



May 5, 2021

VIA ELECTRONIC SUBMISSION

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Docket Number FINCEN–2021–0005
RIN 1506–AB49

Re: Beneficial Ownership Information Reporting Requirements

Dear Sir or Madam:

The American Investment Council (“AIC”)¹ appreciates the opportunity to submit this letter to the Financial Crimes Enforcement Network (“FinCEN”) regarding the implementation of the Corporate Transparency Act (“CTA”). AIC and its members commend FinCEN for issuing the advance notice of proposed rulemaking (“ANPRM”) on beneficial ownership information reporting requirements and for soliciting comments from the public as it considers how best to implement this important new law.

AIC supports the fight against money laundering and terrorist financing and the objectives of the CTA, to ensure that malign actors do not seek to conceal their ownership of corporations, limited liability companies and other similar entities in the United States to facilitate illicit activities. AIC believes that FinCEN’s implementing regulations must be consistent with this objective and must meet the additional congressional directives in the CTA to establish clear reporting rules that minimize burdens and to collect only such information as is “reasonably designed to

¹ AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, AIC develops, analyzes, and distributes information about the private equity and private credit industry and its contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, AIC is based in Washington, D.C. AIC’s members are the world’s leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest. For further information about AIC and its members, please visit our website at <http://www.investmentcouncil.org>.

generate a database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators.”²

In this letter, we focus on three key topics that FinCEN asked about in its ANPRM:

(1) clarification of the exemptions in the CTA to the definition of “reporting company” [ANPRM Question 6]; (2) the process for qualifying for an exemption [ANPRM Question 9]; and (3) the certification requirement for certain foreign pooled investment vehicles [ANPRM Question 15]. AIC focuses on these questions, in particular, because its members are sponsors of pooled investment vehicles (“PIVs”) that operate in the private equity and private credit markets and are registered as investment advisers with the Securities and Exchange Commission (“SEC”). As FinCEN has recognized in the past, private equity funds are long-term investment vehicles that do not afford opportunities for investor redemptions and, thus, pose very low risks for money laundering and terrorist financing activities.³

I. Clarification of the PIV Exemption to Include PIV-Associated Entities

The CTA requires reporting companies to submit specified information on their beneficial owners—the individual natural persons who own or control them—and on the persons who form or register these reporting companies. The CTA properly carves out from these reporting requirements both SEC-registered investment advisers and the PIVs that they manage.⁴ AIC worked with Members of Congress and their staffs to help craft these exemptions, which were based on the recognition that SEC-registered investment advisers are regulated entities that are regularly examined by the SEC and file publicly available disclosures at least annually that must be updated whenever there are material changes to the information. Accordingly, if law enforcement or federal regulators desire information about such advisers and the PIVs that they manage, they can readily obtain this information without resorting to the FinCEN registry.

² CTA § 6402(8)(C).

³ Private equity funds usually have a lifespan of 10 to 12 years and typically have restrictions on cash withdrawals during the fund lifespan, making them unattractive for money laundering purposes—criminals would prefer quick access to their ill-gotten gains. *See* FinCEN, Anti-Money Laundering Programs for Unregistered Investment Companies, 67 Fed. Reg. 60617, 60618 n.11 (Sept. 26, 2002). Except in very limited circumstances (such as to avoid violations of law), private equity funds generally do not permit withdrawals by limited partners. This approach is necessary because private equity funds make long-term investments in illiquid companies, which requires invested capital to be locked up for extended periods of time. It differs from registered investment companies, commodity pools and other pooled investment vehicles, which do offer redemption rights. For this reason, FinCEN has chosen to apply AML regulations exclusively to certain other PIVs. *See, e.g.*, 31 C.F.R. § 1024 (rules for mutual funds).

⁴ *See* 31 U.S.C. § 5336(a)(11)(B)(x), (xi), (xviii).

AIC urges FinCEN, in implementing the CTA, to state clearly that the exception for PIVs applies to the various entities in a PIV structure. PIV structures may vary and may include subsidiaries and affiliates.⁵ Congress, in exempting PIVs, did not discriminate among such structures, and all such entities should fall within the exclusion in the CTA to give proper effect to the exemption that Congress created. This approach not only reflects congressional intent but also represents a sound policy choice: requiring various entities within the PIV structure to register would impose needless burdens on PIV sponsors and not materially contribute to the registry's aim of obtaining beneficial ownership information that otherwise would be opaque to the federal government or that may contribute to the fight against money laundering and other illicit activities.

The various entities within the PIV structure are, of course, known to the PIV's SEC-registered investment advisers, and information about these entities is, therefore, easily available from the advisers. SEC-registered investment advisers also are subject to extensive books and records requirements under Rule 204-2 under the Investment Advisers Act of 1940, including with respect to the private funds they sponsor, manage or advise, and, as noted above, such books and records are subject to SEC examination.

II. Qualifications for Exemptions

In the ANPRM, FinCEN poses questions regarding potential steps that may be required of companies to claim and verify their eligibility for an exemption from the CTA's reporting requirements. AIC urges FinCEN not to make the qualification for an exemption contingent on a certification or other filing process.

AIC submits that requiring an exempt entity to make a filing to claim a statutory exemption is antithetical to the very notion of having an exemption. The exemption exists precisely because those entities that qualify do not need to make requisite filings as part of the CTA's framework. Making the exemption contingent on some separate filing requirement defeats the purpose. Moreover, any such filing requirement would not provide any information that would be "highly useful" to a database user.

The CTA itself bears this point out. Nowhere does the CTA call on FinCEN to require filings for entities that qualify for exemptions, and nowhere does Congress require FinCEN to verify exemptions. In fact, Congress calls on filings only in certain cases of exempt entities (*e.g.*, certain foreign PIVs), which indicates that Congress did not anticipate filing requirements for

⁵ For example, an AIC member may establish not only a main PIV, which will accept investors, but also various affiliated legal entities for business or regulatory reasons, including, among other vehicles, (i) special purpose vehicles or aggregators formed below the PIV to serve as vehicles that make one or more specific acquisitions, (ii) feeder funds formed above the PIV to facilitate the investment by one or more investors, (iii) parallel funds formed to invest in parallel with the main fund with a different group of investors, and (iv) alternative investment vehicles, which are generally legal structures formed in parallel to the main fund legal structure (but with substantially the same investors) for the purpose of making one or more specific acquisitions.

exempt entities in general. Rather, the legislative history strongly suggests that Congress considered and deliberately chose not to take this path. Previous versions of the legislation included a requirement for exempt companies to provide a written certification to FinCEN regarding their exempt status.⁶ This requirement, however, was removed and not adopted in the enacted legislation.

Finally, creating a filing and verification process for exempt entities would needlessly distract FinCEN from the task that it has been assigned by Congress—creating and operating a registry for *non*-exempt entities. FinCEN should not divert its attention from this sizeable undertaking and use its resources to evaluate and verify exemptions, particularly in the case of regulated entities such as SEC-registered investment advisers and the PIVs they operate and advise. The CTA creates its own policing mechanism to ensure entities are reporting as mandated: it establishes civil and criminal penalties for reporting failures, which creates powerful incentives for entities to assess what their reporting obligations are and whether they are exempt. FinCEN should rely on this statutory mechanism to ensure that the exemptions are properly used.

FinCEN can assist in this process by creating clear categories for reporting companies and clear exemptions, as discussed above, for non-reporting entities. Such clear lines will enable firms to determine their obligations and to follow the rules as mandated.

III. Exempted Foreign Pooled Investment Vehicles

The CTA places a reporting requirement on certain PIVs. Specifically, a PIV that is “formed under the laws of foreign country” is required to file with FinCEN “a written certification that provides identification information of an individual that exercises substantial control over the pooled investment vehicle.”⁷ In the ANPRM, FinCEN asks about this requirement.

AIC believes it is important that FinCEN apply this requirement appropriately. Under the CTA, this certification requirement applies to pooled investment vehicles that have two characteristics. First, they are exempt entities as “described in [31 U.S.C. § 5336](a)(11)(B)(xviii).” That means these vehicles would be reporting companies but for the exemption for pooled vehicles that are:

- (a) operated and advised by entities that are themselves exempt (such as SEC-registered investment advisers), and
- (b) either (1) fall within the definition of investment company under the Investment Company Act or (2) avail themselves from the exclusion in sections 3(c)(1) or (c)(7) of that Act to avoid investment company status and are identified in the investment adviser’s Form ADV.

Second, the pooled investment vehicle must be formed under the laws of a foreign country (*i.e.*, not a U.S. entity).

⁶ H.R. 2513, 116th Cong. at 10 (2020).

⁷ 31 U.S.C. § 5336(b)(2)(C).

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To be a reporting company in the first instance, an entity must be a U.S. company or a foreign company “registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe.” Because these PIVs by definition are not U.S. companies, they must be foreign entities that are required to register to do business in the United States.

Thus, only those foreign PIVs that are required to so register should be captured by this requirement. When a PIV so registers, it should be able to provide the statutorily required information to FinCEN through a streamlined submission process; that is, any PIVs that meet this exemption should not have to submit information akin to what is required for a reporting company, which would impermissibly diminish the value of the exemption granted in the CTA. In all events, we expect this certification will apply in a narrow and focused set of cases.

AIC appreciates your considerations of our comments on this important rulemaking process and looks forward to engaging with FinCEN further on the implementation of the CTA. AIC would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,



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