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Response to FinCEN Statement On Ongoing CTA Litigation

By Mark R. High and Jon D. Cohen

On December 3, 2024, a federal district court in the Eastern District of Texas issued an order granting a nationwide preliminary injunction against enforcement of the Corporate Transparency Act (CTA). *Texas Top Cop Shop, Inc., et al. v. Garland, et al.*, No. 4:24-cv-00478 (E.D. Tex.). The injunction (1) enjoins enforcement of that statute and the regulations implementing its beneficial ownership information reporting requirements, and, specifically, (2) stays all deadlines to comply with the CTA's reporting requirements. The Department of Justice, on behalf of the Department of the Treasury, filed a Notice of Appeal on December 5, 2024, seeking a lifting of the injunction.

Over the weekend, FinCEN issued a statement in response to these actions. Those of us active in this area were hoping FinCEN would provide some guidance regarding companies' filing obligations as we draw near the deadline filing date for most entities of January 1, 2025. While enforcement of the CTA is blocked for now, what would happen if the stay was lifted on, for example, December 23? With approximately 20 million CTA filings yet to be made, by FinCEN's estimate, it seems unlikely that they could all be filed by January 1. Would FinCEN thus deem all late filers to have violated the CTA, despite enforcement, and thus the filing requirement itself, having been stayed for 20 days? FinCEN's recent statement certainly does not take that possibility off the table. Its statement says, "[r]eporting companies are not currently required to file their beneficial ownership information with FinCEN and will not be subject to liability if they fail to do so *while the preliminary injunction remains in effect.*" (Emphasis added.)

This leaves filers in a no-man's land. File now while the injunction states that filing is not necessary? Or wait for a clear decision, which may come too late for most companies to be able to physically comply? We believe each filing entity needs to decide for itself whether to voluntarily continue to make its filings, ensuring compliance in the event the injunction is lifted, or stand back and risk getting backed into violating the statute. Certainly, there is a middle ground of continuing to prepare to file but not actually submitting the required materials. The further we get into December, however, the more that option necessarily entails risking what could be viewed as an intentional violation of the Act.

It seems like FinCEN could solve this conundrum by providing even a short extension of the filing deadline. FinCEN has already granted a 60-day extension of the filing deadline for newly formed companies affected by this summer's hurricanes. See [here](#), for example. This would certainly assist the companies seeking to comply in good faith, but also provide clarity to the agency and allow it to direct its enforcement resources against bad actors, not mom-and-pop shops caught in a governmental standoff.

FinCEN continues to accept what it is calling "voluntary submissions." In the absence of a specific extension of the filing date, we suggest that companies continue to determine their compliance obligations, collect the information required to comply, and perhaps prepare a draft filing. Whether the company makes its filing during the injunction period is a harder decision; we suggest that it would be a reasonable action in light of the exposure that might result from the

injunction being lifted immediately before or even after the current filing deadline. We remain available to assist our clients in discussing these options and implementing their decisions.

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