# Oregon Business Lawyer

**Oregon State Bar Business Law Section Newsletter • March 2023**

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# FinCEN Approves Final Regulations Under the Corporate Transparency Act: A New Era of National Beneficial Owner Reporting

*By Michael D. Walker and Emil J. Sadofsky. Samuels Yoelin Kantor LLP*

Historically, beneficial ownership reporting requirements for businesses have been the purview of state governments. However, on September 29, 2022, after more than 15 years of proposals, counterproposals, and administrative process, the U.S. Department of the Treasury approved the final regulations governing the new federal requirements for beneficial ownership reporting.

The new regulatory regime requires most business entities to report personal information about their owners. The regulations were promulgated under the Corporate Transparency Act of 2019 (CTA).[1] The CTA and regulations will provide the federal government with an ownership database, allowing greater visibility into the use of state-created entities. In theory, this greater visibility will help combat money laundering and the financing of terrorism on a national scale.

In our December 2021 article on the CTA, published before the final regulations were promulgated, we explored the broad contours of the CTA and outlined the compliance obligations of reporting companies under the CTA. (Link to December 2021 issue.)

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This article aims to answer the questions many business attorneys may have about this new reporting system. The regulations will have sweeping effects on small and medium-size businesses. Although the burden of reporting is relatively small, the number of businesses that will have obligations under the new system is immense. Understanding the beneficial ownership reporting requirements well in advance of the effective date will be critical for most business attorneys.

### Which entities will be subject to the new reporting requirements?

Under the CTA, all reporting companies must disclose beneficial ownership information. The Code of Federal Regulations defines "reporting company" as any corporation, limited liability company, or similar entity that is created by the filing of a document with the Secretary of State or a similar office, or formed under the laws of a foreign country and registered to do business in the United States. 31 CF.R 1010.380(c). In short, almost any business entity whose creation requires a filing with the state is subject to the reporting obligations.

The CTA exempts certain businesses that have heightened reporting requirements under existing law.[2] Notably, most sole proprietorships, general partnerships, and private trusts will not be reporting companies because those entities usually do not require a filing with the Secretary of State or similar office. Therefore, the owners of these entities will not have any obligation to provide beneficial ownership information. In addition, entities exempt from the CTA reporting requirements include: banks, broker-dealers, insurance companies, public account firms registered under the Sarbanes-Oxley Act, nonprofit entities described under 501(c) of the Tax Code and

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exempt from taxation under 501(a), and any "large operating company." 31 CFR 1010.380(c)(2). In the final regulations, a large operating company is an entity that has more that 20 full-time employees in the United States, has an "operating presence at a physical office" in the United States, and filed a Federal income tax or information return in the United States for the previous year demonstrating more than $5,000,000 in gross receipts or sales. 31 C.F.R 1010.380(c)(2)(xxi). While described as a "large" entity in the regulations, many small businesses that Oregon attorneys represent may fall under this exception.

### When will businesses have to comply with the new reporting obligations?

The effective date of the regulations is January 1, 2024. The regulations establish different periods for distinct types of companies to comply with the CTA. Reporting companies formed after January 1, 2024, must file reports within 30 calendar days of their formation. 31 C.F.R. 1010.380(a)(1)(i). Reporting companies in existence prior to January 1, 2024 (including any entity that became a foreign reporting company before January 1, 2024) must file reports before January 1, 2025. 31 C.F.R. 1010.380(a)(1)(iii). Any previously exempt company must file a report within 30 days after the date on which the entity no longer meets the exemption criteria. 31 C.F.R. 1010.380(a)(1)(iv).

Probably the most important date to remember with respect to the implementation of the beneficial owner reporting system is that already-formed companies have one year from the effective date of the regulations to file a report. Business attorneys should inform their clients of the need to report this information well before the deadline, because the Financial Crimes Enforcement Network (FinCEN)—the agency charged with implementing the regulations—will be handling an extremely high volume of disclosures that year, and may well lack the experience and expertise to efficiently process the volume of reporting that could be expected in the first year of compliance.

### What information must be disclosed?

Each reporting company must disclose information about its beneficial owners and each company applicant (as discussed below). The term "beneficial owner" means an individual who directly or indirectly exercises substantial control over the entity or owns or controls not less than 25% of the ownership interests of the entity. 31 CFR 1010.380(d). The regulations define "substantial control" based on a variety of facts and circumstances, and include control exercised by individuals serving as senior officers, persons having control over the appointment of senior officers or a majority of the board of directors (or similar body), persons having substantial influence over important decisions made by the reporting company, or other form of substantial control. 31 CFR 1010.380(d)(1)(i).

Reporting companies must disclose the full legal name, date of birth, current residential address, a unique identifying number from an acceptable identification document, and a scanned photograph of the identification document of each beneficial owner and each company applicant. 31 CFR 1010.380(b)(1).The reporting company must also disclose its full legal name, any trade name or "doing business as" name, a complete address, the jurisdiction of formation, and its IRS Taxpayer Identification Number (TIN).

When evaluating ownership for purposes of the 25% beneficial ownership rule, a trust or similar arrangement will be deemed to be an owner if the trust holds such ownership interest: (i) as a trustee of the trust or other individual (if any) with the authority to dispose of trust assets; (ii) as a beneficiary who is the sole permissible recipient of income and principal from the trust; or has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or (iii) as a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust. 31 CFR 1010.380(d)(2)(iii)(C). Also, ownership includes ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company. 31 CFR 1010.380(d)(2)(iii)(D).

The term "company applicant" means anyone who directly files an application to form a domestic reporting company or registers a foreign reporting company to do business in the United States and any person who directs or controls such filing. 31 CFR 1010.380(e). This requirement should be of particular interest to attorneys who frequently register businesses on behalf of their clients.

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## CTA Regulations *Continued from page 2*

The proposed regulation mandates disclosure from both the company applicant (which can include an attorney, agent, or employee) and the person on whose behalf the company applicant is applying. Thus, under the regulations, both an attorney filing the formation documents of the business and the beneficial owners on whose behalf the attorney works must meet the disclosure obligations. A company applicant for an entity that is in existence on January 1, 2024, need not be disclosed. 31 CFR 1010.380(b)(2)(iv). Thereafter, new entities will have to disclose the company applicant's name and other identifying information referenced above. 31 CFR 1010.380(b)(1)(ii) and 1010.380(b)(2)(iv).

Individuals who are beneficial owners or company applicants can obtain a unique FinCEN identification number (FinCEN Identifier) by applying to FinCEN for such number, disclosing the same personal information referenced above. 31 CFR 1010.380(b)(3)(iii)(4). Once procured, a FinCEN Identifier may be provided to a reporting company in lieu of such personal information. 31 CFR 1010.380(b)(3)(iii)(4)(A).

Each reporting company must keep its information up to date with FinCEN. This is not an annual filing requirement but an "as needed" filing requirement. Hence, within 30 days of "any change with respect to who is a beneficial owner or information reported for any particular beneficial owner," a reporting company must report the change regarding the reporting company or beneficial owner. 31 CFR 1010.380(a)(2).

The regulations distinguish between two types of applicants: those providing a business service and all others. 31 CFR 1010.380(b)(1)(ii)(C). Applicants that provide a business service as a corporate or formation agent must report their business address. FinCEN is particularly interested in collecting data on applicants that frequently serve as formation agents because it believes that such information will help identify patterns associated with tax evasion, money laundering, and the funding of terrorist organizations. All applicants not providing a business service as a formation agent must disclose their residential address.

Because of these issues, in order to protect their personal information, business attorneys who assist clients in the formation of business should strongly consider obtaining a FinCEN Identifier as soon as it is possible to do so. Business attorneys might also consider addressing the CTA reporting issues (including update reporting) in engagement letters with their business clients.

Finally, on January 17, 2023, FinCEN published a notice and request for comments on the "data fields" that will be used in connection with reporting under the CTA. 88 CFR 2760, Document Number 2023-00703. Presumably, this administrative process will soon result in an actual CTA reporting form.

### Who will have access to the reported information?

In addition to FinCEN, all information reported to FinCEN will be stored in a searchable database that may be accessed by: (i) federal agencies involved in national security, intelligence, or law enforcement; (ii) state and federal law enforcement agencies with court approval; (iii) financial institutions to facilitate customer due diligence requirements under applicable law (general anti-money and "know your customer" laws), but only with the consent of the reporting company; and (iv) to certain U.S. regulators or certain foreign governments, subject to certain conditions and approvals. 31 U.S.C. § 5336(c)(2)(B) and (c)(5). However, the information reported to FinCEN will not be available to the public.

### What are the penalties for failing to satisfy reporting obligations?

A reporting violation occurs whenever a person willfully provides false or fraudulent beneficial ownership information or willfully fails to report complete or updated beneficial ownership information. 31 CFR 1010.380(g).

FinCEN can impose civil or criminal penalties on persons who commit reporting violations. Civil penalties may not exceed $500 for each day the violation continues. 31 U.S.C. § 5336(h)(3)(A)(i). Criminal penalties can be up to two years' imprisonment and $10,000 in fines. 31 U.S.C. § 5336(h)(3)(A)(ii).

The CTA includes a safe harbor for anyone who corrects false information submitted to FinCEN within 90 days of the inaccurate filing. If the correction is made on time and the person did not have actual knowledge of the falsity, the person is protected from civil or criminal liability. 31 U.S.C. § 5336(h)(3)(C).

### Conclusion

Because the consequences for violating the Corporate Transparency Act will be severe, businesses and business attorneys should begin to prepare now for full compliance. The burden of compliance will be small for most reporting companies. Nevertheless, the vast scope of the CTA means that some businesses may fall between the cracks and fail to timely report beneficial ownership information. ◆

### Endnotes

1. Corporate Transparency Act, 31 U.S.C.A. § 5336.
2. For a full list of exempt entities, see 31 U.S.C. § 5336(11)(B).

# Basic Tax Considerations in Limited Liability Company Choice of Entity

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Business owners setting up their entity structures have multiple entity forms from which to choose. Limited liability protection and the relative complexity (or simplicity) of an entity structure generally are the leading considerations in that choice, usually followed by the tax implications for the owners and the entity. As a result of changes in the rules years ago by the Internal Revenue Service (IRS) to allow business owners operating as a limited liability company (LLC) more flexibility in their choice of entity taxation, LLCs have become an extremely popular choice. This article briefly discusses some of the basic tax considerations in the choice of an LLC as a business entity structure, including fundamental differences of taxation of an LLC as a partnership versus as an S corporation.

As alluded to above, pursuant to the so-called "check-the-box" rules of revised IRS Treasury Regulations §§301.7701-2 and 301.7701-3, business owners today have more flexibility using the IRS Form 8832 entity classification election or Form SS-4 application for employer identification number (discussed further below) to choose their entity classification for purposes of federal taxation while still enabling limited liability protection.

Although business owners usually understand the basic need for limited liability protection, their first question often is whether their LLC should be taxed as a partnership or a corporation when there are two or more members, or treated as a "disregarded entity" or a corporation if there is just a single member. The question typically arises from vague information they have read or heard that taxation as an S corporation is more advantageous. Often, the basic reason to opt for taxation as an S corporation is in response to a business owner's desire to limit assessment of self-employment taxes on their net earnings from the LLC business (as discussed further below), but certainly other tax implications must be considered.

At the most basic level, a single-member LLC is, under the IRS classification rules, by default treated as a "disregarded" entity if no specific election is made by the member. This means the entity has no separate tax characteristics from its member and is "ignored" for all federal tax purposes. Accordingly, all income, gains, losses, expenses, deductions, and other tax items of the LLC—such as any depreciation on assets or tracking and reporting of net operating loss carryovers—are reported directly on a separate schedule on the single member's personal income tax return with the member's Social Security number. No separate federal income tax or information return is filed for the LLC in that situation (nor typically for the state) and the LLC generally resembles basic sole proprietorship taxation, albeit with the added benefit to the member of limited liability protection for legal purposes.

Despite the fact that no tax is assessed at the LLC level for a disregarded entity, the LLC single member can—and typically should—obtain for the LLC a separate federal employer identification number (EIN) from the IRS, using Form SS-4 or using the IRS online application, as required for all other entities. The LLC will use the EIN instead of the member's Social Security number for company bank and other accounts—such as credit card merchant accounts—and for reporting information to vendors. The LLC obviously also would use the EIN to report payment of wages and withholding of taxes for all employees of the business. In Oregon, the LLC similarly would need to apply for a business identification number (BIN) for state income withholding purposes for any employees of the business.

However, in this disregarded entity scenario, LLC members cannot pay themselves wages distinct from the net earnings of the LLC, nor withhold taxes as an employee, whether for income tax or employment tax purposes. This is because the IRS does not recognize the net earnings of such member of a disregarded LLC as separate from the LLC. Instead, such member must calculate, report, and pay to the IRS and state taxing authorities on a quarterly basis their estimated income taxes and self-employment taxes on all net earnings of the business. This same rule also holds for members of an LLC taxed as a partnership, pursuant to a long-standing IRS position expressed in IRS Revenue Ruling 69-184, 1969-1 C.B. 256, which disallows partners from being treated as employees with regard to the personal earnings of their partnership. Notwithstanding, in these situations (the same as for a sole proprietorship), the assessment of self-employment taxes

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is subject to a maximum amount of taxable net earnings, which amount typically is increased annually by the IRS and can be found at https://www.ssa.gov/benefits/retirement/planner/maxtax.html.

In contrast to an LLC with a single member, an LLC with two or more members is by default taxable as a partnership under the IRS classification rules, unless the members specifically elect corporate tax treatment. Unlike the fairly straightforward treatment of a disregarded entity for federal tax purposes and tax reporting for both the member and the LLC, the tax treatment and reporting are considerably more complicated for an LLC with two or more members who choose to stay with the default tax treatment as a partnership or for any LLC that elects to be taxed as a corporation.

When an LLC with two or more members faces the choice between the default partnership tax treatment or the special S corporation tax treatment for the LLC, there sometimes is a misperception that the two forms of tax treatment are basically the same or very similar. However, the similarities between partnership taxation and S corporation taxation are quite limited.

An LLC subject to taxation as a partnership falls under the rules and regulations of Subchapter K of the Internal Revenue Code (IRC §§701-771). In contrast, pursuant to IRC §1371(a), an entity taxed as an S corporation falls under most of the tax rules and regulations for corporations under Subchapter C of the Code (IRC §§301 through 391), with the exception or application of some special rules under Subchapter S (IRC §§1361 through 1379) for "small business corporations."

Note that taxation as an S corporation is a specific corporate tax election that must be made by the members on Form 2553 [Link to https://www.irs.gov/forms-pubs/about-form-2553] and submitted to the IRS. The form has information, signature, and timing requirements to which the members must adhere. For example, the names, addresses and specific ownership shares (or percentages) of each member must be listed on the Form 2553, including the signature of each owner consenting to the S corporation election. The Form 2553 also must be submitted to the IRS within two months and fifteen days from the desired effective date of the election (typically the beginning of the entity tax year), although the IRS does allow late and retroactive elections in certain situations. The LLC members also have the option to elect entity tax treatment simply as a corporation and without the need for any special election form other than the initial IRS Form SS-4 tax election or Form 8832 entity classification, which by default would subject the LLC to non-"pass through" corporate taxation under Subchapter C.

As for their similarities, it is true that LLCs taxed as S corporations (except in rare circumstances) and LLCs taxed as partnerships do not pay any tax at the entity level, and net income, gain, losses, expenses, deductions, and other tax items all are passed through to the members and retain their character to be reported proportionally on appropriate schedules of the individual income tax returns of the members. Also, basis adjustments to an S corporation member's LLC membership interest mostly will reflect allocations of income, gain, losses, expenses, and distributions as occur under the partnership rules. In both scenarios, capital accounts typically should be maintained by the LLC to track the members' and the entity's respective basis in their ownership interests and the company's assets.

The LLC partnership and S corporation entity forms also both have separate federal and state information return filing obligations (as contrasted to the members' income tax return filing obligations), which costs of preparation incrementally can add to the overall expenses of operating in either entity form.

Note also that the pass-through of income, gain, expense, loss, and other tax items must always be made strictly pro rata to members of an LLC taxed as an S corporation, due to the limitation of IRC §1361(b)(1) to just one class of stock for S corporations. This means no preferred or non-pro rata stock distributions, while the pass-through of income, gain, expense, loss, and other tax items in an LLC taxed as a partnership generally is made pro rata among the members, subject to any agreement by the members to make different distribution allocations among themselves under more complicated partnership taxation rules and regulations. The IRS partnership tax regulations under Subchapter K [Treas. Reg. §1.704-1(b)(2)(ii) and (iii)] do require that any non-pro rata distributions to members have "substantial economic effect," which relates to rules about a member's available basis in their membership interest and the balancing of all member capital accounts, which discussion is beyond the scope of this article.

Despite these basic similarities of pass-through treatment of tax items, the differences between LLCs taxed as partnerships and LLCs taxed as S corporations are much more significant. One key difference (and potential benefit) to many small business owners in an LLC taxed as an S corporation is the ability to pay wages to an LLC member as an employee and to withhold, report, and pay over to taxing authorities income and employment taxes from those wages. This is in direct contrast to the denial of such treatment to members of LLCs treated as disregarded entities or members of LLCs taxed as partnerships, as discussed above.

Theoretically and in practice, this treatment is allowed even when the member is the only employee of an LLC taxed as an S corporation. The member's wages or salary can be set below the amount of the total net earnings of the LLC and below the maximum amount of taxable net earnings. The balance of the net earnings of the LLC typically then would be distributed as dividends, which are not subject to employment taxes. This reduces the overall assessment of employment taxes that otherwise could occur for a single member in a disregarded LLC

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or members of an LLC taxed as a partnership, where their earnings also are below the maximum amount of taxable net earnings. However, as an important caveat to this treatment of an S corporation LLC member as an employee, where all or primarily all of the net income of the LLC is based on the actual services of such member or members (for example, a lawyer in a law firm or a CPA in an accounting firm), and substantially less than all the net earnings are distributed to the member as wages (and instead are distributed in the form of dividends), the IRS and state taxing authorities can challenge the amount of wages or salary as being insufficient. If successful in such challenge, the taxing authorities will adjust the members' salary up to more closely match the total net earnings of the LLC, and then assess additional employment taxes on the difference, often along with added penalties and interest on the tax difference. Nevertheless, where earnings are from other than just services of the member (for example, from retail sales or other product services), or where additional non-owner employees of the LLC also are receiving taxable wages, this strategy generally is effective for the LLC member.

Another key difference between LLCs taxed as a partnerships and LLCs taxed as S corporations includes the broad flexibility in the number and type of owners allowed in a partnership, compared to the relative limitation on the number and type of owners allowed in an S corporation. More specifically, pursuant to IRC §1361(b), S corporations ostensibly are limited to 100 equitable owners (although this number potentially can be expanded substantially through extended family ownership), can only have certain types of qualified entities as owners, and cannot have any non-U.S. owners, none of which restrictions apply to LLC partnerships.

LLCs taxed as a partnerships and LLCs taxed as S corporations also are subject to different debt basis rules, which in general can allow more favorable treatment to LLC partnership members to pass through entity-level debt than are allowed to S corporation LLC members. Distribution of appreciated assets to a member from an LLC taxed as an S corporation and from an LLC taxed as a partnership also are subject to different treatment. The rules of IRC § 311(b) and § 336 require an S corporation to recognize gain on the distribution of such appreciated assets (i.e., as if the asset had been sold), and then requires the S corporation to pass through such potentially taxable gain to the members after corresponding adjustments are made to the members' basis in their LLC interests and to the member's basis in the asset. In contrast, the rules of Subchapter K under IRC §731 (with some exceptions under IRC §751) allow the distribution of such an appreciated asset without gain recognition to either the LLC partnership or the members, and with a transferred basis in the asset to the distributee member.

Note also that as a result of the above differences with regard to entity debt basis treatment and the potential recognition of taxable gain on the distribution of appreciated assets, business owners should be very careful to consider these rules when forming an LLC where ownership of real estate or other appreciable property by the LLC is among the plans of the members.

Other notable tax differences occur for the sale of an S corporation LLC interest, which typically results in capital gain or loss treatment to the LLC member on the sale (and generally subjects the sale to more preferential capital gain rates if the LLC interest has been held for more than one year), while the sale of an LLC partnership interest generally also will be treated as a capital asset sale, but potentially subject to ordinary income tax treatment depending on certain assets held by the LLC partnership which are subject to the sale.

Business owners who are forming a new entity or thinking of changing from one form of taxation to another should carefully consider all the competing benefits, burdens, and costs of operating an LLC as a disregarded entity or as a partnership versus as an S corporation. Given the considerable tax differences and complexities between LLCs taxed as disregarded entities or partnerships and LLCs taxed as S corporations, only some of which have been touched upon in this article, practitioners without more advanced partnership and corporate tax expertise would be wise to obtain or advise their clients to seek such expert advice. Unless the member or members of the LLC are very confident —based on good tax advice—that operating as an S corporation is the best choice of tax treatment to the members, the members are often better advised to start their operations under the default classifications as a partnership or as a disregarded entity for a single member LLC until the LLC has one or two years of operations and financial information to examine. Thereafter, as the business operations proceed, the members can consult with their tax and accounting professionals to determine (often through the preparation of pro forma or "dummy" S corporation tax returns) if taxation as an S corporation would be more beneficial to the members, including to reduce employment taxes, and even with the potential added incremental costs of separate federal and state entity returns that would be required for the LLC. Since the election of tax treatment as an S corporation after tax treatment as a partnership or as a disregarded entity is relatively simple (even for late elections made retroactively), and revocation of an S election sometimes can be tricky, tax treatment under the IRS default classification rules typically is the recommended route for new business owners forming their LLCs until they can assess their early business operations. ◆

**Author's Note:** This article is intended to highlight only some of the key issues and tax considerations in choosing an LLC as an entity structure, and should not be a substitute for counsel with a knowledgeable tax professional for a more complete analysis of the issues, in particular based on a business owner's specific facts and situation.

# Certification for Businesses Owned by Women, BIPOC individuals, or Veterans

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If your client's small business is at least 51% owned or operated by women, BIPOC (Black, Indigenous, and People of Color) individuals, or veterans, they should look into certification programs that increase their access to opportunities for contracts with government agencies and large corporations.

### Benefits of certification

Public image has never been more important than it is in our global digital economy. Your client's ability to showcase a certification on their website, in social media profiles, and at their physical location provides a compelling marketing strategy.

Increasingly, private companies have diversity and inclusion officers who require that a certain percentage of vendors are businesses owned by women and BIPOC individuals. Certification facilitates fulfillment of their internal diversity requirements.

The federal government has pledged to offer a percentage of its contracting dollars to certified businesses. It also provides valuable training and introductions to key administrators for qualified businesses. The bottom line: certifications can provide a true leg up in an inequitable playing field for women, BIPOC individuals, and veterans.

The U.S. Small Business Administration (SBA) offers several federal-government options for obtaining free certification.

### SBA program for women-owned businesses

The main program for women-owned businesses is the Women-Owned Small Business (WOSB) Federal Contract program. As stated on its website, "[T]he federal government's goal is to award at least 5% of all federal contracting dollars to women-owned small businesses each year." That is a lot of available money, and certification enables a company to become an eligible recipient.

The government recognizes the inequity based simply on gender, and limits competition for certain contracts to businesses that are WOSB-certified. These contracts are known as "set-asides." Provided they are eligible, WOSB-certified firms can also compete for contract awards under other SBA socio-economic programs, including 8(a) and HUBZone. It is important to note that WOSB-certification benefits apply only to federal contracting opportunities, and not those in the private sector.

Not only will certification enable businesses access to set-aside contracts in designated industries and sectors in the North American Industry Classification System (NAICS), but the certified business can also register with multiple databases, such as the Department of Defense's System for Award Management (SAM).

Before pursuing certification, take a look at the NAICS codes to see if your client's business qualifies. The list is extensive and includes both some common and less common services, for example:

- Residential remodelers
- Chocolate and confectionery makers
- Retail & commercial bakeries
- Music publishers
- Sound recording studios
- Media streaming distribution services, social networks, and other media networks and content providers
- Mortgage and loan brokers
- Investment advisers
- Insurance agencies and brokerages
- Real estate agents and brokers

### SBA 8(a) program for disadvantaged persons

Sections 7(j)(10) and 8(a) of the Small Business Act—15 U.S.C. § 636(j)(10) and § 637(a)—authorized the SBA to establish the 8(a) Business Development program. It is a nine-year program created to help small businesses owned and controlled by socially and economically disadvantaged individuals. The 8(a) certification qualifies businesses as eligible to compete for the program's sole-source and competitive set-aside contracts.

Small-business development is further accomplished by providing qualified participant businesses with management, technical, financial, and procurement assistance, designed to strengthen their ability to compete in the U.S. economy.

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Alaska Native corporations, Community Development Corporations, Indian tribes, and Native Hawaiian organizations are also eligible to participate in the 8(a) program. The SBA partners with federal agencies to promote maximum participation of 8(a) program participants, to ensure equitable access to opportunities in the federal marketplace.

The 8(a) program is designed for experienced socially and economically disadvantaged small-business owners who have been in operation for at least two years, and are interested in expanding their footprint in the federal marketplace. The SBA notes, "While the 8(a) certification does not guarantee contract awards, [it is] a dynamic tool to pursue and capture new opportunity from the government."

8(a)-certified businesses can:

- Efficiently compete and receive set-aside and sole-source contracts
- Receive one-on-one business development assistance for their nine-year term from dedicated Business Opportunity Specialists focused on helping firms grow and accomplish their business objectives
- Pursue opportunities for mentorship from experienced and technically capable firms through the SBA Mentor-Protégé program
- Connect with procurement and compliance experts who understand regulations in the context of business growth, finance, and government contracting
- Pursue joint ventures with established businesses to increase capacity
- Qualify to receive federal surplus property on a priority basis
- Receive free training from SBA's 7(j) Management and Technical Assistance program

The federal government authorizes sole-source contracts to 8(a) participants for up to $7 million for acquisitions assigned manufacturing NAICS codes, and $4.5 million for all other acquisitions. Entity-owned 8(a) program participants are eligible for sole-source contracts above these thresholds, but the Department of Defense requires approval of a formal justification if the 8(a) sole-source contract exceeds $100 million. All other federal agencies require approval for sole-source 8(a) contract actions that exceed $25 million.

8(a) program participants are eligible to compete for contract awards under other socio-economic programs or small business set-asides for which they qualify.

To qualify for the 8(a) program, businesses must meet the following eligibility criteria:

- Be a small business, according to SBA's size standards
- Not have previously participated in the 8(a) program
- Be at least 51% owned and controlled by U.S. citizens who are socially and economically disadvantaged (as defined per Title 13 Part 124 of the Code of Federal Regulations)
- Have a personal net worth of $850,000 or less, adjusted gross income of $400,000 or less, and assets totaling $6.5 million or less
- Demonstrate good character
- Demonstrate the potential for success by, for example, having been in business for two years

8(a) certification lasts for a maximum of nine years. The first four years are considered the development stage and the last five years are considered the transitional stage. In order to remain in the program, businesses must remain in compliance with program requirements.

When considering an 8(a)-certification, first use the Am I Eligible? tool on SBA's Certify website.

### HUBZone certification

The HUBZone Program "fuels small business growth in historically underutilized business zones with a goal of awarding at least 3% of federal contract dollars to HUBZone-certified companies each year." Funds from the HUBZone program are set-aside dollars, specifically earmarked for participant businesses. Every five years, the map that determines eligibility for the HUBZone program changes, and this year, the map will change July 1. This means, in addition to the general qualifications of certification, if the principal place of business plus 35% of employees are no longer in the HUBZone, the certification will lapse or the application of the business will be denied. Be certain to check out the new map and whether or not your business clients are located inside a HUBZone.

If the company is not in a listed industry or only works in the private sector, state-level certification may be a better option and has a more streamlined process.

### Veteran certification programs

The SBA also has certification programs for veteran-owned businesses: the Veteran Small Business Certification (VetCert) program (VOSB) and the Service-Disabled Veteran-Owned Small Business program (SDVOSB). (Note: Before January 1, 2023, only small businesses owned by service-disabled veterans were eligible.)

Certified VOSBs can pursue sole-source and set-aside contracts at the Veterans Administration (VA), while certified SDVOSBs have the opportunity to pursue federal sole-source and set-aside contracts across the federal government.

To be eligible for VetCert, a business must: meet SBA's size standards and be at least 51% veteran owned.

To be eligible for SDVOSB certification, no less than 51% of the business must be owned and controlled by one or more veterans rated as service-disabled by the VA.

*Continued on page 9*

## Business certification

*Continued from page 8*

A veteran who is permanently and totally disabled and unable to manage the daily business operations of their business may still qualify if their spouse or appointed permanent caregiver is assisting in that management. For the complete list of eligibility requirements, see the final rule published in the Federal Register.

### State options and benefits

Businesses located in Oregon have several certification options.

- Minority/Women Business Enterprise (MBE/WBE)
- Service-Disabled Veteran Business Enterprise (SDVBE)
- Emerging Small Business (ESB)

Which one to pursue depends on the company's specific business goals.

The MBE/WBE program through the Certification Office for Business Inclusion and Diversity (COBID) is one of the most popular. Typically, a business would consider this certification if it wants to compete for state, county, and city government contracts, as well as special jurisdictional contracts, such as with hospitals and universities. While the COBID programs are designed for companies competing for government contracts, certifications received through these programs also help private companies with diversity goals to satisfy their internal diversity and inclusion requirements.

Business eligibility for MBE/WBE certification is fairly general, including:

- Be a for-profit business. OAR 123-200-1600(3)(a).
- Be registered with the Oregon Secretary of State. OAR 123-200-1600(3)(c).
- Have gross annual receipts (three-year average) that do not exceed $23.98 million. OAR 123-200-1100(16).

The business owner must:

- Be a U.S. citizen or a lawfully admitted permanent resident. 49 CFR 26.67(a).
- Own and control 51% or more of the business. OAR 123-200-1220.
- Control and manage day-to-day operations. OAR 123-200-1240.
- Have proper licensing (e.g., engineer, plumber). OAR 123-200-1240(8)(a).
- Have made a contribution of capital. OAR 123-200-1220(6).

This last requirement is one that highlights the importance of maintaining corporate records and capital accounts—a mistake many unrepresented new businesses make.

*If tax returns and basic financial reports from the prior three years are available, the application process can typically be completed in a short time.*

Once certified, MBE/WBE-certified companies are listed in a directory with the state. In addition, networking opportunities and other resources are available to MBE/WBE-certified businesses.

To qualify for for the WOSB and EDWOSB programs, the applying company must meet the applicable definition of small business. You can use this online quiz to confirm a business meets the definition.

For more information about the requirements of COBID certifications programs, review the Qualifications by Certification Program chart, which categorizes the requirements of each program. If you have specific questions, the COBID office is extremely helpful and will promptly answer (by phone (503.986.0075) or email (biz.cobid@biz.oregon.gov).

### Application process

If tax returns and basic financial reports from the prior three years are available, the application process can typically be completed in a short time. Applications are found online and can be filled out and submitted digitally.

Each program has its own checklist to help applicants get organized. You can find the WOSB and EDWOSB checklist here and the WBE program's here.

Gather the following documents prior to beginning the certification process:

- A copy of the business owner's U.S. birth certificate, driver's license, or passport
- The employer identification number (EIN)
- Profit and loss (P&L) statement and balance sheet
- Three years of federal income-tax returns
- Proof of investment capital by the relevant owners
- The data universal numbering system (DUNS) number, recently replaced by the SAM.gov number
- Any business registration or certificates

### Other certification options

The focus of this article is on free government programs. Some third-party certifiers or networking groups do charge an application fee or other membership dues. A review of these certification programs will be covered in a future article. ◆

# A Brave New World: Oregon's Legal Psilocybin Landscape

*By Dave Kopilak and Kaci Hohmann, Emerge Law Group P.C.*

*Dave Kopilak is a business attorney at Emerge Law Group P.C., where he works on a variety of corporate matters. He was the primary drafter of both Oregon Measure 109 (2020), which legalized psilocybin services in Oregon, and Oregon Measure 91 (2014), which legalized the adult use of cannabis in Oregon.*

*Kaci Hohmann is a business attorney at Emerge Law Group P.C., where she works on a variety of corporate matters. Kaci was a member of the drafting team for Oregon Measure 109, which legalized psilocybin services in Oregon. She is on the Executive Committee of the OSB Business Law Section and is the Chair-elect of the Cannabis and Psychedelics Law Section Executive Committee.*

On Election Day 2020, Oregonians approved Ballot Measure 109, also known as the Oregon Psilocybin Services Act (the Act). It created the nation's first legal, regulatory framework for the manufacture, sale, and consumption of psilocybin products and the provision of psilocybin services. The Oregon Health Authority (OHA) is the regulating agency.

### General framework

Under the Act, clients may purchase, consume, and experience the effects of psilocybin products only at a licensed service center and only under the supervision of a licensed facilitator.

The Act provides for three types of sessions between the client and a licensed facilitator: a preparation session, an administration session, and an integration session. The preparation session is an intake meeting that must occur before the client can participate in an administration session. In the administration session, the client consumes and experiences the effects of a psilocybin product. In the integration session, which is optional on the client's part, the client and facilitator can discuss the client's psilocybin experience and how the client may derive lasting meaning from the experience. Group administration sessions are permitted, as are outdoor administration sessions.

The Act provides for four license types: manufacturer, service center operator, facilitator, and laboratory. A manufacturing license includes cultivation, harvesting, production, and processing. A facilitator license applies to an individual, whereas the other licenses could be held by legal entities.

One of the most striking aspects of the Act is its non-medical nature. Although a medical or mental health condition may be the reason a client seeks a psilocybin experience, the Act does not require a client to be diagnosed with or have any particular medical condition to participate. Any client who is eligible can participate for any reason, or for no particular reason at all.

Similarly, the Act expressly provides that the OHA cannot require a facilitator to have a degree from an institution of higher learning. A facilitator must have a high-school diploma or equivalent and must complete a 160-hour education and training program. No further education nor additional professional licenses are required. In fact, the OHA promulgated a rule that prohibits facilitators who hold other professional licenses from practicing their other professions while providing psilocybin services.

### The current status

The Act provided for a two-year development period to give the OHA sufficient time to educate itself about psilocybin, to provide information about psilocybin to the public, and to adopt rules. The two-year development period expired on December 31, 2022. After many meetings, many public comments, and much work, the OHA adopted its final set of rules on December 27, 2022, and began to accept applications for licenses on January 2, 2023.

As of March 3, 2023, the OHA had received 13 manufacturer applications, six service center applications, zero facilitator applications, and two laboratory applications, but had not yet issued any licenses. There are currently 20 approved facilitator training programs, but the facilitators in those programs have not yet completed their courses. Individuals likely will begin to apply for facilitator licenses over the next few months.

### Colorado and other states

On Election Day 2022, Colorado voters approved Colorado Proposition 122, which provides for a similar (yet more expansive) regulatory framework for psilocybin products and services. Colorado will not begin accepting license applications under Proposition 122 until September 30, 2024, and thus Oregon will be the first state in the country to issue psilocybin licenses to businesses and individuals.

A number of other states are considering various forms of legalization, and it is likely that more states will join Oregon and Colorado over the next few years.

### Federal illegality

Like marijuana, psilocybin is classified as a Schedule I controlled substance under the federal Controlled Substances Act. Consequently, just as is the case with

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marijuana businesses licensed by the Oregon Liquor and Cannabis Commission, any psilocybin business that manufactures, distributes, dispenses, or possesses psilocybin will be in violation of federal law.

Over the years, the United States Department of Justice (US DOJ) made a number of public pronouncements about its enforcement policies concerning marijuana. Probably the most influential of those was an August 29, 2013, document that came to be known as the "Cole Memo" after its author James Cole, who was the Deputy Attorney General at the US DOJ. The Cole Memo was released in response to Colorado and Washington adopting the first adult-use marijuana laws in 2012, and essentially indicated that the US DOJ would take a hands-off approach when it came to state laws that legalized marijuana, so long as such laws provided for strong and effective regulatory and enforcement systems.

**So far, neither the US DOJ nor the OR DOJ has made any public statements about the Act, Colorado's Proposition 122, or state-regulated psilocybin programs in general.**

The Cole Memo was rescinded on January 4, 2018, by then-United States Attorney General Jeff Sessions, who declared that it was unnecessary, as the US DOJ already had well-established enforcement principles that govern all federal prosecutions. A final public pronouncement was made by the United States Attorney for the District of Oregon (OR DOJ), in a memorandum released on May 18, 2018. That document, which came to be known as the "Williams Memo" after its author, Billy Williams, looked awfully similar to the Cole Memo. For all intents and purposes, the Williams Memo restated the US DOJ's enforcement policies in the State of Oregon concerning marijuana that were initially laid out in the Cole Memo. The Williams Memo has never been updated or repealed, and presumably remains in effect.

So far, neither the US DOJ nor the OR DOJ has made any public statements about the Act, Colorado's Proposition 122, or state-regulated psilocybin programs in general. Although one might logically apply (or extend) the Williams Memo to psilocybin within the State of Oregon, there is no guarantee that the US DOJ or the OR DOJ will take any particular course of action. It appears they are taking a "wait and see" approach at the moment. However, anything is possible.

### Legal issues for psilocybin businesses

Oregon attorneys who represent psilocybin businesses under the Act will encounter many of the same legal issues that attorneys encounter when representing marijuana businesses. However, with respect to nearly all of those issues, there will be nuanced differences, most of which will make things even more challenging for psilocybin businesses and their attorneys.

Aside from the everyday legal issues that all businesses and attorneys encounter, the following is a list of some of the most important legal issues for psilocybin businesses.

**Federal illegality with no federal guidance**

The lack of federal guidance may warrant special care when it comes to securities law disclosures, entity organization documents, leases, and other contracts.

**Banking**

The lack of any federal guidance will likely ensure that banks or financial institutions will not openly and knowingly provide banking services to psilocybin businesses, at least for a while.

**Section 280E of the Internal Revenue Code**

Section 280E prohibits any business trafficking in a Schedule I or Schedule II controlled substance under the federal Controlled Substances Act from deducting any business expenses. In lieu of taking deductions, trafficking businesses can adjust their gross income downward by their cost of goods sold (COGS) to arrive at their taxable income. COGS are the direct costs incurred by a business to acquire or manufacture merchandise. State-regulated marijuana business have been dealing with Section 280E from the outset, and it has always been troublesome. However, Section 280E may have more extreme effects on service center operators (and potentially facilitators) because the "services" component of the Act is so significant. Services are not merchandise. Consequently, none of the service-related expenses incurred by a service center can be categorized as COGS.

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# Psilocybin

*Continued from page 11*

*Psilocybin is a naturally occurring psychedelic prodrug compound produced by more than 200 species of fungi.*

**Land use**

The Act allowed cities and counties to submit ordinances that prohibit manufacturing or service centers in their jurisdiction to their voters for approval in statewide general elections. In November 2022, voters in some jurisdictions did in fact prohibit manufacturing and service centers. However, most of the densely populated areas in Oregon allow all psilocybin businesses. A map of the jurisdictions that have permitted or prohibited psilocybin businesses is provided in a Local Jurisdiction Tracker. Those jurisdictions are now promulgating time, place, and manner restrictions, or grappling with how psilocybin businesses—especially service centers—fit within their existing land-use ordinances. Before leasing or purchasing real property, it is fundamental for a psilocybin business to understand those local ordinances.

**OHA rules**

The OHA's final rules implementing the Act are detailed and voluminous. The sheer amount of paperwork involved in providing services to a client is rather astounding. Regulatory compliance will be essential.

**Client agreements**

In the ordinary course of business, cannabis retailers do not enter into agreements with their customers. However, service-center operators and facilitators almost certainly will be entering into detailed agreements with their clients. They will want to have robust warranty disclaimers, releases, and liability waivers in their client agreements—especially if professional liability insurance for psilocybin services is prohibitively expensive.

**Residency requirements**

The Act requires that one or more Oregon residents must have more than 50% of the ownership interests of any legal entity that will hold a manufacturer or service center license. Additionally, all facilitators must be Oregon residents. The residency requirements expire on January 1, 2025.

**Trademarks**

As a result of federal illegality, the United States Patent and Trademark Office will not issue federal trademarks for any psilocybin products. An argument could be made that a facilitator who provides psilocybin services (and nothing more) is not federally illegal, because the facilitator is not manufacturing, distributing, dispensing, possessing, or even touching any psilocybin.

Consequently, federal trademark viability needs to be considered on a case-by-case basis. There are often numerous creative solutions to protect intellectual property even in the absence of federal trademarks.

### Ethics

Following the legalization of marijuana in Oregon, Oregon Rules of Professional Conduct (ORPC) Rule 1.2(d) was adopted to make it expressly clear that Oregon lawyers are permitted to counsel and assist clients regarding Oregon's marijuana-related laws. In 2022, the Oregon State Bar (OSB) Cannabis and Psychedelics Law Section submitted a formal request to the OSB Legal Ethics Committee to amend ORPC Rule 1.2(d) to permit Oregon lawyers to counsel and assist clients regarding any state and local laws that may be illegal under federal or tribal law. As of the date of this article, the proposed amendment has not been approved.

### The road ahead

Oregon's psilocybin program is in its infancy and as such, there are still many unknowns. Currently, the number of psilocybin licensee applications is small, resulting in a much slower rollout than what we saw in the early days of Oregon's marijuana industry. As Oregon's psilocybin ecosystem matures, we hope to see a thriving, inclusive, and sustainable program. ◆

# The Pros and Cons of the Attorney Fee Clause

*By Steven F. Cade, Sussman Shank LLP*

*Steven F. Cade, a partner in the law firm of Sussman Shank LLP, has more than a decade of diverse litigation experience. His practice concentrates in the areas of commercial litigation, construction law, products liability, elder, and transportation law. He also advises both insurers and insureds on insurance coverage issues.*

Attorney fees drive litigation. When drafting a contract, don't just reach for the same clause you used last time. A carpenter knows that not every problem calls for a hammer. Consider developing a tool kit of various clauses. Select one and shape it to the needs of the particular contract. As with any provision, an attorney fee clause should be shaped by consideration of how it will actually be used. This article provides the thoughts of a trial attorney.

### Should one include an attorney fee clause at all?

Generally, attorney fee clauses allow a damaged party to be made whole. Under the so-called "American rule,"[1] which is the default rule in Oregon, a party cannot recover its attorney fees unless a contract or statute allows it. Unlike tort claims, which often allow amorphous "pain and suffering" awards in addition to recovery of hard economic damages, contract claims are generally limited to actual economic impact. A contractual attorney fee provision allows a damaged party to be made completely whole, including the admittedly high cost of a lawyer, in the face of a breach.

However, an attorney fee clause can encourage litigation. The high cost of litigation can be a hurdle to even commencing the process. A party may be more likely to overlook a breach of minor or middling seriousness if attorney fees are not available. A clause that requires pre-suit mediation only partially mitigates this, partially because people who consult lawyers about litigation are already upset and ready to sue (and therefore unlikely to successfully mediate), and partially because such clauses are often ignored in practice.

An attorney fee clause can compensate for imbalances in economic power. In a contract between parties with significant disparities in resources, the stronger party might prefer not to have an attorney fee clause. This is because its strong resource base allows that party to more readily bear the cost of litigation. Thus, the deterrent to litigation is stronger for the less-resourced party where there is no attorney fee clause. This consideration is slightly mitigated where the potential claim is $10,000 or less. In such a case, the prevailing party is entitled to fees so long as she complied with the procedural pre-requisites. ORS 20.082. ORS 20.082 is reciprocal.

In deciding whether to include an attorney fee clause, one must be mindful that ORS 20.086 makes all attorney fee clauses reciprocal. Under this statute, any one-sided attorney fee clause becomes two-sided. Although the statute only authorizes "reasonable attorney fees" to the party who prevails without a contract expressly allowing it to have fees, in practice the unnamed party generally receives the full benefit of whatever clause is in the contract.

If applicable, one should also consider the impact of the laws of other states. The law of another state might apply through a choice of law provision or due to the nature of the contract. Many commercial contracts select New York or Delaware law, or the state of the vendor, and a lawyer must consider what that choice means in each specific context. This article only addresses Oregon law. Most states do not have a reciprocity provision similar to ORS 20.086.

As of 2012, only California, Florida, Hawaii, Montana, Oregon, Utah, and Washington had generally applicable reciprocal fee statutes. Another handful have reciprocity statutes that apply only in limited cases: Alabama, Arkansas, Connecticut, Delaware, Kansas, Kentucky, Massachusetts, Maine, New Hampshire, New Mexico, New York, and Ohio.[2] A drafter seeking to avoid reciprocity might therefore choose the law of another state to govern. This may have unanticipated consequences in that other substantive provisions of that state's law may be unfavorable. It may even be ineffective. The author of this article has briefed, but not had a decision upon, the issue of whether a reciprocity statute is a procedural statute, and thus applicable regardless of choice of law, or a substantive statute thus governed by the law of the selected forum. If the law of another state is implicated, extra care is warranted.

### The breadth of the clause

What are the triggers for the clause? A well-written clause should specify what triggers it. If the clause is triggered by a lawsuit, the clause should say whether the fees are for trial, or appeal, or both. In Oregon, without an express mention of fees on appeal, appellate fees may not be available.[3] Do you want fees to be available for mediation, and if so, just for pre-suit mediation, contractually required mediation, or any? Arbitration? Are fees available if a party hires an attorney to make a demand or tries to enforce a provision but

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# Attorney fee clause

*Continued from page 13*

resolves it short of filing a lawsuit? Should fees be available only if a party makes a qualified pre-suit demand? Some fee clauses allow fees in these situations, others do not.

### What about indemnity instead?

In an attempt to get around the reciprocity provided by ORS 20.086, some contract writers substitute a standard attorney fee clause with an indemnity provision. This provision generally provides that one party has the obligation to indemnify the second party against any expenses (including attorney fees) that the second party incurs in connection with enforcing the contract (or successfully defending a claim brought by the first party). The author has not seen a case decided that addresses whether this method successfully circumvents ORS 20.086.

### For reasonable fees, actual fees, or both?

In litigation, the general standard is for an award of a reasonable fee—generally the hours worked multiplied by a reasonable rate. Under case law this need not be equivalent to the actual fees incurred. In a commercial case, for example, for various reasons the attorney may be charging the client a rate that is less than a fair market rate for an attorney of equivalent experience and subject matter expertise. The actual rate charged is often taken as prima facie evidence of what is a reasonable rate, but in truth the attorney can legitimately submit a petition for a higher rate if it is supported by market research. Generally, courts follow either the Oregon State Bar survey or the Morones Survey of Commercial Litigation Fees. Some contract litigation is even done on a contingent fee basis. Fee awards for contingent fees can be the standard hours worked times a reasonable rate, or the contingent fee portion of the award (say one-third of the total award), or sometimes both. Fee awards in certain cases which are extremely difficult, beneficial to the public, or risky can also include a multiplier under which the base fees are increased by thirty, forty, fifty, or even one hundred percent.

It may be worth considering whether to write that the prevailing party is entitled to "reasonable fees" or "actual fees" or "the lesser of actual or reasonable fees." Such a construction might be ignored in practice, where judges tend to award "reasonable" fees regardless of language, but it may give your litigator another arrow in his quiver at just the right moment.

### How about other costs?

What costs should be recoverable under your provision? Generally, attorney fees are just that: the fees charged by the lawyer. Under Oregon precedent, reasonable attorney fees can include items not included in overhead and routinely charged to the client, such as postage, internet research, fax, and long-distance charges.[4] Prevailing parties by rule or statute usually also get to recover some filing fees, services fees, and other small miscellaneous charges as "costs." See, e.g., ORCP 68A(2), FRCP 54(d)(1). But a clause entitling the prevailing party to just "attorney fees" may not provide recovery of other major litigation expenses.[5] These expenses can include additional litigation costs such as expert costs (consulting and testifying), mediation costs, or depositions costs, but they can also include internal company resources expended in connection with the dispute, such as the time of employees, or expertise of a manager, or a consultant of some other stripe. To enable recovery of anything besides "attorney fees," the clause should specify the type of expense anticipated to be incurred and perhaps even include a catch-all of the type found in a typical indemnity provision.

### Conclusion

An author drafting an attorney fee provision should carefully consider the needs of the specific client, the parties' positions, and the type of transaction at issue. ◆

### Endnotes

1. "[A]s a general rule American courts will not award attorney's fees to the prevailing party absent authorization of statute or contract." *Deras v. Meyers*, 272 Or. 47, 65, 535 P.2d 541 (1975).
2. Bright, Jeffry C., "Unilateral Attorneys Fees Clauses: A Proposal to Shift to the Golden Rule," 61 *Drake L. Rev*. 85, 89 n.12 (2012).
3. This rule was originally announced in *Adair v. McAtee*, 236 Or 391, 396 (1964), and most recently affirmed in *Synectic Ventures I, LLC v. EVI Corp*., 244 Or App 406, 410 (2011) (which helpfully collects a number of interim cases with various iterations of language that were insufficient to support an award of appellate attorney fees).
4. *Rabinowitz v. Pozzi*, 127 Or App 464, 470 (1994), rev. den'd 320 Or 109; *Hamlin v. Hampton Lumber Mills, Inc*., 227 Or App 165 (2009); *Bearden v. N.W.E., Inc.*, 298 Or App 698, 710 (2019).
5. ORCP 68A(2) allows only an award of such additional expenses as are "specifically" allowed by agreement. Unless the agreement specifies the category of cost, a trial judge may refuse to award things such as mediator expenses, delivery fees, and travel expenses. See, e.g. *Butler Block, LLC v. AGNI Group*, LLC, 240 Or App 548 (2011) (trial court allowed expert costs where contract specifically provided for them, but disallowed mediator expenses under insufficiently specific catch-all for "all other fees, costs and expenses actually incurred"; the decision was affirmed on other grounds). A catch-all is not counter-indicated, however, as another trial judge may allow it. It just makes sense to detail out as many expense types as possible, if you want a broad recovery.

*This article is part of a series on miscellaneous contract provisions in common business, commercial, and real-estate agreements. When disputes arise, these overlooked provisions can determine the fate of a transaction. If not closely examined in the context of every agreement, they can provide grounds for litigation or threats of litigation.*

# Business Law Section 2023 Subcommittees

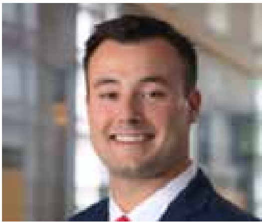
## Continuing Legal Education

Melissa Jaffe
*Chair*

One of the most important things we can do as a section is help each other be better lawyers and stay on top of changing laws in our area. Our CLE subcommittee has organized some great events over the last year and is looking at ways to incorporate technology to reach members outside of the major metro areas. This subcommittee also organizes our annual fall CLE which will be offered as a hybrid this year.

Members: Anne Arathoon, Melanie Choch, Tim Crippen, Berit Everhart, Matt Larson, Ben Pirie.

## New Business Lawyers



Joseph L Cerne
*Co-Chair*

Kaci Hohmann
*Co-Chair*

The New Business Lawyers Subcommittee is a way for new(er) lawyers who engage in transactional business practice to network with each other, mentor law students, and provide speaking and writing opportunities for its members. The subcommittee has six working groups: mentorship, social, pro bono, law schools, education, and newsletter.

Members: Tim Crippen, Krista Evans, and Berit Everhart, and several other Section members.

## Outreach

*Krista Evans*
*Chair*

The Outreach Subcommittee plans and carries out education programs and social events aiming to expand the reach of the Business Law Section to Oregon's professional communities in the Portland metropolitan area and statewide. The subcommittee also organizes the Section's annual planning retreat for executive committee members.

Members: Joe Cerne, Melanie Choch, Leigh Gill, Brian Jolly, Jennifer Nicholls.

## Newsletter

Tim Crippen
*Chair*

The Newsletter Subcommittee solicits and reviews articles from attorneys and publishes Oregon Business Lawyer, the quarterly Business Law Section newsletter.

Members: Adam Adkin, Blake Bowman, Jay Brody, Melanie Choch, Stephanie Davidson, Mick Harris, Kaci Hohmann, Melissa Jaffe, Dave Malcolm, Wendy Beth Oliver, Michael Walker, Meghan Williams.

## Legislative

Michael Walker
*Chair*

The mission of this subcommittee is business law improvement in Oregon.

Members: Blake Bowman, Leigh Gill, Melissa Jaffe, Matt Larson, Jennifer Nicholls, Ben Pirie.

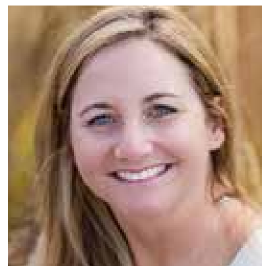
## Nominating and Member Recruitment

Will Goodling
*Chair*

This subcommittee encourages active membership in the Business Law Section and nominates Section members for service on the Executive Committee.

Members: Anne Arathoon and a third person who is not on the Executive Committee.

## Castles Leadership Award



*Anne Arathoon*
*Chair*

The award recognizes an Oregon lawyer for excellence in the practice of business law, professionalism among fellow business lawyers, and outstanding community leadership. This subcommittee receives and reviews nominations for the award and recommends a recipient to the Executive Committee.

Members: Previous Chairs of the Executive Committee.

# What Business Lawyers Need to Know About the Committee on Foreign Investment in the United States (CFIUS)

**Tuesday, April 18, 2023 • Noon–1:15 p.m.**
**In person at Stoel Rives LLP • 760 SW 9th Ave, 30th Floor, Portland**
**or online via Zoom**

Co-hosted by the OSB Business Law Section and the OSB International Law Section
CLE Credits: 1 General (pending)

Learn about the Committee on Foreign Investment in the United States (CFIUS), and when a filing with CFIUS is mandatory. This program will include case studies illustrating the kinds of issues that will trigger a CFIUS review in seemingly ordinary M&A and corporate finance transactions, and provide practical tips to help business lawyers identify CFIUS issues early and address them proactively.

CFIUS is an inter-agency committee within the executive branch of the U.S. government that reviews foreign investments in U.S. businesses and real estate for national security risks. The Committee has the power to impose mitigation measures and recommend that the President prohibit transactions that threaten national security. Under the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), filing with CFIUS is now mandatory in certain circumstances. Determining whether a CFIUS filing is mandatory is an important diligence step for any transaction in which an investor or acquiring party may be a "foreign person" (including U.S. entities controlled by foreign persons), as CFIUS can impose civil penalties of up to the value of the transaction against each party that fails to file when mandatory. If not formally notified of a transaction by either a mandatory or voluntary filing, the Committee retains the power to investigate and potentially unwind a transaction at any time, including after the transaction has been completed.

This presentation is designed to provide business practitioners with essential knowledge and tools to spot potential CFIUS issues and address them when appropriate.

### Registration

There is no cost to attend the event, but registration is required.

Lunch will be provided for in-person attendees, courtesy of Stoel Rives LLP.

Click here to register for the in-person event at Stoel Rives. Limited to 50 in-person attendees.

Click here to register for the online event. Please note: The Zoom presentation begins at 12:15 p.m.

Participants must register by noon on Friday, April 14. The meeting link will be emailed to online participants the afternoon of April 17.

For registration questions, contact the OSB CLE Service Center at (503) 431-6413, (800) 452-8260, ext. 413, or via email.

### The Presenter

**Kassim Ferris** is a partner at Stoel Rives with over 25 years of experience handling intellectual property and international trade regulation matters. He represents clients in connection with national security reviews by CFIUS, intellectual property issues in government contracting, and compliance with U.S. export controls. His intellectual property practice includes domestic and international patent procurement, patent opinions, technology licensing, patent enforcement and defense, and intellectual property aspects of mergers, acquisitions and other corporate transactions.

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## Professional Opportunity

**Rose Law Firm, PC**

Rose Law Firm is seeking an attorney with 6-12 years of experience in a wide range of business law practice areas—including M&A, corporate, real estate, executive compensation, tax, and estate planning. This position is ideal for someone wanting to transition away from the billable hour demands of a larger firm but still interested in maintaining a sophisticated practice and collaborating with a team of like-minded professionals.

This position requires someone with strong experience and a solid corporate skillset—especially in areas such as corporate structuring, commercial agreements, shareholder agreements, divestitures, mergers and acquisitions, joint venture management, internal ownership succession events, coordinating on tax issues, litigation support. We offer competitive wages and benefits with flexible billable hour goals (1,400-1,800). Please see full details and apply at www.rose-law.com/careers.

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.


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