

May 27, 2025

The Honorable Scott Bessent
Secretary of the Treasury
c/o Financial Crimes Enforcement Network
Policy Division, P.O. Box 39
Vienna, VA 22183

Re: Department of the Treasury Financial Crimes Enforcement Network Notice of Interim Final Rule and Request for Comments Titled "Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension," Docket No. FINCEN-2025-0001, OMB Control No. 1506-0076, and RIN 1506-AB49, 90 Fed. Reg. 13688 (March 26, 2025)

The Manhattan Institute for Policy Research (Manhattan Institute) is a 501(c)(3) nonprofit think tank committed to developing and disseminating new ideas that foster greater economic choice and individual responsibility. C. Jarrett Dieterle, Legal Policy Fellow with the Manhattan Institute, submits these comments in response to the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) notice titled "Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension" that was published in the Federal Register on March 26, 2025.

My name is Jarrett Dieterle, and I am a legal policy fellow with the Manhattan Institute.¹ In this role, I develop and communicate novel, sound ideas on how to improve America's constitutional, legal, and regulatory systems of governance. I have testified before Congress and submitted regulatory comments to federal agencies, as well as provided testimony and input to numerous state legislatures. I have authored many policy briefs, articles in journals including *National Affairs* and the *Georgetown Law Journal*, and short-form commentaries in popular publications such as the *New York Times*, *Wall Street Journal*, *USA Today*, and *Washington Post*.

I support the Interim Final Rule (IFR) put forth by the agency, especially in light of the numerous legal and policy problems inherent in the Corporate Transparency Act (CTA), as well as in the previously-enforced FinCEN Beneficial Ownership Information (BOI) reporting rules.² The following sections provide a fuller analysis of my comments and recommendations.

Background

Passed in the waning weeks of the first Donald J. Trump Administration, the Corporate Transparency Act was tucked into the 2021 National Defense Authorization Act (NDAA), which was eventually enacted into law over a presidential veto. Passed under the auspices of combating money laundering, the act was billed as an effort to crack down on the use of shell companies engaged in illegal or dangerous activity that could harm America. To combat this stated threat, the CTA requires "reporting companies" to

¹ I am submitting this comment letter in my individual capacity. Details regarding my professional affiliation are provided here for convenience and ease of reference only. Charles Yockey, legal policy analyst with the Manhattan Institute, contributed to portions of this letter.

² As previously contained in 31 CFR 1010.380 prior to the issuance of the current IFR.

disclose the identity and information of any “beneficial owner” to the Financial Crimes Enforcement Network (FinCEN) located inside the Treasury Department.³

The CTA defines “reporting company” to include any corporation, limited liability company (LLC), or other entity that was “created by the filing of a document with a secretary of state or a similar office under the law of a State” or “formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or similar office.”⁴ While this definition is simple enough, the CTA goes on to rattle off 23 different exemptions to what constitutes a “reporting company,” as discussed in greater detail below.⁵

If the “reporting company” criteria are met, then the law requires the disclosure of identities and information regarding any “beneficial owner” of the company, which it in turn defines as “an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise” exercises “substantial control over the entity” or “owns or controls not less than 25 percent of the ownership interests of the entity.”⁶ While the CTA lists a handful of limited exceptions as to who can qualify as a beneficial owner—such as exemptions for minor children or individuals acting solely as employees of the entity—the statute itself is otherwise silent as to how terms like “understanding,” “relationship,” or “otherwise” should be defined in the beneficial ownership analysis.⁷

FinCEN attempted to step into this void with several proposed and final rulemakings from 2022 to 2023,⁸ which, among other things, added more specificity to both the “substantial control” prong and the “25 percent ownership interest” prong of the beneficial owner test. (The specificities and complexities of this rulemaking are discussed more extensively below).

Stemming from the CTA meeting with a host of constitutional challenges in the federal court system,⁹ the BOI reporting deadline was extended numerous times.¹⁰ Finally, with the change in Presidential administration in early 2025, the Treasury Department announced on March 2, 2025 that it was

³ C. Jarrett Dieterle, “A FinReg Backtrack Brings Good News for Small Business,” *Discourse* (Apr. 21, 2025) <https://www.discoursemagazine.com/p/a-finreg-backtrack-brings-good-news>.

⁴ 31 U.S.C. § 5336(a)(11).

⁵ 31 U.S.C. § 5336(a)(11)(B).

⁶ 31 U.S.C. § 5336(a)(3).

⁷ 31 U.S.C. § 5336(a)(3)(B).

⁸ See generally Davis Polk, “FinCEN releases proposed rule on access to beneficial ownership registry” (Dec. 21, 2022) <https://www.davispolk.com/insights/client-update/fincen-releases-proposed-rule-access-beneficial-ownership-registry>; Davis Polk, “FinCEN releases Final Rule on access to beneficial ownership information” (Dec. 28, 2023) <https://www.davispolk.com/insights/client-update/fincen-releases-final-rule-access-beneficial-ownership-information>.

⁹ W Sarah, “The Corporate Transparency Act and Its Legal Challenges: A Detailed Examination,” *Venture Vault* (Dec. 27, 2024) <https://venture-vault.com/2024/12/27/the-corporate-transparency-act-and-its-legal-challenges-a-detailed-examination/>; John J. Park, “Is the Corporate Transparency Act Unconstitutional?: Government Appeals a District Court Ruling That Said ‘Yes,’ With More Challenges In Progress,” *The Federalist Society* (Sep. 13, 2024) <https://fedsoc.org/commentary/fedsoc-blog/is-the-corporate-transparency-act-unconstitutional-government-appeals-a-district-court-ruling-that-said-yes-with-more-challenges-in-progress>.

¹⁰ Mauren Leddy, “FinCEN Says It Won’t Enforce Corporate Transparency Act Deadline,” *Thompson Reuters* (Mar. 3, 2025) <https://tax.thomsonreuters.com/news/fincen-says-it-wont-enforce-corporate-transparency-act-deadline/>; Baker Hostetler, “FinCEN To Suspend CTA Enforcement, Extend BOI Reporting Deadlines” (Feb. 28, 2025) <https://www.bakerlaw.com/insights/fincen-to-suspend-cta-enforcement-extend-boi-reporting-deadlines/>.

suspending enforcement of the CTA against U.S. persons and domestic reporting companies.¹¹ This was followed by the promulgation of the current IFR on March 25, 2025,¹² which solidified and formalized the agency’s prior non-enforcement announcement. This brings us up to today.

Analysis

In many ways, the original iteration of the CTA—and its 2023 final implementing regulations—could be described as a series of rules that few knew existed and that even fewer understood. From the constitutional arena to the statutory and regulatory realm, the CTA’s short life has mostly been mired in turmoil.

1. Widespread evidence of a lack of knowledge about the BOI reporting requirements and the administrative burden on small businesses

In the lead up to the CTA taking effect, news stories abounded of widespread ignorance about the law’s existence among broad swaths of the business community.

Data from the National Federation of Independent Business suggested that over 80% of small business owners did not even know of the beneficial ownership interest (BOI) reporting requirement under the CTA, while a mere 2% were “very familiar” with the requirement.¹³ Although broader surveys of the business community reported a higher rate of knowledge on the surface, the fine print still suggested an extensive lack of knowledge. For instance, one survey found that over 90% of businesses reported being aware of the CTA, but only 45% were aware of its reporting requirements—the heart of the law—at that juncture and only 39% were aware of the reporting deadlines.¹⁴

These surveys were corroborated by that fact that, as of November 8, 2024—with less than two months until the then-January 1, 2025 deadline—a mere 20% of the businesses subject to the CTA’s requirements had filed BOI reports.¹⁵

This is likely due to the law’s focus on small- and medium-sized businesses. Whereas many laws carry small business exemptions in recognition of the limited administrative capacities of these entities, the CTA contains a big business exemption: Its broadest exemption limits its application to businesses under 20 employees and less than \$5 million in gross receipts.¹⁶

¹¹ U.S. Dept. of the Treasury, Press Release, “Treasury Department Announces Suspension of Enforcement of Corporate Transparency Act Against U.S. Citizens and Domestic Reporting Companies” (Mar. 2, 2025) <https://home.treasury.gov/news/press-releases/sb0038>.

¹² U.S. Dept. of the Treasury, Immediate Release, “FinCEN Removes Beneficial Ownership Reporting Requirements for U.S. Companies and U.S. Persons, Sets New Deadlines for Foreign Companies” (Mar. 21, 2025) <https://www.fincen.gov/news/news-releases/fincen-removes-beneficial-ownership-reporting-requirements-us-companies-and-us>.

¹³ NFIB Research Center, Financing Sales Survey (Dec. 2023) <https://strgnfibcom.blob.core.windows.net/nfibcom/Financing-Sales-Survey.pdf>.

¹⁴ CSC, “Majority of U.S. Businesses Concerned About Corporate Transparency Act Compliance” (Aug. 13, 2024) <https://www.cscglobal.com/service/press/majority-of-us-businesses-concerned-about-cta-compliance/>.

¹⁵ Martha Waggoner, “BOI update: 6.5 million of 32 million reports filed so far,” *Journal of Accountancy* <https://www.journalofaccountancy.com/news/2024/nov/boi-update-6-5-million-of-32-million-reports-filed-so-far/>

¹⁶ 31 U.S.C. § 5336(a)(11)(B)(xxi).

Although the ostensible rationale for this big business carve out is that most large businesses are already subject to a host of other regulations and reporting requirements under federal law, the end result is that the CTA primarily targets America’s Mom-and-Pop shops.

Overnight, millions of single- or multi-member LLCs—but not partnerships or sole proprietorships—found themselves within the law’s ambit. Many, if not most, of these businesses lack in-house counsel or formal accounting departments, let alone employees tasked with monitoring the latest developments on the FinCEN regulatory docket. (In fact, it’s unclear how many are even familiar with FinCEN, given that it’s a niche department of several hundred staffers tucked inside the 100,000-plus Treasury Department workforce, which itself is situated within the 3-million-plus federal government workforce).¹⁷

To better understand the disconnect between Washington, D.C. and the on-the-ground reality of how many American small businesses operate, an example is illustrative. In recent decades, more and more American farmers have started to organize their businesses as LLCs.¹⁸ This structure can be particularly handy for farms that run multiple lines of business and seek to provide a liability shield for each.

As I have written elsewhere:

For instance, [farms] often have one LLC for their free-range egg business, another for their raw honey business, a third for their traditional crop fields and perhaps a fourth for the springtime maple syrup run—all of which would be subject to BOI filing requirements.¹⁹

Importantly, the farmers operating these businesses are not telecommuters sitting behind a computer screen all day doing compliance paperwork, but are “out in the fields, operating the machinery, repairing what is broken, and ensuring production doesn’t come to a standstill.”²⁰ Most farm LLCs subject to the CTA are not large agri-businesses either, both on account of the law’s aforementioned big business exemption and the fact that family farms account for over 97% of all American farms.²¹

According to the Farm Bureau, over 230,000 American farms are state-registered businesses, meaning they would fall within the reporting requirements of the CTA.²² Once again, it’s clear that the vast

¹⁷ Drew DeSilver, “What the data says about federal workers,” (Jan. 7, 2025) <https://www.pewresearch.org/short-reads/2025/01/07/what-the-data-says-about-federal-workers/>; U.S. Equal Employment Opportunity Commission, Federal Sector Reports: Department of the Treasury (TREAS) <https://www.eeoc.gov/federal-sector/reports/department-treasury-treas>; Financial Crimes Enforcement Network, Frequently Asked Questions, “How is FinCEN organized?” <https://www.fincen.gov/frequently-asked-questions>.

¹⁸ Mike Downey, “Does your farm need an LLC?,” *Farm Progress* (Jul. 19, 2022) <https://www.farmprogress.com/commentary/does-your-farm-need-an-llc->

¹⁹ Dieterle, “A FinReg Backtrack Brings Good News for Small Business,” *Discourse* <https://www.discoursemagazine.com/p/a-finreg-backtrack-brings-good-news>.

²⁰ *FileForms*, BOI Report, “How the Corporate Transparency Act Will Affect Farmers and the Agriculture Sector” (Oct. 15, 2023) <https://fileforms.com/how-the-corporate-transparency-act-will-affect-farmers-and-the-agriculture-sector/>.

²¹ *Food Safety News*, “Data shows most American farms are still family farms,” (Dec. 7, 2016) <https://www.foodsafetynews.com/2016/12/data-shows-most-american-farms-are-still-family-farms/>.

²² Samantha Ayoub, “Corporate Transparency Act Deadline Looming,” *Farm Bureau* (Oct. 18, 2024) <https://www.fb.org/market-intel/corporate-transparency-act-deadline-looming>.

majority of these businesses are unaware of the CTA's BOI requirement, let alone even being aware of FinCEN as a relevant regulatory body that can impact their business. (On the latter point, a search of the largest farm news sites in the United States—including *AgDaily*, *AgWeb*, *DTN/Progressive Farmer*, and *Farm Bureau*—returns only *one* non-CTA-related reference to FinCEN in the combined historical archives of these publications, and that reference was itself from 2024).

The stakes are not small. Failure to comply with the CTA's reporting requirements results in inflation-adjusted civil penalties of over \$600 *per day*, in addition to criminal penalties of up to two years imprisonment and a \$10,000 fine. Given that many farms operate numerous LLCs for their various agri-businesses as discussed, the daily penalties could easily range over several thousand dollars per day.

The evidence of widespread ignorance of the CTA and the BOI reporting requirement would alone be sufficient to counsel agency caution and prudence when it comes to enforcing and implementing the law. But even among those who *are* aware of the CTA, confusion abounds as to exactly whom it applies. To understand why, it necessitates an extended tour through the statutory and regulatory legal thicket.

2. Uncertainty regarding which businesses are subject to the BOI reporting requirements

As noted above, the CTA defines “reporting company” to encompass any corporation, limited liability company (LLC), or other 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 “formed under the law of a foreign country and registered to do business in the United States by the filing of a document with a secretary of state or similar office.”²³

The law contains 23 exemptions to the “reporting company” definition, including exemptions for securities reporting issuers, securities exchanges or clearing agencies, investment advisors, venture capital fund advisors, pooled investment vehicles, and more.²⁴

These various exemptions and the ways in which they interact have raised myriad questions for potentially regulated parties. This can perhaps be best seen in the realm of so-called private funds. The inquiry required to determine whether entities in this space are subject to BOI reporting requirements can get complex quickly. As one law firm analysis summarized:

Considering the limitations of the above [twenty-three] exemptions, there will still be instances in which entities within the private funds space will be subject to beneficial ownership reporting, such as state-registered investment advisers, exempt reporting advisers (who are not venture capital fund advisers), and the private funds which they advise. Any related entities, such as a general partner, may also be subject to beneficial reporting.²⁵

²³ 31 U.S.C. § 5336(a)(11).

²⁴ 31 U.S.C. § 5336(a)(11)(B).

²⁵ Michael W. Wilbe and Shelbie Harvey, “Corporate Transparency Act Considerations for Private Investment Funds,” Thompson Hine LLP (Jul. 9, 2024) <https://www.thompsonhine.com/insights/corporate-transparency-act-considerations-for-private-investment-funds/>.

The *Hedge Fund Journal* put it more drily by simply noting: “every situation will require a bespoke analysis.”²⁶

But even if one is able to navigate this bespoke legal analysis, the most difficult interpretive challenge resides in determining who is a “beneficial owner” subject to the BOI reporting requirement. The CTA defines a “beneficial owner” as “any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise” exercises “substantial control over the entity” or “owns or controls not less than 25 percent of the ownership interests of the entity.”²⁷

In terms of what constitutes “substantial control,” FinCEN’s 2023 Final Rule found the following sufficient to qualify: serving as a senior officer of the reporting company; having authority over the appointment or removal of any senior officer or majority of the board of directors; having the ability to direct, determine, or exert “substantial influence” over “important decisions” made by the reporting company (which could include, among other things, decisions regarding “the nature, scope, and attributes of the business”); or having “any other form of substantial control over the reporting company.”²⁸

The rule went further, stating that, among other things, “[a]n individual may directly or indirectly ... exercise substantial control over a reporting company” via: board representation; majority voting power; control over intermediary entities that themselves exercise substantial control over a reporting company; “[a]rrangements or financial or business relationships, *whether formal or informal*, with other individuals or entities acting as nominees” (emphasis added); or “any other contract, arrangement, understanding, relationship, or otherwise.”²⁹

As mentioned above, both the statute and rule are silent as to how terms like “understanding,” “relationship,” or “otherwise” should be defined in the beneficial ownership analysis. FinCEN’s elucidation of the “25 percent ownership interest” prong proceeds in similar fashion, laying out numerous lists and sub-lists while still declining to directly define terms such as “understanding,” “relationship,” and “otherwise.”

As economic policy scholar David Burton of the Heritage Foundation has noted, FinCEN uses a “substantial influence over important [decisions]” test for determining “substantial control,” and then “layers on top of that a ‘formal or informal arrangement or understanding’ test” that expands the “universe of potential beneficial owners ... still further.”³⁰

This multi-layered penumbras-and-emanations style of regulatory rulemaking provides more questions than it does answers. To consider how this might play out on the ground, consider a pop-up bar that is operating as an LLC in New York City. Under the language of the CTA and the 2023 Final Rule, it would seem feasible to argue that the bar’s liquor supplier could qualify as a “beneficial owner.” For instance,

²⁶ Brian T. Daly, et al., “Akin: The Corporate Transparency Act’s Impact on Private Fund Managers,” *The Hedge Fund Journal* (Jan. 7, 2024) <https://thehedgefundjournal.com/the-corporate-transparency-acts-impact-on-private-fund-managers/>.

²⁷ 31 U.S.C. § 5336(a)(3).

²⁸ 31 CFR § 1010.380(d)(1)(i)(C).

²⁹ 31 CFR § 1010.380(d)(1)(ii).

³⁰ David R. Burton, Comment Letter to FinCEN re: Beneficial Ownership Information Reporting Requirements (Feb. 7, 2022) http://thf_media.s3.amazonaws.com/2022/Regulatory_Comments/FINCEN-2021-0005-0438_attachment_1.pdf.

determining what liquor a pop-up bar can or cannot stock is certainly an “important matter” (involving, as it does, the “nature, scope, and attributes” of the bar) over which the supplier has “substantial control.” And he likewise could be said to “indirectly” exercise “substantial control” through “formal and informal” arrangements or via a “contract, arrangement, understanding, relationship, or otherwise.”

A similar analysis could be made for other folks involved with our pop-up bar, such as the head bartender—who, despite being perhaps safe under the CTA by virtue of “acting solely as an employee” of the business,³¹ could theoretically qualify as a beneficial owner if he owned even 1% of the company (in which case he would no longer be acting “solely” as an employee). The lack of guidance from FinCEN in this area and others is why businesses structured via Employee Stock Ownership Plans have raised particular complexities, as discussed in a compliance bulletin issued by one law firm:

ESOP-owned companies may face significant compliance challenges in identifying and disclosing beneficial ownership information under the CTA. Determining the beneficial owners of the company becomes complex when considering the multiple layers of ownership inherent in ESOP structures. Moreover, ESOP-owned companies may also need to navigate privacy concerns related to disclosing the personal information of employee beneficiaries to FinCEN. Furthermore, filing inaccurate beneficial ownership reports or providing false or misleading information can lead to civil penalties against the individuals or entities responsible for filing the reports, possibly harming ESOP share value and potentially leading to additional liability on ESOP fiduciaries.³²

Our above pop-up bar scenario is not a mere abstraction, either. In fact, ESOPs are gaining traction in the restaurant and brewery industry, underscoring how the CTA’s complexities can have an outsized impact on small and independent businesses.³³

A final area of likely confusion for many business owners is that the CTA’s and 2023 Final Rule’s definition of “substantial control” differs from how ownership has often been traditionally viewed and defined under state incorporation and LLC formation laws.³⁴ Given that incorporation law has traditionally been considered a state law issue under our system of federalism, this final point illuminates yet another concern with the CTA, which we turn to next .

³¹ 31 U.S.C. § 5336(a)(3)B)(iii).

³² Brendan Hobbs and David Ottinger, “Analyzing the Corporate Transparency Act’s Impact on ESOPs,” GrayRobinson Business Law Section (May 6, 2024) <https://www.gray-robinson.com/insights/post/4787/grayrobinson-business-law-section-insight-analyzing-the-corporate-transparency-acts-impact-on-esops>.

³³ Maggie Wise, “Why Some Restaurant Group Owners Should Consider an ESOP Transaction,” Windham Brannon (Jul 2, 2024) <https://windhambrannon.com/blog/restaurant-groups-esop/#:~:text=Advantages%20for%20Group%20Restaurant%20Owners,ESOP%20in%202003%20and%202020>; Aaron Schuette, “Independent Craft Breweries and Employee-Ownership,” *CraftBeer.com* (Jan. 6, 2020) <https://www.craftbeer.com/craft-beer-muses/independent-craft-breweries-employee-ownership>.

³⁴ See., e.g., Walters Kluwer, “Don’t leave your LLC at the mercy of default state law provisions” (Jul. 5, 2022) <https://www.walterskluwer.com/en/expert-insights/dont-leave-your-llc-at-the-mercy-of-default-state-law-provisions#:~:text=In%20most%20states%2C%20the%20default,wish%20it%20to%20be%20managed>; see also Norbert Michel, Treasury And Congress Set To Pass Off New Regulatory Burden On Small Businesses,” *Forbes* (Jan. 27, 2020) <https://www.forbes.com/sites/norbertmichel/2020/01/27/treasury-and-congress-set-to-pass-off-new-regulatory-burden-on-small-businesses/#3e0e5b9f1a07>.

3. The CTA's constitutional infirmities counsel further prudence on behalf of the government

The CTA presents unresolved and serious constitutional concerns that counsel caution as the agency proceeds with its implementation. Although a comprehensive constitutional analysis is beyond the purview of this comment, it is worth noting that a dozen federal courts have pending cases on their dockets arguing that the CTA runs afoul of the United States Constitution.³⁵

Perhaps the most formidable of these arguments arises under the Commerce Clause.³⁶ In *National Small Business United v. Yellen*, a case originating in the Northern District of Alabama, the district court found the CTA unconstitutional for exceeding the scope of power granted to Congress under the Commerce Clause.³⁷ The statute does not mention commerce, channels of commerce, or commercial instrumentalities, and its application is not limited to commercial entities or commercial activity.³⁸ Rather, it applies to any legal entity incorporated under state law unless exempted by statute or rule, regardless of whether that entity engages in any commercial conduct whatsoever.

The government's defense of the CTA, relying on the "substantial effects" doctrine originating in *Wickard v. Filburn*,³⁹ is that Congress may regulate an entire class of intrastate activity if, in the aggregate, that activity has a substantial effect on interstate commerce. However, as the court recognized, this doctrine is not without bounds. The Supreme Court has made clear in cases such as *United States v. Morrison* that regulation must concern economic activity, not simply any conduct that might be indirectly connected to national economic conditions.⁴⁰ In *Morrison*, the Court invalidated the civil remedy provision of the Violence Against Women Act because it regulated noneconomic, violent criminal conduct that lacked a substantial connection to commerce.

Similarly, the CTA imposes a reporting mandate not on commercial activity, but on information involving the owners of a legal entity, despite the fact that incorporation law has traditionally been understood to be

³⁵ *National Small Business United v. Yellen*, No. 5:22-cv-1448-LCB (N.D. Ala.); *Robert J. Gargas Co., L.P.A. et al v. Secretary of the Treasury et al*, 1:23-cv-02468 (N.D. Ohio); *Boyle v. Bessent*, 2:24-cv-00081 (D. Me); *Small Business Association of Michigan et al v. Yellen et al*, 1:24-cv-00314 (W.D. Mich); *Texas Top Cop Shop, Inc., et al v. Pamela Bondi, et al*, 4:24-cv-00478 (E.D. Tex); *Black Economic Council of Massachusetts, Inc. et al v. Yellen et al*, 1:24-cv-11411 (D. Mass); *Firestone et al v. Yellen et al*, 3:24-cv-01034 (D. Or); *Trustees of the Lewis Wharf Condominium Trust v. Yellen et al*, 1:24-cv-11679 (D. Mass); *Taylor et al v. Yellen et al*, 2:24-cv00527 (D.Utah); *Washington et al v. United States Treasury Department*, 6:2024cv01483 (M.D. FL); *Community Associations Institute et al v. U.S. Department of the Treasury et al*, 1:24-cv-01597 (E.D.Va.); *Smith et al v. United States Department of the Treasury et al*, 6:24-cv-00336 (E.D. Tex); *Hotze et al v. United States Department of the Treasury et al*, 2:24-cv-00210 (N.D.Tex); *Midwest Association of Housing Cooperatives v. United States Department of Treasury, Secretary of et al*, 4:24-cv-12949 (E.D. Mich); *Spizzirri Law, LLC et al v. Yellen et al*, 1:25-cv-97 (N.D.Ga). See generally Alan Winston Granwell, "Corporate Transparency Act: Government Appeals Smith Case, Seeks Reporting Rule Reinstatement," Holland & Knight (Feb. 14, 2025) <https://www.hklaw.com/en/insights/publications/2025/02/corporate-transparency-act-government-appeals-smith-case>.

³⁶ Some legal scholars have also argued that the CTA violates the 5th amendment's right against compelled testimony. See, e.g., Cato Institute, Amicus Curiae Brief in *NSBU v. Dept. of Treasury*, Case No. 24-10736 (May 20, 2024) <https://www.cato.org/legal-briefs/national-small-business-united-v-us-department-treasury>.

³⁷ *National Small Business United v. Yellen*, No. 5:22-cv-1448-LCB (N.D. Ala.).

³⁸ For a fuller analysis as to why the commerce clause was traditionally understood to apply to only to interjurisdictional commerce and trade, see Manhattan Institute, Amicus Curiae Brief in *NSBU v. Dept. of Treasury*, Case No. 24-10736 (May 20, 2024) <https://manhattan.institute/article/amicus-brief-national-small-business-united-v-us-dept-of-the-treasury>.

³⁹ *Wickard v. Filburn*, U.S. 111 (1942).

⁴⁰ *United States v. Morrison*, 529 U.S. 598 (2000).

within the province of state law. The history of corporate law in the United States reflects a consistent understanding that the regulation of corporate formation, structure, and internal affairs rests with the states. The Supreme Court has long acknowledged that “corporations are creatures of state law”⁴¹ and that “[n]o principle of corporation law and practice is more firmly established than a State’s authority to regulate domestic corporations.”⁴²

Perhaps the seminal case in this regard is *Santa Fe Industries v. Green*, which involved an issue arising under the Securities Exchange Act of 1934. In *Santa Fe Industries*, the Court made itself clear: “Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.”⁴³

The CTA’s requirement that entities disclose their ownership structure, backed by civil and criminal penalties, is a clear incursion into corporate governance. Yet, there are no express jurisdictional hooks identified by Congress, no commercial trigger, and no limiting principle that ties the CTA’s mandates to Congress’s constitutional powers.

As the court in *NSBU* notes, “the CTA is not a direct regulation of corporate formation ... because the CTA does not establish general federal incorporation or force States to demand beneficial owner and applicant information as a filing requirement for incorporation.”⁴⁴ However, even though the CTA “does not directly interfere with or commandeer State incorporation practices,” it nonetheless still “convert[s] an astonishing amount of traditionally local . . . conduct into a matter for federal enforcement.”⁴⁵

The CTA’s structure reinforces this point. It requires beneficial ownership disclosures from entities simply because they exist, not because they are engaged in commerce or have utilized commercial channels. No threshold of business activity triggers the reporting obligation. There is no requirement that the entity be involved in the flow of goods, services, or capital.

The statute is indifferent to whether the entity is dormant, nonprofit, or established for personal estate planning. This is a significant departure from prior case law, such as the Supreme Court’s *California Bankers Assn. v. Shultz* decision,⁴⁶ which involved the constitutionality of the Bank Secrecy Act. As the court in *NSBU* notes, unlike in *Schultz*, “the CTA regulates most State entities, not just entities that move in commerce.”⁴⁷ Specifically, various reporting and record-keeping requirements were upheld in *Schultz* “largely because they governed negotiable instruments and money actually moving in foreign and interstate commerce,” which is distinct from the CTA’s governance of entities themselves (some of which may not be presently engaged in commerce or are only engaged in intrastate commerce).⁴⁸

⁴¹ *National Small Business United v. Yellen (NSBU)*, No. 5:22-cv-1448-LCB, at 19 (citing *Cort v. Ash*, 422 U.S. 66, 84 (1975) (later abrogated on other grounds)).

⁴² *Id.* (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987))

⁴³ *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977).

⁴⁴ *Id.* at 20.

⁴⁵ *Id.* at 22 (citing *Bond* at 863).

⁴⁶ *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974).

⁴⁷ *NSBU* at 29-30

⁴⁸ *Id.* at 30.

The government has also attempted to ground the CTA in its foreign affairs and national security powers, citing concerns about money laundering, terrorism financing, and international transparency standards. While such concerns are understandable, the court in *NSBU* rightly observed that the act of incorporation is a matter of domestic, not foreign, concern. The Supreme Court's decision in *Bond v. United States*⁴⁹ affirms that even when Congress acts pursuant to a treaty or international understanding, it may not regulate purely local activity that is otherwise beyond its constitutional authority.

While the foreign affairs and natural security powers may provide more convincing support for requiring beneficial ownership information for *foreign* companies registered to do business in the United States—which incidentally mirrors the enforcement distinction made in the current IFR—these powers cannot serve as a catch-all justification for regulating matters unrelated to foreign actors or global commerce.

Absent a clear and constitutionally grounded basis for congressional authority, the federal government should exercise restraint in enforcing new obligations on millions of entities whose existence is traditionally governed by state law. Given the breadth of the potential constitutional infirmities at play with the CTA, prudence dictates that FinCEN avoid layering implementation burdens atop a statute whose validity remains in serious doubt. As such, the current IFR can therefore be seen as not only administratively appropriate but constitutionally responsible.

4. There are more narrowly tailored ways to address money-laundering concerns

The CTA is merely one part of the broader anti-money laundering (AML) legal infrastructure that can be found in the United States federal code. Originating with the Bank Secrecy Act (BSA) of 1970, the current AML regime in the United States has expanded significantly over the years, due to the passage of subsequent laws like the Money Laundering Control Act of 1986 and the USA PATRIOT Act (not to mention the CTA itself), as well as the fact that the BSA's reporting requirements are not inflation-adjusted.⁵⁰

These AML rules have largely persisted without any significant cost-benefit analysis.⁵¹ To the extent such an analysis has been conducted, the evidence points to a costly regime with limited returns. A 2016 study by the Heritage Foundation found that while filings of so-called “suspicious activity reports” with FinCEN have steadily increased over time, as few as 20 percent may involve the sort of big ticket concerns the AML infrastructure was originally meant to address, such as cyber attacks, complex money laundering operations, or terrorist financing.⁵²

⁴⁹ *Bond v. United States*, 564 U.S. 211 (2011).

⁵⁰ Diego Zuluaga, “A War on Crime or on Business?,” Cato Institute (Mar. 21, 2019) <https://www.cato.org/blog/war-crime-or-business>; Norbert Michel and David Burton, *Financial Privacy in a Free Society*, The Heritage Foundation (Sep. 23, 2016) <https://www.heritage.org/markets-and-finance/report/financial-privacy-free-society>.

⁵¹ Michel and Burton, *Financial Privacy in a Free Society*, The Heritage Foundation (2016).

⁵² *Id.*

In terms of actual law enforcement proceedings, the returns may be even more modest. According to the Heritage analysis, when considering the entire financial cost to the federal government of the AML regime, each conviction under the regime would have averaged \$7 million in costs in 2015.⁵³

For its part, the CTA has obviously not existed in an implementable form long enough to conduct any sort of cost-benefit analysis regarding its track record. But it's worth noting that both critics and proponents of the CTA have pointed out the myriad ways in which money-laundering operations could easily evade and fake compliance with the BOI reporting requirements.⁵⁴

Meanwhile, the annual compliance burden of the AML regime—in terms of aggregate governmental and private actor costs—was estimated to be between \$4.8 and \$8 million dollars.⁵⁵ These numbers—now relying on data nearly a decade old—have almost certainly risen substantially since that 2016 analysis. (Of note, that analysis was also conducted *before* the passage of the CTA, which added yet additional compliance costs onto the AML infrastructure).

Given these regulatory burdens of the AML regime—and the CTA's further imposition on small Mom-and-Pop businesses that are generally the furthest thing from anyone's conception of a shady or nefarious operation—a more narrowly-tailored approach should be taken when it comes to seeking beneficial ownership information.

We support FinCEN's exemption of all domestic reporting companies from the BOI requirements. We also note, however, that short of a broad-based domestic reporting company exemption, there are additional ways the CTA's burden could be more narrowly tailored.

As one idea, Norbert Michel and David Burton have pointed out how much of the information sought in the BOI reporting requirements is already gathered on various forms by the Internal Revenue Service during tax season.⁵⁶ As such, the IRS could simply be instructed to create a beneficial owner database that could be shared with FinCEN,⁵⁷ similar to how the IRS shares information with other units of government already.⁵⁸ Doing so would have the added benefit of not increasing the regulatory and compliance burden on private businesses.

⁵³ *Id.*

⁵⁴ Jacob Azrilyant, Shell Game: How the Corporate Transparency Act Aims to End the Illicit Use of Shell Companies, Where It Fails, and What To Do About It, American Bar Association, *Public Contract Law Journal* (Dec. 22, 2021) https://www.americanbar.org/groups/public_contract_law/resources/journal/2021-fall/how-corporate-transparency-act-illicit-use-shell-companies/; David R. Burton, The Corporate Transparency Act and the ILLICIT CASH Act, Heritage Foundation, Backgrounder No. 3449 (Nov. 7, 2019) https://www.heritage.org/sites/default/files/2019-11/BG3449_0.pdf.

⁵⁵ Michel and Burton, Financial Privacy in a Free Society, The Heritage Foundation; Diego Zuluaga, "A War on Crime or on Business?," Cato Institute.

⁵⁶ David R. Burton, The Corporate Transparency Act and the ILLICIT CASH Act, Heritage Foundation; Norbert Michel, "Senators Trying To Add Beneficial Ownership Requirements To Latest National Defense Authorization Act," *Forbes* (Jul. 1, 2020) <https://www.forbes.com/sites/norbertmichel/2020/07/01/senators-trying-to-add-beneficial-ownership-requirements-to-latest-national-defense-authorization-act/>.

⁵⁷ *Id.*

⁵⁸ Internal Revenue Service, IRS information sharing programs, <https://www.irs.gov/government-entities/governmental-liaisons/irs-information-sharing-programs>.

Another idea could be adapting a more “tiered” system of BOI reporting requirements.⁵⁹ Under this idea, certain high-risk enterprises—whether by virtue of the sector in which they do business or the type of transactions in which they are engaged—would face heightened BOI reporting requirements, whereas low-risk entities would enjoy a regulatory light-touch approach (and perhaps even outright exemption). If such an approach were to be considered, FinCEN would need to provide clearer guidance to potentially covered entities than it did in its 2023 Final Rule. Ideas could include “develop[ing] user-friendly online platforms, offer[ing] training programs, or establish[ing] dedicated support channels to help businesses understand and meet their reporting obligations.”⁶⁰

In sum, the CTA is not what stands between America and a vast criminal underworld of rampant black markets and money laundering operations. Not only are there good reasons to have healthy skepticism as to the efficacy of our country’s current AML regime, but the data sought within the BOI requirement itself is already mostly available elsewhere within the federal government.

While the agency appears to be on solid ground with its broad-based domestic reporting company exemption, there are also additional narrowly tailored approaches that could advance the CTA’s anti-money-laundering focus without making businesses suffer under the full weight of the law’s potential compliance costs. Even if some of these ideas would necessitate congressional action in order to come to fruition, their very existence belies the claim that the CTA is the only—or most desirable—way to protect American interests in this realm.

5. The exemption for domestic reporting companies and U.S. persons shows appropriate regulatory prudence

Given the above backdrop and the formidable constitutional, statutory, and regulatory issues with the CTA and its 2023 Final Rule, the agency has struck an appropriate note of prudence and caution in its current IFR. While preventing money-laundering is a noble goal, it is clear that the BOI reporting requirement uses a meat cleaver approach for what could be a scalpel task.

As illustrated in this comment, the CTA’s BOI reporting requirement—at least as implemented by the 2023 Final Rule—created more headaches than it solved. Limiting the CTA’s enforcement to foreign entities allows the act to continue to function in the domain in which money-laundering concerns run highest (and the federal government’s constitutional authority is strongest)—the international arena—while ensuring that American businesses are not unduly burdened.

While some have speculated that the IFR’s broad-based exemption for domestic reporting companies and U.S. persons does so much “violence” to the structure of the CTA that it could be susceptible to legal

⁵⁹ Elias Aidun, Transparency or Loopholes? How the CTA’s Exclusion of U.S. Companies Weakens Its Impact, *University of Cincinnati Law Review Blog* (Apr. 14, 2025) <https://uclawreview.org/2025/04/14/transparency-or-loopholes-how-the-ctas-exclusion-of-u-s-companies-weakens-its-impact/>.

⁶⁰ *Id.*

challenges,⁶¹ we believe the statute’s broad delegation to the agency of the power to create additional exemptions for “any entity or class of entities” puts the IFR on solid legal footing.⁶²

Specifically, the statutory language allows for the creation of such exemptions if the agency deems that requiring BOI reports from a particular entity or class of entities “would not serve the public interest” and “would not be highly useful” in national security and other law enforcement efforts.⁶³

We believe that this type of broad-yet-concrete leeway for the agency—as well as the quintessentially policy-based inquires of what constitutes “the public interest” and what is “highly useful” for law enforcement—will insulate the IFR from the types of legal challenges that are sure to be more likely in the wake of recent Supreme Court decisions like *Loper Bright Enterprises v. Raimondo* and *Corner Post v. Board of Governors of the Federal Reserve System*.⁶⁴



For the reasons laid out here, Treasury and FinCEN should adopt and finalize the current IFR and thus exempt domestic reporting companies and U.S. persons from the CTA’s reporting requirements.

Respectfully submitted,

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⁶¹ Christina Houston, et al., The Corporate Transparency Act: Are Rumors of Its Death Exaggerated?, Business Law Today, American Bar Association (Mar, 17, 2025) https://www.americanbar.org/groups/business_law/resources/business-law-today/2025-march/corporate-transparency-act-are-rumors-of-its-death-exaggerated/.

⁶² 31 U.S.C. § 5336(a)(11)(B)(xxiv).

⁶³ 31 U.S.C. § 5336(a)(11)(B)(xxiv)(I)&(II).

⁶⁴ *Loper Bright Enterprises v. Raimondo*, Supreme Court of the United States, Slip Op. No. 22–451 (Decided June 28, 2024) https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf; *Corner Post v. Board of Governors of the Federal Reserve System*, Supreme Court of the United States, Slip. Op. No. 22–1008 Decided July 1, 2024 https://www.supremecourt.gov/opinions/23pdf/22-1008_1b82.pdf.