FinCEN Beneficial Ownership Information Reporting:

Guidance for the Private Funds Industry

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INTRODUCTION

On September 30, 2022, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") published a final rule (the "Final Rule") implementing beneficial ownership information reporting requirements of the Corporate Transparency Act (the "CTA").[1] The Final Rule identifies which legal entities must report beneficial ownership information to the government, what information must be reported and when reports are due, and it is the first of three rulemakings that FinCEN plans to implement the CTA.

The Final Rule exempts from the reporting obligation 23 types of entities that are specifically identified in the CTA, and the preamble to the Final Rule provides some guidance on the rationale for and scope of these exemptions. However, many questions remain, particularly with respect to the implementation of these exemptions and relevant definitions in the private funds context. The following questions represent common queries we are receiving from participants in the private funds industry related to the Final Rule, and the answers to them are the consensus views of the undersigned law firms.

This document is being provided to clients and contacts of the authoring firms to facilitate consideration and implementation of the CTA's beneficial ownership reporting requirements. The document is not intended to, and does not, provide legal, compliance or other advice to any person, and receipt of this document does not constitute the establishment of an attorney-client relationship. As the facts and circumstances of any particular legal entity and/or its ownership structure may vary and/or raise unique questions or considerations, counsel should be consulted with respect to application of the Final Rule and the consensus views outlined below.

We have revised this document to account for certain guidance issued by FinCEN since our original publication. FinCEN may issue additional guidance in the future that addresses the matters described below, and any such guidance could provide interpretations that differ from

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[1] *Beneficial Ownership Information Reporting Requirements*, 87 Fed. Reg. 59498 (September 30, 2022), *available* here; *Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024*, 88 Fed. Reg. 83499 (November 30, 2023) (extending from 30 days to 90 days the initial reporting deadline for reporting companies created or registered to do business in the United States on or after January 1, 2024 and before January 1, 2025), *available* here.

those we have articulated.[2] As a result, the positions described herein should be reviewed in conjunction with any applicable guidance that FinCEN may issue and advice from counsel regarding your specific situation. We do not undertake to update this document on issuance of additional FinCEN guidance, and interested persons should continue to review and evaluate FinCEN guidance as it is released.

FREQUENTLY ASKED QUESTIONS

1. **Are relying advisers exempt from beneficial ownership reporting under the Final Rule?**

Yes, the consensus view of our firms is that relying advisers identified as such on the Form ADV of an investment adviser registered with the Securities and Exchange Commission (the "SEC") are exempt from beneficial ownership reporting under the Final Rule.

The Final Rule exempts from the reporting requirement any investment adviser as defined in Section 202 of the Investment Advisers Act of 1940 (the "Advisers Act")[3] that is registered with the SEC under the Advisers Act (an "RIA").[4]

For a variety of tax, legal and regulatory reasons, an adviser to private funds, including an RIA, may establish separate legal entities through which it conducts a single advisory business. The SEC, pursuant to a regime known as "umbrella registration," permits the RIA and its affiliated advisory entities to register under the Advisers Act on a single Form ADV – subject to certain conditions – rather than requiring the affiliates (defined by the SEC as "relying advisers") to complete multiple Forms ADV that would reflect a shared business with the main RIA (defined by the SEC as the "filing adviser"). The SEC formally recognized umbrella registration in 2016 by codifying into Form ADV the practice its staff had endorsed in an interpretive release issued in 2012, one of the conditions of which was that any relying adviser be independently eligible to register with the SEC. As a result, relying advisers are investment advisers registered with the

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2 FinCEN guidance published to date is available via FinCEN's website, here. Currently available information includes a Small Entity Compliance Guide (the "FinCEN BOI Compliance Guide") and Frequently Asked Questions ("FinCEN BOI FAQs"), last updated January 12, 2024.

3 15 U.S.C. §80b-2.

4 31 CFR 1010.380(c)(2)(x).

SEC.[5] Umbrella registration reflects the independent registration requirement in the instructions to Form ADV and in Schedule R to the Form ADV.[6]

Thus, if not for umbrella registration under a filing adviser's Form ADV, each relying adviser identified as such would separately register with the SEC. An RIA's relying advisers are considered by the SEC to be registered advisers, and it is clear these relying advisers are themselves "investment adviser[s] as defined in section 202" of the Advisers Act that are "[r]egistered with the [SEC] under the [Advisers Act]" for purposes of the beneficial ownership reporting exemption for RIAs in the Final Rule. In accordance with this position, references below to "RIAs" in the context of beneficial ownership reporting requirements and applicable exemptions under the Final Rule are intended to include any filing adviser and/or relying adviser, as applicable.

2. Are general partners ("GPs") and managing members within a private fund structure exempt from beneficial ownership reporting?

As a threshold matter, we note that a GP or managing member of a private fund must be created through the filing of a document with a secretary of state or similar office under the law of a state or Indian tribe, or registered to do business in the United States through such a filing, in order to be in scope for the beneficial ownership reporting obligation under the Final Rule.[7] We expect many, if not most, GPs and managing members that are U.S. entities to be in scope, and we expect most non-U.S. GPs and managing members to be out of scope (*i.e.*, we expect they are not likely to be registered to do business in any state in the United States). To the extent an entity serving as a GP or managing member is in scope under the Final Rule, there are multiple potentially applicable exemptions from the reporting obligation, including the exemption for RIAs discussed above.[8]

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5 *See* SEC, Division of Investment Management, No-Action Letter, American Bar Association, Business Law Section (January 18, 2012) (the "2012 ABA No-Action Letter") (providing guidance allowing certain advisers "to use a single registration (*i.e.*, to register on a single Form ADV), provided that they conduct a single advisory business" and stating staff's position that "*each relying adviser is an investment adviser registered with the Commission* and, as such, is required to comply with all of the provisions of the Advisers Act and the rules thereunder" (emphasis added)); Form ADV and Investment Advisers Act Rules, 81 Fed. Reg. 60418, 60433, 60436 (September 1, 2016) (the "Form ADV Amendments") ("codify[ing] umbrella registration for certain advisers to private funds" under the staff no-action guidance "to *consolidate the multiple registration forms that may otherwise have been required* by [multiple investment advisers operating] a single advisory business" (emphasis added)); SEC, Division of Investment Management, Form ADV and IARD Frequently Asked Questions, Schedule R (June 12, 2017) (the "ADV/IARD FAQs") (noting the 2012 staff position on relying advisers is superseded by the Form ADV Amendments, which codified umbrella registration).

6 *See* Form ADV: General Instructions, Question 5; Form ADV, Part 1A, Schedule R, Section 2.A.

7 *See* 87 Fed. Reg. at 59537; 31 CFR 1010.380(c)(1).

8 Although FinCEN declined to provide categorically that the exemption for RIAs "encompasses vehicles used by an investment adviser that serve as general partners or managing members of pooled investment vehicles

a. RIA Exemption

A GP or managing member of a private fund that (i) is a special purpose vehicle ("SPV") created by an affiliated SEC-registered investment adviser, (ii) fits within the definition of "investment adviser" under the Advisers Act and (iii) meets the relevant conditions set forth in the SEC Staff's 2005 and 2012 no-action letters to the American Bar Association is deemed to be an investment adviser registered with the SEC (a "GP RIA").[9] Such a GP RIA therefore should qualify for the RIA exemption, which applies to SEC-registered "investment advisers."[10]

b. Subsidiary Exemption

A GP or managing member may qualify for the subsidiary exemption where its ownership interests are controlled or wholly owned, directly or indirectly, by an entity that is exempt under any of the RIA, securities reporting issuer or large operating company exemptions, although we acknowledge this is a relatively unusual structure. Additionally, any entity below an exempt GP whose ownership interests are controlled or wholly owned by the exempt GP would also itself qualify for the subsidiary exemption. We discuss "control" in the context of the subsidiary exemption in the response to Question 6 below.

c. Securities Reporting Issuer Exemption

Publicly traded companies that either are issuers of a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act")[11] or are required to file supplementary and periodic information under Section 15(d) of the Exchange Act are exempt under the securities reporting issuer exemption. As a GP or managing member is not likely to itself be a securities reporting issuer, the availability of this exemption for GPs or managing members may be limited. That said, as noted above, a GP or managing member may qualify for the subsidiary exemption where its ownership interests are controlled or wholly owned, directly or indirectly, by an entity that is exempt under the securities reporting issuer exemption.

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advised by the investment adviser," FinCEN specifically acknowledged that these entities used by an exempt adviser could themselves satisfy the criteria for an exemption. 87 Fed. Reg. at 59544-45.

9 For instance, such an SPV designates the RIA to undertake fund management services for the private fund, has no personnel other than those employed by the RIA and is subject to SEC examination. *See* 2012 ABA No-Action Letter, *supra*; SEC, Division of Investment Management, No-Action Letter, American Bar Association Subcommittee on Private Investment Entities (December 8, 2005), Section G, Question 1.

10 In contrast, family offices excluded from the "investment adviser" definition under the SEC's so-called "Family Office Rule" may be subject to the beneficial ownership reporting requirement, unless another exemption from the beneficial ownership reporting requirement applies. *See* 17 CFR 275.202(a)(11)(G)-1.

11 15 U.S.C. §78a *et seq*.

d. Large Operating Company Exemption

Entities with more than 20 full-time U.S.-based employees and an operating presence at a physical office in the United States that report over $5 million in U.S.-source gross receipts in their U.S. federal tax filings from the previous year are exempt pursuant to the large operating company exemption. For an entity that is part of an affiliated group of corporations[12] that filed a consolidated return, the applicable amount is the amount reported on the consolidated return for this group. Note, however, that FinCEN declined to permit companies to consolidate employee headcount across affiliated entities and, therefore, the availability of this exemption for GPs or managing members may be limited.[13] That said, as noted above, a GP or managing member may qualify for the subsidiary exemption where its ownership interests are controlled or wholly owned, directly or indirectly, by an entity that is exempt under the large operating company exemption.

3. Is an ultimate GP vehicle that appears above fund-specific GPs in an asset management company's organizational structure exempt from beneficial ownership reporting?

There is no categorical exemption for the parent company of entities that are exempt from beneficial ownership reporting.[14]

For some sponsors, these ultimate GP vehicles are likely to have beneficial ownership reporting obligations. For others, ultimate GP vehicles appearing above fund-specific GPs may be subsidiaries of an entity that is exempt under the RIA, securities reporting issuer or large operating company exemption. In the latter case, the ultimate GP vehicle above fund-specific GPs may be exempt from reporting through the subsidiary exemption where its ownership interests are controlled or wholly owned, directly or indirectly, by an exempt entity near the top of the larger asset management company's organization. This analysis may require a close review of the organizational structure of the asset management company. We discuss "control" in the context of the subsidiary exemption in the response to Question 6 below.

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12 As defined in 26 U.S.C. §1504.

13 *See* 87 Fed. Reg. at 59543.

14 *Id*. (declining to interpret the subsidiary exemption to include holding companies owning only exempt entities because "the subsidiary exemption focuses on subsidiaries, not parents, of exempt entities").

4. Are exemptions available for a holding company that owns or controls an RIA or a GP RIA?

No, not presumptively on the basis that it owns or controls an RIA or a GP RIA. FinCEN considered whether to exempt holding companies owning only CTA-exempt entities and expressly declined to do so.[15] Of course, other exemptions may apply (*e.g.*, as discussed in response to Question 3 above, the holding company could be controlled or wholly owned by an exempt entity within the broader asset management company's organization), and the relevant facts and circumstances should be considered.

5. Is an SPV or other subsidiary under an exempt pooled investment vehicle ("PIV") presumptively exempt from beneficial ownership reporting?

No, not presumptively on the basis that it is a subsidiary of an exempt PIV, although we discuss potential paths to an exemption in the response to Question 6 below.

As noted in part (b) of the response to Question 2 above, the CTA provides a so-called "subsidiary exemption" for entities whose ownership interests are controlled or wholly owned, directly or indirectly, by one or more enumerated types of exempt entities. However, PIVs are excluded from the list of enumerated exempt entities whose subsidiaries are automatically exempt from CTA reporting.[16] Thus, being a subsidiary of a PIV is not an automatic basis for an exemption under the CTA.[17]

FinCEN explained in the preamble to the Final Rule that it would not adopt a "blanket" exemption for subsidiaries of PIVs simply by virtue of ownership but that such entities may nonetheless be eligible for an exemption, depending on the applicable facts and circumstances: "While distinct legal entities that are wholly owned by exempted pooled investment vehicles may be integrally related to the administration of those pooled investment vehicles, whether they are exempt from the reporting requirements of the CTA depends on whether they themselves, in

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15 *Id*.

16 Under the Final Rule, an exempt "pooled investment vehicle" includes any company operated or advised by an SEC-registered investment adviser that would be an investment company under Section 3 of the Investment Company Act of 1940 but for the exclusion provided from that definition by Section 3(c)(1) or (7) thereof that is identified by its legal name by the applicable investment adviser in its Form ADV. *See* 31 CFR 1010.380(c)(2)(xviii), (f)(7).

17 Money services businesses and entities that exist exclusively to assist or govern tax-exempt entities are also excluded from the list of enumerated exempt entities whose subsidiaries automatically enjoy an exemption from beneficial ownership reporting. *See* 31 CFR 1010.380(c)(2)(xxii), (c)(2)(vi), (c)(2)(xx).

their own right, meet the criteria of an exemption."[18] The availability of an exemption, therefore, will not turn on the exempted status of the parent PIV, but an exemption may be available, as discussed below.

6. Is another exemption available for SPVs or other subsidiaries owned by an exempt PIV? (updated February 13, 2024)

Below-the-PIV entities "whose ownership interests are controlled …, directly or indirectly, by" an exempt entity—*i.e.*, other than an exempt PIV—***may*** qualify for a reporting exemption,[19] but the reporting status of any SPV, holding company or other entity owned by a PIV must be evaluated on a case-by-case basis to see if the entity's ownership interests could be deemed to be controlled by an entity (again, *other than the PIV*) that is itself exempt from reporting. Although (as noted above) the subsidiary exemption is not presumptively available for entities by virtue of their status as subsidiaries of an exempt PIV, entities whose ownership interests are controlled by certain exempt entities other than a PIV may be exempt from beneficial ownership reporting under the Final Rule.

As explained above in response to Question 5, FinCEN stated in the preamble to the Final Rule that "whether [entities owned by PIVs] are exempt from the reporting requirements of the CTA depends on whether they themselves, in their own right, meet the criteria of an exemption."[20] Because the Final Rule does not create a blanket exemption for these below-the-PIV entities, it is important to consider the nature of ownership and control of each SPV or other subsidiary entity owned by a PIV.

In pursuing this analysis, we consider what the phrase "whose ownership interests are controlled" by an exempt entity means. Neither the Final Rule nor the regulatory preamble defines "control" for purposes of the subsidiary exemption. On January 12, 2024, FinCEN issued guidance stating that an exempt entity must "entirely control[] all of the ownership interests" in the relevant entity for the subsidiary exemption to apply, again without defining control.[21]

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[18] 87 Fed. Reg. at 59544.

[19] *See* 31 CFR 1010.380(c)(2)(xxii). Our discussion of the term "control" throughout this document is limited to the use of that term in the Final Rule and CTA. The discussion does not apply to the definition of the term "control" for purposes of any of the federal securities laws, analysis of which could lead to different conclusions for purposes of those laws than those conclusions applied for purposes of the Final Rule and beneficial ownership reporting requirements.

[20] 87 Fed. Reg. at 59544.

[21] *See* FinCEN BOI FAQs, FAQ L.6, *available* here.

To discern what "control" may mean, we consider the Final Rule's definition of related terms in the context of a natural person's relationship to a reporting company. For example, the Final Rule provides that "substantial control" may be found where an individual serves as a senior officer, has authority over the appointment or removal of any senior officer or a majority of the board of directors or similar body, has substantial influence over important business, financial or corporate decisions or has similar indirect or direct substantial control (including through board representation or control over intermediary entities that exercise substantial control) (the "substantial control" definition).[22] The Final Rule also defines the term "ownership or control of ownership interest" in language that tracks the subsidiary exemption's application to an entity "whose ownership interests are controlled or wholly owned" by certain exempt entities.[23] Under this definition, an individual may "own or control an ownership interest" in an entity through a contract, arrangement, understanding, relationship or otherwise, including through ownership or control of intermediary entities that separately own or control the entity's ownership interests (the "indirect ownership" definition).

Based on the foregoing, we believe an RIA or a GP RIA that, for example, has control over important decisions of a PIV (per the substantial control definition above) could be viewed to indirectly "control" the ownership interests of an SPV or other entity owned by the PIV for purposes of the subsidiary exemption by virtue of its control over the PIV that owns the SPV or other PIV subsidiary (per the indirect ownership definition above).[24] We believe such an SPV or other PIV subsidiary could be treated as exempt from beneficial ownership reporting where there are no third parties (*e.g.*, senior officers or individuals exercising substantial control over it who are not affiliated with the RIA or GP RIA) who would otherwise be reported on a beneficial ownership report filed by the entity and where the RIA's control over important decisions of the PIV gives it entire control of the ownership interests in the SPV.[25]

We believe a result to the contrary would provide no law enforcement benefit and would be inconsistent with the exemption framework in the CTA. That is, for example, a beneficial

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22 *See* 31 CFR 1010.380(d)(1)(i). It should be noted that "substantial control" for purposes of beneficial ownership reporting should be assessed based on the definition and guidance provided by FinCEN in the Final Rule. Although "substantial control" in this context may draw on or overlap with definitions of "control" under other federal regulatory or statutory provisions, FinCEN expressly declined to consider any such definitions dispositive. *See* 87 Fed. Reg. at 59528; *Beneficial Ownership Information Reporting Requirements*, 86 Fed. Reg. 69920, 69934 (*proposed* December 8, 2021). "Substantial control" for beneficial ownership reporting purposes is not dispositive of "control" for purposes of the Advisers Act or Investment Company Act of 1940, and vice versa.

23 *See* 31 CFR 1010.380(d)(2)(ii). "Control" is not separately defined for this purpose.

24 As described in the response to Question 2, the GP of a fund operated by an RIA is deemed registered with the SEC and, therefore, the GP RIA's control over a PIV could bring below-the-PIV SPVs in scope for the subsidiary exemption. Alternatively, some sponsors have structures in which the RIA itself can be said to indirectly control the PIV and, therefore, the ownership interests of its subsidiaries. The result is the same.

25 We note in this regard FinCEN's concerns related to the ability of an entity only partially owned by exempt entities to shield beneficial owners from disclosure. 87 Fed. Reg. at 59543.

ownership report filed by a subsidiary of a PIV, where that subsidiary's ownership interests are entirely controlled by an SEC-registered investment adviser and there is no third party exercising substantial control (*e.g.*, a third-party senior officer of the subsidiary) or holding an ownership interest in the subsidiary, would contain information that FinCEN has already determined is not necessary to include in its beneficial ownership database: such a report would identify control persons of PIVs, RIAs and GP RIAs, all of which are exempt from beneficial ownership reporting.

We outline this example and additional simplified scenarios below to illustrate this interpretive approach. Of course, different scenarios and more complex structures will require further analysis, and there may be situations in which reporting would be more appropriate than applying the subsidiary exemption.

(a) SPV 100% owned by a PIV that is controlled by an RIA or a GP RIA: Applying the analysis set forth above, we believe it could be reasonable to treat this SPV as exempt from beneficial ownership reporting pursuant to the subsidiary exemption. As described above, the PIV's GP RIA or RIA, which is an exempt entity, can be viewed to have indirect control over the SPV's ownership interests under the relevant definitions provided by FinCEN by virtue of its control over the PIV. If the SPV were to file a beneficial ownership report, the report would contain only information that FinCEN has already determined is not necessary to include in its beneficial ownership database (namely, information about control persons of entities that are exempt from reporting). However, it may be prudent to consider whether any of the limited partners in the PIV possesses significant rights (*e.g.*, via the limited partnership agreement or side letter) such that the PIV's GP RIA or RIA does not entirely control the ownership interests of the SPV.

(b) SPV 100% owned by multiple PIVs with the same RIA or GP RIA: For the reasons articulated in scenario (a), we believe it could be reasonable to treat this SPV as exempt from beneficial ownership reporting pursuant to the subsidiary exemption.

(c) SPV 100% owned by PIVs that are advised by multiple RIAs or GP RIAs unaffiliated with one another: We believe the rationale articulated in scenario (a) applies equally here and, thus, believe it could be reasonable to treat this SPV as exempt from beneficial ownership reporting pursuant to the subsidiary exemption.

(d) SPV majority owned by a PIV that is controlled by an RIA or a GP RIA, with a minority (less than 25%) stake owned by a third party with no control rights: This scenario requires a more nuanced analysis than scenarios (a)-(c) given the minority ownership stake. There may be situations in which the RIA or GP RIA has entire control through contractual or other means over the SPV's ownership interests, notwithstanding

the minority stake. For example, the RIA or GP RIA may have the right to restrict the transferability of ownership interests, to reorganize the corporate form of the legal entity (and thereby reorganize, redistribute, reallocate, etc., the ownership interests in that entity), to take other actions relating to ownership interests and to take necessary actions to effectuate those other rights. Further, as the third party owns less than 25% of the SPV and has no control rights, the SPV would have no beneficial ownership information to report beyond the information FinCEN has already determined is not necessary to include in its beneficial ownership database (*i.e.*, information about control persons of the exempt RIA). Reporting would thus appear to provide no benefit to law enforcement and be inconsistent with the CTA's exemption framework. In such a situation, we believe it could be reasonable to treat the SPV as exempt from reporting pursuant to the subsidiary exemption.[26]

(e) SPV majority owned by a PIV that is controlled by an RIA or a GP RIA, with a minority (less than 25%) stake owned by a third party with some control rights over the SPV: Assuming the third-party owner does not have control over the SPV's ownership interests (as discussed in scenario (d)), we believe the analysis here may turn on whether any individual affiliated with the third-party owner can be viewed to have "substantial control" over the SPV.[27] If so, we believe the better view may be for the SPV to file beneficial ownership reports with FinCEN. A contrary result would appear to "shield" from reporting the third-party individual with substantial control, whose information would otherwise be included in FinCEN's database. Additionally, substantial control rights over the SPV could be viewed to provide the minority holder with some control over the SPV's ownership interests.

(f) SPV majority owned by a PIV that is controlled by an RIA or a GP RIA, with a minority (but 25% or greater) stake owned by a third party, with or without control rights: In many cases, we believe this SPV likely would file beneficial ownership reports with FinCEN. If the third party is an individual, application of the subsidiary exemption would appear to result in "shielding," as the individual owning 25% or more of the SPV may need to be reported.

We do not view FinCEN's FAQ L.6, released on January 12, 2024, as fundamentally inconsistent with these scenarios as laid out in the September 2023 version of this document, and our revisions herein are intended to clarify our positions' alignment with FinCEN's recent

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[26] Where the minority owner is investing into the SPV through a separately organized feeder, rather than directly, that feeder vehicle may have its own beneficial ownership reporting obligations, which would need to be separately considered.

[27] Substantial control is discussed above and also in response to Question 17 below.

guidance.[28] In particular, the language of the FAQ, combined with the text of the CTA and the preamble and text of the Final Rule, suggest that the subsidiary exemption can be satisfied in the private funds context where the above-described contractual rights exist. Indeed, in our experience, it is difficult to identify other commercially available rights of control over ownership interests that are not held by the RIA or GP RIA in these situations. However, we caution that there may be circumstances where it may be reasonable to conclude that the ownership interests of a specific entity are not entirely controlled by another exempt entity and, in all cases, this determination will require detailed facts-and-circumstances analysis.

7. Is "control" under the subsidiary exemption found only where there is sole ownership by a PIV? How might the analysis change where a below-the-PIV SPV is majority owned by the PIV but also has some minority ownership interests (for instance, co-investors or operating company management)? (updated February 13, 2024)

As noted above in response to Question 6, the subsidiary exemption may apply to subsidiaries with ownership interests that are entirely controlled ***or*** wholly owned by an exempt RIA or GP RIA. To our view, the use of "or" in the subsidiary exemption suggests that there must be situations where an exempt entity does not own 100% of the ownership interests of a subsidiary but nevertheless controls such ownership interests. However, FinCEN also declined to extend the exemption for "wholly owned" entities to those that are "majority-owned" by certain exempt entities because this approach would, in FinCEN's view, extend the exemption farther than was intended by the CTA.[29] In particular, and as noted above, FinCEN sought to prevent entities only partially owned by exempt entities from shielding all of their beneficial owners from disclosure.[30]

Thus, we believe there may be limits to the subsidiary exemption if an SPV's ownership interests are not wholly owned by one or more exempt PIVs. Lack of whole ownership may raise a question, depending on the facts and circumstances, as to whether beneficial owners of the SPV may be shielded from disclosure or whether the ownership interests of the SPV can be considered entirely controlled by the PIV's GP RIA or RIA.

Accordingly, if a GP RIA or an RIA of one or more PIVs has control over the ownership interests of a below-the-PIV entity (as discussed in scenario (d) in the response to Question 6 above), this entity arguably would be exempt from reporting under the subsidiary exemption, even if the exempt investment adviser's control is not a result of the SPV's sole ownership by a PIV or PIVs. However, as set out in the examples in response to Question 6 above, one factor to

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28 *See* FinCEN BOI FAQs, FAQ L.6, *supra*.

29 87 Fed. Reg. at 59543.

30 *Id*.

consider is whether an individual owns a 25% or greater ownership interest in, or exercises substantial control over, the below-the-PIV entity. In that situation, we believe the below-the-PIV entity may need to report its beneficial ownership information to FinCEN because otherwise a "beneficial owner" may be shielded from disclosure. Thus, for example, a PIV subsidiary that has owners with passive ownership interests may nevertheless be exempt under the "control" prong of the subsidiary exemption if it can be reasonably concluded that the below-the-PIV entity's ownership interests are entirely controlled by an RIA or a GP RIA.[31] In contrast, under-the-PIV entities with certain minority interest holders and/or persons outside the exempt investment adviser who exercise substantial control may need to report their beneficial ownership to FinCEN.

8. Are exemptions available for portfolio companies owned by a PIV? (updated February 13, 2024)

As noted in response to Question 2 above, the large operating company exemption excuses an entity from reporting if it (i) directly employs more than 20 full-time U.S.-based employees, (ii) reported $5 million or more in U.S.-source gross receipts to the IRS in the prior year (on a consolidated basis) and (iii) has an operating presence at a physical office within the United States (meaning an office at which the entity regularly conducts its business that the entity owns or leases and that is physically distinct from the place of business of any other unaffiliated entity). We expect that many portfolio companies will meet this exemption (and that portfolio company subsidiaries will be exempt to the extent those subsidiaries are wholly owned, or their ownership interests are controlled, by an exempt portfolio parent company).

For portfolio companies that do not meet the large operating company exemption, we believe the analysis provided in response to Questions 6 and 7 above may be applicable in some situations. In other words, a portfolio company that is wholly owned by a PIV operated by an RIA or a GP RIA and whose ownership interests are indirectly controlled entirely by the PIV's RIA or GP RIA could, theoretically, fit within the scope of the subsidiary exemption.

9. Are exemptions available for hard-wired feeders?

A hard-wired feeder required by its governing documents to invest in a downstream vehicle advised by an RIA is itself considered to be operated or advised by the RIA. Thus, if the hard-wired feeder satisfies the "pooled investment vehicle" definition under the Final Rule (*i.e.*, it would be an investment company but for Section 3(c)(1) or (7) of the Investment Company Act

[31] See, for example, scenarios (d) and (e) in the response to Question 6 above.

of 1940 (the "ICA")[32] and is identified by its legal name in the RIA's Form ADV)[33] or otherwise qualifies for an exemption, it is exempt from beneficial ownership reporting.

10. Are exemptions available for funds of one?

If a fund of one is operated or advised by an RIA and satisfies the "pooled investment vehicle" definition under the Final Rule (meaning that it would be an investment company but for Section 3(c)(1) or (7) of the ICA and is identified by its legal name in the RIA's Form ADV), it is exempt from beneficial ownership reporting. FinCEN stated in the preamble to the Final Rule that the term "pooled investment vehicle" "encompasses a wide variety of investment products with a wide range of names and structures…. [A]s a general principle, … a vehicle's eligibility for [the PIV] exemption does not hinge on its nominal designation, but rather on whether the vehicle or entity satisfies the elements articulated in the final regulatory text."[34]

Alternatively, another exemption from beneficial ownership reporting may be available. For example, a fund of one could qualify for the subsidiary exemption if its ownership interests are controlled or wholly owned by an institutional investor that is itself exempt from reporting. The specific facts and circumstances would need to be considered.

11. Are exemptions available for private equity joint ventures?

We believe private equity joint ventures (*e.g.*, businesses in which a private equity fund invests with one or more other parties) may be assessed pursuant to the guidance provided in response to Questions 6, 7 and 8 above.

12. Are exemptions available for 3(c)(5) or 3(c)(11) funds?

The Final Rule exempts from beneficial ownership reporting any PIV that is operated or advised by an exempt bank, credit union, broker-dealer or investment adviser and then separately defines the term "pooled investment vehicle" to mean (a) any investment company as defined in Section 3(a) of the ICA and (b) any company that (i) would be an investment company under Section

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32 15 U.S.C. §80a-3.

33 *See* 31 CFR 1010.380(f)(7).

34 87 Fed. Reg. at 59544; *see also* ADV/IARD FAQs, Form ADV: Item 5.D (SEC staff "believes … there are some facts and circumstances in which it may be appropriate for an adviser to treat a single-investor fund (also known as a 'fund of one') as a pooled investment vehicle"). It is our experience that, in practice, many RIAs consider funds of one that they advise to be PIVs and treat them as "private funds" under the Advisers Act (including for Form ADV reporting and other purposes).

3(a) but for the exclusion provided from that definition in Section 3(c)(1) or (7) of the ICA *and* (ii) is identified by its legal name in the applicable investment adviser's Form ADV.[35]

Some PIVs that limit their investors to accredited investors or qualified purchasers and, therefore, are investment companies but for Section 3(c)(1) or (7) of the ICA could potentially also qualify for other ICA exemptions from the definition of the term "investment company," including exemptions under ICA Section 3(c)(5) or 3(c)(11).[36] To be eligible for the PIV exemption from beneficial ownership reporting under the Final Rule, a fund would be required to qualify under ICA Section 3(c)(1) or (7) and be identified as a private fund in the RIA's Form ADV.[37]

Alternatively, a 3(c)(5) or 3(c)(11) fund could qualify for another exemption from beneficial ownership reporting. For example, such a vehicle could, depending on the relevant facts and circumstances, qualify for the subsidiary exemption if its ownership interests are controlled or wholly owned, directly or indirectly, by one or more other exempt entities, as discussed in response to Questions 6, 7 and 8 above.

13. Are exemptions available for business development companies? (updated February 13, 2024)

Many business development companies ("BDCs") qualify for the securities reporting issuer exemption. Additionally, some BDCs, in particular upon their formation, rely on the Section 3(c)(7) exclusion from the definition of "investment company" under the ICA and, as such, may qualify for the PIV exemption (assuming they are identified on the applicable RIA's Form ADV). A BDC would also qualify for the PIV exemption if it is an investment company as defined in Section 3(a) of the Investment Company Act and it is advised or operated by an RIA.

We do not think a business development company qualifies for the investment company exemption from beneficial ownership reporting, as this exemption applies to an investment

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35 31 CFR 1010.380(c)(2)(xviii); 31 CFR 1010.380(f)(7).

36 *See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*, 76 Fed. Reg. 39645, 39668 (July 6, 2011) (acknowledging that funds may qualify for multiple exclusions from the ICA "investment company" definition). We note that, as a threshold matter, beneficial ownership reporting applies only to corporations, limited liability companies and other entities created by the filing of a document with a secretary of state or similar office (as well as non-U.S. entities registered to do business in the United States by the filing of such a document). If a vehicle (*e.g.*, a 3(c)(11) fund) is organized as a common law trust or otherwise does not meet this threshold requirement, it would not be subject to the beneficial ownership reporting requirement.

37 We acknowledge that certain provisions of the federal securities laws treat a 3(c)(1) or (7) vehicle differently from one that relies on another exclusion from the ICA's "investment company" definition. We believe a 3(c)(5) or 3(c)(11) fund that also qualifies for the 3(c)(1) or (7) exclusion under the ICA should be able to take advantage of the Final Rule's PIV exemption from reporting without prejudice to its treatment under the federal securities laws, but the relevant facts and circumstances would need to be considered.

company (as defined in Section 3 of the ICA) that is registered with the SEC under the ICA. Although a BDC is an investment company as defined under the ICA and is regulated by the SEC, it is not registered as an investment company with the SEC.

14. Does the Final Rule exempt all exempt reporting advisers?

No. The Advisers Act exempts two types of investment advisers from registration with the SEC: (i) those that solely manage qualifying venture capital funds, which are exempted by Section 203(l) of the Advisers Act ("venture capital fund advisers"), and (ii) those that solely manage private funds and have assets under management in the United States of less than $150 million, which are exempted by Section 203(m) of the Advisers Act ("private fund advisers"). Such "exempt reporting advisers" are not required to register with the SEC but must make an initial filing with the SEC and report certain information annually on Form ADV. The Final Rule exempts venture capital fund advisers from beneficial ownership reporting, but it does not include an exemption for private fund advisers.[38]

15. Are disregarded entities considered tax filers, such that they could potentially be eligible for the large operating company exemption?

The Final Rule exempts certain large operating companies from beneficial ownership reporting. Among other elements of the "large operating company" definition, an entity must have filed a federal income tax or information return demonstrating more than $5 million in gross receipts or sales.[39] Because disregarded entities do not file their own U.S. federal income tax returns, it is our view that they do not fall within the large operating company exemption. Any applicable exemption would apply only to the disregarded entity's owner, as the disregarded entity's results are included in the regarded owner's tax return.

16. Should an RIA consider including all of its advised 3(c)(1) and 3(c)(7) funds on its Form ADV to take advantage of the PIV exclusion?

As noted above, the Final Rule defines "pooled investment vehicle" to include a 3(c)(1) or (7) fund that is identified by its legal name in the applicable adviser's Form ADV (or will be so identified in the next annual updating amendment).[40] Thus, any 3(c)(1) or (7) vehicle that is not identified in the RIA's Form ADV will not satisfy the requirements for the PIV exclusion and may be required to file a beneficial ownership report with FinCEN, unless another exemption is

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38 *See* 87 Fed. Reg. at 59544-45 (declining to add exemptions for advisers not within the scope of the CTA's exemptions).

39 31 CFR 1010.380(c)(2)(xxi).

40 31 CFR 1010.380(f)(7).

available. Each RIA should review its own facts and circumstances and consider the potential implications of including on its Form ADV any vehicles that it does not currently include.

17. For purposes of determining what information to report if an entity in the private fund context is not exempt from beneficial ownership reporting, which individuals may be considered to exercise "substantial control" over a reporting company?

The Final Rule defines a "beneficial owner" as any individual who, directly or indirectly, either (1) exercises substantial control over a reporting company or (2) owns or controls at least 25% of the ownership interests of the company. The term "substantial control" is intended to encompass the key individuals (*i.e.*, natural persons) who stand behind a reporting company and direct the company's actions.

The Final Rule's definition of substantial control incorporates *de jure* and *de facto* components:

- *De jure*: any natural person who serves as a senior officer of a reporting company.
- *De facto*: any natural person who either (1) has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body) of a reporting company or (2) directs, determines or has substantial influence over important decisions made by the company.[41]

Under the Final Rule, beneficial ownership information must be reported for ***every*** individual who exercises substantial control over a reporting company (in contrast with FinCEN's customer due diligence rule, which requires the identification of only a single control person).[42]

For most reporting companies, identifying individuals who meet the *de jure* component of the substantial control definition should be a relatively straightforward exercise. The term "senior officer" is defined in the Final Rule and encompasses any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer or any other officer, regardless of official title, who performs a similar function (but excluding individuals who serve only as a corporate secretary or treasurer).[43]

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41 The Final Rule states that important decisions made by a reporting company include, without limitation, decisions regarding major expenditures or investments; issuances of equity; incurrence of significant debt; approval of the operating budget; selection or termination of business lines or ventures; compensation schemes and incentive programs for senior officers; entry into and performance of significant contracts; amendments of any substantial governance documents; and reorganization, dissolution or merger of the reporting company. 31 CFR 1010.380(d)(1)(i)(C).

42 31 CFR 1010.230(d)(2).

43 31 CFR 1010.380(f)(8); 87 Fed. Reg. at 59526.

By contrast, identifying individuals who meet the *de facto* component of the substantial control definition will require fact-based assessments.[44] In many cases, authority over the appointment or removal of senior officers or a majority of the board of directors will be memorialized in reporting companies' organizational documents. However, in some circumstances, functional authority to appoint or remove senior officers or directors may rest with a designated group of people or a single individual from firm leadership (*e.g.*, executive committee, chief investment officers) and may or may not be memorialized in an internal policy or written agreement. Further, as discussed below, the component of the substantial control definition focused on persons deemed to substantially influence important decisions of a reporting company, if interpreted broadly, could capture a broad swath of investment professionals, including individuals who generally would not be identified as control persons in any other context.

a. Executive Committee Members

A firm's executive committee generally has supervisory authority over key aspects of the firm's operations, including responsibility for setting long-term or strategic priorities for the firm. Although day-to-day decision-making commonly is delegated to individual committee members or other officers of the firm, for many firms, their structure may lead to a reasonable conclusion that executive committee members are the personnel who exercise substantial control over reporting companies' activities, on the basis that (1) all other personnel's authority ultimately derives from—and may be revoked by—the executive committee and (2) in practice, no important decisions (*e.g.*, selection or termination of business lines or ventures) are taken without the executive committee's direct or indirect approval. By contrast, in other cases, the roles of the executive committee members may be so far removed from day-to-day decision-making that they do not, in fact, exercise substantial influence over important decision-making.

b. Chief Investment Officers ("CIOs")

Within many investment firms, CIOs perform a broad supervisory role across the firm's investment activities, which may include the ability to appoint portfolio managers and investment committee members across fund structures. With this type of authority, CIOs could be deemed to exercise *de facto* substantial control through their ability to exercise substantial influence over key decisions by a reporting company. In other cases, the roles of CIOs may be so far removed from day-to-day decision-making that they do not, in fact, exercise substantial influence over important decision-making.

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[44] In making such fact-based determinations, firms should consider whether statements in internal policy documents may imply that specific individuals possess authority that would be sufficient to support a finding of substantial control (even though there may be compelling counterarguments in practice).

c. Directors

There appear to be reasonable arguments to support the position that directors should not automatically be deemed to exercise substantial control over a reporting company. In contrast to senior officers, the Final Rule does not explicitly require disclosure of directors of reporting companies. Rather, the Final Rule states that board representation is one way in which individuals "may" exercise substantial control over a reporting company,[45] implying that director status, by itself, does not constitute substantial control. Supporting this interpretation, the Final Rule requires disclosure of individuals who have authority over the appointment or removal of a *majority* of the board of directors (whereas authority over the appointment or removal of a *single* senior officer explicitly would be sufficient to constitute substantial control). Finally, we note that this interpretation would be consistent with the Committee on Foreign Investment in the United States ("CFIUS") regulations, from which the Final Rule's definition of "substantial control" was partially drawn.[46] Under the CFIUS regulations, board membership—by itself—generally is not sufficient to support a finding of control.[47]

There may be situations in which individual directors could be deemed to exercise substantial control, such as when an individual director's consent is required to authorize specific actions or the director can control decisions of the board (*e.g.*, as a result of weighted voting interest or supermajority voting requirements).[48] Notably, a consent right over the appointment or removal of senior officers would qualify as substantial control. Therefore, in assessing whether a director may exercise substantial control, consideration should be given to voting mechanics as well as investor consent rights.

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45 31 CFR 1010.380(d)(1)(ii).

46 *See* 86 Fed. Reg. at 69934.

47 *See* 31 CFR 800.208(e)(5).

48 FinCEN provides another example in the FinCEN BOI Compliance Guide of an individual who "[d]irects important decisions [of a reporting company] through board representation." FinCEN explains that this individual is a reportable beneficial owner of the reporting company because the individual "is on the company's board of directors ***and*** makes important decisions on the reporting company's behalf, thereby exercising substantial control over it." FinCEN BOI Compliance Guide, *supra* n. 2, at 28 (emphasis added). We do not believe this discussion in the FinCEN BOI Compliance Guide precludes our position above that directors of a company are not automatically deemed to exercise substantial control over it, as FinCEN's description of the relevant individual's role makes clear s/he "makes important decisions on the reporting company's behalf," thus triggering the individual's treatment as a beneficial owner exercising substantial control over the company. As noted above, the specific facts relevant to a company's individual directors will need to be considered. *Accord* FinCEN BOI FAQs, FAQ D.9, *available* here.

d. Portfolio Managers ("PMs")

PMs devise and implement investment strategies and processes to meet client objectives, manage portfolios and make investment decisions. In practice, however, the PM title may encompass an extensive pool of individuals of varying degrees of seniority and responsibility. Commonly, actual decision-making is vested with a team of senior PMs, upon whose instructions more junior PMs execute. In such situations, the senior PM team members each may be deemed to exercise substantial control.[49] In other cases, such as where PMs are appointed by a senior officer (*e.g.*, CIO) or team (*e.g.*, executive committee) and are subject to removal at any time, there may be compelling arguments that PMs do not exercise substantial control.

e. Investment Committee ("IC") Members

IC members participate in decision-making relating to reporting companies, including with respect to broad strategic issues and material investment and asset management recommendations. While, in many cases, no single IC member will have the ability to unilaterally cause or prevent important decisions of a reporting company, individual IC members may nonetheless be deemed to exercise substantial influence over such decisions. In other cases, such as where an IC operates primarily as a resource to an individual or a body with final decision-making authority, firms may reasonably conclude that no IC member exercises substantial control in such capacity.

f. Authorized Signatories

Various personnel may be delegated signature authority with respect to specified actions involving reporting companies. While certain actions for which signatory authority has been delegated may qualify as "key decisions made by the reporting company," there are compelling arguments that such delegation should not be equated with control, particularly where (1) the delegation may be revoked at any time and (2) in practice, the authorized signatory cannot take actions contrary to the instructions of more senior personnel.[50]

We provide the following simplified scenarios to illustrate this interpretive approach to determining which individuals may be considered to exercise substantial control over a reporting company. Of course, different scenarios and more complex structures will require further

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[49] *See* 87 Fed. Reg. at 59527 ("A reporting company may also be structured such that multiple individuals exercise essentially equal authority over the entity's decisions—in which case each individual would likely be considered to have substantial influence over the decisions even though no single individual directs or determines them."). Such individuals may comprise the PMs identified in offering documents pursuant to the Advisers Act, which could serve as a useful internal benchmark.

[50] In the ordinary course, certain authorized signatories may be deemed to possess substantial control in some other capacity (*e.g.*, CIO or PM).

analysis. Ultimately, each firm will need to consider its own unique structure and operational framework to assess which individuals exercise substantial control over its reporting companies.

(1) ***A non-exempt (i.e., reporting) portfolio company that is indirectly wholly owned by a single PIV***: To the extent a portfolio company consults with the PIV on "important decisions," there is a range of different individuals who might be said to directly or indirectly exercise substantial control over the portfolio company by virtue of their control, direct or indirect, over the PIV. For many private equity sponsors, this might include certain senior personnel, such as founders, IC members or other individuals identified as having control over the PIV. For other private equity sponsors, the deal teams that proposed investing in and manage the investment in the portfolio company might also be said to exercise substantial control. However, in our experience, most deal teams report to, take directions and instructions from and ultimately defer to more senior personnel (such as IC members or heads of funds) and, thus, in many situations would not have sufficient control to be deemed a reportable beneficial owner.

(2) ***A non-exempt (i.e., reporting) SPV that sits between the PIV and a portfolio company and is 100% controlled by such PIV***: Generally, scenario 2 would be similar to scenario 1 – *i.e.*, we might normally expect to see senior members of the fund, IC members and other senior personnel of the private equity sponsor identified as exercising substantial control, except that the deal team or other less senior individuals might also be identified as officers, directors or principals of the SPV such that they also might need to be identified as beneficial owners. Indeed, in these situations, there might be individuals who have been identified in corporate formation documents or reported to external parties as having control over the SPV, and our presumption (which can, in certain circumstances, be overcome) is that such individuals would be identified as beneficial owners.

(3) ***Same as scenario 1, but where there are multiple, unaffiliated funds invested in the portfolio company***: The analysis for this scenario would largely be similar to scenario 1, except that there may be some benefit to the PIVs coordinating with each other as to which individuals at each fund exercise substantial control over the portfolio company. There could be situations where one fund identifies a much larger list than the other fund of individuals who could be deemed to be beneficial owners, but a discussion between the funds might be appropriate to ensure that they view substantial control the same way and are appropriately identifying beneficial owners.

(4) ***Ancillary SPVs that sit outside the investment but are key components of the private equity corporate family***: These SPVs will need to be analyzed on a case-by-case basis but might include a longer or shorter list of fund-affiliated beneficial owners because of their unique circumstances. For example, such an SPV might have a longer list of

beneficial owners where a large number of fund-affiliated individuals are directly invested into the SPV or have voting or other contractual rights with respect to that entity. By contrast, another SPV might have an entirely different list of beneficial owners because fund-affiliated individuals sit outside the investment context – in this situation, IC members might not be deemed beneficial owners. Thus, these entities should be evaluated on a case-by-case basis.

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We are closely monitoring developments related to FinCEN's implementation of the beneficial ownership information reporting regime under the CTA. Please do not hesitate to reach out to any of the primary contacts below or your regular contacts at the undersigned firms with any questions.

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