the individuals who order that filing to take place. That clarifying language aligns with the purpose of the CTA which is to ensure the United States is aware of the individuals behind the entities conducting activities within U.S. borders. In addition, the proposed rule uses objective tests to identify the individuals whose identities must be disclosed, focusing on who actually "filed" the key document and who actually "directed or controlled" that filing. By covering both sets of individuals, the proposed definition prevents individuals who order a filing to take place but use a third party to accomplish that task from concealing their role in the process. In the case of an entity engaged in wrongdoing, law enforcement may be more interested in the individual who ordered the filing than in who submitted the paperwork.

At the same time, disclosing the individuals who actually file formation or registration documents with a State or Tribal agency – as the CTA requires – will help shine a light on the corporate service providers, trust companies, notaries, accounting firms, law firms, and others that assist multiple entities to undertake activities within the United States. Over time, as law enforcement identifies entities involved with wrongdoing, they will also identify the facilitators most frequently associated with those entities. Identifying those facilitators may, in turn, lead to their becoming more careful with whom they do business or even subject them to prosecution for aiding or abetting misconduct.

Some law firms may object to disclosing the names of individual attorneys under this part of the proposed rule, claiming it would somehow violate the attorney-client privilege or client confidentiality requirements. As discussed above, the general rule is that disclosures of client identifying information and fee arrangements are not protected by the attorney-client privilege or the client confidentiality requirement. See, e.g., Taylor Lohmeyer Law Firm PLLC v. United States, 957 F.3d 505 (5th Cir. 2020), cert. denied (2021); In re Grand Jury Subpoena Served Upon John Doe, Esq., 781 F.2d 238, 247 (2d Cir. 1986) (en banc). Accordingly, to the extent that identifying an attorney in connection with the filing of a formation or registration document with a State or Tribal authority might reveal the identity of that attorney's client, that concern does not trigger any attorney-client privilege or client confidentiality related protections.

Further, the identification of an attorney in connection with filing or ordering the filing of a formation or registration document with a State or Tribal agency would not convey any confidential communication relating to substantive legal advice. Formation and registration filings require the disclosure of facts, not legal advice. Associating the name of a specific attorney with a specific client is also not a violation of the attorney-client privilege, since no legal advice is disclosed. In addition, formation and registration filings deliberately disclose information to a third party – a State or Tribal agency – that is outside the attorney-client relationship. The client intends for that information to be disclosed in order to obtain permission for the relevant entity to initiate activities within the United States. In other words, the client does not intend the information to remain confidential. For those reasons, the legal profession has no justification for keeping secret the identities of individual lawyers forming or registering entities in the United States.

IV. Reporting Company (Questions 21 & 22)

The CTA does not use the terms "domestic reporting company" or "foreign reporting company," but both terms help to clarify and simplify implementation of the CTA and play useful roles in the proposed rule.

A. Domestic Reporting Companies (Questions 21 & 22)

The proposed rule's definition and explanation of the phrase "domestic reporting company" faithfully and thoughtfully implements the CTA. The proposed rule defines a domestic reporting company as any entity that is a corporation, LLC, or "[o]ther entity that is created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian Tribe." Section 1010.380(c)(1)(i).

The proposed rule clearly explains why it identifies "filing a document" as the key common characteristic defining "other similar entities" covered by the CTA. The proposed rule cites not only the plain language of the statute, but also the difficulties with using alternate features such as personal liability limits or legal distinctions between entities and their owners, since those features vary by State and do not align with the purposes of the CTA. The approach actually taken by the proposed rule ensures broad coverage by the registry, helping to achieve the CTA's primary objective of increasing beneficial ownership transparency for a variety of entities operating within U.S. borders. Equally important, the proposed rule uses an objective test – whether a document has been filed with a State or Tribal office – to determine which entities must file with the registry, a bright line test that will facilitate implementing and enforcing the CTA.

Particularly important is the proposed rule's decision not to condition application of the CTA on specific types of entities. Instead, the proposed rule states only that the proposed definition of domestic reporting company "*would likely include* limited liability partnerships, limited liability limited partnerships, business trusts (a/k/a statutory trusts or Massachusetts trusts), and most limited partnerships, in addition to corporations and limited liability companies (LLCs), because such entities appear typically to be created by a filing with a secretary of state or similar office." Pages 69938-39 (emphasis added). If the proposed rule had instead specified the exact types of entities subject to the CTA, it might have encouraged some States, Tribes, or countries to devise new types of entities that could then claim to be beyond the law. Listing potentially covered entities avoids that problem while giving fair notice of the law's intended inclusive reach. Given that the CTA explicitly includes inclusive language in defining reporting companies, the proposed rule is taking the best approach by not unnecessarily limiting the statute's application to entities in a way that might create loopholes and undermine the law. Cf. CTA section 5336(a)(2)(A).

1. **Foundations (Questions 21)**

In response to **Question 21** asking if any additional provisions are needed to clarify which entities qualify as reporting companies, the final rule would be strengthened if it included "foundations" in the non-exclusive list of entities identified as "likely" to be subject to registry disclosure obligations. States like New Hampshire and Wyoming currently allow foundations to conduct business within U.S. borders in the same way as corporations and LLCs and also require those foundations to file formation documents with the secretary of state.[72] Leaving foundations off the list of potentially covered entities would miss an opportunity to provide fair notice to those entities of their potential obligation to file beneficial ownership information with the registry.

2. **Nomenclature (Question 21)**

In additional response to **Question 21**, it is respectfully recommended that the preamble to the final rule make clear that in determining whether an entity has been "created" by a filing with a State or Tribal agency, the key test is not the label attached to the filing but its effect in authorizing or enabling an entity to begin conducting activities within the United States. For example, if a State filing is styled as a "registration" document, but enables an entity newly formed under U.S. law to begin operating within U.S. borders, that filing should be deemed as having "created" an entity similar to a corporation or LLC and rendered it subject to the CTA unless an exemption applies. In short, the filing's practical effect rather than its official nomenclature should be deemed determinative. Without that clarification, it is possible that some States or Tribes might deliberately label their filings in ways designed to avoid triggering CTA coverage, a tactic that the final rule should not allow to succeed.

[72] See, e.g., New Hampshire Foundation Act, NH Rev Stat § 564-F:1-101 et seq.; Wyoming Statutory Foundation Act, WY Stat § 17-30-102 et seq.

3. Organizational Filings (Question 21)

In further response to **Question 21**, it is also respectfully recommended that the final rule clarify what happens when an entity that had no obligation to file a formation document with a State or Tribal agency later files a document with a State or Tribal agency to reorganize, convert, register, or effectuate a change in a way that results in a new type of entity becoming active within U.S. borders. Consider, for example, a general partnership which had no filing obligation when first formed, but later "registers as" or converts to a limited partnership by filing a related document with a State or Tribal agency. In some states, like Delaware, it is relatively clear that an existing entity must submit a separate filing to convert to a limited partnership.[73] In other states, such as Massachussettes, the key filing to convert a general partnership to a limited partnership is deemed a "registration" document.[74] Some might claim the relevant filings in such cases do not "create" a new entity because the underlying entity already existed in a different form.

As with nomenclature, this distinction without a difference might inadvertently create loopholes in the CTA's application. If the final rule were to allow, for example, a general partnership to convert to a limited partnership at a later stage and, for that reason alone, escape CTA coverage, it would open up an unintended loophole that many entities would use to dodge beneficial ownership transparency. Since limited partnerships require the filing of a document to attain that status, they should be treated as similar to corporations and LLCs and subject to the CTA even if the limited partnership once functioned in a different form. To rule otherwise would be to authorize disparate treatment of limited partnerships that are similar in every key respect other than their origin.

The needed clarification could be included in the preamble to the final rule. Alternatively, the proposed rule could include a new provision clarifying that a legal entity is "created" by any State or Tribal filing that results in an entity that would otherwise have been subject to the CTA were it initially formed or created as such following the effective date of the final rule. Either approach would align with the purpose of the CTA which is to increase beneficial ownership transparency for a wide range of entities operating within U.S. borders. It would also align with the proposed rule's bright line, objective test which focuses on the filing of a document to trigger CTA coverage.

Without the requested clarification, entities that file a document with a State or Tribal agency to effect a reorganization, conversion, registration, or other change in form might be confused about their registry obligations. Unscrupulous parties might try to take advantage of the lack of clarity to evade the CTA. It is also possible that some States or Tribes might try to design procedures enabling existing entities to take new forms without triggering CTA coverage

[73] 6 DE Code § 17-217(b)(2).

[74] Mass. Gen. Laws ch. 108A, § 45(1) (2021). In Massachusetts, one may "register" for limited partnership status. The final rule should clarify that this registration, and similar corporate governance filings, have the effect of "creating" a reporting company.

and permit those entities to operate within U.S. borders without disclosing their beneficial owners. The final rule should prevent that type of gamesmanship.

B. Optional Filings (Question 21)

In further response to **Question 21**, it is respectfully recommended that the preamble to the final rule be strengthened by clarifying the registry's application to entities that are not required to file formation or registration documents with a State or Tribe, but choose to do so. For example, a number of States do not require general partnerships to file formation documents, but allow them to do so for tax, liability, dissolution, or other reasons.[75] Entities that choose to file formation documents with a State or Tribal agency should be subject to the same treatment as entities that file on a mandatory basis – the two sets of entities are sufficiently "similar" that there is no reason to treat them differently.

The preamble should clarify and provide fair notice to entities which choose to file a formation or registration document with a State or Tribal agency that they also trigger the obligation to disclose their beneficial owners to the registry. That approach would not only be in keeping with the purpose of the CTA to increase ownership transparency for entities operating within U.S. borders, but would also align with the proposed rule's focus on filing formation or registration documents as a bright line test triggering CTA coverage. Explicitly addressing this issue in the preamble would help resolve questions that are sure to arise regarding the registry filing obligations of entities who file optional formation or registration documents with a State or Tribal agency.

C. DBA Filings (Question 21)

In final response to **Question 21**, it is respectfully recommended that the preamble to the final rule be strengthened by clarifying how the law will apply to sole proprietorships that file a document with a State or Tribal agency to operate under a "Doing Business As" (DBA), "trade," or "fictitious" business name.

Because sole proprietorships typically operate under the name of the human being who is the sole proprietor without "creating" a separate legal entity, most States do not require sole proprietorships to file a formation or registration document with the State.[76] The preamble to the proposed rule notes, however, that State and Tribal laws "may differ" on their filing requirements for sole proprietorships. Page 69939. The preamble implies that if a sole proprietorship does not submit any filing with a State or Tribe, it would not meet the definition of a domestic or foreign reporting company and would not need to file beneficial ownership information with the registry.

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[75] See, e.g., North Dakota Cent. Code § 45-13-05; California Corporations Code § 16105; California Secretary of State, "Starting a Business – Entity Types," 2020, ("Registering a [general partnership] at the state level is optional."), https://www.sos.ca.gov/business-programs/business-entities/starting-business/types#gp.
[76] See, e.g., "Sole Proprietorships," SBA, https://www.sba.gov/content/sole-proprietorship.

A more difficult question, however, involves a sole proprietorship that chooses to file a document with a State or Tribe to operate under a DBA, trade, or fictitious name.[77] Thousands of sole proprietorships now run sizable businesses in the United States, any of which may use a DBA, trade, or fictitious name that might serve to obscure the identity of the sole proprietor.[78] The final rule needs to clarify whether filing a document with a State or Tribal agency to obtain a DBA, trade, or fictitious name is commensurate with filing a formation or registration document, since it enables the sole proprietorship to begin conducting business activities within U.S. borders under a new name. Particularly important is whether the State or Tribe would also allow the sole proprietorship to use its new name to open a bank account, sign a contract, own real estate, or take other actions while keeping the sole proprietor's identity hidden, a situation that would be unusual today[79] but could change.

It is respectfully recommended that the final rule clarify that if a sole proprietorship files a document with a State or Tribal agency to obtain a DBA, trade, or fictitious name and also gains authority under State or Tribal law to use that name to open a bank account, sign a contract, own real estate, or take other actions while concealing the sole proprietor's identity, then the sole proprietorship, due to its similarity to a corporation or LLC, would trigger the CTA's beneficial ownership disclosure obligation. If the final rule does not provide that clarification, it may encourage some States or Tribes to begin promoting sole proprietorships with DBA names as a way to evade beneficial ownership transparency.

D. Secretary of State or Similar Office (Question 22)

In response to **Question 22**, we respectfully request clarification that the term "similar office" would include any state or local governmental authority, including a state, local, regional, or tribal court. This clarification is needed, because certain statutory trusts, like the South Dakota trusts identified in the Pandora Papers, that may not file in connection with formation may nonetheless file with local courts to relocate "foreign" trusts or to seek enhanced privacy.[80]

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[77] See, e.g., Florida Department of State, "Types of Business Entities/Structures," 2021, https://dos.myflorida.com/sunbiz/start-business/corporate-structure/ ("Sole proprietorships, when not operating under the owner's legal name, must register a fictitious name with the Division of Corporations.").
[78] 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.
[79] See, e.g., "Opening a Bank Account for a Sole Proprietor," Bank of America (allowing an account to be opened by a sole proprietor under a DBA name, but also requiring "[p]ersonal information about the business owner"), https://www.bankofamerica.com/smallbusiness/deposits/resources/documents/sole-proprietor/; "Can You Sign a Contract With a Fictitious Business Name?" Marie Huntington, azcentral, ("With regard to sole proprietorships, the business owners in a sole proprietorship must sign their legal names to make the contract enforceable."), https://yourbusiness.azcentral.com/can-sign-contract-fictitious-business-name-16916.html; "Can a Sole Proprietorship Take the Title to Real Estate?" Dennis Masino, CHRON ("Because sole proprietorships do not exist separate and apart from their owners, they are incapable of owning real estate on their own."), https://smallbusiness.chron.com/can-sole-proprietorship-title-real-estate-59861.html.
[80] See S.D. Cod. Laws § 55-1-56 to -59; https://www.washingtonpost.com/business/interactive/2021/booming-us-tax-haven-industry/.

Without clarification, courts may not be interpreted to be included in the phrase "similar office," and as discussed above, these voluntary filings should trigger the CTA reporting requirements.[81]

E. Foreign Reporting Companies (Questions 22 & 25)

The proposed rule's definition and explanation of the phrase "foreign reporting company" faithfully and thoughtfully implements the CTA. It defines a foreign reporting company as any entity that is a corporation, LLC, or other entity that is "[f]ormed under the law of a foreign country" and "[r]egistered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe." Section 1010.380(c)(1)(ii).

The same analysis as above supports the proposed rule's decisions to focus on the filing of a document as the trigger for CTA coverage and against conditioning CTA coverage on the specific type of entity initiating the filing. Both are sound interpretations of the statute when applied to entities formed in other countries. In addition, the five strengthening measures suggested above would apply with equal force in the context of entities formed in other countries. For example, foreign foundations can conduct business within U.S. borders and so should be listed as "likely" to be subject to the registry; foreign entities that file forms with a State or Tribal agency should be evaluated on the effect of the filing and not on its official label; foreign reporting companies that file an organizational document to convert to a new type of entity or file an optional registration document with a State or Tribal agency should trigger CTA coverage, since they are indistinguishable from other registered foreign reporting companies; and non-U.S. entities that obtain a DBA, trade, or fictitious name and can use that name to open bank accounts, sign contracts, own real estate, or conduct other activities are similar enough to corporations and LLCs that they, too, should file with the registry.

Addressing these issues in the preamble to the final rule will help resolve what could otherwise be a flood of questions about which non-U.S. entities must file with the registry.

F. Registered to Do Business (Question 25)

In response to **Question 25** and the proposed rule's request on page 69939 for comment on whether FinCEN "should further clarify the 'registered to do business' requirement" for foreign reporting companies, it is respectfully suggested that the final rule would benefit from additional clarification.

Right now, all 50 States require entities formed outside of the State – typically called "foreign entities" – to register with the State before transacting business within its borders. That

[81] Consistent with the statutory purpose to create a clear, federal standard for incorporation practices and the various audits to be conducted to ensure the efficacy of the CTA, FinCEN might consider exploring whether inconsistencies in state filing requirements in connection with various domestic activities might require an alternative reporting requirement in connection with registering to do business or operate in the United States, such as when a foreign entity might file for a TIN in connection with transacting in the United States. See CTA § 6402(5)(A).

general rule implies that most foreign entities will have to register with a State and, as a consequence, will also have to file with the beneficial ownership registry. But some States – it is unclear how many based on varying parameters – have created registration exceptions that will directly limit the effectiveness of the CTA. Those exceptions essentially provide that a State will not treat a foreign entity as transacting business within its borders – and so will not require it to register with the State – if the foreign entity's activities within the State involve maintaining a bank account, owning real estate, or acquiring a mortgage.[82]

Those state registration exceptions are problematic, because many money laundering and corruption schemes need little more than a U.S. bank account or the purchase of U.S. real estate to conceal or launder dirty money. By excusing foreign entities from having to register with the State if their in-state activities involve a U.S. bank account, U.S. real estate purchase, or U.S. mortgage, some States will enable many foreign entities to escape the registry disclosure requirement. In some cases, the state exceptions may not matter – a "foreign" entity created elsewhere in the United States would likely still be covered by the CTA via its home State status – but they likely would matter for entities formed under the laws of another country, since those non-U.S. entities would not otherwise be subject to the registry's disclosure requirements. The end result of the state exceptions may be to enable non-U.S. entities to legally dodge the registry, which would not only open up a major U.S. national security vulnerability but may also hand non-U.S. entities a competitive advantage over U.S. businesses by lowering their relative costs and helping them keep their true owners secret.

At a minimum, the preamble to the final rule should deal with this problem by invoking 31 U.S.C. 5336(d)(2) requiring State and Tribal agencies to "cooperate with and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database." Citing that statutory authority, FinCEN could use either the preamble to the final rule or a final regulatory provision to require State and Tribal agencies to inform FinCEN of each law, regulation, or guidance on their books which allows a non-U.S. entity to conduct activities within U.S. borders without ever registering with the State or Tribe. Once FinCEN has a comprehensive list of those registration exceptions, it could determine the scope and impact of the related money laundering and terrorist financing threat to national security. In addition, FinCEN could work with the relevant States and Tribes to ensure that the exceptions are not available to entities formed in other countries and instead require non-U.S. entities, without exception, to file a registration document with a State or Tribal agency.[83] The filing of that registration document would, in turn, trigger the registry's beneficial ownership disclosure obligation. This would be the best approach under the statute given the statutory intent to create "clear, Federal standard" for incorporating, formation and organizing practices in the U.S., including for foreign entities. See CTA section 6402(5)(A).

[82] See, e.g., Texas Business Organizations Code § 9.251; Wyoming Stat § 17-16-1501(b).

[83] FinCEN may want to consider requiring state registration for any non-U.S. entity to own U.S. real property in any State, territory, or Tribal jurisdiction, obtain a mortgage from any U.S. financial institution, or to open a U.S. bank or other financial account, in order to prevent State exceptions to the doing business registration requirement from creating undesirable loopholes for activities that are susceptible to money laundering and other illicit uses.

G. Exemptions (Questions 26-31)

Overall, the proposed rule's provisions relating to the 23 statutory exemptions that free certain entities from the registry's disclosure obligations faithfully implement the CTA. This comment letter will discuss several issues that apply to the exemptions as a whole as well as seven of the specific exemptions.

1. Narrow Construction

Before commenting on any of the individual exemptions, it is respectfully recommended that the preamble to the final rule be strengthened by stating explicitly that all of the CTA's statutory exemptions should be narrowly construed. Explicitly stating that principle in the preamble would assist federal, State, and Tribal agencies as well as the courts to interpret and apply the law. This principle rests on two foundations. First, it is in line with the primary purpose of the statute which is to increase beneficial ownership transparency and ensure the United States knows who is behind the entities conducting activities within its borders. Second, the principle is consistent with the law's legislative history. On December 9, 2020, one of the CTA's chief architects, Senator Brown, noted on the Senate floor just before the Senate voted to enact the CTA 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."[84]

2. Individual Exemptions

When establishing the individual exemptions, most of the provisions in the proposed section 1010.380(c)(2) essentially repeat the statutory language verbatim, because the statutory language already provides clear guidance, bright line rules, and narrow categories. A few of the proposed provisions offer needed clarifications in line with the law. We also recommend that the risky nature of two specific exemptions be highlighted in the final rule. Finally, we recommend making a clarification with respect to the exemption for corporate subsidiaries, as the proposed rule may create confusion and improperly expand the exemption; however, we would note its current wording appears to be due to an inadvertent mixup rather than a flawed policy decision.

3. Bank Exemption (Question 26)

The proposed rule's exemption for banks hews closely to the statute, but could be improved in two ways. Section 1010.380(c)(2)(iii). First, section 1010.380(c)(2)(iii)(C) should be clarified by referencing 15 U.S.C. 80b-2(a)(2). The current reference, to 15 U.S.C. 80b-2(a), encompasses over two dozen different definitions instead of focusing on just the bank definition in the more specific citation. Second, the preamble to the final rule may wish to clarify that trust companies can qualify for this exemption only if those trust companies are "supervised and examined" by a state or federal bank or savings association authority and if they also meet the other requirements set out in 15 U.S.C. 80b-2(a)(2). This issue merits mention in the preamble

[84] 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.

due to the frequent questions that arise related to whether trust companies qualify for the bank exemption.

4. **Public Utility Exemption (Question 31)**

The proposed rule's decision to define "public utility" by referring to the term "regulated public utility" in 26 U.S.C. 7701(a)(33)(A) is both practical and effective. Section 1010.380(c)(2)(xvi). The proposed approach taps into a long-standing, detailed, and well-accepted body of law that is already familiar to U.S. public utilities and U.S. regulators. It will minimize confusion and ensure consistent treatment across Treasury, IRS, and other federal rules. Using consistent terms also relieves public utilities of the need to learn a new set of legal requirements and integrate them into their existing practice. The proposed approach is also consistent with the intent of the CTA, since it restricts the exemption to a set of highly regulated businesses already subject to government oversight.

5. **Pooled Investment Vehicle Exemption (Question 29)**

The proposed exemption for pooled investment vehicles is currently not addressed anywhere in the preamble to the proposed rule; it appears only in the text of the proposed rule itself. This exemption is so unusual and high risk, however, that it warrants the expression of several guiding principles in the preamble to the final rule.

The proposed rule states that the exemption applies to "[a]ny pooled investment vehicle that is operated or advised by a person described in paragraph (c)(2)(iii), (iv), (vii), (x), or (xi) of this section." Section 1010.380(c)(2)(xviii). The proposed rule defines the term "pooled investment vehicle" in more detail in proposed section 1010.380(f)(7), explaining that it means: "(i) Any investment company, as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)); or (ii) any company that: (A) would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of that Act (15 U.S.C. 80a–3(c)); and (B) is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form)" filed with the Securities and Exchange Commission (SEC).

Both pooled investment vehicle provisions in the proposed rule hew closely to the statute. It is respectfully suggested, however, that the final rule's preamble include an acknowledgement that this exemption is both unusual and high risk. FACT's understanding is that this exemption is unprecedented within the United States.

Neither Congress nor FinCEN has offered any merit-based justification for the exemption, and none seems relevant. Multiple factors indicate that the pooled investment vehicle exemption poses a high risk of money laundering and terrorist financing.[85] Right now,

[85] See, e.g., "Private Investments, Public Harm: How the Opacity of the Massive U.S. Private Investment Industry Fuels Corruption and Threatens National Security," (December 2021), Global Financial Integrity, Transparency International, and the FACT Coalition, https://thefactcoalition.org/report/private-investments-public-harm/.

due to an ill-advised, longstanding Treasury exemption, investment companies and investment advisers are allowed to operate without any anti-money laundering programs in place, despite the fact that many handle substantial funds – often from offshore sources – and use those funds to finance pooled investment vehicles.[86] Pooled investment vehicles have also been identified by the Federal Bureau of Investigation (FBI) as subject to misuse by criminals and U.S. adversaries.[87] U.S. money laundering prosecutions of investment companies and investment advisers offer still more evidence of the risks inherent in this exemption.[88] In addition, pooled investment vehicles do not normally disclose their beneficial owners to the 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.

Given these facts, rather than remain silent, the preamble to the final rule should, at a minimum, acknowledge the law enforcement risks posed by the pooled investment vehicle exemption, urge its narrow construction, promise sustained audit attention, and recommend that entities accepting exempt pooled investment vehicles as clients exercise enhanced due diligence to detect, prevent, and report suspicious activity.

6. **Tax-Exempt Entity Exemptions (Question 29)**

The preamble to the proposed rule is also silent with respect to another set of problematic exemptions labeled by the proposed rule as: "Tax-exempt entity" and "Entity assisting a tax-exempt entity." Sections 1010.380(c)(2)(xix)-(xx). The failure to provide any guidance related to either exemption, both of which pose money laundering and terrorist financing risks[89] and difficult interpretation issues, should be remedied in the final rule.

Section 1010.380(c)(2)(xix) states that the first exemption, for tax-exempt entities, applies to "[a]ny entity" that is "described in section 501(c) of the Internal Revenue Code"; is a "political organization, as defined in section 527(e)(1) of the Code, that is exempt from tax under section 527(a) of the Code"; or is a trust described in paragraph (1) or (2) of section 4947(a) of the Code." Section 1010.380(c)(2)(xx) states that the second exemption applies to "[a]ny entity" that "operates exclusively to provide financial assistance to, or hold governance rights over" an

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[86] Id. at 18-21.
[87] 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 (warning that "threat actors likely use the private placement of funds, including investments offered by hedge funds and private equity firms, to launder money").
[88] 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; SEC, "SEC Institutes Administrative Proceedings Against Former Registered Investment Adviser Representative," March 2, 2021, https://www.sec.gov/enforce/ia-5694-s.
[89] U.S. regulators currently advise financial institutions that open accounts for nonprofit organizations to conduct due diligence reviews to assess their money laundering and terrorist financing risks, noting that the risks can "vary dramatically depending on the operations, activities, leadership, and affiliations of the organization." "Joint Fact Sheet on Bank Secrecy Act Due Diligence Requirements for Charities and Non-Profit Organizations," (November 19, 2020), FinCEN and other U.S. financial regulators, at 2, https://www.fincen.gov/sites/default/files/shared/Charities%20Fact%20Sheet%2011_19_20.pdf.

entity described in the prior exemption, is a "United States person," is "beneficially owned or controlled exclusively by one or more United States persons that are United States citizens or lawfully admitted for permanent residence," and "[d]erives at least a majority of its funding or revenue from one or more United States persons that are United States citizens or lawfully admitted for permanent residence."

Both of the proposed provisions closely follow the wording of the related statutory provisions with one exception: the proposed label given to the second exemption uses the word "assisting" – a word that provides an inappropriately broad description of the exemption. It is respectfully recommended that the final rule change the label for the second exemption to "Entity exclusively providing financial assistance to or holding governance rights over a tax-exempt entity," consistent with the statute and the defining language that immediately follows the label. Section 1010.380(c)(2)(xx). This unusual exemption, which is unprecedented in the United States and exists in no other beneficial ownership registry worldwide, requires a precise description, not an expansive label that will encourage a variety of entities to claim it and push the boundaries of its reach. The exemption covers a narrow set of entities that typically cloak the identity of persons contributing money to 501(c) organizations and often serve as conduits for substantial funds from hidden sources. The exemption is the product of a fierce lobbying effort and was added to the law without any merit-based explanation. Potentially widening its scope even further by implying that the exemption might apply to any entity "assisting" a tax-exempt entity is ill-advised, inconsistent with the immediately following text, and unfounded in the law.

In addition, it is respectfully recommended that the preamble to the final rule provide guiding principles to interpret both provisions to resolve expected questions and ensure both exemptions are properly interpreted and applied. The following statement by Senator Brown, a chief architect of the CTA, speaking on the Senate floor just prior to Senate approval of the CTA, suggests what those principles might be:

> "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, trusts, 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.
>
> In addition, the exemption given to entities that 'operate exclusively to provide financial assistance to or hold governance rights over' a charitable entity is intended to be even more restrictive; it 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.

Again, these 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."[90]

The final rule would accordingly be strengthened and represent the best read of the CTA if the preamble were to state explicitly that the two exemptions are intended to be given a very narrow construction; that the first is intended to exempt only entities whose income is exempt from taxation under section 501(c) of the tax code and are engaged in tax-exempt activities; and that the second exemption is not available under any circumstance for entities formed under foreign laws, established for foreign beneficial owners, or funded with foreign money that, in the year when donated and aggregated with other foreign funds, exceeded 50 percent of the entity's total funding that year.[91] That guidance would help federal, State, and Tribal agencies, the courts, and the entities themselves to interpret and apply the law as intended by Congress. Providing no guidance at all with respect to these unprecedented exemptions will only invite speculation, differing applications, and possible misinterpretation of both provisions.

In addition, the preamble to the final rule should acknowledge the law enforcement risks posed by the two exemptions, promise sustained audit attention, and recommend that financial institutions accepting the exempted entities as clients carefully assess their money laundering and terrorist financing risks.

7. **Large Operating Company Exemption (Questions 27 & 28)**

In contrast, the proposed rule's treatment of the exemption for large operating companies not only faithfully implements the CTA, but also provides a number of useful clarifications. Section 1010.380(c)(2)(xxi). Nonetheless, it is important that FinCEN not expand this exemption in any final rule as it remains novel in its metes and bounds compared to other beneficial ownership registry around the globe.

This exemption is available only to entities that employ "more than 20 employees on a full-time basis in the United States," have "an operating presence at a physical office within the United States," and "filed in the previous year Federal income tax returns in the United States" demonstrating more than $5 million "in gross receipts or sales," including from "other entities owned by the entity" and "other entities through which the entity operates." 31 U.S.C. 5336(a)(11)(xxi). The reasoning behind this exemption is that a business with multiple U.S.

[90] 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.
[91] Stating that the second exemption is unavailable to any entity formed abroad or with foreign beneficial owners or large amounts of foreign funding is particularly important, because it would reinforce the law's provisions seeking to minimize money laundering and corruption risks posed by foreign ownership or control of entities seeking to evade the CTA's disclosure obligations, especially entities that lack a physical presence in the United States.

employees, a U.S. physical presence, U.S.-based revenues, and recent U.S. tax filings already offers multiple sources of information that can be used by U.S. law enforcement to identify its beneficial owners. In practice, this may not always be the case, and, as FinCEN is all too aware, money-laundering, tax-evasion and other financial crimes examples may often be associated with small to medium-sized "front" companies, meriting ongoing review of this exemption.

To facilitate effective implementation of this exemption, however, the proposed rule offers several clarifications. First, the proposed section 1010.380(c)(2)(xxi)(A) states that the exempt entity must employ more than 20 "full time employees in the United States," using a term that is already defined in federal tax regulations, 26 C.F.R. 54.4980H–1(a) and H–3. The proposed approach enables the CTA to utilize an existing, detailed body of law that addresses multiple issues related to full-time employees and also ensures consistent treatment of the subject across FinCEN and IRS regulations. In addition, section 1010.380(c)(2)(xxi)(A) clarifies that the term "United States" – as used in the two tax regulations – has the same meaning as in section 1010.100(hhh), ensuring "United States" is used the same way across the CTA's implementing rules.

The proposed section 1010.380(c)(2)(xxi)(B) repeats verbatim the statutory requirement that the exempt entity have "an operating presence at a physical office within the United States." The proposed rule then defines that term in more detail in proposed section 1010.380(f)(6), explaining that it means the entity "regularly conducts its business at a physical location in the United States that the entity owns or leases, that is not the place of residence of any individual, and that is physically distinct from the place of business of any other unaffiliated entity." This clarification is essential to prevent entities from claiming that they meet the U.S. physical office requirement if they provide online information to U.S. residents, employ U.S. workers who work from home, pay for a U.S. post office box, or use an address belonging to a third party such as an attorney, corporate service provider, or homeowner. In short, the proposed rule makes clear that the exemption is available only to a business that owns or leases a physical office on U.S. soil where its employees work and which can be visited in person by U.S. law enforcement.

The proposed section 1010.380(c)(2)(xxi)(C) provides multiple clarifications related to the exemption's tax-based gross-receipts requirements. It clarifies that the requirements can be met by filing either a Federal "income tax return" or "information return" in the United States "for the previous year." It states that to meet "the more than $5 million in gross receipts or sales" requirement, the total must be reported "net of returns and allowances" on "the entity's IRS Form 1120, consolidated IRS Form 1120, IRS Form 1120-S, IRS Form 1065, or other applicable IRS form." It clarifies that when calculating the total of gross receipts or sales, an entity must exclude "gross receipts or sales from sources outside the United States, as determined under Federal income tax principles." And it clarifies that if an entity "is part of an affiliated group of corporations within the meaning of 26 U.S.C. 1504 that filed a consolidated return," the total gross receipts or sales must be "the amount reported on the consolidated return for such group."

Each of these provisions faithfully implements the law while providing greater clarity on how to satisfy the exemption's tax-based requirements in a manner that is also consistent with other potentially related exemptions. 31 U.S.C. 5336(a)(11)(B)(xxi)(II)(aa)-(bb) explicitly refer to "gross receipts or sales" of the relevant entity, other entities owned by the entity or other entities through which the entity operates as reported on the federal tax returns filed by the entity (and not by those other entities that it may own or through which it may operate). As FinCEN correctly clarifies in the proposed rule, the statutory term "gross receipts or sales" in tax reporting is specifically defined, as applicable, on IRS Form 1120, IRS Form 1120-S, and IRS Form 1065 (or on other applicable forms). It does not include broader categories of revenues or expenses that may result in taxable or net income for an entity, and expanding this definition would be improper under the plain language of the CTA.

Further, the proposed rule correctly clarifies that the only relevant federal tax returns for the applicable year are those filed by the entity claiming the exemption. This clarification is the only interpretation consistent with the lead-in language in 31 U.S.C. 5336(a)(11)(B)(xxi). In the context of an affiliated group of corporations as defined in 26 U.S.C. 1504, a single parent corporation would be the applicable filing entity and would be the only entity eligible for this exemption under the CTA. We recommend that the final rule clarify that other members of the affiliated group would have to claim exemptions as subsidiaries of the parent corporation under 31 U.S.C. 5336(a)(11)(B)(xxii) (or pursuant to another exemption). In this way, the proposed rule allows certain affiliate corporations owned by the parent filer or through which the parent filer might operate, to contribute to the gross receipts or sales calculation for the parent, while avoiding any potential conflict with the subsidiary exemption. Similarly, in the context of a partnership for tax purposes, this approach would take into account wholly-owned subsidiaries that are otherwise disregarded for income tax purposes. These wholly-owned entities may be formed to operate different lines of business or own different pools of assets to create a well-tailored corporate risk profile, but are not responsible for separate federal income tax filings.

Any other reading of the statute might change the nature of this exemption to encompass more passive investment activities, which would be inappropriate based on the exemption's clear focus on active business operations. Further, other exemptions are already designed to address entities conducting passive investment activities. See 31 U.S.C. 5336(a)(11)(B)(xviii).

Also important is the clarification in the proposed preamble that an entity must exclude gross receipts or sales from sources outside the United States when calculating whether it meets the $5 million minimum in gross receipts or sales. Without that restriction, an entity might rely entirely on non-U.S. income that would be difficult or impossible for U.S. law enforcement to verify or use to analyze the entity's substantive U.S. operations and identify its beneficial owners.

The proposed rule's thoughtful implementation of the exemption's statutory requirements is consistent with the intent of the law to create narrow exemptions, in this case for large operating companies that are located on U.S. soil, employ U.S. workers, produce U.S.-based revenues, and file U.S. taxes. Nonetheless, this exemption merits ongoing review consistent with the nature of money-laundering, tax evasion, and other risks associated with this relatively novel exemption.

8. **Subsidiary Exemption (Question 26)**

As currently drafted, the proposed rule's treatment of the exemption for subsidiaries of certain exempt entities faithfully implements the CTA, with a problematic exception that may be the result of an inadvertent mixup.

The CTA states that the subsidiary exemption applies to any entity "of which the ownership interests are owned or controlled, directly or indirectly," by one or more of 18 specified exempt entities. 31 U.S.C. 5336(a)(11)(B)(xxii). The proposed implementing rule is nearly as brief as the CTA but differs slightly in its wording. It states that the exemption applies only to an entity "of which the ownership interests of such entity are controlled or wholly owned, directly or indirectly, by one or more" of the same 18 exempt entities listed in the statute. Section 1010.380(c)(2)(xxii). The proposed rule makes one key clarification regarding the statute and one change that is not supported by the statute: the proposed rule correctly clarifies that the subsidiary exemption only applies when the subsidiary is "wholly"owned, but then confusingly puts "controlled" before "owned" (the reverse of the statute).

The first clarification resolves an apparent ambiguity in the statute: whether a subsidiary must be wholly owned by one or more of the specified exempt entities in order to be exempt from the registry or whether a subsidiary can still qualify for the exemption if the specified exempt entities together hold only a majority or even a minority stake in the entity. FinCEN's conclusion that a subsidiary must be wholly owned is consistent with the plain language of the statute and offers the best way to achieve the aims of the CTA. In contrast, by placing the word "controlled" before rather than after the word "owned," the proposed rule seems to suggest that the word "wholly" does not apply to both verbs. It is important for the final rule to correct the wording and to clarify that an entity must also be "wholly" controlled for the subsidiary exemption to apply, consistent with both the law and the proposed preamble.

The preamble to the proposed rule correctly explains why requiring a subsidiary to be wholly owned is the best interpretation of the statutory language. FinCEN explains that it "interprets the definite article 'the' in the quoted statutory text as requiring an entity to be owned entirely by one or more specified exempt entities in order to qualify for it." Page 69940. That proposed statutory interpretation is sound. Congress could have removed the word "the" from the statute or used a phrase like "most of the," but lawmakers chose instead wording indicating that 100 percent of "the ownership interests" of an entity must be owned or controlled by one or more of the 18 specified exempt entities in order for that entity to qualify for the exemption.

The requirement that a subsidiary be "wholly" owned or "wholly" controlled is also supported by the CTA's legislative history. Senator Brown, a chief architect of the law, explained in his floor statement just before the CTA's approval by the Senate that the subsidiary exemption was "intended to be interpreted as narrowly as possible," and that the exemption was "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."[92] As Senator Brown explained, the CTA showed that when Congress wanted to make a provision reliant on partial ownership or control of an entity, it knew exactly what to do – spotlighting the term, "beneficial owner," which the CTA states includes individuals who "own or control" not more than "25 percent" of an entity's ownership interests. That 25 percent figure is precisely spelled out in the statute. No comparable numerical percentage appears in 31 U.S.C. 5336(a)(11)(B)(xxii) or, indeed, in any exemption. The statute could have specified a numerical threshold to trigger the subsidiary exemption, but did not. Again, the statute and the legislative history support the proposed rule's conclusion that the exemption applies only to subsidiaries that are wholly owned, making FinCEN's interpretation the best approach to implementing the CTA.

The remaining problem, however, is why the proposed rule applies the term "wholly" to the word "owned" but not to the word "controlled." A related question is why the proposed rule places the word "controlled" before "owned" instead of conforming with the statutory phrasing of "owned or controlled." One possible explanation is that the wording is the result of a mixup. That the proposed rule meant to use the phrase "wholly owned or controlled," so that the modifier "wholly" would apply to both "owned" and "controlled."

The reason to suspect a mixup is because the exact same analysis used in the preamble to justify requiring 100 percent ownership would also justify requiring 100 percent control. In the statute, the same "the" that the proposed rule found to be authoritative when interpreting the word "owned" also applies to the word "controlled." The preamble expresses no reason for treating the words "controlled" and "owned" differently, and does not recommend doing so. The preamble's straightforward analysis applies equally to both words. For that reason, it is possible that the current wording of the proposed rule is not the product of a policy decision, but simply an inadvertent insertion of the word "wholly" in the wrong spot or a misplacement of the word "controlled."

Alternatively, if the proposed wording is deliberate and were left as is, it would undermine and render superfluous the decision to restrict the exemption to subsidiaries that are wholly owned. As currently drafted, the word "wholly" appears in front of the word "owned" but does not modify the word "controlled," allowing the exemption to be interpreted as applying to any subsidiary that is controlled to any degree by one or more of the 18 specified exempt entities. As the CTA clearly demonstrates, the concept of entity "control" is nuanced, and a beneficial owner may exert meaningful "control" over an entity through a variety of means and positions. For example, even if a specified exempt entity controlled only one percent of the votes of a subsidiary, that subsidiary could argue that it qualifies for the subsidiary exemption based on the broad view of "control" that the CTA recognizes. However, that approach would potentially allow the persons controlling the other 99 percent to conceal their identity.

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[92] 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 negative implications of this loophole are many. For example, as discussed above, if FinCEN were to incorrectly determine that "control" in the context of the subsidiary exemption could signify majority control, super-majority control, or any level other than complete control, novel entities such as series limited liability companies could be designed to exploit that determination by assigning control of a single asset to a single individual holding a minority series of member interests. The less-than-complete-control loophole could enable tens of thousands — perhaps hundreds of thousands — of additional entities to conceal the names of their beneficial owners, the exact opposite of the goal of the CTA. That result is not intended by the law nor is it discussed or supported by the preamble to the proposed rule.

To resolve the problematic wording, the final rule should insert the word "wholly" in front of "controlled." Alternatively, the final rule could change the wording to more closely resemble the statute so that it would read: "of which the ownership interests of such entity are wholly owned or wholly controlled, directly or indirectly, by one or more" of the 18 exempt entities. With either correction, the proposed exemption would reflect the reasoning now contained in the preamble and provide the best interpretation of the law.

9. **Inactive Entity Exemption (Question 26)**

The proposed rule's treatment of the exemption for inactive entities is the last of the seven exemptions discussed in this comment letter. The proposed exemption faithfully implements the CTA, while providing needed clarifications. Section 1010.380(c)(2)(xxiii).

The CTA states that the exemption applies only to an entity which (1) has been "[i]n existence for over 1 year;'' (2) "is not engaged in active business"; (3) "is not owned, directly or indirectly, by a foreign person"; (4) "has not, in the preceding 12-month period, experienced a change in ownership or sent or received" more than $1,000; and (5) "does not otherwise hold" assets of "any kind or type." 31 U.S.C. 5336(a)(11)(B)(xxiii).

The proposed rule repeats much of the statutory language, but also provides several key clarifications. First, it states that the exemption is available only to an entity which "was in existence on or before January 1, 2020." That bright line rule makes clear that the exemption can be claimed only by entities that pre-date by at least a year the CTA's enactment date of January 1, 2021. The preamble to the proposed rule supports this approach by noting the exemption's explicit statement that it applies only to entities "[i]n existence for over 1 year" and a second statutory provision that refers to these exempt entities as "Grandfathered Entities." 31 U.S.C. 5336(b)(2)(E). The preamble also takes note of the CTA's legislative history, including the statement by Senator Brown, one of the law's chief architects, that the exemption was "intended to function solely as a grandfathering provision that exempts from disclosure only those dormant companies in existence prior to the bill's enactment" and "[n]o company created after the date of enactment of the bill is intended to qualify for exemption as a dormant company."[93] The proposed rule is the best interpretation of the CTA based on the reasoning set

[93] 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.

forth on page 69940 that the exemption functions "as a grandfather provision applicable only to entities in existence for over one year at the time the CTA was enacted."

The proposed approach is consistent with the reasons given for establishing this unusual exemption which, like several others, does not appear to exist in any other beneficial ownership registry around the world and is unprecedented within the United States. The exemption was created in response to concerns expressed by some members of the U.S. real estate industry that, over the years, 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 and then allowed those companies to go dormant upon the properties' sale or transfer. Those real estate interests claimed those dormant companies were too difficult to locate either to register under the CTA or to 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. Today, "aged shelf corporations" are offered online for thousands of dollars and provide an obvious way for fraudsters to create an illusion of an established business when attempting to open a bank account, transfer funds, or make investments.[94] The proposed rule recognizes this problem when it states on page 69940, that the 2020 cutoff date "limits opportunities for bad actors to exploit the exemption by forming exempt shelf companies for later use."

In addition to clarifying that the exemption is available only to companies that pre-date the CTA by at least a year, the proposed rule clarifies that the exemption is available only to an entity that is "not owned by a foreign person, whether directly or indirectly, wholly or partially." This clarification 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 proposed rule carries out congressional intent by stating plainly that if a dormant company is owned to any extent – directly or indirectly, wholly or partially by a foreign individual or entity – it falls outside the scope of the exemption.

The proposed rule also clarifies the exemption's next two criteria related to ownership changes and funding transfers. It makes clear that the exemption is not available to any entity which, in the preceding 12-month period, experienced "any" change in ownership or sent or received more than $1,000 either directly or through a financial account.

It is respectfully suggested that the final rule consider further strengthening this clarifying language in two ways. First, Sections 1010.380(c)(2)(xxiii)(D) and (E) could be strengthened by identifying the date against which the 12-month period should be measured. For example, (D) could state that the entity has not experienced "any change in ownership in the 12-month period

[94] See, e.g., "Aged Shelf Corporations," for sale by Wyoming Corporate Services Inc. ("These are clean aged shelf companies. They have never been used and as such have no credit or assets."), https://wyomingcompany.com/aged-corporation/ (viewed Dec. 28, 2021).

preceding the date of the exemption." That change in wording would help make clear the date from which the 12-month period should be counted.

Second, the preamble to the final rule could explain that the phrase "any change in ownership" is intended to have a broad reach to prevent wrongdoers from trying to apply the exemption to a recently purchased "aged shelf" entity. The preamble could explain, for example, that the phrase is intended to cover any alteration of a nominal or beneficial owner of an entity, any addition or subtraction of an owner, and any change in the percentage or nature of ownership interests held by a specific person, including due to a purchase or transfer of a pre-existing entity. That explanation would help guard against an unidentified person taking ownership of a long dormant U.S. company and using its bank account to transfer illicit funds, while claiming to be legally exempt from the registry's disclosure requirements.

In addition, the proposed rule provides an important clarification in section 1010.380(c)(2)(xxiii)(F) by stating that an entity seeking to claim the exemption may not hold any kind or type of assets, "whether in the United States or abroad." While the expansive statutory language already implies that broad coverage, the implementing regulation offers the best approach by making it explicit.

Finally, the preamble may want to note explicitly in the final rule that the existence of five different, detailed limits on this exemption is proof of congressional intent that it be given a very narrow reach.

10. **New Exemptions (Question 30)**

On page 69941, the preamble to the proposed rule indicates that FinCEN has decided against creating any new exemptions to the registry's disclosure obligations at this time, but would "continue to consider whether any additional exemptions would be appropriate." This decision is consistent with the statute. After hearing from myriad stakeholders, interests, and experts and engaging in lengthy bipartisan negotiations, Congress settled on the 23 exemptions in the CTA. That lengthy list of exemptions has not yet been put into effect, supporting the proposed rule's decision to complete the registry implementation process, gain experience with the existing 23 exemptions, and await the results of required reviews before embarking upon any effort to create new exemptions.

The CTA currently provides two procedures for reviewing the existing 23 exemptions, indicating discomfort with some of them and a desire to gather more information about how they will work once the registry is in effect. Section 6502(c) of the Anti-Money Laundering Act tasks GAO, after the registry is operative, 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." The new 31 U.S.C. 5336(i) simultaneously tasks Treasury with conducting a "Continuous Review of Exempt Entities" to determine whether any should be revoked. The proposed rule sensibly decides to postpone creating any new exemptions before gaining a greater understanding of the risks posed by the existing ones.

Other jurisdictions have used reviews of their exemptions to identify, evaluate, and reduce risks of illicit activity engaged in by some exempt entities. For example, when the United Kingdom first established its registry, Scottish limited partnerships (SLPs) were exempt from the registry's disclosure requirements, despite their association with illicit activity, most notably in connection with the Russian Laundromat scandal. After the SLP incorporation rate almost doubled as the registry took effect, the U.K. government initiated a review of the exemption and, in 2017, revoked it and required SLPs to register their beneficial owners.[95] Within months, the SLP incorporation rate dropped by 80%, reaching its lowest level in seven years.[96] This real world example of the consequences of an ill-considered exemption supports FinCEN's decision to postpone creating any new exemptions before gaining a greater understanding of the risks posed by the existing ones.

Also on page 69941, the proposed rule solicits comment on "how, when considering a new exemption, the agency should make the statutorily required determinations that collecting beneficial ownership information for a potentially exempt entity or class of entities 'would not serve the public interest' and also 'would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.'"

One clear path forward, in line with the Administrative Procedure Act, would be to provide public notice of any proposal to establish a new exemption and offer an opportunity for public comment before making a final decision. The CTA already requires the Treasury Secretary to obtain the written concurrence of the U.S. Attorney General and the Secretary of Homeland Security for any new exemption. Depending upon the nature of the proposed exemption, a wide variety of other parties may also wish to provide comments including Congress, the state Attorneys General, the Department of Defense, the intelligence community, the IRS, other federal and state law enforcement and regulatory agencies, allied countries, GAO, the federal Inspectors General, the Council of the Inspectors General on Integrity and Efficiency, and civil society stakeholders.

Using the public notice and comment procedure offers a well-understood and court-approved process for granting new CTA exemptions. Rather than leave this issue unresolved, the final rule would benefit from a clear statement that FinCEN will use the APA-approved notice and comment method to establish any new exemption.

11. **Exemption Certificates**

On page 69941, the preamble to the proposed rule discusses whether FinCEN should require exempt entities "to file a report in order to claim an exemption," even though the proposed rule itself does not do so. The preamble notes that such reports "may make FinCEN's BOI database significantly more useful by making it clear which entities did not file BOI because they intentionally claimed exemptions and which simply failed to satisfy the reporting

[95] Open Ownership, "Early impacts of public registers of beneficial ownership: United Kingdom." Page 9, April 2021. https://www.openownership.org/uploads/oo-impact-story-united-kingdom-2021-04.pdf.
[96] Id.

obligation." Id. But the preamble also notes that opponents claim filing such reports would be "highly burdensome" and deny a statutory basis exists for requiring them. FinCEN solicits comment on whether "FinCEN should permit exempt entities to voluntarily file exemption certifications." Id.

Detecting misuse of the 23 exemptions is likely to be among the most difficult of the implementation tasks associated with the registry. The proposed rule estimates that 30 million entities will be subject to the registry's filing requirements of which over 4.4 million will qualify for exemptions. FinCEN clearly doesn't have the personnel or resources needed to detect and confront the potentially large number of entities that may be abusing the exemption authority, and the States and Tribes currently have little incentive or resources to assist that effort.

The law does require both GAO and Treasury to assess the exemption categories, evaluate compliance with the law, and determine whether any of the exemptions should be revoked. Both Treasury and GAO will have to find a way to carry out those statutorily-mandated obligations. At a minimum, both will need to compare the entities that filed with the registry against the entities formed in the States and Tribes, use that data to identify the non-filers, and determine whether those non-filers qualified for exemption. In light of the millions of entities involved in that exercise, manual reviews of the data are impractical. Instead, GAO and Treasury will need to get automated data reports from the registry as well as from the States and Tribes, create computer matching programs, and then analyze the results.

With respect to the filing burden imposed on any specific entity, the CTA already requires every entity operating in the United States to determine whether and on what basis it is exempt from the registry. Once an entity has made that determination, it is difficult to imagine that it would experience any significant additional burden from reporting as much on a standardized form filed with the registry. In addition, the minimal burden imposed by filing an exemption certificate early on may be more than offset over the long term by enabling FinCEN, other law enforcement agencies, regulators, and auditors to quickly confirm the validity of the filed exemption certificates, more accurately target their investigations and audits, and avoid imposing any additional compliance costs on the entities that filed exemption certificates.

It is in light of the practical demands associated with investigating and evaluating misuse of the CTA's 23 exemptions that FinCEN should make the decision on whether to require entities to file exemption certificates on either a voluntary or mandatory basis. If wrongdoers know or suspect that neither FinCEN nor its auditors can identify non-filers, they may feel free to ignore the filing requirements or improperly claim exempt status. To prevent wholesale disregard of the law and strengthen the hand of U.S. law enforcement, even voluntary exemption certificates filed with the registry would help reduce the analytical burden on GAO and Treasury and aid in the identification of wrongdoers.

For that reason, FinCEN should not only allow exempt entities voluntarily to file exemption certificates with the registry, but encourage them to do so to avoid being swept up in a GAO or Treasury audit. Avoiding audits requiring substantiation of an entity's exempt status may provide an effective incentive for exempt entities to file exemption certificates with the registry. At the same time, any entity that files a false exemption certificate would open itself up to prosecution under the CTA or 18 U.S.C. 1001 which prohibits making "any materially false, fictitious, or fraudulent statement or representation" to the executive branch.

Encouraging or mandating exemption certificates would help carry out the CTA's directives to the Treasury Secretary to create a registry with accurate, complete, and highly useful information.[97] It would assist FinCEN and its auditors to identify entities that are unlawfully claiming exempt status, and make it possible to take action against those entities to compel them to disclose their true owners. Additional beneficial ownership disclosures would render the registry more complete and more accurate and, therefore, more useful to national security and intelligence analysts, law enforcement agencies, regulators, financial institutions, and other registry users.

Finally, whether exemption certificates are, in the end, filed on a voluntary or mandatory basis with the registry, FinCEN should consider providing a separate warning to financial institutions against taking any action to facilitate customer abuse of the CTA exemptions. As further discussed below,[98] the next proposed rule is expected to clarify which financial institutions may access the registry due to their customer due diligence obligations under the Bank Secrecy Act. Perhaps the preamble to that proposed rule, the preamble to this final rule, or separate revised customer due diligence (CDD) guidance to U.S. financial institutions could be used to clarify that, as part of their CDD duties, financial institutions should ask every customer that is an entity, as part of its KYC process, to indicate in writing whether the entity is exempt from the registry and, if so, the specific exemption that applies and why. The warning could make clear that, if a customer claims an exemption that, on its face, seems inapplicable, the financial institution must conduct a reasonable, risk-related due diligence review to avoid facilitating client misconduct. In addition, the warning could clarify that if a customer refuses to disclose whether it is claiming a registry exemption or provide key details, the financial institution should consider declining to do business with that entity and perhaps even file a suspicious activity report.

In sum, the importance and significant difficulties associated with overseeing implementation of the CTA's exemption provisions justify FinCEN's requiring entities to file exemption certificates with the registry on either a voluntary or mandatory basis.

12. **Exemption Principles (Question 26)**

Finally, it is respectfully suggested that FinCEN consider strengthening the final rule by articulating in the preamble three basic principles underlying the law's disclosure exemptions. Those principles could then be used by federal, State, and Tribal agencies as well as the courts to interpret and apply the exemptions. The three principles, each of which has been expressed by Sen. Brown or others who helped author the CTA, are that the exemptions are intended to cover: (1) highly regulated entities that already disclose their beneficial owners to the government; (2) entities whose U.S. employees, U.S. physical presence, U.S.-based revenues, and U.S. tax filings already provide the level of information necessary for U.S. law enforcement to identify their

[97] See supra note 17.
[98] See infra at Access Issues.

beneficial owners without requiring them to file with the registry; and (3) entities that pose a negligible risk of facilitating money laundering, terrorist financing, sanctions evasion, tax evasion, or other wrongdoing. FinCEN should consider expressing those principles in the final rule's preamble to guide both implementation and evaluation of the existing 23 exemptions as well as future deliberations over requests for new exemptions.

These principles would provide useful guidance, for example, to Treasury and GAO personnel conducting the evaluations of existing exemptions mandated by law.[99] If a Treasury or GAO review found that one or more of the existing exemptions was not justified under any of the three principles and also imposed significant risks to the U.S. financial system, Treasury could take steps to reconsider those exemptions consistent with the CTA's requirements.

V. __Timing of Reports__ (Questions 33 (i and ii), 34, 35, 36, 37 & 38)

The proposed rule's provisions that specify the time frames whereby reporting companies, exempt entities (as applicable) and other actors covered under the CTA must report timely beneficial ownership information are the best approach to ensure the beneficial ownership information collected by FinCEN under this regulation is likely to be more accurate, complete, and highly useful to law enforcement - fulfilling the statutory directives of the CTA.[100]

The FACT Coalition's initial comments and recommendations on Treasury's ANPRM laid out principles we believe would help Treasury identify reasonable timeframes for reporting beneficial ownership information. In particular, we emphasized the need for reporting requirements to be triggered by specific events (e.g., the establishment of a new legal entity; a change in a reporting company's beneficial owner(s), etc.) rather than determined by an arbitrary reporting timeline. Additionally, we encouraged Treasury to establish reporting requirements that would require beneficial ownership information to be reported as soon as reasonably possible after the triggering event, to ensure the information being collected by FinCEN is accurate and timely and to guard against potential scenarios where bad actors might orchestrate the establishment and exchange of legal entities in a manner intended to 'game' longer timelines and evade reporting requirements.

A. New Entities —14 day reporting period for new domestic entities and foreign reporting companies

FACT supports Treasury's rationale that a 14 day period to disclose beneficial ownership information is a sufficient window of time, given that most entities at the time of formation would have ready access to the necessary information (for the purposes of forming the entity in general). We also note that data we share throughout this comment from the Small Business Administration suggests that a majority of entities covered by this rule likely have no more than

[99] See Anti-Money Laundering Act, § 6502(c); 31 U.S.C. 5336(i). See also supra note 95 and accompanying text discussing the importance of exemption reviews.
[100] See supra note 17.

1-2 owners. Reporting companies will have ready access to the required information about those owners, relieving any burden created by this timeframe.

We also support the Treasury's rationale that a 14-day period will incentivize reporting companies and company applicants to make filing beneficial ownership disclosures to FinCEN a natural part of the formation or registration process, furthering the CTA's objective to “set a clear, Federal standard for incorporation practices.” Page 69941. Longer timing deadlines may result in stale information that will mitigate the usefulness of this information, and cause confusion if there are changes in ownership that occur shortly following the formation of new reporting companies. In contrast, making updated beneficial ownership information an integral and timely part of any formation process will create a more reliable database that can also be better used to understand the typical ways that reporting companies are formed and transition beneficial ownership, which can improve processes around form standardization and exemption auditing, among other best practices. Therefore, the timely period that FinCEN has chosen is the best approach to implementing the CTA.

B. Existing Entities —1 year reporting period for existing entities formed before effective date of rule

We believe this timeline is generous and should give existing entities ample time to clarify their ownership structures and collect the information needed to comply with the proposed rule. For example, while there are some variances in the annual reporting requirements for companies formed in jurisdictions covered by this proposed rule, most legal entities are generally required to submit annual reports to those jurisdictions to remain active and in good standing. And, many if not most of those entities also have annual tax reporting obligations. In both circumstances, companies must compile and/or review core information about the company’s performance, management, government and ownership, and also must often take steps to reporting changes in the aforementioned categories (say, a change in revenues or business structures that has tax implications) on at least an annual cycle. Thus, we believe it is reasonable to expect existing entities, in the course of preparing their annual filings, to also secure and confirm the information needed to comply with the new proposed rule during a similar time frame.

We also note that the passage of the CTA occurred at the end of 2020, and issuance of this proposed rule occurred at the end of 2021. Finalization of this rule is likely to occur in 2022, and while FinCEN has not yet determined when the effective date of the proposed rule will be, an effective date one year after enactment of the rule in 2022 could mean that covered existing entities will potentially have had three and half years after passage of the CTA to prepare for this new regulatory requirement. Therefore, we would respectfully recommend against granting a time period longer than a year after the effective date for existing entities to comply. The current approach taken by FinCEN is a well reasoned interpretation of the CTA.

C. Previous Exempt Entities - 30 days after change in status

In the preamble of the proposed rule, FinCEN has stated it believes that “30 days from the date an exemption ceases to apply is a reasonable time for once-exempt entities to file an initial report with FinCEN. Specifically, FinCEN believes that keeping the database updated and accurate is essential to ensuring it is highly useful and that 30 days provides sufficient time for entities that previously evaluated their eligibility for an exemption from the reporting requirements and claimed such an exemption to collect and file the required BOI with FinCEN." Page 69942.

We agree that the proposed 30 day time frame for previously exempt entities to file an initial beneficial ownership report from the effective date of the entity's change in status is a sound interpretation of the CTA to help ensure the information secured in the database is up to date, accurate, and highly useful to law enforcement.

To wit, investigations by journalists and law enforcement have identified instances where the status of entities have been altered or changed multiple times in a short period of time as a means of obscuring the origin of funds held or moved by these entities and their purpose as well. For any final rule to best implement the CTA, it is important that the reporting of these types of entity changes be done in a timely and comprehensive manner (as is also covered below with respect to BOI changes).

In addition, earlier in the preamble of the proposed rule, where FinCEN seeks to clarify the definition of 'dormant' companies that qualify as exempt for the reporting requirements, FinCEN cites the legislative history of the CTA in the preamble of the proposed rule as a rationale for clarifying that the exemption was intended to be "applicable only to entities in existence for over one year at the time the CTA was enacted. This interpretation also limits opportunities for bad actors to exploit the exemption by forming exempt shelf companies for later use." Page 69940. Applying this logic, we argue that a change in status for a dormant company, or any other entity deemed exempt from the reporting requirements in the proposed rule, constitutes in the context of this rule a 'significant' change in the reporting company's ownership status, which given the established pattern of such changes being used to facilitate illicit activities, requires a timely reporting deadline in return.

D. Reporting Corrections - 14 day window for corrections

FinCEN's rule, under proposed section 1010.380(a)(3) "would require reporting companies to file a report to correct inaccurately filed information within 14 calendar days after the date on which the reporting company becomes aware or has reason to know that any required information contained in any report that the reporting company filed with FinCEN was inaccurate when filed and remains inaccurate." Page 69942. FinCEN goes on to give the rationale for this period, saying that it is "intended to be consistent with the 14-calendar-day timeframe for a newly formed or registered reporting company to file an initial report with FinCEN" and that "quickly correcting errors is essential for fulfilling Congress's instruction that BOI reported to the agency be 'accurate, complete, and highly useful.'" Page 69942.

We agree that FinCEN's timely period for issuing corrections to reports is the best approach to implementing the CTA and agree with the stated rationale, including FinCEN's assertion that they believe this deadline will present a 'low burden' for reporting companies. Page 69942. The 14-day period is triggered when a reporting company, beneficial owner or applicant 'becomes aware of or has reason to know' that information filed is inaccurate. This suggests that such parties will have already taken steps to confirm whether the information is inaccurate, leaving them with the final remaining step of filing a corrected report. This means it is reasonable to assume that, with corrected information in hand, a reporting company, applicant or beneficial owner can reasonably complete and submit a corrected report within that time frame.

An overly permissive time frame for reporting corrections could degrade the quality of the information collected by the registry in opposition to the purpose of the CTA. For example, law enforcement in the course of an investigation involving a reporting company and/or one of its beneficial owners could be pursuing threads associated with data points provided by an initial report. As such, while in pursuit of an arrest or indictment within a limited frame, investigators could be brought up short if during this period a corrected report is filed months after the initial report, generating confusion for investigators and undermining the credibility/accuracy of evidence needed for clarity in criminal justice or judicial proceedings.

We also recommend FinCEN provide clarity on the following passage in the proposed rule, which states that "Proposed 31 CFR 1010.380(a)(3) also notes that a corrected report filed under this paragraph within this 14-day period shall be deemed to satisfy 31U.S.C.5336(h)(3)(C)(i)(I)(bb) if filed within 90 calendar days after the date on which an inaccurate report is filed." (Page 69942). We understand that this passage is meant to create an initial safe-harbor for inaccurate filings, such that a correction filed within 90 days of any inaccurate filing will be deemed to satisfy the 14-day requirement; but that any filing made after 90 days will be subject to the literal 14-day rule. In other words, an inaccurate filing discovered immediately after a filing would not have to be updated until 90 days following such filing. An inaccurate filing discovered on the 76th day following such filing would have the same deadline. As otherwise indicated, we believe that what is most important is that the final rule requires timely correction, is easily understandable, and is not subject to manipulation (or other problematic practices that may undermine the accuracy, completeness or usefulness of the registry). Clarification around this point may be merited to satisfy these three requirements.

E. Reporting Changes in BOI - 30 day window

We support FinCEN's proposed timeline for reporting companies, beneficial owners and applicants to report changes in previously submitted BOI that occurred after submission within a 30-day window of time. Specifically the proposed rule would, " would require reporting companies to file an updated report within 30 calendar days after the date on which there is any change with respect to *any* information previously submitted to FinCEN, including any change with respect to who is a beneficial owner of a reporting company, as well as *any* change with respect to information reported for any particular beneficial owner or applicant. This proposed rule would also apply to a reporting company that subsequently becomes eligible for an exemption from the reporting requirement after the filing of its initial report (emphasis added)." Pages 69942-69943.

These proposed requirements ensure that all changes in BOI are reported in a timely fashion, and apply to all parties - reporting companies, beneficial owners and applicants - and all reported information - names, addresses, etc. - which, as FinCEN notes in the preamble to its proposed rule, is the best approach to fulfilling the intent of the authorizing statute,[101] and ensuring the information being reported remains highly useful to law enforcement and relevant authorities. We also support applying the 30-day deadline for reporting companies to report changes that make them eligible for an exemption from the reporting requirements, on the grounds that this represents a significant change in status for a company or owner that warrants timely action to ensure BOI collected remains accurate and to guard against gaming of the reporting requirements by illicit actors.

In particular, we agree with and support FinCEN's justification for a 30 day window based on concerns the agency and commenters have had regarding the abuse of shelf companies - entities created by company applicants that are 'put on the shelf' to age until they are sold as a attractive vehicles for business and financial activity due to their perceived 'age'. In our previous comments to FinCEN for the ANPRM for this rule, we flagged examples of law enforcement[102] and academic experts' ongoing concerns[103] with the use of shelf companies to facilitate illicit financial activity. We also note that the existence of the unprecedented reporting exemption given in this proposed rule to so-called dormant companies (discussed earlier in this document, as well as earlier in this section), which in theory serve a different function, but are difficult to distinguish from shelf companies created for illicit or unethical activity, demands strategies to compensate for the the possibility that use of dormant companies could undermine the intent of the CTA and the usefulness of this registry. In our view a 30-day deadline to report changes - in conjunction with a timely deadline to report changes in an entity's exempt status - serve as a meaningful and important backstop to ensure the usefulness and quality of the data being collected in the face of this complexity.

The proposed rule also provides clarity, in response to a comment filed during the ANPRM period, on what the reporting obligations and process would be if a reporting company experienced more than one change in BOI within a 30 day time frame. Namely, the reporting company would be obligated to report the first change within 30 days of the enactment of that change, and report the second change within 30 days of the second change.

We support this approach, in that it would stagger reporting obligation to avoid confusion for filers, and produce a record that tracks changes to an entity's BOI over time, which would enhance the accuracy and usefulness of the BOI data for law enforcement, and guard against intentional changes in ownership that might otherwise 'game' reporting requirements. As with our previous comment, we also respectfully recommend that to minimize burdens on filers,

[101] 31 U.S.C. 5336(b)(1)(D).
[102] See for example - 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-shaskybusiness-formation-financial-crime.pdf
[103] See for example, 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

FinCEN should consider designing a form that enables filers to update specific information without having to re-file an entire report or other filing.

Additionally, a standardized form could be adopted that allows reporting companies to consolidate into a single filing multiple ownership changes; however, any such filing must still be completely accurate and detailed enough to describe the exact date and nature of any ownership change reported during the period of time covered by such report. In any event, it is essential that changes of ownership change become synonymous with potential reporting obligations under the CTA, as–much like with initial reporting–this will result in parties engaging in such changes internalizing the reporting obligations under the CTA in a way that will minimize burdens associated with such filings and ensure the most accurate, complete and useful ownership registry. Accordingly, the appropriately timely filing requirement set forth in the proposed rule for BOI changes is the best approach to properly implementing the CTA.

VI. __Reporting Violations__ (Question 39)

The proposed rule faithfully implements 31 U.S.C. 5336(h)(1) of the CTA levying penalties for inaccurate reporting, while clarifying several issues in useful ways. Section 1010.380(g). The proposed rule states, in conformance with the law, that civil and criminal penalties apply only to persons engaged in willful conduct. The proposed wording makes clear, as the CTA intended, that the law's penalties do not apply to inadvertent mistakes. The wording also makes clear that the penalties apply equally to the submission of false, fraudulent, or incomplete beneficial ownership information, again as intended by the law.

In addition, the proposed rule clarifies several issues in reasonable ways and provides fair notice of the broad scope of the law to punish wrongdoing. Proposed section 1010.380(g)(2) clarifies that the penalties apply to any "person," including "any individual, reporting company, or other entity." That clear statement is important to ensure that everyone understands their obligation to provide accurate and complete beneficial ownership information and that anyone engaged in wrongdoing in connection with filing is subject to the law's civil and criminal penalties. Proposed section 1010.380(g)(3) clarifies that the term "beneficial ownership information" includes "any information provided to FinCEN under this section." Again, this clear statement ensures that everyone understands their obligation – without exception – to provide accurate and complete information to FinCEN, and is necessary as each piece of information reported under the CTA is material to creating an accurate, complete and highly useful database.

Proposed section 1010.380(g)(4) clarifies that the penalties for wrongful conduct apply to persons who provide or attempt to provide beneficial ownership information to FinCEN "directly or indirectly, including by providing such information to another person for purposes of a report or application under this section." This statement is important to provide fair notice that the prohibition on wrongdoing and accompanying penalties apply not only to persons who deal directly with FinCEN but also to persons who direct others to submit false, fraudulent, or incomplete beneficial ownership information to FinCEN. Without this clarification, key persons responsible for wrongdoing might try to escape accountability for their actions.

Proposed section 1010.380(g)(5) performs a similar function when it clarifies that a willful failure to report complete or updated beneficial ownership information to FinCEN includes any person who "directs or controls another person with respect to any such failure to report, or is in substantial control of a reporting company when it fails to report complete or updated beneficial ownership information to FinCEN." Again, this provision holds accountable any person who directs another to mislead or misinform FinCEN, providing fair notice of the law's authority to penalize such misconduct. This rule appropriately addresses the responsibility of the various parties that must be involved to ensure that the database is, in fact, accurate, complete, and highly useful.

One additional clarification may be worth making. In conformance with the law, the rule repeatedly applies the civil and criminal penalties to false, fraudulent, or incomplete information provided "to FinCEN." The final rule may want to clarify that the penalties specified in the CTA are not exclusive but in addition to other federal penalties, such as 18 U.S.C. 1001, which penalizes making false, fictitious, or fraudulent statements to anyone in the federal executive branch, or 18 U.S.C. 1956, which makes a criminal offense the conspiracy to commit money laundering offenses. That clarification, while not essential, would provide notice that other penalties could apply to persons who supply false, fraudulent, or incomplete beneficial ownership information to Treasury officials, FBI agents, financial regulators, or other federal personnel aside from FinCEN employees.

A. **Company Terminations**

On page 69944, the preamble to the proposed rule solicits comment on one other possible response to reporting violations: the termination of entities that willfully refuse to file beneficial ownership information with FinCEN despite a requirement to do so. The preamble also requests comment on the statutory basis for this legal action.

Today, many States authorize their secretary of state or a similar official to revoke the authority of an entity to operate within the State if the entity submits false information to the State.[104] Section 5336(d)(2) of the CTA requires State and Tribal 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." Citing that statutory obligation, the final rule could direct State and Tribal agencies to include a checkbox item on appropriate existing forms asking whether an entity has filed required reports with the registry. If the entity indicates "yes," and FinCEN later informs the State or Tribe that the response is false, the final rule could authorize FinCEN to request immediate revocation of the entity's authority to operate in the United States and require the State or Tribe, upon receipt of such a

[104] See, e.g., Wyoming Stat § 17-16-1420 ("Grounds for administrative dissolution. (a) The secretary of state may commence a proceeding under W.S. 17-16-1421 to administratively dissolve a corporation if any of the following has occurred: … It is in the public interest and the corporation … [h]as provided fraudulent information or has failed to correct false information upon request of the secretary of state on any filing under this act with the secretary of state; or … [a]n incorporator, director, officer or agent of the corporation signed a document he knew was false in any material respect with intent that the document be delivered to the secretary of state for filing.") See also WY Stat § 17-16-1530 (providing similar grounds for revoking the certificate of authority of a foreign corporation to transact business in Wyoming).

request from FinCEN, to revoke the entity's status within 30 days, unless the entity establishes that its response was or has become accurate.

This type of administrative measure would not only be commensurate with the actions of a willfully noncompliant entity, it would provide the United States with an important tool to exclude entities with hidden owners from conducting activities within U.S. borders. In addition, it is possible that this administrative measure could be taken more quickly, effectively, and economically against an entity operating in the United States than imposing civil fines or prosecuting individuals who may be abroad. Requesting State or Tribal action against an entity is also the type of administrative action that is well within FinCEN's scope of authority. In addition, this type of administrative measure might help incentivize compliance with the CTA.

Still another consideration is the CTA's repeated directives to the Treasury Secretary to create a registry with accurate, complete, and highly useful information.[105] If entities believe they can willfully ignore the registry's filing requirements and FinCEN has no effective response, many may take that course of action, leaving the registry with information that is incomplete, outdated, and of limited use. Enabling FinCEN to use existing state procedures to request prompt termination of an entity that willfully defies the registry's filing requirements would spur compliance, prohibit non-filers from continuing to operate within U.S. borders, and help reduce the incidence of incomplete and outdated registry information. The measure would also rest upon a solid statutory foundation, since 31 U.S.C. 5336(d)(2) mandates State and Tribal cooperation with FinCEN to maintain an accurate, complete, and highly useful database.

For those reasons, the final rule should authorize this administrative measure and clarify that FinCEN, the States, and the Tribes may take this action in tandem with or instead of any civil or criminal penalty under Section 1010.380(g) for failure to report and maintain complete and accurate beneficial ownership information to FinCEN.

VII. Definitions

The proposed rule offers several additional definitions of key terms. Section 1010.380(f). The proposed definitions repeat key statutory language, provide logical clarifications, or utilize existing definitions in other laws enabling FinCEN to tap into those legal interpretations and implement the CTA in a way that is consistent across the federal government. This comment letter highlights the importance of one proposed definition in particular while recommending deletion of another.

A. U.S. Operating Presence (Question 28)

This proposed definition plays a key role in establishing eligibility for statutory exemptions given to State-licensed insurance producers and large operating companies. Sections 1010.380(c)(2)(xiii) and (xxi). Both exemptions require a qualifying entity to maintain an operating presence at a U.S. physical office. The proposed definition clarifies that requirement by stating that an entity "regularly conducts its business at a physical location in the United

[105] See supra note 17.

States that the entity owns or leases, that is not the place of residence of any individual, and that is physically distinct from the place of business of any other unaffiliated entity." This proposed clarification is essential to preventing entities from claiming they meet the U.S. physical office requirement if they provide online information to U.S. residents, employ U.S. workers who work from home, pay for a U.S. post office box, or use an address belonging to a third party such as an attorney, corporate service provider, or homeowner. The proposed definition makes clear that the relevant exemptions are available only to a business that owns or leases a real, physical office on U.S. soil where its employees work and that can be visited in person by U.S. law enforcement.

B. Senior Officer

This proposed definition states that "senior officer" means "any individual holding the position or exercising the authority of a president, secretary, treasurer, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function." The term "senior officer" does not appear in the CTA, but is used by the proposed rule in a proposed definition of "substantial control." Section 1010.380(d)(1)(i). As explained earlier, this comment letter respectfully recommends reconsidering this approach due to potential confusion, over-inclusivity, and possible conflict with the rule's proposed definition of "employee."[106]

VIII. __Effective Date__ (Question 40)

We respectfully recommend that FinCEN consider implementing January 1, 2023 as the effective date for final regulations, and in no event implement an effective date that is later than one year following the promulgation of the final rule. The proposed rule does not offer a specific effective date once enacted, but instead states:

> "The CTA authorizes FinCEN to determine the effective date of the BOI reporting rule. FinCEN does not propose an effective date in this proposed regulation, but seeks views on the timing of the effective date and any potential factors to be considered. FinCEN is committed to identifying the soonest possible effective date after publication of the final rule."

Page 69945. FinCEN goes on to say that, "[the agency] recognizes that the collection of beneficial ownership information is critical to protecting U.S. national security and other interests and will advance efforts to counter money laundering, terrorist financing, and other illicit activity" and that "[a] timely effective date will help to achieve national security and law enforcement objectives and support Congress' goals in enacting the CTA." Page 69945.

The preamble of the proposed rule then goes on to list factors influencing how the effective date should be determined, including the finalization of others aspects of this rule; the design and construction of the BOSS system; the period of time reporting companies may need

[106] See 26 C.F.R. 31.3401(c)-1(a) which states that the term "employee" includes "every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee" and "includes officers and employees."

to prepare for compliance; the time needed for jurisdictions to understand the new regulatory regime, update their systems and forms; and the time need to educate and notify reporting companies under their jurisdiction of their obligation to comply with the new reporting measures. Additionally, the preamble of the proposed rule notes that revision of the CDD rule (in order to align it with this proposed rule's provision) is itself triggered by the enactment of this proposed rule.

We agree that a timely effective date for the rule is critical to achieving Congress' goals in enacting the CTA, and that a longer than is reasonable timeline for an effective date might interfere with the communicated intent in the statute. The CTA is clear that timeliness is important; otherwise, it would not have required the promulgation of final rules implementing the CTA within one year following its enactment. While implementing the CTA is a herculean task and FinCEN should be commended for these proposed rules, unnecessary delays in the effective date could run afoul of this intent and the effectiveness of any final rule. For example, bad actors will no doubt attempt to restructure, move, or divest from the entities under their control that would be subject to disclosure.

Additionally, the CTA as enacted obligates the Treasury and GAO to conduct studies evaluating the effectiveness and scope of the CTA, and as mentioned above, conduct a rulemaking to revise the current CDD rule. These studies and revisions will have a significant bearing on the implementation and effectiveness of the beneficial ownership disclosure regime. An effective date longer than a year after the final rule is promulgated may generate knock-on delays for these evaluations, delaying the collection of valuable data that could contribute to the usefulness of the registry and the information collected by it for its users.

Lastly, we believe it is important to remember how the timeframe for this effective date aligns with the broader time frame that was ultimately required for enactment of the CTA. International financial regulators began recommending the collection of entities' beneficial ownership data as a fundamental tool to combat money laundering and illicit finance as early as 1988.[107] The first formal global recommendations on determining and disclosing entities' ultimate beneficial owners were issued by The Financial Action Task Force in 2003.[108] More recently, FATF's mutual evaluation of the United States' adherence to international anti-money laundering standards in 2006 flagged lack of beneficial ownership disclosure as a concern, and did so again a decade later with more urgency in its 2016 mutual evaluation of the U.S. anti-money laundering regime.[109] Meanwhile, the first U.S. Congressional legislation proposed to enact beneficial ownership requirements for entities formed in or operating in the U.S. was introduced in 2008, by former Senators Carl Levin (D-Mich.) Norm Coleman (R-Minn.) and

[107] Lexis Nexis. "The Hidden World of Beneficial Ownership." 2017. The document references a first mention of UBO by financial institutions on page 5, as follows: "The link between ultimate beneficial ownership (UBO) and financial crime was first flagged in 1988 by the Bank for International Settlements."

[108] Best Practices on Beneficial Ownership. Financial Action Task Force. October 2003: https://www.fatf-gafi.org/publications/methodsandtrends/documents/best-practices-beneficial-ownership-legal-persons.html.

[109] FATF. "United States' measures to combat money laundering and terrorist financing." Mutual Evaluation Report. December 2016: https://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html

then Senator Barack Obama (D - Ill.),[110] which was followed by many additional legislative proposals.

In the interim, numerous media reports, civil society analysis, Congressional hearings and investigations have all identified the lack of beneficial ownership disclosure in the United States as a critical gap in our ability to combat illicit finance and protect our national security interests. In short, since first understood as a policy priority for U.S. policymakers, it has taken over two decades to establish these beneficial ownership requirements. Meanwhile, international standards have been dynamic: in the EU beneficial ownership registries are public, consider more opaque entities like trusts, and are interconnected. From that perspective, enacting this rule in a timely manner is a priority to ensure the information collected by enactment of this rule is highly useful and that the U.S. retains its leadership position with respect to international anti-money laundering efforts. In that regard, it is important that the U.S. take this opportunity to avoid being labeled as non-compliant with FATF yet again, or only partially compliant with best practices as determined by the OECD Global Forum on Transparency and Exchange of Information, rather than falling further behind international standards in entity transparency.

To its credit, the Treasury Department and FinCEN have generally met the timelines established in the CTA for proposing and finalizing this rule. We respectfully suggest they continue along this path and identify an effective date that is ambitious but achievable. We therefore respectfully suggest that the effective date be January 1st, 2023, or no longer than a year after the promulgation of the final rule which, when combined with the period prior to enactment, should give reporting companies, applicants, regulatory agencies and company formation jurisdictions a reasonable period of time to prepare.

We do acknowledge that naming an effective date that is too early could hinder reporting companies' and their owners' ability to comply with the rule, as well as rush implementation of the BOSS system. But, we believe our proposed timeline, combined with time spent in preparation between finalization and enactment of this rule, will be sufficient time for covered entities, regulators and other affected parties to take the steps necessary in preparation for the rule to become effective. FinCEN's own analysis has suggested that the majority of legal entities covered under the proposed rule have simple ownership structures.

Similarly, we respectfully suggest that if it has not already done so, FinCEN use the parameters and mandate articulated in the statutory language of the CTA as well the comments and consensus already gleaned from the previous iterations of this rulemaking to begin laying some of the technical foundations for the BOSS system now, rather than wait for completion of the entire rulemaking process.

With regards to the timeframe needed to design and build the BOSS system, we note below in our response to questions regarding the regulatory cost analysis that there are a number of reasons relating to best practices, enhanced data quality and interoperability, and potential

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[110] U.S. Senate Permanent Subcommittee on Investigations. "Levin-Coleman-Obama Bill Introduced to Stop Misuse of U.S. Companies." May 1, 2008: https://www.hsgac.senate.gov/subcommittees/investigations/media/levin-coleman-obama-bill-introduced-to-stop-misuse-of-us-companies.

cost-savings, that we believe it would be advisable that FinCEN look to existing beneficial ownership databases and the Beneficial Ownership Data Standard (BODS), developed by OpenOwnership and approved by the UK Government's Open Standards Board, as foundations for the BOSS system. In this instance, we believe using BODS as the data standard template for the BOSS system could also save valuable time and better ensure FinCEN can create and deploy an effective system in a timely manner.

Lastly, related to both suggestions above, we also respectfully recommend that FinCEN and Treasury seek adequate funding from Congress to ensure they have the staffing, time, expertise and resources to design, construct and launch the BOSS system, as well as effectively engage with covered entities and State and Tribal agencies.

IX. Regulatory Analysis

Overall, the proposed rule provides a careful, thorough, and reasonable analysis of a variety of regulatory issues and the costs and benefits associated with the rule.

A. Administrative Procedure Act Consideration

Based on the proposed rule, FinCEN appears well positioned to promulgate a final rule that is consistent with its rulemaking authority under the CTA. We respectfully recommend that FinCEN make clear in its final rulemaking instances when the rulemaking is required pursuant to the plain meaning of the CTA, and where FinCEN is exercising discretion in promulgating the final rule due to an ambiguity in the statute. See, e.g., Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996). Where FinCEN is exercising its discretionary rulemaking authority, we respectfully recommend that FinCEN make clear why the final rule implements the best approach to resolving any statutory ambiguity. We have attempted to identify throughout our comment whether a portion of the rulemaking might be considered discretionary or non-discretionary, and in cases where the rulemaking might be considered discretionary, what the best approach is given the statute's clear purpose.

B. Alternatives (Questions 5 & 6)

On page 69950, the proposed rule suggests one major alternative to its preferred approach to implementing the CTA: requiring reporting companies "to submit BOI to FinCEN indirectly, by submitting the information to their jurisdictional authority who would then transmit it to FinCEN." This alternative considers an approach similar to that presented in several bills which sought to increase beneficial ownership transparency by requiring the 50 States, instead of the federal government, to obtain beneficial ownership information for the entities formed within their borders.[111]

This legislative alternative was rejected by Congress, apparently due to the costs imposed upon the States, the disadvantages inherent in enhancing 50 state databases compared to creating a single new database at the federal level, and the strong opposition expressed by some States, which is consistent with the ways in which certain states apparently compete, in part, through

[111] See, e.g., the True Incorporation Transparency for Law Enforcement Act (TITLE Act), S. 1889 (2019).

secrecy. The proposed rule's estimates, which project a cost of between $3 million and $33 million per State for each to develop its own beneficial ownership database, provide an upper-bound expense of proceeding on the state level. Assigning the overall cost to the federal government instead is not only more economical, but also more justifiable since the Constitution assigns responsibility for overseeing interstate and foreign commerce to the federal government. Still another consideration is the existence of international principles which favor a centralized beneficial ownership registry over a more decentralized system.[112] Centralized registries are favored, because they allow law enforcement and others to access beneficial ownership information "through one central location in a standardi[z]ed format" at reduced cost.[113]

The proposed rule takes the best approach in implementing the registry as it faithfully implements the law–including its stated purpose of creating a clear, federal standard for incorporation practices. CTA section 6402(5)(a). It also provides a less expensive, more practical, and more effective approach to beneficial ownership transparency. For those reasons, the proposed rule correctly rejects the alternative.

C. Burden Estimates (Questions 8, 9, 11 & 19)

While the cost benefit analysis contains important information that supports its estimates of the reporting burden imposed by the CTA, it could be improved in two ways.

1. Additional SBA and Census Data

First, the cost benefit analysis should consider including in the final rule certain data from the Small Business Administration (SBA) and the Census Bureau Business Register that would further support its conclusions about the minimal cost of the proposed rule for most businesses operating in the United States.

In 2020, the SBA published data indicating that 99.9 percent of U.S. businesses are small businesses, defined by SBA as businesses with fewer than 500 employees, and 81 percent of those small businesses have no employees.[114] The SBA data does not indicate whether the small businesses without employees are primarily corporations and LLCs, both of which may qualify as reporting companies, or are sole proprietorships that may not have reporting obligations as discussed earlier in this letter, so additional analysis is warranted in relying on this small business data. If a large percentage are single-owner corporations or single-member LLCs, this

[112] See, e.g., "Principles for Effective Beneficial Ownership Disclosure," Open Ownership (July 2021)(Principle 4: "BO disclosures should be collated and held within a central register."), https://www.openownership.org/uploads/oo-guidance-open-ownership-principles-2021-07.pdf; "Revisions to Recommendation 24 and the Interpretive Note – Public Consultation," Financial Action Task Force (FATF), Interpretive Note (4)("All companies created in a country should be registered in a company registry."), https://www.fatf-gafi.org/publications/fatfrecommendations/documents/public-consultation-r24.html.
[113] "Principles for Effective Beneficial Ownership Disclosure," Open Ownership (July 2021)(Principle 4), https://www.openownership.org/uploads/oo-guidance-open-ownership-principles-2021-07.pdf.
[114] SBA Office of Advocacy, "Frequently Asked Questions," October 2020, https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf.

SBA data would help confirm that, for most U.S. businesses, identifying beneficial owners will impose a near zero cost, since only one individual would qualify.[115]

A similar analysis applies to U.S. businesses owned and controlled by a married couple, a situation so commonplace it has produced the "mom and pop" cliche. SBA has not issued specific data on small businesses owned by married couples, but the Census Bureau Business Register apparently contains at least some confidential information on U.S. businesses jointly owned or operated by spouses. FinCEN should consult with the Census Bureau to see if its Business Register has data to help estimate the percentage of U.S. businesses owned by spouses. Due to the married couple's ownership status and clear authority over business operations, those mom-and-pop businesses can easily identify their beneficial owners, again, at virtually no cost.

Together, the SBA and Census Bureau Business Register data could further support the analysis that the CTA will impose a minimal reporting burden on the vast majority of U.S. businesses.

2. Per Business Cost Estimate

Second, the cost benefit analysis should evaluate its per-business estimate of $45 in compliance costs in light of relevant U.K. data. After establishing its registry, the U.K. government initiated a study of the compliance costs actually incurred by covered businesses. The U.K. study, based on information self-reported by companies, found that after a larger first year expense, the annual compliance cost for businesses with less than 50 employees dropped to the equivalent of about $3.[116] Given the prevalence of single-owner and mom-and-pop businesses in the United States – whose costs to identify their beneficial owners will be close to zero even in the first year – the final rule should review its per-business cost estimate to ensure it correctly reflects the law's likely minimal maintenance cost after the first year.

D. Government Cost Estimates (Questions 4, 11 & 22)

The proposed rule also contains a lengthy analysis of the costs to the U.S. government to create and maintain the beneficial ownership registry. It is respectfully suggested that the proposed cost estimates be strengthened in three respects, all of which relate to the design and operation of the registry software, named by FinCEN as the Beneficial Ownership Secure System (BOSS).

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[115] If most of the small businesses are single-owner corporations or single-member LLCs, the data would be consistent with a 2019 U.K. study which, after reviewing the U.K. registry, found: "The most common number of [beneficial owners] reported was one (43%), followed by two (37%). Only 13% of businesses had three or more." U.K. Department for Business, Energy & Industrial Strategy, "People of Significant Control (PSC) Register: review of implementation," March 2019, https://www.gov.uk/government/publications/people-of-significant-control-psc-register-reviewof-implementation.

[116] U.K. Department for Business, Energy & Industrial Strategy, "People of Significant Control (PSC) Register: review of implementation," March 2019, (as indicated in the prior footnote, about 80% of the U.K. businesses had only one or two beneficial owners which helps account for the extremely low cost), https://www.gov.uk/government/publications/people-of-significant-control-psc-register-reviewof-implementation.

First, the proposed rule estimates on page 69948 that BOSS will cost $33 million to develop and $31 million per year to maintain, without providing any explanation or underlying information about what those cost estimates encompass. Importantly, the proposed rule makes no mention of whether FinCEN plans to make use of the Beneficial Ownership Data Standard (BODS),[117] a well-developed, cost-free open data standard designed by OpenOwnership specifically for beneficial ownership registries.[118] BODS is already being used to publish or structure data in dozens of countries and could potentially save millions of taxpayer dollars in U.S. database development costs. At a minimum, the proposed cost analysis should make clear to what extent FinCEN plans to take advantage of BODS as an established guide for collecting and structuring beneficial ownership data when developing BOSS. Creating its own standard and schemas for this data would add greater complexity and cost to FinCEN's development of BOSS, development costs which could be saved by building on BODs rather than financing the development from scratch of a new and potentially more expensive system.

Second, the proposed rule does not describe any of the expected features of BOSS or the extent to which the estimated software costs already include any of the associated expenses. Important features include whether BOSS will collect, store and provide BOI data that is structured and machine-readable, will enable registry users easily to search the data on both a per record and bulk basis using a variety of variables; will use interoperable data structures enabling registry users easily to compare and integrate U.S. data with beneficial ownership data from other registries around the world; can incorporate automated verification procedures before a particular filing is accepted to ensure the information is accurate, complete, and highly useful;[119] will include a discrepancy function enabling registry users to identify potentially inaccurate information and suggest corrections; will incorporate an automated notification function alerting registry users when a change or update is made to designated forms; will include automated and manual risk scoring functions to assign high-risk ratings to certain forms or persons; will track and record each change made over time to a registry filing to indicate the specific change made, who made it, and when; and will track and record each time the registry is accessed to indicate what records were viewed, who accessed them, and when. Presumably, FinCEN has already considered the macro features it plans to include in BOSS when calculating its development and maintenance costs, and can easily disclose them in the final rule. In addition, FinCEN should ensure the registry features it has selected are in line with best practices to maximize the registry's utility for its users and relay that information in the final rule's cost benefit analysis.

Third, the proposed cost estimates fail to identify or discuss any of the costs associated with the many mandatory registry audits required by law. The CTA imposes years-long audit obligations on Treasury, the Treasury Inspector General (IG), and the Government

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[117] OpenOwnership, "Beneficial Ownership Data Standard (v0.2)," http://standard.openownership.org/en/0.2.0/.
[118] OpenOwnership is a London-based nonprofit funded by the U.K. government, World Bank, BHP Foundation, and others. See https://www.openownership.org/ and https://www.openownership.org/funders/.
[119] The verification procedures should, at a minimum, prevent filings with blank fields or incorrectly formatted information; ensure the accuracy of identification numbers; bar addresses that are improperly formatted or fabricated; and, prevent the listing of any individual or entity who appears on a U.S. sanctions list. If a problem arises in a particular filing, the registry should be designed to send a pop-up message to the filer indicating an error and requesting correction; if no correction is made, the registry should decline to accept the filing and ask the filer to reapply.

Accountability Office (GAO) to evaluate registry operations, examine exempt entities, assess state incorporation practices, and determine whether additional entities should disclose their beneficial owners.[120] In his floor statement before House adoption of the CTA, House Financial Services Ranking Republican Patrick McHenry stressed the importance of the CTA's mandatory audits to ensure that "beneficial ownership information is being collected, stored and used as intended by Congress."[121]

The cost benefit analysis estimates that 25.7 million entities will be subject to the registry's disclosure obligations, about 4.4 million entities will be exempt, and each year after that, over 3.8 million new entities will be formed in the United States of which about 550,000 will be exempt.[122] Given those massive numbers, the only way effective audits can take place is if the registry produces automated reports with relevant registry data that can be provided to Treasury and GAO auditors to perform their duties. In addition, the auditors will need to work directly with FinCEN as well as State and Tribal agencies to ensure the auditors are using reliable data and effective audit procedures. Those auditing activities will require funding.

To understand the importance of planning for automated data reports and auditing activities and why the associated expense needs to be an explicit part of the overall cost benefit analysis, consider one example of the statutorily-mandated audit work. Treasury is required by 31 U.S.C. 5336(i) to conduct a continuous review of exempt entities to spot exemptions that risk criminal activity and determine whether any exemptions should be revoked; further, GAO is required by section 6502(c) of the Anti-Money Laundering Act to evaluate a wide range of

[120] 31 U.S.C. 5336(b)(6) requires Treasury to conduct an annual review, for three years after the registry becomes effective, on the effectiveness of the registry's procedures and standards related to minimizing reporting burdens and strengthening the accuracy of filed reports. 31 U.S.C. 5336(c)(10) requires GAO to conduct an annual audit, for seven years after the registry becomes effective, on agency adherence to the protocols established to control access to the registry and the extent to which Treasury "is using beneficial ownership information appropriately." 31 U.S.C. 5336(h)(4) requires the Treasury IG to establish a system to receive comments or complaints from third parties "regarding the beneficial ownership information notification and collection process or regarding the accuracy, completeness, or timeliness of such information." No time limit applies to that obligation. 31 U.S.C. 5336(i) requires Treasury to conduct a "[c]ontinuous [r]eview" of entities that are exempt from the registry's disclosure requirements and determine if any "entity or class of entities … has been involved in significant abuse relating to money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or any other financial crime." CTA § 6502(a) requires GAO to conduct a study, two years after the registry has been in operation, "assessing the effectiveness of incorporation practices implemented" in response to the CTA and whether those practices have provided useful information to U.S. "national security, intelligence, and law enforcement agencies" and helped them combat "incorporation abuses" and "civil and criminal misconduct" and a range of financial crimes. CTA § 6502(b) requires Treasury to conduct a study to evaluate the "effectiveness of using FinCEN identifiers'" and whether future registry disclosures should be limited to "company shareholders." CTA § 6502(c) requires GAO, no later than two years after the registry's effective date, to review "the regulated status, related reporting requirements, quantity, and structure of each class of corporations, limited liability companies, and similar entities that have been explicitly excluded from the definition of reporting company" and assess the related "risks of money laundering, the financing of terrorism, proliferation finance, serious tax fraud, and other financial crime." CTA § 6502(d) requires GAO to conduct a study, no later than two years after the registry's effective date, to examine State law on "partnerships, trusts, or other legal entities," the lack of available beneficial ownership information, and what steps should be taken in response.
[121] Rep. Patrick McHenry, "National Defense Authorization Act," Congressional Record 166: 208 (December 8, 2020), p. H6932.
[122] See page 69961.

factors related to exempt entities. That work will require both Treasury and GAO, at a minimum, to compare the number of entities formed in particular States against the number of entities from those States that actually submitted registry filings so that they can identify non-filers, determine if the non-filers were exempt, and whether or not those non-filers were engaged in suspect activities. Performing that type of analysis will require the registry to provide automated data reports to the Treasury and GAO auditors, possibly using monthly or quarterly reports to ensure a manageable workload. Making sense of the reported data will surely require the Treasury and GAO auditors to work directly with FinCEN, the 50 States, and covered Indian Tribes. Yet the proposed rule is currently silent as to the costs associated with those auditing activities.

A second example involves FinCEN identifiers. As indicated earlier, to enforce the legal requirement that only one FinCEN identifier be assigned to each individual or entity, FinCEN will need to identify and track each person with a FinCEN identifier in order to detect whether any single person has more than one FinCEN identifier or multiple persons are sharing the same FinCEN identifier.

FinCEN estimates that "the number of individuals that would apply for a FinCEN identifier may be relatively low … approximately 1 percent of the reporting company estimates above." As a result, FinCEN calculates that "258,737 individuals would apply for a FinCEN identifier during Year 1 and 32,266 individuals would apply for a FinCEN identifier annually moving forward." FinCEN also states in the proposed rule that applications for FinCEN identifiers would be filed "primarily by those beneficial owners with complex corporate structures." Page 69965. While 250,000 initial FinCEN identifier applicants may seem modest compared to 25 million initial reporting companies, it is still a large dataset. Additionally, the total is artificially low, because it does not take into account the many entities that may also apply for a FinCEN identifier. Still another factor is that, because the FinCEN identifier applicants are likely to be individuals or entities using complex entity ownership structures, the data itself may be complex and the number of entities that utilize FinCEN identifiers may be significantly more than the individuals that seek FinCEN identifiers. The large numbers and complex data make it impractical to expect registry auditors to manually track or analyze the FinCEN identifier data.

The same analysis applies to mandatory audits to track and analyze registry access and uncover any instances of unauthorized access to the registry.

Mandatory audits, multiple auditors, large datasets, automated audit data reports, continuous audit analysis, and necessary consultations with federal, State, and Tribal agencies all contribute to the auditing costs. Effective auditing is critical to ensuring the registry is accurate, complete, highly useful, and secure. Rather than ignore this essential function, the final rule should acknowledge registry auditing costs as a necessary and substantial expense, separately estimate the total amount required, and include the expenditure as an explicit line item in the overall cost benefit analysis.

X. ***Next Proposed Rule on Access***

FinCEN has indicated that it plans to issue a second proposed rule to implement the CTA focused primarily on the CTA's access provisions. That proposed rule will be as important as the current proposed rule, since it will determine how the groups specified in the CTA will be able to review and use registry data. The CTA's statutory language establishing access to the registry differs significantly from, and provides much broader access than, the rules that apply to FinCEN's other databases, including the databases containing Currency Transaction Reports (CTRs) and Suspicious Activity Reports (SARs). As a result, the proposed rule will break new ground for FinCEN, which is charged with carrying out the CTA's broader directives.

A. Authorized Registry Users

The CTA identifies at least eight separate categories of persons authorized to access registry data:

(1) National security and intelligence agencies;
(2) Treasury agencies, including the IRS;
(3) Federal law enforcement agencies;
(4) State, Tribal, and local law enforcement agencies;
(5) Financial regulators;
(6) Financial institutions;
(7) Foreign counterparts to the U.S. categories; and
(8) Registry auditors.

Each category poses issues that require clarification in the upcoming proposed rule in order to establish the best approach to providing access to registry data. In doing so, it is important for the proposed rule to take into account the CTA's primary purpose which is to enable the United States to identify the human beings using 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 persons to gain access to registry information for use in national security and intelligence matters, criminal and civil law enforcement matters, financial regulation, and financial institution compliance with customer due diligence obligations. The CTA also imposes multiple mandatory audit obligations on the Treasury Department, Treasury Inspector General (IG), and Government Accountability Office (GAO), none of which will be able to carry out their auditing duties without access to registry data.

One key issue is defining the federal, State, Tribal, and local "law enforcement" agencies that may access registry data. Several CTA provisions give express 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.[123] 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.[124] Since none

[123] 31 U.S.C. 5336(c)(5)(B).
[124] 31 U.S.C. 5336(c)(5)(A).

of those agencies handle criminal prosecutions, they demonstrate the CTA's intended broad reach to apply to civil, tax, and administrative agencies. When defining covered law enforcement agencies, the best approach for the rule would be to state that the CTA provides access to "a wide cross-section of federal, state, tribal, and local agency personnel engaged in national security, intelligence, civil, criminal, tax, and administrative activities to enforce U.S. law" — language which would incorporate the flexibility and broad scope intended by the CTA.

Similar issues involve defining "national security" and "intelligence" agencies, covered financial regulators, and covered "financial institutions" eligible to access the registry data. Equally important will be determining which of their non-U.S. counterparts may access registry data taking into consideration statutory, comity, and reciprocity concerns as well as the need for international cooperation to combat money laundering, terrorist financing, tax evasion, sanctions busting, trafficking, and other misconduct.

B. Access Procedures

In addition to identifying who may access registry data, the proposed rule will need to establish reasonable access procedures. Each category of registry user is subject to a different set of statutory requirements to access registry data, but all could use a reasonably similar registry access procedure requiring them to complete a standardized set of questions to gain entry to the database. Designing those questions should maximize use of standardized checkboxes and datafields to help auditors track and evaluate compliance with the law's access restrictions.

Among the procedural access issues that must be addressed in the next proposed rule are issues related to defining courts of competent jurisdiction, accepting court authorizations of registry inquiries, accepting required certifications or attestations, accepting delegated agency approvals of data requests, defining the allowable scope of individual data requests, clarifying the procedures for U.S. agencies to request data on behalf of non-U.S. actors, and ensuring compliance with data security protocols. The proposed rule should explain, for example, that the CTA grants access to covered agencies engaged in specific law enforcement "activities" rather than requiring a formal "investigation" or "case" with an official designation or case number. It should also explain that a single authorization by an appropriate agency official can apply to a class of related inquiries into the same matter rather than require repeated related authorizations that would waste time and resources and frustrate the purpose of the CTA to create a highly useful database.

In addressing all of those procedural issues, the proposed rule should seek to facilitate rather than restrict the ability of a wide variety of registry users to advance national security, intelligence, law enforcement, financial regulatory, and due diligence objectives.

C. Treasury and IRS Personnel

Also useful would be if the next proposed rule clarifies the broad authority of Treasury and IRS personnel to access registry information. Because 31 U.S.C. 5336(c)(5) singles out Treasury and the IRS in a separate provision and authorizes them to access beneficial ownership information in the registry without referencing the access limitations imposed on other categories of registry users, the proposed rule should acknowledge their special status under the law and state explicitly that Treasury and IRS personnel have immediate, direct, and full access to the database to carry out their national security, intelligence, civil and criminal law enforcement, tax administration, financial regulation, and other duties.

D. Financial Institutions

Another key access issue that the next proposed rule must address is the authority of covered financial institutions to access registry data. 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 client-related information. In addition, the CTA requires FinCEN to establish a registry that is "highly useful" to financial institutions among other registry users.[125]

Accordingly, the proposed rule should state plainly that, after a financial institution with customer due diligence obligations (i) signs an agreement with the Treasury Secretary, (ii) establishes formal registry protocols and procedures, (iii) clears them with FinCEN, (iv) sets up an automated system to track every instance in which the financial institution accesses the registry, (v) sets up systems for annual audits to confirm compliance with the registry protocols and procedures, and (vi) trains and obtains certifications for its personnel to access and search the registry, the financial institution will have immediate, direct, and full access to the beneficial ownership database to examine information authorized by their clients. Requiring instead that financial institutions submit their data requests to FinCEN would be impractical, likely immediately overwhelm FinCEN's resources, and render the registry essentially unusable in the financial community. The rule should ensure that financial institutions with customer consent gain the direct, ready access that Congress and the CTA have authorized.

E. Auditor Access

Still another key issue requiring clarification in the next proposed rule is the authority of Treasury, the Treasury IG, and GAO to access registry data and receive automated audit reports containing registry data in order to carry out the audits mandated by the CTA. Because the law requires a variety of audits to test its effectiveness, including with respect to the accuracy, completeness, and usefulness of registry information; actual use of registry data; the riskiness with respect to, and any abuse of, the statutory exemptions; and agency adherence to the data access protocols, the CTA provides adequate authority for audit personnel to obtain and analyze relevant registry data.[126]

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[125] 31 U.S.C. 5336(b)(1)(F)(iv).

[126] The law's mandatory audits include the following. 31 U.S.C. 5336(b)(6) requires Treasury to conduct an annual review, for three years after the registry becomes effective, on the effectiveness of the registry's procedures and standards related to minimizing reporting burdens and strengthening the accuracy of filed reports. 31 U.S.C. 5336(c)(10) requires GAO to conduct an annual audit, for seven years after the registry becomes effective, on agency adherence to the protocols established to control access to the registry and the extent to which Treasury "is using beneficial ownership information appropriately." 31 U.S.C. 5336(h)(4) requires the Treasury IG to establish a system to receive comments or complaints from third parties "regarding the beneficial ownership information notification and collection process or regarding the accuracy, completeness, or timeliness of such information." No time limit applies to that obligation. 31 U.S.C. 5336(i) requires Treasury to conduct a "[c]ontinuous [r]eview" of

In the case of GAO, for example, it would be virtually impossible for GAO auditors to analyze agency adherence to data access protocols, as required by 31 U.S.C. 5336(c)(10), without examining actual registry data showing how specific agencies have accessed and used specific data. GAO auditors would also be unable to conduct a detailed analysis of the CTA's exemptions, as required by CTA section 6502(c), if it were barred from examining what percentage of a particular State's new entities actually filed with the registry, what percentage failed to file, what entities filed exemption certificates with the registry, and any efforts by FinCEN, States, or others to deny exemptions and compel covered entities to file with the registry. As FinCEN recognized in its development of this proposed rule, the courts support interpretations of the law that avoid absurd results.[127] Denying registry auditors access to registry data would, in fact, be absurd.

F. Registry Data Generally

The upcoming proposed rule should make clear the scope of registry information that will generally be made available to registry users. The best approach would be for the proposed rule to state explicitly that registry users are generally intended to have prompt, direct, and full access to all registry information and be able to search the data in a variety of ways. The proposed rule should state, for example, that all registry users, including financial institutions with client consent, will be able to see a reporting company's past and present beneficial owners and applicants, as well as the reporting company's own past and present identifying information, so that registry users can use that information to evaluate the money laundering and terrorist financing risks posed by the reporting company.

The proposed rule should also state that registry users, including financial institutions with client consent, will be able to search the database by beneficial owner name and FinCEN identifier in order to see every entity with which a particular individual is associated, again to help evaluate the riskiness of a specific reporting company. In addition, the proposed rule should state explicitly that registry users, including financial institutions with client consent, will be able

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entities that are exempt from the registry's disclosure requirements and determine if any "entity or class of entities … has been involved in significant abuse relating to money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or any other financial crime." CTA § 6502(a) requires GAO to conduct a study, two years after the registry has been in operation, "assessing the effectiveness of incorporation practices implemented" in response to the CTA and whether those practices have provided useful information to U.S. "national security, intelligence, and law enforcement agencies" and helped them combat "incorporation abuses" and "civil and criminal misconduct" and a range of financial crimes. CTA § 6502(b) requires Treasury to conduct a study to evaluate the "effectiveness of using FinCEN identifiers" and whether future registry disclosures should be limited to "company shareholders." CTA § 6502(c) requires GAO, no later than two years after the registry's effective date, to review "the regulated status, related reporting requirements, quantity, and structure of each class of corporations, limited liability companies, and similar entities that have been explicitly excluded from the definition of reporting company" and assess the related "risks of money laundering, the financing of terrorism, proliferation finance, serious tax fraud, and other financial crime." CTA § 6502(d) requires GAO to conduct a study, no later than two years after the registry's effective date, to examine State law on "partnerships, trusts, or other legal entities," any lack of available beneficial ownership information, and what steps should be taken in response.

[127] See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); Public Citizen v. Young, 831 F.2d 1108, 1112 (D.C. Cir. 1987) ("a court must look beyond the words to the purpose of the act where its literal terms lead to absurd or futile results" (cleaned up)).

to search the database by multiple variables, in isolation and combination, including by beneficial owner, applicant, entity, address, and FinCEN identifier. Particularly important, as detailed in our earlier comments regarding FinCEN identifiers, is that the proposed rule state explicitly that all registry users, including financial institutions with client consent, will have prompt and full access to information identifying the person assigned to each FinCEN identifier.

G. Changed and Updated Data

A related issue that should be addressed in the upcoming proposed rule is whether and how registry users will receive notice if changes are made, including updates, to beneficial ownership or reporting company information they have previously accessed. The proposed rule should clarify, for example, whether and how registry users can opt-into or opt-out-of receiving such notifications and under what terms, including whether they will be able to designate notifications for specific entities or classes of entities using a risk-based approach, and whether registry users may discontinue notifications when the information becomes burdensome, involves a former case or client, or is no longer relevant. The proposed rule could also clarify details related to the notification format, means of delivery, automatic expiration dates, and automated tracking of notifications sent and received. Building a robust notification system would increase the usefulness of the registry, as required by law, for national security and intelligence analysts, law enforcement agencies, financial regulators, financial institutions, and other registry users.

H. Incorrect or Incomplete Data

Still another important access issue is the extent to which the registry will enable registry users who access information that appears to be inaccurate or incomplete to flag that information for possible correction. For years, E.U. beneficial ownership registries have required registry users, if they detect potentially inaccurate data, to file an electronic data "discrepancy" report with the registry.[128] 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.

The U.S. registry would benefit from a similar mandatory system requiring registry users spotting inaccurate or incomplete data to click on a button and use an automatically generated "discrepancy report" to identify the potential error, regardless of 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

[128] 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.

discrepancy report should take only minutes to complete and file, and the filer should be given absolute protection against any liability for its submission.

Once a discrepancy report is filed, the registry should generate an automatic notice to the person who filed the information or some other contact identified by the reporting company that a question has been raised about a possible error (without identifying who detected the problem) and request a correction or explanation within a specified period of days. Pending resolution of the problem, the registry could place a cautionary "yellow flag" on the affected filing as well as any other filing containing the same information so that registry users know a data discrepancy exists. The registry could also bar any new filing by the same person until the matter is resolved, providing an incentive for quick resolution. If the problem is not cured within the specified period of time, the registry could replace the "yellow flag" with a "red flag," and automatically send notice of the problem to a FinCEN employee for further action. This type of automated procedure would help resolve minor errors quickly while alerting FinCEN to potentially more serious concerns.

This system also complements the current reporting regime, which appropriately imposes time-based obligations for corrective filings. Using the "knows or or has reason to know" standard for filing corrected information in response to discrepancy reports offers a promising approach. Generating automatic notices of flagged discrepancies would also produce a more transparent process benefiting registry users, reporting companies, and beneficial owners.

I. Treasury IG Complaint System

Finally, the upcoming proposed rule should clarify whether and the extent to which the Treasury IG may access registry data to carry out its statutory obligation to establish and maintain a "complaint process" for registry users, including processing complaints about inaccurate, misleading, or incomplete registry data.[129] At a minimum, the proposed rule should clarify that Treasury IG personnel may access the registry under 31 U.S.C. 5336(c)(5) in connection with the IG's registry complaint process, including to confirm the presence of information mentioned in a complaint and help spur correction of potentially inaccurate or incomplete data. If the registry were to adopt the automated procedure described above to resolve errors identified in discrepancy reports, it could use the same procedure to resolve data problems reported by the Treasury IG.

Reasonable rules governing access to reporting company and beneficial ownership information filed with the registry will determine the effectiveness of the CTA in curbing money laundering, terrorist financing, tax evasion, and other misconduct within U.S. borders. We look forward to the next proposed rule to advance the CTA's effectiveness.

[129] 31 U.S.C. 5336(h)(4).

XI. SAM Profiles

One final issue that the proposed rule does not address, but is critical to effective implementation of the CTA, involves coordinating CTA beneficial ownership registry requirements with the rules applicable to the System for Award Management database.

The proposed rule concentrates, as it should, on issues related to the beneficial ownership registry. But the CTA also requires the same beneficial ownership information 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 registry and SAM, the proposed rule should at least acknowledge the registry's relationship to SAM.

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, DUNS number, TIN, contact information, and certain affirmative representations required by law.[130]

For the first time, the CTA requires certain SAM profiles to include beneficial ownership information. The key provision, section 6403(c) of the CTA, states the following:

> "(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."

[130] System for Award Management (SAM), "Quick Start Guide for Contract Registrations," https://www.sam.gov/SAM/transcript/Quick_Guide_for_Contract_Registrations.pdf.

Senator Brown, one of the CTA's chief architects, made these comments about the SAM provision 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."[131]

Section 6403(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 FinCEN registry coterminous with coverage under section 6403(c) requiring prospective contractor disclosures in SAM, 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.

Section 6403(c) requires the Administrator for Federal Procurement Policy to lead implementation of the SAM provision, presumably with help from the Federal Acquisition Regulation (FAR) Council.[132] The deadline for completing the FAR revisions needed to mandate inclusion of beneficial ownership information in some SAM profiles is January 1, 2023.[133]

It is respectfully suggested that the preamble to the final rule acknowledge the statutory ties between the beneficial ownership registry and SAM and note that determinations on the scope and content of the registry will also impact entities seeking to bid on federal contractors. In addition, FinCEN should consider stating in the preamble that the registry may wish to establish 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. That verification tool would help ensure the accuracy of not only the information submitted to the registry, but also in a SAM profile submitted to GSA. To enlist help from GSA to establish this verification tool, the proposed rule could cite 31 U.S.C. 5336(d)(2) which requires federal agencies to "cooperate with

[131] 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.
[132] "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," https://www.acquisition.gov/far-council-members.
[133] January 1, 2023 is two years after the date of enactment of the CTA, which was January 1, 2021.

and provide information requested by FinCEN for purposes of maintaining an accurate, complete, and highly useful database for beneficial ownership information."

Conclusion

We thank you, again, for the opportunity to comment on the proposed rule to implement 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,

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Executive Director

Erica Hanichak
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