

Part 7: Addressing and Demystifying Common Denials Surrounding the Upcoming CTA

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CTA Denial #7: “CTA responsibilities do not implicate fiduciary duties.”

Persons with “substantial control” over a reporting company under the CTA not only will be required to disclose their own PII as “beneficial owners” of the reporting company but will also, in many instances, owe fiduciary duties to the reporting company as well as to the (other) owners of the reporting company to properly comply with the CTA. Any decision by a reporting company’s management not to report under the CTA, or to partially report or to inaccurately report, will directly implicate actionable duties owed to the reporting company, its owners, and possibly third parties. Further, such actions may constitute “for cause” termination events with respect to such “substantial control” person, as the act or omission may constitute gross negligence, willful misconduct, fraud, material misrepresentation, or an illegal act with respect to the reporting company. A “substantial control” person’s evasion of the law could also implicate denial or cancellation of the reporting company’s directors and officers (D&O) insurance coverage for the event in question and expose the individual to uncovered personal liability for the action in question. Further, grievous failure to comply with the CTA could result in imposition of a criminal sentence of up to two years in federal prison for the offending individual.

Under most states’ business statutes, the concept of fiduciary duties is prevalent and applies to the behavior of officers, managers, directors, and other governing and management parties to the business entity itself and, in some instances, to the owners of the business entity directly. Principal among the fiduciary duties is the “duty of care.” The duty of care requires that a person act with the prudence that a reasonable person in similar circumstances would use. If a person’s actions do not meet this standard of care, then the acts are considered negligent and may result in actionable damages enforceable against the individual. However, a fiduciary may discharge the duty of care by exerting appropriate diligence and informed consideration with respect to the action in question. Further, in most instances, a fiduciary may discharge its duty of care on a subject by hiring a professional adviser that the fiduciary reasonably believes has the necessary experience and expertise to advise on the subject and by relying on such advice in making the business decision. Thus, “substantial control” persons may insulate themselves against duty-of-care claims by retaining legal counsel to evaluate and advise on the reporting business decisions in question. Further, to the extent that a waiver of fiduciary duties is permitted by the applicable state and included in the applicable business entity’s charter documents, such waiver

will not extend to the fiduciary duty of good faith, which could be implicated by a failure to file a CTA report.

Conclusion

The Corporate Transparency Act is a new beneficial owner reporting requirement in the United States. Beginning January 1, 2024, tens of millions of U.S. business entities, and their beneficial owners, will become subject to FinCEN's new requirements which were originally designed to catch "bad" actors choosing to hide behind the "corporate veil." Whether you like it, hate it, or are indifferent, the CTA is here to stay. Compliance is both mandatory and advisable. Now is the time to discuss this with your legal team for guidance.