INVESTMENT COMPANY INSTITUTE®

1401 H Street, NW, Washington, DC 20005-2148, USA
202-326-5800 www.ici.org

Susan M. Olson
GENERAL COUNSEL

202-326-5813
susan.olson@ici.org

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By Electronic Transmission

AnnaLou Tirol
Deputy 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 Ms. Tirol:

The Investment Company Institute ("ICI")[1] appreciates the opportunity to comment on the advance notice of proposed rulemaking[2] issued by the Financial Crimes Enforcement Network ("FinCEN") seeking comment on FinCEN's implementation of its mandates under the Corporate Transparency Act ("CTA").[3] The CTA requires FinCEN to promulgate rules regarding the standards and procedures for reporting companies to report beneficial ownership information to FinCEN and the standards for FinCEN to maintain and share such information with financial institutions and government agencies. ICI urges FinCEN to align its rulemaking to the current Customer Diligence Rule requirements as closely as possible. ICI believes that a consistent approach for both anti-money laundering compliance, implementation and enforcement and the information collected for the FinCEN database will make for a more coherent regime in terms of usefulness to law enforcement and minimizing the cost burden for financial institutions in meeting their anti-money laundering program obligations. We offer the following comments on the

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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 US$29.8 trillion in the United States, serving more than 100 million US shareholders, and US$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, Advance notice of proposed rulemaking, 86 FR 17557 (Apr. 5, 2021) (the "ANPRM").

3 The CTA is Title LXIV of the NDAA, Pub. L. 116-283 (Jan. 1, 2021).

elements of the ANPRM that uniquely affect mutual funds registered under the Investment Company Act of 1940 ("mutual funds").

A. ICI supports rulemaking initiatives leading to the availability of highly useful information

ICI supports FinCEN's efforts to implement the beneficial ownership reporting requirements mandated by the CTA in a way that seeks to provide meaningful information to government agencies and financial institutions to combat money laundering and terrorist financing. In promulgating regulations to implement the beneficial ownership reporting requirements, the CTA requires FinCEN, to the extent practicable, to—

> "minimize burdens on reporting companies associated with the collection of [beneficial ownership information], in light of the private compliance costs placed on legitimate businesses, including by identifying any steps taken to mitigate the costs relating to compliance with the collection of information; and
>
> [] collect [beneficial ownership information] in a form and manner that ensures the information is highly useful in—
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> (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."[4]

In this vein, ICI understands that the ANPRM will not address FinCEN's mandate to revise the Customer Due Diligence rule (the "CDD Rule"), but ICI also recognizes that the nature and type of beneficial ownership information collected by FinCEN necessarily will inform future revisions to the CDD Rule. Accordingly, in promulgating rules to implement the CTA's requirements, ICI urges FinCEN to consider the significant costs and resources that financial institutions (including mutual funds) have expended in implementing the CDD Rule.

In doing so, ICI urges FinCEN to take into account the unique nature of the mutual fund industry in making any changes to the current AML program requirements applicable to mutual funds.[5] The mutual fund industry operates differently from other financial institutions in many respects, including in ways that are directly relevant to the consideration of a mutual fund's AML obligations. As FinCEN has acknowledged in prior rulemakings, "mutual funds are best understood as a form of

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4 CTA § 6403(a).

5 For additional information about the structure of mutual funds and the distribution of mutual fund shares through regulated intermediaries, *see* Letter from Dorothy M. Donohue, Deputy General Counsel, Investment Company Institute, to Jennifer Shasky Calvery, Director, Financial Crimes Enforcement Network, dated October 2, 2014, on FinCEN's customer due diligence rule proposal, available at www.ici.org/pdf/28441.pdf.

financial product rather as an institution providing financial services or investment advice."[6] Almost all mutual funds are externally managed through their service providers, including investment advisers, distributors, and transfer agents. In this regard, it is important that FinCEN consider the access that these service providers have to customer information necessary to fulfill AML obligations.

B. Discussion of Specific Requests for Comment in the ANPRM:

Q1: The CTA requires reporting of beneficial ownership information by "reporting companies," which are defined, subject to certain exceptions, as including corporations, LLCs, or any "other similar entity" that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe or formed under the law of a foreign country and registered to do business in the United States by the filing of such a document.

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

FinCEN should provide clarity regarding the phrase "other similar entity" consistent with the Adopting Release for the CDD Rule, where FinCEN clarified that trusts created by the filing of a trust instrument with the State pursuant to statutory authority (e.g., Delaware statutory trusts and Massachusetts business trusts) are legal entities.[7]

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

Entities should be considered "other similar entities" consistent with the CDD Rule, to include limited partnerships, business trusts that are created by a filing with a state office, any other entity created in this manner, general partnerships, and any other similar entities created in a similar manner in a foreign jurisdiction. A legal entity should not include any association of persons formed simply through a contractual arrangement or common understanding among its members.

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

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

7 CDD Final Rule at 29412.

The list of entities that should be required to report should align with the CDD Rule to the extent not inconsistent with the statutory requirements set forth in the CTA. Please also see our response to Question 7, below.

> ***Q3: The CTA defines the "beneficial owner" of an entity, subject to certain exceptions, as "an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise" either "exercises substantial control over the entity" or "owns or controls not less than 25 percent of the ownership interests of the entity." Is this definition, including the specified exceptions, sufficiently clear, or are there aspects of this definition and specified exceptions that FinCEN should clarify by regulation?***
>
> ***a. To what extent should FinCEN's regulatory definition of beneficial owner in this context be the same as, or similar to, the current CDD rule's definition or the standards used to determine who is a beneficial owner under 17 CFR 240.13d–3 adopted under the Securities Exchange Act of 1934?***

We urge FinCEN to align the definition of *beneficial owner* consistent with the current definition under the CDD Rule, not Rule 13d-3 under the Securities Exchange Act of 1934. FinCEN should avoid a definition that would require persons that have investment or voting power over a security because of a fiduciary-type relationship (e.g., investment advisers and trustees) to have to aggregate their holdings across customer accounts such that they would be deemed to be a beneficial owner for purposes of the CTA. Such a definition would produce information that is not relevant to, and would complicate and obscure ownership information for, regulators, law enforcement, or financial institutions.

> ***b. Should FinCEN define either or both of the terms "own" and "control" with respect to the ownership interests of an entity? If so, should such a definition be drawn from or based on an existing definition in another area, such as securities law or tax law?***

Similar to the preceding response, FinCEN should interpret "own" or "control" within their plain meanings such that only one natural person (if any) can be deemed to own or control one unit of equity in a legal entity. In this regard, FinCEN should explicitly provide that there can only be up to four natural person beneficial owners.

> ***c. Should FinCEN define the term "substantial control"? If so, should FinCEN define "substantial control" to mean that no reporting company can have more than one beneficial owner who is considered to be in substantial control of the company, or should FinCEN define that term to make it possible that a reporting company may have more than one beneficial owner with "substantial control"?***

Only one person should be able to have "substantial control" over an entity. Further, the definition should make clear that not all legal entities will have a beneficial owner that will have "substantial control" over the entity. The definition should also be narrowly tailored such that it does not capture persons who own directly or indirectly less than 25 percent of a company unless certain indicia of managerial or policy control are present and actually exercised by the person.

Q7: In addition to the statutory exemptions from the definition of "reporting company," the CTA authorizes the Secretary, with the concurrence of the Attorney General and the Secretary of Homeland Security, to exempt any other entity or class of entities by regulation, upon making certain determinations. Are there any categories of entities that are not currently subject to an exemption from the definition of "reporting company" that FinCEN should consider for an exemption pursuant to this authority, and if so why?

FinCEN should exempt any entity that is currently excluded from the definition of "legal entity customer" under the CDD Rule that is not also exempt under the CTA. FinCEN should also exempt any company whose natural person beneficial owners are already identified in regulatory filings in connection with the registration of a subsidiary of such company. For example, direct and indirect control persons of investment advisers and broker-dealers may already be identified on Forms ADV or BD, as applicable, and providing such information would be duplicative of information already provided to the Securities and Exchange Commission.

Q9: How should a company's eligibility for any exemption from the reporting requirements, including any exemption from the definition of "reporting company," be determined?

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

Any exemption from the definition of reporting company should be self-executing. At a minimum, exempt entities should be able to rely on public filings, if applicable, to qualify for any exemption and should not have to provide an annual affirmation to the extent their status is readily discernible from public filings made with regulatory agencies. For example, registered investment companies, registered investment advisers, and broker-dealers should not have to provide any information to FinCEN to prove their status as an exempt company as such information would be duplicative of information already provided to the Securities and Exchange Commission.

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

No. Each exemption should be self-executing. For most exempt entities, creating an obligation to file an additional periodic report would add unnecessary costs for marginal or no benefit to combatting money laundering or terrorist financing.

Q10: What information should FinCEN require a reporting company to provide about the reporting company itself to ensure the beneficial ownership database is highly useful to authorized users?

To the extent FinCEN requires any additional information about a reporting company, such information should be consistent with a financial institution's obligations under the CDD Rule, as revised by FinCEN, such that the information collecting burden on financial institutions in meeting their CDD obligations is alleviated through access to relevant and useful information. Relevant, additional information could include the business purpose of the reporting company, whether the reporting company is an operating company or a holding company, a passive investment vehicle,

date of formation/incorporation, and the entities through which each beneficial owner owns or holds their interest, subject to any exemptions.

Q11: What information should FinCEN require a reporting company to provide about the reporting company's corporate affiliates, parents, and subsidiaries, particularly given that in some cases multiple companies can be layered on top of one another in complex ownership structures?

FinCEN should only require information about a reporting company's corporate affiliates, parents, and subsidiaries only to the extent such information is useful. Any reporting requirements in this regard should consider that certain reporting companies' corporate affiliates or parent holding companies may be exempt from the reporting requirements under the CTA and FinCEN should not require information to be provided indirectly where it is not required to be provided directly.

Q12: Should a reporting company be required to provide information about the reporting company's corporate affiliates, parents, and subsidiaries as a matter of course, or only when that information has a bearing on the reporting company's ultimate beneficial owner(s)?

A reporting company should be required to provide information about its corporate affiliates, parents, and subsidiaries only when the information has a bearing on the reporting company's beneficial owners, and only to the extent the information would not be exempt directly. In this regard, to the extent information on a reporting company's corporate affiliates, parents, and subsidiaries are required, ICI suggests that FinCEN permit that one reporting company in a corporate group fulfill the reporting requirements under the CTA with one filing made on behalf of the other reporting companies in its corporate group.

Q15: Section 5336(b)(2)(C) requires written certifications to be filed with FinCEN by exempt pooled investment vehicles described in section 5336(a)(11)(B)(xviii) that are formed under the laws of a foreign country.

a. By what method should these certifications be filed?

b. What information should be included in these certifications?

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

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

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

Any information submitted pursuant to Section 5336(b)(2)(C) should be able to be filed electronically through a reporting portal or email. In addition, the information required to be collected should only contain information sufficient to show that the entity was formed in a foreign

jurisdiction and should not include beneficial ownership information or any additional information that is not required under the CTA. FinCEN should also consider what information would be useful to a financial institution in meeting its AML obligations through non-documentary methods, if needed.

Q35: How can FinCEN make beneficial ownership information available to financial institutions with CDD obligations so as to make that information most useful to those financial institutions?

a. Please describe whether financial institutions should be able to use that information for other customer identification purposes, including verification of customer information program information, with the consent of the reporting company?

FinCEN should make beneficial ownership information available to financial institutions in such a way that the financial institutions can use as much of the information as possible to meet their AML obligations, including customer identification and customer due diligence requirements.

b. Please describe whether FinCEN should make financial institution access more efficient by permitting reporting companies to pre-authorize specific financial institutions to which such information should be made available?

Permitting reporting companies to pre-authorize certain financial institutions' use of such information would make the AML process more efficient and ease the burden on financial institutions while allowing them to still meet their AML obligations. ICI suggests permitting reporting companies to pre-authorize all financial institutions or types of financial institutions (e.g., broker-dealers or mutual funds) rather than pre-authorizing specific financial institutions.

c. In response to requests from financial institutions for beneficial ownership information, pursuant to 31 U.S.C. 5336(c)(2)(A), what is a reasonable period within which FinCEN should provide a response? Please also describe what specific information should be provided.

FinCEN should provide, or enable users access to, the information that is useful to financial institutions immediately upon account opening. Useful information would include identifying information of the reporting company's beneficial owners consistent with current CDD or AML requirements.

Q36: How should FinCEN handle updated reporting for changes in beneficial ownership when beneficial ownership information has been previously requested by financial institutions, federal functional regulators, law enforcement, or other appropriate regulatory agencies?

a. If a requestor has previously requested and received beneficial ownership information concerning a particular legal entity, should the requester automatically receive notification from FinCEN that an update to the beneficial ownership information was subsequently submitted by the legal entity customer?

b. If so, how should this notification be provided?

c. Should a requesting entity have to opt in to receive such notification of updated reporting?

FinCEN should "push out" notifications to any financial institution that has requested information on a reporting company immediately once an update has been made to the information because it would ease the information collecting burden on the financial institution. In addition, FinCEN should implement a mechanism for financial institutions to opt-out of future notifications when the information is no longer relevant to the financial institution.

Mutual funds often delegate to external transfer agents the implementation of certain fund-specific AML functions (with appropriate oversight). In this regard, financial institutions should be able to appoint a service provider (such as a mutual fund's transfer agent) to access the registry on the financial institution's behalf. Similarly, if FinCEN establishes a mechanism to inform financial institutions of changes to records about which financial institutions or its delegate(s) have requested, FinCEN should deliver that information to a designated service provider.

Q38: In what circumstances should applicant information be accessible on the same terms as beneficial ownership information (i.e., to agencies engaged in national security, intelligence, or law enforcement; to non-federal law enforcement agencies; to federal agencies, on behalf of certain foreign requestors; to federal functional regulators or other agencies; and to financial institutions subject to CDD requirements). If financial institutions are not required to consider applicant information in connection with due diligence on a reporting company opening an account, for example, should a financial institution's terms of access to applicant information differ from the terms of its access to beneficial ownership information?

Applicant information should be made available to financial institutions to the extent the financial institution would have to collect the information under its AML procedures. If the applicant's information is irrelevant (e.g., because it is stale, or the applicant no longer has a role in the reporting company's business) then it should not be made available for privacy reasons.

Q43: How can FinCEN best reach out to financial institutions to ensure the efficiency and effectiveness of the process by which financial institutions could potentially access the beneficial ownership information held by FinCEN?

FinCEN may wish to reach out to financial institutions proactively and should engage with financial institutions from each category (e.g., mutual funds, banks, broker-dealers etc.) to gauge the differences in the usefulness of beneficial ownership information to each category. ICI would welcome dialogue with FinCEN to discuss how the reporting registry and its related provisions could best help mutual funds meet their AML obligations.

FinCEN may also wish to speak with service companies, such as data aggregators and technology service providers, on a regular basis to discuss uniform protocols, secure data delivery or file sharing mechanisms, and other issues that may affect financial institutions' (and their service providers') ability to access useful information.

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ICI appreciates the opportunity to present our views on the ANPRM and looks forward to providing more specific comments on any proposal developed by FinCEN. 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
Senior Director, Operations & Transfer Agency,
Investment Company Institute