

# Corp. Transparency Act Could Survive 11th Circ. Several Ways

By **Michael Huston, Jamie Schafer and Adrianna Simonelli** (April 18, 2024)

The Corporate Transparency Act is an extensive new anti-money laundering law that went into effect Jan. 1. It requires the disclosure to the U.S. Department of the Treasury's Financial Crimes Enforcement Network of detailed information regarding owners, officers, and control persons by most entities formed or registered to do business in the United States.

The CTA represents the most significant revision to the U.S.' anti-money laundering compliance framework in nearly two decades. The law seeks to address the concern that entities in the United States may be anonymously formed and used to achieve a number of nefarious aims, such as obscuring the conduct of criminal enterprises, hiding the proceeds of corruption and evading U.S. economic sanctions.

The CTA has been subject to criticism in relation to the significant new compliance burdens it places on business, as well as the privacy implications of FinCEN collecting personal information regarding individuals associated with reporting companies. One prominent critic, the National Small Business Association, a business advocacy organization, recently succeeded in its legal challenge to the CTA.

On March 1, the U.S. District Court for the Northern District of Alabama held in *National Small Business United v. Janet Yellen* that the CTA was unconstitutional because it exceeded Congress' enumerated powers. The Alabama district court entered an injunction halting enforcement of the CTA as to the plaintiffs in that matter — the NSBA and one of its individual members, business owner Isaac Winkles.

Unsurprisingly, on March 11, the government appealed the ruling to the U.S. Court of Appeals for the Eleventh Circuit, which appears to have granted expedited treatment to the appeal.

## The Current State of Play for the CTA

So, what does this mean for the CTA going forward?

Shortly after the Alabama district court entered the injunction, FinCEN confirmed in a statement its view that the injunction against the application of the CTA applies only as to the plaintiffs in the Alabama case.

Notably, the government took the explicit position that the injunction applies to NSBA members as of March 1, the date of the district court's decisions, but also suggested that it would not apply to reporting companies for which individual NSBA members are the beneficial owners.

It is not yet clear what the government's position would be for a reporting company of



Michael Huston



Jamie Schafer



Adrianna Simonelli

which an NSBA member was one of several beneficial owners or where an NSBA member was the company applicant — that is, the individual who formed a reporting company.

It would appear likely that a reporting company would still be required to report — unless the entity itself were an NSBA member — but under the injunction, the CTA could not be enforced individually against any NSBA member beneficial owner or company applicant if they refused to provide the required beneficial ownership information in relation to the reporting company's CTA report.

Moreover, this logic would seem to extend to other individuals — like senior officers, corporate service providers and lawyers — who may be in the crosshairs of enforcement for failing to file a CTA report. If any such individual or entity was an NSBA member as of March 1, under the injunction it appears that they may not currently be subject to potential liability for failure to provide information or file a CTA report on behalf of an entity under their administration.

### **What to Expect Next**

The government filed a notice of appeal of the district court's decision to the Eleventh Circuit, and shortly thereafter the parties filed a joint motion for its expedited consideration of the appeal.

The Eleventh Circuit set a briefing schedule that could see oral arguments occurring as early as this June. The government filed its opening appeal brief on April 15, and briefing from the plaintiff is likely to be completed by June.

However, an expedited briefing schedule does not necessarily result in an expedited ruling from the court. The average time from filing the notice of appeal to decision in the Eleventh Circuit is about one year.

There is a strong possibility that if the Eleventh Circuit affirms the Alabama district court's ruling that the statute is unconstitutional, then this case would head to the U.S. Supreme Court.

The U.S. solicitor general defends an act of Congress before the Supreme Court as long as there is any reasonable argument to be made supporting its constitutionality. The Supreme Court will usually grant a petition for a writ of certiorari to review a federal court decision that holds a federal statute unconstitutional.

Yet even with the Eleventh Circuit's expedited briefing schedule, the Supreme Court would not take up the case until its October 2024 term — and it is possible the case could slip further into the October 2025 term, depending on the speed of the Eleventh Circuit.

The Alabama district court's opinion takes a relatively aggressive view of the limitations on congressional power. But a number of justices on the current Supreme Court have indicated their openness to revisiting the doctrine on the scope of federal power. This makes it exceedingly difficult to predict how the Eleventh Circuit or the Supreme Court would react to the constitutional analysis performed by the Alabama district court.

If the Eleventh Circuit does not find the district court's analysis persuasive, it could still consider the plaintiffs' other constitutional challenges as alternative grounds for affirming the district court — even though the district court declined to address them. However, assuming that the circuit court considers only the constitutional arguments the district court

ruled on and disagrees, it would then remand to the district court to take up the plaintiffs' other constitutional objections to the CTA.

In the meantime, because of the narrow scope of the district court injunction to the plaintiffs in this case, other plaintiffs will need to file similar suits to benefit more immediately from the Alabama decision. To date, at least three other challenges have been filed — in the U.S. District Court for the Northern District of Ohio, the U.S. District Court for the Western District of Michigan and the U.S. District Court for the District of Maine.

While the Alabama decision will not have a precedential effect in those jurisdictions, it could be persuasive to other courts where challenges are raised and result in swift decisions in a court agreeable to Alabama's constitutional analysis.

The government could also seek to stay the district court's injunction pending appeal. It has not yet done so. The limited application of the injunction means that the government might not choose to do so.

But even if the government declines to request a stay now, it may pursue one later if other courts issue injunctions broader than the Alabama district court's that would materially affect the administration of the CTA, which has already gone into effect.

### **Long-Term Implications**

Even if the plaintiffs win in the Alabama litigation, the CTA may still largely survive.

The district court suggested that the CTA's commerce clause problem could be solved if a requirement to file was triggered by engaging in commerce, rather than the mere formation of an entity under a state's law. In response, the government could narrow the CTA's implementing regulations to apply only to covered entities engaging in commerce. Congress could also always amend the CTA if necessary to add that limitation.

Such a revision to either the regulations or the statute would arguably moot the Alabama district court's constitutional holding.

In this event, it bears noting that courts have generally construed the concept of "engaging in commerce" broadly under the Supreme Court's jurisprudence. Under the law as it currently stands, courts would likely hold that simple corporate activity would be enough to trigger a CTA filing requirement, such as opening a bank account or purchasing an asset.

Thus, if the commerce clause challenge were remedied, the CTA may still remain broadly applicable with relief afforded only to those entities not engaged in any transactions, such as dormant or shelf entities. A remedy of this nature would also almost certainly cause additional ambiguity in applying the CTA — and result in further litigation.

The road ahead for the Alabama litigation entails a long march through the appellate courts with no full resolution of the constitutional challenges raised — and potentially no broad relief from the CTA's requirements — for quite some time. This is true even in light of the expedited briefing on appeal, as an expedited briefing schedule does not necessarily mean the circuit court will rule in an expedited fashion, nor does it dictate how quickly the Supreme Court may act.

And no matter the outcome of this challenge to Congress' authority, it remains to be seen how courts will address other unresolved constitutional arguments raised in the Alabama

litigation against the statute.

### **What Now?**

Entities and individuals affected by the CTA — and not subject to the current injunction as NSBA members as of March 1 — should presume that the CTA will remain broadly applicable in the near term. Newly formed entities should continue to report under the CTA within 90 days of creation, as required.

However, entities that were formed prior to Jan. 1, 2024, may delay required filings under the CTA until Jan. 1, 2025. For those entities, it may be prudent to conduct analysis and gather information in preparation to comply with the CTA, but wait until later in the year to file required reports.

This would allow such entities the benefit of further anticipated guidance from the government addressing ambiguities under the new reporting rules, as well as potential shifts in the reporting landscape as a result of the pending constitutional challenges.

---

*Michael Huston is a partner at Perkins Coie LLP and co-chairs the firm's appeals, issues and strategy practice. He previously served as an assistant in the Office of the Solicitor General in the U.S. Department of Justice.*

*Jamie Schafer is a partner at Perkins Coie. She also co-chairs the American Bar Association's anti-money laundering committee.*

*Aдриanna Simonelli is an associate at Perkins Coie.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*