

This long-running blog opens with a new message: It's time to get complying. It has now been nearly ten months since the First of January activation of the Corporate Transparency Act (CTA). After a flurry of guidance issuance and court cases in the springtime, the implementation of the US beneficial owner disclosure regime by the Financial Crimes Enforcement Network (FinCEN), a division of the US Treasury Department, quieted down in the summer months. As the end-of-year deadline for all pre-existing Reporting Companies to disclose their owners nears, affected parties ought to have one eye focused on collecting and preparing the necessary Beneficial Owner Information and the other eye on the constitutional challenges to the CTA percolating their way through the US federal court system. This issue of the CTA Landscape blog duly updates our readers on the state of the more advanced court case. Following that analysis, it shares the string of new FAQs released since the last blog post in May and also introduces two more incoming FinCEN disclosure regimens: one applying to purchases of US real estate and the other to investment advisors. Finally, it will end as it begins, with strong encouragement to any parties with possible CTA reporting obligations to initiate your program pronto, so as to identify and collect the information you need to disclose to the US Treasury Department in a few months' time.

For previous summaries published in [April](#), [August](#), [October](#), [November](#) and [December](#) of 2023 and [March](#) and [May](#) of 2024, please refer to the [MTL CTA Landscape webpage](#).

The Appellate Posture of *NSBU v. Yellen*

On September 29, the Eleventh Circuit Court of Appeals heard oral arguments on the appeal from the federal district court decision out of Alabama invalidating the CTA. In *NSBU v. Yellen*, the Department of Justice (DOJ) appeal from the District Judge's ruling that the CTA was an unconstitutional overreach by the US Congress.

Based on the questions from the bench and the final response briefs submitted by the parties, it appears that the crux of the dispute lies in the type of challenge that the Plaintiffs brought. There are two common types of Constitutionality challenges to statutes: Facial and as-applied. A facial challenge prospectively contests the general constitutionality of a law in all applications. An as-applied challenge to a statute makes no arguments for or against the constitutional validity of the law per se, but contests the application of the law to the specific situations of the Plaintiffs in the case.

In the NSBU case, the Plaintiffs made a facial challenge, alleging that Congress had no jurisdictional authority to legislate such rules against state-registered entities not engaged in a trade, business or any commercial activities. They argued, instead, that by linking the scope of CTA to registration under state law – both a non-commercial and a non-federal activity, Congress was seeking to regulate activities outside the scope of its authority under the Commerce Clause (please see the MTL CTA Landscape blog posts from [March](#) and [May](#) for fuller discussions of this legal claim).

However, as contended by the DOJ, the vast majority of entities set up under state law and thus governed by the CTA are set up for the intent of engaging in and do in fact engage in a trade or business. Under the prevailing standard in the Eleventh Circuit, therefore, a facial challenge based on a few hypothetical outliers should not suffice to void an act of Congress. Further, as the DOJ pointed out, all of the named Plaintiffs in the case engage in a trade or business and the interest group spearheading the case represents small businesses. So, even an as-applied challenge by these particular Plaintiffs would seem set to fail.

The Appellate Court's ruling is scheduled for this year, but that order is unlikely to suspend the deadline of 31 December 2024 for CTA Reporting Companies to disclose their Beneficial Owner Information to FinCEN. Substantively, the tenor of oral arguments suggested that the Appellate Court regards the District Court's chosen standard for a facial challenge as unsuitable and is thus inclining towards remanding the case and instructing the District

Court Judge to try again with the correct standard. Even if the District Court Judge still refuses to budge on outcome, procedurally, that will take time and not be settled until 2025 (and then would be appealed anyway). If in a surprise move, the Court of Appeals were to uphold the lower court's ruling and logic, a petition for certiorari to the US Supreme Court from the DOJ would be a safe bet, In that case, we should not expect any resolution until 2025 at the earliest.

Simultaneous to the NSBU case, groups of Plaintiffs have filed on-going challenges to the CTA in multiple federal lower courts (e.g. Western District of Michigan, Oregon). These efforts are likewise highly unlikely to affect the 31 December deadline.

In short, any in-scope parties that have been waiting on the resolution of the court challenges to the CTA before embarking on their CTA compliance activities (as repeatedly advised by this blog), should abandon that expectation as no longer realistic. Even if ultimately struck down, the law will be in effect through the 31 December disclosure deadline.

FinCEN Releases More CTA Guidance

Along with a toolkit of templates and sample content to facilitate the CTA compliance of smaller businesses, FinCEN released a heap of new FAQs since our last blog post in May. While several of the recent FAQs address general operational topics (like access to BO Information in FAQs A3 and A6, or the reporting of multiple BOs in FAQ B10), many address particular topics, such as the following–

- The reporting obligations for Reporting Companies dissolved before their disclosure deadline (FAQs C15, C15)
- The reporting obligations for non-US Reporting Companies registered to do business in one or more US States (FAQ C17, C19)
- The corporate actions that do or do not trigger the requirement to submit another BOI report (FAQ C18)

- The need for the spouses of beneficial owners to be disclosed as well in “community property” jurisdictions (FAQ D18)
- The criteria for an acceptable form of identification for individuals (FAQs F5, F15)
- The appropriate address for Reporting Companies with no “principal place of business” in the US (FAQ F12)
- The need for US TINs for Reporting Companies that did not previously need one (FAQs F13, G3)
- The application of certain exemptions from reporting (FAQs C10, L10)

FinCEN on the March

While we have all distracted by their beneficial owner disclosure demands per the CTA, FinCEN promulgated two more disclosure regimes, both of which were discussed in a prior CTA Landscape blog [here](#).

Real estate

- On 28 August, FinCEN adopted the final disclosure rule for certain residential real estate sales and transfers.
- The final rule resembles the NPRM of February, adopting many CTA concepts by obliging certain professionals (including lawyers) involved in any designated real estate transaction featuring companies or trusts as the purchaser to disclose the beneficial ownership of those companies or trusts.
- While implicating a broad range of residential property types, most real estate transactions are not subject to the final rule because it is limited to unfinanced transactions. Thus, if the property is paid for with a mortgage or non-collateralized loan issued by a bank or other lending company, the rule would not generally apply.
- The requirement enters into effect on 1 December 2025.

Investment advisors

- Also on 28 August, FinCEN adopted the final rule to extend the scope of “financial institutions” under the Bank Secrecy Act to cover certain investment advisors.
- Not all investment advisors are covered and, crucially, the final rule limited the application to non-US advisors. In general, any SEC-registered advisors and those exempt under some (but not all) registration exemptions would be in-scope.
- However, where the advisor’s principal office and place of business is outside the US, the rules are further tightened to cover only their activities that either–
 - Take place within the US, including through any US agents; or
 - Involve the provision of advisory services to a US Person or to a non-US fund with US Person investors.
- The consequences for in-scope investment advisors entail the establishment of a full-scale anti-money laundering (AML) program to identify and document their customers, along with record-keeping provisions and an obligation to file currency transaction and suspicious activity reports.

This blog ends as it began: It’s time. To any parties with possible CTA reporting obligations, I advise you to initiate your program to identify and collect the information you may need to disclose to the US Treasury Department. The deadline is only two months’ away and no court decision or *deus ex machina* is plausibly likely to eliminate or defer this obligation before then.

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