

33rd Annual Tax Symposium

THE CTA DEADLINES ARE HERE: WHAT ARE YOU WAITING FOR?

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I. OVERVIEW

- A. Status of challenges to the CTA and potential outcomes
 - 1. Is there any chance we won't have to file?
 - a. Proposed legislative changes
 - b. Updates to judicial challenges to the CTA
- B. A defunct entity may not have a free pass
 - 1. A defunct entity may not have a free pass
 - a. Elements of the inactive entity exemption
 - b. The meaning of "no assets" under the exemption
 - c. Next steps (or lack thereof) when it is determined that an entity is exempt
- C. Tidbits learned along the way
 - 1. Keys to efficient and secure CTA filings
 - a. Tidbits and CTA best practices for engaging in the filing process
 - b. Unauthorized practice of law in Michigan and other states
 - c. Common CTA troubleshooting issues

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II. CTA REPORTING DEADLINES

A. CTA Reporting Deadlines

1. Deadlines are upcoming, while compliance is lagging behind
 - a. The clock is ticking for companies to come into compliance with the CTA at an alarming speed.
 - b. There are a little more than 6 weeks left for most companies, specifically those companies formed before January 1, 2024.
 - c. There are at least 32 million affected companies and the vast majority have not filed their BOIR, and many are unaware of the CTA.
 - d. The filing rate of Beneficial Ownership Information Reports with FinCEN as of mid-October was approximately 16%.
2. A refresher: CTA deadlines
 - a. Existing domestic or foreign Reporting Companies formed before January 1, 2024: On or before January 1, 2025 (one year after the effective date of the CTA).
 - b. New domestic or foreign Reporting Companies formed during calendar year 2024: Within 90 days after its date of formation (i.e., the filing date of its Articles or Certificate).
 - c. New domestic or foreign Reporting Companies formed on or after January 1, 2025: Within 30 days after its date of formation (i.e., the filing date of its Articles or Certificate).

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III. CHALLENGES TO THE CTA

A. Court Cases Challenging the CTA

1. There are nine (9) different cases pending in the federal court system challenging the constitutionality of the CTA. Not all of the cases are widely reported other than the Alabama case and the Oregon case.
2. While the Texas lawsuit, the Massachusetts lawsuit and the Utah lawsuit seek to challenge the CTA as applied to all non-exempt reporting companies that are required to comply with the law, the other cases only seek to benefit the Plaintiffs in those matters.
 - a. **Alabama:** Complaint Filed November 15, 2022 – *National Small Business United, et al. v. Yellen, et al.*, United States District Court, Northern District of Alabama, Case No. 5:22-cv-01448-LCB; United States Court of Appeals for the Eleventh Circuit, Court of Appeals Docket #: 24-10737
 - i. Plaintiffs have challenged the enforcement of the CTA on constitutional grounds. On March 1, 2024, based on Plaintiffs' motion for summary judgment, the court entered an order declaring the CTA unconstitutional and permanently enjoining Defendants, along with any other agency or employee acting on behalf of the United States, from enforcing the CTA against Plaintiffs. The order only applies to Plaintiffs in the Alabama litigation. FinCEN issued a notice on March 1, 2024, regarding its enforcement of the CTA, stating that Defendants were appealing the ruling and confirming that it would continue to enforce the CTA against any reporting company not covered by the court's order (i.e., any entities other than Plaintiffs).

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- ii. On March 11, 2024, Defendants appealed the ruling to the United States Court of Appeals for the Eleventh Circuit, Docket No. 24-10736, where it is currently pending. On June 3, 2024, the U.S. Department of Treasury filed a reply in the appeal pushing back against efforts to dissolve the CTA. The Treasury Department has faced additional pressure and scrutiny, with more than 20 states filing a joint amicus brief, asserting that the CTA displaces state authority and would economically harm residents. Oral argument was held on each parties' positions on September 27, 2024. The court of appeals decision is still pending.
 - b. **Ohio:** Complaint Filed December 29, 2023 – *Robert J. Gargasz Co. LPA, et al. v. Secretary of Treasury, et al.*, United States District Court, Northern District of Ohio, Case No. 1:23-cv-02468-CEF.
 - i. Plaintiffs have challenged the enforcement of the CTA on constitutional grounds. Upon a motion by Defendants, on April 17, 2024, the court entered an order staying the proceedings pending the outcome of the Eleventh Circuit appeal in the Alabama lawsuit.
 - c. **Maine:** Complaint Filed March 15, 2024 – *William Boyle v. Janet Yellen, et al.*, United States District Court, District of Maine (Portland), Case No. 2:24-cv-00081-SDN.

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- i. Plaintiff objected to being forced to comply with the CTA as an unconstitutional encroachment on the sovereignty of the State of Maine to regulate entity formation. The parties have filed various motions seeking summary judgment against each other and Defendants have also filed a motion to dismiss the case. On October 1, 2024, a motion was filed for oral argument on the various motions.

- d. **Michigan:** Complaint Filed March 26, 2024 – *Small Business Association of Michigan, et al. v. Yellen, et al.*, United States District Court, Western District of Michigan, Case No. 1:24-cv-00314-RJJ-SJB.
 - i. Plaintiffs have challenged the enforcement of the CTA on constitutional grounds. Plaintiffs filed a motion for preliminary injunction seeking to prevent Defendants and any other agency or employee acting on behalf of the United States from enforcing the CTA against Plaintiffs and its members. On April 26, 2024, the court issued an order denying Plaintiffs' motion for preliminary injunction. On May 31, 2024, Plaintiffs filed a motion for summary judgment. On July 8, 2024, Defendants filed their cross motion for summary judgment. Since then, various miscellaneous pleadings have been filed. Defendants filed a notice of supplemental authority on October 3, 2024.

- e. **Texas:** Complaint Filed May 28, 2024 – *Texas Top Cop Shop, Inc. et al. v. Merrick Garland, et al.*, United States District Court for the Eastern District of Texas, Case No. 4:24-cv-00478-ALM.

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- i. Plaintiffs are challenging the enforcement of the CTA on constitutional grounds and seek (a) an injunction prohibiting Defendants from enforcing the CTA and the Reporting Rule and (b) a declaratory judgment, invalidating the CTA in its entirety and holding unlawful and setting aside the Reporting Rule. The requested relief goes beyond Plaintiffs in the case to all parties that are currently affected by the reporting requirements of the CTA. On June 3, 2024, Plaintiffs filed a Motion for Preliminary Injunction prohibiting Defendants from enforcing the CTA and its implementing regulations pending further proceedings. On June 26, 2024, Defendant's filed a response in opposition to the motion for the preliminary injunction. Since then, various miscellaneous pleadings have been filed and a motion hearing was held on October 9, 2024. The Court's decision is still pending.
- f. **Massachusetts:** Complaint Filed May 29, 2024 – *Black Economic Council of Massachusetts, Inc., et al. v. Janet Yellen, et al.*, United States District Court, District of Massachusetts, Case No. 1:24-cv-11411-PBS.
 - i. Plaintiffs seek to declare the CTA unconstitutional and obtain a permanent injunction, enjoining Defendants and any other agency or employee acting on behalf of Defendants from enforcing any provision of the CTA against any individual or entity. The requested relief goes beyond Plaintiffs in the case to all parties that are currently affected by the reporting requirements of the CTA. There has been no substantive activity on the docket thus far other than a scheduling order which will take this case well into 2025.

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- g. **Oregon:** Complaint Filed June 26, 2024 – *Michael Firestone, et al. v. Janet Yellen, et al.*, United States District Court, District of Oregon, Case No. 3:24-cv-01034-SI.

- i. Plaintiffs seek an action for declaratory relief to declare the CTA unconstitutional as applied to Plaintiffs and other Oregon entities that are subject to the FinCEN reporting requirements. Plaintiffs also seek a permanent injunction, enjoining Defendants and any other agency or employee acting on behalf of the United States from enforcing the CTA against Plaintiffs and other similarly situated Oregon entity. On June 27, 2024, Plaintiffs filed an emergency motion for temporary restraining order and preliminary injunction. On September 20, 2024, the Court entered its opinion and order denying Plaintiffs' motion for preliminary injunction and this decision has been filed by the government in some of the other cases as supplemental authority so the other court's take notice (although it has no precedential value) of the Oregon court's decision.

- h. **Utah:** Complaint Filed July 29, 2024 – *Phillip Taylor, et al. v. Janet Yellen, et al.*, United States District Court, District of Utah, Case No. 2:24-cv-00527-AMA-DBP.

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- i. Plaintiffs seek to declare the CTA unconstitutional and obtain a permanent injunction, enjoining Defendants and any other agency or employee acting on behalf of the United States from enforcing the Act against Plaintiffs or any others similarly situated, and to take any action necessary to remedy constitutional violations that arose from any actual or attempted enforcement of the CTA. The requested relief goes beyond Plaintiffs in the case to all parties that are currently affected by the reporting requirements of the CTA. On July 29, 2024, Plaintiff filed its Motion for Preliminary Injunction. On October 16, 2024, Defendants' filed their Memorandum in Opposition of Plaintiff's Motion.

- i. **Virginia:** Complaint Filed September 10, 2024 – *Community Associations Institute, et al. v. U.S. Department of Treasury, et al.*, United States District Court, Eastern District of Virginia, Case No. 1:24-cv-01597-MSN-LRV.

- i. Plaintiffs seek to declare the CTA unconstitutional as it applies to Plaintiffs, declare that the CTA does not apply to Plaintiffs and obtain a permanent injunction, enjoining Defendants and any other agency or employee acting on behalf of the United States from enforcing the CTA against Plaintiffs and their respective members. On September 10, 2024, Plaintiff filed its Motion for Preliminary Injunction. On October 2, 2024, Defendants' filed their Memorandum in Opposition of Plaintiff's Motion. A hearing was held on October 11, 2024 on Plaintiff's Motion. The Court's decision is still pending.

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B. Bills Introduced Challenging the CTA

1. The rollout of the CTA has generated opposition from some business organizations, members of Congress and others, who see the reporting requirements as onerous and intrusive. Representative Warren Davidson (R-OH) introduced House bill (H.R. 8147) on April 29, 2024 to repeal the CTA known as the “Repealing Big Brother Overreach Act” which was followed by Senator Tommy Tuberville (R-AL) introducing Senate bill (S. 4297) on May 9, 2024 to bootstrap onto Senator Davidson’s bill to repeal the CTA. There has been no legislative action on these bills since their introduction.

C. Bills Introduced to Assist Businesses with the CTA

1. Representative Zachary Nunn (R-IA) introduced House bill (H.R. 7963) on April 11, 2024 known as the “Small Business Red Tape Relief Act of 2024” to enhance education for small businesses on reporting requirements and ensure accountability through quarterly reports submitted to Congress. There has been no legislative action on this bill since its introduction.
2. Despite the cases and legislative efforts, it is business as usual for the United States Department of Treasury and FinCEN as it continues to implement and enforce the CTA for everyone not covered by the Alabama decision or one of the 23 statutory exemptions from reporting. When and where these litigation and legislative matters will land are unpredictable. Meanwhile the clock continues to tick on the deadlines for businesses to make their CTA filings.

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IV. EXEMPTIONS

- A. Exemptions: A refresher
 - 1. Non-exempt reporting companies are required to file BOI reports
 - 2. Commonly used exemptions: large operating company, wholly-owned subsidiary, inactive entity, tax-exempt entity
 - 3. There are 23 total exemptions, most which cover already regulated entities (for example, entities regulated by the SEC).
 - 4. If the entity is otherwise a Reporting Company and no exemption is available, a BOI Report required from the entity.

V. INACTIVE ENTITY EXEMPTION

- A. Elements of the Inactive Entity Exemption
 - 1. An inactivity entity exempt from reporting under the Act is any entity that:
 - a. was in existence on or before January 1, 2020; AND
 - b. is not engaged in active business; AND
 - c. is not owned by a foreign person, whether directly or indirectly, wholly or partially; AND
 - d. has not experienced any change in ownership in the preceding twelve month period; AND
 - e. has not sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve month period; AND

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- f. does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.
- 2. What does it truly mean to be an “inactive” entity?
 - a. An inactive entity must truly not hold **any** assets.
 - i. One place where we have seen companies who may otherwise be “inactive” but are forced into filing is the failure to fully close bank accounts associated with the entity. Even a few dollars leftover in an otherwise unused bank account is an asset held by the company.
 - ii. Along with personal property or cash assets, real property is also an asset that would force an entity into filing. Whether it is a vacant lot or unused building, if the entity holds title to the property, it is an asset.
- 3. What does it mean to not be engaged in active business?
 - a. The effect of dissolving an entity
 - i. Getting rid of a reporting company before the filing deadline won't work.
 - (A) Assuming the entity does not meet all 6 factors of the inactive entity exemption, dissolving the entity in 2024 before the January 1, 2025 deadline will not provide any relief from having to file a BOIR under the CTA.

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- (B) FinCEN provided guidance on this. A company is not required to report its beneficial ownership information to FinCEN if it ceased to exist as a legal entity before January 1, 2024, having fully and irrevocably dissolved. However, if a company continued to exist in any legal capacity after this date, it must comply with BOI reporting requirements, even if it had ceased operations prior to January 1, 2024. Additionally, companies created or registered on or after January 1, 2024, are required to report BOI, even if they dissolve before their initial report is due.
- (C) By “formally and irrevocably dissolving,” FinCEN means “filing dissolution paperwork with its jurisdiction of creation or registration, receiving written confirmation of dissolution, paying related taxes or fees, ceasing to conduct any business, and winding up its affairs (e.g., fully liquidating itself and closing all bank accounts).”
- (D) This is a difficult but harsh reality for many business owners who thought they could avoid reporting requirements by dissolving their company, or by simply letting the company die out, before the first report is filed. For those who thought they would terminate their entity before the first report was filed (before 1/1/25) they will not have avoided the requirement of filing.

- 4. What happens after it is determined that the entity is inactive?
 - a. As with any exception, there is no need to inform FinCEN or make any sort of filing that declares an exemption.

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VI. TIDBITS LEARNED ALONG THE WAY

- A. Tips and rules for efficient and secure filing
 - 1. Information learned during the filing process
 - a. **Single-member LLC's:** Need to file a BOIR unless otherwise exempt. Many single-member LLC's are "disregarded entities" and do not have their own EIN but rather use the sole member's social security number if the sole member is an individual or the sole member's EIN if it is an entity. In this case, there is no need to obtain an EIN for the single-member LLC and the social security number or EIN of the member can be used.
 - b. **FinCEN IDs:** Filing can be made easier, especially for Beneficial Owners who appear in multiple filings, by acquiring FinCEN ID Nos. FinCEN ID Nos. allow Beneficial Owners to be identified solely by a number, without repeating the same information on multiple filings. They take about 10-15 minutes to apply for once the Beneficial Owner has collected the necessary information, and can be applied for at <https://fincenid.fincen.gov/landing>
 - c. **Homeowner's Associations:** As long as the HOA was incorporated at the state level and is not otherwise a 501(c) tax-exempt entity (not just a non-profit entity), it will be required to file a BOIR. Typically, the beneficial owners are all of the members of the Board of Directors of the HOA (and, if applicable, anyone who owns at least 25% of the homes in the association).

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- d. **Drafting Considerations:** Employment agreements should include provisions requiring senior officers who are beneficial owners to timely provide the necessary information needed to file a BOIR and to update such information. Operating agreements, shareholder agreements and partnership agreements should have similar language. In M&A transactions, there should be representations and warranties from the Seller regarding CTA compliance. Last, try to push as many beneficial owners as possible to obtain a FinCEN ID No. as that shifts the burden of updating the beneficial ownership information from the reporting company to the individual.
- e. **Representations and Warranties:** In transactions between businesses, companies may want to include CTA-related representations and warranties in purchase documents. While these may be addressed by general “compliance with laws” representations and warranties, it may be wise to include CTA-specific items.
- f. **Missing beneficial owners and filing:** When in doubt or there is uncertainty on whether a reporting company should file a BOIR under the CTA, it is recommended that you do so. The downside of failing or refusing to file (civil and criminal penalties including costs and/or jail) are far worse than filing. Thus, when in doubt, FILE!
- g. **Trusts:** Generally, trusts are not formed at the state level and, therefore, are not reporting companies and are not required to file a Beneficial Ownership Information Report (BOIR) under the CTA. However, even though a trust is typically not a reporting company, a trust can be a beneficial owner of a reporting company if the trustee owns or controls at least 25% of the ownership interests of a reporting company in its fiduciary capacity as trustee of the trust, or if the trustee has substantial control over a reporting company. Since

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a trust (just like an entity) cannot be a beneficial owner, further analysis is warranted to determine the beneficial owners of the trust as they would be required to report. Trust terms vary from trust to trust and must be reviewed to determine who is to be reported as a beneficial owner (such as trustees and sometimes beneficiaries and others depending on their powers).

- h. **Subsidiary Exemption:** If an exempt entity controls some but not all of the ownership interests of the subsidiary, the subsidiary does not qualify. To qualify, a subsidiary's ownership interests must be 100 percent owned or controlled by an exempt entity.
- i. **Election Results:** The results of the 2024 election may affect the CTA deadlines and implementation.

B. Unauthorized Practice of Law

1. Michigan

- a. The State Bar of Michigan has not provided any insight or guidance, including issuing an advisory opinion, on whether accountants involved with analyzing, preparing and submitting Beneficial Ownership Information Reports under the CTA constitutes the unauthorized practice of law.
- b. Answering very general questions without analysis is probably OK. Preparing a very simple filing that requires virtually no analysis is probably OK. Accountants should speak with their legal advisors and malpractice insurance carriers for advice.

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- c. Maddin Hauser and its attorneys are not providing a legal opinion through this presentation or otherwise. This is just for general information only. An analysis of the unauthorized practice of law is a matter of state law and not federal law and FinCEN has not provided any protection in the CTA for accountants. All FinCEN has said is the BOIR under the CTA can be filed by anyone including attorneys and accountants which is not helpful.
2. Other States
 - a. **Iowa:** On September 9, 2024, the Iowa Supreme Court adopted new rule 37.6 clarifying that it is not the unauthorized practice of law for non-attorneys to assist clients in preparing, filing, or determining whether to file, BOI reports.
 - b. **New Jersey:** The Committee determines a licensed CPA (and, the letter later implies, an Enrolled Agent) may prepare these forms, subject to certain conditions in the state of New Jersey. Given that most filings are likely to be straightforward, the Committee finds that a licensed CPA can engage in this conduct, provided the CPA notifies the client that it may be advisable to consult with a lawyer. The Committee relies on the professionalism of CPAs to ensure that such licensees will recognize when a filing is more complex and it is in the client's interests for a lawyer to be retained in the matter. The Committee emphasizes that CPAs (or EAs) should mention that consulting with an attorney may be advisable. It also notes that CPAs should recognize when a filing becomes complex enough to warrant advising the client to consult an attorney. This requirement goes beyond merely suggesting that legal counsel may be helpful; it mandates that CPAs explicitly advise clients when it is in their best interest to retain counsel.

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- c. **Maryland:** AG opinion that Maryland courts would most likely hold that a CPA may, without violating the prohibition on unauthorized practice of law, provide clients general information about the CTA and the BOIR requirement without tailoring the information to any client's individual situation, or fill out and file a BOIR form using a list of beneficial owners submitted by the client. However, a CPA generally should not answer a BOIR-related question for a client where there is uncertainty as to the answer and resolving that uncertainty would require legal knowledge, skill, and judgment.

C. Troubleshooting

1. **File Sizes:** The BOIR form will only accept files up to a certain size as an attachment when Beneficial Owners are submitting their photo identification. As a result, filers often cannot just use a photo taken on an iPhone. One solution we have found is using screenshot software to turn an HEIC or PDF file into a smaller JPG or PNG.
2. **Old Information:** Often, a filer will say to "just look up the information on the MI SOS website" for the company's address for a filing. However, this information is often out of date. Filers should confirm with their clients about what the correct information is, and should use the **most correct** information, regardless of what is on the MI SOS or other state site.
3. **Passports:** It should be noted when soliciting photo IDs that U.S. Passports do not contain residential address information. While those who submit state-issued photo IDs will usually provide their address to the filer through the driver's licenses, a Beneficial Owner who uses a passport will have to submit their residential address separately.

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D. Post-Filing Obligations

1. **Beneficial Owners:** An initial BOIR should only include beneficial owners at the time of the filing. Reporting companies should notify FinCEN of changes to beneficial owners and related beneficial ownership information through update reports.
2. **Confirmation from Beneficial Owners:** On a regular basis, those responsible for CTA filings should communicate with the Beneficial Owners to confirm that the information listed on the BOIR is current and updated.
3. **FinCEN IDs:** As with reports, Beneficial Owners should update their FinCEN ID information with any changes.