February 7, 2022

Via www.regulations.gov

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

Re: Docket Number FINCEN-2021-26548
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 this opportunity to comment on FinCEN's proposal regarding beneficial ownership information ("BOI") reporting requirements.

FinCEN's Notice of Proposed Rulemaking ("NPRM") addresses requirements of the Corporate Transparency Act ("CTA"), part of the Anti-Money Laundering Act of 2020. NVCA previously submitted comments[1] on an Advanced Notice of Proposed Rulemaking ("ANPRM") regarding the BOI rules and is appreciative of FinCEN's changes to the large operating company ("LOC") exemption reflected in the NPRM. However, we believe additional changes are warranted before the BOI rules are finalized, not only with regard to the LOC exemption, but also with regard to exemptions for certain fund advisers.

In particular, NVCA urges FinCEN to:

a. revise the LOC exemption so that it is more broadly applicable to early-stage companies that present a low risk of money laundering or other crimes, specifically by: (i) counting the sale of $5 million in company equity as sufficient to meet the sales requirement prong of the LOC exemption, and (ii) counting as a "physical office" a home office or shared space;

   and

[1] https://www.regulations.gov/comment/FINCEN-2021-0005-0126

b. extend the exemption for fund advisers that file BOI through the SEC's Form ADV to apply to state-registered and private fund advisers, as this would eliminate duplicative reporting of beneficial ownership information by state-registered and private fund advisers.

NVCA and the Role of Venture Capital

NVCA serves a diverse membership 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 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 and innovative product lines.

While NVCA believes the CTA will advance important transparency goals for certain corporate dealings, we urge FinCEN to create an efficient BOI reporting system that exempts businesses that have been vetted and manifest other indicia of low risk of money laundering or other financial crime, as well as businesses that are required to report beneficial ownership information pursuant to other laws. Unnecessary regulatory hurdles may draw resources from a startup's core business (and its investors) at a time when growth and job creation are paramount. The specific comments below are intended to minimize such impediments.

Ensure Full Utility for the Large Operating Company Exemption

As noted previously, the LOC exemption at 31 U.S.C. § 5336(a)(11)(B)(xxi) could cover some early-stage companies that have received venture funding. 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
- have "an operating presence at a physical office within the United States."

With regard to the first prong of this test, NVCA appreciates FinCEN's modification (since the ANPRM) to the definition of "full-time." The modification – which clarifies that working another job does not preclude an employee from being considered full-time for purposes of the LOC exemption – demonstrates the consideration that one third of American workers work part-time jobs. We urge further consideration and revisions to the following requirements to ensure this exemption is appropriately applicable to small companies that present low risk of money laundering or other crime.

First, NVCA believes the requirement of $5,000,000 in revenue or sales should include sales of shares in a company. Many startups initially operate as pre-revenue entities for extended periods of time – e.g., biotechnology or medical technology companies that require extensive focus on research and development while navigating clinical trials. As described above, startups often raise funds by selling shares in the company to venture capital firms, which are exempt from BOI reporting, reflecting the status of venture capital firms as regulated businesses. Venture capital investment in a company is typically preceded by diligence regarding a company's existing owners and management; products, services, and technology; and business plans.

The $5MM revenue/sales prong of the LOC exemption is sensible because such sales are indicators of company legitimacy and low likelihood of money laundering risk. The sale of $5MM in company equity generally is an even greater indicator of company legitimacy and low likelihood of money laundering risk, because the company selling equity generally has undergone significant vetting by investors. Clarifying that the sales prong of the LOC exemption can be satisfied by $5MM in sales of company equity would ensure there is no regulatory penalty for promising new startups that have been vetted by investors but have yet to make sales.

Second, with respect to the U.S. office requirement, we urge FinCEN to clarify that a "physical office" does not need to be a traditional company-specific office but can include a home office or shared office space. The COVID-19 pandemic has proven that established companies can thrive and be well maintained in a variety of physical spaces – including, perhaps especially, in homes. The BOI rules should not penalize established entities that operate without reliance on a traditional, company-specific office.

Ensure Uniform Exemptions for Private Fund Advisers to Minimize Duplicative Reporting

NVCA also urges that state-registered advisers and private fund advisers filing BOI using Form ADV should be afforded the same exempt treatment as federally registered advisers and venture capital fund advisers that file the same BOI using Form ADV.

The intent of the rule is to ensure that BOI is available to law enforcement and regulators. Since federally registered advisers or venture capital fund advisers already provide BOI using Form ADV, the NPRM provides an appropriate exemption for these advisers from what otherwise would be a duplicative reporting requirement under FinCEN's BOI rules. The same logic applies to state-registered advisers and private fund advisers that file BOI using Form ADV. There is no reason to require duplicative BOI reporting, and FinCEN has discretion to extend the exemption to those state-registered and private fund advisers.

The NPRM provides exemptions for two types of "investment advisers," as defined in the Investment Advisers Act of 1940 ("Advisers Act"): (1) registered investment advisers ("RIAs") that are registered with the SEC; and (2) exempt reporting advisers ("ERAs") that are exempt from SEC registration because they are advisers only to "venture capital funds" as defined by the Advisers Act, and have filed BOI using "Item 10, Schedule A, and Schedule B of Part 1A of Form ADV." Additionally, the NPRM's pooled investment vehicle exemption applies to entities that are operated or advised by these RIAs or venture capital fund advisers.

These exemptions reflect the intent of the CTA to ensure BOI is available to law enforcement and regulators. If an entity already files BOI with a governmental authority (e.g., the SEC) pursuant to other regulations, that entity should be exempted from what would be a duplicative reporting requirement under FinCEN's BOI rules. Federally registered advisers and venture capital fund advisers that file BOI using form ADV are, accordingly, exempt.

The same logic should apply to state-registered advisers and private fund advisers that file BOI using Form ADV. Some fund advisers cannot utilize the exemption from SEC registration for venture capital fund advisers because of the nature of the assets in which the relevant funds invest. For example, when an adviser's fund invests in digital tokens issued by startups, or in startup equity acquired through the secondary market, the adviser may not qualify as a venture capital adviser. Some of these advisers, however, may qualify for different exemptions from SEC registration – particularly those exemptions for private fund advisers with less than $150 million under management (for the federal private fund adviser exemption) or less than $100 million under management (for any state private fund adviser exemption).[2] Many of these advisers file BOI using form ADV.

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 BOI using 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. As with exempted entities under the current proposed rule, 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).

[2] Some of these advisers may be state registered, rather than federally registered, based only on advisory services they offer outside fund management and the size of their assets under management. For example, an adviser that provides advisory services to individual investors in addition to its venture capital or private funds, but has less than $100 million in assets under management, typically would register with state regulators.

Conclusion

NVCA appreciates this opportunity to provide comments on the NPRM. The regulations could have a significant impact on the venture capital ecosystem, particularly innovative young startups. We urge FinCEN to tailor the regulations to avoid burdening entities that already report beneficial ownership information pursuant to other regulations or that otherwise present low risk for facilitating money laundering. Thank you for your consideration of our views.

Sincerely,

Bobby Franklin

Bobby Franklin
President and CEO