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Corporate Transparency Act:
What You Need to Know Before 2024

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1290 Broadway, Suite 1700, Denver, Colorado 80203 | (303) 860-0608
clereception@cobar.org | cle.cobar.org
Corporate Transparency Act: What You Need to Know Before 2024

After years of rulemaking, the Corporate Transparency Act reporting requirements are set to take effect in 2024. Herrick Lidstone has been following the Act since its inception, and is here with the latest on last-minute rules, and what you need to know to keep your firm and your clients in compliance with the Act.

Presented by Herrick Lidstone, Esq., Burns Figuera and Will
**BIOGRAPHICAL INFORMATION**

**PROGRAM SERIES CHAIR**

Kimberly L. Martinez, Esq., recently joined Stewart Title Guaranty Company ("STGC") as underwriting counsel with over 15 years of title experience working in the claims department at STGC and private practice. The majority of her background involves representing large and small financial institutions, among other creditors, in connection with creditor’s rights, real estate litigation, title claims, and real estate transactions. While in private practice, Kimberly routinely handled Chapter 7, Chapter 11, Chapter 13 bankruptcy cases, adversary proceedings, judicial foreclosures, mechanic’s lien litigation, lender-liability defense, quiet title actions, title curative actions, and due diligence. She also has been requested to write multiple amicus briefs on behalf of special interest bar associations.

**FACULTY**

Herrick K. Lidstone, Jr., Esq., is a shareholder in the law firm of Burns Figa & Will PC, where he practices in the areas of business transactions, including taxation, limited liability company and corporate formation and organization, mergers and acquisitions, ethics, and securities. He has lectured at the Institute for Advanced Legal Studies, has been an adjunct professor at the University of Denver Sturm College of Law (1986-1997, 2012, and 2014 through 2017) and at the University of Colorado School of Law (2009). Mr. Lidstone has presented more than 120 papers for various professional organizations on securities law, ethics, limited liability companies, and partnerships.

Mr. Lidstone has written more than 30 articles on business and securities law published in *The Colorado Lawyer*. He is the author of the Securities Law Deskbook (2006-2018 (CLE in Colorado, Inc.)), Limited Liability Companies and Partnerships In Colorado (2015-2019, with Allen Sparkman (CLE in Colorado, Inc.)), and Federal Income Taxation of Corporations (6th Ed., with William Krem and Richard Robinson (ALI-ABA, 1989)). Mr. Lidstone is a contributor to several other legal treatises including Holderness and Wunnicke's Legal Opinion Letters Formbook (Aspen Law & Business, 3rd Ed. 2010 and Supplements) and Rozansky and Reichert, Practitioner's Guide to Colorado Business Organizations (Colorado Bar Assn., 2008 and supplements). Mr. Lidstone has more than 50 papers published on the social science research network (http://ssrn.com/author=802201) and is consistently listed among the top 10% of SSRN's more than 620,000 published authors.
Mr. Lidstone has served numerous times as an expert witness in cases involving professional ethics, corporate, partnership, limited liability company, and securities law matters.

Mr. Lidstone has served as a member of the Executive Council of the Colorado Bar Association's Business Law Section since 2007, and as the Business Law Section's representative to the Working Group on Legal Opinions Foundation (formerly of the American Bar Association) since 2007. Mr. Lidstone has testified on behalf of the Colorado Bar Association more than 20 times on bills pending before the Colorado General Assembly and has been involved in the drafting of a number of those bills. Mr. Lidstone served on the Colorado Securities Board (Colorado Department of Regulatory Agencies) from 1999 until 2011, and 2014 until 2017.

Mr. Lidstone is a member of the Arapahoe, Denver, Colorado and American bar associations and the Denver Association of Oil and Gas Title Lawyers. Mr. Lidstone has been recognized by Best Lawyers, Super Lawyers, and Who's Who in the World a number of times. In September 2018, Mr. Lidstone received the Cathy Stricklin Krendl Lifetime Achievement Award “bestowed from time to time on a lawyer who has, over an extended period of time, manifested intellectual and professional excellence in the practice of, or scholarship on, Colorado business law; the recipient's generosity of spirit as reflected in the recipient's participation in, and contribution to, the advancement of Colorado business law; the recipient's efforts to enhance the general quality of business law practice by Colorado lawyers; and the recipient's devotion to the principles of legal professionalism.” In February 2019 Mr. Lidstone received the Richard N. Doyle CLE Award of Excellence from Continuing Legal Education in Colorado, Inc. for “dedication and outstanding contributions to CBA-CLE programs and publications.” Mr. Lidstone has been selected for the University of Colorado Law School award for “Alumni in Private Practice,” to be awarded in March 2022.

Mr. Lidstone earned his A.B. degree from Cornell University in 1971 and his J.D. degree from the University of Colorado at Boulder in 1978. Mr. Lidstone served on active duty as an officer in the United States Navy from 1971 until 1975, and in the U.S. Naval Reserve until 1980 from which he retired as a Lieutenant Commander. His experiences in the U.S. Navy led to his contribution to Professor Don Stanton's 2018 book Looking Back At The Cold War (30 Veterans and a Patrol Plane Commander Remember). Mr. Lidstone is a Fellow emeritus of the Colorado and Arapahoe County Bar Foundations, the charitable arms of the Colorado Bar and the Arapahoe County Bar Associations. Mr. Lidstone has been involved with various committees of the South Metro Denver Chamber of Commerce since 2010.
CORPORATE TRANSPARENCY ACT: NEW RULES TO GOVERN ALL ENTITIES DOING BUSINESS IN THE UNITED STATES

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

October 26, 2023

The federal Corporate Transparency Act (the “CTA”) 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.

It is important to note that all entities are potentially subject to the requirements of the CTA – LLCs, partnerships, cooperatives, corporations, and other associations created by a filing with the Secretary of State or other filing authority. This includes entities created to operate the family business, estate planning entities, oil and gas exploration, real estate ownership, professional service firms, and other businesses created 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.


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 created on or after January 1, 2025, 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 creation. (Reporting Companies created in 2024 have 90 days to file their initial report.⁵) In addition, all non-exempt Reporting Companies that are in existence on December 31, 2023, will have to file a BOI report no later than January 1, 2025.⁶

• 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.⁷ 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, managers, or general partners.

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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 The CTA itself and the rules as originally proposed state that the filing requirement is 30 days after creation for all entities. A notice of proposed rulemaking that FinCEN published on September 28, 2023 (comment period expiring October 30, 2023) extends the deadline for entities created or registered in 2024 from 30 days to 90 days “to give those entities additional time to understand the new reporting obligation and collect the necessary information to complete the filing.” “Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024,” published September 28, 2023 at 88 Fed. Reg. 66730.

⁶ There is no reason for a Reporting Company to file a BOI report much in advance of the January 1, 2025 deadline inasmuch as doing so makes the Reporting Company and its beneficial owners such to the amendment and updating requirements.

At this point in time, only the first set of rules have been adopted and another set has been proposed, and there are more to come. FinCEN has also issued several interpretive releases as described at www.fincen.gov/boi. Including, in September 2023, the “Small Entity Compliance Guide.”

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.

For your convenience and ease in reviewing this paper, I have included the following table of contents:

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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 created 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.

Creation of Checklists. Of the many things that a lawyer or an accountant can do to help their clients meet the clients’ CTA filing obligations is to create checklists. FinCEN’s Small Entity Compliance Guide (September 2023) can be very helpful in creating those checklists and includes many charts and checklist information.

- Section 1.1 of Chapter 1 includes answers to the question “Is my company a ‘reporting company’?”
- Section 1.2 has an 11-page bullet-pointed discussion of whether “my company [is] exempt from the reporting requirements,” discussing each of the 23 exemptions.
- Section 2 has a 16-page detailed discussion of “what is substantial control?” (Section 2.1), “what is an ownership interest?” (Section 2.2), “what steps can I take to identify

my company’s beneficial owners?” (Section 2.3), and “who qualifies for an exemption from the beneficial ownership definition?” (Section 2.4).

- Section 3 has a 5-page discussion on whether a company has to report company applicants.

- Section 4 has a 4-page discussion of the information that a Reporting Company must report.

- Section 5 has a 3-page discussion of the timing for filing initial BOI reports that will have to be updated if the proposed rule extending the filing date for Reporting Companies formed in 2024 is adopted.

- Section 6 has a four-page discussion of required amendments.

**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 created 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 created or registered on or after January 1, 2024 must file the required initial BOI reports no later than 90 days after receiving notice of their creation or registration (or public notice otherwise being available).12

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).14 The Reporting Company must correct inaccurate information in previously-filed BOI reports within 30 days of when the Reporting Company becomes aware or has reason to know of the inaccuracy of information in earlier BOI reports.15

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12 31 CFR § 1010.380(a)(1)

13 The CTA itself and the rules as originally proposed state that the filing requirement is 30 days after the creation or registration of an entity. 31 U.S.C. § 5336(b)(5); see also 31 CFR § 1010.380(a). A notice of proposed rulemaking that FinCEN published on September 28, 2023 (comment period expiring October 30, 2023) extends the deadline for entities created or registered in 2024 from 30 days to 90 days “to give those entities additional time to understand the new reporting obligation and collect the necessary information to complete the filing.” “Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024,” published September 28, 2023 at 88 Fed. Reg. 66730.

14 31 CFR § 1010.380(b)(3).

15 31 CFR § 1010.380(a)(2).
Note that the rules provide that the Reporting Companies are responsible for filing the initial BOI reports and any amended or corrected reports.\textsuperscript{16} 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 2022 Release”). The September 2022 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.”\textsuperscript{17}

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 2022 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.\textsuperscript{18}

As set forth in the September 2022 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 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

\textsuperscript{16} 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.”

\textsuperscript{17} September 2022 Release at pages 45-46, immediately preceding Section III.A(ii).

\textsuperscript{18} 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).
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.\(^{19}\)

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\(^{20}\) and the rule,\(^{21}\) 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. An “inactive entity” is one which was in existence on or before January 1, 2020, is not engaged in active business, and is

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\(^{19}\) 31 C.F.R. § 1010.380(c).


\(^{21}\) 31 C.F.R. § 1010.380(c)(2).
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.22

Other types of legal entities, including certain trusts, and (although not mentioned in the rule) general partnerships and decentralized autonomous organizations (DAOs23), 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.

Many homeowners associations will be non-exempt Reporting Companies. While there are twenty-three types of entities that are exempt from the CTA’s reporting requirements, including organizations that file their annual tax returns under Section 501(c) of the Internal Revenue Code (“Code”), the vast majority of condominium and community associations and co-ops file their annual tax returns under Section 528 of the Code, which would not qualify for an exemption from the CTA reporting requirements. While there may be amendments to the current rules to exempt HOAs and similar entities, no such rules have yet been adopted.24

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.

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.

A beneficial owner is anyone who (i) exercises “substantial control” over the entity, including officers of the HOA and the HOA manager (frequently a commercial entity, and the individuals who control that entity); or (ii) owns or controls at least 25% of the ownership interest. Notably, this means that individual Board members who become officers of the HOA will need to provide the beneficial ownership information. In addition, if there is a “bulk” owner (the developer, for example) that owns 25% or more of the ownership interest of a condominium, community
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.

- 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-created entities will most likely be Reporting Companies with no exemption. The initial BOI Report must be filed within 30-days of creation. Even if a newly-created 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 or ninety days and thus at least the initial BOI Report will have to be filed.

Also, in many cases, shareholders, officers, and other control persons 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 Are Not Reporting Companies?** In order to determine what are not reporting companies, it is important to review the definition: A domestic Reporting Company is “an 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 sole proprietorship is not a Reporting Company, even though it may file for various licenses to operate its business. To the contrary, however, a single member LLC, even though treated as a disregarded entity for tax purposes, would be a Reporting Company unless another exemption is available.

association or co-op, the bulk owner would also qualify as a beneficial owner and be subject to these reporting requirements.
A general partnership is not created by any filing under Colorado law and therefore is not a Reporting Company. It is “the association of two or more persons to carry on as co-owners a business for profit, . . . whether or not the persons intend to form a partnership.” The statement of registration of a general partnership as a limited liability partnership does not “form” the partnership, but may result in the general partnership becoming a Reporting Company. There is nothing specific about this in the rules and there could be an interpretation that the LLP created by filing the statement of registration does create a new entity notwithstanding the statutory statement that the partnership remains a partnership after registration.

Trusts formed in the United States are generally not Reporting Companies, whether formed for estate planning purposes as a revocable or an irrevocable trust, a business trust, or other forms of trusts. These are generally created by agreement, not by a filing with the Secretary of State or other state or Tribal authority. Once created, they may be registered with a court, a trade name may be filed with the Secretary of State, or (if it owns real property) with the registry of deeds of the applicable jurisdiction. The September 2022 Release states that the filing with a state or Tribal agency to obtain a d/b/a or other trade name does not “create” the entity and should not result in the entity becoming a Reporting Company. A declaration of trust may also be recorded to provide public notice of its existence. Nonetheless, the trust was formed by the agreement of the parties, not by any filing.

In discussing this issue, the September 2022 release states (at pages 133-134):

In general, FinCEN believes that sole proprietorships, certain types of trusts, and general partnerships in many, if not most, circumstances are not created through the filing of a document with a secretary of state or similar office. In such cases, the sole proprietorship, trust, or general partnership would not be a reporting company under the final rule. Moreover, where such an entity registers for a business license or similar permit, FinCEN believes that such registration would not generally “create” the entity, and thus the entity would not be created by a filing with a secretary of state or similar office. However, the particular context and details of a state’s registration and filing practices may be relevant to determining whether an entity is created by a filing and based on the range of responses regarding state law corporate formation practices, there may be varying practices that make a categorical rule that includes or exclude specific types of entities impracticable.

Non-U.S. trusts and general partnerships would become a Reporting Company when they file to do business in the United States, however.

25 C.R.S. § 7-64-202(1). See, also, C.R.S. § 7-60-106(1).
26 In the September 2022 Release at page 134, FinCEN notes that “[i]n light of the potential for varying state law practices, FinCEN may consider guidance in the future to address considerations relevant to entities that register to use d/b/a or other trade name.”
Additionally, when a sole proprietorship, general partnership, or a trust owns or controls another entity that is a Reporting Company, the BOI Report must include information about the sole proprietor, general partnership and general partners, and the trust, trustees, and beneficiaries as necessary to meet the Reporting Company’s BOI Report obligations. As set forth in 1010.380(d)(1)(ii), the trustee of a trust may be considered the “control person” of the Reporting Company and (perhaps depending on whether it is a revocable or irrevocable trust or other factors) the trustee may also be the beneficial owner or the beneficiaries of the trust may be considered the beneficial owner(s). See also 1010.380(d)(2)(ii)(C) which discusses the trustee’s potential control through a trust of a Reporting Company.

Of course, as described in 1010.380(c)(2)(xix)(C), a trust that is a tax-exempt entity is specifically exempt from being a reporting company although, again, it could be the owner of a Reporting Company.

**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-created entity) or by the other responsible persons (for entities existing before January 1, 2024).

**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 created 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 create an entity (whether or not disclosed as a Company Applicant) has an obligation to the lawyer’s client to advise the newly-created entity (if a Reporting Company) to file the BOI report timely. Importantly:

- As noted above, newly-created entities will most likely be Reporting Companies with no exemption. The initial BOI Report must be filed within 30-days (or, during 2024, 90 days) of creation.

- In many cases, shareholders, officers, and other control persons 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.

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27 See Exhibit B for a form of notification to clients.

28 The CTA itself and the rules as originally proposed state that the filing requirement is 30 days after creation for all entities. A notice of proposed rulemaking that FinCEN published on September 28, 2023 (comment period expiring October 30, 2023) extends the deadline for entities created or registered in 2024 from 30 days to 90 days “to give those entities additional time to understand the new reporting obligation and collect the necessary information to complete the filing.” “Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024,” published September 28, 2023 at 88 Fed. Reg. 66730.
Entities created before January 1, 2024. The Company Applicant for all entities created before January 1, 2024, does not have to be disclosed under the CTA or its rules. Nevertheless, 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.29

- A Reporting Company that is created 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 (90-day in 2024) 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, should 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.30 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?

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29 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.

30 The requirement to file amendments and a discussion thereof is included in Chapter 6 (“What if there are changes to or inaccuracies in reported information”) of the “Small Entity Compliance Guide”.
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 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?31
   e. Other issues that may come up.

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31 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.
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.

There is also the possibility that a Reporting Company may become exempt after filing a BOI Report. This is discussed in Section 6.3 of the Small Entity Compliance Guide which suggests that the Reporting Company should file an updated BOI Report to indicate that it is newly exempt from the reporting requirements.

**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.\(^{32}\)

In both cases, a law firm or an accounting firm may also not be a Reporting Company (because, for example, they were created 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).\(^{33}\)

**When Does The Reporting Obligation End?** Clearly the reporting obligation for a Reporting Company ends when the Reporting Company becomes exempt under one of the 23 provisions of the statute and the rules as discussed above.

It would seem logical that a Reporting Company that has dissolved and wound up its operations would no longer be subject to the CTA’s reporting requirements, but that may not be true, based on the rules as they currently exist. Clearly a dissolved entity that otherwise meets the definition for an inactive entity would not have a continuing reporting obligation – but that requires that the entity have been in existence on January 1, 2020, and meet the other requirements for an inactive entity as described above. These are for the most part described in the present tense, and so a pre-January 1, 2020 entity that dissolves and winds up its business operations would appear to be eligible for the inactive entity exemption.\(^{34}\)

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\(^{33}\) 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.

\(^{34}\) Note that under Colorado law (C.R.S. § 7-114-105) and the Model Business Corporation Act (§ 14.05) state that after dissolution, “[a] dissolved corporation continues its corporate existence but may not carry on any business except as appropriate to wind up and liquidate its business and affairs.” Delaware has a similar provision in § 278 of its General Corporation Law.
CORPORATE TRANSPARENCY ACT: NEW RULES TO GOVERN ALL ENTITIES DOING BUSINESS IN THE UNITED STATES

The September 2022 final rule and its supplemental information do give at least a hint although without a rule directly on point. At page 53 (section III.A.ii) of the release publishing the final rules, FinCEN says:

Lastly, with respect to questions regarding the treatment of company termination or dissolution, FinCEN does not expect a reporting company to file an updated report upon company termination or dissolution. FinCEN will consider appropriate guidance or FAQs to address any other specific questions that may arise about application of the final rule to particular facts and circumstances.

Although FinCEN states (on page 161) that it believes the “inactive entity” exemption is clear, FinCEN states that “the agency understands that specific factual scenarios may arise during implementation that warrant additional clarification. In those cases, the agency welcomes questions from stakeholders and anticipates addressing their concerns through guidance.” Later, (page 196-7), FinCEN reported a comment that “to minimize these costs and burdens,” FinCEN should, among other things, “Reconsider the scope of the proposed rule as it relates to obligations of dissolved entities, preexisting companies, and obligations to report company applicant information.” Again, FinCEN declined to do so, but said that it would consider further issues later. On page 236 they talk about dissolution and the exemption from reporting applicable to “inactive entities.”

FinCEN’s statements above are, of course, interpretations and not rules. The rules are silent leaving no definitive guidance for Reporting Companies and their advisors whether they continue to be Reporting Companies following dissolution and winding up of its business activities (unless the Reporting Company was created on or before January 1, 2020 and otherwise meets the definition of an “inactive entity” in 31 CFR § 1010.380(c)(2)(xxiii)).

The only mention of dissolution of a Reporting Company in FinCEN’s Small Entity Compliance Guide is on page 46 where the Guide has a note saying that “[t]here is no requirement to report a company’s termination or dissolution.”

**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, 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

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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 created 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 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 created 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 creation 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. 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 ownership interests in 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

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percent of the ownership interests of such Reporting Company."\textsuperscript{37} To be a “Beneficial Owner” subject to the CTA reporting requirements, a person must either:

\begin{itemize}
\item a. Be a person who exercise substantial control over the Reporting Company;\textsuperscript{38} or
\item b. Controls at least 25\% of the ownership interests of the Reporting Company.
\end{itemize}

For the purposes of the CTA, the definition of “substantial control”\textsuperscript{39} includes: (1) an individual serving “as a senior officer”\textsuperscript{40} 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”\textsuperscript{41}, or (3) “directs, determines, or has substantial influence over important decisions made by the Reporting Company.”\textsuperscript{42} Note that the term “director” is not included within the definition of “substantial control.”

\begin{itemize}
\item 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 or otherwise was an individual who directs, determines, or “has substantial influence over important decisions made by the Reporting Company.”
\item In some cases, however, even a person without substantial control may be a control person even without “control” if the person holds the title of president, chief financial officer, general counsel, chief executive officer, or chief operating officer.\textsuperscript{43}
\end{itemize}

\textsuperscript{37} 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.

\textsuperscript{38} See generally the discussion at Section 2.1 of the “\textit{Small Entity Compliance Guide}” available at https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide_FINAL_Sept_508C.pdf.

\textsuperscript{39} 31 CFR § 1010.380(d)(1)(i).

\textsuperscript{40} 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).

\textsuperscript{41} 31 CFR § 1010.380(d)(1)(i)(B).

\textsuperscript{42} 31 CFR § 1010.380(d)(1)(i)(C).

\textsuperscript{43} See generally the discussion at Section 2.1 of the “\textit{Small Entity Compliance Guide}” at chart 3.
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. 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) and at Section 2.2 of the “Small Entity Compliance Guide”. Ownership rights include equity, stock, or voting rights, capital or profits interests, convertible instruments, or options or privilege, or “any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.”

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).46

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 steps can be taken to identify Beneficial Owners of a Reporting Company?
According to the “Small Entity Compliance Guide” at Section 2.3, a Reporting Company should take the following steps to identify Beneficial Owners:

- Identify individuals who exercise substantial control over the Reporting Company;
- Identify the types of ownership interests the Reporting Company has issued and the individuals that hold those ownership interests; and
- Calculate the percentage of ownership interest held directly or indirectly by individuals who own or control, directly or indirectly, at least 25% of the

44  31 CFR § 1010.380(d)(1)(ii).
45  See generally the discussion at Section 2.2 of the “Small Entity Compliance Guide” at chart 4.
46  See also the discussion of “Who qualifies for an exception from the beneficial owner definition” at Section 2.4 of the “Small Entity Compliance Guide”.

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ownership interests – which must be measured by economic rights (with or without voting power) and by voting power.47

As noted above, entities can hold ownership interests in Reporting Companies. While these ownership entities (whether or not Reporting Companies themselves) will have to be disclosed in the BOI Report, the important information must be the individuals (human beings) who own or control these ownership entities – members and managers of LLCs, officers and shareholders of a corporation, trustee and beneficiaries of a trust, limited partners and general partners of a partnership, offices and members of a cooperative, and control persons and owners of other entity forms. The “Small Entity Compliance Guide” provides a number of examples at pages 24 through 28.

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.48 Reporting Companies will have 90 days 30 days following their creation or registration to file their initial reports.49 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 inaccuracy of information submitted in an earlier report(s),50 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.

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47 There is a table at page 23 of the “Small Entity Compliance Guide” which is designed to help the entity work through these ownership interest calculations, depending on the nature of the entity and the nature of the ownership interests issued.

48 The Company Applicant is only required for Reporting Companies created 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.

49 31 CFR § 1010.380(a)(1).

50 31 CFR § 1010.380(a)(2)
The “Small Entity Compliance Guide” discusses the specific requirements as set forth in Rule 1010.380(b) (“Content, form, and manner of reports”) at length in Section 4 including (in Chart 7) checklists for a Reporting Company, each Beneficial Owner, and each Company Applicant. See Exhibit E at the end of this paper for a form of checklist.

**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 or to “willfully fail to report complete or updated” BOI.

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. That may be easier said than done since most will require owner approval or consent after appropriate disclosure.

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51 See generally the discussion at Section 4 (“What specific information does my company need to report?”) of the “Small Entity Compliance Guide.”


54 See Exhibit C – Reporting Mandate in Governance Document.
COMPANY APPLICANTS

Who Is the Company Applicant? The rule\(^{55}\) 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 created 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.”

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\(^{55}\) 31 CFR § 1010.380(e).
Importantly, FinCEN only contemplates one or no more than two Company Applicants.\(^{56}\) The one-page *Beneficial Ownership Reporting-Key Questions*\(^{57}\) 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 created 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.\(^{58}\)

**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 creation 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.

\(^{56}\) In Part II of the Appendix to FinCEN’s January 17, 2023 Notice discussing BOI Reports (https://www.federalregister.gov/document/2023/01/17/2023-00703/agency-information-collection-activities-proposed-collection-comment-request-beneficial-ownership), it suggests that the BOI Reports for newly-created 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.


\(^{58}\) See generally the discussion at Section 3 (“Does my company have to report its company applicants?”) of the “Small Entity Compliance Guide.”
The Lawyer as Registered Agent. Nothing in the statute or the rules (as adopted or proposed so far) requires that a person serving as registered agent for an entity is a Company 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. 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. Foreign government access is limited to requests made by foreign law enforcement agencies, prosecutors, and judges in specified circumstances.

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. 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.

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59 31 USC § 5336(a)(2).
60 31 CFR § 1010.380(e).
Proposed Rules. On December 15, 2022, FinCEN issued a new Notice of Proposed Rulemaking ("NPRM") regarding access by authorized persons to BOI that will be reported to 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. 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

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68 31 CFR § 1010.380(f)(2).
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.

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”69 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.”70

FinCEN Identifiers are further discussed in Section 4.3 of the “Small Entity Compliance Guide”.

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

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69 31 CFR § 1010.380(b)(1)((C)(1).
70 31 CFR § 1010.380(b)(1)((C)(2).
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.

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.” The Rules confirm that the penalties apply to “any person” – not just the Reporting Company.

While the form of the BOI Report has not yet been issued, in January 2023 FinCEN did issue a notice in the Federal Register entitled “Beneficial Ownership Information (BOI) Report Summary of Data Fields.” Part I sets forth the information to be required from the Reporting Company. Part II sets forth the information to be required from the Company Applicant. Part III sets forth the information to be required from the Beneficial Owners. In each question set forth in Part II and Part III, the Reporting Company is entitled to answer:

z. Unknown (check the box if you are not able to obtain this information about the Company Applicant [or in Part III, the Beneficial Owner])

Presumably answering a question with “z” satisfies the Reporting Company’s obligation, but will not satisfy the Company’s Applicant’s or the Beneficial Owner’s obligation. In order to meet the Reporting Company's obligation, however, it is likely that the Reporting Company must have accomplished some due diligence by requesting the information from the Company Applicant or the Beneficial Owner.

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:

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72 31 CFR § 1010.380(g).
“[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.74

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.75

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.”

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


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have signed in to access the form through login.gov. As of September 21, 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 of 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*, 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 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

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76 *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) [citations omitted].
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 created 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-created 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. FinCEN has an online list of its reference materials at https://www.fincen.gov/boi/Reference-materials, most of which are listed below.

**Rule Making**

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

- 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.  

- 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. 

- In September 2023, FinCEN issued a notice and request for comments on extending the 30-day reporting requirement to 90 days for entities created in 2024.  
  [Available at](https://www.govinfo.gov/content/pkg/FR-2023-09-28/pdf/2023-21226.pdf).

The CTA requires that FinCEN rescind and revise portions of the current rule for customer due diligence requirements for financial institutions (the “CDD Rule”) to bring the CDD Rule into compliance with the federal Anti-Money Laundering (“AML”) Act as a whole; 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

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

82 31 CFR § 1010.230.

83 Division F of the NDAA is the AML Act of 2020.
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. These rules have not yet been proposed, but are required to be effective no
later than January 1, 2025, assuming that the BOI reporting rule meets its proposed effective date
of January 1, 2024.

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”:

FAQs: Beneficial Ownership Information Reporting Frequently Asked Questions (March 24,

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

“Small Entity Compliance Guide” (subtitled: “Beneficial Ownership Information Reporting
Requirements”) issued September 2023, and available at

84 CTA, Section 6403(d)(1).
85 CTA, Section 6403(d)(1) requires that these rules be adopted not later than one year after the BOI reporting
requirements become effective.
CORPORATE TRANSPARENCY ACT: NEW RULES TO GOVERN ALL ENTITIES DOING BUSINESS IN THE UNITED STATES

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.

Effective January 1, 2024, a federal law known as the Corporate Transparency Act (CTA) will apply to all domestic entities (including corporations, limited liability companies and limited partnerships) and foreign entities doing business in the United States, unless an exemption applies to the entity. There are 23 types of entities that are exempt from the CTA reporting obligation. Those entities that are already subject to other substantial federal reporting requirements (such as public companies, banks, securities brokers and dealers, insurance companies and registered investment companies and advisors) are exempt. Another significant exemption is for large operating companies with more than 20 full-time US employees, an operating location in the US, and more than $5.0 million in gross receipts or sales from US sources, as reported on the prior fiscal year tax return. Certain tax-exempt entities, wholly-owned subsidiaries and inactive entities are also exempt.

For those many companies that do not fall under an exemption, the CTA reporting requirements become effective:

- For any person forming an entity with a state filing in any state on and after January 1, 2024, within 30 days of the filing (unless the 90 day amendment is adopted).
- For all entities existing on December 31, 2023, not later than January 1, 2025.

The new reporting requirements require entities to file Beneficial Ownership Information (BOI report) with the federal Financial Crimes Enforcement Network (FinCEN). The BOI report includes information on the individuals exerting substantial control over the entity or with a 25% ownership interest in the entity, whether direct or indirect. The CTA and the rules provide certain civil and criminal penalties for entities 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. Please contact Burns Figa & Will, PC directly if you need assistance in determining whether your entity is exempt and/or filing your BOI reports.

These materials are provided for informational purposes only. They do not constitute legal or tax advice and do not create an attorney-client relationship with you.
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) Governmental Authorities

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

(vii) through (xiii), credit unions, 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.

(xiv) Commodity Exchange Act registered entity

(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 described in IRC 501(c) or a political organization (527), or an entity assisting a tax-exempt entity that meets certain requirements.

(xx) A large operating company that employs 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 (xx).

(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.
EXHIBIT E - REQUIRED INFORMATION CHECKLISTS FROM CHART 7, SECTION 4.1 OF THE “SMALL ENTITY COMPLIANCE GUIDE”

Reporting Company
☐ Full legal name
☐ Any trade name or “doing business as” (DBA) name
   » Report all trade names or DBAs.
☐ Complete current U.S. address
   » Report the address of the principal place of business in United States, or,
   » If the reporting company’s principal place of business is not in the United States, the primary location in the United States where the company conducts business.
☐ State, Tribal, or foreign jurisdiction of formation
☐ For a foreign reporting company only, State or Tribal jurisdiction of first registration
☐ Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN))
   » If a foreign reporting company has not been issued a TIN, report a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.

Each Beneficial Owner and Company Applicant. Not all reporting companies are required to report information about Company Applicants.
☐ Full legal name
☐ Date of birth
☐ Complete current address
   » Report the individual’s residential street address, except for company applicants who form or register a company in the course of their business, such as paralegals.
   » For such individuals, report the business street address. The address is not required to be in the United States.
☐ Unique identifying number and issuing jurisdiction from, and image of, one of the following non-expired documents:
   » U.S. passport
   » State driver’s license
   » Identification document issued by a state, local government, or tribe
   » If an individual does not have any of the previous documents, foreign passport
CORPORATE TRANSPARENCY ACT

NOVEMBER 2023

BY: HERRICK K. LIDSTONE, JR.
BURNS, FIGA & WILL, P.C.
GREENWOOD VILLAGE, CO

CTA – IT’S COMING

- Statute is found at 31 U.S.C. 5336
- Current Rules are found at 31 C.F.R. 1010.380
- More rules and interpretations are expected
- Under the current statute, the CTA reporting obligations become effective:
  - for all entities created on or after January 1, 2024, and
  - for all existing entities (as of December 31, 2023) by January 1, 2025.
- See https://www.fincen.gov/boi
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 entitled “Terrorism and Entity Formation” based on that article.

➢ 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.

➢ The global Financial Action Task Force (https://www.fatf-gafi.org/en/home.html) was established by the G7 countries in 1989 and have been proposing ways to prevent money laundering and similar crimes since then - with the Europeans taking it more seriously than others.

➢ In 2006 and subsequent years Michigan Senator Carl Levin and others proposed bills to adopt FATF principles in the United States, but without success.

CTA, SECTION 6402

➢ It is the sense of Congress that:

1. More than 2,000,000 corporations and limited liability companies are being formed under the laws of the states of the United States each year;

2. Most or all states do not require information about the beneficial owners of the corporations, limited liability companies, or other similar entities; and

3. Malign actors seek to conceal their ownership of these entities “to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption, harming the national security interest of the United States and allies of the United States.

➢ That section goes on to describe the need for federal legislation “providing for the collection of beneficial information for corporations, limited liability companies, or other similar entities.”
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.

Effective January 1, 2024, a federal law known as the Corporate Transparency Act (CTA) will apply to all domestic entities (including corporations, limited liability companies and limited partnerships) and foreign entities doing business in the United States, unless an exemption applies to the entity. There are 23 types of entities that are exempt from the CTA reporting obligation. Those entities that are already subject to other substantial federal reporting requirements (such as public companies, banks, securities brokers and dealers, insurance companies and registered investment companies and advisers) are exempt. Another significant exemption is for large operating companies with more than 20 full-time US employees, an operating location in the US, and more than $50 million in gross receipts or sales from US sources, as reported on the prior fiscal year tax return. Certain tax-exempt entities, wholly-owned subsidiaries, and inactive entities are also exempt.

For those many companies that do not fall under an exemption, the CTA reporting requirements become effective:

➢ For any person creating an entity with a state filing in any state on and after January 1, 2024, within 30 days of the filing. [Proposed rule extends the filing date to 90 days for entities created or registered in 2024]

➢ For all entities existing on December 31, 2023, not later than January 1, 2025.

The new reporting requirements require entities to file Beneficial Ownership Information (BOI report) with the federal Financial Crimes Enforcement Network (FinCEN). The BOI report includes information on the individuals exerting substantial control over the entity or with a 25% ownership interest in the entity, whether direct or indirect. The CTA and the rules provide certain civil and criminal penalties for entities 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. Please contact Burns Figa & Will, PC directly if you need assistance in determining whether your entity is exempt and/or filing your BOI reports.

These materials are provided for informational purposes only. They do not constitute legal or tax advice and do not create an attorney-client relationship with you.
THE FOCUS OF THE CTA - REPORTING COMPANIES

Under the CTA, commencing January 1, 2024, Reporting Companies will have to file reports ("BOI Reports") containing personal information:

- About the Reporting Company
- About the Beneficial Owners, and
- In some cases, about the Company Applicant

A domestic Reporting Company is a corporation, single-member or multi-member 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 any other entity created or 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 BOI Reports.

While tax exempt companies under IRC 501(c) and political organizations under IRC 527 are exempt Reporting Companies, HOAs are tax exempt under IRC 528 are not exempt and must report.

WHO IS NOT A REPORTING COMPANY -- EXEMPTIONS

23 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 in existence on or before January 1, 2020, are also exempt from the reporting requirements.

General partnerships are “an association of two or more persons to carry on as co-owners a business for profit. (CRS 7-64-202) No filing is required. LLPs are different.

A trust is a contractual relationship frequently used in estate planning and is not created by any filing, even though a filing may be made to register the trust with a court.
INTERESTING QUESTIONS

- 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 creating an entity, and then they will likely be treated as a general partnership. General partnerships (created 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.
  - Tax status of an LLC as a “disregarded entity” is not relevant to Reporting Company status.
- Question G.2 of the FAQs (9/29/2023) makes it clear that a parent company cannot fulfill its subsidiaries’ reporting requirements except by considering whether the subsidiary is a Reporting Company and whether it meets an exemption. Even single owner entities may be Reporting Companies.

CESSATION OF REPORTING OBLIGATIONS

- Once a company determines that it is a Reporting Company, the rules provide limited means of avoiding the BOI reporting obligation.
- The most common will be where the Reporting Company becomes exempt.
- There is no clear exemption from the reporting requirements even following entity dissolution.
  - An entity created before January 1, 2020, that dissolves may be able to take advantage of the inactive entity exemption.
  - There is no specific rule for a Reporting Company that files articles of dissolution and completes its winding up process to cease its reporting obligation.
  - FinCEN’s September 2022 adoption release does say this about the issue at pages 53 and 160:
    - Lastly, with respect to questions regarding the treatment of company termination or dissolution, FinCEN does not expect a reporting company to file an updated report upon company termination or dissolution. FinCEN will consider appropriate guidance or FAQs to address any other specific questions that may arise about application of the final rule to particular facts and circumstances.
  - That is not a part of the rules, but is only a comment made in the adopting release. The rules do not specifically address the issue of dissolution.
- The only reference in the Small Entity Compliance Guide is on page 46 that “Note: There is no requirement to report a company’s termination or dissolution.”
**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.
- A September 2023 interpretation considers the 25% based both on value (whether or not it has any voting rights) and on voting rights.
- The determination of “who” the Beneficial Owner is will either be simply or extremely difficult.

**COMPANY APPLICANTS**

- The BOI Reports for any Reporting Company created or registered 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, although the definition is quite broad and includes: (*most likely to be included in the two):
  - Client individual* requesting that the entity be created or foreign company be registered
  - Partner, who receives the request and passes it on to the
  - Associate, who works with the
  - Paralegal or corporation service company, who actually makes the filing*
- Company Applicants must report the individual’s residential street address except for Company Applicants who create or register Reporting Companies in the course of their business (such as employees of commercial corporate service companies or law firms). In that case, individuals may use their business address.
- Registered Agents have no current reporting obligation.
**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.
- The application for a FinCEN Identifier must include home address.

**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.
**AMENDMENTS**

- Reporting Companies are obligated to file amendments to their BOI Reports within 30 days “to reflect any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners.”
  - Note that there is no materiality standard.
  - Note further that there is no statutory requirement expressly stating that Beneficial Owners have an obligation to notify the Reporting Company of any changes.
- In some cases (such as a change in the board of directors or managers or officers) the Reporting Company may know of the change as it occurs.
- In other cases the Reporting Company may not know unless the Beneficial Owner passes the information to the Reporting Company.

**PENALTIES**

- There are penalties established against the Reporting Companies and “any person” who provides false or misleading information for the BOI Reports or 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
- Rules suggest that it is more important for Reporting Companies to make filings timely and report that Beneficial Owner 2 has failed to provide the required PII (passport, drivers licenses, etc.).
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. 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.

- Lawyers and accountants who collect and retain PII from their clients and their control persons (think drivers license, passport, etc.) must ensure the security of that information.

- Secretaries of State are required to provide notification of CTA requirements to entities created or registered under its laws, but initially has no defined obligation to help enforce.

CONSIDER

- Client or client entity who refuses to comply with the CTA reporting obligations.

- Client who requests the lawyer to undertake a matter the lawyer knows to be subject to BOI reporting but:
  - Refuses to provide accurate information to make a BOI report the lawyer believes is required; or
  - Refuses to provide the information to amend a BOI report previously filed; or
  - Refuses to permit the lawyer to make a filing even though the lawyer may have the required information as a result of the transaction documentation

- Rule 1.16(a) which provides that a lawyer has a duty to withdraw from representing a client where (among other things) “the representation will result in violation of the Rules of Professional Conduct or other law” - including the CTA.

- Where this is a concern to an attorney, Rule 1.2(d) requires consultation with the client.

- If (in the lawyer’s judgment) withdrawal is required, is a noisy withdrawal permissible or perhaps required?

- Does ABA Resolution 100 add to these duties or merely clarify existing obligations?
**HOW YOUR ATTORNEY CAN HELP CLIENTS**

- Many clients without a complex business structure can probably handle CTA reporting themselves.
- However, clients with numerous legal entities or a more complex organizational structure may face challenges interpreting the Rules.
- Your lawyers should be available to:
  - Help you gather the necessary information
  - Answer your questions as you file your reports.
  - Review your reports before you file them.
  - Help you prepare reports for filing.
  - Assist in training your staff to handle reporting.
  - Consider whether to prepare checklists for client convenience.
- CTA compliance will likely become a factor in due diligence investigations for M&A and financing transactions.

**CHECKLISTS AVAILABLE IN SMALL ENTITY COMPLIANCE GUIDE**

Required information checklists Reporting Company:
- Full legal name.
- Any trade name or "doing business as" (DBA) name – Report all trade names or DBAs.
- Complete current U.S. address. Report the address of the principal place of business in United States, or, if the reporting company's principal place of business is not in the United States, the primary location in the United States where the company conducts business.
- State, Tribal, or foreign jurisdiction of formation.
- Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)). If a foreign reporting company has not been issued a TIN, report a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.

Each Beneficial Owner and Company Applicant:
- Not all reporting companies are required to report information about company applicants.
- Full legal name.
- Date of birth.
- Complete current address. Report the individual's residential street address, except for company applicants who create or register a company in the course of their business, such as paralegals. For such individuals, report the business street address. The address is not required to be in the United States.
- Unique identifying number and issuing jurisdiction from, and image of, one of the following non-expired documents: U.S. passport – State driver's license – Identification document issued by a state, local government, or tribe – If an individual does not have any of the previous documents, foreign passport.

*From Small Entity Compliance Guide Chart #7 (Section 4.1) at page 38*
Thank you, very much

Herrick Lidstone