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Client & Friends Alert¹

Corporate Transparency Act (CTA) Halted – At least for Now²

December 13, 2024

On December 3, 2024, in a last minute halt to a stealth law’s creeping deadline (reviled by many small businesses and clueless to many others),³ the United States District Court for the Eastern District of Texas granted a nationwide preliminary injunction against the enforcement of the Corporate Transparency Act (CTA) together with its implementing regulations⁴ and stayed the CTA’s upcoming January 1, 2025 reporting deadline.⁵ The U.S. government has appealed, seeking a stay of the injunction.

Here is our assessment of where things now stand, likely future developments, and some practical implications for affected companies,

I. Why Enjoined?

The Memorandum and Order in *Texas Top Cop Shop, Inc., et. al. v. Garland*, granting the nationwide injunction (written by District Court Judge L. Mazzant) summarizes the Petitioners’

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² We extend our thanks to Alexandra Mamantoff for here assistance in the preparation of this alert, as well as to Ichter Davis, LLC for their review of the appellate procedural steps discussed below.

³ FinCEN had estimated that some 32 – 35 million small business would be subject to the CTA reporting requirements. Thus far, less than one month before the now stayed filing deadlines, it reports that only 6.1 million have complied as of early November.

⁴ 31 U.S.C. § 5336; 31 C.F.R. 1010.380 (“Reporting Rule”)

⁵ *Texas-Top-Cop-Shop-Inc.-et-al.-v.-Garland-et-al.*, Civil Action No. 4:24-CV-478 (U.S. Dist. Ct. E.D. Texas, Sherman Division, December 3, 2024) (“Texas Top Cop”). For a synopsis of the CTA, the Beneficial Ownership Information (BOI) reporting rule, see <https://wstelecomlaw.com/2024/01/corporate-transparency-act-cta-a-synopsis>

complaint as a challenge to a “seemingly benign” attempt at federal regulation of companies registered to do business under state law, requiring them to disclose detailed personal and other information to federal authorities “on pain of severe penalties”.⁶ Judge Mazzant adds that “[f]or good reason, Plaintiffs fear this flanking, quasi-Orwellian statue and implications on our dual system of government.” Following a lengthy constitutional analysis, the Court goes on to hold that the CTA appears “likely unconstitutional” and thus, together with its Reporting Rule, must be enjoined.

Importantly, the District Court did not rule that the CTA is unconstitutional, only that that Petitioners have carried their burden to prove the elements required for injunctive relief.⁷ One of these elements is a likelihood that they will prevail on the merits of their challenge to the CTA and the Reporting Rule: that both the statute and the rule are *likely* unconstitutional. The Court found that they did,⁸ and granted the preliminary injunction. Further, since the CTA and the rule, if upheld, would require an estimated 32.6 million companies registered under state law to comply, the Court determined that the injunction should apply nationwide.

II. So, is the CTA on Hold? Yes – But Perhaps Not for Long.

As expected, on December 5, 2024, the U.S. Department of Justice immediately filed a notice of appeal⁹ and, on the same day, the Financial Crimes Enforcement Network (FinCEN), the agency charged with CTA enforcement, issued a statement that it would comply with the court’s order:

In light of a recent federal court order, 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*. However, reporting companies may continue to voluntarily submit beneficial ownership information reports.¹⁰

On December 11, 2024, the United States Attorney General filed a *Motion to Stay Preliminary Injunction Pending Appeal*. The motion seeks emergency relief and asks the District Court for expedited relief, claiming that they will “seek relief from the Fifth Circuit on Thursday, December 12 or Friday, December 13”. However, the District Court has declined the government’s request and will not rule on the Motion until the Plaintiffs have an opportunity to respond. This response is due on Monday, December 16, 2024.

While many affected small businesses breathe a sigh of understandable relief, it would be premature to think that the CTA enforcement threat is over. As the appeals’ process continues, here are some points Reporting Companies should note.

⁶ Texas Top Cop at 1. (Citations largely omitted)

⁷ Texas Top Cop at 22 (listing required showing of (i) threat of irreparable harm, (ii) substantial likelihood of success on the merits, (iii) balance of harm favoring plaintiffs, and (iv) no harm to public interest).

⁸ The Court found that the Petitioners have met the burden of showing that the CTA is likely unconstitutional on its face (incapable of any valid application) – and thus did not have to reach the issue of whether it is unconstitutional “as applied”. *Id.* at 73.

⁹ Texas Top Cop Shop, Inc., *et al.* v. Garland, *et al.*, No. 24-XXXXX (5th Cir. Dec. 5, 2024)

¹⁰ <https://www.fincen.gov/boi> (emphasis added)

- The suspension of the BOI Reporting obligation and its deadline may be lifted at any time. FinCEN expressly states that the suspension of reporting liability will last only “while the [court’s] order remains in force.”
- In relevant part, the District Court’s order provides that both the statute and its implementing regulation are enjoined, and the January 1, 2025, compliance deadline is stayed under Section 705 of the Administrative Procedures Act pending “further order of the Court.”
- Under APA Section 705, a reviewing court has discretion to postpone the effective date of an [agency action](#) or to preserve the status quo pending judicial review. In other words, that “further order” could come at any time.
- The CTA injunction and reporting deadline postponement could also be lifted at any time by the Fifth Circuit Court or (if the case goes that far) by the U.S. Supreme Court. Here is how.

III. The Appeals Process.

As indicated, the U.S. Attorney General has filed a motion with the District Court to stay its preliminary injunction, arguing that the injunction goes beyond what the plaintiffs had requested. In other words, the government is asking the District Court to second guess itself. As the Petitioners’ response is due December 16, 2024, the District Court will likely rule on the stay of its injunction very soon thereafter.

- o The U.S. Attorney’s motion indicated that if the injunction is not stayed, the government will seek immediate relief from the Fifth Circuit Court of Appeals.
- o The Fifth Circuit will presumably evaluate a request for an emergency stay of the CTA injunction based on the same test used by the District Court (as both are in the same circuit) to impose it.¹¹ Essentially, this would be asking the Fifth Circuit to overturn the lower court’s findings of fact.
- o Absent an emergency stay of the injunction (as requested by the U.S. Attorney General), the Fifth Circuit would issue a briefing schedule, and compile the record (of the District Court’s injunction) on appeal, with oral argument and possible motions by either party. The process could take several months or longer. The Fifth Circuit could affirm, reverse, vacate, or modify the District Court’s preliminary injunction, or remand it back to the District Court for further proceedings.

¹¹ Texas Top Cop at 22. See *Supra* note 7.

- If the Fifth Circuit upholds the injunction, the government may seek further review, either an *en banc* review by the entire Fifth Circuit or by appeal (writ of certiorari) to the U.S. Supreme Court.
- The appeals process would focus on whether the District Court erred in granting the injunction, not necessarily on the merits. Meanwhile, the trial on the merits of *Texas Top Cop* would otherwise continue before the District Court.

IV. Preparing for What Happens Next.

So, what are Reporting Companies that were facing the fast approaching – but now postponed - CTA filing deadline supposed to do? A difficult question as judicial decisions, such as those posited above, are unpredictable. The CTA enforcement may be suspended for as little as week, a few months, years, or forever. If the stay is lifted at some time during the appeals process, the reviewing court or FinCEN may or may not extend the filing deadline (*i.e.*, they may or may not be a grace period). So prudence suggests that affected parties preserve their BOI filing preparation, documentation, and draft reports. In addition to monitoring the appeals process, here are some further considerations.

For starters, the injunction will face high hurdles (and could be modified) as it moves through the courts.

First, the nationwide scope of the injunction means that it would be reviewed with heightened scrutiny given its reach outside of the Fifth Circuit’s delineated territory. A reviewing court could limit the stay to the *Texas Top Cop* Petitioners, consistent with the holding in another case finding the CTA to be unconstitutional but binding only upon the plaintiffs who brought the challenge.¹²

Second, the District Court held that the CTA was unconstitutional on its face and not just “as applied.” The facial constitutional challenge will require a more difficult showing, and, again, a reviewing court could limit the stay’s nationwide scope while reviewing the merits of the remaining constitutional arguments.

Third, on appeal, the arguments for and against the injunction will be a blurry mix of the narrow judicial review of whether the elements supporting it are met with broad public interest arguments against it citing amorphous concerns of national security. How they will be received by the reviewing court(s) for now is unpredictable.

Finally, the new Republican Congress could weigh in on the outcome. The CTA was approved by both Houses of Congress, with much Republican support. Its legislative purpose, combating money laundering and the hiding of ill-gotten proceeds as a matter of national security, is not

¹² **National Small Business United, et al. v. U.S. Department of the Treasury, et al.**, No. 5:22-cv-1448 (N.D. Ala. Mar. 1, 2024), appeal docketed, No. 24-10736 (11th Cir.).

likely to be questioned – only the arguably overreaching authority of FinCEN’s implementation of it is up for debate. In fact, the District Court cited case law to “illustrate how easily Congress could have written the CTA to pass constitutional muster.”¹³ In the long run, a legislative fix is not inconceivable, and preparation now for a “CTA light” filing (*e.g.*, preservation and safekeeping of BOI gathered thus far) may perhaps be a wise choice.

Time will tell. But for now, it is much too early to celebrate the CTA’s demise.

As always, if you have questions or comments, please do not hesitate to contact us.

¹³ Texas Top Cop at 32(citations omitted).