
Folks:

Take-Away: Filing a beneficial owner interest report with FinCEN by a nonlawyer may constitute the unauthorized practice of law in some states.

Background: Over the past year or so I have sat through several different seminar presentations on the Corporate Transparency Act (CTA.) At some point in each of these CTA presentations the discussion turned to who is charged with completing and filing the beneficial owner interest report, or BOIR, with FinCEN? The debate always then turned to who is in a better position to file the BOIR, the attorney that represents the reporting entity, or the entity's CPA? Each 'group' inevitably pointed to the other 'group' and said something like *"you are the better position to handle the FinCEN report filing than us."* At one presentation even I heard the excuse that the 'Big' accounting firms would decline any responsibility to file the FinCEN report on behalf of a client, claiming that such activity was not covered by their malpractice insurance carriers. While this 'professional posturing' was always humorous to observe, it is still an important question that reporting entities, lawyers, and CPAs need to have answered.

Question: Which professional should (or can) take on the responsibility to file the BOIR with FinCEN? New Jersey has given us some direction, at least within that state.

New Jersey Supreme Court Committee on the Unauthorized Practice of Law

Question: The New Jersey Society of Certified Public Accountants asked the question whether its members were permitted to file beneficial owner information under the CTA?

FinCEN FAQ: In its frequently asked questions, FinCEN was asked if a reporting company was required to use an attorney or CPA to submit beneficial ownership information to FinCEN? [FAQ B.7, issued November 16, 2023.] In its answer FinCEN responded: *No. FinCEN expects that many, if not most, reporting companies will be able to submit their beneficial ownership information to FinCEN on their own using the guidance FinCEN has issued. Reporting companies that need help meeting their reporting obligations can consult with professional service providers such as lawyers or accountants.*

Committee's Answer: The Committee found, with some vague 'hedging' using the subjective distinction *complex*, that the completion of BOIRs *may* constitute the practice of law, meaning that a CPA who completes the BOIR could be charged with the crime of the unauthorized practice of law. The Committee concluded:

With regard to the beneficial owner information reports under the CTA, the Committee finds that the public needs protection, given the complexity of some matters and the significant civil and criminal penalties for noncompliance with the Act. Complex filings require a lawyer's judgment, training, and expertise- the analysis may be tricky and the risk of penalties, if the analysis is faulty, is greater. While the public needs protection in complex matters, however, most filing will be straightforward. For example, all matters where there is a single owner of a limited liability will be simple- that single owner is the beneficial owner of the entity for purposes of the Act. In such cases, one does not need to be a lawyer to determine the necessary information to include in a beneficial owner information report.

Given that most filings are likely to be straightforward, the Committee finds that a licensed CPA can engage in this conduct provided the CPA notifies the client that it may be advisable to consult with a lawyer. The Committee relies on the professionalism of CPAs to ensure that such licensees will recognize when a filing is

more complex and it is in the client's interest for a lawyer to be retained in the matters.

While small businesses are now faced with retaining a lawyer or a CPA (or Enrolled Agent) to submit such reports, the businesses with straightforward filings should be able to do the task themselves, with guidance from FinCEN, the U.S. Chamber of Commerce, and other entities. Corporations may file the forms on their own, but if they hire someone to do it on their behalf, it must be a lawyer or a CPA/Enrolled Agent.

Observation: The Committee's use of a *complex standard* is not helpful. What does *complex* actually mean? How is *complexity* measured? Does the subjective term *complex* change from situation to situation, with different meanings? It will be interesting to see if other states respond similarly to 'the unauthorized practice of law?' question. Due to the subjective *complex standard* used to determine if the preparation of a FinCEN form is the practice of law, it should not be surprising that CPAs across the country will decline to prepare BOIRs on behalf of their reporting company clients.

Conclusion: The filing of a CTA BOIR is the practice of law, in *complex*, non- straightforward, situations. Professionals are left to guess whether the situation that they are presented with, e.g., a dynasty trust that owns a business interest, is *complex*, or not, when it comes to filing a BOIR.
