Banking and Finance Law Daily Wrap Up, BANK SECRECY ACT—Small business advocacy group contends Corporate Transparency Act is unconstitutional, (May 14, 2024)

Banking and Finance Law Daily Wrap Up

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By Steven D. Cole, J.D.

The National Small Business Association's brief urges the federal appellate court to affirm the district court's holding that Congress exceeded its legislative authority by mandating certain reporting requirements in the Corporate Transparency Act.

As previously reported, the federal government appealed the decision of a district court in Huntsville, Alabama, which facially invalidated the Corporate Transparency Act (CTA). The court granted summary judgment in favor of the National Small Business Association (NSBA), finding that the CTA's mandate for reporting companies to provide certain identifying information regarding all beneficial owners to the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) exceeded Congress's power to legislate. The government then appealed that decision to the U.S. Court of Appeals for the Eleventh Circuit on April 15, 2024. Since then, at least three *amicus curiae* briefs have been filed in support of the government's argument that the CTA was validly enacted on the bases of the Commerce Clause, congressional authority to levy and collect taxes, and Congress's foreign affairs and national security power (see *Banking and Finance Law Daily*, April 24, 2024). Now, the NSBA has submitted its 78-page brief on May 13, 2024, in support of its contention that the Eleventh Circuit should affirm the district court's holding (*National Small Business United v. U.S. Dept. of the Treasury,* No. 24-10736 (11th Cir.)).

Summary. The NSBA opposes the CTA's requirement that a "corporation, limited liability company, or similar entity" formed under state or tribal law, or in a foreign country, must disclose to FinCEN each beneficial owner's full legal name, date of birth, current address, and a unique identifying number, arguing that the CTA "encroaches upon the sovereign power of the States to charter corporations and other entities under their laws." A "beneficial owner" is defined therein as any individual who owns or controls at least 25 percent of the equity in the entity, or exercises "substantial control" over it. According to the NSBA, "the CTA creates a nationwide Big-Brother-type database, filled with digital mugshots of millions of law-abiding Americans." This congressional attempt to assert a "general federal police power" goes well beyond its legitimate legislative authority and tramples upon citizens' privacy rights, in violation of the United States Constitution.

The NSBA's arguments, as presented in its brief, are summarized below.

Commerce Clause. The Commerce Clause does not justify the CTA's enactment because the CTA facially regulates non-economic, non-commercial activity—*i.e.*, the process of incorporation. Congress can regulate "*de minimis*" intrastate, non-economic or non-commercial activity, but only if doing so is essential to avoid undermining a larger, comprehensive regulatory scheme that clearly and directly regulates interstate commerce. The CTA, however, is a single-subject, enactment-focused legislation, similar to statutes struck down as unconstitutional in *United States v. Lopez* (Gun-Free School Zones Act) and *United States v. Morrison* (Violence against Women Act). Furthermore, Congress cannot justify using its "necessary and proper" powers to regulate state-law entity formation, since this is not within the pre-existing sphere of federal regulation. And even if it were, it would not be proper for Congress to do so because the CTA is disproportionate to the end of fighting financial crimes—beginning Jan. 1, 2025, the CTA will apply to 32.6 million existing entities, and five million new entities each year, costing each between $85 and $2,615, according to FinCEN's estimates.

Taxing Power. The CTA cannot be justified under Congress's power to levy and collect taxes because the CTA authorizes FinCEN to share beneficial owner information with "national security, intelligence, and law-

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enforcement" agencies, not just agents of the Internal Revenue Service. Moreover, the CTA's definition of "beneficial owner" broadly encompasses individuals who have "substantial control" of an entity or exercise "substantial influence" over its "important decisions," even if they are not on the payroll, entitled to profits, and derive no taxable income from their role with the entity. The government is "trying to masquerade the CTA as a U.S. tax-enforcement statute when it is, in fact, a global law-enforcement statute."

Foreign affairs and national security. Although compliance with international standards and catching foreign bad actors may have been key motivations behind it, the CTA clearly regulates entities formed under state and tribal laws. While the distinction between foreign and internal affairs may not always be easy to draw, entity formation is clearly on the internal-affairs side of the ledger, given the centuries-long history of state governmental regulation.

Fourth Amendment. Affirmation of the district court's holding is also appropriate on the alternative ground that the CTA compels unreasonable, suspicionless searches of millions of people, in violation of the Fourth Amendment. The CTA's reporting requirements constitute a "search" of covered entities and their owners, and such searches are unreasonable because beneficial owners or applicants of entities formed under state laws have a reasonable expectation of privacy against having these entities submit their personal information to FinCEN for law-enforcement purposes. None of the exceptions to warrantless searches applies. "The Government cannot use the CTA as a workaround to the Fourth Amendment's warrant requirement to fight financial crimes more efficiently."

Thus, the NSBA has urged the Eleventh Circuit to affirm the federal district court's ruling, either on the ground that Congress exceeded its powers in enacting the CTA or on the alternative ground that the CTA violates the Fourth Amendment. If not, then it should remand the case to the district court for consideration of the remaining claims—*i.e.*, that the CTA violates the First, Fifth, and Ninth Amendments.

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Companies: National Small Business United d/b/a National Small Business Association

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