SECTION V:
CHOICE OF ENTITIES AND
CORPORATE TRANSPARENCY ACT

	Sole Proprietorship	General Partnership ("GP")	Limited Partnership ("LP")	Limited Liability Partnership ("LLP")	Limited Liability Company ("LLC")	"C" Corp	"S" Corp	Series LLC - Protected Series	Series LLC - Registered Series
Formation; Required Filings	None required; recommend: Assumed Name Certificate	None required; recommend: Assumed Name Certificate	Must file Certificate of Formation with Tex SoS	Form LP then must file annual registration with Tex SoS	Must file Certificate of Formation with Tex SoS	Must file Certificate of Formation with Tex SoS	Must file Certificate of Formation with Tex SoS	"Master" LLC must file Certificate of Formation with Tex SoS; "Cell" Series formed according to operating agreement, no Tex SOS registration required.	"Master" LLC must file Certificate of Formation with Tex SoS; "Cell" Series must file Certificate of Registered Series with Tex SOS.
Limited liability of owners for claims against entity	No	No	Yes , except GP is fully liable	Yes	Yes	Yes	Yes	Yes, limitied liability of owners for claims against entity. Also, limited liability for cell series for claims against other cell series "to the extent" separate cell series keep separate accounting for assets.	Yes, limitied liability of owners for claims against entity. Also, limited liability for cell series for claims against other cell series "to the extent" separate cell series keep separate accounting for assets.
Ownership	Individual	Minimum 2	Minimum of 2; 1 general partner and 1+ limited partner(s)	Minimum of 2	One individual (also H&W) or 2+	Any number	Up to 100	Any number	Any number
Charging Order Protection	No	No	Yes	Yes	Single member (or H&W) No Multi-Member Yes	No	No	(For the master LLC and each cell series, respectively): Single member No; Multi-Member Yes	(For the master LLC and each cell series, respectively): Single member No; Multi-Member Yes
Taxation	All income reported on Individual's return	Partnership	Can elect Partnership or Corporation (C Corp or S Corp)	Can elect Partnership or Corporation (C Corp or S Corp)	Can elect Partnership or Corporation (C Corp or S Corp)	C Corp or S Corp	S Corp	Can elect Partnership or Corporation (C Corp or S Corp)	Can elect Partnership or Corporation (C Corp or S Corp)

CHOICE OF ENTITIES

Take time to understand the client's plans for using or developing the property. Certain factors (liability protection, succession-planning, outside investors, tax-treatment, or compliance with the Corporate Transparency Act) may favor one entity type over another. Please consult the Texas entity chart in the appendix for a comparison of key characteristics of common entities.

Naturally your client should acquire and develop the land through one or more limited liability entities. Common entities that offer limited liability for real estate acquisitions include:

- Domestic/Foreign For-Profit Corporation
- Domestic/Foreign Limited Liability Company
- Domestic/Foreign Limited Partnership
- Irrevocable Trust
- Series Limited Liability Company (Protected or Registered)

To start, consider the prevalence of different entities that other business owners choose to file. The chart below shows the number of new entities registered with the Secretary of State in 2022, separated by entity type.

Entity or Series Type	**2022**
Domestic LLCs	351,055
Domestic Registered Series (Refers only to Certificates of Registered Series filed with SOS. Does not include "Protected Series," which SOS does not track.)	122
Domestic For-Profit Corporations	23,083
Domestic Limited Partnerships	4,636
Domestic Non-Profit Corporations	14,445

The following discussion of entities will be limited in respect to the longer-established limited liability entity types, with a focus on entity types most applicable to acquiring rural land. I will give more detail about series LLCs simply because it is a newer entity type, and real estate clients may be curious about them.

Limited Liability Company. The LLC is by far the most preferred entity in Texas and across the country, well suited for property purchases and development. It offers the limited liability of a corporation, but without the onerous governance requirements of a corporation, and with the management flexibility of a partnership. As the most prevalent entity type, parties commonly involved in real estate transactions are familiar and comfortable with LLCs.

Limited Partnership. The limited partnership is an entity form that sophisticated investors are comfortable with. Management and liabilities are borne by the general partner(s), while limited partners (i.e. investors) have personal liability protection. Note for comparison that a manager-managed LLC can also separate the management from the equity owners The general partner does not need to own any interest in the LP.[1] It is common and wise for the general partner to be a separate limited liability entity like an LLC.

Corporation. The C-corporation offers limited liability to equity owners, but lacks the flexibility offered by LLCs and partnerships. There are few practical reasons to choose a corporation over an LLC for a land acquisition. One reason would be if the client is already operating as a corporation.

S-Corporation. A client may ask about being an "S-corp." An "S" corporation is not a separate class of legal entity. Unlike LLCs, corporations and LPs, the "S" corporation has no statutory characteristics relating to limited liability or internal management. The phrase "S-corp" or "S" corporation is simply is a reference to a tax-related election made with the IRS, so that the entity (often an LLC) is taxed according to Subchapter S of the Tax Code.[2] This paper will not give more details on Subchapter S. A productive discussion about entities often requires some clarifying of terms that the client has heard from other people or Google. This is how to deal with the term "S-corp."

Irrevocable Trusts. Acquisition through an irrevocable trust may fit a client with specific succession-planning goals. Remember that revocable trusts or other self-settled trusts do not offer personal liability protection.

Series LLCs. The Series LLC is a relatively new form of entity in Texas and around the country. Texas is one of only 14 states that allow series LLCs. Texas first allowed series LLCs in 2009. For comparison, traditional LLCs came into existence in Texas in 1991, and all 50 states have laws allowing them. In general, the series LLC allows a "master" LLC to form any number of "cell" series LLCs below the master LLC. The cell series can be used to hold separate assets, and the assets of each cell series are insulated from liabilities of the other cell series (and the master LLC). Also, each cell series can have different ownership interests, members and managers. Each cell series can receive a separate federal EIN. However, within Texas, the master LLC and all cell series must report and pay franchise taxes under the same franchise tax account number.[3]

Because the series LLC is relatively new and not widely recognized, lenders and title companies may be reluctant to work with them. Willing lenders and title companies may require extra documentation before closing transactions.

Within the category of series LLCs there are two types: "protected" series and "registered" series. The protected series is the more informal version of the series LLC that existed between 2009 and 2021. In a protected series LLC, the master LLC can create (or terminate) a cell series by an internal process established in the operating agreement. The process may be as simple as a resolution of the members or managers, without the need to file any document with the Secretary of State. Professional service providers, like lenders and title companies, have struggled, and will continue to struggle, with the lack of transparency in the management of protected series.

---

[1] TBOC Section 153.151(d).

[2] *See* 26 U.S. Code § 1361(a)(1).

[3] *See* the Comptroller's description of series LLCs in its FAQ page: https://comptroller.texas.gov/taxes/franchise/faq/taxable-entities.php

In order to gain more transparency and give comfort to third parties dealing with series LLCs, in 2021 Texas created the second type of series, the "registered" series LLC. With a registered series LLC, the master LLC must file a new "certificate of registered series" with the Secretary of State in order to create a new cell series. Note that the filing fee for each certificate of registered series is the same as the filing fee of a certificate of formation for a traditional LLC. Aside from organization formalities with the SOS, the internal management of registered series is essentially the same as with a protected series.

Each series LLC must keep clean, separate accounting records between the master LLC and all cell series. According to the 2021 revision of the series LLC statute, the assets of each cell series are only protected from the liabilities of other cell series "***to the extent***" that each cell series maintains records and accounts for assets separately from the other cell series and the master LLC.[4] Where the 2009 bill provided insulation of assets only "***if***" each cell series keeps separate records, the 2021 bill substituted "***to the extent***."

A drafting attorney knows that changing the word "if" to "to the extent" is an intentional action that must carry some substantive meaning. I researched the history of the 2021 bill and watched video of committee proceedings. I was unable to find any comments or discussions about this word change. I also could not locate any case law in Texas (or in Delaware, which the Texas statute parroted) that refines the statutory language. The lack of case law is related to the newness and lack of widespread use of series LLCs.

In the absence of more detailed guidance, a series LLC client must understand the importance of good bookkeeping. Failure to faithfully account for the cell series separately can jeopardize their liability protection. If you or the client are concerned about liability exposure, an acceptable alternative is to form a separate traditional LLC in the place of each cell series.

The most important point to make about series LLCs is: although they have become a subject of chatter on the internet and within communities of real estate investors, they are rarely used in Texas. Referring back to the Secretary of State's records, in 2022 there were only 122 Certificates of Registered Series filed (vs. more than 350,000 traditional LLCs). We can safely conclude that "registered" series are extremely rare compared to other more traditional entity types. Protected series could be more popular than registered series, but it is hard to measure how much more. The Secretary of State does not track the number of protected series formed.

Note About Foreign Entities. Some clients consider entities formed in different states for a number of reasons. Delaware is a common selection for companies that will fundraise from investors, especially if the investors are sophisticated or coming from outside Texas. Investors feel comfortable with Delaware's corporate environment, common law and chancery courts.

Note About Anonymity and the Corporate Transparency Act. For clients concerned about anonymity, some states make it more difficult for third parties to discern the owners of an entity. Nevada is one example. However, with the advent of the Corporate Transparency Act (more in the following section), it will become near impossible for a registered entity in any state to conceal its

[4] TBOC Section 101.602(b)(1)

beneficial owners from the federal government (anonymity from private third parties will still apply).

Some entity types will not require CTA compliance under the current rules and regulations. The chart in the following section shows which entities are exempt from CTA compliance.

You should discuss with the client that avoiding disclosures under the CTA does not guarantee they are free from making disclosures under some other statute. Even if the client acquires the property through an entity that is exempt from CTA compliance, lenders and title companies may have their own policies that require disclosure of the same information that the CTA asks for. Furthermore, keep in mind that the US Treasury, Financial Crimes Enforcement Network (FinCEN) makes other efforts to discern the identity of individuals that purchase real property through entities. For example, since 2016 FinCEN has used Geographic Targeting Orders ("GTOs") to monitor the cash purchases of residential real estate by legal entities in certain Texas counties.[5] GTOs will not apply to non-residential purchases of rural land. I mention GTOs because they might apply, and to reiterate that the federal government can find other ways to pierce the anonymity of any entity.

Checklist

Here is a list of questions you should ask the client in order select an entity that fits their profile:

1. Will there be investors? Will the investors be people that the client knows well or unrelated investors? Will the investors be sophisticated in real estate? Will any investors come from outside Texas?

2. Is the client acquiring the land as part of a specific succession plan?

3. Will the client be financing the purchase or development of the property?

4. Do you get the sense that the client is the type of person that keeps organized records for separate entities? Or will they be using a professional bookkeeper or CPA for their entities?

5. Does the acquisition involve multiple tracts that can be easily separated by legal description? Or does the client anticipate purchasing additional tracts?

6. If the client is acquiring multiple tracts, does the client intend to monetize all tracts through the same type of business? This question relates to series LLCs. Because all cell series must report to the Texas Comptroller under the same franchise tax account number, it is best for all cell series to operate the same type of business. Extra fees paid to a CPA to assemble a more complicated report to the Comptroller could quickly eliminate any cost savings that the client hoped to get from the series LLC.

7. Is the entity already formed at the time the purchase contract is signed? Again, this relates to series LLCs. If the client intends to form the entity after executing the purchase contract, there is

[5] *See* FinCEN's current Geographic Targeting Order at this link: https://www.fincen.gov/sites/default/files/shared/Phase_17_RRE_GTOs_Order_FINAL_508C.pdf.

an opportunity to ask lenders and title companies if they are comfortable working with a series LLC. Are they comfortable working with a protected series, or do they require a registered series? Any reticence from either the lender or title company is a signal that a series LLC may complicate the closing. At best, this means that the client will have to pay an attorney more money to respond to questions and extra document requests. This added attorney time could quickly eliminate any management convenience and cost savings that the client sought from the series LLC.

CORPORATE TRANSPARENCY ACT (the "CTA"): A SELECTED SUMMARY

This section is only a selected discussion of essential points about the Corporate Transparency Act. For early engagement with a client, the included points will be more than enough to inform and alert them to new disclosure requirements. This discussion will focus on domestic entities. The CTA also includes language on foreign entities, foreign persons, and Tribal entities and persons. The treatment of those entities and persons substantively mirrors the treatment of domestic entities. Quotes and references to the text of the CTA and the final Treasury Rules and Regulations leave out the words "foreign" and "Tribal," only for brevity.

To access the original texts that I mention in this discussion, please refer to:

- Corporate Transparency Act, as passed in December 2020[6];
- Final regulations (the "Regulations") published in the Code of Federal Regulations that clarify and specify the requirements mandated by the CTA[7]; and
- The 99 pages of final rules (the "Rules") published in the Code of Federal Regulations that explain how the Treasury drafted the Regulations[8].

For clarity, the CTA does not add any new restrictions on foreign persons that may hold ownership interests in US entities. It only requires that all beneficial owners of entities, including foreign entities and individuals, report personal information to FinCEN.

The Bad News

You must deliver the news to the client that, if they plan to create a new entity by registering with the Secretary of State after January 1, 2024 (or if they currently own an entity that was created by registering with the SOS), they will need to disclose to the federal government (specifically FinCEN) the following information:

- Full legal name of the entity
- Any assumed name(s) of the entity
- Address of the principal place of business of the entity
- Jurisdiction of formation
- Tax ID or EIN of the entity
- Full legal name of each beneficial owner
- Date of birth of each beneficial owner
- Residential street address of each beneficial owner
- Either driver's license number or passport number of each beneficial owner
- An image of the unexpired driver's license or passport number of each beneficial owner, including the picture of the person.

[6] https://www.fincen.gov/sites/default/files/shared/Corporate_Transparency_Act.pdf
[7] https://www.fincen.gov/sites/default/files/shared/31_CFR_1010_380_excerpt_from_Final_Rule.pdf
[8] https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf

If you as the attorney, or your paralegal, forms the new entity on a client's behalf after January 1, 2024, then you qualify as a "company applicant" under the CTA.[9] You (and the paralegal that actually files the formation documents) will also need to disclose to the federal government the following information*:

- Full legal name of the attorney (and paralegal, if applicable)
- Date of birth of the attorney (and paralegal, if applicable)
- Business street address of the attorney (and paralegal, if applicable)
- Either driver's license number or passport number of each company applicant
- An image of the unexpired driver's license or passport number of each company applicant, including the picture of the person.

**Attorneys or paralegals that register entities regularly will be allowed to apply for a FinCEN Identifier, so that they do not have to repeatedly file all this information for every entity they form. The FinCEN Identifier will be a unique identifying number that references the person's stored data in the FinCEN database. As of the time of this writing, the system to request the FinCEN Identifier is not set up.*

These requirements are part of the Corporate Transparency Act. The Corporate Transparency Act brings a new reality for American business owners and investors. Clients will be jarred by the new requirements and want to understand where such a dramatic change came from.

Historical Context

This is a dramatic change, but it is one that has been coming for some time. Since 1989, a confederation of countries has been pressuring the US to meet higher standards for monitoring the activities of business entities within its borders.[10] The lack of transparency in the millions of entities across the states has created opportunities for some bad actors to launder money and conduct illegal activities.

FinCEN attempted to get a bead on illegal activity in the real estate market when it first issued real-estate-focused Geographic Targeting Orders in 2016.[11] Real estate attorneys will recognize the heightened disclosures required for residential purchases in Texas' major metropolitan counties and along the border.

The CTA is a culmination of this international pressure and FinCEN's own concerns derived from GTO data. Congress passed the CTA into law in December 2020, as part of the National Defense Authorization Act ("NDAA"). Trump vetoed the NDAA in its entirety.[12] In a rare bipartisan

[9] For entities created BEFORE January 1, 2024, company applicants do not need to file their information with FinCEN.
[10] See history of the international Financial Action Task Force here: https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html.
[11] *See* https://www.fincen.gov/news/news-releases/fincen-takes-aim-real-estate-secrecy-manhattan-and-miami.
[12] https://www.reuters.com/business/aerospace-defense/trump-vetoes-major-defense-bill-despite-strong-backing-congress-2020-12-23/

moment, Congress overrode the veto. The House vote to override was 322/87, and the Senate vote to override was 81/13.[13]

The takeaway points of this history are that (1) the CTA did not come out of nowhere, and (2) it will be in place for the foreseeable future. Attorneys and business owners must accept this new reality.

Essential Definitions With Commentary

The following definitions are to help an attorney analyze whether a particular entity is required to disclose information about its beneficial owners (also referred to as "beneficial owner information" or "BOI"). There are now private service providers offering guidance on CTA compliance and services to file information on a client's behalf.[14] ***Note that for the average small business owner operating a traditional LLC, compliance will more than likely be required.***

"Reporting Company": an entity for which beneficial ownership must be reported. The CTA defines a domestic reporting company as a corporation, limited liability company, or other similar entity that is created by the filing of a document with a secretary of state or a similar office under the law of a State.[15] Importantly, the Rules focus on creation by filing as the essential factor of a reporting company.[16] The determinative factor in the creation of the entity must be the filing with the secretary of state or other similar office. This captures many forms of entities, but not all.

Sole proprietorships, general partnerships, limited liability partnerships (LLPs), common law trusts, and separate cells of a protected series LLC would not fit the definition as it is outlined in the current Rules.

Furthermore, the CTA includes 23 specific exceptions for certain types of entities that would otherwise be reporting companies.[17] The most relevant exception to private companies is the "large operating company," which is an entity with at least 20 full-time employees, at least $5million in US-sourced revenue in the previous year, and a physical office in the US.[18] In general, other exceptions include publicly-traded companies, banks, investment advisers, investment companies that register with other federal agencies, and charitable trusts. Law firms are not exempted though some may qualify as "large operating companies."

Please refer to the chart below for a condensed analysis of common entity types and whether they qualify as reporting companies.

"Beneficial Owner": A beneficial owner is an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, either: (a) exercises substantial control over the entity, or (b) owns or controls not less than 25 percent of the ownership interests

---

[13] See the roll call votes for the House of Representatives here, and for the Senate here.
[14] For one example (not an endorsement), here is a link one "quiz" to determine CTA requirements.
[15] 31 United States Code Section 5336(a)(11)(A)(i)
[16] *See* 3rd Column of Page 40 (of the linked PDF) of the CTA Rules and Regulations.
[17] 31 United States Code Section 5336(a)(11)(B)
[18] 31 United States Code Section 5336(a)(11)(B)(xxi); 31 CFR 1010.380(c)(2)(xxi)

of the entity.[19] The definition goes on to name five exceptions, which notably include employees whose control is derived solely from their employee status. However, the Rules state that "senior officers" will always be considered beneficial owners. "Senior officers" include the CEO, CFO, COO, general counsel, and others with similar roles regardless of the title.[20]

If a beneficial owner of a reporting company is an exempt entity, the exempt entity only has to disclose its name.[21]

"Company Applicant": The Regulations defined the domestic "company applicant" as (a) the individual who directly files the document that creates the domestic reporting company, and (b) the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document.[22] The intention is for this to capture the attorney and any paralegal that may actually carry out the filing.

Deadlines and Penalties

For entities formed on or after January 1, 2024, the deadline to file the initial BOI report is 30 days from the formation (assuming FinCEN's new database is open).[23] For entities formed before January 1, 2024, the deadline to file the initial report will be January 1, 2025.[24]

If any of the reported information changes, the reporting company must file an updated report within 30 calendar days of when the change occurred.[25] The events most likely to trigger the obligation to file an updated report are the change in address of a reporting company or beneficial owner. Regarding the photo identification document (driver's license or passport), a person's BOI is deemed to have "changed" when information on the document has changed (i.e. change of legal name or address).[26] The expiration of a driver's license or passport itself does not qualify as a change that requires an updated report. However, when an updated report is filed, the photo identification documents uploaded must be unexpired.

Importantly, a company applicant is not required to update FinCEN when its information changes.

The possible penalties for willfully providing false beneficial ownership information or willfully failing to provide required information are (i) civil penalties up to $10,000 (accumulating at $500 per day that the violation continues), and/or (ii) up to 2 years of imprisonment.[27] These penalties apply to any "person" who violates the law, which may include the reporting company, the beneficial owner, or the company applicant.[28]

[19] 31 United States Code Section 5336(a)(3)(A)
[20] 31 CFR 1010.380(d)(1)(i)(A); 31 CFR 1010.380(f)(8)
[21] 31 CFR 1010.380(b)(2)(i)
[22] 31 CFR 1010.380(e)
[23] 31 CFR 1010.380(a)(1)(i)
[24] 31 CFR 1010.380(a)(1)(iii)
[25] 31 CFR 1010.380(a)(2)(i)
[26] 31 CFR 1010.380(a)(2)(v)
[27] 31 United States Code Section 5336(h)(3)(A)
[28] *See* 31 CFR §1010.380(g)(1)

The "BOSS"

The required beneficial owner information will be reported to a new database, called the Beneficial Ownership Secure System (not ironically also called the "BOSS"). As of the time of this writing, the BOSS has not been completed. There is no mention in the Rules or Regulations that filing deadlines will be extended if the BOSS is not ready by January 30, 2024 (the earliest possible filing deadline).

The CTA intends for essentially all filings to be done electronically. The Rules stated that there may be a process for paper filing when "certain circumstances" make a reporting company unable to file through the online interface.[29] The tone of the Rules is that the Treasury expects online filing.

Security of Sensitive Information: Use and Access to the BOSS

When discussing the CTA with clients, emphasize that the Treasury has no intention of making their personal information available to private third parties. There is no process provided in the CTA whereby a private third party could gain access to information from the BOSS through any civil legal process. The one exception to this is that banks may access BOSS information after receiving the consent of the reporting company.

The intent of the CTA is that beneficial ownership information will only be used to help government authorities to monitor for and investigate possible criminal activity. Access to the BOSS database is limited to (i) the Treasury (including the IRS), (ii) other federal agencies when it will be used in furtherance of a national security, intelligence or law enforcement activity, (iii) state and local law enforcement agencies only after a court of competent jurisdiction authorizes the agency to seek access to BOSS as part of a criminal or civil investigation, (iv) financial institutions only if the reporting company consents, and (v) foreign government authorities subject to vetted requests.[30] The CTA's clear intent is for BOI to be maintained and accessed for law enforcement purposes only.

The CTA explicitly requires that the Treasury stores beneficial owner information 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."[31] Furthermore, the CTA requires the Treasury to regularly audit the database to ensure that government authorities accessing beneficial owner information do so only for authorized purposes consistent with the CTA.[32]

Clients and attorneys may reasonably worry about how secure the BOSS database will be, and how faithfully FinCEN will limit the use of the information to its narrow scope. For what it is worth, the CTA places a higher penalty on the improper disclosure of BOI than it does on a person's failure to comply with the CTA. Someone who improperly discloses BOI is liable for $500 for

[29] *See* 3rd Column of Page 11 (of the linked PDF) of the CTA Rules and Regulations.
[30] 31 U.S.C. 5336(c)(2)(B)(i)(I)
[31] Corporate Transparency Act, Section 6402(7)(A)
[32] Corporate Transparency Act, Section 6402(7)(B)

each day the violation continues or is not remedied, up to $250,000, and/or up to 5 years in prison.[33] If the improper disclosure is part of a pattern of illegal activity, the penalties may be total fines up to $500,000 and/or 10 years in prison.[34]

Document Drafting

In a post-CTA environment, a drafting attorney should discuss with clients how they want to address CTA requirements in the operating agreement. Some clients and business partners will inevitably delay or resist sending their personal information. For new entities it is best to collect the BOI as part of the organization process. The operating agreement should also require beneficial owners to provide a copy of their driver's license or passport upon request, and to update the entity if their address, legal name, or their photo identification document changes.

The operating agreement may include penalties on a beneficial owner for failure or refusal to provide required information. How harshly do the clients want to penalize the owners for resisting document requests? For example, the operating agreement could say that, if a member or partner fails or refuses to provide information and a government agency subjects the entity to legal processes or fines, the refusing member must reimburse the entity for all costs. The entity may withhold such amounts from distributions to the refusing member. Whatever the approach, the operating agreement should define a beneficial owner's failure to disclose information as a default and include a process to remedy the default.

The operating agreement may also include an agreed definition of "substantial control." A definition may be helpful when a person owns less than 25% of the entity and also does not exercise substantial control as the CTA contemplates. This would be a way to spare passive minority owners from the burden of CTA disclosures.

Notifying Existing Entities; Ethics and Engagement Letters

Since 2021 the Treasury has been coordinating with secretaries of state and private organizations of small businesses in order to publicize the CTA's requirements. Still many business owners and attorneys are only learning about the CTA now. We expect that public outreach about the CTA will continue and increase after January 1, 2024. In particular, secretaries of state should begin circulating informational notices, printed FinCEN forms and internet links to educate business owners about CTA compliance.

Attorneys may still need to deliver the unwelcome news about the CTA. For entities that we may have worked with before January 1, 2024, the CTA raises the ethical issue of the obligation to inform clients about changes in laws. Imagine for a second how large a malpractice claim could be if a former client gets fined for not complying with the CTA, and the client argues that you failed to tell them about the new requirements. Does an attorney have an affirmative duty to notify a former client of the new CTA obligations?

---

[33] 31 United States Code Section 5336(h)(3)(B)

[34] 31 United States Code Section 5336(h)(3)(B)(ii)(II)

I discussed this question with the Texas Ethics Hotline and reviewed opinions from other state bar associations.[35] The consensus is that an attorney does not have an ethical obligation to inform *former* clients of changes in laws. A narrow reading of the Texas Disciplinary Rules of Professional Conduct ("TDRPC") supports this conclusion. The TDRCP limits the attorney's duties to former clients to confidentiality and avoidance of conflicts of interest.[36] The disciplinary rules make no comment about informing former clients of changes in laws or circumstances that might affect a former client. In practical terms, laws change constantly at all levels of government, and it would be impossible to know every time that a change happens that substantially impacts a particular former client.

The analysis is different in the case of a client that *may not be a former client*. The best way to avoid ambiguity of a client's current/former status is to use letters to terminate engagement. This is more of a best practice than a common practice. The CTA presents a good opportunity to start using termination of engagement letters. The appendix to this article includes a sample termination of representation letter.

Even with a termination of engagement letter, whether an engagement is terminated depends on a variety of factors.[37] One important factor could be the scope of work in the engagement letter. Now more than ever, it is best to state the scope of engagement narrowly. In addition to being prudent, a narrow scope of engagement makes practical sense for an attorney that is hired for a specific transaction.

Beware of including catch-all language in the scope of work such as "and other general counsel matters." The CTA and its expensive penalties make it is risky to suggest there is an ongoing representation after a specific transaction is complete. An engagement letter may still leave room to expand the scope of engagement (for example, something to the effect of "the scope of work may be expanded as necessary to complete the [specific task]"). State explicitly that there is no obligation to inform the client of changes in laws, and no ongoing representation after the transaction is complete.

Finally, if an attorney cannot comfortably say that a client is a former client, it is a good idea to email them informational fliers from the Treasury and/or contact information for a free help desk at the Treasury. At the time of this writing, this the most consumer-friendly resource the Treasury has published: https://www.fincen.gov/boi-faqs.[38] The Rules mentioned that FinCEN's Regulatory Helpline will answer calls from the public about compliance.[39] The number currently listed for the Regulatory Helpline is 800-949-2732. Bear in mind that FinCEN is still in the process of increasing and training staff for the barrage of calls that are coming. We hope that more consumer-

---

[35] *See* Maryland State Bar Association discussion analyzing the CTA specifically: https://www.msba.org/ethics-opinions/ethics-docket-no-2023-03.

[36] *See* Texas Disciplinary Rules of Professional Conduct, Rules 1.05, 1.08 and 1.09

[37] *See* Maryland State Bar Association discussion analyzing the CTA specifically: https://www.msba.org/ethics-opinions/ethics-docket-no-2023-03.

[38] See also the FinCEN's official 56-page "Small Entity Compliance Guide."

[39] https://www.fincen.gov/regulatory-help

friendly resources will be published soon, and that there will be a well-staffed phone line for CTA questions.

Storing Sensitive Information: If an attorney collects sensitive personal information for the purpose of filing and updating clients' information in the BOSS, it is a good idea to state in the engagement letter how that information will be stored and secured. For example, state in the letter that physical copies of personal information will not be kept, will only be stored electronically, and will be deemed to be stored properly if the attorney uses an industry-leading cloud storage vendor.

If you are considering a third-party professional company to manage your clients' CTA compliance, one benefit of a third-party service is that you do not have to worry about keeping clients' personal documents stored in your office or computer.

CHART OF ENTITIES AND WHETHER CTA APPLIES*

Entity/Business Type	CTA Compliance Required?	Reasoning	Notes
Limited Liability Company	Yes	Created by mandatory filing with SOS.	
LLC – Large Operating Company	No	Specifically exempt.	Must have at least 20 FT Employees, $5million in revenue in previous year, and physical office in US.
Series LLC – Registered Series – Master LLC	Yes	Created by mandatory filing with SOS.	
Series LLC – Registered Series – Cell Series	Yes	Created by mandatory filing with SOS.	
Series LLC – Protected Series – Master LLC	Yes	Created by mandatory filing with SOS.	
Series LLC – Protected Series – Cell Series	No	Not created by filing with SOS.	
C-Corporation – Not Publicly Traded	Yes	Created by mandatory filing with SOS.	
C-Corporation – Publicly Traded	No	Specifically exempt.	
Assumed Name	No	Not a legal entity.	
Sole Proprietor	No	Not a legal entity.	
General Partnership	No	Not created by filing with SOS.	
Limited Liability Partnership (general partnership with voluntary filing to limit liability of general partners)	No	Not created by filing with SOS.	Registration form and annual reports are voluntary.
Limited Partnership	Yes	Created by mandatory filing with SOS.	
Professional Corporation or PLLC (for Attorneys)	Yes	Created by mandatory filing with SOS. Not exempted.	
Common Law Trust	No	Not created by filing with SOS.	

*The determination of whether the CTA applies to each entity is my interpretation of FinCEN's Rules and Regulations as they are written at the time of this article. Be aware that FinCEN may update its regulations at any time. Banks and title companies may also have internal policies to require CTA compliance, even if that is not in line with the Rules and Regulations. The best resource to see the most updated guidance is FinCEN's official CTA reference materials.

QUICK REFERENCE – COMPLIANCE DEADLINES:

Formation Pre – 1/1/24: Initial report of beneficial owner information due by 1/1/2025. Company applicant (i.e. attorney's information) not required.

Formation Post – 1/1/24: Initial report of beneficial owner information due 30 days from SOS registration. Company applicant (i.e. attorney's information) must be filed.

Updated Report: For entities that have filed initial report, updated beneficial owner information report is due 30 days from when any single piece of required information changed. Most likely information to be updated is a change in address. No update is required if company applicant's information changes.

Loss of Exemption: A previously exempt entity must file an initial report within 30 days of losing the exemption.