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## REGISTERED AGENT

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### Waste Not, Want Not:

#### ACHIEVING CORPORATE TRANSPARENCY WITHOUT GOVERNMENTAL OVERREACH

In 1859, the first crude oil well was dug, and that oil was then distilled into kerosene for lighting.<sup>1</sup> The distillation process created a waste byproduct, which we know today as gasoline.<sup>2</sup> Thirty-three years and the invention of the automobile were needed before gasoline was seen as a valuable fuel source.<sup>3</sup> Three decades of waste simply because no one could see the value of this "byproduct." Sadly, the federal government and some state governments are currently making the same mistake. The Corporate Transparency Act ("CTA") went into effect on January 1, 2024, mandating the disclosure of Beneficial Ownership Information ("BOI") by most entities doing business in the U.S. to the Financial Crimes Enforcement Network ("FinCEN").<sup>4</sup> New York recently passed its own version of the CTA targeting New York Limited Liability Companies,<sup>5</sup> while California, Maryland and Massachusetts all introduced but failed to pass corporate transparency legislation.<sup>6</sup> But, is this type of legislation really needed to achieve corporate transparency? Or, do additional reporting requirements and the creation and maintenance of secure reporting databases simply place undue burdens on businesses and taxpayers? Is there a better way to obtain the information corporate transparency legislation is seeking? For decades, registered agents have been collecting much of the information sought in corporate transparency legislation; however, much like gasoline in 1859, few have thought to utilize it.

#### THE FAILURE OF THE CTA:

While the CTA was passed in 2021, it did not go into effect until January 1st of 2024, and the legal challenges to it began almost immediately. The National Small Business Association ("NSBA"), through one of its members, brought suit against the U.S. Treasury, then Secretary

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1 *Gasoline Explained: History of Gasoline*, U.S. Energy Information Administration (Dec. 22, 2023), <https://www.eia.gov/energyexplained/gasoline/history-of-gasoline.php#:~:text=Although%20other%20petroleum%20products%2C%20including,recognized%20as%20a%20valuable%20fuel.>

2 *Id.*

3 *Id.*

4 Beneficial Ownership Information Reporting Requirements, 87 FED. REG. 59,498 (codified as 31 C.F.R. § 1010.380).

5 N.Y. Legis. Assemb. S995B. Reg. Sess. 2022-2024 (2023).

6 See S.B. 1201, 2023-2024 Reg. Sess. (Ca. 2024).; see also H.B. 3566, 193<sup>rd</sup> Gen. Ct. (Ma. 2023).

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Janet Yellen, and then acting Director of FinCEN, Himamauli Das, challenging the constitutionality of the CTA.<sup>7</sup> In March, the U.S. District Court for the Northern District of Alabama ruled that "[t]he Corporate Transparency Act is unconstitutional because it cannot be justified as an exercise of Congress' enumerated powers."<sup>8</sup> Despite this holding, the Court declined to extend its ruling to entities and individuals beyond the members of the NSBA.<sup>9</sup>

Even with this initial setback, the CTA remained enforceable against the vast majority of U.S. entities and their beneficial owners. That changed on December 4th, when the Eastern District of Texas placed an injunction against the CTA's disclosure requirements and enforcement mechanisms.<sup>10</sup> When issuing the injunction, the Court stated that, despite the deference it owed to Congress, "the CTA appears likely unconstitutional."<sup>11</sup> Due to the likelihood of harm any reporting company that submits BOI information to FinCEN would experience, the Court issued the injunction nationally rather than simply limiting it to the named Plaintiffs.<sup>12</sup>

This injunction was briefly lifted by the US Court of Appeals for the Fifth Circuit on December 23rd, but it went back into effect on December 26th when a separate panel from the same court ruled that the stay on the injunction should be vacated "in order to preserve the constitutional status quo while the merits panel considers the parties' weighty substantive arguments."<sup>13</sup>

As of this writing, the fate of the CTA is murky at best. Oral argument on the injunction is set for March 25, 2025, in front of the merits panel of the Fifth Circuit Court of Appeals. However, the government has filed an emergency petition to the Supreme Court in hopes of having the injunction lifted before that date.

While these legal challenges have called into question the constitutionality of the CTA, underwhelming reporting returns have called its efficacy into question. By the end of 2024, FinCEN estimated that approximately 32 million BOI reports would be filed, accounting for the number of existing entities in the U.S. as well as how many would be formed in the calendar year.<sup>14</sup> However, within the first week of November, 2024, FinCEN announced that it had only received 6.5 million BOI reports.<sup>15</sup> After 10 months of reporting, and before the aforementioned Court decisions created marked uncertainty related to reporting requirements, a mere 20% of applicable U.S. entities had submitted their BOI report.

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7 *Nat'l Small Bus. United v. Yellen*, 721 F. Supp. 3d 1260 (N.D. Ala. 2024).

8 *Id.* at 1289.

9 *Id.*

10 *Tex. Top Cop Shop, Inc. v. Garland*, Civil Action 4:24-CV-478 (E.D. Tex. Dec. 17, 2024).

11 *Id.*

12 *Id.*

13 *Tex. Top Cop Shop, Inc. v. Garland*, No. 24-40792, 2024 (5th Cir. Dec. 26, 2024).

14 *Supra* note 4 at 59549.

15 Martha Waggoner, *BOI update: 6.5 million of 32 million reports filed so far*, J. OF ACCOUNTANCY, (Nov. 8, 2024)

<https://www.journalofaccountancy.com/news/2024/nov/boi-update-6-5-million-of-32-million-reports-filed-so-far.html>.

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Regardless of these setbacks, few have called into question the goals of the CTA or other corporate transparency legislation. Even the most scathing judicial opinions recognize that combating financial crimes that target the U.S. economic system and citizens are noble pursuits.<sup>16</sup> So, how can the goals of the CTA be achieved within the boundaries of the Constitution? How can corporate transparency be achieved without unduly burdening businesses and taxpayers?

#### **LEVERAGING REGISTERED AGENTS TO IMPROVE CORPORATE TRANSPARENCY:**

Almost every state mandates that an entity operating within its borders appoint and maintain a registered agent within the state; however, the duties of registered agents are not uniform from state to state. The standard duty of a registered agent is to accept service of process on behalf of, then forward to client entities.<sup>17</sup> However, some states have legislatively expanded the duties of registered agents. In Wyoming, for example, registered agents are required to maintain a verified, individual contact with each client entity as well as details related to the members, officers and decision makers of each client entity.<sup>18</sup> Upon request by the Wyoming Secretary of State, registered agents must turn over any information they possess on any specific client entity.<sup>19</sup> With these increased duties come increased scrutiny. Registered agents that fail to maintain required records or provide them to the Secretary of State in a timely manner are subject to fines or even revocation of registration.<sup>20</sup> If all States placed these same duties on registered agents, as well as the means to enforce compliance, a significant step would be made toward corporate transparency.

Even without a statutory scheme like Wyoming, registered agents have a vested interest in maintaining accurate and reliable client information. Most registered agents not only provide registered agent services, but also business formation and ancillary filing services. Thus, if registered agents are processing entity formations, they are also likely providing their clients with, or have access to, bylaws and operating agreements which typically list the entity's decision makers. If registered agents are filing annual reports or other similar state compliance filings, then they will likely have updated information related to the client entity's decision makers. Further, most businesses that offer recurring services allow for payment accounts to be created, so most registered agents will also have a payment contact and stored payment information for each client entity on record.

If the information collected and stored by registered agents above is not enough, amending registered agent statutes to place greater requirements on record-keeping is much less onerous than legislation as comprehensive as the CTA and its ilk. Many states already mandate that a business maintain a list of shareholders.<sup>21</sup> If this list was required to be

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16 See *supra* note 7 at 1266, referring to the goals of the CTA as "sensible" and "praiseworthy"; see also *supra* note 10 at 5, referring to the goals of the CTA as "admirable."

17 See, e.g., FLA. STAT. § 605.0113(3).

18 WYO. STAT. § 17-28-107.

19 WYO. STAT. § 17-28-108.

20 WYO. STAT. § 17-28-109.

21 See, e.g., GA. CODE § 14-2-1601.

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provided to each entity's registered agent and expanded to include contact information then bolstered by oversight and enforcement mechanisms, such as giving the State's Secretary of State the ability to audit and penalize registered agents for noncompliance, then corporate transparency could be a reality.

Rather than creating myriad new reporting requirements that burden businesses and taxpayers, States could achieve the objectives of the CTA with a fraction of the legislation by simply expanding registered agent duties and oversight.

#### CONCLUSION:

Corporate transparency is a worthy goal; our economic system has long been a safe haven for bad actors, with businesses and taxpayers incurring the costs. Rather than further burdening these groups with confusing reporting requirements and harsh penalties, government should first turn to the already available means of obtaining the information they seek. With registered agents already storing the bulk of this information, it only makes sense to utilize it. If not, this information will simply become a waste byproduct like gasoline in 1859, and millions more will be spent passing, fighting, and complying with unnecessary legislation.

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