



May 5, 2021

Via www.regulations.gov

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

Re: Docket Number FINCEN-2021-0005
RIN 1506-AB49

To Whom It May Concern:

On behalf of our nation's venture capital investors and the startups they support, the National Venture Capital Association ("NVCA") appreciates the opportunity to submit comments on the advance notice of proposed rulemaking ("ANPRM") regarding implementation of the Corporate Transparency Act ("CTA").

The CTA directs the United States Department of the Treasury ("Treasury") to create a program for certain entities to report beneficial ownership information to Treasury's Financial Crimes Enforcement Network ("FinCEN"), and Treasury has delegated rulemaking authority to FinCEN. The reporting requirements are intended to ensure that money launderers and other criminals cannot take advantage of opacity regarding beneficial ownership in order to facilitate crimes.

The ANPRM includes a wide range of questions regarding which entities ("reporting companies") should report beneficial ownership information, what information should be reported, how reporting companies will report, and other matters. The CTA will have a significant impact on a variety of business entities, potentially including venture capital investors and small innovative companies in which they invest. We offer our views to help ensure that the regulations are appropriately tailored to avoid creating confusion or unnecessary burdens on legitimate businesses that present little risk of facilitating the criminal activity that the CTA is designed to prevent or detect.

NVCA and the Role of Venture Capital

NVCA has a diverse membership base of venture capital firms throughout the country, investing in sectors as varied as medical devices, information technology, biotechnology, cybersecurity, climate technology, and many more. Venture capitalists invest and partner with high-growth

startups with transformative ideas that power innovation and our economy, including notable companies such as Moderna, Zoom, Google, and Genentech.

Venture capital firms create partnerships to combine capital held by limited partners (e.g. pension funds, endowments, foundations) with their talent and expertise to make long-term equity investments into innovative startups. Venture investors work closely with startups to help entrepreneurs turn ideas into successful companies and continue to support a company through multiple investment rounds, often spanning between five and ten years. Venture-backed startups generally receive equity investment from multiple venture capital partnerships during each stage of the company's growth. Many young companies begin with investment from the friends and family members of the company founders before attracting angel investors (that sometimes act as a syndicate of many investors), then receive venture capital financings that often include more syndicates in multiple rounds.

Many small startup businesses that receive investment from venture capitalists often will be considered reporting companies under the CTA. Young startups are resource-constrained enterprises and rarely have the regulatory sophistication, whether in-house or via external counsel, for complex compliance tasks. When a startup raises capital in a fundraising round it is often for a specific purpose, like hiring new employees, conducting further research, or launching new product lines. While NVCA believes the CTA will advance important transparency goals for certain corporate dealings, we urge FinCEN to create an efficient reporting system that exempts businesses if beneficial ownership transparency already has been achieved through other means and those that have been vetted such that there is low risk of money laundering facilitation. Unnecessary regulatory hurdles may draw resources from a startup's core business at a time when growth and job creation are paramount and create a new complication to the already difficult undertaking of entrepreneurship. The specific comments below are intended to minimize such impediments.

Ensure Uniform Exemptions for Private Funds and Their Advisers

The CTA exempts from the scope of the term "reporting company" many different types of entities, including two types of entities that meet the definition of an "investment adviser" under Section 202 of the Investment Advisers Act of 1940 ("Advisers Act"): (1) those registered investment advisers ("RIAs") that are registered with the Securities and Exchange Commission ("SEC"); and (2) those that are exempt reporting advisers ("ERAs") because they are advisers to "venture capital funds" as defined under Section 203(l) and Rule 203(l)-1 of the Advisers Act and have filed "Item 10, Schedule A, and Schedule B of Part 1A of Form ADV." 31 U.S.C. § 5336(a)(11)(B)(x) and (xi). A further exemption provided under (xviii) applies to any pooled investment vehicle that is operated or advised by a person as described in the above exemptions (RIAs and ERAs). Venture capital investors fall into one of these distinct regulatory categories dependent on an individual firm's investment activity.

It is important that FinCEN clearly recognize these exemptions for private funds and their advisers in the regulations implementing CTA. Venture capital investors already file beneficial ownership information pursuant to other regulations. CTA exemptions for RIAs and ERAs included in the statute reinforce the sound concept that, when beneficial ownership information

regarding an entity already is available for law enforcement use – specifically because it has been filed with the U.S. government (i.e. the Securities and Exchange Commission) pursuant to other regulations – the entity whose beneficial ownership information is already available should be exempted from the scope of the CTA term “reporting company.”

The list of specific exemptions, however, misses other advisers that file full Forms ADV, or at least the portions of Form ADV that provide information on beneficial ownership. In particular, the specific exemptions seemingly do not cover either: (1) ERAs that are “private fund advisers” under Section 203(m) and Rule 203(m)-1 of the Advisers Act, because they have only private fund clients and less than \$150 million under management; or (2) advisers with less than \$100 million under management that are required to register with a state securities authority rather than the SEC. For private fund advisers, this apparent lack of a specifically applicable exemption is because, while the exclusions from the definition of a reporting company reference venture capital advisers who make specified filings on beneficial ownership, they do not also reference private fund advisers who meet the same requirement. For state-registered advisers, the absence of a specifically applicable exemption is because the language references only federally registered, and not state-registered advisers – who almost invariably also file Forms ADV. Because these entities – like federally registered RIAs and ERAs that are advisers only to venture capital funds – almost always file beneficial ownership information via Form ADV (pursuant to non-CTA regulations), and because their beneficial ownership information accordingly is available to law enforcement, these entities and other Form ADV filers should be exempt from duplicative reporting under the CTA.

Fortunately, Congress anticipated that the list of specific exemptions might miss a few types of entities that should be exempted. In recognition of that possibility, the CTA provides a catch-all exemption for “any entity or class of entities” that FinCEN determines “would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering” or other crimes. 31 U.S.C. § 5336(a)(11)(B)(xxiv).

NVCA urges FinCEN to use this catch-all to exempt all entities that file form ADV, specifically private fund advisers with less than \$150 million under management and advisers with less than \$100 million under management who register with a state securities authority.¹ As with specifically exempted entities, there is no reason for mandating duplicative beneficial ownership reporting – such duplication would not be “highly useful in national security, intelligence, and law enforcement agency efforts.” 31 U.S.C. § 5336(a)(11)(B)(xxiv).

Ensure Full Utility for Exemption 21

Particularly for young companies that have received venture funding – an important exemption to the reporting company definition appears at 31 U.S.C. § 5336(a)(11)(B)(xxi) (“Exemption 21”). This exemption carves out those businesses that:

- employ more than 20 employees on a full-time basis in the United States;
- demonstrate more than \$5,000,000 in gross receipts or sales; and

¹ To the extent state-registered advisers do not file Forms ADV, FinCEN could condition an exemption for state-registered advisers on those filings.

- have “an operating presence at a physical office within the United States.”

The manifest intent is to exempt legitimate businesses, capturing instead shell businesses that may be used for money laundering or other criminal purposes. To further this end, NVCA suggests the following in connection with the three-prong test for Exemption 21.

With respect to the \$5,000,000 in gross receipts or sales criterion, this should include acquisition of shares in a company. The \$5MM threshold is a way to distinguish legitimate companies from shell companies engaged in illegal activity, yet many startups backed by venture capital can be pre-revenue for many years while they use equity investment to finance research and other growth activities. For example, a biotechnology or medical device startup can conduct R&D and clinical trials for a decade or longer without having made any revenue. In that respect, acquisition of \$5MM in company shares (or other ownership units) is indicative of a legitimate company seeking to grow and create value as much as the threshold of gross receipts or sales. We urge clarification that \$5MM in acquisitions of company shares will satisfy the sales prong of Exemption 21 and ensure there is no regulatory penalty for promising new startups that have been vetted by investors as legitimate operations but are pre-revenue or are early in the company’s existence.

With respect to the 20-employee requirement, FinCEN should clarify that working another job does not preclude being deemed a “full-time” employee for the start-up business, and that full-time means one’s primary employer or primary source of income. For example, a start-up employee who manages the start-up’s website and who also works part-time in a restaurant should not be precluded from being deemed a “full-time” employee at the start-up. The regulations implementing Exemption 21 should take into account that one third of American workers work part-time gig jobs; failing to recognize this fact may penalize startups.

Finally, with respect to the U.S. office requirement, we urge FinCEN to take into account the manner in which the world operates in a post-COVID environment. FinCEN should clarify that a “physical office” could be a residence and that an “operating presence” does not necessarily mean employees reporting regularly to an office building. Remote work will remain a fixture, especially for young, venture-backed startups, and the new beneficial ownership regulations should not penalize entities that do not return to (or perhaps never used) a traditional brick and mortar office building.

Eliminate Confusion Regarding Foreign Pooled Investment Vehicles

NVCA urges FinCEN to eliminate potential confusion with respect to the requirement that certain foreign pooled investment vehicles file certifications regarding an individual that controls that vehicle. As explained further below, the CTA provides that this certification requirement is applicable only to foreign pooled investment vehicles that are required to register in the United States. However, there are few, *if any*, foreign pooled investment vehicles that are required to register in the United States, and accordingly there are few, if any, foreign pooled investment vehicles that would be required to complete the certification pursuant to the CTA. FinCEN should so clarify.

Under the CTA, the certification requirement applies to entities (i) that are “formed under the laws of a foreign country” and (ii) that would be required to report standard beneficial ownership information but for exemptions that apply to certain advisors and funds that they advise. 31 U.S.C. § 5336(b)(2)(C). To have a reporting obligation in the first instance – such that (ii) is applicable – a company must be either 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.” 31 U.S.C. § 5336(a)(11)(A). By definition, foreign pooled investment vehicles are not U.S. companies. Accordingly, the certification requirement applies only to foreign pooled investment vehicles that are registered to do business in the United States. A registration requirement, however, applies to few, if any, foreign pooled investment vehicles, even if they have a significant U.S. nexus. For example, a Cayman fund may invest in the United States and/or have U.S. persons as investors but generally would have no registration requirement.

NVCA accordingly strongly encourages clarification that the certification requirement for foreign pooled investment vehicles has limited applicability.

Conclusion

NVCA appreciates this opportunity to provide comments. The new CTA beneficial ownership rules could have significant impact on the venture capital industry and the innovative American companies in which they invest. We urge FinCEN to remove potential points of confusion and tailor the rules to avoid burdening entities that are exempted entities and already report beneficial ownership pursuant to other regulations or that otherwise present low risk for facilitating money laundering.

NVCA looks forward to continuing to engage with FinCEN on these matters.