HERRICK K. LIDSTONE, JR.
(720) 493-3195
hklidstone@bfwlaw.com

CONSIDERATIONS FOR ATTORNEYS RESULTING FROM THE FEDERAL CORPORATE TRANSPARENCY ACT[1]

By Herrick K. Lidstone, Jr., Burns, Figa & Will, P.C.

September 5, 2023

The federal Corporate Transparency Act (the "CTA")[2] was included in the National Defense Authorization Act ("NDAA") adopted by Congress on January 1, 2021, when it overrode President Trump's veto. The NDAA includes the CTA and certain other anti-money laundering provisions which require implementation by Department of Treasury rulemaking through its Financial Crimes Enforcement Network ("FinCEN"). Only the first set of rules have been adopted, another set proposed, and there are more to come.[3]

It is important to note that all entities are potentially subject to the requirements of the CTA – LLCs, partnerships, cooperatives, corporations, and other associations formed by a filing with the Secretary of State or other filing authority. This includes entities formed to operate the family business, estate planning entities, oil and gas exploration, real estate ownership, professional service firms, and other businesses formed in or operating in the United States. The CTA is of broad application, and each existing entity should consider (with the help of their legal and other advisors) whether it is subject to the CTA reporting requirements discussed below.

---

[1] For an updated version, see Lidstone, Herrick K., *Considerations for Attorneys Resulting from the Corporate Transparency Act* (September 5, 2023), available at https://ssrn.com/abstract=4414393. See, also, *Corporate Transparency – New Rules To Govern All Entities Doing Business in the United States* (August 16, 2023), available at https://ssrn.com/abstract=4529466; *The Federal Corporate Transparency Act: More Answers Are Proposed* (January 11, 2023), available at https://ssrn.com/abstract=4313089; *The Federal Corporate Transparency Act: The Answers Are Here, In Part* (October 15, 2022), available at https://ssrn.com/abstract=4236649; *The Federal Corporate Transparency Act – Answers Are Coming*, (January 1, 2022) available at https://ssrn.com/abstract=3991988; *The Federal Corporate Transparency Act: Still Waiting for Answers* (November 20, 2021) available at https://ssrn.com/abstract=3964106; *The Federal Corporate Transparency Act – Part 2: Waiting for Answers and Dealing with Ethical Issues* (March 2021) available at https://ssrn.com/abstract=3805868; and *Why Business and Real Estate Lawyers Need to Worry About the 2021 National Defense Authorization Act* (January 2021) available at https://ssrn.com/abstract=3759897. These articles provide information about the background to the CTA and why regulators and certain members of Congress have sought its adoption in the United States for almost 20 years.

[2] 31 U.S.C. § 5336 ("Beneficial ownership information reporting requirements"), available at https://www.law.cornell.edu/uscode/text/31/5336.

[3] See Exhibit A for a list of the regulations and interpretations for the CTA.

The CTA is scheduled to become effective January 1, 2024, even though at this writing we are awaiting some additional rules and ultimately access to the Beneficial Ownership Secure System ("BOSS")[4] which is where the Beneficial Owner Information ("BOI") Reports will be filed. When effective:

- Any new entity formed on or after January 1, 2024, that meets the CTA's definition of "Reporting Company" and is not otherwise exempt from the requirement to report BOI will have to file a BOI report with the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") within 30 days after formation. In addition, all non-exempt Reporting Companies that are in existence on December 31, 2023, will have to file a BOI report by January 1, 2025.

- This also applies to foreign (non-U.S.) entities based on their date of qualification to do business in the United States.

- In both cases, "when there is a change to previously reported information about the reporting company itself or its beneficial owners," the Reporting Company, itself, must file updated reports within thirty calendar days.[5] As will be discussed later, the term Beneficial Owner is defined very broadly to include direct or indirect owners of 25% or more of the equity of the entity and other "control persons" such as officers, directors, managers, or general partners.

At this point in time, only the first set of rules have been adopted[6] and another set has been proposed.[7] and there are more to come. FinCEN has also issued several interpretive releases as described at www.fincen.gov/boi. As of the date of this article, neither the method to obtain FinCEN Identifiers (through www.login.gov, which is available to the public for a number of government services) or to file BOI reports with FinCEN are available online.

[4] The CTA directs the Secretary of the Treasury to maintain BOI "in a secure, nonpublic database, using information security methods and techniques that are appropriate to protect non-classified information security systems at the highest security level. . . ." CTA, Section 6402(7). To implement this requirement, FinCEN has been developing the BOSS to receive, store, and maintain BOI.

[5] https://www.fincen.gov/sites/default/files/shared/BOI_Reporting_Filing_Dates-Published03.24.23_508C.pdf, published March 24, 2023.

[6] See *The Federal Corporate Transparency Act: The Answers Are Here, In Part* (October 15, 2022), available at https://ssrn.com/abstract=4236649.

[7] See *The Federal Corporate Transparency Act: More Answers Are Proposed* (January 11, 2023), available at https://ssrn.com/abstract=4313089.

OBLIGATIONS OF LAWYERS

Most (if not all) lawyers who represent businesses will find that they represent "Reporting Companies" under the CTA. Many existing entities are likely Reporting Companies without an exemption; all newly formed entities are likely to be Reporting Companies since it will be too early in their life to achieve any exemption from registration. For a brief description of exemptions as they appear in the statute and the rules, see Exhibit D, below.

Let Your Clients Know. Probably among the most significant things that lawyers should consider is to let their clients know about the potential applicability of the CTA. The entity will need to determine whether it is a Reporting Company and, if so, whether the entity is exempt from the reporting obligation. While this is a significant point of discussion in the legal community, it has not yet become such in the business community. Companies need to know of the possibility of CTA application.

Where clients ask lawyers for their assistance in determining the applicability of the reporting obligations of the CTA and meeting any resulting reporting requirements, lawyers have to provide competent (Colo. RPC 1.1) and diligent (Rule 1.3) representation. As agreed between the lawyer and the client, the scope of the representation can be allocated between the lawyer and the client (Rule 1.2(c)). In all cases, lawyers need to address their obligations to communicate matters related to their representation as described in CRPC Rule 1.4.

Although intended to counter terrorist financing and money laundering, the CTA and its rules impose significant obligations on lawyers which need to be considered by lawyers in their representation of their business entity clients.

Should a Lawyer Limit the Lawyer's Representation? Unless lawyers specifically exclude representation relating to compliance with the CTA (a limitation of representation contemplated under Colo. RPC 1.2(c)), lawyers representing Reporting Companies will likely be expected to assist their clients in:

1. Determining whether the client is in fact a Reporting Company and, if so, whether an exemption from the reporting obligation is applicable;

2. Determining who the Beneficial Owners subject to the reporting requirements may be – which may include investigating parent entities and subsidiaries of the Reporting Company to determine direct and indirect ownership and control;

3. Obtaining the necessary BOI from the Beneficial Owners (and Company Applicants for Reporting Companies formed on or after January 1, 2024) for inclusion in the BOI Reports; and

4. Meeting the security obligations under which FinCEN operates in obtaining, maintaining and/or disclosing a Reporting Company's or its BOI's confidential and sensitive personal identifiable information ("PII").

Even lawyers who are not representing Reporting Companies may be asked by their clients if they actually are Reporting Companies and whether they should file reports. (Hint: If the clients are not Reporting Companies or are exempt Reporting Companies, they do not have to file BOI reports.) Many other issues are likely to arise from the obligation of Reporting Companies to file BOI Reports, including disclosure as to whether or not they have made their filings and requests by contractual parties seeking access to client BOI Reports as a result of their due diligence obligations.

This raises the question as to whether the attorney should modify his or her engagement letter to specifically address the client's obligations under the CTA. In my judgment, the answer to that question would be "no." There are many things that a client is obligated to do, including filing annual tax returns and other reports. If the lawyer specifically identifies one continuing reporting obligation, does that mean the lawyer is accepting all others? As in all cases, the best way for the lawyer to represent the client is to provide warnings and advice to clients when the situation arises as a regular part of the lawyer's representation. Where there is an exception to the work the lawyer intends to accomplish for a client, that should be included in an engagement letter or other notification limiting the scope of the lawyer's representation under Rule 1.2.

Clearly, however, a lawyer cannot exclude a representation from an engagement without advising the client about the exclusion. Thus again, the lawyer's notification to the client of the pending or actual applicability of the CTA may be important.

TIME PERIODS UNDER THE CTA

The CTA provides that a Reporting Company formed or registered on or after January 1, 2024[8] must file the required BOI reports no later than 30 days after receiving notice of their creation or registration (or public notice otherwise being available).

On the other hand, domestic or foreign Reporting Companies created or registered before January 1, 2024, will have one year (until January 1, 2025) to file their initial BOI reports.

Reporting Companies have 30 days to report changes to the information in their previously filed BOI reports regarding the Reporting Company itself and the Beneficial Owners (but information regarding Company Applicants need not be updated).[9] The Reporting Company must correct inaccurate information in previously-filed BOI reports within 30 days of when the

[8] 31 CFR § 1010.380(a)(1)

[9] 31 CFR § 1010.380(b)(3).

Reporting Company becomes aware or has reason to know of the inaccuracy of information in earlier BOI reports.[10]

Note that the rules provide that the Reporting Companies are responsible for filing the initial BOI reports and any amended or corrected reports.[11] Nothing in the rules imposes the filing obligation on any Beneficial Owner, Company Applicant, or any other individual. Furthermore, the 30-day period as set forth in the final rules (§1010.380(a)(1)(i)) is inflexible. In adopting the final rules in September 2022 the Department of Treasury also issued an explanatory release (the "September Release"). The September Release states: "the final rule does not establish a specific mechanism for reporting companies to seek extensions to the filing periods for initial, updated, or corrected reports, FinCEN may consider providing guidance or relief as appropriate, depending on the facts and circumstances."[12]

Updating or correcting the report is required when information regarding a Beneficial Owner is inaccurate, incomplete, or changes. (§1010.380(a)(2)). There is no materiality exception; all changes must be addressed under the rules as currently written. The Reporting Company's obligation is fixed at 30 days. As stated in the September Release (at page 49):

> For updated reports, . . . FinCEN considers that keeping the database current and accurate is essential to keeping it highly useful, and that allowing reporting companies to wait to update beneficial ownership information for more than 30 days—or allowing them to report updates on only an annual basis—could cause a significant degradation in accuracy and usefulness of the database. FinCEN has considered that a more frequent updating requirement may entail more burdens than a less frequent one, but reporting companies can be expected to know who their beneficial owners are, and it is reasonable to expect that reporting companies will update the information they report when it changes. Moreover, keeping the requirement to update reports at 30 days is consistent with international practice on the collection of beneficial ownership information.[13]

As set forth in the September Release (page 53), "the final rule does not adopt a good faith or other standard regarding the requirements to update or correct reports. The CTA places the

---

[10] 31 CFR § 1010.380(a)(2).

[11] 31 CFR § 1010.380(a)(1) provides that "[e]ach reporting company shall file an initial report ...." § 1010.380(a)(2) provides that if there is any change to a BOI report, "the reporting company shall file an updated report . . . within 30 calendar days after the date on which such change occurs." § 1010.380(a)(3) provides that if "any report under this section was inaccurate when filed and remains inaccurate, the reporting company shall file a corrected report . . . within 30 calendar days after the date on which such reporting company becomes aware or has reason to know of the inaccuracy."

[12] September Final Release at pages 45-46, immediately preceding Section III.A(ii).

[13] The CTA itself requires updates to be filed "in a timely manner, and not later than 1 year" after there is a change with respect to any reported information, in accordance with regulations to be prescribed by FinCEN." 31 U.S.C. § 5336(b)(1)(D).

reporting responsibility on reporting companies, and this responsibility includes the obligation to report accurately." The CTA also requires Reporting Companies to update information when it changes and it requires Beneficial Owners to advise the Reporting Company when the Beneficial Owner's information changes. As discussed below, the CTA imposes fines and penalties on any person (including the Reporting Company, a Beneficial Owner or Company Applicant) who fails to provide accurate and complete information to the Reporting Company or who fails to timely update information when required.

STEPS TO BE CONSIDERED BY CLIENTS AND THEIR LAWYERS

The deadline for compliance with the CTA is fast approaching; therefore, we strongly recommend that lawyers consider advising their clients who may be Reporting Companies about their potential obligations under the CTA. Reporting Companies need to consider a process for registration and reporting, including considering the following steps:

1. The Client, with the assistance of counsel, should create an action plan for registration and reporting. Companies incorporated prior to January 1, 2024, will have until January 1, 2025, to register and report.

2. With an action plan in place, Reporting Companies should consult with internal stakeholders and in-house/outside counsel regarding reporting obligations or applicable exemptions.

3. Where exemptions are not available, Reporting Companies must obtain the required BOI and Company Information for the BOI Report. Ownership determination may require detailed analysis from multiple sources to establish ownership percentage, in addition to determining individuals with actual authority to substantially control the reporting company. Depending upon ownership complexity, the foregoing analysis may require significant time and resources.

4. Once all owners/controllers are identified, their BOI will need to be collected for reporting purposes and maintained in a secure manner in accordance with relevant privacy and cybersecurity laws. As described below, the use of FinCEN Identifiers may lighten this burden on Reporting Companies.

5. Reporting Companies with multiple subsidiaries should analyze their organizational structure to identify each potential reporting company and begin the exemption analysis on an entity-by-entity basis.

Reporting Companies should document the foregoing processes in their anti-money laundering programs and include protocols for filing with the BOSS and conducting periodic reexaminations of each entity's claimed exemptions or reporting obligations. If any entity in a company's structure ceases to qualify for an exemption and therefore becomes a reporting

company, such entity is required to file a report with FinCEN within 30 days of this change. Failure to report such changes may result in civil and criminal penalties.

WHAT ARE REPORTING COMPANIES?

Applicable Definitions. One of the first requirements that must be understood when a lawyer is considering the client's obligations under the CTA is – "what is a Reporting Company." As discussed in previous articles, not all companies are "Reporting Companies" for the purposes of the CTA. Lawyers representing entities must understand whether their clients are in fact "Reporting Companies" and, if so, whether the client is exempt from the reporting obligation. The rule identifies two types of Reporting Companies: domestic and foreign.[14]

1. 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.

2. 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.

Under the statute[15] and the rule,[16] 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.

[14] 31 C.F.R. § 1010.380(c).

[15] 31 U.S.C. § 5336(a)(ii)(B).

[16] 31 C.F.R. § 1010.380(c)(2).

Inactive entities are also exempt from the reporting requirements. An "inactive entity" is one which was in existence on or before January 1, 2020, is not engaged in active business, and is not owned by a foreign person, whether directly or indirectly, wholly or partially. There are three other significant requirements for an inactive entity:

1. The inactive entity has not experienced any change in ownership in the preceding twelve-month period,

2. The inactive entity has not sent or received any funds in an amount greater than $1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve-month period; and

3. The inactive entity 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 other similar entity.[17]

Other types of legal entities, including certain trusts, and (although not mentioned in the rule) general partnerships and decentralized autonomous organizations (DAOs[18]), are excluded from the definitions to the extent that they are not created or registered by the filing of a document with a secretary of state or similar office.

An interesting comparison involves decentralized autonomous organizations (DAOs) which are a type of blockchain-based organization that operates through code and smart contracts rather than a central authority or human management. They are designed to be autonomous, self-governing entities that execute actions based on predefined rules and decisions made by token holders or stakeholders.

- DAOs can be organized without forming an entity, and then they will likely be treated as a general partnership. General partnerships (formed without making any filing with the secretary of state or other entity) are not Reporting Companies under the CTA, but provide the risk of unlimited liability to the stakeholders.

[17] There are many entities that are not engaged in business and thus "inactive" in normal terminology; these would not be "inactive" for CTA purposes if the entity holds any asset.

[18] In a recent memorandum to clients and friends, the law firm Fried, Frank described DAOs as "a new form of entity, with explosive growth, that some envision as 'the New LLCs'." DAOs operate on a blockchain where owners are generally not disclosed. Fried, Frank, Harris, Shriver & Jacobson LLP client memorandum dated August 17, 2022, available at https://www.friedfrank.com/news-and-insights/a-primer-on-daos-a-new-form-of-entity-with-explosive-growth-that-some-envision-as-the-new-llcs-10713. DAOs can be organized as LLCs (as under the Wyoming DAO Supplement) which would require the filing of an instrument with the relevant filing agency. See Wyo. Stat. § 17-31-101 *et seq.*, adopted in 2021 and amended in 2022 to permit DAOs to obtain legal status as LLCs under Wyoming's LLC Act.

- DAOs are frequently organized as LLCs which do require a filing with the secretary of state resulting in the DAO being a Reporting Company under the CTA required to report its Beneficial Owners. In that way, the Beneficial Owners may be members of a limited liability entity but may lose their anonymity which frequently is considered a benefit of a DAO.

Importantly, in the vast majority of cases, newly-formed entities will most likely be Reporting Companies with no exemption. The initial BOI Report must be filed within 30-days of formation. Even if a newly-formed entity has a plan to become a public company, a 501(c)(3) non-profit corporation, a securities reporting issuer, or other exempt Reporting Company, those steps are unlikely to be completed within the first thirty days and thus at least the initial BOI Report will have to be filed.

Also, in many cases, shareholders, officers, and directors are added and subtracted in the first months of existence of the Reporting Company, and therefore regular amendments to the BOI Reports will have to be filed.

What Does This Mean For Lawyers? Lawyers will need to be prepared to advise their clients whether the client is a Reporting Company and when BOI reports must be filed by one of the Company Applicants (for a newly-formed entity) or by the other responsible persons (for entities existing before January 1, 2024).[19]

New Entities. Lawyers also must decide whether they are willing to accept the disclosure obligation of a Company Applicant by signing or filing the incorporation or organization paperwork for their client formed on or after January 1, 2024. While the Company Applicant has no personal obligation to file a BOI report, a lawyer who helps a person form an entity (whether or not disclosed as a Company Applicant) has an obligation to the lawyer's client to advise the newly-formed entity (if a Reporting Company) to file the BOI report timely. Importantly:

- As noted above, newly-formed entities will most likely be Reporting Companies with no exemption. The initial BOI Report must be filed within 30-days of formation.

- In many cases, shareholders, officers, and directors are added and subtracted in the first months of the Reporting Company's existence, and, therefore, regular amendments to the BOI Reports will have to be filed.

Entities formed before January 1, 2024. The Company Applicant for all entities formed before January 1, 2024, does not have to be disclosed under the CTA or its rules. Nevertheless,

[19] See Exhibit B for a form of notification to clients.

lawyers representing these older companies will want to advise, and perhaps assist, them in meeting their BOI reporting obligations and consideration of the availability of exemptions.

- For example, Reporting Companies that are subject to reporting requirements under the federal securities laws may lose that reporting status.[20]

- A Reporting Company that formed expecting to become a tax-exempt entity (and therefore an exempt Reporting Company) is unlikely to meet the requirements for an exempt Reporting Company under 31 CFR § 1010.380(c)(2)(xix) within the 30-day period during which the initial BOI report is due.

All Entities. In both cases, lawyers representing those clients, whether the lawyer was a Company Applicant or not, will have to advise the client (1) to file the initial BOI report timely, and (2) to keep track of any changes in the client's beneficial ownership information to ensure that amendments to the BOI reports are timely filed. Alternatively, the lawyers can disclaim their obligation to do so, but any such disclaimer should be clearly stated in writing to the client, including a discussion of the penalties should the client itself fail to meet the BOI reporting requirements.

Many lawyers who take on a new client that is an existing entity perform some investigation into the client, whether through a Google search or a more detailed background check on the prospective client and its management. Compliance with the CTA will be another item that the lawyer preparing to represent a new client may want to check:

1. Is the new client a Reporting Company and, if so, is it exempt?

2. Have events occurred pursuant to which the Reporting Company might have lost its exemption?

3. If the new client is a non-exempt Reporting Company, has it filed its reports and all amendments with FinCEN, and can the new client prove it has made those filings? Are there failures to file or errors in filing that need to be cured?

4. Were FinCEN identifiers used to complete the BOI Report and, if so, who were the FinCEN identifiers used to identify? PII requires special handling by law firms and

[20] For example, the exemption only applies to issuers of a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (the "1934 Act") or an issuer that is "required to file supplementary and periodic information under section 15(d) of the" 1934 Act. In the latter case, the *requirement* to file information under Section 15(d) "shall be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class, other than any class of asset-backed securities, to which the registration statement relates are held of record by less than 300 persons." 1934 Act, § 15(d)(1). Once suspended, an issuer can continue to voluntarily file the reports, but would no longer be "required" to file them – thus the exemption in Rule 31 CFR § 1010.380(c)(2)(i)(B) would no longer be available.

other entities. Wrongful disclosure of PII can result in significant penalties even apart from those set forth in the CTA.

5. Any person (lawyer, law firm, accountant, client, officer, administrator) handling PII needs to be aware that wrongful disclosure of PII can have serious consequences. Storage of PII needs to be carefully considered and adequate cybersecurity measures should be maintained.

6. When entering into lending arrangements, might the proposed lender (bank, private lender or other) require:

   a. Representations from the prospective borrower of CTA compliance? Note that many loan agreements already require representations that the borrower is in compliance with all laws – and, clearly, the CTA is a law that (when effective) fits into the compliance category.

   b. Copies of BOI reports and amendments (and FinCEN Identifiers) as filed?

   c. Where a Beneficial Owner has used a FinCEN Identifier rather than setting forth his or her PII in the BOI Report, does the Reporting Company have the information necessary to completely identify the Beneficial Owner – and does the Reporting Company have the authority to do so?

   d. Certification or opinion letter from legal counsel as to whether the CTA is applicable to the prospective borrower?[21]

   e. Other issues that may come up.

7. Likewise, other contractual parties may pose the same requirements in their agreements with the client – especially in connection with merger/acquisition agreements or other financing agreements.

[21] Financial institutions frequently ask lawyers for opinion letters on client lending arrangements. In many cases, lawyers will be asked to opine on "validly existing and in good standing," "enforceability," "due authorization," and "no litigation." Some of those may be legal conclusions for which an attorney opinion may be justified; others are confirmations of fact for which a legal opinion would not be justified. How can an attorney provide an opinion that its client "is not involved in any litigation"? Similarly, whether the client has filed accurate and complete BOI reports with FinCEN under the CTA is not a legal opinion, but rather a confirmation of fact which the lawyer probably cannot justify. Perhaps, at best, a lawyer may be willing to state that the lawyer "has no actual knowledge of any litigation involving the entity and has no actual knowledge that the BOI reports filed by the entity are inaccurate or incomplete." For a further discussion of legal opinions, see Lidstone, *The Anatomy of a Legal Opinion* available at http://ssrn.com/abstract=2261767.

Law Firms and Accounting Firms. Law firms and accounting firms, themselves, may be Reporting Companies to the extent that they otherwise meet the definition of "Reporting Company" and are not otherwise exempt.

It is important to note that any public accounting firm registered in accordance with § 102 of the Sarbanes-Oxley Act of 2002 is an exempt Reporting Company.[22]

In both cases, a law firm or an accounting firm may also not be a Reporting Company (because, for example, they were formed as a general partnership without making any filing with the secretary of state) or may be exempt as a large operating company as defined in 31 CFR § 1010.380(c)(2)(xxi).[23]

BENEFICIAL OWNERS

Why Do We Care About BOI Reporting? The focus of the CTA's reporting is for FinCEN to receive in a searchable form information about Beneficial Owners of a Reporting Company. As stated in the final rule on beneficial ownership reporting requirements adopted on September 30, 2022,[24] illicit actors frequently use corporate and other entity structures as shell and front companies to obfuscate their identities, launder their ill-gotten gains through the U.S. financial system, and provide financing for terrorists which is not traceable. According to the adopting release, not only do such acts undermine U.S. national security, but they also threaten U.S. economic prosperity: shell and front companies can shield beneficial owners' identities and allow criminals to illegally access and transact in the U.S. economy, while creating an uneven playing field for small U.S. businesses engaged in legitimate activity.FinCEN recognizes that millions of small businesses are formed within the United States each year as corporations, limited liability companies, or other corporate structures. These businesses play an essential and legitimate economic role. Small businesses are a backbone of the U.S. economy, accounting for a large share of U.S. economic activity, and driving U.S. innovation and competitiveness. In addition, U.S. small businesses generate jobs, and (according to the release) in 2021 created jobs at the highest rate on record.

Few jurisdictions in the United States, however, require legal entities to disclose information about their beneficial owners—the individuals who actually own or control an entity—or individuals who take the steps to create an entity. Several U.S. jurisdictions take pride in the fact that beneficial ownership information need not be disclosed in any of the entities organized under their laws. Furthermore, in many cases, the beneficial ownership is complicated

---

22 31 CFR § 1010.380(c)(2)(xv). The reference to the Sarbanes-Oxley Act is to 15 U.S.C. § 7212.

23 The large operating company exemption applies to entities that have more than 20 full-time employees in the United States, more than $5 million in gross receipts or sales from sources inside the United States, and have an operating presence at a physical office in the United States.

24 87 Fed. Reg. 59498 at page 59498. 31 C.F.R. § 1010.380.

where the Beneficial Owners are indirect owners – owning or controlling the Reporting Company through other entities.

According to the adopting release, historically, the U.S. Government's inability to mandate the collection of beneficial ownership information of corporate entities formed in the United States has been a vulnerability in the U.S. anti-money laundering/countering the financing of terrorism (AML/CFT) framework. As stressed in the 2022 National Strategy for Combating Terrorist and Other Illicit Financing (the "2022 Illicit Financing Strategy"), a lack of uniform beneficial ownership information reporting requirements at the time of entity formation or ownership change hinders the ability of (1) law enforcement to swiftly investigate those entities created and used to hide ownership for illicit purposes and (2) a regulated sector to mitigate risks.[25] According to the adopting release, this lack of transparency creates opportunities for criminals, terrorists, and other illicit actors to remain anonymous while facilitating fraud, drug trafficking, corruption, tax evasion, organized crime, or other illicit activity through legal entities created in the United States.

The CTA was adopted to address these issues.

Who Are the Beneficial Owners? Before delving further into the rules, it is important to understand that the term "Beneficial Owner" can only refer to an individual – a living, breathing human being. While entities may own shares of other entities, the determination of "Beneficial Owner" must go back to the human being (the individual) "who, directly or indirectly, either exercises substantial control over such Reporting Company or owns or controls at least 25 percent of the ownership interests of such Reporting Company."[26] For the purposes of the CTA, the definition of "substantial control"[27] includes: (1) an individual serving "as a senior officer"[28] of the Reporting Company; (2) any individual that has "authority over the appointment or removal of any senior officer or a majority of the board of directors";[29] or (3) "directs, determines, or has substantial influence over important decisions made by the Reporting Company."[30] Note that the

---

[25] *See* U.S. Department of the Treasury (Treasury), *National Strategy for Combating Terrorist and Other Illicit Financing* (May 2022), p. 12, available at *https://home.treasury.gov/system/files/136/2022-National-Strategy-for-Combating-Terrorist-and-Other-Illicit-Financing.pdf* ("2022 Illicit Financing Strategy").

[26] 31 CFR § 1010.380(d). Lawyers familiar with the definition of "beneficial owner" in Securities Exchange Act of 1934 Rule 13d-3 will notice significant differences between the two rules. Rule 13d-3 only looks at stock ownership. The definition of "affiliate" in Securities Act of 1933 Rule 144(a) looks at direct or indirect control rather than stock ownership.

[27] 31 CFR § 1010.380(d)(1)(i).

[28] 31 CFR § 1010.380(d)(1)(i)(A). The term "senior officer" is defined as "The term "senior officer" means any individual holding the position or exercising the authority of a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer, regardless of official title, who performs a similar function." 31 CFR § 1010.380(f)(8).

[29] 31 CFR § 1010.380(d)(1)(i)(B).

[30] 31 CFR § 1010.380(d)(1)(i)(C).

term "director" is not included within the definition of "substantial control." Thus, a member of the Board of Directors of a corporation would not be a Beneficial Owner unless that person had other incidents of substantial control – for example, being the only member of the Board of Directors.

As defined in the Rules,[31] 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. That, too, is broadly defined in 31 CFR § 1010.380(d)(1)(iii). The term "ownership interests" is also broadly defined in 31 CFR § 1010.380(d)(2).

The term "Beneficial Owner" does not include a minor child, an individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual, or a creditor of a Reporting Company meeting the requirements set forth in 31 CFR § 1010.380(d)(3)(v). There are other persons who are not considered "Beneficial Owners specified in 31 CFR § 1010.380(d)(3).

Because the BOI reports require so much PII regarding each named Company Applicant and Beneficial Owner, many people in those categories will likely use a FinCEN identifier – a unique identifying number that FinCEN will issue to individuals or Reporting Companies upon request and submission of the PII required in the BOI reports. The FinCEN identifier is discussed in more detail below.

What Are the BOI Reports. The BOI reports are truly the focus of the CTA – to get information about the beneficial owners of Reporting Companies – including a significant amount of PII. The content, form, and manner of the initial report are described in 31 CFR § 1010.380(b)(1), and content for updated or corrected reports is found in § 1010.380(b)(2). In either case, the report requires that a significant amount of PII be filed for the Reporting Company, the Beneficial Owners, and the Company Applicant.[32] Reporting Companies will have 30 days following their formation or registration to file their initial reports.[33] In addition, Reporting Companies will be required to report any changes to the information submitted in their previously filed reports. Once a Reporting Company becomes aware of or has reason to know of the

[31] 31 CFR § 1010.380(d)(1)(ii).

[32] The Company Applicant is only required for Reporting Companies formed on or after January 1, 2024, and only in the initial report. § 1010.380(b)(1)(ii). The form of the BOI Report has not yet been established, but on January 17, 2023, FinCEN requested comments on the reporting fields expected to be included in the BOI Reports. See https://www.federalregister.gov/documents/2023/01/17/2023-00703/agency-information-collection-activities-proposed-collection-comment-request-beneficial-ownership.

[33] 31 CFR § 1010.380(a)(1).

inaccuracy of information submitted in an earlier report(s),[34] it must provide the corrected and/or changed information to FinCEN within 30 days.

Domestic and foreign Reporting Companies created or registered before January 1, 2024, will have one year (until January 1, 2025) to file their initial BOI reports. Thereafter, they will be held to the same 30-day requirement for reporting changes and and/or corrections of BOI information to FinCEN.

What Does this Mean for Lawyers? BOI reports may be filed with FinCEN without lawyer involvement. Of course, many clients trying to "do it right" will likely include their legal counsel in the preparation of the BOI reports, especially at the beginning.

As a result, clients should be free to discuss changes and other issues regarding their BOI reports with their lawyers and accountants, and to seek advice from their advisors. As noted above, it is the Reporting Company's obligation to timely file the BOI reports and any amendments thereto. The Reporting Company has the obligation to keep track of that information and to identify changes that require an amendment. Upon consultation, the lawyer, accountant, or other advisor can assist the Reporting Company in making that determination, but in the end, it is the Reporting Company's responsibility.

One very significant issue is that the reporting obligation is the Reporting Company's obligation. Nothing in the CTA imposes liability on a Beneficial Owner unless the information that the Beneficial Owner supplies is false or incomplete – without a "materiality" qualifier. Thus some Beneficial Owners may believe it better to provide no information than to provide incomplete information. That is not correct, however. As described below under "*Penalties*," the CTA establishes criminal and civil penalties for "any person" to "willfully provide or attempt to provide false or fraudulent" BOI[35] or to "willfully fail to report complete or updated" BOI.[36]

On the other hand, the entity's attorney can help the Reporting Company draft provisions in the Reporting Company's articles of incorporation, bylaws, operating agreement, agreement among owners, or other governance documents to impose penalties on Beneficial Owners who do not provide accurate and complete information.[37] That may be easier said than done since most will require owner approval or consent after appropriate disclosure.

---

[34] 31 CFR § 1010.380(a)(2)

[35] 31 U.S.C. § 5336(h)(1)(A).

[36] 31 U.S.C. § 5336(h)(1)(B).

[37] See Exhibit C – Reporting Mandate in Governance Document.

COMPANY APPLICANTS

Who Is the Company Applicant? The rule[38] defines a Company Applicant to be no more than two persons. In determining the two persons to be disclosed on the BOI Reports of entities formed on or after January 1, 2024, the proposed rules provide that the Company Applicant is either: the individual who directly files the document that creates the entity, or in the case of a foreign reporting company, the document that first registers the entity to do business in the United States, or

- the individual who is primarily responsible for directing or controlling the filing of the relevant document by another.

In an effort to assist companies in identifying Company Applicants, FinCEN provides two examples at page 8 of its March 24, 2023 FAQs – neither of which seem to be much help to lawyers assisting a client forming a new company:

- Example 1: Individual A is creating a new company. Individual A prepares the necessary documents to create the company and files them with the relevant state or Tribal office, either in person or using a self-service online portal. No one else is involved in preparing, directing, or making the filing.

- Example 2: Individual A is creating a company. Individual A prepares the necessary documents to create the company and directs Individual B to file the documents with the relevant state or Tribal office. Individual B then directly files the documents that create the company.

In both cases, the FAQ starts, "Individual A is creating a new company." Seldom is it the lawyer creating the new company. The lawyer is usually acting for his or her client. On the other hand, frequently the lawyer "prepares the necessary documents to create the company," whether or not the lawyer actually files (or directs the filing) with the filing office. The FAQs go on to state that "Individual B could for example be Individual A's spouse, business partner, attorney, or accountant."

[38] 31 CFR § 1010.380(e).

Importantly, FinCEN only contemplates one or no more than two Company Applicants.[39] The one-page *Beneficial Ownership Reporting-Key Questions*[40] states that "There can be up to two individuals who qualify as company applicants — (1) the individual who directly files the document that creates, or first registers, the reporting company; and (2) the individual that is primarily responsible for directing or controlling the filing of the relevant document." FinCEN's "frequently asked questions" issued the same date states that "[n]o reporting company will have more than two company applicants."

Reporting Companies existing or registered prior to January 1, 2024 (the effective date of the rule) do not have to identify and report their Company Applicants. In addition, Reporting Companies formed or registered on or after the effective date of the rule do not need to update Company Applicant information after the initial report is filed.

What Does This Mean For Lawyers? As part of their engagement with their clients, lawyers have regularly prepared and filed entity organizational documents with the appropriate state, federal, or Tribal filing authorities to form entities under applicable law. Should that occur, the lawyer (or paralegal) preparing the organizational documents or making the filing becomes the Company Applicant as does the person "directing or controlling" the person making the filing.

Whether or not the lawyer or any employee of the lawyer's office is named as the Company Applicant, the lawyer should discuss with the client the client's status as a Reporting Company and help the client determine if any exemptions are available. If not, the lawyer should prepare (for client review and approval, of course), the initial BOI Report within the required 30-day period unless the client does so itself.

In all cases, it probably makes sense for a lawyer involved in entity formation to obtain a FinCEN identifier when they become available. In that way, the FinCEN identifier appears in the BOI Report in place of the lawyer's (or the law office employee's) PII; and, the PII does not have to be reported to the client.

The Lawyer as Registered Agent. Nothing in the statute[41] or the rules[42] (as adopted or proposed so far) requires that a person serving as registered agent for an entity is a Company

---

[39] In Part II of the Appendix to FinCEN's January 17, 2023 Notice discussing BOI Reports (https://www.federalregister.gov/documents/2023/01/17/2023-00703/agency-information-collection-activities-proposed-collection-comment-request-beneficial-ownership), it suggests that the BOI Reports for newly-formed entities will include "up to two Company Applicants," even though the broad definition may suggest that there may be more than two persons who fit within the definition.

[40] https://www.fincen.gov/sites/default/files/shared/BOI_Reporting_Key_Questions_Published_508C.pdf, issued March 24, 2023.

[41] 31 USC § 5336(a)(2).

[42] 31 CFR § 1010.380(e).

Applicant or may be otherwise responsible for the filing of BOI reports. As in many cases for corporate service companies and law firms where the person also made the filing of the organizational documents, acting in that capacity would potentially impose on them at least the initial filing obligation at the Company Applicant. The Company Applicant does not have to make the initial BOI report filing, but needs to be included in that initial filing and needs to ensure that his or her disclosure is accurate and complete.

Many lawyers prefer not to be registered agents for their clients – and based on conversations that I have had, law firms have taken a position that they will not be registered agents for clients except in special circumstances.

WHO MAY ACCESS THE BOI REPORTS AND THE BOI INFORMATION?

Confidentiality of the Information. Given the sensitivity of the reportable information, the CTA imposes strict confidentiality, security, and access restrictions on the data FinCEN collects. FinCEN is authorized to disclose reported BOI in limited circumstances to a statutorily defined group of governmental authorities and financial institutions. Federal agencies, for example, may only obtain access to BOI when it will be used in furtherance of a national security, intelligence, or law enforcement activity.[43]For state, local, and Tribal law enforcement agencies, "a court of competent jurisdiction" must authorize the agency to seek BOI as part of a criminal or civil investigation.[44] Foreign government access is limited to requests made by foreign law enforcement agencies, prosecutors, and judges in specified circumstances.[45]

With the consent of the reporting company, FinCEN may also disclose BOI to financial institutions to help them comply with customer due diligence requirements under applicable law.[46] Finally, a financial institution's regulator can obtain BOI that has been provided to a financial institution it regulates for the purpose of performing regulatory oversight that is specific to that financial institution.[47]

Proposed Rules.[48] On December 15, 2022, FinCEN issued a new Notice of Proposed Rulemaking ("NPRM")[49] regarding access by authorized persons to BOI that will be reported to

43 31 U.S.C. 5336(c)(2)(B)(i)(I).

44 31 U.S.C. 5336(c)(2)(B)(i)(II).

45 31 U.S.C. 5336(c)(2)(B)(ii)

46 31 U.S.C. 5336(c)(2)(B)(iii)

47 31 U.S.C. 5336(c)(2)(C).

48 For a more detailed discussion of this information, see Lidstone, *The Federal Corporate Transparency Act: More Answers Are Proposed* (January 11, 2023), available at https://ssrn.com/abstract=4313089.

49 87 Fed. Reg. 77404.

FinCEN in the BOI reports to be filed. The proposed regulations would implement protocols to protect the security and confidentiality of the BOI as required by the CTA, to protect sensitive PII reported to FinCEN in the BOI reports. The NPRM explains the circumstances in which specified recipients would have access to BOI and outlines data protection protocols and oversight mechanisms applicable to each recipient category. It is intended that the disclosure of BOI to authorized recipients in accordance with appropriate protocols being defined by FinCEN will help law enforcement and national security agencies prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity – all with a goal of protecting national security.

The NPRM states that the proposed rule "reflects FinCEN's understanding of the critical need for the highest standard of security and confidentiality protocols to maintain confidence in the U.S. government's ability to protect sensitive information while achieving the objective of the CTA—establishing a database of beneficial ownership information (BOI) that will be highly useful in combatting illicit finance and the abuse of shell and front companies by criminals, corrupt officials, and other bad actors."

The NPRM describes FinCEN's ongoing efforts to develop a secure, non-public, cloud-based database in which to store BOI and FinCEN's intention to use rigorous information security methods and controls typically used in the Federal government to protect non-classified yet sensitive information systems at the highest security level – and yet permit access in accordance with the standards discussed above.

What Does this Mean for Lawyers? This does not seem to have significant impact to lawyers except, perhaps, to the extent that a lawyer is a Company Applicant or a Beneficial Owner. In that case the FinCEN records will contain the lawyer's PII, and a release of that information may imply the existence of an attorney-client relationship (existing or former) and could result in the lawyer becoming a witness in any resulting proceeding.

FINCEN IDENTIFIERS

The Statute and Rules. The statute and rules allow individuals to avoid including their PII on BOI Reports if they have a FinCEN identifier. The term "FinCEN identifier" means the unique identifying number assigned by FinCEN to an individual or reporting company under this section."[50] The application process for a FinCEN identifier is set forth in 31 CFR § 1010.380(b)(4) requiring that: (1) the application be made directly to FinCEN; and (2) that the application includes the PII that would otherwise be required to be set forth in the BOI Report. The benefit of obtaining and using a FinCEN identifier is that the individual's PII is only reported to FinCEN, and in all other cases where the individual is included in an initial or amended BOI report, only the FinCEN identifier must be disclosed. As a result, especially for individuals who expect to be included on a number of BOI reports, the FinCEN identifier may better protect the PII.

[50] 31 CFR § 1010.380(f)(2).

In all cases, and especially where an individual is involved as a Company Applicant or Beneficial Owner of more than a single entity, it makes sense for the individual to obtain a FinCEN identifier that can be used for all BOI reports. First, it means that the PII only appears on a single report -- the application for the FinCEN identifier. It will not appear in multiple reports – or, in the case of Beneficial Owners --in amendments or correction reports, and it will not appear in the Reporting Company's records.

Second, and especially for lawyers and corporate service firms (and their respective employees) who regularly file to create entities on behalf of clients, they do not have to disclose their residential address. The rules provide that where information is included in the BOI Report for a Company Applicant, if the person "forms or registers an entity in the course of such company applicant's business, the street address of such business"[51] may be used. In all other cases, the individual who is a Beneficial Owner or a Company Applicant must include "the individual's residential street address."[52]

What Does this Mean for Lawyers? Where a lawyer expects that his or her PII will be required on BOI reports, either as a senior officer, controlling person, Company Applicant, or in any other capacity, the lawyer should consider obtaining a FinCEN identifier. The lawyer's PII information will still be available through FinCEN, but the lawyer will not thereby have to be disclosed to, nor will the lawyer's PII need to be maintained by, the Reporting Company. If the lawyer is not (and does not expect to be) a Beneficial Owner, the address can be the lawyer's business address and not the residential address required of Beneficial Owners.This does create some issues when the lawyer is reviewing the BOI Reports of his or her client or other entities. The BOI Reports will not be fully understandable without knowing the underlying FinCEN identifier information – which the Reporting Company may not have.

PENALTIES.

Reporting Violations. The statute establishes penalties for a Reporting Company filing a false or fraudulent BOI Report or failing to timely file the original BOI Report or any future amendments. Persons potentially liable include the Reporting Company who actually filed the BOI Report as well as the Beneficial Owner or the Company Applicant who provided inaccurate, incomplete, or fraudulent information. 31 U.S.C. 5336(h)(1)(A) states that it is unlawful for any person to "willfully provide or attempt to provide false or fraudulent" BOI.

- 31 U.S.C. 5336(h)(1)(B) goes on to state that it is unlawful for any person to "willfully fail to report complete or updated" BOI.

[51] 31 CFR § 1010.380(b)(1)((C)(*(1)*.

[52] 31 CFR § 1010.380(b)(1)((C)(*(2)*.

Willfully providing false information to FinCEN or failing to report complete information to FinCEN can result in fines up to $10,000 and imprisonment for up to two years. Where criminal sanctions are not appropriate, violators "shall be liable to the United States for a civil penalty of not more than $500 for each day that the violation continues or has not been remedied."[53] The Rules[54] confirm that the penalties apply to "any person" – not just the Reporting Company.

Where a lawyer is aware that a client is providing incomplete or inaccurate information, the lawyer should consider his or her obligations under CRPC Rule 1.2(d) – not to assist a client in conduct that the lawyer knows is criminal or fraudulent. Rule 1.2(d) goes on to state:

> "[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Rule 1.15(a) states that a lawyer "shall not represent a client or where representation has commenced shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law." Rule 1.15(b) goes on to say that the lawyer may withdraw from representing a client if "(2) the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent."

Unauthorized Disclosure or Use of BOI. Criminal and civil penalties also apply to unauthorized disclosure or use of the BOI obtained through a report submitted to FinCEN or a disclosure made by FinCEN.[55]

Criminal penalties for an unauthorized disclosure or use of BOI include a fine of not more than $250,000, imprisonment for not more than five years, or both. Alternatively, if the unauthorized disclosure or use violation occurs while violating another federal law or as a part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, the criminal penalty would include a fine of not more than $500,000, imprisonment for not more than ten years, or both.[56]

The CTA does provide a safe harbor for protecting persons from civil and criminal penalties in certain cases described in 31 U.S.C. § 5336(h)(3)(C). For example, if the issue is a reporting violation, the safe harbor applies if the person "voluntarily and promptly, and in no case later than 90 days after the date on which the person submitted [the inaccurate or false] report, submits a report containing corrected information."

---

53 31 U.S.C. § 5336(h)(3)(A).

54 31 CFR § 1010.380(g).

55 31 U.S.C. § 5336(h)(2).

56 31 U.S.C. § 5336(h)(3)(B).

What Does this Mean for Lawyers? Be careful and understand the CTA for your benefit and the benefit of your clients. To the extent that a lawyer or law firm retains any PII, it should be kept securely and subject to strict access controls. Alternatively, the lawyer or law firm should simply not keep PII in its paper or electronic files.

Individually, lawyers who may be Beneficial Owners or Company Applicants may want to consider obtaining a FinCEN Identifier (and recommend the same to your clients) before the BOI reporting rules become applicable. Login.gov is a secure sign-in service used by the public to sign in to participating government agencies and will be the filing point for the BOI Reports.

According to the January 17, 2023**,** FinCEN Identifier information, the form to create the FinCEN Identifier will only be available to persons who have obtained a login.gov account and have signed in to access the form through login.gov. As of September 5, 2023, the ability to create a FinCEN Identifier has not yet been established.

START TO WORK WITH CLIENTS NOW

It is not too early for lawyers to consider the obligations of their clients under the CTA. The CTA is the most significant change to business law in my career. The rules are incomplete and do not answer questions, with the risk of civil and criminal penalties for a failure to meet the rules as FinCEN will interpret the rules.

Lawyers' Duties. Lawyers who represent entities or who assist clients in forming entities should consider advising their clients about the forthcoming impact of the CTA and its potential applicability. This includes lawyers in all legal fields, but especially business lawyers, trust and estate planners, real estate lawyers, and lawyers representing entities in mineral exploration, non-profit work, agriculture, cannabis, communications, construction, health care, taxation, sports and entertainment, water law, and even litigators. A form notice to clients that can be considered is attached as Exhibit B.

In this consideration, the term "Client" is a very broadly defined term under *People v. Bennett*,[57] where the Colorado Supreme Court held:

> An attorney-client relationship is "established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions." The relationship may be inferred from the conduct of the parties. The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed. Further, "[t]he attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client unless and until the client clearly

[57] *People v. Bennett,* 810 P.2d 661, 664 (Colo. 1991) [citations omitted].

understands, or reasonably should understand, that the relationship is no longer to be depended on."

Merely because the lawyer has not billed the client for services in some period of time does not mean that the attorney-client relationship which previously existed has been terminated. As a result, where an attorney represents a business entity, the lawyer should consider whether to provide the client notice of the requirements of the CTA under Colo. RPC Rule 1.4(a)(3) – requiring the lawyer to "keep the client reasonably informed about the status of the matter" as to which the client is anticipating the lawyer's representation.

- Where an attorney regularly provides advice to an entity client on governance matters, files reports for the client with the Secretary of State, or otherwise provides general representation to the entity, it does appear necessary under the rules to provide at least communication of the CTA obligations to the entity.

- Perhaps a water lawyer or an oil and gas title lawyer, or even an employment lawyer for a client has no communication obligation since maintenance of the entity form is arguably beyond the scope of representation.

Where the attorney has advised the client about the existence of the CTA and its requirements and the client fails to take any action, the result of which may be a violation of law which may raise issues under Colo. RPC, Rule 1.2(d) where, when a client engages "in conduct that the lawyer knows is criminal or fraudulent," the lawyer has certain counseling obligations.

Prepare for the Implementation of the CTA. Ultimately, compliance with the CTA is not difficult (except for the fact that the websites have not yet been designed for the large number of Reporting Companies and Beneficial Owners who will have to make filings and then amendments in a short period of time).

- Business entities should determine it is a domestic or foreign Reporting Company as defined in the CTA, a term defined in CFR § 1010.380(c)(1).

- If the business entity is a Reporting Company, is it exempt as those exemptions are established in CFR § 1010.380(c)(2)(i) through (xxiii)?

- Who are the Beneficial Owners, a term defined in CFR § 1010.380(d), and how can the Reporting Company get the information from the Beneficial Owners to meet the Reporting Company's reporting requirements?

For Reporting Companies formed on or after January 1, 2024, who is the Company Applicant, and can the Reporting Company get the information from the Company Applicant to meet the Reporting Company's reporting requirements?

It is important to note that it is the Reporting Company's obligation to file the BOI Reports and any updates. However, as discussed above, there are civil and criminal penalties for Beneficial Owners, Company Applicants, and the Reporting Company who fail to provide the information necessary for the completion of the BOI reports.

For newly-formed entities, to protect the Reporting Company the lawyer may want to recommend that the entity include a section such as that proposed in Exhibit C, below for inclusion in the governance documents. For an existing company, where possible, a Section like that proposed in Exhibit C may give leverage to the Reporting Company to obtain the necessary information.

In each case, counsel for the Reporting Company will have to make a determination as to the enforceability of the provision and should consider whether to include the provision in a shareholders' agreement, the articles of incorporation/organization, operating agreement or shareholder agreement, or in some other agreement which would include the shareholders, officer, and directors as a party.

Any company that engages in acquisitions may now want to include a representation in their agreements that the target company is in compliance with its reporting obligations under the CTA and perhaps obtain a copy of the BOI Reports that have been filed. Banks and other lenders may want to consider a similar provision in their lending agreements. In both cases, the normal due diligence investigation could be expanded to include this issue.

A Reporting Company may want to consider restructuring its internal organization and the ownership of affiliated entities by forming a holding company that would be exempt from the CTA reporting requirements. This could lead to an exemption for their controlled or wholly owned subsidiaries. Planning for this action will need to consider the timing of the CTA's reporting obligations.

A Reporting Company will also want to review its governing documentation to determine who qualifies as a Beneficial Owner and consider whether certain provisions unintentionally cause individuals to qualify as a Beneficial Owner. For example, if a Reporting Company requires that certain corporate activities, such as large expenditures or disposition of company assets, be unanimously approved by the owners, each owner – even if holding a small percentage of the company well below the 25% threshold for beneficial ownership – may be considered to hold substantial control over an important decision. If so, the Reporting Company may be required to disclose even these minority holders as beneficial owners.

CONCLUSION

The nature of the practice of law for our entity clients requires lawyers representing entities to be aware of the CTA's requirements and of the rules being adopted thereunder. Law firms may adopt various approaches to this representation and may accept or reject some of the suggestions

above. And, while lawyers representing entities may exclude certain matters in their engagement agreements with clients, unless they are excluded lawyers, especially those providing general business representation to clients should consider issues that may arise under the CTA and its rules.

EXHIBIT A. UNDERLYING CTA DOCUMENTS AND INTERPRETATIONS.

FinCEN has rules, proposed rules, and has issued additional documents setting forth information of importance to those seeking to understand the CTA and the adopted, proposed, or contemplated regulations:

Rule Making

- In September 2022, FinCEN adopted final rules implementing the BOI reporting requirements.[58]

- In December 2022, FinCEN issued a notice of proposed rulemaking for its first notice of proposed rulemaking regarding access to BOI by authorized recipients. It is intended that these regulations (when adopted) will implement the strict protocols on security and confidentiality required by the CTA to protect sensitive PII.[59]

- In January 2023, FinCEN issued a notice and request for comments on the proposed fields of information that will be required on BOI reports and the FinCEN identifiers when they become effective.[60]

The CTA[61] requires that FinCEN rescind and revise portions of the current rule for customer due diligence requirements for financial institutions (the "CDD Rule"[62]) to bring the CDD Rule into compliance with the federal Anti-Money Laundering ("AML") Act as a whole;[63] to provide for secure access to BOI Reports for financial institutions "in order to confirm the beneficial ownership information provided directly to financial institutions for at least two purposes (AML and to counter financing of terrorist activities) and to permit customer due diligence; and to reduce unnecessary or duplicative burdens on financial institutions and legal entity customers.[64] These rules have not yet been proposed, but are required to be effective no

---

58 Available at https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements.

59 Available at https://www.federalregister.gov/documents/2022/12/16/2022-27031/beneficial-ownership-information-access-and-safeguards-and-use-of-fincen-identifiers-for-entities.

60 Available at https://www.federalregister.gov/documents/2023/01/17/2023-00703/agency-information-collection-activities-proposed-collection-comment-request-beneficial-ownership.

61 CTA, Section 6403(d)(1).

62 31 CFR § 1010.230.

63 Division F of the NDAA is the AML Act of 2020.

64 CTA, Section 6403(d)(1).

later than January 1, 2025, assuming that the BOI reporting rule meets its proposed effective date of January 1, 2024.[65]

One Page Fact Sheets:

"Beneficial Ownership Information Report Filing Dates" available at:
https://www.fincen.gov/sites/default/files/shared/BOI_Reporting_Filing_Dates-Published03.24.23_508C.pdf

"Beneficial Ownership Reporting – Key Questions" available at":
https://www.fincen.gov/sites/default/files/shared/BOI_Reporting_Key_Questions_Published_508C.pdf

FAQs: Beneficial Ownership Information Reporting Frequently Asked Questions (March 24, 2023), https://www.fincen.gov/sites/default/files/shared/BOI_FAQs_FINAL_508.pdf

BOI reporting fields (January 17, 2023)
https://www.federalregister.gov/documents/2023/01/17/2023-00703/agency-information-collection-activities-proposed-collection-comment-request-beneficial-ownership.

Individual FinCEN Identifiers (January 17, 2023)
https://www.federalregister.gov/documents/2023/01/17/2023-00708/agency-information-collection-activities-proposed-collection-comment-request-individual-fincen

[65] CTA, Section 6403(d)(1) requires that these rules be adopted not later than one year after the BOI reporting requirements become effective.

EXHIBIT B. FORM NOTIFICATION TO CLIENTS.

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. There is no implicit guarantee that this information is correct, complete, or up to date. These materials are not intended to create an attorney-client relationship between you and the Law Firm. You should not act or rely on any information in this website without seeking the advice of an attorney.

EXHIBIT C – REPORTING MANDATE IN GOVERNANCE DOCUMENT

Corporations, partnerships, limited liability companies, cooperatives, and other entities are subject to (as applicable) their articles of incorporation, operating agreements, partnership agreements, articles of incorporation and bylaws. The following Section is proposed for inclusion in the articles of incorporation which can be modified or adapted for other entities as a mechanism to encourage or require Beneficial Owners to provide the Reporting Company information for the BOI Reports.

Section 2.17 Beneficial Ownership Reporting.

(a) Each shareholder, officer, and director deemed to be a "Beneficial Owner" as that term is defined in the Corporate Transparency Act, Title LXIV of the 2021 National Defense Authorization Act, 31 U.S.C. § 5336(b) or the rules thereunder (the "CTA") agrees and covenants to provide to the Corporation such information, including all personal identifying information and an "acceptable identification document," required by the Corporation to comply with the CTA if the Corporation is a Reporting Company under the CTA not otherwise exempt from the reporting requirements. Each such shareholder, officer, and director, not later than December 31 of each calendar year or within ten business days following receipt of a request for such information from the Corporation. The Corporation may make that request by email, orally, or in any other form of notice to the shareholder, officer, or director.

(b) After the shareholder, officer, or director has responded to the Corporation's initial request as required above, the shareholder, officer, or director shall provide the Corporation with any corrections or changes to the information provided within ten days of the change have occurred or the error being corrected has been identified.

(c) To the extent that the shareholder, officer, or director provides the Corporation with a FinCEN Identifier in lieu of providing the information required in paragraphs (a) and (b) of this Section 2.17, the shareholder, officer, or director providing the FinCEN Identifier will be responsible to ensure the accuracy of the information that such person provided to obtain the FinCEN Identifier and to make any and all amendments to the application for the FinCEN Identifier as necessary.

(d) Should a shareholder, officer, or director fail to respond to the Corporation's request for information as necessary to comply with the Corporation's reporting requirements under the CTA, should the information provided by the shareholder, officer, or director be incorrect or incomplete in any respect, or should the shareholder, officer, or director fail to make any corrections or amendments to the information and provide such corrections timely to the Corporation for the Corporation to be able to make its Beneficial Ownership Information Report to FinCEN in accordance with the CTA and the rules promulgated by FinCEN, then:

(i) The shareholder, officer, or director shall fully indemnify the Corporation and hold the Corporation fully harmless for any expenses, liabilities, fines, or penalties to which the Corporation may be subject because of its inability to provide the accurate and complete information to FinCEN resulting from the failure by the shareholder, officer, or director to comply with such person's obligation to provide accurate, complete, and timely information as required by this Section 2.17;

(ii) Until such time as the shareholder, officer, or director shall meet its obligations under this Section 2.17, the shareholder, officer or director shall not be entitled to vote any shares that such person may either by consent or at a meeting of the Corporation's shareholders, and no such shares shall be counted towards the quorum for a meeting of shareholders;

(iii) Until such time as the shareholder, officer, or director shall meet its obligations under this Section 2.17, any dividends payable on any shares owned by the shareholder, officer, or director shall be retained by the Corporation and shall not be paid to such person until such time as the Corporation can establish that the shareholder, officer, or director has met such person's obligations under this Section 2.17; and

(iv) *Other penalties?*

EXHIBIT D – POTENTIAL EXEMPTIONS FOR REPORTING COMPANIES

Reporting Company exemptions most likely applicable to clients of business, estate planning, mineral, and real estate attorneys found in 31 U.S.C. § 5336(a)(11)(B) and 31 C.F.R. § 1010.380(c)(2)

(i) *Securities reporting issuer*. Any issuer of securities that has a class of securities registered under § 12 of the Securities Exchange Act of 1934 or is required to reports under § 15(d) of the 1934 Act.

(ii) through (vi), banks, depository institutions, credit unions, and money services businesses meeting certain requirements.

(vii) through (xi), licensed broker-dealers, registered securities exchanges or clearing agencies, registered investment companies or investment advisors, state or federal licensed insurance companies, Commodity Exchange Act registered entities.

(xv) Public Accounting firms registered with the Public Company Accounting Oversight Board in accordance with section 102 of the Sarbanes-Oxley Act of 2002

(xvi) through (xviii), public utilities financial market utility, and pooled investment vehicles, in each case that meet certain requirements.

(xix) through (xx), a tax-exempt entity or an entity assisting a tax-exempt entity that meets certain requirements.

(xxi) A large operating company that employes more than 20 full time employees in the United States, has an operating presence at a physical office in the United States demonstrating more than $5 million in gross receipts or sales, and meeting certain other requirements as set forth therein.

(xxii) An entity whose ownership interests are controlled or wholly owned (directly or indirectly) by one or more of the entities described in (i) through (v), (vii) through (xvii), (xix), or (xxi).

(xxiii) An inactive entity that was in existence on or before January 1, 2020, is not currently engaged in an active business, is not owned (directly or indirectly, partially or wholly) by a foreign person, has not experienced any change of ownership in the preceding 12-month period, and does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership in any corporation, limited liability company, or similar entity.

Corporate Transparency Act

September 12, 2023

By: Herrick K. Lidstone, Jr.
Burns, Figa & Will, P.C.
Greenwood Village, CO

1

1

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.

2

2

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.

3

3

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.

4

4

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

5

5

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

6

6

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.

7

7

Interesting Questions – Anonymity

- Some jurisdictions, such as Nevada, South Dakota, and Wyoming, advertise the anonymity afforded business owners and management under their state statutes.
  - That is not likely to survive under the CTA
- New, blockchain-based entities such as decentralized autonomous organizations (DAOs) also have general anonymity which the CTA may impact.
  - DAOs can be organized without forming an entity, and then they will likely be treated as a general partnership. General partnerships (formed without making any filing with the secretary of state or other entity) are not Reporting Companies under the CTA, but provide the risk of unlimited liability to the stakeholders.
  - DAOs are frequently organized as LLCs which do require a filing with the secretary of state resulting in the DAO being a Reporting Company under the CTA required to report its Beneficial Owners. In that way, the Beneficial Owners may be members of a limited liability entity, but may lose their anonymity which frequently is considered a benefit of a DAO.

8

8

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.

9

9

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

10

10

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

11

11

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.

12

12

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

13

13

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.

14

14

Thank you, very much

Herrick Lidstone

15

15