

SBIA Statement for the Record
for the

U.S. House Small Business Committee
hearing entitled

*“Under the Microscope: Examining FinCEN’s Implementation
of the Corporate Transparency Act”*

2360 Rayburn Building at 10:00AM

April 30, 2024

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President
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On behalf of its members, the Small Business Investor Alliance (SBIA) submits the following statement for the record of the Small Business Committee hearing entitled “*Under the Microscope: Examining FinCEN’s Implementation of the Corporate Transparency Act.*”

Introduction

On July 24, 2023, SBIA sent the attached letter to federal regulators concerning the treatment of Small Business Investment Companies (SBICs) and Rural Business Investment Companies (RBIC) requesting confirmation that SBICs, RBICs, their general partners and investment advisors (collectively, the “Regulated Investment Entities”) qualified for exemption under the Corporate Transparency Act of 2021 (CTA). If regulators could not provide such confirmation, SBIC requested an express exemption for the Regulated Investment Entities pursuant to 31 USC 5336(a)(11)(B)(xxiv) because requiring BOI reporting by these entities would neither serve the public interest, nor be highly useful in national security, intelligence, or law enforcement efforts to detect or deter money laundering, financial terrorism, or other related serious tax and financial crimes.

At this time, federal regulators have not confirmed the Regulated Investment Entities are exempt nor granted an express exemption.

SBIA would like to thank the Committee for holding this important hearing to explore implementation of the CTA and would welcome the chance to work together on this matter going forward.

SBIA Letter to Regulators regarding CTA

See attached below.

July 24, 2023

BY ELECTRONIC TRANSMISSION

Ms. Heidi Cohen,
Regulatory Affairs Senior Counsel
Office of the General Counsel
U.S. Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

RE: Corporate Transparency Act (CTA) – Exceptions

Dear Ms. Cohen:

On behalf of its membership, the Small Business Investor Alliance (“SBIA”) urges the U.S. Department of the Treasury (“DOT”), in concurrence with the Justice Department (“DOJ”) and Department of Homeland Security (“DHS”), to confirm that all Small Business Investment Companies (“SBICs”) and Rural Business Investment Companies (“RBICs”), as well as their general partners and investment advisors (collectively, the “Regulated Investment Entities”), qualify for exemption under the Corporate Transparency Act of 2021 (“CTA”).¹

The SBIA is the national organization that represents small business funds and their investors, including SBICs, some non-SBICs, business development companies (“BDCs”), and the many banks and capital providers that invest in them. These funds make important economic development contributions to domestic job creation, retention, and improvement, including in under-served areas and among under-represented groups, and can provide a valuable vehicle for first-time fund managers, including founders of color and other emerging managers that focus on investments in small businesses.

For the reasons stated below, the SBIA urges you to confirm as soon as possible:

¹ The CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (Jan. 1, 2021) (the NDAA). Division F of the NDAA is the Anti-Money Laundering Act of 2020, which includes the CTA. Section 6403 of the CTA, among other things, amends the Bank Secrecy Act (BSA) by adding a new section 5336, Beneficial Ownership Information Reporting Requirements, to subchapter II of chapter 53 of title 31, United States Code.

- (1) that all SBICs and RBICs are permitted to rely on the exclusion from beneficial ownership (“BOI”) reporting under the CTA pursuant to 31 USC 5336(a)(11)(B)(xviii);
- (2) that all entities formed *exclusively* to act as the general partner of one or more SBICs or RBICs are permitted to rely on the exclusion from BOI reporting under the CTA pursuant to 31 USC 5336(a)(11)(B)(xxii); and
- (3) that all entities formed to act as the investment adviser/manager of one or more SBICs or RBICs are permitted to rely on the exclusion from BOI reporting under the CTA pursuant to 31 USC 5336(a)(11)(B)(xi).

Alternatively, if you cannot confirm such exclusions noted in items (1) – (3) above, the SBIA urges you to grant an express exemption for the Regulated Investment Entities pursuant to 31 USC 5336(a)(11)(B)(xxiv) because requiring BOI reporting by these entities would neither serve the public interest, nor be highly useful in national security, intelligence, or law enforcement efforts to detect or deter money laundering, financial terrorism, or other related serious tax and financial crimes.

Overview of the SBIC and RBIC Programs

SBICs are licensed, regulated and examined by the U.S. Small Business Administration (“SBA”). SBICs invest exclusively in domestic small businesses, which by statutory mission provide capital that is otherwise unavailable or in short supply to small businesses.² The SBIC program is in its seventh decade of operation. Congress established the SBIC program:

to improve and stimulate the national economy in general and the small-business segment thereof in particular ... to stimulate and supplement the flow of private equity capital and long-term loan funds which small-business concerns need for the sound financing of their business operations and for their growth, expansion, and modernization, and which are not available in adequate supply.
15 U.S.C. 662.

RBICs are licensed, regulated and examined by the U.S. Department of Agriculture (“USDA”). The RBIC program is a developmental venture capital program operated for the purpose of promoting economic development and the creation of wealth and job opportunities in non-metropolitan areas and among residents living in those areas.³

² Small Business Investment Act of 1958, Pub. L. 85-699 (Aug. 21, 1958) (15 U.S.C. 661 *et seq.*) SBICs may invest in a domestic “small business,” as defined under federal law, which does not engage in foreign activities (*i.e.*, more than half of employees and assets must be located within the United States) and is not engaged in a “prohibited business” (*e.g.*, passive businesses, real estate businesses, farmland purchases, project financings, foreign investments, associated suppliers, financing licensees or businesses contrary to the public interest. *See* 13 C.F.R. 107.720.

³ 15 USC 2009cc-1 (“*The purposes of the Rural Business Investment Program established under this subchapter are ... to promote economic development and the creation of wealth and job opportunities in rural areas and among individuals living in those areas by encouraging developmental capital investments in smaller enterprises primarily located in rural areas....*”)

In order to receive a license to operate as an SBIC or an RBIC, an investment fund must submit extensive information to the SBA or the USDA, as applicable, regarding the individuals and entities that will own and control the Regulated Investment Entities.⁴ In fact, all owners of the Regulated Investment Entities are required to be disclosed to the SBA along with certain information on such owners, including but not limited to their primary residential or business address and their social securities or employer identification number, as applicable. Moreover, any investor in an SBIC or RBIC that owns 10 percent (10%) or more of the SBIC/RIBC's private capital, must also disclose each of its 10 percent (10%) or more owners (the "Tier 2 Owners"), and each Tier 2 Owner must disclose each of its respective 10 percent (10%) or more owners, and so forth. In addition, FBI background checks are performed on each person that will control an SBIC/RBIC.

In addition to the information that is required to be disclosed in order to be granted an SBIC/RBIC license, there is ongoing regular reporting requirements to the SBA/USDA regarding fund operations, investments, and all of the investors in the fund, including the look-through ownership information described in the paragraph above. The prior written approval of the SBA/USDA is required to add any new investor of 10 percent or more of the SBIC/RBIC and for any changes of control of the general partner or investment adviser of the SBIC/RBIC. In addition, the SBA/USDA conducts frequent examinations for regulatory compliance on all SBICs and RBICs.⁵

The Federal Government, therefore, already has all of the beneficial ownership and control information on the Regulated Investment Entities that is necessary pursuant to the BOI reporting obligations of the CTA. Subjecting SBICs and RBICs to the CTA's BOI reporting requirements would not only be duplicative but would pose additional administrative and capital burdens on these entities that serve to fill gaps in the capital markets for U.S. small business owners.

Arguments for CTA Exemption

The purpose of the CTA is to support federal efforts to prevent criminals from laundering illegal monies through the U.S. financial system. Congress adopted 23 exceptions from the CTA's BOI reporting requirement because the exempted categories cover entities that already are subject to federal regulation or are required to provide BOI to a governmental authority. The statute also authorizes the Secretary to exempt, by regulation, additional types of entities for which collecting BOI would neither serve the public interest nor be highly useful in national security, intelligence, and law enforcement agency efforts.⁶

It is reasonable to conclude that the Regulated Investment Entities were intended to be exempt pursuant to the existing exemptions, but that an oversight has resulted in the omission of some but not all of them. Specifically, 31 USC 5336(a)(11)(B)(xi) excludes from BOI reporting investment advisers described in Section 203(l) (15 USC 80b-3(l)) of the Investment Advisors Act of 1940 (the "1940 Act") if they file certain parts of Form ADV.⁷ When an investment adviser advises some SBIC/RBIC funds and also some

⁴ *See, e.g.* 13 C.F.R. 107.350 (Evaluation of License Applicants); 13 CFR 107.400-410 (Change of Control/Ownership); 13 CFR 107.460 (Restrictions on Common Control/two-or more owners); 13 CFR 107.475 (Transfer of License); 13 CFR 107.510 (SBA Approval of Licensee's Investment Advisor/Manager).

⁵ *See* 13 CFR 107 Subpart F (107.600-107.692) (Recordkeeping, Reporting and Examination Requirements for Licensees).

⁶ 31 U.S.C. 5336(a)(11)(B)(xxiv).

⁷ 13 U.S.C. 5336(a)(11)(B)(xi).

venture capital funds, it is encompassed within Section 203(l) and is required to file parts of the Form ADV with the SEC as an exempt reporting adviser.⁸

However, when an investment adviser advises *only* SBICs/RBICs (and not any additional venture capital funds), it technically falls under a different section, 15 USC 80b-3(b)(7)-(8), and is exempted from filing as an exempt reporting adviser.⁹ This makes sense because when this legislation was drafted, it was taken into consideration that advisers of *only* SBICs/RBICs were already reporting to the SBA and thus, additional reporting to the SEC as an exempt reporting adviser was unnecessary. In other words, the required filing as an exempt reporting adviser for those that also advised venture capital funds was needed because there was not otherwise any reporting on those venture capital funds.

As such, if 31 USC 5336(a)(11)(B)(xi) were interpreted to cover all relevant statutory references including those currently missing from the CTA statute but listed here in bold and italic font, then all of the Regulated Investment Entities would be exempt:

“(xi) an investment adviser—

- (I) described in section 203(l), ***203(b)(7)-(8) or 203(m)*** of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(l), ***3(b)(7)-(8), 3(m)***); and
- (II) that has filed ***or is exempt from filing*** Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the Securities and Exchange Commission;”

We assert there is a strong argument supporting the position that Congress did not expressly mention SBICs and RBICs in its list of exclusions under the CTA because it was believed they were already included in the exemptions by reference to Section 203(l). Exempting some, but not all SBICs/RBICs unintentionally creates a bifurcated regulatory structure based on corporate form, not function; therefore, all SBICs/RBICs should be exempt because they are already subject to direct federal regulation.¹⁰

* * *

It seems that the omission of certain SBICs and RBICs and their governing Regulated Investment Entities by Congress was likely an oversight given the relatively small size and scale of the SBIC and RBIC programs and the nuanced underlying statutory patchwork of Section 15 USC 80b. Further, because these investment funds already disclose the beneficial owner and control information to the Federal Government,

⁸ Exempt investment advisors are still required to file Parts 1A (1-3; 6-7; 10-11) along with any corresponding schedules of Form ADV with the SEC pursuant to 15 USC 80b-3(l)(1)-(3).

⁹ 31 USC 5336(a)(11)(B)(xi). Congress, in the 1940 Act, expressly defined investment advisors who need not be registered to include those who solely advise SBICs and RBICs. 15 USC 80b-3 (b)(7)-(8).

¹⁰ Another example of this bifurcation involves certain SBICs and RBICs that qualify for exemption under the CTA because they are subsidiaries of investment companies that are exempt, or an SBIC is bank-owned. BDCs, for instance, would qualify under the CTA’s “pooled investment” exemption because they are investment companies defined under the Investment Company Act of 1940 and regulated by the Securities and Exchange Commission. A BDC may own an SBIC fund and, as a “sidecar” entity, the SBIC may secure exemption under the CTA’s “subsidiary” exemption. SBICs owned by banks, which are subject to separate federal regulatory scrutiny, would also qualify for CTA exemption. 31 U.S.C. 5336(a)(11)(B)(xviii) and (xxii).

applying CTA's BOI reporting requirements would neither serve the public interest nor be highly useful in national security or related law enforcement efforts.

Therefore, we urge you to confirm that all of the described Regulated Investment Entities are excluded from the BOI reporting obligations of the CTA.

As always, SBIA appreciates the invitation to discuss these issues and looks forward to the opportunity to work together to ensure America's small businesses have access to the capital they need.

Sincerely,

Brett Palmer

Brett Palmer

SBIA President