Legal Matters®

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Corporate Transparency Act will impact 32 million small businesses

Effective January 1, 2024, nearly every legal entity incorporated or registered to do business in the United States will be required to report certain ownership information to the federal Financial Crimes Enforcement Network (FinCEN).

The Corporate Transparency Act (CTA) is likely to catch small business owners — most of whom have never had a federal reporting requirement beyond their taxes — by surprise.

The CTA, established under the National Defense Authorization Act of 2021, aims to curb illicit financial activities such as money laundering, terrorist financing, and other fraud. Businesses that fit the criteria of a "reporting company" under the CTA will have one year to comply.

A reporting company is defined as a domestic or foreign corporation, limited liability company, or similar entity that was either formed or registered to do business in any state or jurisdiction. FinCEN estimates that at least 32.6 million organizations will be affected in year one, most of which will be small businesses.

What do you need to report?

Reporting companies must submit a confidential report called a Beneficial Ownership Information Report (BOIR). Required information includes the following:

- The company's legal and trade names
- Current address
- Jurisdiction of formation
- FEIN or taxpayer identification number

The report must also include information on any "beneficial owners" as well as the "company applicant." A beneficial owner is defined as any individual who directly or indirectly exercises substantial control over the business or controls at least a 25% ownership interest. A company applicant is the individual who filed the documents to create the entity.

BOIR will require the following for each:

- Full legal name
- Date of birth
- Current address
- Unique identifying number from an acceptable document (e.g., a passport or driver's license) as well as copies of such document

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MAHDAVI BACON HALFHILL & YOUNG, PLLC

11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@mbhylaw.com | www.mbhylaw.com

Are your sales really sales? False advertising lawsuits on the rise

Buy one get one! This sale ends tonight! Now 65% off!

Are your sales really sales? It's an important question because lawsuits are on the rise challenging the legality of how companies advertise price promotions.

Retailers should take note of what constitutes false advertising and be aware that their websites may be monitored to detect violations.

Furthermore, while class action lawsuits often target big corporations, smaller businesses can still be susceptible to suits brought by competitors or regulators.

Here are some recent lawsuits challenging false sales:

- **Safeway class actions over BOGO offers:** In July, Safeway agreed to a $107 million settlement in Oregon after a lawsuit alleged that the grocery chain's BOGO (buy one, get one free) offers were misleading. The lawsuit alleged that Safeway regularly inflated the prices of items that were on sale, so that the "free" item was not actually free. A similar case has been filed in California.
- **Class action against Old Navy for creating a false sense of urgency:** Washington consumers have filed a proposed class action against Old Navy, alleging that the clothing retailer created a false sense of urgency by advertising limited-time sales and promotions. The lawsuit alleges that Old Navy's sales were not actually time-limited, and that the retailer regularly offered the same discounts.
- **$197 million settlement with Boohoo brands:** UK retailer Boohoo, owner of the PrettyLittleThing and NastyGal websites, agreed to settle a California class action for $197 million. The lawsuit alleged that Boohoo falsely listed items as marked down, even though they were never sold for the original price. (According to California law and the Federal Trade Commission Act, it's illegal to run sales using a fake reference price. The former price needs to be "the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time.")
- **$10 million settlement against SelectBlinds:** In September, SelectBlinds agreed to settle a California class action for $10 million. The lawsuit alleged that SelectBlinds engaged in a number of false advertising practices, including misleading consumers about the original price of its products.
- **JC Penney class action:** A class action has also been filed against JC Penney alleging that the department store engaged in false reference pricing. The company settled a similar lawsuit in 2015.

Warning to businesses

The rise of lawsuits challenging false sales should serve as a warning to businesses, which need to be careful to ensure that their sale advertising is accurate and truthful. If a business is found to have engaged in false advertising, it could face significant financial consequences, including a class action, fines from government agencies, and damage to its reputation.

We welcome your referrals.

We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

SBA loan changes: Easier access to capital for small businesses

In an effort to bolster small businesses across the nation, the Small Business Administration (SBA) has introduced a number of significant changes to its loan programs. These changes are geared toward simplifying the application process and widening the avenues through which small businesses can secure capital.

Several key changes stand out, including:

- **Simplified underwriting for loans under $500,000:** SBA lenders now have the autonomy to use their own credit policies for loans under $500,000, versus following stringent SBA underwriting standards. That gives lenders more flexibility to greenlight loans and can make it easier for small businesses to qualify.
- **More flexible seller financing options:** When buying a business with an SBA loan, buyers need to inject at least 10% equity into the deal. However, a seller note can now qualify as part of the buyer's equity injection. Additionally, the seller note can go off standby after 24 months instead of waiting until the SBA loan has been paid in full. That gives buyers more maneuverability in managing their financial commitments.
- **Eligibility for partial ownership transfers:** Previously, 7(a) loans could only be used for full transfers in ownership. Now, they can also be used for partial ownership changes. The expansion comes as a boon for sellers seeking new business partners, investors, or a phased exit strategy.

In addition to the changes mentioned above, the SBA has made a number of other updates, including expanding the number of non-bank lenders that can offer SBA loans and expanding the Community Advantage SBLC license.

The Community Advantage program is designed to support mission-driven lenders that serve underserved communities. The SBA has expanded the eligibility criteria for the Community Advantage SBLC license, making it easier for these lenders to participate in the SBA loan program. These changes should give small businesses more options for finding a lender that meets their needs.

Overall, the new rules are expected to make it easier for small businesses to get the financing they need to start, grow and succeed.

DOJ announces new M&A safe harbor policy

The Department of Justice (DOJ) has announced a new M&A Safe Harbor Policy to encourage acquiring companies to voluntarily self-disclose criminal misconduct discovered during the M&A process.

The policy provides a presumption of "declination to prosecute" for companies that meet certain requirements, including:

- Promptly and voluntarily disclosing misconduct to the DOJ within six months of closing.
- Cooperating fully with the DOJ's investigation.
- Engaging in timely and appropriate remediation and restitution.

The policy applies to criminal conduct discovered in bona fide, arms-length M&A transactions, and does not apply to misconduct that was otherwise required to be disclosed or that is already publicly known to the DOJ.

The safe harbor policy offers a number of benefits to acquiring companies, including reduced risk of criminal prosecution, greater certainty about the consequences of disclosing misconduct, and reduced risk of successor liability.

The M&A policy follows the DOJ's corporate Voluntary Self-Disclosure Policy, introduced in March. Under that program, companies can avoid, or reduce, criminal penalties and compliance monitoring by coming forward proactively when they discover internal misconduct.

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Note that the "substantial control" stipulation could cast a wide net over who is considered a beneficial owner. This will include senior officers, as well as those with indirect control through joint ownership and individuals who control an intermediary entity. Beneficial ownership will also extend to those individuals represented by a nominee such as a custodian, agent, trustee, etc.

When are reports due?

Reporting companies formed before January 1, 2024, will have a year to submit their BOIR. However, any companies formed on or after that date may have as little as 30 days to file. (A Notice of Proposed Rulemaking has been filed that will likely offer a temporary 90-day extension, but only for those companies formed in 2024.)

Additionally, businesses must keep their beneficial ownership information up-to-date and file an amended report within 30 days of any changes.

Which businesses are exempt?

The CTA identified a number of entities that are exempt from the definition of reporting company:

- SEC-reporting companies
- Regulated financial services companies
- Insurance companies
- Tax-exempt entities
- Inactive entities
- "Large operating companies" with more than 20 fulltime employees and a prior year tax return showing more than $5 million in gross receipts, operating from physical premises in the U.S.

Compliance challenges

The CTA goes into effect on January 1, 2024, so it is important for small businesses to start planning now. That will give them time to identify their beneficial owners, collect the required information, and file the beneficial ownership report.

Some businesses may have questions over who qualifies as a beneficial owner. That can be difficult for businesses with complex ownership structures or multiple layers of ownership. Others may need time to gather acceptable documentation from beneficial owners who live outside the United States.

If you have questions about the CTA and how to comply, consult with your business attorney.

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BACON
HALFHILL &
YOUNG, PLLC
ATTORNEYS AT LAW

11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@mbhylaw.com | www.mbhylaw.com

Businesses warned of Employee Retention Credit scam

Promoters have been targeting businesses with inflated promises over the Employee Retention Credit (ERC), a tax credit designed to help businesses that were negatively impacted by the COVID-19 pandemic.

These so-called "ERC mills" often charge upfront fees for claim preparation and take a commission on any credit the business receives. However, their filings are often inaccurate and ineligible, and businesses may end up owing repayments, penalties, and interest.

What is the IRS doing to protect businesses?

The IRS has placed a temporary moratorium on processing new ERC claims due to the surge of questionable filings. The agency is also working to develop new protections and safeguards to prevent bad claims from being filed.

What should you do if you've already filed?

If you've already applied for the ERC and are unsure as to whether your business legitimately qualified, contact a lawyer right away. They can evaluate your eligibility and, if necessary, help you withdraw your claim or apply for settlement relief.

- **Withdraw your claim:** You can withdraw your amended return that included your ERC claim as long as your claim has not been processed and paid. Make a copy of the adjusted employment tax return(s), write “withdraw” in the lefthand margin, and have an authorized executive print and sign it with their title and the date. Withdrawal requests should be faxed to the IRS’s ERC claim withdrawal fax line at 855-738-7609. If your return is already under audit, work with your examiner to prepare a withdrawal.
- **Wait for the ERC settlement program:** The IRS is also developing a settlement program for businesses that received an ERC tax credit that they now believe to be in error. The program can help businesses to avoid penalties and future compliance actions.

Beware the consequences

Businesses that did not legitimately qualify for the ERC but received funds in error or a fraudulent submission will be required to repay the credit with interest and penalties.

The Department of Justice is prosecuting advisors who repeatedly submit false forms. Enforcement agencies can obtain the name of businesses that filed through an alleged fraudster and may use those client lists to trigger future audits.

If you may be at risk, it is important to take action immediately.