



## Federal District Court Finds Corporate Transparency Act Unconstitutional: Are Small Businesses Still Required to Comply?

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On March 1, 2024, U.S. District Court Judge Liles C. Burke, of the Northern District of Alabama, declared the Corporate Transparency Act (CTA) unconstitutional and permanently enjoined the Department of Treasury from enforcing it against the National Small Business Association and its ~65,000 members ("NSBA"). At issue was the CTA's reporting requirement, wherein most entities incorporated under State laws are required to disclose beneficial ownership information (BOI) to the Financial Crimes Enforcement Network ("FinCEN"), the Treasury Department's criminal enforcement arm. Plaintiffs, an Alabama businessman and an association in which he is a member, the NSBA, sought a declaration that the CTA's mandatory reporting requirements exceeded Congress's Constitutional authority under Article I and violated the First, Fourth, Fifth, Ninth, and Tenth Amendments. Judge Burke ultimately held that Congress exceeded its Constitutional powers in enacting the CTA's mandatory reporting requirements without addressing whether the CTA violated any Constitutional Amendments.

### **The Corporate Transparency Act: Intentions and Obligations**

Effective January 1, 2024, Congress enacted the CTA as a measure to counteract money laundering, financial crimes, and terrorism financing. Its' reporting requirements affect a vast number of entities. By FinCEN's estimates, the CTA applies to 32.6 million currently existing entities and 5 million new entities annually starting in 2025. Based on the CTA's twenty-four exemptions, which include banks, insurance companies, publicly traded companies, and entities with more than twenty employees, five million dollars in gross revenue, and a physical office in the United States, the reporting requirement mostly impacts small businesses.

The CTA requires corporations, limited liability companies, or similar entities that are either created by filing a document with secretary of state under the laws of a State or Indian Tribe or formed under the laws of a foreign country and registered to do business in the United States ("Reporting Companies") to report information about the individuals who ultimately own or control them. The initial report must provide the name and address of the Reporting Company and the name, date of birth, address and identifying number from a non-expired driver's license, U.S. passport, or non-expired identification document issued by a State, local, or tribal government for the beneficial owners and, when applicable, Company Applicants (the individual that filed the formation documents for the entity).

The CTA provides deadlines for Reporting Companies to submit initial reports based on the entity's date of creation or registration to do business in the U.S. Reporting Companies created **before January 1, 2024**, must file their report on or by January 25, 2025, and are not required to identify Company Applicants. Reporting Companies created **between January 1, 2024, and December 21, 2024**, must file their report the sooner of 90 days after receiving actual or public notice of their company's creation and must identify Company Applicants in addition to Beneficial Owners. Reporting Companies created **on or after January 1, 2025**, have 30 days after receiving notice of their company's creation.

The reported information is intended to be non-public, accessible only for law enforcement and national security purposes when requested by a law enforcement agency or other regulator. Unless there is a change (or correction) in the status or basic information of the Reporting Company or the Beneficial Owners **after** making the initial report, Reporting Companies need only file the required information once. Otherwise, the Reporting Company must file an updated report no later than 30 days after any applicable change. Far from toothless, willful violations of the CTA can incur significant civil and criminal penalties. A person may be subject to civil and criminal penalties for willfully causing a Reporting Company not to file the required BOI report, or for filing an incomplete or false initial report or updated report. Civil penalties can be up to \$500.00 for each day the violation continues, and criminal penalties include a fine up to \$10,000.00 and/or 2 years imprisonment.

### **Judge Burke's Constitutional Concerns**

Judge Burke held the CTA's mandatory reporting requirements exceed "the Constitution's limits on Congressional powers and lacked a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress's policy goals" including Congress's powers to regulate commerce, taxation, or its foreign affairs and national security powers. The court analyzed the CTA's definitions, application, requirements, penalties, and the vast number of entities impacted by the reporting requirements.

After which, Judge Burke surmised "[t]he ultimate result of this statutory scheme is that tens of millions of Americans must either disclose their personal information to FinCEN through State-registered entities, or risk years of prison time and thousands of dollars in civil and criminal fines."

Defending the CTA's Constitutionality, the Government argued that the CTA's disclosure requirements illuminated the often-opaque structures of corporations, LLCs, and other legal entities, allowing the U.S. to more effectively thwart illicit financial flows, tax avoidance, and allowed the U.S. to enhance national security by bringing it into compliance with "international money laundering and countering the financing of terrorism standards." One-by-one, the court eliminated the Government's arguments.

- The court rejected the Government's first argument—determining that Congress's national security powers did not justify the CTA's regulation of corporations that are "creates of state law." It also held that international standards or agreements, rather than the Constitution, are not a basis to confer power to Congress.
- Finding that the CTA did not "regulate commerce on its face, contain a jurisdictional hook, or serve as an essential part of a comprehensive regulatory scheme..." it refused to accept the Government's second contention that the Commerce Clause applied.
- The Court denied the Government's final contention, that the CTA was justified by Congress's taxing authority. It held that the CTA's fines were not a tax, and that Internal Revenue Service ("IRS") access to the BOI collected via the CTA was insufficiently incidental to Congressional taxing power such that its application resulted in a "substantial expansion of federal authority" that would "sanction any law that provided for the collection of information useful for tax administration and provided tax officials with access."

Based on Judge Burke's determination that Congress exceeded its authority by enacting the CTA, he did not reach plaintiffs' arguments that the CTA violated several Constitutional Amendments

## Reactions to Judge Burke's Holdings and the Limited Scope of the Injunction Barring Enforcement

On March 4, 2024, in response Judge Burke' ruling, FinCEN issued a Notice. In its Notice, FinCEN acknowledged the court's ruling that the CTA "exceeds the Constitution's limits on Congress's power" and the injunction "enjoining the Department of the Treasury and FinCEN from enforcing the [CTA] against the plaintiffs." FinCEN states that it will comply with the court's order "for as long as it remains in effect."<sup>1</sup> Notably, FinCEN applies the court's ruling and injunction to apply only to the plaintiffs, stating "[t]hose individuals and entities are not required to report beneficial ownership to FinCEN at this time." FinCEN's narrow interpretation is consistent with the plain language of the order.

Advocates for and against the CTA have issued statements regarding the impact and uncertainty Judge Burke's opinion and injunction have on the CTA's future. The NSBA and the president of the S Corporation Association, Brian Reardon, have called for a more expansive application of the permanent injunction. Speaking on behalf of the S Corporation Association, Reardon said, "[i]f it is unconstitutional for NSBA members, it should be unconstitutional for ... all businesses." On the other hand, Scott Greytak, Director of Advocacy at Transparency International US, a pro CTA advocate aimed at combating international corruption, claimed Judge Burke's holding "imagines a world in which international money laundering simply doesn't exist." Bemoaning the opinion's impact on the CTA as an important tool against international money laundering and corruption, Greytak claims "this decision will only embolden America's adversaries abroad and undermine efforts to protect our communities."

## The Path Forward for Reporting Companies Outside of Judge Burke's Injunction

The future of the CTA is uncertain. While the ruling represents a significant victory for the plaintiffs and critics of the CTA, the legal battle is far from over. On March 12, 2024, the government filed its notice of appeal, setting the stage for a prolonged legal skirmish that could ultimately reach the Supreme Court. This uncertainty complicates the regulatory landscape, leaving businesses to question future compliance obligations and reporting requirements. Reporting Companies should continue to monitor the situation and pay attention to possible copy-cat lawsuits aimed at a broad Constitutional attack on the CTA.

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<sup>1</sup> [Notice Regarding National Small Business United v. Yellen, No. 5:22-cv-01448 \(N.D. Ala.\)](#), [FinCEN.gov](#) (last visited, March 8, 2024).

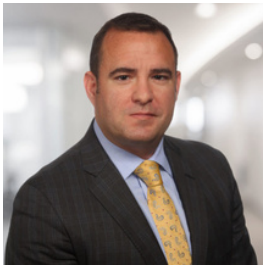
For the millions of Reporting Companies that were not NSBA members protected by the injunction as of March 1, 2024, they should read Judge Burke's and FinCEN's March 4, 2024, Notice conservatively and timely comply with the CTA's filing requirements. The American Institute of Certified Public Accountants ("AICPA"), while calling for a pause to CTA reporting enforcement, has also issued a statement urging small businesses to continue to file BOI reports. Failure to do so could expose Beneficial Owners and some Company Applicants to substantial civil and criminal fines. To assist those currently affected by the CTA's disclosure requirements, FinCEN has made numerous resources<sup>2</sup>available.<sup>3</sup>

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<sup>2</sup> [U.S. Beneficial Ownership Information Registry Now Accepting Reports | FinCEN.gov](#) (last visited, March 7, 2024).

<sup>3</sup> [BOI Small Compliance Guide v1.1 \(fincen.gov\)](#), (last visited, March 8, 2024).

## About the Author



For more than twenty years, [Richard L. Hathaway](#) has litigated non-competition, non-solicitation, trade secrets, and other matters protecting business innovation and intellectual property. He has successfully enforced his business clients' agreements and rights in Texas state or federal court and arbitration. He has recently obtained a multi-million dollar arbitration award for a business against a former employee for misappropriating trade secrets

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