

FinCen Issues Small Entity Compliance Guidance: An Approach to BOI Reporting Obligations

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The US Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") published its **Small Entity Compliance Guide** (the "Guide") for the Corporate Transparency Act (the "CTA") on [September 18, 2023](#). The Guide is the Agency's most comprehensive explanation of compliance with the beneficial ownership information (BOI) reporting rule. (Beneficial ownership information refers to identifying the individuals who directly or indirectly own or control an entity.) FinCEN has also updated its March 2023 [FAQs on the CTA](#). The Guide is a valuable summary of the requirements that complement FinCEN's previous publication of [BOI reporting](#) information and is worth reading.

In another important development, on September 27, 2023, FinCEN proposed an [amendment](#) to the [Final Rule](#) that would temporarily extend the deadline for initial reports by reporting companies created or qualified on or after January 1, 2024 from 30 days after creation or qualification to 90 days. This will likely become part of the Final Rule by year end, however, the 90-day period would only apply through 2024 and would revert to 30 days on January 1, 2025. This welcome relief will give reporting companies more time to better understand these new obligations and collect the necessary information. The Guide helps on this front by explaining the decisions that the people that own and control entities will need to make in order to determine if an entity is required to report.

The Guide includes a chart that visualizes the regulatory requirements. There are, however, certain nuanced issues to which the charts reference, but may require legal analysis. We have outlined these in our summary below.

Scope of FinCen's Small Entity Compliance Guide

The Guide provides a detailed summary of how the BOI reporting rule works, particularly with respect to:

- Which types of entities are subject to the reporting rule and how the 23 categories of exemptions operate to narrow the scope of covered entities; and
- How to identify beneficial owners of a reporting company.

The Guide addresses six key questions to help entities comply with the reporting rule and includes a chapter for each key question, detailing what reporting companies and their individual beneficial owners must do to comply:

1. Does my company have to report its beneficial owners? See Chapter 1
2. Who is a beneficial owner of my company? See Chapter 2
3. Does my company have to report its company applicants? See Chapter 3
4. What specific information does my company need to report? See Chapter 4
5. When and how should my company file its initial report? See Chapter 5
6. What if there are changes to or inaccuracies in reported information? See Chapter 6

We note below additional substantive issues of interest.

- **Implications for Special Purpose Vehicles (SPVs).** Assuming they do not benefit from attendant exemption of parent companies, many SPVs will likely be considered covered entities. However, special purpose acquisition companies, or SPACs, will likely fall under the exemption for public companies, as they are generally publicly traded. Many sponsors of SPVs are exempt from covered entity status because they are, for example, public companies or financial institutions.
- **Real Estate Vehicles are Subject to the Rules.** Many real estate companies, including those that form individual SPVs, including Delaware Statutory Trusts to acquire, develop, lease and finance real property, may be affected. Unless a specific exemption applies, each such entity will be required to file under the CTA.
 - **Many private real estate companies may fall into the “large operating company” exemption,** which provides that entities with a physical US office, more than 20 “full-time” employees and that reported more than \$5 million in gross receipt or sales on its last US federal tax return are exempt. Importantly for real estate companies, the Final Rule notes that entities are not allowed to consolidate employee headcount across affiliated entities, although the revenue threshold may be satisfied on a consolidated basis.
- **What if an individual is the beneficial owner of numerous entities?** A reporting company, as well as an individual, may obtain a FinCEN identifier by submitting to FinCEN an application containing the information about the applicable entity or individual. An individual’s FinCEN identifier may be used by a reporting company in lieu of reporting that individual’s BOI (as long as it remains accurate). Use of the FinCEN identifier is important to individuals who are beneficial owners of numerous entities and do not want to submit sensitive personal information multiple times.
- **Exemptions for Subsidiaries of Exempt Entities.** An exemption exists for wholly-owned subsidiaries of certain exempt entities. However, subsidiaries of money services businesses, pooled investment vehicles and entities that assist a tax-exempt entity, among others, are not eligible for the subsidiary exemption. FinCEN limits this exemption to prevent entities that are only partially owned by exempt entities from shielding each one of their beneficial owners from reporting under the CTA.
- **Closely Held Companies and Partnerships.** Barring an exemption, closely-held companies will generally be considered covered entities under the CTA, but there remains some ambiguity about partnerships as they are not explicitly listed in the CTA. While partnerships may make an optional filing with state officials, to the extent that they are not created by the filing of a

document with a secretary of state or similar office under statute those entities might not be subject to the CTA.

Some key considerations to keep in mind include:

- A closely-held company's beneficial ownership may change frequently. When it does, reporting obligations will follow.
- In the family office context, individuals may be unaccustomed to reporting obligations such as those imposed by the CTA and may rely on their accountants and other advisors to handle any filing obligations. These professionals may not be aware of the CTA. In the case of entities that do not generate income or merely hold assets, advisors may be unaware of their existence. Family offices should conduct a thorough review of its assets and how they are held.
- Even if registered with state officials, large family offices and partnerships may fall within the exemption made available to “large operating companies.” Under the CTA, an entity is a large operating company if it meets three prongs previously discussed above.

Trusts

Certain charitable trusts and split-interest trusts (such as charitable remainder trusts and charitable lead trusts) are expressly exempt from the covered entity category for purposes of beneficial ownership reporting under the CTA. Under FinCEN's existing Customer Due Diligence Rule, statutory trusts are considered legal entities because their formation requires a filing with a state authority similar to a corporation's filing with a state secretary of state. Non-statutory trusts, however, are not considered legal entities because these trusts are the result of contractual arrangements and do not generally require any action by the state

Implications for Private Funds and their Managers

Depending on how private funds and their operations are structured, certain exemptions may apply. However, private funds and their managers will need to evaluate their current fund structures and consider how the CTA applies. Notably, it is unclear if portfolio companies of private funds need to file under the CTA. If the fund manager is not registered with the SEC or relying on the venture capital fund exemption, but instead relying on the private fund adviser, foreign private adviser or family office exemptions to the Advisers Act, they will not be exempt entities under the CTA. Although the fund manager and the fund could be exempt, the portfolio companies holding the fund's investments may not be. Portfolio companies wholly-owned or controlled by a pooled investment vehicle do not qualify for the subsidiary exemption.

General Partners and Managing Members of Pooled Investment Vehicles

In the Final Rule release, FinCEN addressed a comment requesting an additional exemption encompassing vehicles used by an investment adviser that serve as general partners or managing members of pooled investment vehicles advised by the investment adviser. FinCEN declined to provide any additional exemptions but noted that an entity used by an exempt Registered Investment Adviser (RIA) could come under an exemption for subsidiaries that are controlled or wholly owned by certain exempt entities, including RIAs. Thus, to the extent that the ownership interests of an entity that is the general partner or managing member of a pooled investment vehicle

are controlled or wholly owned, directly or indirectly, by an RIA or certain other exempt entities, that general partner or managing member would also be exempt. However, to the extent the ownership interests of an entity that is the general partner or managing member of a pooled investment vehicle are not controlled or wholly owned by the RIA, such as a joint venture-type arrangement with another entity, the subsidiary exemption may not apply.

Subsidiary Exemption Does Not Apply to Entities Owned by Pooled Investment Vehicles

In contrast to the application of the subsidiary exemption to the general partner or managing member of a pooled investment vehicle that is controlled or wholly owned by the RIA, the subsidiary exemption does not extend to situations where an entity's ownership interests are controlled or wholly owned by an exempt pooled investment vehicle. Instead, such entity would have to determine if it can fit within another exemption (for example, the large operating company exemption).

Foreign Pooled Investment Vehicle

Notwithstanding the exemption for pooled investment vehicles, the Final Rule treats foreign pooled investment vehicles differently. More specifically, under the Final Rule, if the pooled investment vehicle is foreign (i.e., would come within the meaning of a foreign reporting company), it will still have to report information about an individual who exercises substantial control over the entity. If more than one individual exercises substantial control over the entity, the entity shall report information with respect to the individual who has the greatest authority over the strategic management of the entity.

Conclusion

We continue to monitor and provide updates on the CTA and related issues. If we can provide more analysis, please contact your Kelley Drye team and we invite you to join us on October 26, 2023 for a webinar produced by MyLawCLE: ***[A View Into Compliance: The Corporate Transparency Act, Beneficial Ownership and Counterparty Due Diligence.](#)***