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THE CORPORATE TRANSPARENCY ACT IS ON APPEAL! HOW THAT IMPACTS YOUR BUSINESS PLANS

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The Corporate Transparency Act (“CTA”)ⁱ, which went into effect January 1, 2024, represents a significant shift in the regulatory landscape for small businesses in the United States. It is aimed at increasing transparency in corporate ownership to combat illicit activities. More specifically, enacted as part of the National Defense Authorization Act for Fiscal Year 2021, the CTA mandates the reporting of beneficial ownership information to the Financial Crimes Enforcement Network (“FinCEN”), to make it more difficult for individuals to use complex corporate structures to facilitate illegal activities, evade taxes, or launder money.

As is common with new laws, the CTA is currently being challenged in the courts. This article is intended to summarize what the CTA is, why it is being challenged, its current legal status, and what you should do moving forward.

The CTA: A Primer

The CTA is a law that requires certain businesses and their owners to disclose information to FinCEN. The CTA applies to any entity that can be defined as a “reporting company”, which is any domestic or foreign entity that registers to do business in the United States by filing a document with the Secretary of State or similar office.ⁱⁱ Common types of reporting companies include limited liability companies, limited liability partnerships, and business trusts.

If a company can be defined as a reporting company, the “beneficial owner”ⁱⁱⁱ, on behalf of the reporting company, must timely^{iv} file a beneficial ownership information report (“BOI Report”) with FinCEN.^v The reporting company must also monitor its BOI Report to make sure it is up to date and accurate.^{vi} Noncompliance with the CTA’s reporting requirements may result in civil and criminal penalties.^{vii}

A more detailed breakdown of the CTA can be found [here](#).

Some Courts Begin to Take Issue with the CTA

On March 1, 2024, a ruling came down against the CTA.^{viii} This case, challenging the CTA's constitutionality and scope, was brought before the U.S. District Court for the Northern District of Alabama by the National Small Business Association and its member, Isaac Winkles.

In *National Small Business United, et al. v. Yellen, et al.*, the plaintiffs argued that the CTA's requirements for reporting beneficial ownership information exceeded Congress's constitutional powers and infringed on several constitutional amendments. Judge Liles C. Burke ruled in their favor, holding that the CTA overstepped Congress's powers under the Constitution's Commerce Clause and the Necessary and Proper Clause, and was not sufficiently related to tax enforcement to be justified under the taxing power.

Judge Burke's ruling resulted in an injunction preventing the enforcement of the CTA against the plaintiffs and a great deal of buzz in corporate and small business communities. However, an unfortunate side effect is the misunderstanding that compliance with the CTA was put on hold, when in fact all other entities, aside from the named plaintiffs, are still required to comply at this time. FinCEN actually issued a statement on March 4, 2024, clarifying this exact point, that the injunction was limited in nature and that other entities must continue to comply with the CTA's reporting requirements.^{ix}

On March 26, 2024 the Small Business Association of Michigan ("SBAM") also filed a lawsuit that challenges the constitutionality of the CTA.^x SBAM, representing over 32,000 small business owners, argued that the CTA violates the Fourth Amendment's protections against unreasonable searches and seizures. The lawsuit, filed in the U.S. District Court for the Western District of Michigan, contends that the law forces businesses to disclose sensitive personal information without any accusation of wrongdoing, effectively creating a massive database for law enforcement use without proper oversight. The plaintiffs again sought to invalidate the enforceability of the CTA.

On the same day it filed its lawsuit, the SBAM moved the court for a preliminary injunction to stop the government's right to force compliance with the CTA.^{xi} On April 26, 2024, Judge Robert J. Jonker denied the plaintiffs' motion for a preliminary injunction, ruling that the plaintiffs did not demonstrate a likelihood of success on the merits of their constitutional challenges to the CTA.^{xii} Judge Jonker acknowledged some privacy concerns raised by the plaintiffs but ultimately concluded that the plaintiffs' arguments were insufficient to justify blocking the enforcement of the CTA at this stage. Therefore, the law remains in effect while the case proceeds through the courts.

On April 15, 2024, the government (here, the Department of Justice ("DOJ")), made it clear that it will defend the CTA in its entirety. The DOJ appealed Judge Burke's ruling to the U.S. Court of Appeals for the Eleventh Circuit.^{xiii} The appeal is supported by three *amicus curiae* briefs (i.e., a brief from a person or organization that is not a party to the lawsuit, but that is allowed to submit briefing to help the court better understand the issues on appeal). All the briefs share a similar argument: Congress had sufficient legislative power to enact the CTA, which was enacted

to combat the use of anonymous shell companies that threatened national security, interstate and foreign commerce and U.S. tax interests.^{xiv} The DOJ’s appeal is being considered on an expedited basis, but it will almost certainly be months before the Eleventh Circuit issues its opinion.

How Does CTA-Related Litigation Impact Me?

The short answer is that it probably doesn’t. As mentioned above, the CTA remains in full force and effect for all those but the plaintiffs in *Small Business United, et al.* This means that any person or business affected by the CTA should still comply with its requirements.

What Happens Next?

We don’t know, but we’re closely monitoring CTA-related litigation and legislation. What we do know is that there will be more CTA-related lawsuits and new court rulings – notably out of the Eleventh Circuit and the Western District of Michigan. We also expect that some states may pursue their own corporate transparency statutes, potentially creating a patchwork of state-level regulations that businesses must navigate. New York, for example, has already enacted its LLC Transparency Act, which mirrors many provisions of the federal CTA and takes effect in December 2024. Other states are likely to follow suit, further complicating the regulatory landscape.

For these reasons, it’s not enough to fully comply with the CTA. Affected individuals and businesses should remain vigilant and up-to-date on further legal and legislative developments, and guidance from regulatory bodies.

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ⁱ Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283 (January 1, 2021) (the “NDAA”).

ⁱⁱ *Id.* § 6403(a)(a)(11)(A).

ⁱⁱⁱ “Beneficial owners” are individuals who own or control at least 25% of the business or are those who exercise significant control over the business. *See* NDAA § 6403(a)(b).

^{iv} *See id.* at § 6403(b)(1)(C) (setting forth the deadlines for submitting a BOI Report). *See also* FINANCIAL CRIMES ENFORCEMENT NETWORK, BENEFICIAL OWNERSHIP INFORMATION REPORTING: https://www.fincen.gov/boi-faqs#B_1 (last visited Dec. 12, 2023).

^v *Id.* §6403(a)(b).

^{vi} *Id.* § 6403(b)(1). *See also*, FINANCIAL CRIMES ENFORCEMENT NETWORK, BENEFICIAL OWNERSHIP INFORMATION REPORTING: https://www.fincen.gov/boi-faqs#B_1 (last visited May 29, 2024).

^{vii} *Id.* § 6403(h); *See also*, FINANCIAL CRIMES ENFORCEMENT NETWORK, BENEFICIAL OWNERSHIP INFORMATION REPORTING: https://www.fincen.gov/boi-faqs#B_1 (last visited May 29, 2024).

^{viii} *See generally*, *National Small Business United, et al. v. Yellen, et al.*, No. 5:22-cv-01448 (N.D. Ala. 2022); *see also id.*, Dkt. No. 51 (N.D. Ala. 2024).

^{ix} UPDATED: NOTICE REGARDING NATIONAL SMALL BUSINESS UNITED V. YELLEN, NO. 5:22-CV-01448 (N.D. ALA.): <https://www.fincen.gov/news/news-releases/updated-notice-regarding-national-small-business-united-v-yellen-no-522-cv-01448> (last visited May 29, 2024).

^x *See generally*, *Small Business Association of Michigan, et al. v. Janet Yellen, et al.*, No. 1:2024-cv-00314 (W.D. Mich. 2024); *See also id.*, Dkt. No. 1.

^{xi} *See generally id.*, Dkt. Nos. 10-11.

^{xii} *See generally id.*, Dkt. No. 24.

^{xiii} *See generally*, *National Small Business United, et al. v. Yellen, et al.*, No. 24-10736 (11th Cir. 2024).

^{xiv} *See generally id.*, Dkt. Nos. 18, 24, 27, and 30.