

Corporate Transparency Act | FAQ

On Tuesday, Nov. 15, 2022, the National Small Business Association filed suit against the U.S. Department of Treasury to stop the harmful Corporate Transparency Act – here’s why.

What is the law being challenged?

The Corporate Transparency Act (CTA), which would create a national registry of owners of small businesses and millions of other entities formed under State laws. This law was passed by Congress in 2021 as part of the National Defense Authorization Act (NDAA).

What does the Corporate Transparency Act do?

The CTA significantly changes the requirements of who is responsible for providing personal information to the federal government ostensibly to combat money laundering. The law requires small businesses to provide information to the federal government, specifically the U.S. Department of Treasury’s financial-intelligence unit--Financial Crimes Enforcement Network (FinCEN), for each "beneficial owner" defined vaguely as any individual with "substantial control" or "applicant" for a corporation or entity formed under State laws.

What is FinCEN’s role under the CTA?

FinCEN has been charged with promulgating the rules to implement the CTA. FinCEN's reporting rules were made public on Sept. 29, 2022, and will go into effect on Jan. 1, 2024.

What are the issues surrounding the CTA for small businesses and nonprofits?

The CTA will create a cumbersome reporting process for small businesses that are rarely equipped with compliance teams or staff attorneys. This was previously handled effectively by the banks, under Customer Due Diligence (CDD) rules, when small businesses opened or maintained their bank accounts.

Who is required to file? Who is a beneficial owner?

Generally, anyone who owns or has a 25 percent or greater interest in a small business with fewer than 20 full-time employees or less than \$ 5 million in gross receipts or sales in the prior tax year (or any entity that is not specifically exempted) or otherwise exercises "substantial control" over the business. This would include a business’s owners and major investors.

What is the difference between owner, beneficial owner and applicant under the CTA?

The regulations refer to owners and applicants. “Owners” or “beneficial owners” refers to the primary business owner AND anyone with 25 percent or more interest in the business. “Applicant” refers to anyone listed on an official State filing to form an entity under State law such as a small business.

When must small businesses submit information under the CTA?

When all new entities are formed or, for existing entities, within two years after the regulations are finalized with updates to reflect any changes "in a timely manner."

How many businesses and nonprofits will have to submit information under the CTA?

More than 32 million existing companies and an additional 5 million newly created companies per year.

What will each small business and nonprofit be required to submit to the federal government?

Small businesses and nonprofits that do not seek or have not yet applied for federal tax-exempt status will be required to submit the full legal name, date of birth, current residential or business address, unique identifying number from a valid U.S. passport, personal identification card, or state driver’s license.

What are the penalties for small businesses and nonprofits that make a mistake in their submissions?

The CTA imposes criminal penalties for for any failure to report the requested personal information of \$500 per day (up to \$10,000) and up to two years in jail.

Where will the information submitted under CTA be kept?

It will be stored in a database (maintained by FinCEN within the Treasury Department—which has already been breached by hackers in the past) that will be accessible by state, local, federal and foreign law enforcement and regulators, in certain cases without any court authorization.

Don't states currently handle most of the incorporation of new small businesses?

Yes, entity formation has been handled by the states for more than two centuries, since the founding of the U.S. The CTA lays the groundwork for a federal takeover of entity formation and self-governance practices.

Is the information from small businesses and nonprofits currently reviewed without the CTA? By whom?

Yes, business owners are already providing substantial ownership information to the federal government. Nearly every business must have a bank account to operate and bank accounts cannot be opened without providing a driver's license, passport and other detailed personal information to a bank counterparty under existing laws and regulations, namely the Customer Due Diligence (“CDD”) rules.

Are the CDD rules better than the CTA rules for ensuring compliance?

Yes, information submitted under the CDD rules is reviewed, vetted, and verified by compliance staff of the bank. There is no review of information submitted under the CTA.

Do the CDD rules prevent access to law enforcement since the CTA's proponents keep mentioning criminal and national security?

No, law enforcement has ready access to CDD information upon request.

If the CDD rules work so well, why did Congress create the CTA?

The largest opponents to the current CDD rules are banks that have to verify the information of their account holders. The CTA merely passes the buck from Wall Street to Main Street small businesses so the banks can save money on compliance costs - pushing those costs on to small businesses.

How does FinCEN determine who is properly reporting?

FinCEN will have no way to discern who is properly reporting and who is not as FinCEN will not perform any quality control over the database. The bottom line is that law-abiding U.S. persons such as the small businesses who are members of the NSBA will struggle to comply, while the predominantly foreign scofflaws who engage in money laundering and terrorism funding will not report at all.

Who is NSBA suing?

NSBA is suing Janet Yellen in her official capacity as the Secretary of the U.S. Department of the Treasury, the Treasury Department and Himamauli Das, the Acting Director of FinCEN, which is charged with carrying out the CTA.

What are the arguments being made in the lawsuit?

The CTA is being challenged in four key respects:

- **Federalism principles:** the federal government is usurping powers over entity formation traditionally belonging to the states, in violation of the 9th and 10th amendments and constitutional principles of federalism.
- **Unreasonable searches and seizures and unconstitutional invasion of privacy:** the requirement to report sensitive, personal information without any suspicion of criminal activity imposed on U.S. citizens under the CTA violates the 4th Amendment’s protection against unreasonable searches and seizures, the 5th Amendment’s protection against compelled self-incrimination, and the right to privacy reserved to people by the 9th Amendment..
- **Vagueness and due process:** The CTA is vague because it requires information about "beneficial owners" and "applicants" that have no plain analogues in existing state entity laws. It is oppressive and creates new terms and definitions made up out of whole cloth which are not normally used in the entity formation process or in corporate or entity governance.

If this is a constitutional question, rather than one implementation, why wait until now to come forward with this case?

- The small business community has been sounding the alarm on these issues for as long as the CTA has been under discussion. Now that FinCEN has published the final rules and the law is going into effect, we have no choice but to act to protect the rights of small businesses owners.
- Isn't there a way to work with Congress/Treasury/FinCEN to address your concerns, rather than seeking to throw the whole law out?
- We believe this is the fastest and best way to relieve small businesses of this unconstitutional law. We share the desire to cut off channels for illegal money laundering and we have strived to be a constructive part of the dialogue on how to do so, however, placing an unfair and unconstitutional burden on small business owners is not the answer.
- A simpler and fairer solution is to use – and, if necessary, expand - the Customer Due Diligence framework that is already on the books. Furthermore, Congress can very easily require that the IRS share with FinCEN the information they are seeking.

CTA: NOT THE WAY

A word from NSBA Board Trustee Cynthia Kay

“When people use the phrase, “Death by 1,000 cuts,” **they’re talking about small business and regulations.** I’ve run my business for 35+ years, and, while I’m still trying to understand exactly how much this new reporting burden will cost, I am quite confident **it will take more time, more money, and will be far more complex than its proponents would have you believe.** In addition to the increased cost my business is facing—at the absolute wrong time—I’m very uneasy with this level of private information being shared: **It never ceases to surprise me the willingness of lawmakers, regulators, and big business to happily hand small-business a raw deal.”**

