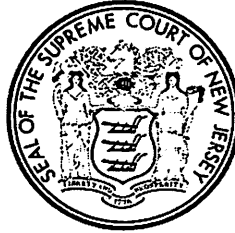


COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW
Appointed by the Supreme Court of New Jersey

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Re: UPLC Docket No. 02-2024

Dear President Aprea:

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CAROL J. KOBAK
STUART J. LIEBERMAN
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The Supreme Court Committee on the Unauthorized Practice of Law considered your inquiry. On behalf of the New Jersey Society of Enrolled Agents, you asked whether your members are permitted to file “beneficial owner information” reports (BOI Reports) under the Corporate Transparency Act.¹

CAROL JOHNSTON
SECRETARY/COUNSEL

(609) 815-2900 ext. 54965
Fax (609) 815-2913

Richard J. Hughes
Justice Complex
P.O. Box 970
Trenton, NJ 08625-0970

Pursuant to this Act, starting on January 1, 2024, companies must report to the Financial Crimes Enforcement Network (FinCEN), in the U.S. Department of the Treasury, identifying information about the “beneficial owners” of a corporate entity (people who directly or indirectly own or control the entity).² The information will assist law enforcement efforts to combat money laundering, terrorism financing, and other criminal activity. Companies registered to do business prior to January 1, 2024 are required to file their reports by January 1, 2025. Companies that

¹ The Act was part of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Act Jan. 1, 2021, P.L. 116-283, Div F, Title LXIV, §§ 6401-6403, codified at 31 U.S.C. Section 5336.

² The Act was found unconstitutional and stayed as to the parties on March 1, 2024 by an Alabama District Court Judge. National Small Business United v. Yellen, Docket No. 5:22-cv-01448 (N.D. Ala.) The Justice Department filed an appeal to the Eleventh Circuit, which is currently pending.

register to do business after January 1, 2024 have 90 days to file their reports. There are civil and criminal penalties for noncompliance. You asked whether it is the unauthorized practice of law for your members to provide guidance about compliance and/or file these reports for their clients.

For purposes of the Act, a beneficial owner of a corporate entity is a person who either directly or indirectly exercises substantial control over the reporting entity, or owns or controls at least 25% of the reporting entity's ownership interests. Ascertaining who is a "beneficial owner" can be straightforward or it can be complex, depending on the facts. The Act exempts larger companies and many other types of companies; determining whether an exemption applies also can be straightforward or complex, depending on the facts.

The Frequently Asked Questions section of the website for FinCEN ([Beneficial Ownership Information Reporting | FinCEN.gov](#)) (www.fincen.gov/boi-faqs) states:

B. 7. Is a reporting company required to use an attorney or a certified public accountant (CPA) to submit beneficial ownership information to FinCEN?

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.

[FinCEN FAQ, issued November 16, 2023.]

The U.S. Chamber of Commerce, in its guidance to businesses, states that while business owners may be able to file the forms on their own, it may be difficult to determine who is a beneficial owner within the meaning of the Act. It recommends that business owners consult with a lawyer if the matter is more complex but if it is more straightforward, the business owner can use an accountant or tax preparer. The Chamber of Commerce article further notes that some accountant and tax preparer firms do not have errors and omissions policies that would cover filings under the Act and such firms are not offering the service. See [Corporate Transparency Act — What You Need to Know | CO-](#) by US Chamber of Commerce (www.uschamber.com/co/start/strategy/small-business-corporate-transparency-act), published December 19, 2023.

To respond to this inquiry, the Committee first determines whether providing guidance to clients and/or filing the reports on behalf of clients is, in fact, the practice of law. If the Committee decides that it is the practice of law, it must then determine whether it is in the public interest to permit nonlawyers to engage in the activity or

whether the public needs to be protected from the activity. In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323, 327 (1995).

The New Jersey Supreme Court has adopted a functional definition of the practice of law. “The practice of law in New Jersey is not limited to litigation. . . . One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required.” In re Jackman, 165 N.J. 580, 586 (2000). The Committee finds that filing beneficial owner information reports is the practice of law, as it entails applying the terms of a dense statute to a set of potentially complicated facts.

The Committee now turns to whether the public needs protection from nonlawyers who may offer these services to businesses. While the Court has the power to prohibit a nonlawyer from engaging in conduct that is the practice of law, it exercises this power only when doing so is in the public interest. In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323, 340 (1995). “The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.” Id. at 327. Incidental use of legal knowledge in the course of providing a nonlegal service does not transform the service into the practice of law. Cf. Auerbach v. Wood, 142 N.J. Eq. 484, 485-86 (E. & A. 1948) (nonlawyer industrial relations and personnel management specialist not engaging in unauthorized practice of law when advising company on policy issues).

In In re Application of New Jersey Society of CPAs, 102 N.J. 231, 241-42 (1986), the Court held that preparation and filing of a New Jersey Inheritance Tax Return is the practice of law but a licensed certified public accountant may engage in this activity if the client has been notified that review of the return by a lawyer would be advisable.³ Id. at 241-42. The Court stated that this requirement of notification was “essential for the protection of members of the public who might otherwise be willing to rely entirely on the skill of the accountant to protect their interest.” Id. at 242. The Court also stated that “in cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public’s realistic need for protection and regulation.” Id. at 237. See also New Jersey State Bar Ass’n v. New Jersey Ass’n of Realtor Bds., 93 N.J. 470, 475-76 (1983) (licensed real estate brokers and salespersons may craft contracts for the sale of residential real estate, a task that is the practice of law, provided certain conditions, including an attorney-review clause in the contract, are met).

The Committee previously considered whether it is in the public interest to permit nonlawyers such as accountants to draft corporate documents or whether the public needs to be protected. UPL Opinion 47 (2011). “Relevant factors include the likelihood of any

³ In Opinion 51 (2014), the Committee decided that enrolled agents also may file New Jersey Inheritance Tax returns.

demonstrable harm to the members of the public who employ the services of the alleged unauthorized practitioners, the cost savings accruing to those members of the public, the voluntary nature of the decision to accept legal services from a person other than a lawyer, and the extent of the service recipient's knowledge of the risks involved in proceeding without a lawyer." Michels, New Jersey Attorney Ethics, Section 39:4, p. 1006 (Gann 2023). The Committee also considered whether the public can be protected by something less than a complete prohibition on nonlawyers undertaking these tasks. It decided that "accountants who are licensed (i.e., certified public accountants)⁴ may advise clients as to the appropriate contents of certificates [of incorporation] provided the licensed accountants inform their clients that assistance of counsel in the drafting of such documents is advisable."

With regard to beneficial owner information reports under the Corporate Transparency Act, 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 filings will be straightforward. For example, all matters where there is a single owner of a limited liability company 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.

Corporate entities that have straightforward filings would have a cost savings if they do not need to hire a lawyer to file the report. The remaining factors to consider – whether corporate entities are aware of the risks of using a nonlawyer for the services and voluntarily forego a lawyer for this task – are not known since the Act is so new.

Given that most filings are likely to be straightforward, the Committee finds that a licensed Enrolled Agent can engage in this conduct provided the Enrolled Agent notifies the client that it may be advisable to consult with a lawyer. The Committee relies on the professionalism of Enrolled Agents to ensure that such licensees will recognize when a filing is more complex and it is in the client's interests for a lawyer to be retained in the matter.

While small businesses are now faced with retaining a lawyer or an Enrolled Agent (or certified public accountant) 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.

⁴ Accountants are licensed as certified public accountants by the New Jersey State Board of Accountancy, N.J.S.A. 45:2B-42 et seq.

Since the Act is new and circumstances may change, the Committee reserves the right to amend or supplement this response in the future. The consideration of the public interest may be affected by the pending Eleventh Circuit case from Alabama and other court actions that may be filed, in New Jersey or elsewhere, regarding compliance with this new Act. Should those developments – or other information that may arise – affect the Committee’s analysis, it may reconsider this response.

Thank you for making this inquiry of the Committee.

Very truly yours,

COMMITTEE ON THE
UNAUTHORIZED PRACTICE OF LAW



Carol Johnston
Committee Secretary/Counsel
For the Committee

c: Nancy Giacumbo, Chair (via email)
Committee Members (via email)