

# AZ | CPA

May/June 2024

## The Road to the CPA: CPA Candidates Share Their Story



The Arizona Society of Certified Public Accountants | [www.ascpa.com](http://www.ascpa.com)



## The Corporate Transparency Act & Its Impact on Small Businesses

By Adrian Ochoa

*When Congress enacts laws that impact businesses, it is the small businesses that take the greatest hit due to a lack of resources to learn the intricacies of the rules and pay professionals to help navigate the law. This is generally true even when a law is enacted to combat worthy national, social and economic goals, such as combating money laundering, terrorism and tax fraud.*

*Continued on next page...*

By now you have likely heard of the new Corporate Transparency Act (CTA). In enacting the CTA, Congress mentioned that perpetrators have sought to conceal their ownership of corporations, LLCs or similar entities to facilitate money laundering, financing terrorism, tax fraud and other illegal acts. Thus, Congress thought that federal legislation, which required the collection of beneficial ownership information (BOI), was needed to effectively combat these illegal acts and to protect national interests.

The CTA, which went into effect on January 1, 2024, requires otherwise unregulated companies to report information about “beneficial owners” – those who own at least 25% of or exercise substantial control over the reporting company – to the U.S. Department of the Treasury’s Financial Crimes Enforcement Network (FinCEN). Failure to comply could result in fines of up to \$10,000 and imprisonment for up to two years.

Unfortunately, the vast majority of businesses that must comply with the CTA are small businesses. The CTA expressly exempts the “large operating company.” The law exempts 23 types of businesses, including accounting firms, banks, charitable entities and large operating companies that meet certain requirements. The CTA’s “large operating company” exception must meet three criteria: the number of employees, its operating presence and its gross receipts or sales.

## Compliance Costs for Small Businesses

The CTA’s cost of compliance for small businesses will be high because the law is vastly complicated and failure to comply can trigger serious financial consequences and even imprisonment. According to the Small Business Administration and U.S. Chamber of Commerce, 99.9% of all businesses in America are considered small businesses. Small businesses, in other words, are the backbone of American economic growth – they pay taxes, create jobs

and support local communities. The CTA and other similar federal laws, like the Internal Revenue Code, have a greater negative impact on small business owners than large corporations because they often lack the resources to navigate the intricacies of the requirements. Failure to follow the rules, even by an honest mistake, can have dire financial consequences.

## Contesting Penalties and Procedures

I help taxpayers contest all sorts of penalties assessed by the IRS and FinCEN. Like the Report of Foreign Bank and Financial Accounts (FBAR), CTA is administered by FinCEN. However, unlike FBAR, the IRS has not been given the authority to enforce the CTA. The CTA imposes a penalty of \$500 for every day a reporting company is late, up to a maximum penalty of \$10,000. The penalties are similar for failure to file the FBAR on personal income tax returns. In the case before the U.S. Supreme Court *Bittner v. United States*, the taxpayer had not filed the FBAR on five foreign bank accounts from 2007 through 2011. The Tax Court calculated the fines as totaling \$50,000 – that is one per report, while the IRS calculated the fines as totaling \$2.72 million! As shown in this case, the potential costs for not filing and complying with federal law, even if due to an oversight, can be very high, and federal agencies pursue these penalties with a heavy hand.

Moreover, unlike various other tax matters, in which the taxpayer can take their dispute to Tax Court, Tax Court is not available for FBAR penalties because the FBAR is not a tax form. The IRS began enforcing FBAR penalties back in 2003, but the FBAR is a FinCEN form. Even though the taxpayer does not have an opportunity to go to Tax Court, the taxpayer does have an opportunity to go to the IRS Office of Appeals.

In addition to IRS Appeals, the taxpayer can file in Federal District Court. The question is whether FinCEN will follow similar procedures and

allow business owners to contest and appeal the CTA penalties with the same or similar due process rights as other IRS penalties. Another question is whether FinCEN will impose any penalties during the first year, as the law is still exceedingly fresh, and business owners and professionals are still learning to navigate the law. Arguably, business owners will have reasonable cause to abate the CTA penalties because the law is so new.

## Is the CTA Unconstitutional?

Small businesses have hope that courts will hold that the CTA is too burdensome and unconstitutional. A federal court in Alabama on March 1, 2024, ruled that the CTA is unconstitutional, as challenged by the National Small Business Association. Since the court prevented the FinCEN from enforcing the CTA against the plaintiffs, the court broadly rejects the constitutionality of the statute, rather than a more tailored “as applied” rationale. The Act “exceeds the Constitution’s limits on the legislative branch and lacks a sufficient nexus to any enumerated power to be a necessary or proper means of achieving Congress’ policy goals,” the opinion said. Following the ruling, FinCEN issued a statement clarifying it will only cease enforcement with respect to the specific plaintiffs in the case, rather than with respect to all reporting companies. As of now, the CTA and its BOI reporting requirements remain in effect for all other entities that are required to report BOI to FinCEN under the CTA. Many believe that if it’s unconstitutional for NSBA members, it should be unconstitutional for all businesses.

Finally, as expected, new companies are popping up offering to assist reporting companies with their CTA compliance. It is important and advisable to check with existing advisors to determine if these entities are legitimate and worthwhile. ●

*Adrian Ochoa is of counsel at Burch & Cracchiolo. He is an ASCPA member and serves on the ASCPA’s editorial committee.*