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CTA regulations set to take effect in January 2024 with obligations for some private fund sponsors

Effective January 1, 2024, new Treasury regulations under the Corporate Transparency Act (CTA) will require many U.S. entities and foreign entities doing business in the United States to report identifying beneficial owner information to the Department of Treasury's Financial Crimes Enforcement Network (FinCEN). The deadline follows the publication of Treasury's [final regulations](#) on September 30, 2022.

All businesses with US entities (or foreign entities doing business in the United States) will be potentially affected by the CTA requirements, which are by no means limited to fund sponsors. This note, however, focuses particularly on those CTA compliance issues that are especially relevant to investment fund sponsors and private funds.

While many fund sponsors and their affiliated entities will be covered by one of 23 exemptions from the new reporting requirements, including an exemption specifically for registered investment advisers (RIAs) and venture capital fund advisers (VC Advisers) regulated under the U.S. Investment Advisers Act of 1940 (the Advisers Act), other fund entities may not necessarily be covered by an exemption and, therefore, would be deemed "Reporting Companies" under the FinCEN regulations.¹

Notably, for Reporting Companies formed before the 2024 effective date, initial reporting is due within one year – by January 1, 2025 – thereby providing ample time for fund sponsors and investment advisers to determine whether an exemption applies and, if not, to gather the relevant data required by FinCEN. Reporting Companies formed after January 1, 2024, however, will need to file reports with FinCEN within 30 calendar days of formation (though a [recently proposed FinCEN rule](#), if adopted, would extend this deadline to 90 calendar days). Any updates or revisions to the beneficial ownership information previously reported to FinCEN must also be filed within 30 calendar days. Failure to meet the reporting requirements can result in civil or criminal penalties, including the potential for significant fines or even imprisonment.

This brief note will explain (i) the relevant background of the CTA rules, (ii) who must file beneficial ownership information as a Reporting Company, (iii) what (and when) Reporting Companies must file and (iv) what constitutes a beneficial owner.

Background

The CTA was enacted in 2020 as part of the National Defense Authorization Act for Fiscal Year 2021, for the first time creating a federal obligation to report beneficial ownership information for all U.S. entities (and foreign entities doing business in the United States), unless exempted. Pointing to the lack of transparency that may facilitate fraud, drug trafficking, corruption, tax evasion, organized crime or other illicit activity, CTA mandated FinCEN with implementing the rules and regulations governing the new disclosure regime.

¹ 31 CFR 1010.380(c)(1) defines a Reporting Company as either a "domestic Reporting Company" or a "foreign Reporting Company." A domestic Reporting Company includes any entity that is (i) a corporation, (ii) a limited liability company or (iii) otherwise created by the filing of a document with a secretary of state or any similar office under state or tribal law. A foreign Reporting Company includes any entity that is (i) a corporation, limited liability company or any other entity, (ii) formed under the law of a foreign country and (iii) registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under state or tribal law.

Determining who must file (and relevant exemptions)

As noted above, all U.S. entities and foreign entities doing business in the United States that meet the definition of “Reporting Company” are required to file with FinCEN unless they meet one of 23 statutory exemptions.² The exemptions most relevant to investment fund advisers are outlined in this section.

Entity Description	CTA Exemption?	Rationale
Registered investment adviser (RIA)	Yes.	Exemption for RIAs.
Private fund adviser (ERA)	Likely no.	No enumerated exemption for private fund advisers. Other exemptions may apply on a case-by-case basis.
Venture capital fund adviser (ERA)	Yes.	Exemption for VC Advisers.
Small business investment company (SBIC) adviser	Likely no.	No enumerated exemption for SBIC advisers. Other exemptions may apply on a case-by-case basis.
U.S. state-registered or state-regulated investment adviser	Likely no.	No enumerated exemption for state-registered or state-regulated advisers. Other exemptions may apply on a case-by-case basis.
Foreign private adviser doing business in the United States	Likely no.	No enumerated exemption for foreign private fund advisers. Other exemptions may apply on a case-by-case basis.
Managing member of RIA	Likely no.	Other exemptions may apply on a case-by-case basis.
Relying adviser of RIA or VC Adviser	Likely yes.	As an investment adviser required to be registered with the SEC, relying advisers taking advantage of “umbrella registration” on Form ADV are likely to meet the exemption for RIAs.
General partner or managing member of investment fund	Possibly.	GPs or other similar entities owned and controlled by an exempt RIA or VC Adviser will be exempt under the subsidiary exemption. Otherwise, other exemptions may apply depending on the particular facts and circumstances. Such entities, if directly controlled by an RIA or VC Adviser, and listed as “related persons” on Form ADV, could potentially meet the exemptions for RIAs or VC Advisers as well.
Investment fund relying on Section 3(c)(1) or 3(c)(7)	Yes.	Exemption for pooled investment vehicles (PIVs) advised by RIAs or VC Advisers.
Foreign investment fund relying on Section 3(c)(1) or 3(c)(7)	Yes (with caveats).	Exemption for pooled investment vehicles (PIVs) advised by RIAs or VC Advisers, plus limited reporting requirements (i.e. single controlling individual).
Real estate fund relying on Section 3(c)(5)(C)	Likely no.	Not eligible for PIV exemption. Subsidiary exemption or other exemptions may apply on a case-by-case basis.
Holding company subsidiary of an investment fund	Possibly.	Subsidiary exemption not available if solely owner or controlled by PIV, though subsidiary exemption could apply with respect to other entities that own or control the holding company. May in some cases qualify as a PIV in its own right.
Real estate investment trust (REIT) owned by an investment fund	Possibly.	Subsidiary exemption not available if solely owner or controlled by PIV, though subsidiary exemption could apply with respect to other entities that own or control the holding company.
Portfolio company of an investment fund	Possibly.	Subsidiary exemption not available if solely owner or controlled by PIV, though subsidiary exemption could apply with respect to other entities that own or control the holding company. Exemption for large operating companies may apply if it has more than 20 full-time employees and \$5 million in gross receipts or sales.

² The full list of exemptions under 31 CFR 1010.380(c)(2) is as follows: (i) securities reporting issuer, (ii) governmental authority, (iii) bank, (iv) credit union, (v) depository institution holding company, (vi) money service business, (vii) broker-dealer registered under the U.S. Securities Exchange Act of 1934 (the Exchange Act), (viii) securities exchange or clearing agency, (ix) other Exchange Act registered entity, (x) registered investment company or investment adviser, (xi) venture capital fund adviser, (xii) insurance company, (xiii) state-licensed insurance producer, (xiv) Commodity Exchange Act registered entity, (xv) accounting firm, (xvi) public utility, (xvii) financial market utility, (xviii) pooled investment vehicle, (xix) tax-exempt utility, (xx) entity assisting tax-exempt entity, (xxi) large operating company, (xxii) subsidiary of certain exempt entities and (xxiii) inactive entity.

A. Registered investment advisers and venture capital fund advisers

For many fund advisers, the explicit exemptions for RIAs and VC Advisers, in particular, will be relevant and useful.³

Note that private fund advisers (who, like, VC Advisers, are “exempt reporting advisers” that file an abbreviated version of the Form ADV) are not exempted. Nor are foreign private advisers, those other advisers that rely on the small business investment company (SBIC) adviser exemption or advisers registered or otherwise regulated by a U.S. state. Each of these entities, however, may qualify for other exemptions, as discussed in further detail below. It is also possible that Congress may add new categories of exemptions in the future as the FinCEN reporting requirements take effect.

In light of the fact that the SEC has adopted regulations allowing for umbrella registration of multiple advisers within the same Form ADV filing, we believe that relying advisers will generally be deemed to meet this exemption to the same degree as their filing adviser. Note that, to the extent an exempt RIA or VC Adviser is owner or managed by a general partner or managing member entity, that entity would not, by virtue of owning or controlling the RIA or VC Adviser, itself be exempt and, therefore, would either need to find a separate exemption or would be a Reporting Company.

Whether an adviser’s related persons (such as the general partner or managing member entities of investment funds and affiliated with an RIA or VC Adviser) will also be exempt is less clear and will depend on the particular facts and circumstances of each fund structure. Related persons that are fully owned and controlled by RIAs or VC Advisers would clearly be exempt under the subsidiary exemption discussed below. It is possible that such related persons could rely on the RIA exemption or the VC Adviser exemption. The SEC has in the past advanced the view that such related persons are “persons associated with an investment adviser” as defined under Section 202(a)(17) of the Advisers Act and, accordingly, the SEC would not seek enforcement if such related persons do not register separately as investment.⁴ Notably, however, in the absence of a filing adviser (to which such related persons are affiliated), such related persons would otherwise meet the definition of “investment adviser.”

B. Pooled investment vehicles

Any pooled investment vehicle (PIV) that is operated or advised by a bank, credit union, registered broker-dealer, registered investment company, RIA or VC Adviser will be exempt from the FinCEN requirements.⁵

A PIV includes (i) any investment company, as defined under Section 3(a) of the Company Act or (ii) any company that (A) would be an investment company but for the exclusions provided under Section 3(c)(1) (i.e. the exemption for entities with fewer than 100 beneficial owners) or Section 3(c)(7) (i.e. the exemption for entities whose owners are all “qualified purchasers”) under the Company Act and (B) is identified by its legal name by the applicable investment adviser in its Form ADV.⁶

³ 31 CFR 1010.380(c)(2)(x) exempts any entity that is (A) an investment company as defined in Section 3 of the U.S. Investment Company Act of 1940 (the Company Act) or is an investment adviser as defined in Section 202 of the Advisers Act and (B) registered with the Securities and Exchange Commission (the SEC) under the Company Act or the Advisers Act.

³ 31 CFR 1010.380(c)(2)(xi) exempts any investment adviser that (A) is described in Section 203(l) of the Advisers Act (i.e. VC Advisers) and (B) has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV with the SEC (i.e. aspects of Form ADV that disclose information about the beneficial owners and officers of the adviser).

⁴ No-Action Letter, American Bar Association, Business Law Section, dated January 18 2012. (Available here: <https://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm>), which cites four factors that date from the No-Action Letter, American Bar Association, Subcommittee on Private Investment Entities, dated December 8, 2005: (i) the adviser to a private fund establishes a special purpose vehicle (the “SPV”) to act as the private fund’s general partner or managing member; (ii) the SPV’s formation documents designate the adviser to manage the private fund’s assets; (iii) all of the investment advisory activities of the SPV are subject to the Advisers Act and the rules thereunder and the SPV is subject to examination by the SEC; and (iv) the registered adviser subjects the SPV, its employees and persons acting on its behalf to the registered adviser’s supervision and control and, therefore, the SPV, all of its employees and the persons acting on its behalf are “persons associated with the registered adviser” defined under Section 202(a)(17) of the Advisers Act.

⁵ 31 CFR 1010.380(c)(2)(xviii).

⁶ 31 CFR 1010.380(f)(7).

This exemption will apply to the vast majority of private funds, though it excludes a minority of private funds that invest in certain commodities or real estate (rather than securities) and therefore do not meet the definition of “investment company” under the Company Act. Therefore, this exemption also excludes those real estate funds relying on the Section 3(c)(5)(C) exemption under the Company Act (though such funds may be subsidiaries of exempt entities and potentially exempt under the subsidiary exemption). Finally, under a special rule for foreign PIVs, any PIV that is formed under the laws of a foreign country that would otherwise be exempt shall nonetheless be deemed a Reporting Company, except that such entity’s report need only include information with respect to one individual (and not the full disclosure otherwise required) – either (i) the one individual who exercises substantial control over the entity or (ii) if more than one such individual, the individual who has the greatest authority over the strategic management of the entity.⁷

C. Large operating companies

An entity is defined as a “large operating company” and exempt from the reporting requirements if it (i) employs more than 20 full-time employees in the United States; (ii) has an operating presence at a physical office within the United States; and (iii) filed a federal income tax return in the United States for the previous year demonstrating more than \$5 million in gross receipts or sales (net of returns and allowances), excluding gross receipts or sales from sources outside the United States.⁸ Notably, for purposes of the \$5 million test, for an entity that is part of an affiliated group of corporations that filed a consolidated return, the applicable amount shall be the amount reported on the consolidated return. For purposes of counting employees, however, the employees of affiliated entities should not be included; rather, FinCEN has instructed that only the actual entity’s employees should be included.⁹

This exemption, in particular, may be useful to larger fund management companies or portfolio companies of investment funds.

D. Subsidiaries of exempt entities

Any entity whose ownership interests are controlled or wholly owned, directly or indirectly, by most categories of exempt entities, will also be exempt from the FinCEN requirements as a “subsidiary” of an exempt entity. The determination of whether an entity that is not wholly owned by an exempt entity may be deemed a subsidiary of that exempt entity due to being “controlled” by the exempt entity is fact-specific and must be reviewed for each organization’s unique structure. Note that subsidiaries of money services businesses, accounting firms and PIVs are not permitted to avail themselves of this exemption.¹⁰

Note that although entities such as portfolio companies and holding companies owned by PIVs may not use this exemption (as the exemption specifically excludes subsidiaries of PIVs, even those that are wholly owned by PIVs), it is worth considering whether such entities could qualify under other exemptions, such as the large operating company exemption, or might otherwise also themselves meet the PIV definition. Holding companies, in particular, that are controlled by RIAs or VC Advisers, may still be able to use the subsidiary exemption (even if they are wholly owned by PIVs).

E. Other notable exemptions

While not applicable to most fund sponsors, other exemptions will commonly apply to fund investors or other entities that routinely serve as partners alongside fund vehicles in holding companies, special purpose vehicles, joint ventures or other structures. Notably, these include, among other categories, issuers of public securities; banks, credit unions and bank holding companies; insurance companies; non-profit companies (including 501(c)

⁷ 31 CFR 1010.380(b)(2)(iii).

⁸ 31 CFR 1010.380(c)(2)(xxi).

⁹ 31 CFR 1010.380(f)(1) defines “employee” by reference to the definition in 26 CFR 54.4980H-1(a)(15), i.e. the definition used in the Internal Revenue Code that generally defines an employee as an “employee under the common-law standard,” which will exclude, at a minimum, leased employees. In light of the definition, Reporting Companies should be consistent as to reporting this number for both tax and CTA purposes. While detailed Treasury regulations provide more detail about the employer-employee relationship under this definition, generally, independent contractors should not be included as “employees.” In some cases, a facts-and-circumstances test may be necessary.

¹⁰ 31 CFR 1010.380(c)(2)(xxii).

(3) companies); broker-dealers and others registered under the Exchange Act; commodity pool operators (CPOs), commodity trading advisers (CTAs) and other entities registered under the Commodity Exchange Act; and governmental entities and public utilities.

What Reporting Companies must file

As noted above, Reporting Companies created on or after January 1, 2024 must file their initial report with FinCEN within 30 calendar days of formation (though, as noted above, a proposed rule would extend this timeframe to 90 calendar days);¹¹ any Reporting Companies formed before January 1, 2024 must file their initial reports no later than January 1, 2025.¹² If there are any changes with respect to required information previously submitted to FinCEN concerning a Reporting Company or its beneficial owners (or a corrected report to FinCEN),¹³ the Reporting Company must provide an updated report within 30 calendar days after the date on which such change occurs (or such error is discovered, in the case of a corrected report).¹⁴ As part of the reporting process, each entity may obtain a “FinCEN identifier,” a unique identifying number that FinCEN will issue to each Reporting Company as part of the reporting process; FinCEN identifiers will not be available until January 1, 2024.¹⁵

Generally, each initial report must contain the following information about the Reporting Company:¹⁶

- The full legal name of the Reporting Company;
- Any trade name or “doing business as” name of the Reporting Company;
- A complete current address, consisting of the street address of the Reporting Company’s principal place of business in the United States (or, alternatively, the street address of the primary location in the United States where the Reporting Company conducts business);
- The state, tribal or foreign jurisdiction of the Reporting Company;
- For a foreign Reporting Company, the state or tribal jurisdiction where it first registered; and
- The Reporting Company’s Taxpayer Identification Number (TIN) and/or Employer Identification Number (EIN) issued by the U.S. Internal Revenue Service or, if no TIN has been assigned, the tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.

Also, generally, for each Reporting Company, all of its beneficial owners and, for entities formed after January 1, 2024, its company applicant¹⁷ must each provide the following:¹⁸

- The full legal name of the beneficial owner (or company applicant);
- The date of birth of the beneficial owner (or company applicant);
- A complete current residential street address of the beneficial owner’s (or company applicant’s);

¹¹ To be more specific, 31 CFR 1010.380(a)(1)(i) states that the 30-day deadline commences on the earlier of the date on which (i) the Reporting Company receives actual notice that its creation has become effective or (ii) the date on which a secretary of state or similar office first provides public notice that it has been created.

¹² 31 CFR 1010.380(a)(1)(i)-(iii).

¹³ 31 CFR 1010.380(a)(1)(iii) allows for a 90-day grace period for Reporting Companies to file corrected reports in the event that any report filed with FinCEN was inaccurate when filed and remains inaccurate. FinCEN’s rationale is to encourage compliance, acknowledging that Reporting Companies may make good-faith errors at the inception of new reporting requirements.

¹⁴ 31 CFR 1010.380(a)(2)-(3).

¹⁵ 31 CFR 1010.380(b)(4).

¹⁶ 31 CFR 1010.380(b)(1)(i)(A)-(F).

¹⁷ Under 31 CFR 1010.380(e), in addition to each beneficial owner, if not already a beneficial owner of the Reporting Company, its company applicant is required to provide the same information as beneficial owner. The company applicant is the individual who directly files the document that creates the domestic Reporting Company or that first registers a foreign Reporting Company in the United States.

¹⁸ 31 CFR 1010.380(b)(1)(ii)(A)-(E).

- The unique identifying number from (i) a non-expired U.S. passport; (ii) other state, local or tribal identification; (iii) a non-expired driver's license issued by a state; or (iv) if none of the other documents are available, a non-expired passport issued by a foreign government; and
- An image of the document described above.

Reporting Companies owned by an exempt entity (in whole or in part) need not provide the beneficial ownership information above that exempt entity, but instead merely provide the name of the exempt entity.¹⁹ If a Reporting Company, however, has one or more other beneficial owners in addition to the exempt entity, the Reporting Company would need to provide information about these other beneficial owners.

In addition, a final updating report is required for a Reporting Company that becomes newly exempt indicating that the entity is no longer a Reporting Company.²⁰

We are happy to discuss the details of the FinCEN reporting regime upon request and in specific detail as it applies to each of our clients' particular entities and structure.

Determining who is a beneficial owner

Before making their reports to FinCEN, non-exempt Reporting Companies will have to consider who constitutes a beneficial owner. Broadly, the term "beneficial owner" is defined to include any individual who, directly or indirectly, either exercises substantial control over the Reporting Company or owns or controls at least 25 percent of the ownership interests of such Reporting Company.²¹

An individual will exercise "substantial control" over the Reporting Company under the new FinCEN rules if the individual:²²

- serves as a senior officer of the Reporting Company;²³
- has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
- directs, determines or has substantial influence over important decisions made by the reporting company;²⁴ or
- has any other form of substantial control over the reporting company.

The rules provide that an individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a Reporting Company through the following:²⁵

- Board representation;
- Ownership or control of a majority of the voting power or voting rights of the Reporting Company;

¹⁹ 31 CFR 1010.380(b)(2)(i).

²⁰ 31 CFR 1010.380(b)(3)(ii).

²¹ 31 CFR 1010.380(d). The definition of "ownership interest" and rules surrounding the ownership or control of ownership interest and calculation of the total ownership interests of a reporting company are set forth in detail in subsection (d)(2).

²² 31 CFR 1010.380(d)(1)(i).

²³ 31 CFR 1010.380(d)(8) defines "senior officer" to include 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. Though not explicitly listed, a fund advisory entity's chief compliance officer would also likely meet the definition of "senior officer."

²⁴ As defined, these important decisions will include, without limitation: (i) the nature, scope and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company; (ii) the reorganization, dissolution, or merger of the reporting company; (iii) major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the Reporting Company; (iv) the selection or termination of business lines or ventures, or geographic focus, of the Reporting Company; (v) compensation schemes and incentive programs for senior officers; (vi) entry into or termination, or the fulfillment or non-fulfillment, of significant contracts; and (vii) amendments of any substantial governance documents of the Reporting Company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures.

²⁵ 31 CFR 1010.380(d)(1)(ii).

- Rights associated with any financing arrangement or interest in the Reporting Company;
- Control over one or more intermediary entities that separately or collectively exercise substantial control over a Reporting Company;
- Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- Any other contract, arrangement, understanding, relationship, or otherwise.

Certain individuals are excluded from the term “beneficial owner,” however, including minor children, as well as individuals acting as nominee, intermediary, custodian or agent.²⁶

For fund advisory or management entities that aren’t exempt from reporting, all investment committee members are likely to meet the definition of beneficial owner for purposes of the FinCEN rules, even if they do not own or control 25 percent of the ownership interests or otherwise serve as a senior officer.

For investment funds that don’t meet the definition of PIVs and therefore aren’t exempt from reporting, all key persons may be deemed beneficial owners. Investors who do not own 25 percent of the ownership interests of the investment fund will not typically be deemed to control the investment fund, even if they serve as members of any limited partner advisory committee, or if the limited partners of the fund, in aggregate, have certain abilities to remove the general partner or provide certain consents.

Looking ahead

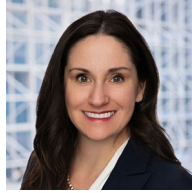
Hogan Lovells has a broad, global team of investment funds and private equity transactional attorneys as well as regulatory experts in anti-money laundering, sanctions, banking regulations and international trade and investment. We continue to monitor developments as the January 1, 2024 deadline approaches for CTA compliance, including any new guidance FinCEN or Treasury may provide (including pursuant to a [specially-designated FinCEN FAQ](#) on CTA compliance).

We recognize that each client’s structure may present complex questions, on an entity-by-entity basis, as to the applicability of an exemption or the required information to be provided in respect of a private fund, upper-tier structure, portfolio company structure, or even a fund’s investors. We are happy to discuss any questions or aspects of CTA compliance in greater detail either before or after the January effective date.

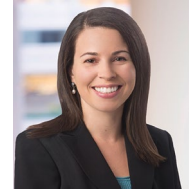
²⁶ 31 CFR 1010.380(d)(3).

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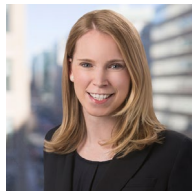
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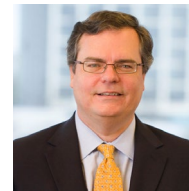
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