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HIGH FIVE FOR CTA COMPLIANCE: Five Questions Business Owners Should be Asking to Get Ahead of Corporate Transparency Act

BY: ANDREW DOUP

Beginning January 1, 2024, millions of U.S. small businesses will be required to begin reporting information to the federal government about the company, its owners, and the individuals responsible for entity formation. Failure to comply may result in personal liability, including civil penalties ($500/day) and criminal prosecution ($10,000 fine/up to two years jail time).

The Corporate Transparency Act (CTA) is intended to help the Treasury Department's Financial Crimes Enforcement Network (FinCEN) identify bad actors in the U.S. financial system. However, given the onerous prospect of civil liability and criminal prosecution, small business owners can turn a headache into a high-five by consulting with their professional advisors on CTA compliance strategies.

Here are five questions to ask:

1. Is my company exempt from reporting requirements? The CTA specifically targets small businesses, so companies that are tax-exempt, or that otherwise have over 20 full-time U.S.-based employees and report more than $5 million in annual revenue to the IRS, are exempt. The CTA also specifically targets businesses that are not already subject to regulation by a federal agency, so financial institutions, public utilities, and SEC-registered entities are generally exempt. Unless your business is one of the 23 specific exemptions, it must report.

2. Who is a "beneficial owner" of my company? If your company is required to report to FinCEN, then your next step is to identify the persons who own at least 25 percent of the company's ownership interests, or otherwise exercise substantial control over the company. There are five exemptions to beneficial ownership reporting, including for minors, custodians, employees, and creditors.

3. Should my business report the individuals who formed the legal entity? If the company is formed on or after January 1, 2024, then yes. If the company was formed before January 1, 2024, then no. The individuals who formed the legal entity include the individual who made the filing (e.g., business owner, paralegal, etc.) and the individual who directed the filing (e.g., business owner, attorney, accountant, etc.).

4. What gets reported? A report must include legal name, U.S. address, jurisdiction of formation, and taxpayer ID of the company; and legal name, date of birth, current address, and unique government-issued identification number (e.g., U.S. passport or state driver's license) of the beneficial owners and individuals involved with legal formation. Any change or correction to the information reported about a company or its beneficial owners must be filed within 30 days after the date on which the change occurred, or the error was discovered. A company is not required to report a change of information on individuals involved with formation unless such individuals have obtained FinCEN identifiers, in which case the update must be reported within 30 days.

5. When and how should my company file its initial report? Beginning January 1, 2024, businesses must e-file reports with FinCEN. New businesses established from this date have a 30-day window to file their initial report. Meanwhile, businesses set up before this date get a grace period until January 1, 2025.

The CTA represents a generational change in the law for business formation and the clock is ticking for business owners and their advisers to prepare for CTA compliance. This summary is for informational purposes only; for additional information, FinCEN has published a compliance guide for small business owners.

Andrew P. Doup, Esq. serves as outside legal counsel to entrepreneurs and small business owners, advising on asset protection, business organizations, and capital raising strategies. Schedule an introductory call with Andrew at www.syndicationcounsel.com.

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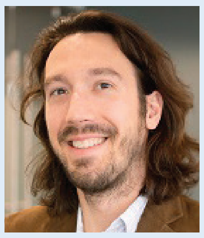
TRADEMARK TUG-OF-WAR: Winning the Battle Against Genericization



BY: ERIC ESTADT

One of the hallmarks of a great brand is to become famous enough to be a household name. However, this can be a double-edged sword. Once your mark becomes famous enough, there is a real risk that the brand just becomes a generic term for any similar type of product. And this could soon be happening with the trademark TACO TUESDAY.

Taco Bell, through its intellectual property (IP) holding entity, has petitioned for the cancellation of the trademark TACO TUESDAY for restaurant services. The mark is concurrently owned by Taco John's and Gregory Hotel, Inc., and has been used by Taco John's since 1979. While Taco Bell's complaint is playfully worded and a little over-the-top ("To deprive anyone of saying 'Taco Tuesday' – be it Taco Bell or anyone else who provides tacos to the world- is like depriving the world of sunshine itself"), the consequences for Taco John's could be quite serious.

In order to function as source identifiers in the marketplace, trademarks must be capable of differentiating your product from your competitors' products. However, once a mark has become generic in the minds of consumers, it ceases to uniquely identify your brand, and there is a real danger that you may lose your trademark rights altogether.

Once famous brands such as aspirin, cellophane, dry ice, hovercraft, kerosene, linoleum, and teleprompter have all suffered the fate of genericization. Others, such as Xerox, have come close to the edge of losing their marks and have had to resort to creative solutions such as advertising campaigns to prevent the brand from becoming genericized.

While that kind of action can be helpful once your mark is already becoming genericized, there are proactive actions a brand owner can take to prevent genericization of their trademark.

Always use the trademark as a trademark

Resist the urge to use your trademark as a noun or verb in place of other generic descriptors. For example, the phrase "Velcro® it together!" uses the trademark to describe adhering something together with a hook-and-loop fastener. This may lead the public to refer to any attaching things with any hook-and-loop products as "Velcro-ing," regardless of which specific product is being referred to. A better phrase would be "Stick it together with Velcro®!"

Use the appropriate trademark symbols

You should always use the appropriate trademark symbol (® for federally registered marks or TM or SM for unregistered or state-level trademarks and service marks) at least once wherever the mark appears. Typically, the symbol should be used at least with the mark's first or most prominent use in a document or display. However, it should be noted that using the ® symbol with marks that are not federally registered is illegal – in those cases, TM or SM should be used.

Set your mark apart

Consider using different fonts, colorization, capitalization, stylization, or sizing to make the mark appear different from the surrounding text. This will help the public to recognize that your mark is not just an ordinary word.

Develop brand use guidelines

Whether for use by the media or licensees, develop a set of guidelines describing how your trademark is to be properly used and displayed. The document may detail specific fonts or colors the mark must be depicted in or specific phrases incorporating the mark that should be used or avoided. Be proactive and keep the public informed when you are rebranding.

Enforce your rights against infringers

While this does not mean filing a full-blown trademark infringement lawsuit against everybody who misuses your mark, you should at least inform infringing third parties of your trademark rights and demand that they cease their unauthorized use. The vast majority of trademark disputes are resolved by contacting infringers, either informally or in a cease-and-desist letter, to avoid litigation. However, it's critical to understand your business and how it may require different actions. It is possible that overly aggressive claims could lead the accused infringer to file a declaratory lawsuit against you, dragging you into unwanted litigation that could threaten your trademark rights. It is best to contact your trademark lawyer before threatening any legal action against potential infringers.

About Eric Estadt

Eric Estadt joined Carlile Patchen & Murphy LLP in 2022 and is a member of the firm's Business Law Practice Group. He has experience supporting a wide range of clients, from Fortune 500 companies to individuals, protecting and enforcing their trademarks in a wide array of industries. Eric specializes in utility and design patents in the mechanical, medical device, pharmaceutical, and electronics industries.