

CORPORATE TRANSPARENCY ACT

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CTA - ITS COMING



- Statute is found at 31 U.S.C. 5336
- Current Rules are found at 31 C.F.R. 1010.308
- More rules and interpretations are expected
- Under the current statute, the CTA reporting obligations becomes effective
 - for all entities formed on or after January 1, 2024, and
 - for all existing entities (as of December 31, 2023) by January 1, 2025.

THIS IS NOT NEW PRIOR BENEFICIAL OWNERSHIP ISSUES



- In December 2007 I wrote an article for the Business Law Section newsletter entitled *Entity Ownership Disclosure - New Requirements Coming.*
- On February 15, 2008, Burns, Figa & Will, P.C. and Parasec Corp. sponsored a CLE luncheon based on that article entitled *“Terrorism and Entity Formation”*
- The December 2007 article and the subsequent CLE were based on a November 13, 2007 Denver Channel 7 news story by John Ferrugia entitled *“Colorado Open for Business To Illegal Immigrants Or Terrorists-Loophole In Law Allows Corporations To Set Up Unchecked”*
- My conclusion to the 2007 article may have been a bit premature: “As we used to say in the U.S. Navy when the seas were swelling, “Stand by for heavy rolls” - things may be changing in the entity formation process. ” Almost seventeen years later that appears to be the case.

COLORADO RULES OF PROFESSIONAL CONDUCT

CTA - ITS COMING



- *The Lawyer should consider letting clients know about the forthcoming effectiveness of the CTA*
 - *CRPC Rule 1.4 (Communication with Clients)* provides that lawyers have an obligation to keep clients informed about matters relating to the client representation
 - Lawyers who represent entities may have an ethical obligation under the rules to inform entity clients they represent about the reporting requirements if related to the representation. If only representation is doing title opinions, then the obligation may not exist.
- Does not apply to former clients - but who is a “former client.” As stated in *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991):

“The attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand, that the relationship is no longer to be depended on.”
- It is not the lawyer’s judgment - but the reasonable belief of the client.
- Is it appropriate for a lawyer representing businesses to send a newsletter piece to clients and former clients (your “holiday card email list”?) about the impending effectiveness of the CTA? At the worst, it seems to be a marketing opportunity.

CTA NOTICE



► Dear Clients, Friends, and Former Clients:

We at _____ (the “Law Firm”) wanted to let you know of a major change in law that will impact almost everyone operating a business or non-profit through a legal entity such as a corporation, limited liability company, cooperative, or a limited partnership. Note that this notification is provided to you for informational purposes only and does not constitute legal advice.

Effective January 1, 2024, a federal law known as the “Corporate Transparency Act” (the “CTA”) will apply to all existing and newly-formed non-exempt reporting companies. Effective comes in two parts:

- Any person forming an entity with the Secretary of State of any state on and after January 1, 2024 will have to first determine if the newly formed entity is exempt from the reporting requirements of the CTA and, if not exempt, will be required to file Beneficial Ownership Information (a “BOI report”) with the federal Financial Crimes Enforcement Network (“FinCEN”).
- All entities existing on December 31, 2023 will have to determine whether they are exempt from the reporting requirements and, if not, file a BOI report with FinCEN not later than January 1, 2025.

The CTA and the rules provide certain civil and criminal penalties for Reporting Companies that do not file the BOI reports accurately and timely, and those penalties also apply to any Beneficial Owner that fails to provide accurate and complete personal information for the BOI reports.

Rules further governing the CTA are being finalized by FinCEN. Your friends at the Law Firm are monitoring the continuing rule-making activities and can assist you in complying with this federal law when it becomes effective. Please do not hesitate to contact your lawyer at the Law Firm should you have any questions.

These materials are provided for informational purposes only. They do not constitute legal advice nor do they necessarily reflect the opinions of the Law Firm or any of its attorneys or clients. These materials are not intended to create an attorney-client relationship between you and the Law Firm

THE FOCUS OF THE CTA - REPORTING COMPANIES



- Under the CTA, commencing January 1, 2024, Reporting Companies will have to file reports (“BOI Reports”) containing information:
 - About the Reporting Company
 - About the Beneficial Owners, and
 - In some cases, about the Company Applicant
- A domestic Reporting Company is a corporation, limited liability company (LLC), or any entity 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 is a corporation, LLC, or other entity formed under the law of a foreign country that is registered to do business in any state or tribal jurisdiction by the filing of a document with a secretary of state or any similar office.
- Certain Reporting Companies may be exempt from filing Beneficial Ownership Information Reports

WHO IS NOT A REPORTING COMPANY EXEMPTIONS



- ▶ Twenty-three types of entities are exempt from the definition of “reporting company,” including:
 - Publicly-held issuers that file reports with the Securities and Exchange Commission, as well as broker-dealers, exchanges, clearing agencies, investment companies that are registered or licensed under the federal securities laws;
 - certain banks, credit unions, and other licensed financial institutions;
 - tax exempt entities; and
 - large operating companies that employ more than 20 full-time employees in the United States, with a physical presence in the United States, and that have filed tax returns in the United States reflecting gross receipts or sales of more than \$5,000,000.
- ▶ Inactive entities are also exempt from the reporting requirements.

WHO ARE BENEFICIAL OWNERS?



- ▶ “Beneficial Owner” can only refer to an individual who is in “substantial control” of the Reporting Company
- ▶ The definition of “substantial control” includes:
 - ▶ an individual serving “as a senior officer” of the Reporting Company;
 - ▶ any individual that has “authority over the appointment or removal of any senior officer or a majority of the board of directors”; or
 - ▶ “directs, determines, or has substantial influence over important decisions made by the Reporting Company.”
- ▶ As defined in the Rules, the term “direct or indirect control” has a very broad meaning and includes a number of indirect arrangements where an individual can exercise control.
- ▶ Ownership of 25% of the Reporting Company also results in the direct or indirect owner being a Beneficial Owner – regardless of whether that 25% interest gives the owner any degree of control.

COMPANY APPLICANTS



- The BOI Reports for any Reporting Company formed on or after January 1, 2024, will have to contain information about the Company Applicant.
- The Company Applicant is the individual who is primarily responsible for directing or controlling the filing of the relevant document by another.
- There can be no more than two Company Applicants according to the interpretations issued by FinCEN
- Registered Agents have no current reporting obligation

ACCESS TO INFORMATION IS HIGHLY RESTRICTED



- FinCEN will maintain the BOI Reports in a very secure database known as BOSS – beneficial ownership secure system
- Access to the information will be restricted to a statutorily prescribed group of U.S. governmental entities when the information will be used by the agency “in furtherance of national security”
- For state, local and tribal authorities, courts may authorize the agency to access the information in connection with a criminal or civil investigation
- Foreign governments and authorities are even more restricted in their ability to access the information.
- Financial institutions can access the BOI information about a client Reporting Company with the consent of that Reporting Company
- Reporting Companies and others (law firms, accounting firms) who hold copies of the BOI must maintain similar protections

FINCEN IDENTIFIERS



- Where a Beneficial Owner may be subject to reporting on one or more Reporting Companies, the Beneficial Owner can obtain a FinCEN Identifier to use in stead of providing that information to the Reporting Company.
- The Company Applicant can also obtain a FinCEN identifier.
- The process for obtaining a FinCEN identifier has not yet been established.

PENALTIES



- There are penalties established against the Reporting Companies and “any person” who provides false or misleading information for the BOI Reports of who fails to provide the required information.
 - Criminal penalties – imprisonment for up to 2 years and fines up to \$10,000
 - Civil penalties – up to \$500 for each day that the violation continues
- There are more significant penalties for the unauthorized disclosure or use of BOI
 - Criminal penalties – imprisonment for up to five years and fines up to \$250,000
 - If part of a “pattern of illegal activity”, imprisonment for up to ten years and fines up to \$500,000

TWO OTHER ISSUES FOR LAWYERS AND ACCOUNTANTS



- In August 2023 the ABA Board of Governors adopted Resolution 100 which amended Model Rule 1.16(a) which requires (among other things) that, before accepting representation of a client and during the period of representation, the lawyer has to consider whether “the client or prospective client seeks to use or persists in using the lawyer’s services to commit or further a crime or fraud despite the lawyer’s discussion pursuant to Rules 1.2(d) and 1.4(a)(5).”
- On August 31, 2023, the PCAOB closed the comment period for its proposal to amend professional auditing standards that governs the auditor’s consideration of a company’s noncompliance with laws and regulations. That was AS 2405, *Illegal Acts by Clients*, originally proposed on June 6, 2023.
- In both cases, the rules would, if adopted, impose due diligence obligations on lawyers and accountants which likely would include the client’s compliance with the CTA.

Thank you, very much

Herrick Lidstone

