

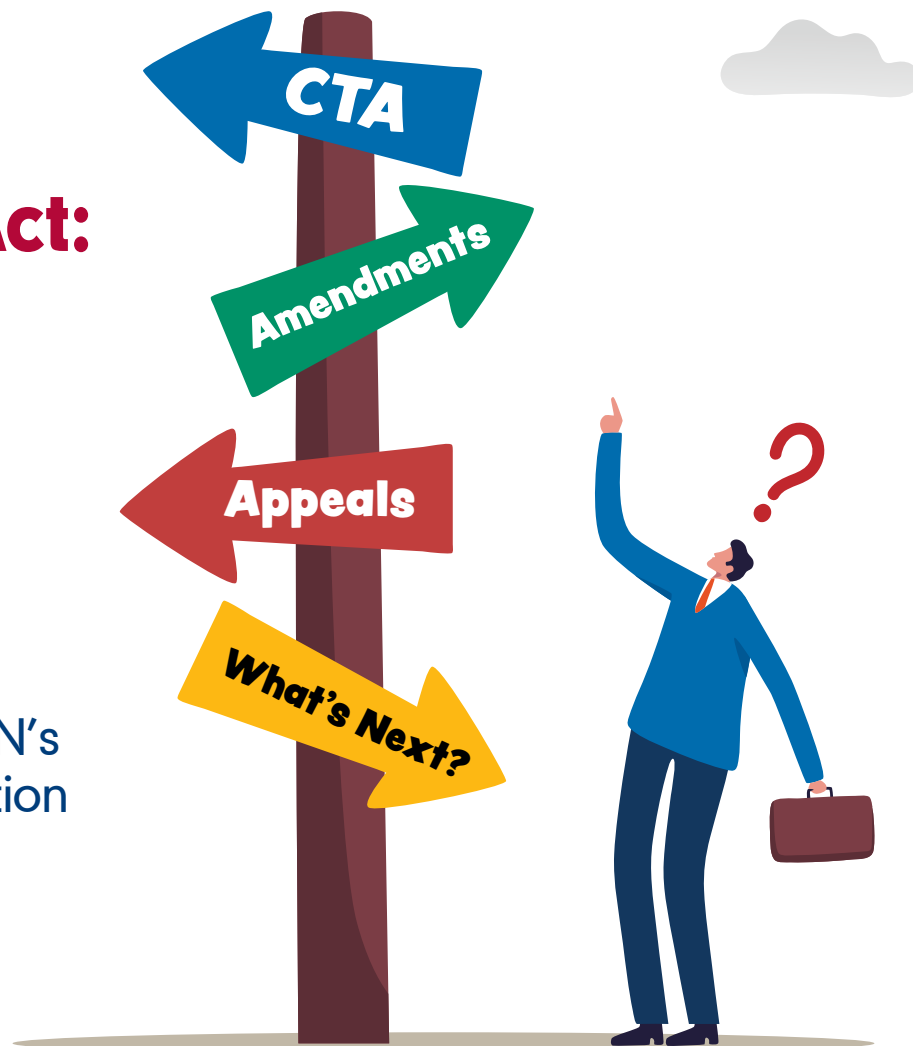
The Turbulent Release of the Corporate Transparency Act



The Corporate Transparency Act: Amendments, Access Rule, and Appeals

Analyzing the Turbulent Release and Implementation of FinCEN's Groundbreaking Regulation

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The Corporate Transparency Act (“CTA”) has received considerable national attention since its January 1, 2024 effective date. The past six months alone have seen a number of significant developments, including eased filing deadlines for beneficial ownership reports in 2024, the introduction of new standards and safeguards for accessing the Beneficial Ownership Secure System (“BOSS”), and even an initial volley of constitutional challenges to the CTA. As one of the national leaders in new entity filings, Delaware remains uniquely positioned at the epicenter of the CTA’s impact. This article provides a refresher course on CTA basics, breaks down some of its recent changes, and highlights three federal cases seeking (and in one instance winning) permanent enjoinder from the CTA’s reporting requirements.

What Is the CTA, Again?

Passed in 2021, the 21-page Corporate Transparency Act (31 U.S.C. § 5336) was enacted by Congress as part of the 1,482-page bipartisan National Defense Authorization Act to expand on the Bank Secrecy Act and broaden existing laws that prevent and combat money laundering, terrorist financing, and other illicit activity.¹ The CTA requires any entity formed by a filing with a secretary of state or similar office under the laws of a state or Indian tribe (a “Reporting Company”) to file a beneficial ownership information report (a “BOI Report”) with the Financial Crimes Enforcement Network (“FinCEN”) within a specific timeframe from its formation, barring an exemption.² Reporting Companies existing prior to the January 1, 2024 effective date of the CTA have until January 1, 2025 to file a similar beneficial ownership report.³ There are 23 exemptions to the definition of a Reporting Company.⁴ For so long as a Reporting Company falls into one of the exempted categories, it will

not be required to file a BOI Report. Absent an exemption, the CTA's definition of Reporting Company will encompass almost all Delaware-created business entities.

Each BOI Report filed with FinCEN must contain specific information on the Reporting Company itself as well as certain personal identifying information on its beneficial owners ("Beneficial Owners") and company applicants ("Applicants")—a new designation for certain individuals tied to the formation of Reporting Companies.⁵ An individual qualifies as a Beneficial Owner by owning or controlling at least 25 percent of the ownership interests in the Reporting Company or by exercising "substantial control" over the Reporting Company.⁶ Individuals exercising substantial control include any who (i) serve as a senior officer of a Reporting Company, (ii) exercise authority over the appointment or removal of any senior officer or a majority of the board of directors or managers (or similar body) of a Reporting Company, (iii) direct, determine, or substantially influence important decisions made by the Reporting Company, or (iv) have any other form of substantial control over the Reporting Company.⁷

An Applicant can be (i) the individual who directly files the document that forms the Reporting Company and (ii) the individual who is primarily responsible for directing or controlling such filing, if different than the direct filer.⁸ Each BOI Report must have at least one Applicant, with a maximum of two.⁹ Reporting Companies existing before the January 1, 2024 effective date are exempt from the Applicant requirement.¹⁰ Attorneys, advisers, independent managers, accountants, corporate service providers, and other professionals all may qualify as Applicants based on the roles they play in the formation of a Reporting Company.¹¹

Amendment to Filing Deadlines in 2024

Amid concerns surrounding the public's overall awareness and exposure to the CTA's reporting requirements, FinCEN amended its beneficial ownership reporting rule on November 30, 2023 to extend the filing deadline for entities created or registered on or after January 1, 2024 and before January 1, 2025 from 30 calendar days to 90 calendar days.¹² Under these modified deadlines, all Reporting Companies now must submit BOI Reports within the following timeframes:

- **No later than January 1, 2025:** All domestic Reporting Companies existing prior to January 1, 2024 and all foreign Reporting Companies registered to do business in the U.S. prior to January 1, 2024.
- **Within 90 calendar days from formation:** All domestic Reporting Companies formed on or after January 1, 2024 and before January 1, 2025 or foreign Reporting Companies registered to do business in the U.S. on or after January 1, 2024 and before January 1, 2025.
- **Within 30 calendar days from formation:** All domestic Reporting Companies formed on or after January 1, 2025 or foreign Reporting Companies registered to do business in the U.S. on or after January 1, 2025.
- **Within 30 calendar days:** Any filing to correct a previously submitted BOI Report in which the Reporting Company has become aware contained false, inaccurate, or outdated information.

The responsibility to timely file and update a BOI Report rests with the Reporting Company itself, rather than with certain individuals or entities. Regardless, the CTA establishes escalating civil and criminal penalties for persons responsible for violating reporting requirements, willfully disclosing confidential information, or causing a false filing.¹³ FinCEN has reiterated that its decision to extend the timeframe to file for entities created or registered in 2024 does not warrant a permanent departure from the BOI Reporting regime initially set out by Congress, as Reporting Companies in the future will have greater awareness of the CTA's requirements and, as a result, will ostensibly be better positioned to comply with the 30-day reporting timeframe than they would have been in 2024.¹⁴

Access Rule and BOSS

In another step towards "creating a highly useful database for authorized BOI recipients," FinCEN issued a final rule on December 22, 2023 promulgating its anticipated CTA access and safeguards provisions (the "Access Rule").¹⁵ This new rule prescribes guidelines on who may access beneficial ownership information, *what* information is available, and *how* retrieved information must be protected.¹⁶ The Access Rule expressly grants access to six categories of parties, including (i) U.S. federal agencies engaged in national security, intelligence, or law enforcement activity; (ii) U.S. state, local, and tribal law enforcement agencies; (iii) foreign law enforcement agencies, judges, prosecutors, central authorities, and competent authorities (foreign requesters); (iv) financial institutions using BOI Reports to facilitate compliance with customer due diligence (CDD) requirements under applicable law; (v) federal functional regulators and other appropriate regulatory agencies acting in a supervisory capacity assessing financial institutions for compliance with CDD requirements under applicable law; and (vi) treasury officers and employees.¹⁷

The Access Rule also establishes security and confidentiality protocols applicable to each type of authorized recipient of information.¹⁸ Domestic agencies seeking beneficial ownership information will need to enter into contractual agreements with FinCEN, establish standards and procedures to protect the security and confidentiality of such information, and maintain permanent auditable records of requests.¹⁹ Banks and financial institutions will function under geographic restrictions when retrieving beneficial ownership information and must establish administrative, technical, and physical safeguards for its protection, similar to the Gramm-Leach-Bliley Act.²⁰ The Access Rule doubles down on prior commitments from FinCEN that any unauthorized use or disclosure of beneficial ownership information retrieved from BOSS could incur suspension of access as well as civil and criminal liability.²¹

Mounting Litigation

Since the CTA's effective date, constitutional challenges have begun to surge across the country, with varying degrees of success. Most prominent of these cases has been *National Small Business United d/b/a the National Small Business Association, et al. v. Janet Yellen et al., No. 5:22-cv-01448 (N.D. Ala.)*, in which the U.S. District Court for the Northern District of Alabama held the CTA to be an unconstitutional exercise of Congressional power.²²

In *NSBA v. Yellen*, two plaintiffs—the National Small Business Association ("NSBA"), an Ohio nonprofit corporation representing

(continued from p. 11)

“over 65,000 businesses and entrepreneurs located in all 50 states”, and Isaac Winkles (“Winkles”), an NSBA member and business owner—challenged whether the CTA’s reporting requirements exceed Congress’ authority under Article I of the Constitution and violate the First, Fourth, Fifth, Ninth, and Tenth Amendments.²³ Both the NSBA and the U.S. Department of Justice on behalf of the Department of the Treasury (the “Government”) agreed to proceed via dispositive motions and cross-moved for summary judgment. In its review, the Alabama court assessed plaintiffs’ standing to challenge the federal regulation and the viability of the Government’s sources of constitutional authority for the enactment of the CTA.²⁴

Ultimately, the court entered a final declaratory judgment on March 1, 2024 holding that, as a matter of law, (i) both plaintiffs have standing to bring their constitutional claims, and (ii) the CTA is unconstitutional because it cannot be justified as a legitimate exercise of Congress’ enumerated powers.²⁵ Injunctive relief was then granted by the Alabama court, enjoining the Government from enforcing the CTA’s reporting requirements against the NSBA and Winkles. Relief was expressly limited to those plaintiffs named in the suit (including those businesses and entrepreneurs represented by the NSBA) and did not extend further to all other Reporting Companies across the country. Because the court concluded that the CTA did not constitute a valid exercise of Congress’ enumerated powers, it did not go on to address whether the regulation violates the First, Fourth, and Fifth Amendments. In a press release published May 11, 2024, FinCEN stated that it is appealing the decision to the United States Court of Appeals for the Eleventh Circuit, but until then will not enforce the CTA against the plaintiffs in that action.²⁶

In the wake of the *NSBA v. Yellen* decision, several new federal complaints have rapidly followed in apparent attempts to replicate the award of injunctive relief. In *William Boyle v. Janet Yellen et al.*, 2:24-cv-00081 (D. Me.), filed March 15, 2024, a Maine resident (“Boyle”) with ownership interests in two limited liability companies engaged solely in intrastate commerce challenged the constitutionality of the CTA, contending it exceeds the enumerated powers of the federal government as set forth in Article I, Section 8, violates the Ninth and Tenth Amendments, and infringes on state sovereignty.²⁷ Boyle’s complaint argues that, in practice, the CTA unjustifiably transfers responsibility from exempt institutions that process the targeted illicit transactions (e.g., banks, financial institutions, and escrow agents) on to small business owners.²⁸

Small Business Association of Michigan v. Janet Yellen et al., 1:24-cv-00314 (W.D. Mich.), filed on March 27, 2024, presents similar constitutional challenges as *NSBA v. Yellen* from the perspective of a business association. The Small Business Association of Michigan (“SBAM”), representing 30,000+ members, filed suit against Janet Yellen and the Department of the Treasury for declaratory relief from the CTA’s reporting requirements.²⁹ In its complaint, the SBAM analogizes the CTA’s treatment of law-abiding U.S. citizens to that of criminals, without providing any particular reason to suspect them of wrongdoing.³⁰

By circumventing the Fourth Amendment, SBAM reasons, the CTA allows federal law enforcement to leverage collected data in any future criminal investigation, regardless of whether such an investigation is related to money laundering or terrorist financing.³¹

As these civil actions and appeal proceed through the legal system, FinCEN has expressed no intention of slowing its CTA implementation efforts. Other than the named plaintiffs (and represented parties) in *NSBA v. Yellen* subject to the U.S. District Court’s injunction, all other Reporting Companies across the United States are still required to comply with the CTA and its beneficial ownership reporting requirements.



The views expressed in this article are those of the authors and not necessarily those of Richards, Layton & Finger or its clients.



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Notes:

- 1- See H.R.6395 - William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (Jan. 1, 2021).
- 2- 31 U.S.C. § 5336(a)(11).
- 3- 31 C.F.R. § 1010.380(a)(1)(iii).
- 4- 31 U.S.C. § 5336(a)(11)(B). Under 31 U.S.C. § 5336(a)(11)(B) (xxiv), additional exemptions may be granted to any entity that the Secretary of the Treasury has determined should be exempt because requiring beneficial ownership information (i) would not serve the public interest and (ii) would not be highly useful in national security, intelligence, and law enforcement agency efforts to detect, prevent, or prosecute money laundering, the financing of terrorism, proliferation finance, serious tax fraud, or other crimes.
- 5- 31 C.F.R. § 1010.380(b)(1)(ii).
- 6- 31 U.S.C. § 5336(a)(3)(A)(i); 31 U.S.C. § 5336(a)(3)(A)(ii).
- 7- 31 C.F.R. § 1010.380(d)(1).
- 8- 31 C.F.R. § 1010.380(e).
- 9- See FinCEN, Beneficial Ownership Information Reporting Frequently Asked Questions, at E.1 (Issued September 18, 2023), https://www.fincen.gov/boi-faqs#E_1.
- 10- 31 C.F.R. § 1010.380(b)(2)(iv).
- 11- See FinCEN, Beneficial Ownership Information Reporting Frequently Asked Questions, at E.3 (Issued September 18, 2023), https://www.fincen.gov/boi-faqs#E_3.
- 12- 31 C.F.R. § 1010.380(a)(1); see 88 Fed. Reg. 83499 (Nov. 30, 2023).
- 13- 31 U.S.C. § 5336(h).
- 14- See 88 Fed. Reg. 83502 (Nov. 30, 2023).
- 15- See 88 Fed. Reg. 88732 (Dec. 22, 2023).
- 16- See FinCEN, Fact Sheet: Beneficial Ownership Information Access and Safeguards Final Rule, <https://www.fincen.gov/news/news-releases/fact-sheet-beneficial-ownership-information-access-and-safeguards-final-rule>.
- 17- 31 C.F.R. § 1010.955(b).
- 18- See 31 C.F.R. § 1010.955(d).
- 19- 31 C.F.R. § 1010.955(d)(1).
- 20- 31 C.F.R. § 1010.955(d)(2).
- 21- 31 C.F.R. § 1010.955(f).
- 22- National Small Business United, d/b/a the National Small Business Association et al., v. Janet Yellen et al., No. 5:22-cv-1448 (N.D. Ala. 2024).
- 23- *Id.* at 4.
- 24- *Id.* at 18.
- 25- *Id.* at 59.
- 26- See FinCEN, 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#msdyntrid=DP_MtZNpU0WiMeBBV_JEZT81_pbv4xKlwsKK5lygbFU.
- 27- William Boyle v. Janet Yellen et al., 2:24-cv-00081 (D. Me. 2024).
- 28- *Id.*
- 29- Small Business Association of Michigan et al. v. Janet Yellen et al., 1:24-cv-00314 (W.D. Mich. 2024).
- 30- *Id.*
- 31- *Id.*