



THE CORPORATE TRANSPARENCY ACT: BUSINESS OPPORTUNITY OR RISK LANDMINE

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The Corporate Transparency Act (CTA) is a federal law requiring certain U.S. business entities to report beneficial ownership information to the Financial Crimes Enforcement Network (FinCEN) to combat money laundering and illicit financial activities. Scheduled to go into effect on January 1, 2025, the law applies to many small and medium-sized businesses, mandating disclosure of individuals who own or control 25% or more of a company.

As this article was being finalized, however, the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction against the enforcement of the CTA, citing concerns about its constitutionality and its impact on small businesses. *See Texas Top Cop Shop v. Garland et al.*, Case No. 4:24-cv-00478 (December 3, 2024). This decision temporarily suspends the requirement for business owners to comply with the CTA's reporting requirement obligations, including

submitting detailed beneficial information to FinCEN by January 1, 2025, until further notice from the court.

This decision highlights the ongoing uncertainty surrounding the CTA and underscores the need for commercial lawyers to stay informed about litigation affecting the CTA and their clients' compliance obligations.

WHAT DOES THE PRELIMINARY INJUNCTION MEAN FOR LAWYERS AND CTA FILERS?

The preliminary injunction did not decide the constitutionality of the CTA. Instead, it granted the preliminary injunction because the plaintiffs (1) demonstrated a high likelihood of success on the merits of their case; (2) would experience irreparable harm absent injunctive relief; (3) the threatened injury outweighed any damage the injunction might cause the defendants; and (4) the injunction would not harm the public interest.

The government will almost certainly appeal this decision and may seek to stay the injunction or limit its application to the named plaintiffs or their organizational members. Lawyers must approach client communications with caution, clearly explaining the limited scope of the decision, the likelihood of appeal, and advising clients on whether to continue preparing for compliance to avoid potential disruption if the injunction is overturned or narrowed.

SERVICE GAPS, BUSINESS OPPORTUNITIES & RISKS IN CTA COMPLIANCE REPRESENTATION

Previous articles have focused on the fundamental requirements and penalties associated with the CTA. This article examines the service gaps experienced by commercial clients, the business opportunities the CTA presents for law firms, and the risks and ethical considerations associated with integrating CTA compliance into your practice should clients continue to prepare for CTA compliance. It also contemplates what law firms should do to prepare for CTA compliance should the preliminary injunction be lifted.

Small business owners frequently seek assistance from accounting and law firms to assist with CTA compliance, but are often turned away due to firms' reluctance to assume the associated risks. These risks include malpractice liability, ethical/disciplinary concerns, and CTA penalties, which include fines up to \$10,000, civil penalties up to \$500 per day, and up to two years imprisonment. Lawyers may also face the risk of disciplinary actions and malpractice claims associated with negligent CTA reporting.

Firms should consult with their malpractice carriers to understand coverage limitations related to CTA representation. For example, lawyers will almost certainly not have coverage for fines, sanctions, civil or criminal penalties. Coverage may also be limited or denied if lawyers fail to conduct due diligence and are willfully blind to a client's fraudulent, false or criminal misrepresentations. This is a good time for lawyers to read ABA Formal Opinion 491 and take a closer look at obligations pursuant to Rule 1.2 of the Model Rules of Professional Conduct.

DOES THE CTA APPLY TO YOUR CURRENT PRACTICE?

If you practice in a law firm, the CTA applies to your firm, and compliance will be required if the preliminary injunction is lifted. By definition, law firms are business entities subject to beneficial ownership reporting requirements. At a minimum, firms should ensure compliance with the CTA in their internal operations by reviewing employment agreements, shareholder agreements or operating agreements to identify and maintain necessary beneficial ownership information.

Firms who practice in the areas of business organization and corporate

formation should examine and update their policies and procedures related to corporate filings. Best practices will include incorporating specialty teams that include designated and trained CTA/FinCEN compliance paralegals and assistants. Policies should also designate responsibility for tracking and updating FinCEN registrations.

IDENTIFYING AND NOTIFYING AFFECTED CLIENTS

Lawyers with business clients need to identify current clients who are subject to CTA requirements to fulfill their duties of diligence, communication and competence. Clients should be encouraged to appoint a CTA compliance officer. Additionally, lawyers should assess their duties to former clients for whom they created a business organization, including whether to notify them of CTA requirements. Any such notice should clarify that any further assistance from the lawyer/firm will require a new engagement agreement.

REVISING ENGAGEMENT AGREEMENTS

Lawyers involved in business organization and corporate formation should immediately review and revise engagement agreements. For example, clients should be informed of CTA requirements and advised whether the firm will assist with filing, should filing be required. A best practice in corporate formation representations is to explicitly address CTA reporting, with options to:

- State that the client has been advised of the filing requirements and has agreed the attorney is not responsible for filing the report; or
- Include an addendum when the firm/attorney agrees to handle filings, specifying the client's obligations to provide necessary information, dead-

lines, and how the firm will protect the data. The agreement should also outline consequences for non-compliance, such as the firm's withdrawal from representation. See NOVAK, SCOTT & HOLLENBACK, SCARINCI, CTA Guidance for Legal Counsel Serving Businesses, Bloomberg Law, March 2024.

Engagement agreements should also highlight that clients are responsible for providing accurate data and notifying the firm of any changes.

Additionally, if a lawyer advises a client to comply with the CTA and the client refuses, the lawyer must evaluate whether continued representation is possible under Rule 1.16 and consider disengagement. Mandatory withdrawal associated with non-compliance, evasive compliance, or fraudulent compliance should be addressed in engagement agreements.

A STRATEGIC OPPORTUNITY FOR LAW FIRMS

CTA compliance offers law firms an opportunity to expand their existing commercial or business law practice groups. However, successfully incorporating CTA compliance into your practice will require firms to implement detailed policies, designate dedicated attorneys and staff, and implement mandatory training for those associated with CTA compliance. By taking these steps, firms can mitigate risks while capitalizing on the growing demand for CTA compliance services, should the CTA's preliminary injunction be lifted.

Disclaimer: This article is not intended to be relied upon as legal advice. There is no attorney-client relationship between Bassford Remele P.A. and any reader of this article.

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