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Services

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## Corporate Transparency Act Alert: Private Investment Funds

by Ken Witt and Austin Graves

The Corporate Transparency Act (“CTA”) will come into effect on January 1, 2024, and an estimated 32.6 million private companies will have to report, for the first time, extensive information about their beneficial owners and company applicants to the Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”). Failure to comply with the CTA carries significant civil and criminal penalties for non-compliance, including fines of up to \$500 per day (up to a maximum of \$10,000) and imprisonment for up to two years for willful violations. As explained more fully below, CTA casts a wide net, and many private investment funds, their sponsors, general partners and investment managers, as well as their investors, will have reporting obligations under the CTA, starting in 2024.

As more fully described in our previous articles on all things CTA (linked [here](#), [here](#), [here](#), [here](#) and [here](#)) any entity classified as a “reporting company” must submit an initial report to FinCEN detailing information about the company itself and two categories of individuals: (i) all “beneficial owners”,<sup>1</sup> and (ii) “company applicants”.<sup>2</sup> (Company applicant information is not required, however, for companies formed or first registered to do business in the U.S. before January 1, 2024.) Beneficial ownership information (“BOI”) must be reported within 30 days of formation (90 days for companies formed in 2024).

A “reporting company” under the CTA is any LLC, corporation, or other entity formed by filing a document with a secretary of state (or other similar office) and that does not fall within one of the CTA’s 23 specific exceptions. Notable exemptions for purposes of our discussion of private investment funds include pooled investment vehicles, registered investment advisers, venture capital fund advisers, controlled and wholly-owned subsidiaries of certain exempted companies and large operating companies.<sup>3</sup>

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<sup>1</sup> “Beneficial owners” for this purpose include owners of 25% or more of a company and persons who exercise substantial control, such as senior officers.

<sup>2</sup> “Company applicant(s)” are the individuals who either file, or direct the filing of, the document creating or registering the reporting company. FinCEN permits no more than two company applicants per reporting company.

<sup>3</sup> “Large operating companies” must maintain an operating presence at a physical office in the U.S., have more than 20 full-time employees in the U.S., and have filed a U.S. tax return in the previous year reporting over \$5 million in gross receipts or sales.

### Private Fund Exemptions

Private investment funds may be exempt as “pooled investment vehicles”, but the definition is fairly restrictive<sup>4</sup>, and a number of private funds will not qualify. A fund advised by an investment adviser registered with the SEC (an “RIA”)<sup>5</sup> or by a venture capital fund adviser would be exempt. However, funds advised by private fund advisers or state-registered advisers and family office funds would be reporting companies under the CTA unless another exemption applies, such as the large operating company exemption.

Non-U.S. funds would not fall within the scope of the CTA reporting regime unless they are registered to do business in a U.S. state.

SPVs, co-investment vehicles, parallel funds, alternative investment vehicles, feeder funds and other vehicles should all be analyzed based on the foregoing guidelines.

### Private Fund Manager Exemptions

RIAs are exempt from CTA reporting. Exempt reporting advisers, such as private fund advisers<sup>6</sup> and venture capital fund advisers, are treated differently under the CTA. Venture capital fund advisers are exempt from reporting, as are funds advised by them. However, private fund advisers are not exempt, and neither are the funds advised by them, unless otherwise exempt. Foreign private advisers<sup>7</sup> are not exempt, as such, but would not fall within the reach of the CTA if they are not registered to do business in the U.S.

Fund management entities that do not fall within the registered investment adviser or venture capital fund adviser exemptions would be required to report under the CTA unless otherwise exempt as, for example, large operating companies. Accordingly, general partners and managing members of private funds would generally fall within the CTA reporting regime, although a general partner or managing member that an RIA may form as an SPV to manage a fund may be deemed to be an RIA without the SPV's having separately registered as an investment adviser, based on certain conditions set forth in the SEC Staff No-Action Letters<sup>8</sup>, and thereby qualify for the RIA exemption. Fund sponsors are likewise not expressly exempt from the CTA and would have to report unless otherwise exempt.

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<sup>4</sup> A “pooled investment vehicle” means an investment company as defined by the Investment Company Act of 1940 or a company that would be an investment company but for the exclusions in Section 3(c)(1) or 3(c)(7) of the Investment Company Act and that is identified in the Form ADV filed by the fund's investment adviser with the SEC. The pooled investment vehicle exemption from reporting includes any pooled investment vehicle that is advised by a bank, credit union, broker-dealer, registered investment adviser or venture capital fund adviser.

<sup>5</sup> Based on two SEC staff no-action letters (the “SEC Staff No-Action Letters”), an investment adviser that has not been separately registered with the SEC may nevertheless be deemed an RIA under certain circumstances where an RIA files or amends a single Form ADV on behalf of itself and each such unregistered investment adviser that the RIA controls or is under common control with. See SEC No-Action Letter, American Bar Association, Subcommittee on Private Investment Entities (pub. avail. Dec. 8, 2005) available [here](#) and SEC No-Action Letter, American Bar Association, Business Law Section (pub. avail. January 18, 2012) available [here](#). There is no guidance yet as to whether FinCEN would view such entities as RIAs for purposes of the CTA.

<sup>6</sup> A private fund adviser with a principal place of business in the U.S. is an investment adviser that only advises private funds and has less than \$150 million in regulatory assets under management.

<sup>7</sup> A foreign private adviser is an investment adviser without a place of business in the U.S. with fewer than 15 U.S. clients or investors in a private fund and with less than \$25 million in regulatory assets under management related to those U.S. clients or investors.

<sup>8</sup> See note 5.

## Contacts

**Ken Witt**  
480.429.4864  
[ken.witt@kutakrock.com](mailto:ken.witt@kutakrock.com)

**Mark Lasee**  
480.429.4828  
[mark.lasee@kutakrock.com](mailto:mark.lasee@kutakrock.com)

**Marc Lieberman**  
480.429.7103  
[marc.lieberman@kutakrock.com](mailto:marc.lieberman@kutakrock.com)

**Emily Smith**  
480.429.4886  
[emily.smith@kutakrock.com](mailto:emily.smith@kutakrock.com)

**Isaiah Wilson II**  
480.429.7122  
[isaiah.wilson@kutakrock.com](mailto:isaiah.wilson@kutakrock.com)

**Colson Franse**  
480.429.4851  
[colson.franse@kutakrock.com](mailto:colson.franse@kutakrock.com)

**Austin Graves**  
509.252.2464  
[austin.graves@kutakrock.com](mailto:austin.graves@kutakrock.com)

**Christina Ribble**  
480.429.4844  
[christina.ribbon@kutakrock.com](mailto:christina.ribbon@kutakrock.com)

## Private Fund Investors

An institutional or individual investor in a private fund that is not exempt from CTA reporting would be required to provide information to the private fund/reporting company for the fund's FinCEN beneficial ownership reports if the investor is a "beneficial owner" of the fund. As noted above, an investor could be a beneficial owner either by reason of 25% or more ownership or "substantial control" of the fund. Private funds are typically LLCs or limited partnerships, and the investor's percentage ownership would be calculated as percentage of the total outstanding capital and profit interests of the fund entity. "Capital and profit interests" are not defined in the CTA or FinCEN rules, and there is a great deal of uncertainty as to how to calculate percentage ownership interests in partnerships and limited liability companies for purposes of the CTA.

"Substantial control" is a vague and expansive concept and is triggered if an investor serves as a senior officer (perhaps a principal of the general partner in the fund context), has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body) or directs, determines or has substantial influence over important decisions made by the reporting company (sales of principal assets, reorganization, dissolution or merger, investments, debt, issuance of equity, amendments of substantial governance documents, and other decisions). Investors with such substantial control rights may be beneficial owners that are required to provide information for the reporting company's FinCEN reports.

If the private fund investor is exempt from the CTA (e.g. a bank, insurance company or large operating company) then the private fund beneficial ownership report to FinCEN should only include the name of the exempt investor. However, if the private fund investor is not exempt from the CTA (e.g., a high net worth individual) and qualifies as a beneficial owner of a reporting company fund, the investor, if an individual, will have to provide the investor's legal name, date of birth, current residential address, a unique identifying number from a current passport, driver's license, etc., and an image of the document.

## FinCEN Identifiers

Beginning January 1, 2024, individuals and companies may provide their information directly to FinCEN on a one-time basis to receive a unique FinCEN Identifier for use in future BOI reports. FinCEN Identifiers will not only help protect the privacy and personally identifiable information (PII) of beneficial owners, but they will also shift the responsibility for updating BOI away from the reporting company to the beneficial owners themselves. Private funds that are reporting companies would be well advised to encourage all beneficial owners to obtain FinCEN identifiers as a means of mitigating the reporting companies' responsibilities while also protecting their beneficial owners' PII. Non-exempt investors in private funds that are reporting companies should also consider applying for FinCEN identifiers to avoid the need to provide PII to multiple funds.

Kutak Rock and our CTA Rapid Response Team are here to help clients navigate the CTA compliance process. If you have any questions about how, if at all, the CTA will affect your business, please contact your Kutak Rock attorney, the members of the CTA Rapid Response Team and Institutional Investments Group listed on the left, or any member of the Scottsdale Office Corporate and Securities Group. You may also visit us at [www.kutakrock.com](http://www.kutakrock.com).

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