Why the Corporate Transparency Act Is Unconstitutional and Must Be Overturned

Before January 1, 2025, nearly every small business entity in the United States, whether a partnership, LLC, or corporation, will need to file a report with the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) disclosing its "beneficial owners." That is, of course, unless the courts enjoin this violation of citizens' constitutional rights. While at first blush this reporting requirement seems like just one more bureaucratic hassle, the true implications of this requirement are alarming. Something needs to be done to stop it.

The Center for Individual Rights (CIR) is a nonpartisan, nonprofit public interest legal firm dedicated to vindicating American's individual rights against government abuse. Our legal services are always free of charge (with the support of generous private donations). CIR has prevailed in many high-level legal challenges over its 35-year history, including in five of seven cases it has argued in the Supreme Court of the United States on behalf of its clients. To help explain why CIR will be pursuing a legal challenge to the Corporate Transparency Act, we have produced this guide, and we kindly seek confidential submissions from those who are concerned about the Act and who might wish to be represented in a challenge to it.

What is the Corporate Transparency Act?

At the tail end of 2020, when basically everyone in this country was preoccupied with the chaos surrounding Covid, Congress passed the Corporate Transparency Act as an amendment to more important legislation Supposedly to deter money laundering through the use of anonymous companies (but also following the admission of its chief sponsor that it was intended to regulate political and policy advocacy he didn't like), the CTA mandated any "reporting company," file its "beneficial ownership information" with FinCEN.

What entities need to file reports?

A "reporting company" is defined as "a corporation, limited liability company, or other similar entity that is" "created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe." In the government's own estimation, this applies to "approximately 32.6 million existing [small] companies and 5 million new [] companies," few of which even know about the filing requirement.

The statute also exempts 23 categories of companies, which bizarrely excludes large companies and essentially all businesses involved in finance, such as publicly traded corporations, banks, money services businesses, insurance companies, public corporations, commodities brokers, financial advisors, and even closely-held private corporations employing more than 20 people and generating more than $5,000,000 per year in gross revenue. In other words, the companies most likely to be involved in financial crimes can ignore this law, seemingly because their lobbyists were able to organize quickly and exert sufficient interest during the congressional debate over the Act's passage. Meanwhile, every mom-and-pop business, even those with no assets, and non-

profits who have not been explicitly granted federal tax exemption or have had it revoked for failure to file tax returns, are on the hook.

What needs to be reported to the government?

The information required is both invasive and imprecise—reports must include the names, home addresses, dates of birth and copies of photo IDs of anyone with even informal "control" of the entity. Both pre-existing and newly formed entities are required to identify each "beneficial owner" of the entity, by providing the "full legal name," "date of birth," and current address of every natural person who "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity[.]" 31 U.S.C. § 5336(a)(3), (b)(1). Each beneficial owner must also provide photo identification to FinCEN to prove their identity. 31 U.S.C. § 5336(a)(1). Entities must also update this information regularly if it changes. 31 U.S.C. § 5336(b)(1)(D).

What happens if you mess up?

Failures to file required reports, or errors or omissions in the reports, can lead to federal criminal charges. 31 U.S.C. § 5336(h)(3). The government can also fine you $500 per day that a report is overdue or filed with inaccurate or incomplete information.

Filing accurate reports won't always be easy. Figuring out who actually owns 25% or more of a business is relatively simple. But what about every person who, "indirectly," through an informal "understanding" has "substantial control"? Do family members who give a relative seed money for their business need to be reported as owners because their gift might come with implied conditions? What about employees who oversee the business's operations but don't have an official ownership interest? How about the volunteer board of directors for a small non-profit? With around nine months left to go in the initial compliance window and only about 100,000 of the roughly 38 million required reports having been filed, it is up to each entity to figure out the answers to these questions *fast*.

Why does the federal government want this information?

What is also concerning is what happens to this information. FinCEN is directed to use the reported information to further law enforcement efforts when requested "from a Federal agency engaged in national security, intelligence, or law enforcement activity, for use in furtherance of such activity" or "from a State, local, or Tribal law enforcement agency, if a court of competent jurisdiction, including any officer of such a court, has authorized the law enforcement agency to seek the information in a criminal or civil investigation." 31 U.S.C. § 5336(c)(2)(B). The CTA also delegates to the Secretary of Treasury the discretion to authorize additional disclosures "to financial institutions and regulatory agencies," through additional rulemaking. 31 U.S.C. § 5336(c)(2)(C). In other words, the government will use this information however it wants, but mostly it will be using it to criminally investigate and prosecute business owners.

Isn't corporate secrecy a bad thing?

The Act was explicitly designed to end the anonymous ownership and control of business entities, but that aim is more troubling than might be obvious. There are many good reasons why anonymous business ownership has been a key aspect of American law since our nation's founding. For example, as one academic explained in a recent article, "Anonymous companies were essential to launch the first abortion drug in the United States at a time when no pharmaceutical company was willing to touch it for fear of backlash by anti-abortion activists. Anonymous companies today serve as 'race-neutral' public faces of Black entrepreneurs who conceal their race in order to more equitably compete in a marketplace infected with systemic racism. And anonymous companies are ubiquitous over the internet, enabling survivors of intimate partner violence to become financially self-sufficient entrepreneurs without fear of harassment or stalking."

Anonymous ownership and control of entities is also an important part of political advocacy. There is significant evidence that the CTA was intended, at least in part, to compel disclosures of the identities of political donors. The original version of the Act was introduced in 2017, and its co-sponsor Senator Sheldon Whitehouse was explicit about his goals. In a speech Senator Whitehouse gave on the Senate floor in 2017, he explained that by tracking "the actual owners of companies" law enforcement could stop entities from "funneling money into our elections through faceless shell companies," and allow the government to determine "the identities behind big political spending." Never mind, however, that the U.S. Supreme Court has held that laws mandating disclosures of the identities of political donors impose unconstitutional burdens on donors' association rights under the First Amendment.

What can be done about this?

Fortunately, the Center for Individual Rights is committed to fighting the CTA in court. CIR is a non-profit, non-partisan, public interest law firm dedicated to protecting constitutional rights from government interference. Though we can't represent everyone, we provide free legal representation to selected individuals who are willing to challenge unlawful government action—in order to vindicate their rights and to set broad precedents that protect all Americans.

What are the arguments that the Act is unlawful?

The CTA is likely unconstitutional in three different ways. First, it is an unlawful federal intrusion into state affairs. As one scholar wrote, "Throughout the history of American law, the definition and supervision of business entities has been the task of the states. At the Constitutional Convention, during the Progressive Era, and at the height of the New Deal, the federal government debated whether to enter the corporate area itself and every time declined." That is, of course, until now.

The federal government is supposed to have *limited* power, though, particularly in areas like this where the states have always been in charge. And while Article 1, Section 8, Clause 3 of the Constitution allows federal regulation of "commerce ... among the states," a business entity isn't commerce at all, it is simply a form of control over activities. That's why totally non-commercial groups like Alcoholics Anonymous often form corporations. Plus, while some companies do engage in interstate businesses activities, many others don't at all. Thus, for many companies, the

Act "does not regulate existing commercial activity.". *See NFIB v. Sebelius*, 567 U.S. 519, 552 (2012).

Second, the CTA violates the Fourth Amendment's prohibition on unreasonable searches and seizures. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It further provides that "no Warrants shall issue, but upon probable cause." Based on this constitutional text, the Supreme Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by a judge or a magistrate, are per se unreasonable subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U. S. 332, 338, (2009). Even when the government demands disclosure of confidential information for legitimate purposes apart from criminal investigation, the target of the demand "must be afforded an *opportunity* to have a neutral decisionmaker review" the demand. *City of L.A. v. Patel*, 576 U.S. 409, 421 (2015). Demands must be targeted to individuals—they can't just be blanket requirements for everyone. *Id.*

Because the CTA requires millions of entities to file reports disclosing admittedly confidential information about control over those entities with no individualized suspicion or judicial process it likely violates the Fourth Amendment. This is often information that is not otherwise known by banks or other regulators as it includes information about informal and indirect control of the entity. And it is often highly sensitive information that should be kept secret. Yet the CTA demands its disclosure without any judicial process, on pains of criminal prosecution.

Third, the Act violates the First Amendment. The First Amendment prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Implicit in the First Amendment's protections is the right of anonymous association. *Americans for Prosperity v. Bonta*, 141 S.Ct. 2373, 2382-83 (2021) (plurality op.). Indeed, "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

But the Act was intended to require entities to disclose to the government who controls them. Indeed, it was hailed as a way to figure out who is behind political speech and who associates with certain groups. This means that entities who have very good reasons to protect this information face an impermissible intrusion from the government. Certain non-profits who advocate for policy change, groups like Alcoholics Anonymous that depend on anonymity as a part of their mission, and even companies that hide their ownership to avoid racial discrimination or reprisals from perpetrators of domestic violence are all swept up in the Act's reach.

Is my entity a good candidate to challenge the Corporate Transparency Act?

CIR is preparing a challenge to the Act and wants to hear from entities willing to challenge the law. Not every entity will check every box, but we're looking for clients who make the most compelling case for why the law is unconstitutional. If you own or control an entity that you think might be a good candidate, please let us know.

1. **Entities that must register with FinCEN.** Most business entities must file reports with FinCEN unless they fall under one of 23 exemptions. The bulk of exemptions are for

large businesses or those involved in financial activities. Nonprofits are exempt *only* if they have active tax-exempt status from the IRS, but companies that have applied for tax exemption and are awaiting a ruling and those that have had tax-exempt status revoked for failures to file yearly tax returns are not exempt. For more information see the agency's small entity compliance guide. https://www.fincen.gov/boi/small-entity-compliance-guide.

2. **Wholly local and non-commercial entities.** Nonprofits, or other entities that don't engage in commercial activity, particularly those whose members reside in a single state and that conduct all activities within a single state are best positioned to challenge the federal intrusion into state law. The smaller and less commercial the better.
3. **Entities with compelling reasons for secrecy.** Companies that engage in political advocacy, rely on secrecy for therapeutic, religious, or safety reasons, or any other entities that have a good reason to want to protect the identities of their owners and control persons make the most compelling case that the law violates the First Amendment, and provide the most persuasive reasons why it violates the Fourth Amendment.
4. **Mad as hell and not going to take it anymore.** Any other entity that is willing to fight the federal government and has a good reason for hesitating to file reports with FinCEN.

What do I do if I want to get involved?

Submit a confidential case inquiry to CIR at https://www.cir-usa.org/contact/suggest-a-case/. Be sure to include a description of the entity and why it is concerned about the CTA's reporting requirements. Please provide as much detail as you are comfortable with about your entity and why the CTA's reporting requirements would interfere with your entity's purpose or otherwise violate your rights.