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Regulatory Spotlight: What Lawyers Need to Know About New Reporting Required Under the Corporate Transparency Act

On January 1, 2024, the new beneficial ownership information (BOI) reporting requirement enacted by the Corporate Transparency Act (CTA) goes into effect. The CTA requires statutorily-created business entities (other than those exempted) to file a BOI report providing *inter alia* personally identifiable information about the individuals who own or control the entity.

For those attorneys not already versed on the CTA changes, this article is a heads-up as the reporting will potentially significantly impact law firms and raise ethical considerations of which you need be aware. For example:

- Law firms, lawyers, paralegals, or other staff may all be considered reporting applicants/companies
- Law firms will need to inform their clients of the CTA's BOI reporting requirement if applicable and be prepared to advise how to comply
- Withdrawal may be required if a client refuses to comply

Put simply, Congress decided it was necessary to create mandatory BOI reporting to aid the government in policing illicit actors hiding behind shell and front companies in order to launder criminal enterprise funds through the U.S. financial system.

While there are carve-outs for certain entities, despite the American Bar Association's [ABA] best efforts, lawyers and law firms are not exempt. This applies to the law firm's own business organization filings with the secretary of state as well as those filed on behalf of clients and other third parties. The limited exception is a law firm (or any other entity) meeting the specific criterion of a "large organization" defined in the rule.¹

31 CFR Part 1010 (RIN 1506-AB49) – What Is It?

FEDERAL REGISTER SUMMARY: FinCEN now requires certain entities to file with it reports that identify two categories of individuals: the beneficial owners of the entity ("BOI") and individuals who file an application with specified governmental authorities to create the entity or register it to do business. These regulations implement Section 6403 of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA), and describe who must file a report, what information must be provided, and when a report is due.

¹ Attorneys who are not already well-versed in changes brought about by the CTA should review the applicable law and administrative opinions to make certain that they are prepared to provide effective compliance advice to their clients and to comply with reporting requirements which might apply to their own firms. Please be advised that this article is intended for educational and informative purposes to guide that preparation, but it should not be treated as a substitute for licensed attorneys to reach their own professional conclusions.

Beneficial Ownership Defined

The new rule creates a mandatory reporting requirement of beneficial ownership information for all domestic and foreign (non-US) statutorily-created business entities, with limited exceptions.

“Beneficial ownership” is defined as any individual who directly or indirectly either exercises substantial control over a reporting company or owns or controls at least 25 percent of the ownership interests. 31 CFR 1010.380(d)(4)(iii)

“Substantial control” in turn is defined as an individual who:

1. serves as a senior officer;
2. has authority over the appointment or removal of any senior officer or majority of the board of directors or similar body;
3. directs, determines, or has substantial influence over important decisions.

“Important decisions” are exhaustive as noted in the “illustrative list” included in 31 CFR 1010.380(d)(1)(i)(C)(1)–(7) including control over principal assets, reorganization, dissolution, or mergers, major expenditures, and operating budget approval. Be wary that 31 CFR 1010.380(d)(1)(iv) has a catch-all provision regarding “substantial control” that notes the examples in the list are “non-exhaustive” and reporting entities should be guided by these specific examples but also consider how individuals could exercise substantial control in other ways as well.

What Information Must Be Reported for Each Beneficial Owner?

Required reporting information of each BOI includes but is not limited to full legal name, date of birth, address (residential if an individual), and proof of identification. There is a provision for a FinCEN issued identification number, but the required information will be similar.

Why Are Lawyers Not Exempted?

The ABA, among others, zealously advocated for a law firm exemption to no avail. The reasoning put forth by the government was that an exemption was only appropriate for entities that Congress considered already sufficiently regulated, if not more so, in a related financial area such as securities issuers and brokers, government entities, banks, and credit unions. Congress decided that while lawyers are subject to the Model Rules of Professional Conduct as adopted in their licensing jurisdiction, those rules do not fully align with Circular 230 and were not sufficient in their own right to satisfy the goals of the CTA reporting.

“Large Operating Entity” Exemption

A law firm may be exempted if it is a “large operating entity” defined as (1) employs more than 20 full-time employees in the U.S., (2) has an operating presence at a physical office within the US, and (3) filed a federal income tax or information return in the U.S. for the previous year demonstrating more than \$5 million in gross receipts or sales. The full list of exempted entities is found in 31 U.S.C. 5336(a)(11)(B)(i)–(xxiii). Inactive entities are covered in 31 CFR 1010.380(c)(2)(xxiii).

What If One of the Beneficial Owners Is An Exempt Entity?

There is a “Special Rule” proscribing limited reporting information required for beneficial owners who are exempt entities, minor children, foreign pooled investment vehicles, and deceased company applicants. 31 CFR 1010.380(b)(3).

What About Trusts?

Unclear. It appears that since a trust is not “an entity created through a filing with the State” the trust should not need to file under FinCEN. However, the beneficial interests of a trust’s beneficiaries holding a 25% or greater interest may need to comply with the reporting requirements.

When Are the Reports Due?²

A reporting company created or registered to do business before January 1, 2024, will have until January 1, 2025 to file its initial beneficial ownership information report. A reporting company created or registered on or after January 1, 2024, will have 30 days to file its initial beneficial ownership information report. This 30-day deadline runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier.³

Who Will Have Access to These Reports?⁴

FinCEN reports it will permit Federal, State, local, and Tribal officials, as well as certain foreign officials who submit a request through a U.S. Federal government agency, to obtain beneficial ownership information for authorized activities related to national security, intelligence, and law enforcement. Financial institutions and their regulators will also have some access with the consent of the reporting company.

² U.S. Treasury Financial Crimes Enforcement Network BOI Reporting FAQs

³ There is currently pending a proposed rule change that may amend the filing deadline for certain BOI reports from 30 to 90 days See : [Beneficial Ownership Information Reporting Deadline Extension for Reporting Companies Created or Registered in 2024](#)

⁴ U.S. Treasury Financial Crimes Enforcement Network BOI Reporting FAQs

Ethical Considerations

While each lawyer's obligations will differ on a case-by-case basis for each client, a lawyer should ask the following questions for each representation:

1. **Duty to dig.** What is the scope of a lawyer's due diligence requirements to inquire sufficient to ethically ensure that the lawyer is not being used to assist a client in a crime or fraud (applies to vetting potential new clients as well as existing clients)?
2. **Duty to disclose business ownership.** Whether, when, and how a lawyer might be required to disclose to the government information about the beneficial ownership of an entity the lawyer forms on behalf of a client or otherwise represents?
3. **Duty to withdraw, and how to withdraw.** When is withdrawal permissive versus mandatory? Is a noisy withdrawal permissible or arguably required?
4. **Duty to client.** How should a lawyer balance the duties owed to a client with the right to protect oneself from regulatory action and personal liability, particularly as the lawyer has an independent duty under the CTA?

Law firms may well be reporting companies under the CTA. Further, lawyers, paralegals and other staff who submit business organization filings may be considered company applicants.

Under MR 1.4 (Communication) and MR 1.16 (Declining or terminating representation) as amended⁵, lawyers must determine whether they need to inform a client, or prospective client, of the CTA's BOI reporting requirements. Changes may be advisable to retainer agreements/engagement letters to ensure clients and potential clients are on clear notice of these requirements and the consequences of failing to provide the lawyer with the correct required information.

If a client (or prospective client) requests the lawyer undertake a matter the lawyer knows to be subject to BOI reporting but refuses to provide the information or refuses permission to file, a lawyer is arguably required to terminate (decline) the representation pursuant to MR 1.16 and may have exposure under MR 3.3 (candor toward the tribunal). At minimum, the lawyer may be required to refuse to prepare and/or submit the filing.

Risk-Based Analysis

The ABA urges lawyers to use risk-based analysis.⁶ A lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under MR 1.2(d). Even where MR 1.2(d) does not require further inquiry, other Rules may. See e.g. MR 1.1(competence), MR 1.3(diligence), MR 1.4(communication), MR 1.13(organizational client), MR 8.4(b),(c) (duty of honesty and integrity), MR 1.16(a) (declining or terminating representation).

The ABA recently at its 2023 Annual Meeting August 7-8, 2023 amended MR 1.16(declining or termination representation) and Comments [1], [2], and [7] in response to the federal government's increasing efforts to regulate lawyers.⁷ See in particular amendments to Comment 2⁸ regarding mandatory withdrawal. Comment 2 as amended provides guidance specific to the risk-based analysis under the CTA changes and cites to additional resource publications.

In addition to typical considerations such as familiarity with the client and the nature of the representation, Comment 2 *inter alia* suggests the lawyer should consider whether the jurisdiction involved in the representation is considered at high risk for money laundering or terrorist financing.

One of the several publications Comment 2 cites is the Financial Action Task Force ("FATF") Guidance for a Risk-Based Approach for Legal Professionals.⁹ The FATF is an independent inter-governmental body that develops and promotes policies to protect global financial systems. This guide for legal professionals is a comprehensive, exhaustive deep-dive offering guidance from geographic to transactional risks along with client assessment and mitigation.

It is important to understand that it is unlikely lawyers can waive liability for the duty to report BOI information by engagement agreements or otherwise.

⁶ See Revised Report to the House of Delegates (August 2023)

⁷ ABA House of Delegates Adopts Revised Resolution 100 Amending Model Rule of Professional Conduct 1.16

⁸ Rule 1.16 Declining or Terminating Representation

⁹ FATF Guidance for Legal Professionals

It is important to understand that it is unlikely lawyers can waive liability for the duty to report BOI information by engagement agreements or otherwise. Like any other ethics rule, a lawyer cannot waive the rules of professional conduct by contract with the client. Because Congress very specifically did not exempt lawyers from BOI reporting, this duty attaches to the lawyer independent of any retainer agreement. *FAFT Guidance For Legal Professionals* recommended in Comment 2 encapsulates this concept where it states:

Even though individual legal professionals or law firms may be able to conclude that specific AML/CFT obligations do not apply to them, ethical standards require them to ensure that their services are not being misused, including by criminals, and they should carefully consider what they need to do to guard against that risk.¹⁰

With that caveat, lawyers may consider adding a notice regarding FinCen BOI reporting requirements to engagement letters in any representation that might invoke the CTA. If a lawyer becomes aware that a client has filed a false BOI report, the new rules do not give lawyers the choice of remaining silent about such fraud. The requirements arise from the case-by-case facts and cannot be waived.

The key to a lawyer understanding their ethical duties in these situations is to ask the right questions. This article provides the basics of the new CTA requirements along with guidance on ethics considerations, but is by no means intended to be a comprehensive resource in this new and evolving regulatory system. Any lawyer who practices in this area, whether routinely or rarely, is well advised to read all available resources provided by FinCEN, the fully annotated rule, and check with local ethics counsel. For lawyers who provide, or have clients who provide, trust company services, FAFT also published *Guidance for Risk-Based Approach to Trust and Company Service Providers*.¹¹ For lawyers who practice in areas such as business, corporate, securities, and tax law, the *FAFT Guidance for Legal Professionals* is required reading,

Additional Resources

- **Full Annotated Regulations** Federal Register / Vol. 87, No. 189 / Friday, September 30, 2022 / Rules and Regulations
- **FinCEN Regulatory Support:** 1-800-767-2825 or frc@fincen.gov
- **FinCEN website for Beneficial Ownership Information Reporting** includes Reference Materials, BOI Newsroom, Small Business Resources (Compliance Guide, FAQ, Quick Reference, and Videos).

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¹⁰ Id. ¶65, p. 18

¹¹ *FAFT Guidance for a Risk-Based Approach for Trust and Company Service Providers*

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