December 9, 2024

Corporate Transparency Act Enjoined

December has started as a rough month for the new federal Corporate Transparency Act (CTA) and those trying to figure out whether and how to comply with it. And it seems unlikely to get better any time soon.

On December 3, the U.S. District Court for the Eastern District of Texas dealt a serious—and disruptive—blow to the CTA when it issued a nationwide preliminary injunction against all enforcement of the CTA and its associated reporting rules barely four weeks before the January 1, 2025 compliance deadline impacting millions of reporting companies.

Three days later, the Department of Justice appealed that order to the Fifth U.S. Circuit Court of Appeals, and later that day, the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) weighed in on its Beneficial Ownership Information Report (BOIR) portal, conceding that "[i]n 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*." (Emphasis added.) The FinCEN post goes on to offer that "reporting companies may continue to voluntarily submit beneficial ownership information reports."

What does this mean for reporting companies?

Despite some initial ambiguity about whether the injunction imposed by the Texas federal court was applicable nationwide and whether it applied to reporting companies formed both pre- and post-January 1, 2024 (the court only specifically referred to the January 1, 2025 deadline for pre-2024 entities), FinCEN itself has acknowledged that the order "(1) enjoins the CTA, including enforcement of that statute and regulations implementing its beneficial ownership information reporting requirements, and, specifically, (2) stays all deadlines to comply with the CTA's reporting requirements."

According to FinCEN, this means that, for the time being, CTA beneficial ownership reporting is not currently required and reporting companies will not be subject to liability for not filing their reports. It cautions, however, that this pause in enforcement applies only "while the preliminary injunction remains in effect." FinCEN also confirmed that despite the injunction, reporting companies may continue to voluntarily submit BOIRs.

What comes next?

This is not the first time the CTA has been invalidated by a federal court. Earlier this year, a U.S. District Court in Alabama found the CTA unconstitutional and enjoined its enforcement, but that court's injunction applied only to the plaintiffs in that specific case. Federal courts in Virginia and Oregon have gone the other way and upheld the CTA.

The Texas federal court issued a preliminary injunction, meaning that it is temporary and pending final disposition. The federal government's pending appeal does not automatically pause or place that order on hold, but it remains possible that the government could seek an emergency stay of the injunction pending appeal. Although it is impossible to know what the outcome of such a request might be, many observers have suggested the CTA might not receive a warm response before the conservative Fifth Circuit. On the other hand, a number of appellate judges, including several members of the Supreme Court, have in recent years been skeptical of nationwide injunctions issued by district courts. If the Fifth Circuit declines to issue a stay, the government could seek a stay from the Supreme Court. If such a stay were to be requested and granted, CTA enforcement and its corresponding filing deadlines could be reinstated during the pendency of the government's appeal.

Meanwhile, the Alabama federal court's earlier decision invalidating the CTA also remains on appeal, before the Eleventh U.S. Circuit Court of Appeals. There is a possibility of the Fifth and Eleventh circuits reaching opposite conclusions about the CTA's constitutionality. Such split decisions in the circuits are often resolved by the Supreme Court. And even in the absence of a circuit split, the Supreme Court frequently grants review in cases where a federal court of appeals strikes down a federal statute. The final word on the CTA's constitutionality may therefore have to wait for an eventual decision on the merits by the nation's highest court.

Layer on to this the impending change of administrations in Washington and the further possibility that under new leadership, the Department of Justice may decline to proceed with appealing decisions against the CTA. Even if the government does proceed with the appeals, legislation has already been introduced in Congress to either delay the effectiveness of the CTA or repeal it entirely.

Uncertainty over the future of the CTA seems to be the only certainty at the moment. Will the government seek and obtain a stay of the Texas federal court's injunction? If the injunction is stayed just before the January 1, 2025 deadline, will reporting companies be granted extra time to file? Will the CTA survive given all the judicial and legislative headwinds it faces? Is any of this going to be finally resolved before January 1? While it is possible, it doesn't seem likely. And finally, if it is not resolved by January 1, there is no certainty as to what the new administration's position will be with regard to all the pending litigation.

What should reporting companies do now?

Reporting companies should begin by understanding that the penalties for noncompliance with the CTA—monetary fines and jail time—are real, and at present, it's impossible to know with certainty whether, when or how they may be enforced in the future in light of the Texas federal court's injunction and FinCEN's related guidance.

While FinCEN has confirmed that CTA filings are not currently required so long as the Texas federal court's injunction remains in place, there is no universally applicable answer for what reporting companies should do with respect to the CTA right now. However, there are options, each with advantages and downsides: (1) cease all CTA-related compliance activities; (2) continue to work toward CTA compliance with the January 1 deadline and all other applicable deadlines; or (3) put any actual BOIR filings on hold but finalize CTA analysis and prepare reports for filing.

The best option for each reporting company will vary depending on a number of factors, including what they have done so far in terms of compliance, their desire for tracking or ignoring CTA developments, their concerns about the information provided to FinCEN and their risk tolerance.

For example:

- If you have not filed a BOIR and never wanted to, the Texas court delivered an early holiday gift. You do not have to comply with the CTA—at least for now. The downside of not taking steps toward CTA compliance is that if the injunction is lifted, you may have only a brief window to comply. This approach also requires that you pay active attention to the continuing CTA saga as it unfolds in the courts and in Congress.
- If you have not filed or prepared any BOIRs, then you could consider following the hybrid approach of preparing for filing but not actually filing pending resolution of the preliminary injunction or CTA actions. By doing so, you will be well positioned for a resumption of mandatory BOIR filings.
- If you have been working on BOIR filings and are ready or nearly ready to file, you might consider filing the BOIRs now. Compliance with the original deadline means avoiding the need to follow the CTA battle and its fallout—whatever happens. The potential downside to this approach is observing update obligations to maintain compliance until the CTA's future is resolved and the uncertainty of what may happen to the filed information if the CTA is ultimately terminated.
- If you have already properly and timely filed a BOIR, you have complied with the CTA, and the outcome of the Texas case or other challenges is less relevant to you. You may, however, still need to decide whether to file any required BOIR updates. If the CTA is eventually struck down or repealed, you should follow what will happen with the information that has already been provided.
- If you are still wondering what the CTA is, see these prior alerts and review the options outlined above again.

If you need advice regarding CTA obligations, please feel free to reach out to your current Day Pitney counsel, and if you do not have one, you can contact a member of the Day Pitney CTA team at **CTA@daypitney.com**.

Authors

R. Scott Beach
Partner

Greenwich, CT | (203) 862-7824

Stamford, CT | (203) 977-7336

rsbeach@daypitney.com

Lane T. Watson
Partner

Hartford, CT | (860) 275-0355

ltwatson@daypitney.com

Amy R. Lonergan
Partner

Boston, MA | (617) 345-4613

alonergan@daypitney.com

B. Dane Dudley

Partner

West Hartford, CT | (860) 313-5752

bddudley@daypitney.com

Darren M. Wallace

Partner

Stamford, CT | (203) 862-7874

Greenwich, CT | (203) 862-7800

dmwallace@daypitney.com