

U.S. Corporate Transparency Act: Guide For Private Fund Sponsors

January 2, 2024

Overview

Under rules that begin to take effect January 1, 2024, many domestic and foreign entities doing business in the United States will need to make federal filings identifying and providing information about their beneficial owners and company applicants or face civil or criminal penalties.¹ The rules are complex and entail a variety of exemptions.

Private fund sponsors will want to understand how these pending reporting obligations affect both funds and management company structures. These obligations may differ significantly based on the ownership and control structure of sponsor entities, adviser entities, funds and portfolio companies. Sidley has published an Update discussing the general requirements of the BOI Rule (as defined below), which is available [here](#) (General Update). The purpose of this Guide is to provide guidance on the structures and requirements most likely to affect private funds and their sponsors.

Who Must Report?

Beneficial ownership information (BOI) reporting requirements under the Corporate Transparency Act (CTA) and the related final rule (BOI Rule) adopted by the Financial Crimes Enforcement Network (FinCEN) require a reporting company to file a report with FinCEN including the information discussed in further detail below.

A “reporting company” is defined to mean a domestic or foreign reporting company, as follows:

- A “domestic reporting company” means any entity that is (i) a corporation, (ii) a limited liability company or (iii) created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.
- A “foreign reporting company” means any entity that is (i) a corporation, limited liability company or other entity, (ii) **formed under the law of a foreign country** and (iii) **registered to do business in the United States** by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.

Exemptions from Reporting

The BOI Rule includes 23 categories of exemptions from the definition of “reporting company” from the CTA for entities already generally subject to substantial federal or state regulation under which beneficial ownership may be known, such as certain entities registered with the Securities and Exchange Commission (SEC). Key exemptions that may be relevant to private fund sponsors are described below.

Determining whether an exemption applies to a particular entity is a facts and circumstances analysis, and sponsors should identify each entity in their management company and fund organizational structures (including upper-tier management companies, holding companies, investment vehicles and special purpose vehicles (SPVs)) to determine whether an exemption applies.

a) *Investment advisers*: Any investment adviser that is registered with the SEC under the Investment Advisers Act of 1940 (Advisers Act) is exempt from the BOI Rule.

- A relying adviser included in a filing adviser’s Form ADV umbrella registration also qualifies for this exemption.
- A general partner or managing member of a private fund (Fund GP) can qualify for this exemption (i) if it is a relying adviser or (ii) if it meets the conditions of a 2005 SEC No-Action Letter to the American Bar Association² and a 2012 SEC No-Action Letter to the American Bar Association³, which granted relief to enable an SPV that acts as a Fund GP to rely on its related adviser’s registration with the SEC. Among other conditions, the Fund GP must be an SPV created by a registered investment adviser; the SPV must designate the registered investment adviser to manage the SPV’s assets; and all of the employees and persons acting on behalf of the SPV must be “persons associated with” the registered investment adviser, and therefore subject to SEC examination.
- A holding company or other upper-tier management company entity that owns or controls an investment adviser or a Fund GP is not automatically exempt based on the investment adviser’s or Fund GP’s exempt status. Unless another exemption applies, such entity is subject to the reporting requirements.
- An SEC exempt reporting adviser (ERA) and state-registered investment adviser is not expressly exempt under the BOI Rule. Unless another exemption applies, ERAs and state-registered investment advisers are subject to the reporting requirements.

b) *Commodity pool operators (CPOs) and commodity trading advisors*: Any commodity pool operator or commodity trading advisor that is registered with the Commodity Futures Trading Commission (CFTC) is exempt from the BOI Rule. This exemption **does not apply** to commodity pools operated by registered CPOs, although such commodity pools may qualify for other exemptions.

c) *Venture capital fund advisers*: Any investment adviser exempt from registration under Section 203(l) of the Advisers Act and that has filed Item 10, Schedule A, and Schedule B of Part 1A of Form ADV, or any successor thereto, with the SEC is exempt from the BOI Rule.

d) *Registered investment companies*: Any investment company registered under the Investment

Company Act of 1940 (Investment Company Act) is exempt from the BOI Rule.

e) *Pooled investment vehicles*: Any pooled investment vehicle that is operated or advised by a bank, credit union, broker or dealer, investment company, investment adviser or venture capital fund adviser entity exempt from the BOI Rule is also exempt from the BOI Rule.

For purposes of this exemption, a “pooled investment vehicle” means any company that (i) would be an investment company under the Investment Company Act but for exemptions provided under Section 3(c)(1) or 3(c)(7) of the Investment Company Act and (ii) is identified by the applicable investment adviser in its Form ADV (or will be so identified in its next update).

- A pooled investment vehicle formed in the United States that is advised by an ERA or state-registered investment adviser is not expressly exempt from the BOI Rule, unless another exemption applies.
- A pooled investment vehicle formed in the United States that relies on an exemption other than Section 3(c)(1) or 3(c)(7) of the Investment Company Act is not expressly exempt from the BOI Rule, unless another exemption applies. An employees’ securities company (ESC) within the meaning of Section 2(a)(13) of the Investment Company Act that operates pursuant to an exemptive order exempting it from certain provisions of the Investment Company Act is not expressly exempt from the BOI Rule, unless another exemption applies.
- A foreign pooled investment vehicle that is registered to do business in the United States (i.e., a foreign reporting company) is subject to the reporting requirements, unless another exemption applies. However, the BOI Rule provides for limited reporting in this instance: such entity needs to report information relating to only one individual who exercises substantial control over the entity. If more than one individual exercises substantial control, the entity must report information relating to the individual who has the greatest authority over the strategic management of the entity.
- A commodity pool that does not otherwise rely on an exemption under either Section 3(c)(1) or 3(c)(7) of the Investment Company Act is not expressly exempt from the BOI Rule, regardless of whether the CPO of the commodity pool is registered with the CFTC, unless another exemption applies.

f) *Subsidiaries of certain exempt entities*: The “subsidiary” exemption from the BOI Rule applies to certain entities whose ownership interests are “controlled or wholly owned”, directly or indirectly, by one or more other exempt entities (excluding pooled investment vehicles). As discussed in more detail in the [General Update](#), the BOI Rule does not define “control” for this exemption, and FinCEN has not released guidance regarding the same.

- Because the subsidiary exemption expressly excludes subsidiaries of pooled investment vehicles, any entity below a pooled investment vehicle, such as an acquisition vehicle formed to facilitate investments for tax or other purposes, is not automatically exempt from the BOI Rule because it is either controlled or wholly owned by an exempt pooled investment vehicle. Such entity must determine whether another exemption is available to it. It may be the case that such entity qualifies for the

subsidiary exemption because it is controlled or wholly owned, directly or indirectly, by another exempt entity (e.g., a registered investment adviser).

- The “control” language was added to this exemption as a negotiated change, while the original language of the exemption would have applied only to entities “formed and owned” by certain other exempt entities. FinCEN has not defined “control” of ownership interests for purposes of this exemption, or clarified any interpretive questions regarding the final CTA language in any FAQs. It has only clarified in the BOI Rule that “owned” means “wholly owned”; as a result, majority ownership of a subsidiary alone does not meet the exemption requirement. Accordingly, many exempt entities are awaiting guidance on this issue, and law firms can only speculate on where the scope may land given the competing clear separate meaning to that legislative change (and intent for negotiated exemptions to reduce reporting burdens) and preference of FinCEN and law enforcement to keep this exemption narrow to serve the purposes of the CTA.
- An upper-tier management company entity may qualify for the subsidiary exemption if it is controlled or wholly owned by an entity that falls under other exemptions, such as the large operating company exemption, securities reporting issuer exemption (e.g., a public company) or bank exemption.

g) *Securities reporting issuers*: Any issuer of securities registered under Section 12 of the Securities Exchange Act of 1934 (Exchange Act) or required to file supplementary or periodic information under 15(d) of the Exchange Act is exempt from the BOI Rule.

h) *Registered brokers or dealers*: Any broker or dealer registered with the SEC under the Exchange Act is exempt from the BOI Rule.

i) *Large operating companies*: An entity that (i) employs more than 20 full-time employees in the United States, (ii) has an operating presence at a physical office in the United States and (iii) has filed a federal income tax or information return in the United States for the previous year demonstrating more than \$5 million of gross receipts or sales, excluding gross receipts or sales from sources outside the United States, is exempt from the BOI Rule.

j) *Banks*: Any bank as defined under Section 3 of the Federal Deposit Insurance Act, Section 2(a) of the Investment Company Act or Section 202(a) of the Advisers Act is exempt from the BOI Rule.

- Banks as defined under the Investment Company Act include private trust companies (PTCs) regulated by a state banking authority. Certain family offices may utilize regulated PTCs, and these PTCs may control, as trustee, trusts as controlling beneficial owners of family office entities. Accordingly, a family office entity that is controlled or wholly owned by a PTC may be exempt from the BOI Rule under the subsidiary exemption.

k) *Inactive entities*: Any inactive entity, as defined under the BOI Rule, is exempt from the BOI Rule. An inactive entity is any entity that:

- was in existence on or before January 1, 2020

- is not engaged in active business
- is not owned by a foreign person, whether directly, indirectly, wholly or partially
- has not experienced any change in ownership in the preceding 12-month period
- has not sent or received any funds greater than \$1,000, either directly or through any financial account in which the entity or any affiliate had an interest, in the preceding 12-month period
- does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company or similar entity

In adopting the BOI Rule, FinCEN declined to exercise its statutory authority under the CTA to include any additional exemptions to the definition of reporting company.⁴ We anticipate that certain industry groups may further highlight to FinCEN customary financial products that do not otherwise qualify for existing exemptions, where additional exemptions may reduce reporting burdens and where such information would not serve the public interest or be useful to law enforcement efforts to detect, prevent and prosecute criminal activities. We cannot predict whether FinCEN will be amenable to such requests.

What Must Be Reported?

The BOI Rule requires the disclosure of information relating to the reporting company, as well as to the “beneficial owners” and “company applicants” of the reporting company. See the [General Update](#) for a discussion on the information required to be reported under the BOI Rule. As of the date of this Guide, the forms on which disclosure will be made have not been published. However, the disclosure requirements tie to the key definitions in the BOI Rule.

A “beneficial owner” under the BOI Rule is defined as any individual who, directly or indirectly, either exercises **substantial control** over a reporting company or owns **or** controls at least **25% of the ownership interests** of a reporting company. A “company applicant” is defined to mean up to two individuals, consisting of the individual who files the document that creates or registers a reporting company and the individual primarily responsible for directing such filing. See the [General Update](#) for a more detailed discussion of beneficial owners and company applicants under the BOI Rule.

Sponsors should consider whether portfolio managers or investment committee members of a reporting company exercise substantial control over such reporting company, such as by virtue of having the authority to direct or having substantial influence over the important decisions made by the reporting company. The BOI Rule includes specific examples of both important decisions made by the reporting company and the ways in which an individual may directly or indirectly exercise substantial control over a reporting company. See Appendix A for the examples provided in the BOI Rule.

In examining these reporting obligations, sponsors will need to consider whether the terms of certain securities, including preferred equity and debt instruments, will entitle individuals to exercise such substantial control. The terms of certain securities, contractual rights or arrangements may

also determine whether they constitute “ownership interests” subject to the 25% reporting obligation, as the definition of “ownership interests” is broad and covers more than customary equity interests.

When Does This Happen?

- Reporting companies in existence before January 1, 2024 must file their reports by January 1, 2025.
- Reporting companies formed or registered on or after January 1, 2024 through December 31, 2024 must file their reports within 90 calendar days of formation or qualification.
- Reporting companies formed or registered on or after January 1, 2025 must file their reports within 30 calendar days of formation or qualification.
- Reporting companies must update their reports if there are changes concerning the reporting company or its beneficial ownership.
- See the [General Update](#) for additional details on filing timelines.

Appendix A

The BOI Rule includes the following definition of substantial control, examples of important decisions made by reporting companies and the ways that individuals may directly or indirectly exercise substantial control over a reporting company.

- i. An individual exercises “substantial control” over a reporting company if the individual:
 - (A) serves as a senior officer of the reporting company;
 - (B) has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);
 - (C) directs, determines or has substantial influence over important decisions made by the reporting company, including decisions regarding:
 - (1) 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;
 - (2) the reorganization, dissolution or merger of the reporting company;
 - (3) major expenditures or investments, issuances of any equity, incurrence of any significant debt or approval of the operating budget of the reporting company;
 - (4) the selection or termination of business lines or ventures, or geographic focus, of the reporting company;
 - (5) compensation schemes and incentive programs for senior officers;
 - (6) the entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;
 - (7) 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; or
 - (D) has any other form of substantial control over the reporting company.
- ii. An individual may directly or indirectly, including as trustee of a trust or similar arrangement,

exercise substantial control over a reporting company through:

- (A) board representation;
- (B) ownership or control of a majority of the voting power or voting rights of the reporting company;
- (C) rights associated with any financing arrangement or interest in a company;
- (D) control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;
- (E) arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
- (F) any other contract, arrangement, understanding, relationship or otherwise.

¹ 87 Fed. Reg. 59,498 (Sept. 30, 2022), as amended, available at: [Federal Register / Vol. 87, No. 189; Federal Register / Vol. 88, No. 229; Federal Register / Vol. 88, No. 215](#)

² [2005 SEC No-Action Letter to the American Bar Association](#)

³ [2012 SEC No-Action Letter to the American Bar Association](#)

⁴ 31 C.F.R. 5336(a)(11)(xxiv). Additional exemptions may be included for "any entity or class of entities that the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security, has, by regulation, determined should be exempt from the requirements of subsection (b) because requiring beneficial ownership information from the entity or class of entities— (I) would not serve the public interest; and (II) would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes".

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