STRUCTURED FINANCE ASSOCIATION

FAQs: Corporate Transparency Act Compliance[1]

1. **Can an entity claim the subsidiary exemption (exemption xxii) if it is controlled, but not wholly owned, by exempt entities listed in exemption xxii ("(xxii) listed entities")? This is an important question for funds, because funds are not included in (xxii) listed entities, although registered investment advisors are included. Generally, it appears that if an entity is entirely owned, directly or indirectly, by one or more (xxii) listed entities, then the entity qualifies for the subsidiary exemption.**

There is a spectrum of views, and the following is not intended to foreclose additional views.

Consensus:

An entity whose ownership interests are wholly controlled directly or indirectly by one (xxii) listed entity should be exempt, depending on the facts and circumstances, as well as the meaning of "control" for this purpose.

"Control" in this context focuses on control over the ownership interests in the entity and includes for example ownership through a nominee or a revocable trust. While FinCEN has not specified the elements of "control" in this context, "control" over an ownership interest may include powers of a type consistent with owning the ownership interests, including (but not limited to) being able to pledge or sell the ownership interests, and/or to exercise any related voting rights.

2. **A. Can individuals associated with transaction parties that do not own a securitization issuing entity (that is, entities other than a parent sponsor or depositor) have "substantial control" over the entity, such that such individuals might be beneficial owners?**

a. Repo counterparty financing equity interests
b. Lender secured by equity interests
c. Trustees
d. Administrators

Consensus:

Where transaction parties do not have the independent ability to determine the important decisions of a reporting company, individuals associated with such transaction parties likely don't have "substantial control" over the reporting company. As to all the above, such entities have at most conditional or limited control over the issuing entity, and employees of such entities typically have

[1] *The Structured Finance Association would like to thank Stephen Kudenholdt of Dentons, and Bill Springer and Chip More of Alston & Bird, for their leadership in preparing these Frequently Asked Questions.*

limited authority to act for their employers, such that such individuals generally should not be viewed as having substantial control over the issuing entities.

As to employees of repo counterparties and secured lenders, prior to any default by the repo seller or borrower, it could be argued, by analogy to the "creditor" exception from the definition of beneficial owner, that any powers and rights under the repo or loan documents that are intended to secure the right to receive payment or enhance the likelihood of repayment should not amount to substantial control over the issuing entity. It is noted however that the creditor exception would not directly apply to employees of creditors as the creditor exception on its face only applies to individuals, not legal entities. Following any default under a repo or secured loan, both ownership and substantial control issues should be re-assessed.

B. Can individuals associated with transaction parties that do own a securitization issuing entity (that is, a parent sponsor or depositor) have "substantial control" over the entity, such that such individuals might be beneficial owners?

Consensus:

Transaction parties affiliated with a securitization issuing entity, such as a sponsor or depositor, frequently have substantial control over the important decisions of the issuing entity. Where such transaction parties have the ability to direct or determine the important decisions of the issuing entity, the individuals associated with such party may have sufficient control to qualify as beneficial owners of the issuing entity, particularly with respect to individuals that have senior officer level titles or roles in the transaction party. However, if the control rights of a sponsor or depositor over an issuing entity post-issuance are sufficiently limited, it may be reasonable to take the position that there are no officers of the sponsor or depositor who can indirectly exercise "substantial control" over the issuing entity on an ongoing basis.

3. Employee exception from the definition of beneficial owner: The special rule that excludes individuals who have substantial control solely due to their employment appears to be only available to employees of the reporting company.

Consensus:

It would appear reasonable to take the view that employees of entities holding ownership interests, or of transaction parties such as trustees, administrators and lenders, should not be viewed as having substantial control over the reporting company, as long as the employee does not through his or her employment have authority over the reporting company comparable to the authority that a senior officer in the reporting company would have.

4. If equity in a securitization issuing entity is financed under a repo, does the repo counterparty become owner of the ownership interests (either by ownership or control) such that the issuing entity's eligibility for the subsidiary exemption (xxii) should be reconsidered?

Consensus:

No, unless and until there is a default on the repurchase obligation.

As to whether the repo counterparty owns the ownership interests, even if the ownership interests are actually transferred to and registered in the name of the repo counterparty, prior to a default the repo seller should continue to be viewed as the owner. To the extent the repo seller can

repay the repo and take back the equity interests, the repo seller continues to control the ownership interests. Repo counterparty's status as registered holder can be viewed as comparable to holding as a nominee or agent subject to the repo seller's repurchase obligations, to protect the repo counterparty's interests. However, it is noted that there is a risk that FinCEN may not agree with this view, and may consider a repo counterparty who becomes the registered holder of the ownership interests to be the owner thereof.

As to whether the repo counterparty controls the ownership interests, under market standard terms for repos the repo counterparty does not exercise control over the issuer of the security being repo'd prior to a default under the repo. Where the repo counterparty is granted greater than market standard rights, this would need to be evaluated on a facts and circumstances basis. To the extent that the various powers and rights of the repo counterparty under the repo documents are viewed as intended to secure the right to receive payment or enhance the likelihood of repayment, they could be viewed as not indicative of control over the issuing entity by analogy to the creditor exception from the definition of beneficial owner.

If and when there is a default on the repurchase obligation, the issuing entity's eligibility for the subsidiary exemption (xxii) should be reconsidered. To the extent that both the repo seller and the repo buyer are (xxii) listed entities (or are owned directly or indirectly by such entities), there would not be a change to the reporting status.

5. **Should debt issued by an issuing entity ever be considered an ownership interest for the purposes of the CTA? If yes, such debt may need to be considered in any subsidiary exemption (xxii) availability analysis.**

Consensus:

Generally, debt issued by an issuing entity should not be considered an ownership interest for the purposes of the CTA. By analogy to the "creditor" exception from the definition of beneficial owner, "debt" for this purpose should include rights or interests for the payment of a predetermined sum of money, including associated rights that are intended to secure the right to receive payment or to enhance the likelihood of repayment. The table below sets forth the consensus with regard to particular types of debt and other interests.

Interest	Potential Consensus
REMIC Regular Interests	Generally not an ownership interest
REMIC Residual Interests in Debt Form	Generally not an ownership interest
Below Investment Grade Debt Classes	Generally not an ownership interest
Debt Classes with Control Rights	Generally not an ownership interest; provided that the control rights are limited. For example, the right to direct exercise of representation and warranty remedies, or the right to exercise a conditional

	asset pool purchase, should not rise to the level of substantial control. Control rights imbedded in a debt class that are intended to secure the right to receive payment or enhance the likelihood of repayment, should not constitute substantial control over the issuing entity, by analogy to the creditor exception.
Transferrable voting rights	May be considered ownership interests but the typical veto rights granted to a creditor are unlikely to be considered ownership interests.
Participation certificates, issued for example by a special purpose entity (such as a Delaware statutory trust)	Participation certificates that represent an undivided ownership interest in a defined pools of assets owned by the issuer, and the right to receive distributions therefrom, generally should not be considered to be an ownership interest in the issuer. If the participation certificates represent an interest in the issuing entity, rather than an interest in a pool of assets, then participation certificates may be considered an ownership interest.

6. Can a securitization issuing entity claim the subsidiary exemption (xxii) if its ownership interests are held through the Depository Trust Company (DTC) by its nominee, in reliance on DTC being a financial market utility (exemption (xvii))?

Consensus:

The CTA, the Final Rule and guidance published by FinCEN to date do not expressly address this approach. There is no published indication that FinCEN has considered the issue.

There are substantial logistical difficulties associated with tracing beneficial ownership through DTC and its participant members, which in many cases would make identification of such beneficial owners impracticable without unreasonable effort or expense, if not impossible.

The SFA should request that FinCEN (i) provide exemptive relief for entities whose ownership interests are held through DTC, or (ii) provide guidance for entities whose ownership interests are placed on DTC to the effect that the duty to report is limited to listing DTC, or Cede & Co. as its nominee, on the BOI Report.

Potential Approaches:

I. **Exemptive Relief**: FinCEN should publish an FAQ or an interpretation that states that an entity, 100% of whose ownership interests are held through DTC and registered in the name of Cede & Co., or held through a similar depository that is a financial market utility, qualifies for existing exemption (xvii).

II. **Guidance**: FinCEN should publish an FAQ or an interpretation to the effect that entities that have 100% of their ownership interests held through DTC and registered in the name of Cede & Co., or held through a similar depository that is a financial market utility, may list DTC, or Cede & Co. as its nominee, or such similar depository, as the sole beneficial owner on the BOI Report, and are not required to

report on entities or individuals that have substantial control or that beneficially own 25% or more of their ownership interests.

7. For Series Statutory Trusts, could an individual registered series be considered a reporting company?

Consensus:

For the purposes of the CTA, a series in a Delaware statutory trust should not be considered a separate reporting company distinct from the main trust.

8. If an entity is set up to comply with Section 3(c)(7) of the Investment Company Act, but is also able to rely on another exemption under the ICA such as Section 3(c)(5) or Rule 3a-7, can it nevertheless qualify for the definition of "pooled investment vehicle" under exemption (xviii)?

Consensus:

Yes, an entity may qualify for the pooled investment vehicle exemption (xviii) provided that the entity continues to comply with Section 3(c)(7) of the Investment Company Act under normal industry practices.

9. Company applicants: It appears that a law firm can avoid having any of its lawyers or employees be a company applicant if: (1) the client or a third-party service provider completes the actual filing, and (2) the client who initiated the creation of the entity either directly files the formation documents or directs, asks or instructs a third party service provider to submit such filing, even if the law firm assists with the preparation of the company creation document. Is this approach generally acceptable in the securitization market?

Consensus:

This appears to be generally acceptable. However, some law firms may continue to form entities on behalf of their clients. Where the law firm forms entities on behalf of their client, the related attorneys or employees of the law firm may be considered to be a company applicant for such entities.

10. Can a US non-bank subsidiary owned by a foreign bank qualify for the subsidiary exemption (xxii) in reliance on being owned by such foreign bank where the foreign bank has a branch or agency in the US (but not a banking subsidiary)?

Consensus:

As a general matter, yes. Subsidiary exemption (v) references "[a]ny bank holding company as defined in section 2 of the Bank Holding Company Act of 1956" ("BHCA"). Under a strict reading of the statutory text, a foreign bank would not be a bank holding company unless it owned a US banking subsidiary. However, in regulations under the BHCA and other federal banking statutes, the term "bank holding company" is defined to include, for most regulatory purposes, a foreign banking organization ("FBO"), which term includes a foreign bank with a US branch or agency. It would appear reasonable to interpret the reference in exemption (v) to the definition of "bank holding company" in the BHCA to mean such definition as broadened by operation of the regulations

promulgated under the BHCA.

11. For securitization issuing entities that do not qualify for the subsidiary exemption (xxii) or another exemption from filing, and are SPVs that include use of an independent director (ID) or an independent member (IM), could such ID or IM be viewed as having "substantial control" and therefore a beneficial owner?

Consensus:

Generally no, under typical document provisions which enable an ID or IM to object to and therefor block specific types of actions (such as a bankruptcy filing), but not to affirmatively initiate an action. Where an entity's governing documents provide the ID or IM with more expansive rights, including the ability to affirmatively initiate an action, and where such circumstances actually occur, then the issue may need to be reconsidered.

12. For Delaware statutory trusts (DSTs), there are a number of entities involved in its formation and/or operation, including the depositor, the sponsor (which may be an ultimate owner of the depositor), trustees, and administrators. While the duty to file BOI Reports falls on the DST, a person who "causes the failure" can be liable if the DST fails to file. Who should be responsible for ensuring the DST's compliance with the CTA?

Consensus:

For DSTs that are not exempt, a specific transaction party should be contractually obligated to comply with any applicable CTA reporting requirements. Although practices may vary, typically the duty would be imposed on the sponsor, the depositor or administrator if they are affiliates of the sponsor.

13. Are CLO co-issuers reporting companies?

There does not appear to be an exemption available for a US CLO co-issuer entity that is wholly owned by an offshore issuer.

14. How can disregarded entities file BOI Reports, if needed?

Under current FinCEN requirements, every reporting entity need to have a unique identifying number in order to file BOI Reports. This can be a US EIN or TIN, or for a foreign entity can be a tax identification number issued in the foreign jurisdiction.

Consensus:

FinCEN should clarify that for entities that are disregarded for US federal income tax purposes, such entities can file BOI Reports using their own entity name, and the identifying number of its parent entity. This issue may be of interest to other industry groups and could be resolved in a FinCEN FAQ.

15. Legacy transactions: for entities formed before January 1, 2024, discuss outlook for reaching compliance with any applicable requirements prior to January 1, 2025.

SFA intends to expand and move forward its CTA task force, to address efforts by membership to come into compliance with the CTA requirements for legacy transactions.