Managed Funds Association
The Voice of the Global Alternative Investment Industry
Washington, D.C. | New York

May 5, 2021

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

Re: Advance Notice of Proposed Rulemaking on Beneficial Ownership Information Reporting Requirements, Docket Number FINCEN–2021–0005, RIN 1506–AB49

Dear Sir or Madam:

Managed Funds Association ("**MFA**")[1] appreciates the opportunity to provide comments on the Financial Crimes Enforcement Network's ("**FinCEN**") advance notice of proposed rulemaking ("**ANPRM**") regarding the implementation of the beneficial ownership information reporting provisions of the Corporate Transparency Act ("**CTA**").[2]

MFA appreciates FinCEN's efforts to engage with stakeholders and solicit input on the information reporting provisions of Section 6403 of the CTA. In doing so, FinCEN will help ensure the effectiveness of the provisions that govern beneficial ownership reporting requirements and the maintenance and disclosure of this information in FinCEN's database.

MFA supports the goal of the CTA to combat money laundering and terrorist financing by ensuring 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. The CTA properly directs FinCEN, in seeking to achieve this objective, to ensure that the information requested for the FinCEN database is necessary and highly useful for law enforcement while minimizing the burdens associated with the collection of the required information.[3]

Below, MFA provides comments in response to the questions that FinCEN proposed in the ANPRM, organized by topic.

I. Exemptions to the Definition of "Reporting Company"

Section 6403 of the CTA properly exempts many types of legal entities from the definition of "reporting company." It does so because the types of legal entities afforded

[1] MFA represents the global alternative investment industry and its investors by advocating for public policies that foster efficient, transparent, fair capital markets, and competitive tax and regulatory structures. MFA supports member business strategy and growth via proprietary access to subject matter experts, peer-to-peer networking, and best practices. MFA's more than 140 member firms collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia, supporting a global policy environment that fosters growth in the alternative investment industry.

[2] Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17,557 (April 5, 2021).

[3] *See* 31 U.S.C. 5336(b)(4)(B).

statutory exemptions do not, in Congress's estimation, present the risks of misuse and abuse that warrant inclusion of their ownership information in the registry.

Of particular relevance for MFA members, exemptions apply to investment advisers registered with the Securities and Exchange Commission ("SEC") and to pooled investment vehicles ("PIVs") that they "operate or advise."[4] These exemptions have a strong policy rationale because SEC-registered investment advisers already must file public disclosures at least annually on Form ADV, which disclosures include identifying and other information about the PIVs that an investment adviser manages. Form ADV is also required to be updated whenever there are material changes to the information provided. In addition, such advisers are subject to routine and special examinations by the SEC Division of Examinations, which may obtain additional information regarding PIVs. As such, the CTA recognizes that it would be unnecessary, costly and duplicative if FinCEN were to collect the same information for the beneficial ownership database.

In response to ANPRM Question 6, which asks whether any of the statutory exemptions require clarification, MFA urges FinCEN to clarify that the PIV exemption should cover related entities within the PIV structure.[5] MFA believes this clarification is necessary to fully realize the purpose of the CTA exemption for PIVs. A PIV sponsor may establish the main PIV, which will accept investors, and various down-stream legal entities for various legal or business reasons. For example, it is common for booking and trading entities to be set up below a PIV to serve as vehicles that make specific acquisitions or effect certain securities or other financial instrument trading strategies. Some of these entities may exist only temporarily, to facilitate particular transactions, while others may be longer-term vehicles. Because these entities are wholly owned by exempt PIVs, and may be managed by SEC-registered investment advisers or Commodity Pool Operators ("CPOs") registered with the Commodity Futures Trading Commission ("CFTC"), there is little purpose or value in requiring these entities to be reporting companies because, among other reasons, their managers and operators are already subject to regulation and examination under existing regulatory regimes.

Similarly, PIVs are often organized as LLCs or partnerships that, in turn, have managing members or general partners that are themselves legal entities. These managing members or general partners may be affiliated with the SEC-registered investment adviser that manages the PIV and may be identified on the adviser's Form ADV. It would be redundant for PIV-affiliated entities that are publicly disclosed by an SEC-registered investment adviser on Form ADV—in much the same manner as the PIV is disclosed—to be included under the definition of "reporting company." Likewise, SEC-registered investment advisers are often organized as LLCs or partnerships with managing members or general partners that are themselves legal entities. These managing members or general partners and their owners and controllers are identified on the adviser's Form ADV, and it would be equally redundant to require additional beneficial ownership reporting information for such entities.

It stands to reason that an affiliate formed for the purpose of acting as a managing member or general partner of a PIV or SEC-registered investment adviser would not be engaged in an illicit activity necessitating beneficial ownership reporting. This is equally true of any legal

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

5 Question 6 asks, "[t]he CTA contains numerous defined exemptions from the definition of 'reporting company.' Are these exemptions sufficiently clear, or are there aspects of any of these definitions that FinCEN should clarify by regulation?" 86 Fed. Reg. at 17562.

entity "up the chain"; that is, other LLCs formed for the purpose of holding membership interests in the general partners of PIVs or their SEC-registered investment advisers.

In addition, and in response to ANPRM Question 7, which asks whether any entities not currently exempt should be considered for an exemption, MFA believes that commodity pools that are "operated or advised" by CPOs or Commodity Trading Advisors ("**Trading Advisors**") also should be exempt.[6] The CTA already exempts CFTC-registered CPOs and Trading Advisers, but there is no express exclusion for commodity pools. Commodity pools are pooled vehicles that invest in and trade commodity interests and are analogs to PIVs managed by registered investment advisers. Information on commodity pools operated by CFTC-registered CPOs is available on Form CPO-PQR, and information on commodity pools advised by CFTC-registered Trading Advisors is available on Form CTA-PR. We think that an exemption for commodity pools operated by CFTC-registered CPOs and advised by CFTC-registered Trading Advisors is necessary to parallel the treatment of PIVs and to meet the CTA's direction to FinCEN to "collect information … through existing Federal, State, and local processes and procedures" and to "minimize burdens on reporting companies associated with the collection of the information."[7]

II. Demonstrating Eligibility for an Exemption

The ANPRM asks whether exempt entities must make a filing in order to confirm their qualification for an exemption from the reporting requirements. (ANPRM Question 9.)[8]

MFA urges FinCEN not to impose such burdens on companies that have been exempted from the definition of "reporting company." The imposition of verification requirements on exempted companies is contrary to the congressional purposes in crafting the exemptions. In particular, reporting to FinCEN to support the application, and continued application, of an exemption would negate any benefit of an exemption.

The CTA itself does not contemplate such verification processes but ensures compliance by establishing civil and criminal penalties for failures to report.[9] In this way, Congress likely determined that it would not serve the purpose of the Act but, rather, detract from the goal of creating a highly useful database for law enforcement if FinCEN were to devote considerable resources to collecting information from entities that fall under an exemption to the definition of reporting company.

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[6] Question 7 asks, "[i]n 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?" 86 Fed. Reg. at 17562.

[7] 31 U.S.C. 5336(b)(1)(F)(ii), (iii).

[8] Question 9 asks, "[h]ow 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? … (c) Should exempt entities be required to file periodic reports to support the continued application of the relevant exemption (e.g., annually)?" 86 Fed. Reg. at 17562.

[9] *See* 31 U.S.C. 5336(b)(2)(A).

III. Certifications for Foreign Pooled Investment Vehicles

FinCEN asks about the certification requirement for exempt PIVs that are formed under the laws of a foreign country. (ANPRM Question 15.)[10]

First, MFA encourages FinCEN to clarify in its rule that the certification requirements for foreign PIVs under the CTA only apply to a small and specific category of entities. In order to fall under any exemption to the definition of a "reporting company," an entity must first fit within the definition of a reporting company under the CTA. Otherwise, an exemption would not be necessary. A reporting company is defined as 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."[11] As the certification requirements only apply to foreign exempt PIVs, an entity that is required to file a certification under the CTA must be both (1) a foreign PIV; and (2) registered to do business in the United States. This will be a small class of entities.

Second, the certification requires "identification of an individual that exercises substantial control over the pooled investment vehicle in the same manner as required under this subsection."[12] As discussed above, by definition, PIVs have SEC-registered investment managers and, therefore, information regarding their control persons is already available to the SEC.

Third, MFA recommends that the extent of information collected in the written certifications not be unduly burdensome. In particular, MFA urges FinCEN not to establish higher obligations on foreign exempt PIVs than is required for reporting companies under the CTA. Foreign PIVs required to file a certification are categorized under the CTA as exempt from the definition of reporting company. Thus, it would negate the purpose of the exemption to impose the same, or even greater, reporting requirements on these foreign exempt PIVs in the required certification. Furthermore, we urge FinCEN to streamline the method by which these certifications are filed so as to minimize the burdens on entities required to submit such certifications.

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[10] Question 15 asks, "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)?" 86 Fed. Reg. at 17562.

[11] 31 U.S.C. 5336(a)(11)(A)(ii).

[12] 31 U.S.C. 5336(b)(2)(C).

IV. Information Collected on Reporting Company Affiliates

The ANPRM poses a series of questions regarding the type and extent of information that a reporting company should provide on its corporate affiliates, parents and subsidiaries. (ANPRM Questions 11 and 12.)[13]

The CTA allows reporting companies that are owned by exempt entities to provide only the name of the exempt entity for beneficial reporting purposes.[14] MFA urges FinCEN to maintain this statutory directive in crafting regulations under the Act.

If affiliates of reporting companies are themselves reporting companies, then FinCEN will receive beneficial ownership information from these entities themselves. If, however, an affiliated entity is exempt, then it would frustrate the purpose of the statutory exemption if a reporting company were required to provide the same information on these exempt affiliates as would be required if these entities were reporting companies.

V. Requirements to Update Beneficial Ownership Information

Question 19 of the ANPRM considers the CTA requirement that reporting companies update beneficial ownership information that was previously submitted when changes occur.[15] MFA urges FinCEN to minimize the compliance obligations of reporting companies in providing updated information. MFA recommends that FinCEN require notice rather than an additional report when changes occur and allow for a reasonable period of time within which reporting companies can provide such notice.

Furthermore, in response to Question 20 of the ANPRM, MFA submits that FinCEN should not require reporting companies to submit periodic filings simply to confirm that there are no changes to beneficial ownership information.[16] Doing so would impose excessive compliance burdens and costs while not materially increasing the utility of the FinCEN database.

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[13] Question 11 asks, "[w]hat 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?" 86 Fed. Reg. at 17562. Question 12 asks, "[s]hould 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)?" *Id*.

[14] 31 U.S.C. 5336(h)(3)(A).

[15] Question 19 asks, "[w]hat should reporting companies or individuals holding FinCEN identifiers be required to do to satisfy the requirement of section 5336(b)(1)(D) that they update in a timely manner the information they have submitted when it changes, such as when beneficial owners or holders of FinCEN identifiers (i) transfer substantial control to other individuals; (ii) change their legal names or their reported residential or business street addresses; or (iii) die; or (iv) when a previously acceptable identification document expires? For example, should the reporting companies or individuals be required to file a new report, or provide notice only of the information that has changed?" 86 Fed. Reg. at 17563.

[16] Question 20 asks, "[s]hould reporting companies be required to affirmatively confirm the continuing accuracy of previously submitted beneficial ownership information on a periodic basis (e.g., annually)? How should such confirmation be communicated to FinCEN?" 86 Fed. Reg. at 17563.

VI. Availability of Safe Harbor

FinCEN requests comment on the scope of the safe harbor for persons who seek to correct previously submitted but inaccurate beneficial ownership information. (ANPRM Question 22.)[17] MFA supports the availability of a statutory safe harbor, but MFA believes that any regulations related to the safe harbor should not purport to lower the standard of liability for violations, which is based on a statutory willfulness standard, and should clarify that the safe harbor is not exclusive. To explain, even if a reporting company does not take advantage of the safe harbor or the safe harbor is inapplicable, it should not be liable under the CTA for non-willful violations of the applicable reporting requirements.

VII. Security of the Beneficial Ownership Database

Question 34 of the ANPRM considers the security of the FinCEN database and asks what measures can be taken to ensure beneficial ownership information stored in the database is protected.[18] MFA supports the utmost level of protection and security with respect to the database due to the extent of highly confidential information that will be collected and stored by FinCEN and the resulting risks of cyberattacks and identify theft.

In particular, MFA urges FinCEN to limit access to the database strictly, as broad access increases security risks. To this end, FinCEN should adhere to the CTA requirement that the "appropriate protocols" for requesting access to beneficial ownership information are sufficiently stringent so as to limit both the "scope of information sought" and the number of users who are able to access the information.[19] Furthermore, MFA urges FinCEN to ensure that only Treasury staff whose duties make access to the database essential are able to receive access.

MFA also supports periodic review of the security protections in place for the database and updates to the security so that the best technology is utilized at any time. To instill public confidence in the database's security and confidentiality, MFA urges FinCEN to provide transparency with respect to the processes and protocols for safeguarding the information.

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[17] Question 22 asks, "[s]hould FinCEN's regulations define the scope of this safe harbor? Should the nature of the inaccuracy (e.g., a misspelled address versus the complete omission of a beneficial owner) be relevant to the availability of the safe harbor?"

[18] Question 34 asks, "As a U.S. Government agency, FinCEN is subject to strict security and privacy laws, regulations, and other requirements that will protect the security and confidentiality of beneficial ownership and applicant information. What additional security and privacy measures should FinCEN implement to protect this information and limit its use to authorized purposes, which includes facilitating important national security, intelligence, and law enforcement activities as well as financial institutions' compliance with AML, CFT, and CDD requirements under applicable law? Would it be sufficient to make misuse of such information subject to existing penalties for violations of the BSA and FinCEN regulations, or should other protections be put in place, and if so what should they be?" 86 Fed. Reg. at 17564.

[19] 31 U.S.C. 5336(c)(3)(F), (G).

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MFA appreciates the opportunity to provide these comments to FinCEN in response to its ANPRM. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Jennifer W. Han

Jennifer W. Han
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