

# What To Make Of Dueling Corporate Transparency Act Rulings

By **Robert Johnston Jr., Melissa Wiley and Ryan Fennell** (October 16, 2024)

The Corporate Transparency Act, enacted as part of the National Defense Authorization Act for fiscal year 2021,[1] marked a significant development in the regulatory landscape for businesses in the U.S.

Since its adoption, however, the CTA has faced numerous legal challenges, each raising important questions about its constitutional validity and contributing to the increasing uncertainty for millions of businesses required to comply with its reporting mandates.

## Background on the CTA

Enacted as part of a nationwide effort to combat money laundering, terrorist financing and other forms of illicit financial activity, the CTA established a first-of-its-kind beneficial ownership registry for entities conducting business in the U.S.

The CTA has faced various legal challenges across the country since becoming effective on Jan. 1 — including in federal district courts in Maine, Massachusetts, Michigan, Ohio, Texas and Utah — and recent decisions from the U.S. District Court for the Northern District of Alabama[2] and the U.S. District Court for the District of Oregon[3] have raised significant questions about the law's constitutionality and the implications for the millions of businesses subject to its requirements.[4]

An entity is subject to the reporting requirements of the CTA if it is either (1) created through the filing of a document with a secretary of state or similar office under the law of a state or Indian tribe; or, (2) in the case of non-U.S. entities, registered to do business in the U.S. through such a filing. Unless one of the CTA's 23 available exemptions applies, a reporting company must disclose comprehensive information to the U.S. Department of the Treasury's Financial Crimes Enforcement Network, including sensitive, personally identifying information concerning its beneficial owners, officers and control persons.[5]

All nonexempt reporting companies formed before Jan. 1, 2024, must complete and file a FinCEN Beneficial Ownership Information Report by Dec. 31. Conversely, entities formed between Jan. 1, 2024, and Jan. 1, 2025, will have 90 days from their formation to file the report, while those formed after Jan. 1, 2025, will only have 30 days to do so.

Although a Beneficial Ownership Information Report filing is required only once, as opposed to annually, reporting companies must be sure to update their filing within 30 days of either becoming aware or having reason to know that information previously reported is no longer accurate. Failure to comply with these reporting requirements or willfully providing false information may result in civil or criminal penalties, including fines of up to \$10,000 and imprisonment for up to two years.[6]



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## **Constitutional Challenges**

### ***Northern District of Alabama***

On March 1, U.S. District Judge Liles Burke ruled in *National Small Business Association v. U.S. Department of the Treasury* that the CTA was unconstitutional on the grounds that Congress exceeded its powers to regulate interstate commerce, oversee foreign affairs and national security, and impose taxes.[7]

The case was brought by the National Small Business Association, which represents over 65,000 businesses and entrepreneurs located in all 50 states, and Isaac Winkles, an NSBA member and owner of two small businesses, one of which has three employees and an annual turnover of \$20 million.[8]

The NSBA and Winkles argued that the CTA's mandatory beneficial ownership disclosure requirements exceeded Congress' authority under Article I of the U.S. Constitution.

Agreeing, the court ruled that (1) "the CTA is not authorized by Congress' foreign affairs powers, because those powers do not extend to purely internal affairs, especially in an arena traditionally left to the States"[9]; (2) "[t]he plain text of the CTA does not regulate the channels and instrumentalities of commerce"[10]; and (3) the CTA exceeds Congress' taxing power because the act's civil penalties are not a tax and, in the court's view, the relationship between Congress' taxing power and the Treasury Department's access to the CTA's beneficial ownership database for tax administration purposes is not "sufficiently close." [11]

On the other hand, the court implied that a modified CTA could potentially pass constitutional muster, provided that Congress revised the act to (1) only impose disclosure requirements on entities that are actually involved in interstate commerce; [12] (2) include a "jurisdictional hook" identifying its nexus to interstate or foreign commerce; [13] or (3) be limited to use for tax collection purposes, thereby rendering the CTA "necessary and proper" and "rationally related" to Congress' taxing power. [14] Furthermore, as the opinion itself states, there are potential legislative fixes to the constitutional shortcomings that were found by the court.

Although the NSBA decision was ultimately limited to the plaintiffs in that case, its broader precedential value remains uncertain, particularly considering that the U.S. Court of Appeals for the Eleventh Circuit recently heard oral arguments regarding the government's appeal. [15]

### ***District of Oregon***

On Sept. 20, U.S. District Judge Michael H. Simon denied a motion for a preliminary injunction enjoining enforcement of the CTA on the basis that the plaintiffs' claim that the CTA was unconstitutional was unlikely to prevail on the merits. [16]

In *Michael Firestone v. Janet Yellen*, seven individuals challenged the constitutionality of the CTA — both facially and as applied — contending that the CTA exceeds Congress' authority under Article I of the U.S. Constitution and violates the 10th Amendment, as well as violating the plaintiffs' constitutional and civil rights under the First, Fourth, Fifth, and Ninth Amendments. [17]

After addressing each of the plaintiffs' constitutional arguments in turn, the court concluded

that the plaintiffs were unlikely to succeed on the merits, thereby affirming that the CTA is a legitimate exercise of Congress' broad authority to regulate entities involved in interstate and foreign commerce. Furthermore, in reaching its conclusions, the court repeatedly emphasized that the CTA aims to combat money laundering and terrorism financing by requiring transparency in corporate ownership, thereby serving "government interests of the highest order." [18]

Ultimately, the court ruled that the plaintiffs failed to show (1) a likelihood of success on the merits; (2) a likelihood of irreparable injury; and (3) that the balance of hardships tips sharply in their favor — all of which would be necessary for the Firestone plaintiffs to meet their burden for a preliminary injunction in their case, let alone on a nationwide injunction.

## **Conclusion**

The recent rulings in the Firestone and NSBA cases, as well as several anticipated rulings in other pending cases across the country, emphasize a lack of clarity regarding the constitutionality of the CTA and its attendant reporting obligations. Even considering the possibility of an expedited ruling from the Eleventh Circuit in the NSBA case, there is unlikely to be any meaningful resolution of the CTA's constitutionality until the question is addressed by the U.S. Supreme Court.

Considering this uncertainty, coupled with the growing number of states adopting CTA-inspired regulations, nonexempt reporting companies should immediately begin preparing to either complete and file their Beneficial Ownership Information Reports or face the potential consequences and regulatory scrutiny associated with noncompliance.

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[1] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (H.R. 6395), 134 Stat. 338, 116th Cong. 2d Sess. at §§ 6001-6511.

[2] Nat'l Small Bus. United d/b/a Nat'l Small Bus. Ass'n v. Janet Yellen, Case No. 5:22-cv-01448, Dkt. No. 52 (N.D. Ala. Mar. 1, 2024).

[3] Michael Firestone, et al. v. Janet Yellen, Case No. 3:24-cv-1034, Dkt. No. 18 (D. Or. Sept. 20, 2024).

[4] William Boyle v. Janet Yellen, Case No. 2:24-cv-00081 (D. Me. filed Mar. 15, 2024); Black Econ. Council of Mass., Inc. v. Janet Yellen, Case No. 1:24-cv-11411 (D. Mass. filed May 29, 2024); Small Bus. Ass'n of Mich. v. Janet Yellen, Case No. 1:24-cv-00314 (W.D. Mich. filed Mar. 26, 2024); Robert J. Gargas Co. LPA v. Janet Yellen, Case No. 1:23-cv-02468 (N.D. Ohio filed Dec. 29, 2023); Texas Top Cop Shop, Inc. v. Merrick Garland,

Case No. 4:24-cv-00478 (E.D. Tex. filed May 28, 2024); Taylor v. Janet Yellen, Case No. 2:24-cv-00527 (D. Utah filed July 29, 2024).

[5] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (H.R. 6395), 134 Stat. 338, 116th Cong. 2d Sess. at §§ 6001-6511.

[6] Beneficial Ownership Information Reporting Requirements Small Entity Compliance Guide (December 2023 – Version 1.1), available at [www.fincen.gov/sites/default/files/shared/BOI\\_Small\\_Compliance\\_Guide.v1.1-FINAL.pdf](http://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide.v1.1-FINAL.pdf).

[7] See Nat'l Small Business United d/b/a Nat'l Small Business Assoc. v. Janet Yellen, 5:22-cv-01448 (LCB), Dkt. No. 51 (N.D. Ala. Mar. 1, 2024).

[8] See id. at 3-4.

[9] Id. at 25; see also id. at 20 (discussing "the Founders' deliberate choice to leave general incorporation to the States," which "has gone unchanged" since).

[10] Id. at 27; see also id. at 30 (distinguishing the CTA from the Bank Secrecy Act (BSA) because the BSA's requirements are imposed upon banks, not bank customers, and because banks handle money and negotiable instruments that are actually moving in foreign and interstate commerce).

[11] Id. at 50-52.

[12] See id. at 32-33.

[13] See id. at 45-47.

[14] See id. at 49.

[15] See Nat'l Small Bus. United, Case No. 5:22-cv-01448, Dkt. No. 52 at 2 ("The Defendants, along with any other agency or employee acting on behalf of the United States, are PERMANENTLY ENJOINED from enforcing the Corporate Transparency Act against the Plaintiffs."); see National Small Business United v. U.S. Department of the Treasury, Case No. 24-10736 (11th Cir. filed Mar. 11, 2024).

[16] Michael Firestone, et al. v. Janet Yellen, Case No. 3:24-cv-1034, Dkt. No. 18 (D. Or. Sept. 20, 2024).

[17] Notably, the Firestone plaintiffs allege only individual claims, as opposed to a putative class action. See id. at 2.

[18] See Firestone, Case No. 3:24-cv-1034, Dkt. No. 18 at 20 (D. Or. Sept. 20, 2024).