CTA Checklist for CLO Managers

21 November 2024

With the countdown to compliance for the US Corporate Transparency Act ("CTA") well underway, ahead of the fast-approaching deadline, many CLO managers and stakeholders have yet to decide how they will approach what can be described as potentially the most significant change to US corporate reporting in decades.

The CTA rules, including the various exemptions, which became effective on 1 January 2024, provide a starting point for this analysis. For those CLO managers who form the view that CLO co-issuers are a subsidiary of a registered investment advisor ("RIA") and therefore exempted for CTA reporting, it is incumbent that US legal advice supporting this decision is obtained. Additionally, it would be prudent to ensure that confirmation of the applicable exemption and supporting legal advice is clearly documented on an entity-by-entity basis.

Equally, for those CLO managers who are looking to comply with the CTA by filing the required beneficial ownership information, immediate steps should be taken to ensure that key, critical elements of the process are properly considered.

The CTA is the latest of US lawmakers' efforts to identity the beneficial owners of businesses in the US, in similar fashion to other G7 nations and in line with international anti-money laundering standards. Under the CTA rules, existing reporting companies were granted until 1 January 2025 to file an initial Beneficial Ownership Information report ("BOI Report"). As outlined in earlier Maples Group articles, while some exemptions for CTA reporting exist, it appears that a number of CLO managers have yet to confirm their analysis and make a final informed determination on this matter.

Item #1 – Reporting vs. Exemption

Under the CTA rules, a number of exemption routes are available, particularly for certain types of companies, including public companies, banks and pooled investment vehicles. Unfortunately, the vast majority of CLO co-issuers do not meet the requirements of the pooled investment vehicles exemption. Despite the absence of certainty,[1] most CLO managers that are seeking an exemption are instead relying upon that provided to a subsidiary of an RIA. From our vantage point as a provider of fiduciary services to a substantial segment of offshore CLO issuers and their US co-issuers, approximately 20% of US CLO managers are following an exemption route. By contrast the prevailing majority and approximately 80% of CLO managers are electing to file BOI Reports in respect of each of the deemed reportable entities and expect to do so on or before the regulatory reporting deadline of 1 January 2025 (the "deadline").

As the deadline for compliance becomes imminent, and with increasing clarity on the rules, some CLO managers previously intending to seek an exemption have reversed course and have since decided to file a BOI Report. While this group is broad, it does appear that a number of managers in this subset have made the decision based on the action of their peers, i.e., following the prevailing market view and commentary provided from a number of leading- industry organisations.

A shared view of managers who have taken the fail-safe approach to file the BOI report is the rationale that such structures were initially designed to stand independently of the CLO manager. Managers with this view take the position that any alternate course would result in the co-issuer entity being re-classified as a downstream subsidiary of the CLO manager. Following that course of action and in order to qualify for an “exemption” would equally require analysis and legal advice. The associated expense of this reclassification exercise is likely more than the cost of “reporting” in the first instance. It is precisely such cost-benefit analysis which is widely shared amongst the prevailing market, and which has steered those managers who have taken the more fail-safe approach.

Item #2 – Identify Beneficial Owners

Another tipping point in favour of BOI reporting concerns offshore SPVs with US-domiciled co-issuers. The guidance within the CTA rules to assess substantial control is significantly broad and may be extended to include the directors of the offshore issuer. In these structures, determining who has direct control is not always straightforward. Similarly, identifying the individuals who exert indirect control or ownership can also be challenging.

Item #3 – Are EINs or FinCEN IDs Required?

A number of operational / logistical challenges will need immediate consideration, notably the need for a unique identifier for co-issuer entities such as EINs and/or FinCEN Identifiers for individuals exerting control of the co-issuer. Timeliness to file the BOI report is also critical. Given the anticipated, increased volume of traffic, the time taken to process and upload documents to the FinCEN portal may take longer in the run-up to the deadline.

Item #4 – Other Considerations

The sheer number of entities impacted by this deadline – estimated at 32 million – marks this event as one of significant concern. Given the potential to disrupt any ill-prepared businesses, it is advisable now to consider and analyse each potentially in-scope entity. As a case in point, FinCEN recently clarified that all US entities active at any point during the fiscal year 2024, and irrespective of any termination prior to the deadline, are mandated to submit a BOI Report, unless otherwise exempted.

Expert Guidance for CLO Managers

While the CTA is US legislation, it does have global reach and where managers are not expert in US regulation, appropriate advice will be required to ensure the full and complete analysis of any connected legal entities (i.e. Cayman Islands, Jersey and other jurisdictions), and individuals potentially in-scope of the CTA.

For many CLO managers, the relatively low cost of filing a BOI Report, in contrast to the maximum potential penalty for non-compliance [2], has significantly dampened efforts to look to rely on an uncertain exemption. To assist clients, the Maples Group provides an efficient end-to-end service for CTA compliance, by directly arranging the EINs where required and facilitating reporting to the FinCEN portal. These services also include US entity formation and directly arranging the BOI filings. The Maples Group also provides independent managers to co-issuer entities, effectively substituting those key individuals at CLO managers who otherwise would be in-scope and required personally to comply with the CTA.

Through key insights from clients and industry partners, regarding trends and certainty to compliance with the CTA, the Maples Group provides market leadership in this space, developing tailored solutions. With the launch of our CTA consultancy service, the broader market can also benefit from our team's expertise on this new regulation. For assistance addressing specific concerns about compliance with the CTA regime, please reach out to any of the individuals highlighted below or your usual Maples Group contact.

For legal and regulatory disclosures, please visit www.maples.com/legal-notices.

[1] FAQs: Corporate Transparency Act Compliance | Structured Finance Association

[2] Note this civil penalty potentially imposes fines up to a maximum of US$591 per day (adjusted annually for inflation.)