CTA Saga Continues – Expected Fifth Circuit Filings Could Foretell Year-End Filing Rush

We recently reported on the nationwide preliminary injunction against enforcement of the Corporate Transparency Act (CTA) and then reported on FinCEN's statement confirming it will "comply with the order issued by the U.S. District Court for the Eastern District of Texas for as long as it remains in effect … [and therefore], reporting 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," but may continue to voluntarily file.

We previously noted that the government has already filed its notice of appeal with the Fifth Circuit Court of Appeals. As expected, on December 13 the government filed an Emergency Motion for Stay Pending Appeal indicating the district court issued a "nationwide injunction that cannot be reconciled with fundamental principles of equity" and "[a]n immediate stay is warranted." The government cited precedent that the U.S. Supreme Court has recognized a strong presumption that "'Acts of Congress … should remain in effect pending a final decision on the merits' by the Supreme Court." And, at a minimum, any injunction should be limited to the plaintiffs in this case, like cases pending in other jurisdictions, e.g., Alabama.

The timing of future developments will be critical. The government requested that the Fifth Circuit rule on its motion as soon as possible, but no later than December 27, 2024, "to ensure that regulated entities can be made aware of their obligation to comply before January 1, 2025." This would mean both sides will file an additional round of briefs in the coming days; the government seems to indicate the parties may agree on this timeframe. We obviously expect the plaintiffs to oppose the government's positions, but it is possible the injunction could be kept in place but limited in scope to only the plaintiffs, which would seem to satisfy their immediate individual goal, perhaps leaving them with little incentive to fight to keep the nationwide injunction in place until a court determines the merits of the constitutional challenge.

We, of course, cannot predict what will happen nor, more importantly, when it will happen, including whether there will be a further appeal to the Supreme Court. However, clearly, there are only a few days left in 2024, so reporting parties might not have a final understanding of year-end filing responsibilities until they are out of the office with their eyes well fixed on ringing in 2025.

We continue to think the most conservative approach is to voluntarily comply with the CTA filing deadline as if this injunction were not in place. This puts a filer in the best position to meet any filing obligation if the injunction is unexpectedly lifted without an extension of the original, but currently enjoined, December 31 deadline. Note that some questions have been raised (that, unfortunately, we cannot answer) as to how components of the Beneficial Ownership Information Access and Safeguards rule separately promulgated by FinCEN and enabled by the CTA is impacted by the Texas district court's ruling that "the CTA, 31 U.S.C. Section 5336, is hereby enjoined."

In light of these circumstances, some reporting parties may choose a "wait and see" approach, but that choice comes with risks because there is no way to know when, or if, the injunction will be lifted and filing requirements reinstated. Therefore, for those making the business decision to wait and see, it is prudent to continue all preparations related to filing in the event the injunction is lifted and no grace period is offered.

We will continue to monitor this and issue alerts as this situation develops. You can follow additional developments from FinCEN here.

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