

ALERTS

FinCEN Commences Rulemaking Process for Implementation of Corporate Transparency Act Requiring Disclosure of Beneficial Ownership Information

April 26, 2021

On April 5, 2021, the Financial Crimes Enforcement Network, a bureau of the United States Department of the Treasury (“FinCEN” and “Treasury,” respectively) issued an advance notice of proposed rulemaking (“ANPRM”)[1] beginning the process of implementing regulations under the Corporate Transparency Act (“CTA”).[2] Enacted by Congress on Dec. 31, 2020, as part of the National Defense Authorization Act, the CTA requires certain companies created or registered to do business in the United States (each, a “Reporting Company”) to report certain identifying information, such as beneficial owners of 25% or more and certain control persons, directly to FinCEN.[3] That information is to be held in a non-public database maintained by FinCEN and will be shared with law enforcement and federal regulators, among others. The reporting obligations discussed herein will only take effect upon the promulgation of final regulations by FinCEN, which FinCEN is required to issue by Jan. 1, 2022. The ANPRM is the first step in this rulemaking process and requests public comment on numerous questions relevant to the implementation of the CTA. Comments are due May 5, 2021. Additionally, within a year of issuing a final rule under the CTA, FinCEN is required to issue implementing regulations to revise the existing customer due diligence (“CDD”) rule[4] to align it with the CTA implementing regulations. [5]

This *Alert* highlights certain aspects of the CTA and the ANPRM including implications of the CTA on investment funds and their advisers.

Information to Be Reported

The CTA requires each Reporting Company to disclose information regarding (1) its beneficial owners and control persons, (2) individuals who register the Reporting Company or file the application necessary for the Reporting Company to do business in the United States (“Applicant”) and (3) other identifying information of the Reporting Company itself.

1. Beneficial Owners and Control Persons

The CTA defines a “beneficial owner” as an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise (i) owns or controls not less than 25% of the ownership interests of the Reporting Company or (ii) exercises substantial control over the Reporting Company (each a “Beneficial Owner”). Reporting Companies must report information on both types of Beneficial Owners. In this way, the definition of Beneficial Owner is similar to the definition used in the CDD rule, which requires reporting under both the ownership prong and the control person prong.[6] Beneficial Owner does not include an individual acting as: (i) a nominee, intermediary, custodian or agent on behalf of another individual; (ii) an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person; (iii) an entity’s creditors, unless the creditor holds at least 25% of the entity or has substantial control over the entity; (iv) an individual whose only interest is through a “right of inheritance”; or (v) a minor child if the information of a parent or guardian is reported.[7]

The CTA requires each Reporting Company to identify each of its Beneficial Owners by (i) full legal name, (ii) date of birth, (iii) current residential or business street address and (iv) a unique identifying number from an acceptable identification document.[8] The identification requirements in the CTA itself differ slightly from what is required of legal entity customers under the CDD rule and it seems likely that the CDD rule will eventually be changed to be consistent with the reporting requirements for each Beneficial Owner under the CTA.[9]

The ANPRM asks for public comment on whether the definition of Beneficial Owner is “sufficiently clear, or are there aspects of this definition and specified exceptions that FinCEN should clarify by regulation?”[10] Question 3 of the ANPRM asks specifically whether FinCEN should “define either or both of the terms ‘own’ and ‘control’ with

respect to the ownership interests of an entity” and, if so, should the definition “be drawn from or based on an existing definition in another area, such as securities law or tax law?”[11]

With regard to the control prong of the term Beneficial Owner, the CTA does not define “substantial control,” or describe if it is to be limited to voting control or operational control, or the extent to which it differs from the concept of control in the CDD rule, which defines the control prong as: “A single individual with significant responsibility to control, manage, or direct a legal entity customer.”[12] The ANPRM requests comment on the extent to which the definition of substantial control in the CTA implementing regulations should “be the same as, or similar to, the current CDD rule’s definition or the standards used to determine who is a beneficial owner under 17 CFR 240.13d–3 adopted under the Securities Exchange Act of 1934?”[13] More specifically, the ANPRM asks for public comment on whether FinCEN should define “substantial control” to mean “[1] that no reporting company can have more than one beneficial owner who is considered to be in substantial control of the company, or [2] ... to make it possible that a reporting company may have more than one beneficial owner with ‘substantial control’”.[14]

FinCEN also asks for comments to help determine what steps Reporting Companies should take to confirm the accuracy of Beneficial Owner information, as well as what FinCEN should do to ensure that reported Beneficial Owner information is accurate and complete.[15]

2. Applicants

Reporting Companies are required to disclose the same identifying information for Applicants as for Beneficial Owners (i.e. name, date of birth, address and unique identification number).[16] The ANPRM asks whether the definition of Applicant is sufficiently clear “in light of current law and current filing and registration practices” or if FinCEN should expand the definition.[17] FinCEN also asks for comment on whether a Reporting Company should be required to report information on Applicants after the Reporting Company’s initial report to FinCEN.[18]

3. Information About the Reporting Company

While not specifically mentioned in the CTA, FinCEN has requested comment on what information a Reporting Company should be required to report about itself, including its corporate affiliates, parents, and

subsidiaries, as well as its relationship to its Beneficial Owners.[19] These questions suggest that the information FinCEN may be seeking from Reporting Companies may be broader than information relating only to the Reporting Company's Beneficial Owners and Applicants.

The CTA also provides for Reporting Companies to obtain an identifier to expedite filings. FinCEN must issue an identifier to an entity or individual upon such entity's or individual's request, evidencing that beneficial ownership information has been previously reported to FinCEN ("FinCEN Identifier").[20] Reporting Companies with a FinCEN Identifier may provide it to FinCEN instead of beneficial ownership information. The ANPRM asks for comment on several questions regarding the process of issuing FinCEN Identifiers and the form they will take.[21]

Reporting Companies

Subject to numerous exceptions which are designed to exclude many regulated entities and operating business, as discussed below, the CTA broadly defines a Reporting Company as any:

Corporation, limited liability company or other similar entity that is (i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe or (ii) formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or a similar office under the laws of a State or Indian Tribe.[22]

The CTA does not define the term "other similar entity." The ANPRM includes several questions regarding what factors should be considered and what entities should be included or excluded in the category "other similar entity." [23] More specifically, FinCEN asks if trusts and special purpose vehicles ("SPVs") that are "formed by a filing with a secretary of state or a similar office" should be included or excluded from other similar entities.[24] The CTA requires an official study to identify each state's procedures regarding the collection of beneficial ownership information for partnerships, trusts, and other legal entities to determine what should be included as an "other similar entity." Considering the similarities between partnerships formed by the filing of a document with a secretary of state and limited liability companies, it may be that such partnerships will be included as an "other similar entity."

Moreover, it is currently unclear whether statutory trusts or non-statutory trusts will be subject to reporting requirements under the CTA.[25] But we note that the CTA exempts charitable trusts and split-interest trusts from the reporting requirements.[26]

Entities Exempt from Definition of Reporting Company

The CTA provides 23 exemptions from the definition of Reporting Company, many of which are designed to exclude entities already required to disclose beneficial ownership information publicly or to federal regulators. These include, among others[27]:

1. An investment company[28] that is registered with the Securities and Exchange Commission (“SEC”) under the Investment Company Act of 1940[29] (“40 Act”).[30]
2. An investment adviser[31] that is registered with the SEC under the Investment Advisers Act of 1940[32] (“Advisers Act”).[33]
3. An investment adviser: “(i) described in section 203(l) of the Advisers Act, and (ii) that has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the SEC (“an Adviser Relying on the Venture Capital Exemption”).[34]
4. Banks,[35]
5. Federal or state credit unions.[36]
6. Broker-dealers.[37]
7. Futures commission merchants, introducing brokers, swap dealers, major swap participants, commodity pool operators, and commodity trading advisers that are registered with the Commodities Futures Trading Commission.
8. An insurance company as defined in section 2 of the 40 Act.
9. Any “pooled investment vehicle” that is operated or advised by a (i) bank, (ii) Federal or State credit union, (iii) SEC-registered broker or dealer, (iv) SEC registered investment adviser, or (v) an Adviser Relying on the Venture Capital Exemption.[38]

The CTA defines a “pooled investment vehicle” to mean (i) any investment company, as defined in section 3(a) of the 40 Act;^[39] or (ii) any company that (a) would be an investment company under that section but for the exclusion provided from that definition by paragraph (1) or (7) of section 3(c) of the 40 Act,^[40] and (b) is identified by its legal name by the applicable investment adviser in its Form ADV (or successor form) filed with the SEC.

10. Any entity that (i) employs more than 20 employees on a full-time basis in the United States; (ii) filed in the previous year Federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of (a) other entities owned by the entity and (b) other entities through which the entity operates; and (iii) has an operating presence at a physical office within the United States.

The CTA also includes a provision allowing Treasury, in certain circumstances, to exempt other types of entities from the reporting requirements – this provision may be useful in obtaining exemptions for other types of entities. The CTA also provides for a truncated filing for Beneficial Owners of Reporting Companies that are, themselves, exempt from the definition of Reporting Company. If an entity that is exempt from the definition of Reporting Company is a Beneficial Owner of a Reporting Company, the Reporting Company is only required to report the name of the exempt entity Beneficial Owner and need not report any other information with regard to that exempt entity.^[41]

The ANPRM includes several questions to further formulate the exemptions, asks whether there are any categories of entities that are not currently subject to an exemption but should be, and also seeks comment on how exempt entities should be required to prove they fit into one of the exempt categories.^[42] Specifically:

- a. What information should FinCEN require companies to provide to qualify for these exemptions, and what verification process should that information undergo?
- b. Should there be different information requirements for operating companies and holding companies, for active companies and dormant companies, or are there other bases for distinguishing between types of companies?

- c. Should exempt entities be required to file periodic reports to support the continued application of the relevant exemption (e.g., annually)?[43]

Exemptions to the Definition of Reporting Company Relevant to Investment Funds and Investment Advisers

The exemptions to the definition of Reporting Company include most private investment funds and their advisers, relieving most funds and advisers from reporting their beneficial ownership information to FinCEN. More specifically, the CTA exempts from the definition of Reporting Company: a mutual fund; an SEC registered investment adviser; an Adviser Relying on the Venture Capital Exemption; and, a pooled investment vehicle that is formed under the laws of the United States that is operated or advised by a bank, credit union, broker-dealer, SEC registered investment adviser, or an Adviser Relying on the Venture Capital Exemption. Each of these entities is not required to submit a report to FinCEN with beneficial ownership information.

Advisers that are not registered with the SEC, such as state-registered investment advisers and advisers relying on the “private fund adviser exemption” available to advisers that solely advise private funds if the adviser has assets under management in the United States of less than \$150 million, are not currently exempt from the definition of Reporting Company. Such advisers may be required to report beneficial ownership information to FinCEN unless an exemption applies. For example, an investment adviser that is not otherwise exempt may be able to rely on the exemption available for an entity that employs more than 20 employees on a full-time basis in the United States, has more than \$5 million in gross receipts or sales in the aggregate, and maintains a physical office presence within the United States.

Similarly, funds advised by advisers that are neither registered with the SEC nor Advisers Relying on the Venture Capital Exemption may not be exempt from the definition of Reporting Company. For example, a fund advised by an adviser relying on the “private fund adviser exemption” available to advisers that solely advise private funds if the adviser has assets under management in the United States of less than \$150 million, may be required to submit a report to FinCEN with beneficial ownership information. Moreover, pooled investment vehicles managed by commodity trading advisers are not currently exempt from the reporting requirements.

The CTA provides a modified reporting requirement for certain non-United States domiciled pooled investment vehicles. The CTA requires that “[a]ny corporation, limited liability company, or other similar entity that is an exempt entity described in subsection (a)(1)(B)(xviii) and is formed under the laws of a foreign country shall file with FinCEN a written certification that provides identification information of an individual that exercises substantial control over the pooled investment vehicle.” As discussed above, the CTA has not yet defined “substantial control.” The “exempt entity described in subsection (a)(1)(B)(xviii)” refers to a pooled investment vehicle that is exempt from the definition of Reporting Company because it is operated or advised by a bank, Federal or State credit union, SEC-registered broker or dealer, or SEC registered investment adviser, or an Adviser Relying on the Venture Capital Exemption.

To clarify the modified reporting process, the ANPRM asks for comment on the method by which the written certification should be filed, what information should be included, whether filings should be made to foreign authorities first and then forwarded to FinCEN, or be made directly to FinCEN, and whether the certifications should be accessible to all database users or a subset of them, and whether they should be accessible on the same terms as beneficial ownership information of all other Reporting Companies.[44] Because private investment fund managers often employ numerous funds and SPVs, both foreign and domestic, it is important for them to understand the CTA’s requirements and FinCEN’s implementing regulations, once promulgated, and incorporate any applicable reporting obligations into their compliance functions.

Sharing and Security of Registry Information

Once reported, beneficial ownership information will be kept in a confidential FinCEN database and held for at least five years after the relevant Reporting Company ceases to exist.[45] Although the beneficial ownership registry will not be publicly available, upon request, FinCEN will be authorized to share information in certain circumstances, subject to compliance with protocol, treaty, agreement, convention or official request, as applicable, with (i) financial institutions (in connection with CDD requirements under applicable law with the consent of the Reporting Company); (ii) federal law enforcement, intelligence and national security

agencies; (iii) state, local and Tribal law enforcement authorities; (iv) foreign law enforcement authorities; and (v) federal functional and other regulators.[46]

As part of the ANPRM, FinCEN requests comment on the details of the registry. Notably, it asks: “How can FinCEN make beneficial ownership information available to financial institutions with CDD obligations so as to make that information most useful to those financial institutions?”[47]

The CTA provides for certain cybersecurity protections for the database, including encryption.[48] FinCEN is required to identify and fix any vulnerabilities in the case of a cybersecurity breach that results in substantial unauthorized access to beneficial owner information.[49] The ANPRM requests comment on any additional security and privacy measures to protect the information and limit its use to authorized purposes.[50] FinCEN also asks whether misuse of database information should be subject to penalties under the Bank Secrecy Act and existing FinCEN regulations or if other protections should be implemented.[51]

Report Timing

The timing requirements to file the report with FinCEN differ based on whether the Reporting Company is formed before or after the effective date of the CTA’s implementing regulations.

- Any Reporting Company that was formed or registered *before* the effective date of the CTA’s implementing regulations shall, in a timely manner, and not later than two years after the effective date of the CTA’s implementing regulations, submit the required beneficial ownership information to FinCEN.
- Any Reporting Company that is formed *after* the effective date of the CTA’s implementing regulations must disclose beneficial ownership information to FinCEN at the time of formation or registration.

Regardless of formation date, all Reporting Companies must, in a timely manner, and not later than one year after the date on which there is a change to any required beneficial ownership information, submit to FinCEN a report that updates the information relating to the change.

With regard to Reporting Companies and individuals with FinCEN Identifiers, the ANPRM includes questions about how to satisfy the timely

manner requirement including what should occur when Beneficial Owners or holders of FinCEN Identifiers (i) transfer substantial control to other individuals, (ii) change their legal names or their reported residential or business street addresses, (iii) die or (iv) when a previously acceptable identification document expires.^[52]

For Reporting Companies without FinCEN Identifiers, FinCEN asks “what should be considered a ‘timely manner’ for updating a change in beneficial ownership” and whether the period should differ based on the type of Reporting Company, what factors should be taken into account in determining the period, and how long Reporting Companies should have to update Beneficial Owner information upon a change of ownership.^[53]

Penalties

The CTA proscribes penalties for failing to report or reporting inaccurate or incomplete information. Any person who (i) willfully provides, or attempts to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document; or (ii) willfully fails to report, complete or update beneficial ownership information (a) shall be liable to the United States for a civil penalty of not more than \$500 for each day that the violation continues or has not been remedied and (b) may be fined not more than \$10,000, imprisoned for not more than two years, or both.^[54]

However, there is a safe harbor if a report that contains inaccurate information is voluntarily corrected within 90 days so long as the inaccurate report was not submitted to evade the reporting requirements or with actual knowledge of its inaccuracy.^[55] FinCEN requests comment on how to implement the safe harbor, asking: “How should FinCEN’s regulations define the scope of this safe harbor? Should the nature of the inaccuracy (e.g., a misspelled address versus the complete omission of a Beneficial Owner) be relevant to the availability of the safe harbor?”^[56]

Conclusion

The CTA is an important step toward revealing beneficial ownership information often used to hide money laundering and terrorist financing. While the ANPRM sheds additional light on FinCEN’s understanding of the CTA, there are still many substantive and technical details to work through before the implementing regulations are issued.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] ANPRM, Beneficial Ownership Information Reporting Requirements, 86 Fed. Reg. 17,557 (Apr. 5, 2021), available here (hereinafter, “ANPRM”).

[2] National Defense Authorization Act for Fiscal Year 2021 (CTA §§ 6401–03), available at here.

[3] For more information regarding the CTA and AML Act generally, please see our prior *Alert* “Passage of Anti-Money Laundering Act of 2020 Includes Comprehensive BSA/AML Reform Measures.”

[4] See 31 CFR § 1010.230. The CDD rule requires covered financial institutions to collect identifying information from, and verify the identities of, the beneficial owners of their legal entity customers.

[5] CTA § 6403 (adding 31 USC § 5336(d)).

[6] CTA § 6403 (adding 31 USC § 5336(b)(2)).

[7] CTA § 6403 (adding 31 USC § 5336(a)(3)(B)).

[8] The CTA defines an “acceptable identification document” to mean, with respect to an individual, “(A) a nonexpired passport issued by the United States; (B) a nonexpired identification document issued by a State, local government, or Indian Tribe to the individual acting for the purpose of identification of that individual; (C) a nonexpired driver’s license issued by a State; or (D) if the individual does not have [such] document[s] ... a nonexpired passport issued by a foreign government.” CTA § 6403 (adding 31 USC § 5336(a)(1)).

[9] See CTA § 6403 (adding 31 USC § 5336(d)). The CDD rule requires that covered financial institutions obtain from their legal entity customers (i) name and title of natural person opening account; (ii) name and address of legal entity for which the account is being opened; and (iii) identification information for each beneficial owner (under ownership and control prongs). 31 CFR Appendix A to § 1010.230. Such beneficial ownership information includes: (i) name; (ii) date of birth; (iii) address; and (iv) for United States persons, social security number, or for non-United States

persons, passport number and country of issuance or other similar identification number. *Id.* Documentary verification may be done by unexpired government-issued identification, such as a driver's license or passport. Final Rule, Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29398, 29408 n.46 (May 11, 2016).

[10] ANPRM, 86 Fed. Reg. at 17,561-62, Question 3.

[11] *Id.*

[12] The CDD rule defines beneficial owner as:

(1) Each individual, if any, who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25% or more of the equity interests of a legal entity customer; and

(2) A single individual with significant responsibility to control, manage or direct a legal entity customer, including:

(i) An executive officer or senior manager (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President or Treasurer); or

(ii) Any other individual who regularly performs similar functions.

31 CFR § 1010.230(d).

[13] ANPRM, 86 Fed. Reg. at 17,561-62, Question 3. Subject to numerous exemptions, under the Securities Exchange Act of 1934 implementing regulations, a person who "is directly or indirectly the beneficial owner of more than five percent" of specified classes of equity securities must file a statement containing certain identifying information. 17 CFR § 240.13d-3(a).

[14] *Id.*

[15] ANPRM, 86 Fed. Reg. at 17,563, Questions 23 and 24. There is no obligation to confirm the accuracy of beneficial ownership information under the CDD rule. Rather, the individual acting on behalf of the relevant entity must certify that to the best of their knowledge, the information provided is complete and accurate. 31 CFR Appendix A to § 1010.230.

[16] Under the CTA, the term “applicant” means any individual who (i) files an application to form a corporation, limited liability company or other similar entity under the laws of a State or Indian Tribe; or (ii) registers or files an application to register a corporation, limited liability company or other similar entity formed under the laws of a foreign country to do business in the United States by filing a document with the secretary of state or similar office under the laws of a State or Indian Tribe. *See* CTA § 6403 (adding 31 USC § 5336(a)(3)).

[17] ANPRM, 86 Fed. Reg. at 17,562-63, Question 4.

[18] ANPRM, 86 Fed. Reg. at 17,562-63, Question 25.

[19] ANPRM, 86 Fed. Reg. at 17,562, Questions 10-13.

[20] *See* CTA § 6403 (adding 31 USC § 5336(b)(3)).

[21] ANPRM, 86 Fed. Reg. at 17,563-64, Questions 26-31.

[22] CTA § 6403 (adding 31 USC § 5336(a)(11)(A)).

[23] ANPRM, 86 Fed. Reg. at 17,561 Question 1. *See also id.*, Question 2 (Requesting comment on whether the requirement that entities be created by or registered to do business by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe describes corporate filing practices and applicable law of the states and Indian tribes sufficiently to avoid confusion about whether an entity meets the requirement).

[24] ANPRM, 86 Fed. Reg. at 17,562, Question 8.

[25] Under the CDD rule, statutory trusts, but not non-statutory trusts are considered legal entities with beneficial owner identification requirements.

[26] CTA § 6403 (adding 31 USC § 5336(a)(11)(B)(xix)).

[27] For a full list of exemptions see CTA § 6403 (adding 31 USC § 5336(a)(11)(B)).

[28] As defined in section 3 of the Investment Company Act of 1940 (15 USC § 80a-3).

[29] 15 USC § 80a-1, *et seq.*

[30] CTA § 6403 (adding 31 USC § 5336(a)(11)(A)(x)).

[31] As defined in section 202 of the Advisers Act (15 USC § 80b-2).

[32] 15 USC § 80b-1, *et seq.*

[33] CTA § 6403 (adding 31 USC § 5336(a)(11)(A)(x)).

[34] CTA § 6403 (adding 31 USC § 5336(a)(11)(A)(xi)).

[35] As defined in (i) section 3 of the Federal Deposit Insurance Act (12 USC § 1813); (ii) section 2(a) of the 40 Act (15 USC § 80a-2(a)); and (iii) section 202(a) of the Advisers Act (15 USC § 80b-2(a)).

[36] As defined in section 101 of the Federal Credit Union Act (12 USC § 1752).

[37] That is registered under section 15 of the Securities Exchange Act (“Exchange Act”). 15 USC § 78o (and as defined in 15 USC § 78c).

[38] CTA § 6403 (adding 31 USC § 5336(a)(11)(A)(xviii)).

[39] 15 USC § 80a-3(a).

[40] *Id.*

[41] CTA § 6403 (adding 31 USC § 5336(b)(2)(B)).

[42] ANPRM, 86 Fed. Reg. at 17,562, Question 7.

[43] ANPRM, 86 Fed. Reg. at 17,562, Question 9.

[44] ANPRM, 86 Fed. Reg. at 17,562, Question 15.

[45] *See* CTA § 6403 (adding 31 USC § 5336(c)(1)).

[46] CTA § 6403 (adding 31 USC § 5336(c)(2)(B)).

[47] ANPRM, 86 Fed. Reg. at 17,564, Question 35. *See also id.* Questions 32-38.

[48] *See* CTA § 6403 (adding 31 USC § 5336(c)(8)).

[49] *See* CTA § 6403 (adding 31 USC § 5336(h)(5)(A)).

[50] ANPRM, 86 Fed. Reg. at 17,563, Question 34.

[51] *Id.*

[52] ANPRM, 86 Fed. Reg. at 17,563, Question 19.

[53] ANPRM, 86 Fed. Reg. at 17,563, Question 21.

[54] CTA § 6403 (adding 31 USC § 5336(h)).

[55] *See* CTA § 6403 (adding 31 USC § 5336(h)(4)(3)(C)(i)).

[56] ANPRM, 86 Fed. Reg. at 17,563, Question 22.

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