

Insights

CTA in Limbo: FinCEN Addresses Nationwide Injunctive Order

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By: Robert A. Greising and Thomas M. Abrams

Determination by regulators to save the Corporate Transparency Act ("CTA") was evidenced on Thursday, December 5th as the Department of Justice ("DOJ") filed a notice of appeal just two days after the U.S. District Court for the Eastern District of Texas ordered a nationwide preliminary injunction on CTA enforcement. In a statement recently published to the Financial Crimes Enforcement Network's ("FinCEN") website, FinCEN acknowledged the order and confirmed "reporting companies are not currently required to file beneficial ownership information with FinCEN and are not subject to liability if they fail to do so *while the order remains in force.*" [emphasis added] Instead of beginning to enforce the CTA's beneficial ownership information ("BOI") reporting requirements on the pre-injunction compliance deadline of January 1, 2025, FinCEN will begin the new year gearing up for appellate litigation in the Fifth Circuit Court of Appeals.

Subject to the uncertain impact of a new presidential administration arriving in late January, FinCEN continues to stand behind the CTA as a Constitutional law with a "vital role" in protecting domestic and foreign people and financial systems from "terrorist financing, drug trafficking, and money laundering." To continue pursuing those ends while the Constitutionality of the CTA and associated reporting requirements are argued in court, FinCEN clarified "reporting companies may continue to voluntarily submit beneficial ownership information reports" despite the temporary absence of any legal obligation to do so. In addition to combatting financial crime, many of the roughly 32 million businesses subject to the CTA (the current injunction notwithstanding) have already incurred filing expenses and may wish to file voluntarily, to fulfill reporting "requirements" should the injunction be lifted.

Turning to the Constitutional perspectives, the nationwide preliminary injunction ordered in the December 3, 2024 case—*Texas Top Cop Shop, Inc., et al. v. Merrick Garland, Attorney General of the United States* (Case No. 4:24-cv-478)—was a result of Judge Mazzant's dual-conclusions that neither the Commerce Clause nor the Necessary and Proper Clause of the Constitution armed Congress with authority to enact the CTA. With respect to the Commerce Clause, the Court held that the CTA does not regulate channels or instrumentalities of commerce, or activities (rather it creates an activity, according to the Court). Regarding the Necessary and Proper Clause, the Court rejected arguments by the government that Congress appropriately used the Necessary and Proper Clause in conjunction with another enumerated power (when Congress relies on the Necessary and Proper Clause as a source of power,

the Necessary and Proper Clause can only be used in conjunction with some other enumerated power). To paraphrase the 79-page opinion, Judge Mazzant concluded that the CTA is likely an unconstitutional federal encroachment upon state rights, and *nationwide* relief was necessary due to one of the plaintiff parties—the National Federation of Independent Business—representing numerous members from all across the country (see *Small Business Association of Michigan, et al. v. Yellen, et al.*, (W.D Mich) (finding the CTA likely unconstitutional but enjoining enforcement only as to the plaintiffs in the case)).

In arguing for the Constitutionality of the CTA on appeal, DOJ (on FinCEN's behalf) might reference U.S. District Court opinions from the Eastern District of Virginia (*Cmt. Ass'ns Inst. v. Yellen*, 1:24-cv-1597 (MSN/LRV), (E.D. Va. Oct. 24, 2024)) and the District of Oregon (*Firestone v. Yellen*, 3:24-cv-1034-SI, (D. Or. Sep. 20, 2024)). Those Courts declined to enjoin the CTA, agreeing with the government that Congress was within its power to enact the CTA under both the Commerce Clause—by aiming the CTA at entities with the capacity to engage in commerce—and the Necessary and Proper Clause—by appropriately utilizing it in conjunction with Congressional powers to regulate national security, foreign affairs, and taxation.

Business owners and attorneys alike can only speculate as to when, and with what force, reporting companies will benefit from a conclusive ruling on the Constitutionality of the CTA. It is clear, however, that FinCEN is resolved to restore and enforce the CTA once the current preliminary injunction is lifted. Until an appellate decision upholding, limiting, or overruling the nationwide injunction again changes the CTA landscape, reporting companies can base decisions on the few temporary certainties we currently benefit from:

- *Reporting companies are not currently required to file BOI reports.*
- *Reporting companies may continue to voluntarily submit BOI reports.*
- *Reporting companies that do not file BOI reports will not be penalized while the nationwide injunctive order remains in effect.*
- *Neither the January 1, 2025, initial reporting deadline nor the requirement to file updated BOI reports within 30 days of a change are currently enforceable.*
- *Entities formed in 2025 that would otherwise be required to file a BOI report within 30 days of formation are relieved of that obligation for the time being.*

The pace of progress before the several appellate courts involved in these CTA lower court decisions remains uncertain, as the process has only just been initiated. However, considering the fast-approaching compliance deadline of January 1, 2025, followed by the transfer of executive powers on January 20, 2025, DOJ could exercise its option to request an expedited appeal—whether the Court of Appeals would grant such a request requires more speculation. Krieg DeVault will continue to monitor the CTA landscape and issue further alerts on developments as they occur.



If you have any questions regarding the CTA or obligations to comply with the BOI reporting requirements, please contact Robert A. Greising, Travis D. Lovett, Jacob W. O' Donnell, Thomas M. Abrams, or any member of our Business, Acquisitions and Securities Practice.

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