



Corporate Transparency Act is Here – What Lawyers Should Know

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The Corporate Transparency Act's (CTA) Final Rule has been enacted. Beginning on January 1, 2024, the CTA will be enforceable against all reporting companies, beneficial owners, and applicants. Attorneys, accountants, bankers, and financial consultants beware!ⁱ

While the CTA's legislative goal is to address anti-money laundering, particularly with respect to shell and front companies, the CTA is causing attorneys to assess their obligations not to disclose their client's confidential information under the rules of professional responsibility. During such assessment, attorneys could be faced with the issue that compliance and reporting pursuant to the CTA may conflict with the ethical obligation to maintain client's confidential information.

The ABA pointed out in its opposition and critique of the CTA's requirement of reporting companies to provide beneficial ownership informationⁱⁱ, an attorney or paralegal who forms an entity after January 1, 2024, on behalf of their client, is considered an applicant. As an applicant, they will be forced to provide personal information and confidential information of the client that would otherwise be confidential pursuant to ABA Rule 1.6. With a federal statute as new as the CTA, and with minimal guidance on enforcement, it begs the question, what should attorneys do?

Acquire a Working Knowledge of the CTA and Identify which Clients May Be subject to its Requirements.

It is critical to understand whether or not your clients, or even your own firm, may be subject to CTA reporting requirements. The Final Rule requires both foreign and domestic companies, such as corporations, limited liability companies, partnerships and any other entity created by the filing of a document with a secretary of state or similar office under the law of a state or Indian tribe (also called a "reporting company"), to file a beneficial owner report about their beneficial owners and "the individual who directly files the document that creates the domestic reporting company" (referred to as a "company applicant") with the Financial Crimes Enforcement Network (FinCEN).ⁱⁱⁱ However, not all of your clients may be subject to the CTA, as they may fall under one of the twenty-three types of entities exempt from CTA reporting obligations. All companies formed prior to January 1, 2024, that fall within the definition of a "reporting company", will have until January 1, 2025 to submit their initial reports to FinCEN, whereas any "reporting company" created or registered after January 1, 2024, will have thirty days after receiving notice of their creation or registration to file their initial reports.^{iv}

In Your Engagement letters, Limit the Scope of Engagement.

A cornerstone in representing your clients, while complying with your ethical obligations, is to have a working knowledge of what risk you (and your client) may be subject to by forming entities on behalf of clients and preparing reports on behalf of such entities. One issue with preparing the report on behalf of the company is the ongoing obligation to prepare updated reports when there is "any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners" within thirty days of a change in the beneficial ownership of the company.^v A second issue is the initial reporting requirement that requires disclosure of personal information of the applicant, which could include attorneys, paralegals, consultants, and accountants, when filing the initial report. The most pressing issue though is the conflict between your obligations to maintain attorney-client relationship in confidence, including clients' personal information, and your ongoing obligation to ensure compliance with the reporting requirements of the CTA. For these reasons, we recommend limiting the scope of engagement in your engagement letters. Engagement letters need to be clear that your scope of engagement is either inclusive, or not inclusive, of filing beneficial ownership reports. If you do take on the obligation of filing the initial beneficial ownership reports on behalf of your clients, then your letter of engagement should be abundantly clear whether updates to the reports fall solely on the shoulders of the reporting entity or you, as counsel. Taking it one step further, subject to compliance with your state's ethical obligations, you may consider requiring clients to execute a waiver and indemnification of your firm and attorneys for either, depending on the scope of your representation, (1) ensuring your clients' timely file and update the beneficial ownership reports; (2) the release and revealing, along with the clients' giving of informed consent, of the representation of the client and clients' personal information to FinCEN for purposes of filing the initial beneficial ownership reports; and/or (3) the reporting of inaccurate beneficial ownership information that has been provided by your client.

Oversight and Administration: Implement a firm-wide checklist and committee to address representation of present and future clients subject to CTA reporting obligations.

While attorneys are not obligated under the CTA to file beneficial ownership reports on behalf of their clients, in addition to directly addressing, defining, and limiting the scope of your responsibility in regards to filing beneficial ownership reports in your engagement letters, your firm should consider creating a committee to confirm the scope of your engagement. This committee should ensure that the reporting obligations of your clients are adhered to and align with the CTA requirements. This committee should also consider preparing notice letters to clients for which you have formed an entity which notify the clients that (1) they may be subject to CTA reporting requirements, and (2) the obligation to report information for existing companies falls outside the scope of your engagement and will be the client's responsibility to timely and accurately report unless agreed to in writing in a supplementary engagement letter. While it may seem like a tedious and daunting task to undertake, such task will limit your exposure to violations of ethical obligations, in addition to limiting the exposure of your client being subject to the severe penalties, both criminal and civil, for failure to comply with reporting obligations under the CTA. This task force or committee should also implement internal policies for forming entities, ensuring each attorney and/or paralegal is taking the same steps when addressing and advising clients on CTA compliance. This is because an attorney or paralegal forming a company that is subject to CTA reporting requirements will also be obligated to provide their own personal information with the initial reports to FinCEN.^{vi} Most importantly, if your firm agrees to continue representing and advising clients, who may be subject to CTA reporting obligations beyond the satisfaction of the initial reporting obligations, your committee should create internal policies and checklists, both within your firm and your clients' companies, to track on a regular basis any changes to such companies' reporting status or beneficial ownership, and a system for collecting and storing beneficial ownership information of clients. It is important to note that the CTA is and likely will continue to change under our feet and you must stay up to date on this ever-changing rule.

Continue to watch this blog for CTA updates including information about who has access to reported information and the CTA's impact on financial institutions.

About the Author



Sara Reams is an associate, focusing her practice on real estate matters. With a focus on real estate, Sara works frequently with developers, lenders, operators, landlords and tenants, in both Texas and states throughout the country, in commercial real estate developments and investments. Her principal practice area involves counseling clients in connection with the acquisition, financing, development, leasing, management, disposition and construction of commercial real estate.

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ⁱ *Beneficial Ownership Information Reporting Frequently Asked Questions, Fin. Crimes Enforcement Network (March 24, 2023)*, https://www.fincen.gov/sites/default/files/shared/BOI_FAQs_FINAL_508.pdf

ⁱⁱ Lawrence Goldman & David Marella, *The Corporate Transparency Act: Augmented Federal Anti-Money Laundering Legislation Brings New Reporting Requirements of Company Ownership*, A.B.A.: Bus. L. Section (Jan. 29, 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-

ⁱⁱⁱ See 31 C.F.R. § 1010.380(e)

^{iv} As of September 28, 2023, FinCEN has proposed extending the filing deadline from thirty days to ninety days. See *Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024*, 88 Fed. Reg. 66730 (Sept. 28, 2023) (to be codified 31 C.F.R. 1010).

^v See 31 C.F.R. § 1010.380(a)(2)(i)

^{vi} See 31 C.F.R. § 1010.380(e)