February 7, 2022

VIA ELECTRONIC SUBMISSION

Felicia Swindells, Associate Director
Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Docket Number FINCEN–2021–0005
RIN 1506–AB49

Re: Notice of Proposed Rulemaking on Beneficial Ownership Information Reporting Requirements

Dear Ms. Swindells:

The American Investment Council ("AIC")[1] appreciates the opportunity to submit this letter to the Financial Crimes Enforcement Network ("FinCEN") regarding FinCEN's notice of proposed rulemaking ("NPRM") to implement the beneficial ownership information ("BOI") reporting requirements of the Corporate Transparency Act ("CTA"). AIC submitted comments to FinCEN on the advance notice of proposed rulemaking ("ANPRM") addressing the implementation of the CTA's provisions on May 5, 2021, and we appreciate FinCEN's consideration of our prior comments.

AIC supports the fight against money laundering and terrorism financing and the objectives of the CTA, to ensure that malign actors cannot use corporations, limited liability companies and other similar entities in the United States to conceal their ownership and hide

[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 industries and their 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.

their 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 collect only such information as is "reasonably designed to generate a database that is highly useful to national security, intelligence, and law enforcement agencies and Federal functional regulators."[2]

This letter includes three sections. The first two sections respond to aspects of FinCEN's proposal that are of particular importance to AIC because our members are registered as investment advisers with the Securities and Exchange Commission ("SEC") and are sponsors of pooled investment vehicles ("PIVs") that operate in the private equity and private credit markets. The third section provides comments on certain of the proposed BOI reporting requirements and the effective date of the final BOI reporting rule.

To summarize our key points:

1. AIC strongly supports FinCEN's implementation of the statutory exemptions from the BOI reporting requirements for RIAs and PIVs, and urges FinCEN to confirm our understanding that these exemptions cover PIV-related entities and PIVs formed between the dates of their RIAs' routine annual Form ADV filings. FinCEN's confirmation will be important to ensure the CTA is faithfully implemented and PIVs can continue to operate as they do today. In addition, we reiterate our ANPRM comment that a filing with FinCEN should not be required for an entity claiming an applicable exemption.

2. AIC appreciates FinCEN's clarification in the NPRM that the special rule for foreign PIVs applies only to a foreign company that would otherwise be a "reporting company" for purposes of the BOI reporting requirements, and we encourage FinCEN to retain this approach in the final rule.

3. AIC recommends that (1) FinCEN ensure the final reporting requirements and definitions are clear, which will be necessary to facilitate compliance and enhance the accuracy and reliability of the BOI database; (2) filing timeframes appropriately balance the burden on reporting companies with the benefits to be gained in terms of accuracy of the database; (3) FinCEN clarify the CTA safe harbor for inadvertent errors in filings is available for all corrected reports submitted in accordance with the final BOI rule; and (4) FinCEN provide an implementation period before compliance with the final BOI rule is required.

[2] CTA § 6402(8)(C).

I. Exemptions from the Definition of "Reporting Company"

a. Proposed Clarifications to Exemption for PIVs

The CTA excludes from the BOI reporting requirements SEC-registered investment advisers ("RIAs") and PIVs they "operate or advise," with an exempt PIV including any company that would be an investment company but for the 3(c)(1) or 3(c)(7) exclusion under the Investment Company Act of 1940 *and* is identified by its legal name in the Form ADV of its RIA. FinCEN proposes to incorporate these exclusions into the BOI rule verbatim. AIC strongly supports these exclusions and urges FinCEN to clarify its implementation of these statutory provisions so they are given full effect.

In particular, as FinCEN finalizes the proposed rule, AIC urges FinCEN to state clearly that the exclusion for PIVs applies to all related entities within a PIV structure. For example, an AIC member may establish a main PIV, which will accept investors, as well as affiliated entities that could include vehicles formed below the PIV to make one or more specific acquisitions and feeder funds formed above the PIV to facilitate investment by one or more investors.

In drafting the CTA exemption for PIVs, Congress did not discriminate among the various entities within a PIV structure. As explained in our comment letter on the ANPRM, AIC worked with Members of Congress and their staffs to help craft the RIA and PIV exemptions. These exemptions were based on the recognition that RIAs 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. Accordingly, if law enforcement or federal regulators desire information about such advisers or the PIV structures they manage, these authorities can readily obtain this information without needing to access the FinCEN database.

Congress intentionally crafted the CTA's exclusions from the BOI reporting requirements to ensure that entities for which information is already available to law enforcement and regulatory authorities not be subjected to duplicative reporting requirements. To this end, Congress directed FinCEN, "to the greatest extent practicable" in implementing the CTA, to "collect information … through existing Federal, State, and local processes and procedures" rather than create new disclosure requirements.[3] A plain reading of the statute makes clear that any entity within a PIV structure, even if it is a separate legal entity from the main PIV, is covered by the PIV exclusion from the BOI reporting requirements.

The Investment Advisers Act of 1940 ("Advisers Act") defines the term "related person" to mean "any person, directly or indirectly, controlling or controlled by you, and any person under common control with you."[4] Many persons related to a PIV under this definition will be

[3] 31 U.S.C. 5336(b)(1)(F).

[4] Advisers Act Rule 206(4)-2(d)(7), 17 CFR 275.206(4)-2(d)(7).

listed on the RIA's Form ADV, but not all. For example, some related entities may exist only temporarily, to facilitate a particular transaction. Congress could not have intended for each such entity to be listed on the RIA's Form ADV in order to qualify for the PIV exclusion, so long as the main PIV itself is listed. In other words, an RIA should not need to keep amending its Form ADV and re-filing it simply to reflect the creation of related vehicles and sub-vehicles within a PIV structure. To require this type of recurring update to an RIA's Form ADV would be unwarranted and inconsistent with the legislative text and intent given that information about the PIV structure is available from the RIA. Certainly SEC regulations do not require an RIA to make such filings, unless there has been a material change to the information already on file. Further, as noted above, the RIA is subject to SEC examination at any time, and thus none of the related entities within a PIV structure is outside the government's line of sight.

To fulfill Congress's intent and appropriately implement the legislative text, we urge FinCEN to confirm our understanding of the scope of the PIV exemption. FinCEN could do so by clearly stating in the rule text the exclusion's applicability to related entities within a PIV structure that are themselves investment vehicles. For example, FinCEN could add the following bolded language to the PIV exclusion:

> (xviii) *Pooled investment vehicle.* Any 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***, including any related person, as such term is defined in 17 CFR 275.206(4)-2(d)(7), that would be an investment company but for the exclusion provided from that definition in section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940***.

Relatedly, we do not believe the language or intent of the CTA calls for an RIA's creation of a new PIV to trigger an update to the RIA's Form ADV before the new PIV can qualify for the BOI reporting exclusion, and we urge FinCEN to confirm our understanding in the final rule. In other words, FinCEN's BOI reporting provisions should not deviate from existing SEC requirements related to annual and other-than-annual Form ADV filings by necessitating additional periodic updates so that each newly created PIV will be "identified by its legal name by the applicable investment adviser in its Form ADV" and will therefore qualify for the PIV exclusion.[5]

We request FinCEN's confirmation on these two points to ensure the CTA is appropriately implemented and Congress's intent in excluding PIVs from the reporting requirements is fully realized. As explained above, such reporting would be needlessly burdensome for PIV sponsors, while contributing nothing to the registry's aim of obtaining BOI

[5] *See* SEC, Form ADV: General Instructions, Instruction 4 (describing annual and other-than-annual amendments and stating that Item 7 of Part 1A (financial industry affiliations and private fund reporting) does not need to be updated in an other-than-annual amendment), https://www.sec.gov/about/forms/formadv-instructions.pdf.

that otherwise would be unavailable to the federal government. Any such reporting would neither serve the public interest nor provide highly useful information for U.S. national security, intelligence or law enforcement efforts that is not already available, and we urge FinCEN to avoid this result by ensuring there is no confusion as to the scope of the PIV exclusion.

b. Eligibility for Exemptions

In the NPRM, FinCEN proposes not to require exempt entities to file a report with FinCEN in order to claim an exemption from the BOI reporting requirements. AIC believes this is the correct policy choice and urges FinCEN to retain it in the final rule.

As AIC commented in response to the ANPRM, 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 so those entities that qualify do not need to make filings, and thus making the exemption contingent on a filing with FinCEN defeats the very purpose of the exemption. Moreover, such a filing would not provide any information that would be "highly useful" to users of the BOI database and it would impose a burden contrary to the public interest.

The CTA fully supports the approach FinCEN has proposed. Nowhere does the CTA call on FinCEN to require that exempt entities make filings with FinCEN to avail themselves of the statute's exemptions. In fact, the CTA does call on filings in certain cases of exempt entities (*e.g.*, certain foreign PIVs), indicating that Congress did not anticipate filing requirements for exempt entities in general. Although some 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 was not adopted in the enacted legislation. Thus, the legislative text and history demonstrate that Congress considered and deliberately chose not to require filings with FinCEN in order to claim exemptions.

As we stated in our ANPRM comment letter, the CTA creates its own policing mechanism by establishing civil and criminal penalties for reporting failures. FinCEN proposes to adopt the language of the CTA with several clarifications, including that liability for a failure to report information to FinCEN could be imposed on either an entity or an individual who directs or controls an entity with respect to a failure to report or who is in substantial control of an entity when it fails to report. This potential for liability will provide powerful incentive for companies to assess the BOI reporting provisions and applicable exemptions and, if required, to make the appropriate filings with FinCEN. FinCEN should rely on this mechanism to ensure exemptions are properly used.

To assist in this process, FinCEN should ensure that the provisions of the final rule are clear. In particular, the final rule should clearly delineate who must report and what must be

[6] *See*, *e.g.*, H.R. 2513, Corporate Transparency Act of 2019, 116th Cong. at 10-11.

reported (including, for example, how the rules will apply to entities that may not have officers, employees or a physical place of business) and the scope of the exemptions for non-reporting companies. Such clear lines will enable firms to determine their obligations and to follow the rules as mandated, and will support the creation of a robust, accurate and reliable BOI database.

II. Special Rule for Foreign Pooled Investment Vehicles

The CTA requires a PIV "formed under the laws of a foreign country" 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 AIC's comment letter on the ANPRM, AIC requested that FinCEN clarify that the CTA's certification requirement for foreign PIVs applies only to entities that would qualify as reporting companies but for the exemption for PIVs. In other words, to be subject to this requirement, a foreign PIV first must be registered to do business in the United States and therefore be within the scope of the BOI reporting requirements but for the PIV exclusion.

FinCEN's proposal includes a special rule which provides the clarification we requested, in that it would apply the CTA's reporting requirement for foreign PIVs only to a foreign entity that "would be a reporting company" but for the PIV exclusion.[8] AIC greatly appreciates FinCEN's clarification on this point and encourages FinCEN to retain it in the final rule.

III. Filing Requirements

AIC generally expects its members and the vehicles they manage to be eligible for exclusions from the BOI reporting requirements. However, because AIC's members or their portfolio companies could have occasion to submit to the BOI registry, we offer the following comments on the proposed BOI reporting requirements:

Definitions and requirements. To facilitate compliance and enhance the accuracy and reliability of the BOI database, we urge FinCEN to ensure that the final reporting requirements are clear. In particular, FinCEN should clearly delineate who must report and what must be reported, including ensuring that the final rule addresses any ambiguity that may arise from application of the "substantial control" and "ownership interest" concepts of the "beneficial owner" definition, which, as proposed, are quite complex.

Filing timeframes. FinCEN proposes to require a reporting company to file its initial BOI report within 14 calendar days of its date of formation or the date it first becomes a foreign

[7] 31 U.S.C 5336(b)(2)(C).

[8] Proposed 31 CFR 1010.380(b)(3)(iii).

reporting company, as applicable.[9] Further, FinCEN proposes to require reporting companies to correct any inaccurate information within 14 calendar days.[10] AIC believes 14 days is likely too short a time period for reporting companies to file their initial BOI reports or make corrections to inaccurate reports. The proposed reporting requirements call for a significant amount of detailed information, and companies may not be able to obtain and verify the necessary information within 14 days. We respectfully urge FinCEN to consider a 30-day time period for both initial and corrected reports. We believe a 30-day period for these filing requirements would appropriately balance FinCEN's goals of ensuring an accurate and up-to-date database with the burden that BOI reporting will impose on reporting companies.

Safe harbor. FinCEN proposes to require the corrected reports described in the paragraph above to be filed within a specified period of time based on the date a company discovers an inaccuracy. However, FinCEN's proposed rule would deem such reports to satisfy the CTA safe harbor from liability *only* if the correction is filed within 90 calendar days from the date on which the inaccurate report was originally filed, regardless of when the inaccuracy is detected.

We support the proposal that the requirement to file a corrected report be triggered by a company's discovery of an error. However, we do not agree with FinCEN's proposal to limit availability of the statutory safe harbor only to those corrected filings made within 90 days after the original report. The proposed reporting requirements are complex and will require information from a significant number of individuals. Due to the volume of information and various sources, reporting companies may not be aware of errors until some time has passed. We believe it would be inconsistent with the legislative intent to preclude late-identified errors from qualifying for the safe harbor merely because they were discovered too late to be reported to FinCEN within the 90 days following the original filing. We urge FinCEN to amend its proposed approach to clarify that the CTA's safe harbor applies to all reports that are corrected within 90 days from the date on which a reporting company becomes aware or has reason to know that required information contained in any report it filed with FinCEN was inaccurate.

Effective date. AIC respectfully requests that FinCEN provide an adequate implementation period before compliance with the final BOI rule is required. Reporting companies and non-reporting companies alike will need time to understand the final rule, and reporting companies will need to develop appropriate compliance processes. Questions as to how the rule should apply to specific scenarios will undoubtedly arise, and clarifying these before the rule takes effect will be important to mitigate burdens for reporting companies and ensure the accuracy and reliability of the database. We therefore respectfully request that FinCEN take these factors into account in providing for an implementation period before the final BOI rule takes effect and that, during this time period, FinCEN provide a mechanism for stakeholders to

[9] Proposed 31 CFR 1010.380(a)(1).

[10] Proposed 31 CFR 1010.380(a)(3).

obtain information and guidance from FinCEN on any aspects of the final rule that are unclear as stakeholders consider how to comply with the new requirements.

* * *

We appreciate your consideration of our comments on this important rulemaking and look 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,

Jason Mulvihill
Chief Operating Officer & General Counsel
American Investment Council