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February 7, 2022

By Electronic Transmission

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

Re: Beneficial Ownership Information Reporting Requirements; Regulatory Identification Number 1506-AB49; Docket Number FINCEN-2021-0005

Dear Mr. Das:

The Investment Company Institute ("ICI")[1] appreciates the opportunity to comment on the notice of proposed rulemaking[2] (the "Proposed Rule") issued by the Financial Crimes Enforcement Network ("FinCEN") to implement the beneficial ownership information ("BOI") reporting requirements mandated by the Corporate Transparency Act ("CTA").[3] ICI acknowledges that the scope of the Proposed Rule is limited to FinCEN's implementation of the CTA's BOI reporting requirements and therefore will withhold comment on issues relating to the CTA's "protocols for access to and disclosure of BOI," including with respect to financial institution access to such records, and FinCEN's mandate to re-write its current beneficial ownership rule set forth in 31 CFR § 1010.230.

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[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of $33.1 trillion in the United States, serving more than 100 million US shareholders, and $9.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in Washington, DC, London, Brussels, and Hong Kong.

[2] Beneficial Ownership Information Reporting Requirements, Notice of proposed rulemaking, 86 FR 69920 (Dec. 8, 2021).

[3] The CTA is Title LXIV of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-283 (Jan. 1, 2021).

ICI offers the following comments on the elements of the Proposed Rule that uniquely affect open-end investment companies registered under the Investment Company Act of 1940 ("mutual funds").

A. ICI supports FinCEN's engagement of interested parties in the rulemaking process

As an initial matter, ICI wishes to express its support of FinCEN's broader efforts to modernize the U.S. anti-money laundering regulatory regime and appreciates FinCEN engaging relevant stakeholders, including the mutual fund industry, during the process. In particular, ICI notes that FinCEN's engagement of the mutual fund industry in past rulemakings has been critical to promulgating appropriately tailored anti-money laundering program requirements for mutual funds.

Although mutual funds are exempt from reporting BOI under the CTA, there are certain issues in the Proposed Rule that will affect the remaining rulemakings under the CTA, which will impact financial institutions, including mutual funds, substantially. As has been recognized by FinCEN in prior rulemakings, the mutual fund industry operates differently from other financial institutions in ways that are directly relevant to the consideration of a mutual fund's AML obligations, including that "mutual funds are best understood as a form of financial product rather as an institution providing financial services or investment advice."[4] Accordingly, FinCEN must continue to consider the unique and specific features of mutual funds as it promulgates rules to implement the CTA that result in changes to the current mutual fund AML program requirements.

B. Discussion of Issues in the Proposed Rule Specific to Mutual Funds

1. *Information to be collected*

The information to be collected under the Proposed Rule is consistent with the CTA. ICI is supportive of the ability for a reporting company to voluntarily provide tax identification numbers ("TINs") or social security numbers ("SSNs") of its legal entity and natural person beneficial owners, as applicable.

ICI believes that the collection of TINs and SSNs provides helpful data points for authorized users of the BOI database, especially financial institutions, for accuracy and verification purposes. Although the Proposed Rule does not address access protocols and customer due diligence ("CDD") requirements, the information collected and maintained in the BOI database would not be as useful in those efforts if TINs and SSNs were not collected. Current technology and services used by financial institutions to screen customers under applicable CDD and customer identification program requirements are largely dependent on TINs and SSNs as the main datapoint to produce accurate results.

ICI also urges FinCEN to use an opt-out (rather than an opt-in) consent process for obtaining a reporting company's consent (and each beneficial owner's consent) to share TIN, SSN, and other information reported in the Beneficial Owner database with financial institutions. Using an opt-out consent process is more consistent with the reporting company's decision to provide the information voluntarily in the first place than an opt-in process. An opt-out consent process also

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[4] Customer Due Diligence Requirements for Financial Institutions, Final Rule, 81 FR 29398, 29424 (May 11, 2016) ("CDD Final Rule").

creates efficiencies and makes the information provided more useful to financial institutions in meeting their AML compliance obligations, as noted above.

2. *Timing of Reporting*

Paragraph (a)(1)(iii) of the Proposed Rule requires that reporting companies in existence prior to the effectiveness of the rule report BOI within one (1) year of the effective date of the rule. The one-year requirement however is inconsistent with the CTA, which provides for a two (2) year period within which an existing reporting company must report its BOI.[5] FinCEN must clarify that the requirement for existing entities to report is two (2) years (not one), consistent with the CTA.

3. *The Proposed Definition Beneficial Owner is Overly Broad and Confusing*

The proposed definition of "beneficial owner" is overly broad and will cause confusion, unintended reporting violations, and result in less useful information for law enforcement and financial institutions. Specifically, the underlying definitions of "substantial control"[6] and "ownership interest"[7] are overly broad, ambiguous, and open to misinterpretation as follows:

<u>Substantial Control</u>

The second and third clauses of the definition of "substantial control" capture a broad range of persons and use too many undefined terms that are open to various interpretations. Regarding the second clause, which provides that any person with the "authority over the appointment or removal of any senior officer or dominant majority of the board of directors (or similar body) of a reporting company," ICI notes the following:

- The term "dominant majority" of the board of a reporting company is unclear and an unfamiliar term and must be defined.

- It appears the second clause is overbroad as it seems to capture creditors that have the ability, through contractual covenants or otherwise, to exercise typical creditor's rights in removing a senior officer of a company under certain conditions qualify as possessing "substantial control." This seems to go beyond the scope of the common meaning of beneficial ownership. FinCEN should clarify that the creditor exclusion applies to anyone whose economic interest in the reporting company arises solely from a predetermined sum of money, such as a debt and the payment of interest on such debt. As currently written, the creditor exclusion could be interpreted to include any creditor who has additional rights beyond receiving payment of principal and interest on such debt, such as the right to remove senior officers if certain loan covenants are breached.

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5 *See* new *31 USC* 5336(b)(1)(B), as set forth in Section 6403 of the CTA.

6 See Exhibit A for the definition of "substantial control."

7 See Exhibit A for the definition of "ownership interest."

The third clause likewise creates confusion by deeming any person with the "direction, determination, or decision of, or substantial influence over, important matters of a reporting company" to be a beneficial owner. For example:

- Does the phrase "substantial influence" have any different meaning than "substantial control"? Would "substantial influence" include equity holders of less than 25% who have a "substantial influence" over certain decisions of the reporting company (e.g., a dissolution, the sale of all the assets or other decisions that may need a specified vote for approval)?

- What do the terms "direction," "determination," and "decision" mean? How do these terms affect advisory board members of a reporting company (or non-voting observers)? These terms are far too ambiguous. ICI urges FinCEN to either delete this clause or provide clear definitions or guidance for how these terms should be interpreted.

If such examples qualify as having substantial control, the list of beneficial owners of a company could be confusingly long and will provide an incentive for bad actors to create overly complex governance structures simply to bury any useful information.

Ownership Interest

Similar issues exist with the proposed definition of "ownership interest." ICI recommends that "ownership interest" only include persons that presently possess the ownership interest without the need for any future contingencies to occur. Should a person owning an interest that fits within the definition of paragraphs (D) or (E) of the definition and later exercises their right under the instrument that results in the person owning 25% of the equity ownership interests in a reporting company, *then* the reporting company can update its ownership information with FinCEN accordingly.[8]

4. *Reporting Companies*

The definition of reporting company under the Proposed Rule is consistent with the CTA. ICI urges FinCEN to provide guidance confirming that insurance company separate accounts and certain special purpose vehicles ("SPVs") are not reporting companies.

Although separate accounts are not registered to do business in any state, they are sometimes registered with the SEC under the Investment Company Act of 1940. While the proposal would exclude separate accounts registered with the SEC, the CTA could be read to include separate accounts that are not registered with the SEC. Such unregistered separate accounts often rely on Section 3(c)(1) or 3(c)(7) (for private funds) or Section 3(c)(11) (for certain qualified retirement plan arrangements) under the Investment Company Act and are maintained by insurance companies in connection with certain variable annuities but are nevertheless owned by the insurance company.

[8] ICI notes that when beneficial ownership information changes, such as when a person exercises rights under a warrant, financial institutions will also be under an obligation to update applicable records. In this regard, it would be helpful for FinCEN to contemplate in the upcoming rulemakings for access protocols the ability for FinCEN to "push" these types of changes to financial institution users of the database.

Clarification that such unregistered accounts should not be considered reporting companies either because they are not registered to do business in any state or because they should be considered wholly-owned by an exempt life insurance company under 31 CFR § 1010.380(c)(2)(xxii) would provide helpful clarity on this issue.

SPVs are vehicles established in the form of a trust, partnership, corporation, or other structure or series thereof. SPVs may also be structured as a derivative instrument by or for the benefit of one or more entities or structured vehicles to facilitate an investment or investments or holding of certain investments. However, an SPV is not always a subsidiary of a legal entity that is excluded from the definition of reporting company, thereby potentially making some of them ineligible for the subsidiary exemption under proposed 31 CFR § 1010.380(c)(2)(xxii) in such circumstances.

ICI also notes that pooled investment vehicles have been omitted from the list of qualifying exempt reporting entities under the subsidiary exemption under proposed 31 CFR § 1010.380(c)(2)(xxii). Pooled investment vehicles often establish SPVs or other types of subsidiaries for various reasons, including trading efficiencies for certain types of assets and tax purposes. ICI sees no reason why such SPVs and other subsidiaries should not be able to rely on the subsidiary exemption in the same manner as other entities established as subsidiaries of qualifying exempt reporting companies. ICI urges FinCEN to expand the subsidiary exemption to include pooled investment vehicles as a qualifying entity.

Clarification, such as in the preamble of a final rule, that insurance company separate accounts and SPVs, which are operated or advised by a person that is otherwise excluded from the definition of reporting company, are not reporting companies would be helpful in addressing these ambiguities.

In addition, the CTA provides for a 1-year reporting period, yet the Proposed Rule requires submission of updated BOI within 30 days of a change in any information previously reported to FinCEN.[9] FinCEN should revise the time period to be consistent with the 1-year-period granted to reporting companies under the CTA.

5. *Company Applicant*

ICI urges that FinCEN clarify that a "company applicant" does not include those persons who do nothing more than simply perform the administrative or clerical functions of mailing, assembling, or electronically submitting entity formation documentation to a secretary of state – e.g., a secretary, paralegal, or administrative office staff. Such persons may have little or no substantive knowledge about the reporting company, and there is little benefit in providing their personal information to FinCEN, particularly in light of attendant privacy risks.

ICI also requests FinCEN clarify that any "individual[s] who directs or controls the filing of such document by another person" be limited to the one person who is ultimately in control of such filings – i.e., the one person who can authorize the filing to be made or not made. This is necessary to avoid reporting of information to FinCEN that is of limited value in situations where there are multiple layers between the person who prepares formation documents and the person who

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[9] *See* new 31 USC 5336(b)(1)(D), as set forth in Section 6403 of the CTA.

ultimately is responsible for or controls the preparation of those documents (e.g., multiple layers of supervisors and managers).

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ICI appreciates the opportunity to present our views on the Proposed Rule. If you have any questions about the matters discussed in this letter, please contact Susan Olson (at 202-326-5813 or solson@ici.org) or Joanne Kane (at 202-326-5850 or joanne.kane@ici.org).

Sincerely,

/s/ Susan Olson

Susan Olson
General Counsel, Investment Company Institute

/s/ Joanne Kane

Joanne Kane
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EXHIBIT A

Proposed 31 C.F.R. § 1010.380

(d) *Beneficial owner*. For purposes of this section, the term "beneficial owner," with respect to a reporting company, means any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company.

(1) *Substantial control*. Substantial 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, 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;

(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.

(2) *Direct or indirect exercise of substantial control*. 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. An individual who has the right or ability to exercise substantial control as specified in paragraph (d)(1) of this section and this paragraph (d)(2) shall be deemed to exercise such substantial control.

(3) *Ownership interests*. (i) The term "ownership interest" means:

EXHIBIT A

(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;

(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

(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.

(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

EXHIBIT A

(*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.

(4) *Exceptions*. Notwithstanding any other provision of paragraph (d) of this section, the term "beneficial owner" does not include:

(i) A minor child, as defined under the law of the State or Indian tribe in which a domestic reporting company is created or a foreign reporting company is first registered, provided the reporting company reports the required information of a parent or legal guardian of the minor child as specified in paragraph (b)(3)(ii) of this section;

(ii) An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;

(iii) An 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;

(iv) An individual whose only interest in a reporting company is a future interest through a right of inheritance;

(v) A creditor of a reporting company. For purposes of this paragraph (d)(4)(v), a creditor is an individual who would be a beneficial owner under the other provisions of paragraph (d) of this section solely through rights or interests in the company for the payment of a predetermined sum of money, such as a debt and the payment of interest on such debt. For the avoidance of doubt, any capital interest in the reporting company, or any right or interest in the value of the reporting company or its profits, are not such rights or interests for payment of a predetermined sum, regardless of whether they take the form of a debt instrument. If the individual has a right or ability to convert the right to payment of a predetermined sum to any form of ownership interest in the company, that individual is not a creditor of a reporting company for purposes of this section.