

Post-Injunction Beneficial Ownership Information Reports Developments - What Next?

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Today's Issues

- **Proposed delay in the due date for some pre-existing companies – but then it disappeared**
- The four US District courts rulings on injunctions to bar enforcement of the CTA
- Impact of the most recent ruling that resulted in a nationwide injunction against enforcement of the CTA
- Likely next steps in the legal battle - when we get a final answer?
- Assuming we do eventually file, other items that impact the CTA filings

Congress – Last Minute Action to Push Some Reports Back a Year (Now Failed?)

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Continuing Resolution Proposed Delay in Deadline for Pre-Existing Reporting Companies

- Further Continuing Appropriations and Disaster Relief Supplemental Appropriations Act, 2025, Title V – Comprehensive Outbound Investment National Security Act of 2024, Section 122, December 17, 2024
 - The resolution addresses the deadline for certain pre-existing reporting companies to file beneficial ownership information reports.
 - Specifically, for companies that existed **before January 1, 2024**, the deadline for filing these reports is **January 1, 2026**.
 - This is an extension of the previous deadline, which required filing "not later than 2 years after the effective date of the regulations prescribed under this subsection".
 - As this was written, the Continuing Resolution has not yet been formally enacted into law



Continuing Resolution Proposed Delay in Deadline for Pre-Existing Reporting Companies

- Further Continuing Appropriations and Disaster Relief Supplemental Appropriations Act, 2025, Title V – Comprehensive Outbound Investment National Security Act of 2024, Section 122, December 17, 2024
 - The final rule as written would still apply to
 - Companies formed in 2024 (must file initial reports within 90 days after formation) and
 - Companies formed in 2025 and later (must file initial reports within 30 days after formation)
 - Also does not directly impact the court actions we'll discuss next except it would remove the concerns for most filers about needing to file on very short notice if the injunction is lifted
 - This extension would give the courts all of 2025 to resolve the Constitutionality issues (at least for pre-existing companies)

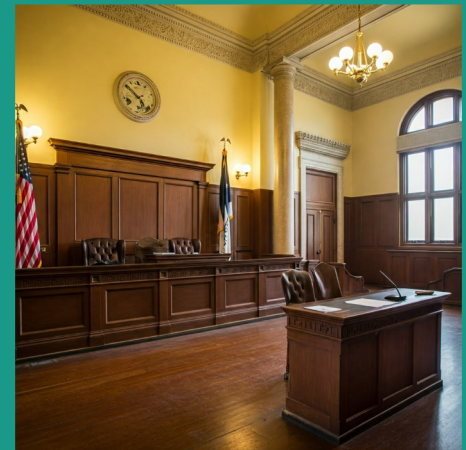


Continuing Resolution Proposed Delay in Deadline for Pre-Existing Reporting Companies

- Further Continuing Appropriations and Disaster Relief Supplemental Appropriations Act, 2025, Title V – Comprehensive Outbound Investment National Security Act of 2024, Section 122, December 17, 2024
 - After opposition to the bill was announced by President-Elect Trump and DOGE leader Elon Musk, a new spending proposal was floated with the support of the President-Elect and without the CTA extension
 - However, that bill failed to obtain a majority (it needed a 2/3rds majority to move forward under special rules needed to get it passed on Thursday evening) with 38 Republicans voting against it in addition to most Democrats
 - At this point (Thursday evening) it's not clear if any bill can be passed by January 1, thus arguably making the CTA extension potentially moot even if somehow it went back into the bill

The Courts - A Lot of Disagreement, but One Nationwide Injunction

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Chaos from the Courts

- Four decisions have come down from U.S. District Courts in cases challenging the CTA and seeking to block enforcement
 - Two have ruled that the CTA is unconstitutional
 - *National Small Business United v. Yellen*, USDC ND AL
 - *Texas Top Cop Shop Inc. v. Garland*, USDC ED TX (new case, decision released December 3)
 - Two have held any challenge unlikely to succeed, denied relief
 - *Firestone v. Yellen*, USDC OR
 - *Community Associations Institute v. Yellen*, USDC ED VA



Chaos from the Courts

- One big change in *Texas Top Cop Shop* is that the Court there issued a national injunction barring enforcement
 - An appeal of the case has been filed by the Department of Justice
 - But it does introduce a new level of chaos shortly before the initial filing deadline for most filers.
- As well, the Eleventh Circuit heard oral arguments on the appeal of *National Federation of Small Businesses* in September and did not seem likely to sustain the Alabama ruling (which was not a nationwide bar on enforcement)



FinCEN Files Notice of Appeal on *Texas Top Cop Shop Inc.*

- Notice of Appeal, CA5, *Texas Top Cop Shop Inc. v. Garland*; No. 4:24-cv-00478, December 5, 2024
 - As expected, the Department of Justice has filed an appeal of the grant of the injunction
 - This is the first step and contains only the information that the defendant is filing this appeal



Department of Justice Asks Texas District Court to Stay Preliminary Injunction Pending Appeal (Denied)

- Defendants' Motion to Stay Preliminary Injunction Pending Appeal, *Texas Top Cop Shop Inc. v. Garland*; No. 4:24-cv-00478, 12/11/24
 - Formal request made to the District Court to stay its injunction pending the outcome of the Appeal being made to the Fifth Circuit
 - Fundamentally states the judge made the wrong decision - seems unlikely that will prove persuasive to the judge who made the decision, but is really aimed at a higher court
 - But also raised issues regarding the national nature of this injunction - that is, it should be limited to the parties in the case only
 - Seems likely is meant to set up an emergency appeal to the Fifth Circuit (and perhaps SCOTUS) assuming this motion is denied
 - **On December 17, 2024, the US District Court denied this request**



Department of Justice Requests Emergency Stay of Injunction from Fifth Circuit

- Defendants-Appellants' Emergency Motion for Stay Pending Appeal, *Texas Top Cop Shop, Inc v. Garland*, CA5, No. 24-40792, 12/13/24
 - Request emergency stay of the injunction
 - Notes the rapidly approaching January 1, 2025, deadline for filing (CR passing would eliminate this concern)
 - Likely will ask Supreme Court to step in if the Fifth Circuit denies relief
 - Both argues the logic granting an injunction in general is flawed and that, in any event, a nationwide injunction would be improper at this point
 - **Fifth Circuit ordered the parties to meet an accelerated schedule for their filings, with the final documents due last night**
 - **Seems most likely to be what you need to pay attention to at this point**



FinCEN Alert on Injunction and Appeal

- “Alert: Impact of Ongoing Litigation – Deadline Stay – Voluntary Submission Only,” FinCEN BOI website, December 6, 2024
 - More details were provided by FinCEN regarding the impact of this injunction and options for those who have not yet filed their initial reports
 - FinCEN will comply with the order for “as long as it stays in effect”
 - Those who have not yet filed can still elect to voluntarily file the form



FinCEN Alert on Injunction and Appeal

On Tuesday, December 3, 2024, in the case of *Texas Top Cop Shop, Inc., et al. v. Garland, et al.*, No. 4:24-cv-00478 (E.D. Tex.), a federal district court in the Eastern District of Texas, Sherman Division, issued an order granting a nationwide preliminary injunction that: (1) enjoins the CTA, including enforcement of that statute and regulations implementing its beneficial ownership information reporting requirements, and, specifically, (2) stays all deadlines to comply with the CTA's reporting requirements. The Department of Justice, on behalf of the Department of the Treasury, filed a Notice of Appeal on December 5, 2024.

Texas Top Cop Shop is only one of several cases in which plaintiffs have challenged the CTA that are pending before courts around the country. Several district courts have denied requests to enjoin the CTA, ruling in favor of the Department of the Treasury. The government continues to believe—consistent with the conclusions of the U.S. District Courts for the Eastern District of Virginia and the District of Oregon—that the CTA is constitutional.

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FinCEN Alert on Injunction and Appeal

While this litigation is ongoing, FinCEN will comply with the order issued by the U.S. District Court for the Eastern District of Texas **for as long as it remains in effect**. Therefore, reporting companies are not currently required to file their beneficial ownership information with FinCEN and will not be subject to liability if they fail to do so **while the preliminary injunction remains in effect**. Nevertheless, reporting companies may continue to voluntarily submit beneficial ownership information reports.



Chaos from the Courts

- So now what?
 - Right now, we do not know what the final resolution will be, as well as when filings will be required, if ever
 - Options for an entity that was required to file before the injunction came down
 - File the report voluntarily
 - Advantage is that the filer will not have to be concerned about monitoring to insure the injunction stays in place or CR passes (a failure there would open the door to the daily penalties)
 - Disadvantages
 - Will need to assemble the information to file the report
 - May incur costs for assistance in filing the report from attorneys or accountants
 - Will disclose data to FinCEN



Chaos from the Courts

- So now what?
 - Don't file but assemble information to file
 - Advantages
 - Are ready to file on a moment's notice should the injunction be overturned
 - Don't disclose data to FinCEN
 - Could avoid incurring assistance fees (though that may make it difficult to file quickly if the injunction is overturned)
 - Must monitor the case and others so the entity will know if they must file again **(CR passing would reduce this concern)**
 - A failure could be very costly (at least in theory)
 - Will result in some distractions from just running the business
 - Will still need to insure data is kept updated



Chaos from the Courts

- So now what?
 - Stop all work, including collecting data
 - Advantages
 - No costs incurred for assembling data, getting advice on filing, etc.
 - No data submitted to FinCEN
 - Disadvantages
 - Must carefully monitor the status of the injunction (**less of an issue if CR passes**)
 - We do not know how much time will be given to file if the injunction is lifted (**again, CR would eliminate this concern for most**)
 - May be difficult to get assistance from attorneys or accountants due to large number of companies suddenly needing to file (**more of an issue if the courts drag this into late 2025 if CR passes**)



Chaos from the Courts

- So now what?
 - Advising the client on which step to take may get way too close to the unauthorized practice of law
 - CPAs aren't trained on court procedure and rules
 - These decisions go beyond merely providing assistance in filing the forms in simple cases
 - If the client has independently made the decision then it appears likely the CPA can assist with the filing itself
 - Likely want to keep clients up to date on the status of this case in general terms
 - However, take care to ensure that you have a process to make sure each client will get all notices you send out
 - Liability might attach if a client claims you only told them they didn't need to file, but failed to later tell them about a reversal
 - Resist the urge to make political commentary on the matter (your clients likely will not all hold the same views about this item and it's way too easy to drift into appearing to guarantee what the ultimate result will be in such political conversations)



Chaos from the Courts

- So now what?
 - We expect the Supreme Court will eventually need to make the final decision on whether or not the law is Constitutional unless Congress were to repeal it
 - In that case, only the opinions of the nine members of the Court on this topic will ultimately matter
 - The Court may wait for a conflict among Circuit Court of Appeals decisions to act, which would be a worst case scenario (uncertainty would continue for a potentially long period of time)
 - Congressional action to repeal the requirements could serve to moot the issue
 - It's not clear right now that taking that action would be a priority for the new Congress or even that it could gain sufficient support – **and if the Continuing Resolution is enacted there is likely to be less interest in enacting a change**
 - Chances get better if the Speaker of the House or incoming Senate majority leader show clear support for repeal

Other BOI Issues - What if Eventually We Are Required to File?



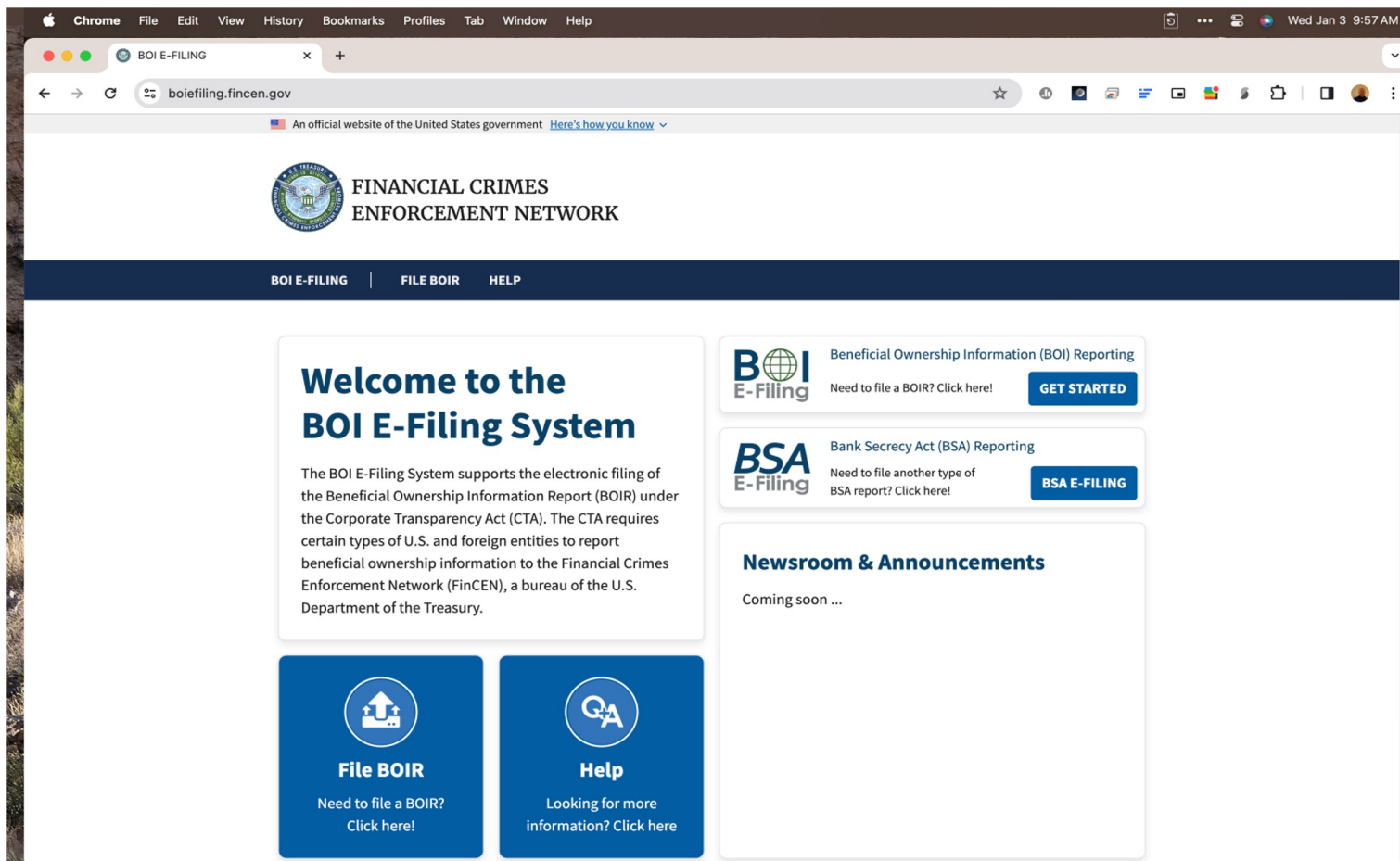
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Where to File



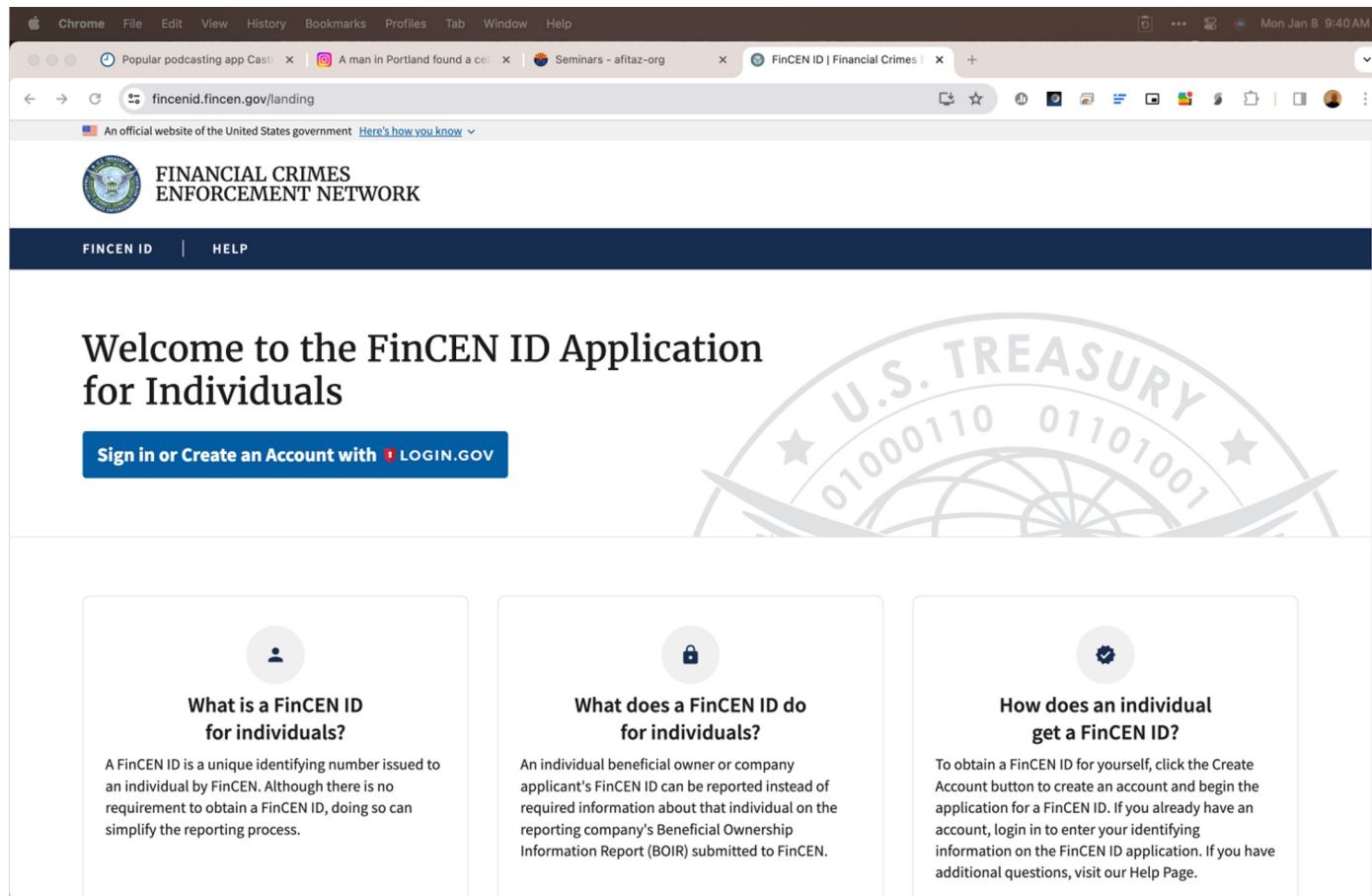
Main BOI Page - <https://www.fincen.gov/boi>

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Efiling System - <https://boiefiling.fincen.gov>

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Individual FinCEN ID Application - <https://fincenid.fincen.gov/landing>

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Filing Requirements



Filing Requirements

- Reporting companies are required to file these reports 31 USC §5336(b)(1)
- What entity types are covered?
 - LLCs
 - Corporations
 - Other entities required to register with a state, tribe, etc. or created by filing a document with the same governments
 - However, may be exempt from filing (one of 23 exemptions)



When Initial Reports Must Be Filed (Paused)

- When initial reports are required to be filed
 - A reporting company created or registered to do business before January 1, 2024 - **January 1, 2025**
 - A reporting company created or registered on or after January 1, 2024 and before the end of 2024 - **90-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
 - Entities created on or after January 1, 2025 will only have **30 days** to file their initial registration
- Previously exempt entity becomes no longer exempt - file a report within **30 calendar days** after the date that it no longer meets the criteria for any exemption



Corrected Reports

- When an error is made in an initial or updated report, a corrected report is required
 - If any report under this section was inaccurate when filed and remains inaccurate, the reporting company shall file a corrected report within 30 calendar days after the date on which such reporting company becomes aware or has reason to know of the inaccuracy.
 - A corrected report filed within this 30-day period shall be deemed to satisfy the rules for a proper first report if filed within 90 calendar days after the date on which the inaccurate report was filed.
 - Note these are two different provisions - being outside either time limit can lead to penalties



General Rules for Updated Reports

- If there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner, the reporting company shall file an updated report in the form and manner specified within **30 calendar days** after the date on which such change occurs.



Information About Who?

- Beneficial Owners
 - Equity interest of more than 25% (directly or indirectly)
 - Significant control (includes all senior officers and others with similar levels of control)
- Company Applicants
 - Only for entities formed 1/1/24 or later
 - Do not update information on company applicants
 - Supervisor and person who filed the documents (often attorney and paralegal)



Information to Be Reported

- Street addresses required for all parties and the entities (residential address for individuals other than company applicants)
- ID number from drivers' license, passport or state ID card
- Image of ID document
- Can obtain (and keep updated) a FinCEN ID and use that in lieu of providing this detailed information to the entity for the filing

Areas of Confusion



Legal Entities, Not Tax Entities Are What Count

- For purposes of the BOI reports there is no such thing as a disregarded entity
 - Single member LLCs have to file even if it is ignored for tax filing purposes
 - The disregarded entity rule only applies to tax matters under the IRC, not for any other purposes
 - Be sure clients have taken inventory of all the LLCs they have
- True sole proprietorships and true general partnerships do not file this report as they do not register with the state
- Similarly, it would appear in most cases that a trade name, even if registered with the state, would not trigger a filing as it creates no entities, just rights for the entity that registered it
- Trusts are also generally not a reporting entity, as they are not created by filing with a state (there are limited exceptions, mainly for some investment vehicles)



Accounting Firms Are Not Automatically Exempt

- This myth became popular because of how FinCEN “simplified” the titles in their FAQ and Small Business Guide
- While those titles refer to “Accounting Firms” as an exemption, the law and even the Small Business Guide and FAQ text make clear this only applies to public accounting firms that register under Sarbanes Oxley, which the vast majority of accounting firms don’t
- On the other hand, a CPA firm that is a pure sole proprietorship (not an LLC, PLLC, PLC, etc.) or pure general partnership would not be an entity - registering with the state board again does not create an entity, just right



Large Operating Entity Issues

- The two tests are inconsistent in the area of combining related entities
 - As a consolidated return is used for the \$5,000,000 test, that means a parent and all subsidiaries will generally have their gross receipts combined for the test
 - However, for employees things aren't so nice
 - Have to consider each entity separately for this test
 - If the parent entity can't meet the 20 employee test on its own, then any wholly owned entity will need to file its own report unless that entity meets the employee test even though the group meets the \$5,000,000 gross receipts test
 - Also cannot count any leased employees, including those with a PEO



Inactive Entities

- This exception only applies to entities formed before 2020
- Must have no assets, no transfers of more than \$1,000 in the past year, no foreign owners, no ownership transfers in the past year
- Also entities must be fully dissolved. If an entity is merely administratively dissolved that doesn't count



Unauthorized Practice of Law Issue

- CPAs are protected from UPL state law complaints under 5 USC 500(c) when dealing solely with tax law matters (that is, Title 26 USC)
- Under an extreme view of the UPL definition, filling in any form for the government would be UPL (that includes annual corporate reports reports, financial aid applications, etc.)
- Reality is that courts haven't been willing to go to the extreme but 31 USC §5663 is new ground
- Insurance carriers are hedging their bets on the issue (not unexpectedly)



Unauthorized Practice of Law Issue

- The New Jersey Supreme Court committee on the unauthorized practice of law has issued specific guidance for that state
 - Panel found that:
 - Preparing and advising on BOI is the practice of law but that is not determinative
 - Have to consider the public interest
 - Would cost less to have access to non-attorneys
 - So question is would the risk to the public be too high
 - Concludes that
 - In complex matters, an attorney would be necessary to avoid harm
 - However, in less complex cases (which the guidance notes are most cases), the special training of an attorney is not needed



Unauthorized Practice of Law Issue

- Panel concludes that CPAs and EAs, based on their professional training, can handle preparing and filing these simpler filings
 - Should advise clients that they might want to check with legal counsel
 - Should direct clients who have complex cases to get legal counsel (don't do the work)
- While the New Jersey letter doesn't bind other states, most have been silent as it is on for most UPL matters
- Carriers are now providing engagement letters and have indicated will generally cover preparing the forms unless a state has ruled such work is UPL (none have at this point)



Unauthorized Practice of Law Issue

- Even if a firm is not preparing the forms, likely should be advising clients of the need to get these filed as carriers have expressed a concern that clients may file claims based on their expectation their CPA should have told them about these issues
- Also take care referring out to various services - the big problem isn't filing the form (a lot of clients can handle that) but rather being sure they file changed reports as necessary
- Also, a large number of attorneys are refusing to prepare the form
- As well, FinCEN in its FAQ suggests that entities who are unable to complete the form seek assistance from CPAs and attorneys

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