

Recent Legal Developments Affecting Syndicated Real Estate Funds

Description

By [Russell J. Stein](#)

Two recent developments may affect private funds, including syndicated real estate offerings. First, at the end of last summer the SEC adopted the Private Fund Adviser rules, regulations that cover certain aspects of management over investment funds. Second, the Corporate Transparency Act (“CTA”) took effect on January 1, 2024, requiring most entities to register their beneficial ownership information with FinCEN.

New SEC Private Investment Fund Adviser rules

At the end of last summer, the SEC adopted the Private Fund Adviser rules (the “New SEC Rules”). These rules generally apply to investment vehicles (typically a limited liability company or limited partnership) that raise capital from investors to invest in securities or other investments. Real estate syndications (“Funds”), as well as private equity funds and venture capital funds, fall within the definition of investment vehicles for purposes of these rules. While the majority of the New SEC Rules relate to *registered* private fund advisers (i.e., registered investment advisors and funds registered with the SEC), some of the New SEC Rules affect unregistered funds and their advisers.

Restricted Activities Rules. Certain fund activities are now required to be disclosed to investors and may require investor consent under the New SEC Rules.

1. A fund adviser (the “Manager”) may not charge the Fund any regulatory or compliance fees of the Manager unless the Manager distributes a written notice of any such fees or expenses to the investors of such fund within 45 days after the end of the fiscal quarter in which the charge occurs.
2. A Manager may not charge to the fund expenses related to an investigation of the Manager by a governmental agency (i.e., the SEC, IRS, or state securities agency) unless the Manager requests each investor to consent to such charge ahead of time and obtains written consent from at least a majority of the investors who are not related to the Manager.
3. If a Fund has a clawback provision in it (i.e., a provision whereby the Manager has to return money to the fund due to an excess promote distribution), the Manager may not reduce the amount of the clawback by taxes unless the Manager provides the investors a written notice within 45 days after the end of the quarter in which the clawback occurs disclosing the amount of the clawback both before and after reduction for such taxes.
4. A Manager may not borrow money, securities, or other private fund assets, or receive a loan or an extension of credit, from an investor unless the Manager: (i) distributes to each investor a written description of the material terms of, and requests each investor to consent to, such borrowing, loan, or extension of credit; and (ii) obtains written consent from at least a majority in interest of the Fund's investors that are not related persons of the Manager.

Preferential Treatment Rule. The New SEC Rules generally prohibit a Manager from directly or indirectly, doing the following with respect to a Fund:

1. A Manager or a Fund may not grant an investor the ability to redeem its interests in the Fund if the Manager reasonably expects such redemption has a material, negative effect on the other investors unless (a) such redemption is required by applicable law, or (b) if the same redemption ability is given to all Fund investors.

2. A Manager or a Fund cannot provide information regarding its holdings to an investor if the Manager reasonably expects that providing the information would have a material, negative effect on other investors in the Fund unless such information is also offered to the other investors in the Fund.
3. Generally, a Manager may not provide preferential treatment to an investor unless (a) it provides advance written notice to prospective investors of preferential treatment related to any material economic terms; and (b) provides timely after-the-fact and annual written notices to current investors of all preferential treatment.

For funds with less than \$1.8 billion in assets under management, the *Preferential Treatment Rules* generally come into effect in early 2025.

If you are uncertain of how these new regulations affect the operations of your fund, we can assist you in reviewing the applicability of the rules to your operations. Contact our Private Funds and Real Estate Syndication attorneys, including [Russell J. Stein](#), to learn more.

Corporate Transparency Act Filing Obligations

The Corporate Transparency Act (“CTA”) took effect on January 1, 2024. Under the CTA, all entities formed or registered to do business in the United States, absent qualifying for an exemption, must furnish a beneficial ownership information (“BOI”) report to the U.S. Treasury’s Financial Crimes and Enforcement Network (“FinCEN”) and report information about the entity’s beneficial owners. Most private syndicated real estate funds, as well as their management companies, will likely have to register and file a BOI report. Entities formed before January 1, 2024, must submit their BOI report to FinCEN before January 1, 2025. Entities formed on or after January 1, 2024, but before January 1, 2025, have ninety (90) days from the date of formation to submit their BOI report.

Failure to timely file with FinCEN may result in penalties of up to \$500 for each day that a company fails to submit a BOI report, as well as potential criminal penalties, including fines of up to \$10,000 and imprisonment for up to 2 years.

On March 1, 2024, the U.S. District Court for the Northern District of Alabama held the CTA to be unconstitutional. However, this decision applies only to the plaintiffs in that case, and the decision has been appealed. For the time being, business entities must still comply with their obligations under the CTA, meaning that newly formed entities must still meet the 90 day filing deadline. Entities formed prior to 2024 have until the end of this year to file their BOI reports. These entities should assess whether they are required to file a BOI report and should collect the necessary information from their beneficial owners, but they may want to wait to file a BOI report until later this year, when there will hopefully be more certainty around the CTA.

FinCEN’s BOI filing portal can be found here: [Beneficial Ownership Information Reporting | FinCEN.gov](#). FinCEN has also released a small business compliance guide to help business owners determine their filing requirements. The guide is located here: [BOI Small Compliance Guide v1.1](#) (fincen.gov).

If you are uncertain regarding the filing requirements for your business or whether you qualify for an exemption, we can assist you to make this determination and the necessary information you will need to gather. Connect with our [Corporate & Business](#) attorneys, including [Lawrence Sheh](#), [Brian Reilly](#), and Madeline Ursini, to learn more.

Date Created

April 17, 2024