Boston Bar Association

Business Law Section Newsletter

Volume 4
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Commercial Finance

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Tax-Exempt Organizations

A PUBLICATION OF THE BOSTON BAR ASSOCIATION BUSINESS LAW SECTION

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A MESSAGE FROM THE OUTGOING CO-CHAIR

It is with many fond memories and more than a tinge of regret that I end my two year tenure as a Co-Chair of the BBA's Business Law Section. As the outgoing Co-Chair, I leave my post with admiration and gratitude for the extremely dedicated, smart, funny, and yes, at times beleaguered Steering Committee members from each of the 14 active committees that comprised this section during the last two years.

Our Section commented extensively on proposed changes to existing laws designed to improve the lives of the individual consumer and the legal framework governing the commercial lives of our business clients. Most notably, members of our Section participated in the newly formed Consumer Finance Working Group and vetted the First Report produced by that group. We commented on House Bill No. 1000, updating certain corporate law references in the Massachusetts banking laws. Members of our Steering Committee also served on two Section task forces and delivered reports to the BBA's New Communications/Website Study Group and the BBA's New Section Study Group. All this - in addition to the numerous brown bag lunch programs and CLE programs that our Section's committees sponsored or co-sponsored. And then, there is this Newsletter that we finally managed to produce on a somewhat periodic basis with almost all committees contributing.

To each of you, congratulations on a job well done. You were terrific to work with. I enjoyed immensely the opportunity to get to know you both as individuals and as lawyers with very diverse practices. If I could leave you with but one thought it would be that there are, indeed, common threads that unite us all and make us a stronger and more effective force for change. Those of you who attended our monthly Steering Committee meetings heard me say this over and over again.

We are fortunate to have an organization such as the Boston Bar Association with its talented professional staff that allows lawyers from all walks of life, practice specialties, large firms, middle size firms, small firms, corporate law departments, governmental agencies, and the like to work together as members of the Boston legal community at large.

I will miss you all.

Paula

Paula K. Andrews

Editors: **Gregory Fryer and Sarah Curtis Richmond**

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Upcoming CLE Programs

The New Federal Banking Legislation: Federal Financial Regulatory Restructuring Provisions

Wednesday, September 15, 2010
4:00 p.m. - 7:00 p.m.
Boston Bar Association - 16 Beacon Street

Financing Renewable Energy Projects

Thursday, October 7, 2010
Boston Bar Association - 16 Beacon Street

For more information: To register for any of the foregoing CLEs, please contact Leah Davis at the BBA at ldavis@bostonbar.org.

Featured Committee: Antitrust

The Antitrust Committee focuses on issues of interest to lawyers who counsel clients concerning antitrust risk and who represent clients before state and federal enforcers and in antitrust litigation. In the past year, the committee has sponsored and co-sponsored a number of brownbag discussions and educational programs on timely antitrust topics, including programs for both new and experienced antitrust practitioners.

The Antitrust Committee offered the following programs this year:

- On December 15, 2009, Tasneem Chipty of Charles River Associates gave an overview of legal and economic requirements for class certification in private antitrust litigation in light of recent federal precedent. Dr. Chipty's presentation was entitled "The Economics of Class Certification: Before and After *Hydrogen Peroxide."*
- On January 5, 2010, the International Law Section and the Antitrust Committee co-hosted "Extraterritorial and Cross Border Coordination and Application of U.S. Antitrust Laws," a roundtable discussion with Mr. Kazuhiro Fukuda, Assistant Director of the Competition Enhancement Office of the Ministry of Economy, Trade and Industry of Japan.
- On February 16, 2010, the Antitrust Committee sponsored "Antitrust Law: Basics" a program covering the nuts and bolts of antitrust law, including the governing statutes, enforcement mechanisms, the role of economics and the fundamentals of vertical and horizontal restraints. Thane D. Scott of Bingham McCutchen LLP served as Program Chair and led a panel of experts including Brandon L. Bigelow of Bingham McCutchen LLP, Kathryn K. Conde of Nutter McClennan & Fish, Michael T. Gass of Choate Hall & Stewart LLP, Christopher T. Holding of Goodwin Procter LLP and Jane E. Willis of Ropes & Gray LLP.
- On February 22, 2010, Elizabeth M. Bailey and Greg Leonard of NERA Economic Consulting presented "Demystifying Upward Pricing Pressure" a brownbag discussion of the new measure of upward pricing pressure ("UPP") proposed by the chief economists of the federal antitrust authorities as an alternative to traditional market share analysis to identify potentially anticompetitive mergers.
- On March 11, 2010, the Antitrust Committee joined the Federal Practice & Procedure Committee and the Class Actions Committee in co-sponsoring "Recent Trends and Emerging Issues in Class Action Practice." Matthew C. Baltay of Foley Hoag LLP moderated a panel discussion with Hon. Patti B. Saris of the U.S. District Court for the District of Massachusetts, Stuart Rossman of the National Consumer Law Center, Daniel S. Savrin of Bingham McCutchen LLP and Thomas M. Sobol of Hagens Berman Sobol Shapiro LLP.
- On March 31, 2010, the International Transactions Committee and the Antitrust Committee co-sponsored a program featuring Pierre Y. Cremieux of Analysis Group, Inc. entitled "Global Antitrust Enforcement: Is it neutral, protectionist or domestic?"
- On April 5, 2010, the Antitrust Committee presented the second program of a two part educational series, " Antitrust Law: Advanced." The program again featured an expert panel led by Program Chair Thane D. Scott of Bingham McCutchen LLP. Also participating as panelists were William N. Berkowitz of Bingham McCutchen, Richard M. Brunell of the American Antitrust Institute, Robert M. Buchanan, Jr. of Choate, Hall & Stewart LLP, Michelle D. Miller of WilmerHale and Patricia Sullivan of Edwards Angell Palmer & Dodge. The panelists covered a range of advanced topics at the forefront of antitrust law including enforcement trends under the Obama administration.

The Antitrust Committee is co-chaired by Mark Ford of WilmerHale and Mary Freeley of the Office of Attorney General Martha Coakley. The Antitrust Committee will be moving to the BBA's Litigation Section next year as part of a newly merged Business Litigation and Antitrust Committee. Anyone interested in joining the new committee or planning future events should contact Mary Freeley or the co-chairs of the Business Litigation and Antitrust Committee.

Antitrust Case Note: *American Needle, Inc. v. National Football League*

By Mary B. Freeley

On May 24, 2010, the Supreme Court decided American Needle, Inc. v. National Football League, 2010 WL 2025207 (U.S.), a case involving the question of whether the National Football League's activity in licensing the intellectual property of NFL teams is subject to scrutiny under §1 of the Sherman Act. In a unanimous decision written by Justice Stevens, the Court held that the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of §1. In so holding, the Supreme Court reversed the judgment of the Seventh Circuit Court of Appeals that the conduct should be viewed as that of a single enterprise. The Supreme Court remanded the case to consider the legality of the concerted action under the Rule of Reason.

The National Football League is an unincorporated association of 32 separately owned professional football teams. Each team owns the intellectual property related to its team name, colors and logo. In 1963, the teams formed National Football League Properties (NFLP) to develop, license and market their intellectual property. Prior to the formation of NFLP, the teams separately arranged for the licensing and marketing of their trademarked items. From 1963 through 2000, NFLP granted licenses to a number of vendors, including American Needle, Inc., to manufacture and sell apparel such as caps and jerseys bearing the NFL team insignias. That changed in 2000 when NFLP granted Reebok International an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams, a move authorized by the teams. NFLP declined to renew American Needle's license when it expired.

American Needle sued the NFL, NFLP, the member teams and Reebok, alleging that the agreements among them constitute a "contract, combination . . ., or, conspiracy, in restraint of trade" in violation of § 1 of the Sherman Act. The NFL defendants countered that they are a "single entity" with respect to the collective licensing of their trademarks and logos as a means of promoting their integrated product – NFL football. The NFL moved for summary judgment, asserting that, under the teaching of *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 767 (1984), the league and its member clubs are or function as a single entity with respect to the conduct alleged, incapable of conspiring within the meaning of §1. The District Court agreed and granted summary judgment. The Court of Appeals affirmed, concluding that the NFL teams "are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." 538 F.3d 736, 743 (7th Cir. 2008). The NFL supported American Needle's *certiorari* petition to the Supreme Court in order to resolve a split among the circuit courts concerning the application of *Copperweld* to joint ventures that involve a high degree of economic integration, such as those in which members, though separate in some respects (such as team ownership), are inherently interdependent in other respects.

Writing for a unanimous Court, Justice Stevens considered the rationale of the Court's *Copperweld* decision and its progeny. The Court then applied a "function over form" analysis to address whether the joint licensing "joins together separate decisionmakers" in a way that would necessarily subject the activity to antitrust scrutiny. Citing *Copperweld*, the Court noted that the relevant inquiry "is whether there is a "contract, combination . . ., or conspiracy" among "separate economic actors pursuing separate economic interests" such that the agreement "deprives the marketplace of independent centers of decisionmaking." 2010 WL 2025207 (U.S.), quoting *Copperweld*, 467 U.S. at 769 (internal citations omitted). If it does, the Court concluded, the entities are capable of conspiring under § 1, and courts must decide whether the restraint of trade is an unreasonable one.

The Supreme Court concluded that the NFL teams do not possess either the "unitary decisionmaking" quality or the "single aggregation of economic power" quality of independent action. Given the separate ownership and management of the teams, the teams are guided by "separate corporate consciousnesses" and compete to attract fans, gate receipts and contracts with players and managerial personnel. The Court found that the decisions by NFL teams to license their separately owned trademarks collectively and to license only one vendor are decisions that "deprive the marketplace of independent centers of decisionmaking," and therefore of actual or potential competition. Accordingly, their actions are not immune from antitrust review. The Court also found that NFLP is an "instrumentality" of the 32 NFL teams in making relevant licensing decisions, and its activity similarly is subject to review under §1. Finally, the Court noted that the NFL teams' shared interests in producing football games and in making their league successful and profitable provides a "perfectly sensible justification" for making many collective decisions, but those interests do not justify treating them as a single entity for antitrust purposes when it comes to the marketing of the teams' individually owned intellectual property. In light of these shared interests and possible precompetitive justifications, the Court remanded the case for further consideration of the agreements at issue under the Rule of Reason.

Featured Committee: Corporate Counsel Committee

The Corporate Counsel Committee is co-chaired by John A. Beccia III at Boston Private Financial Holdings, Inc. and Pilar C. Schultz at Biogen Idec, Inc. The committee focuses on several of the unique challenges facing in-house counsel, including how to best manage an in-house legal department, efficient use of outside counsel, board/governance matters, risk management, regulatory/compliance matters and litigation issues.

Prior programs included:

- A "General Counsel Forum" was held at the John Adams Court House in which chief legal officers discussed the challenges of managing the in-house legal function. Panelists included Paul T. Dacier is Executive Vice President and General Counsel, and Assistant Secretary of EMC Corporation, Charles Gray, Vice President, General Counsel and Secretary of Teradyne, Inc. and Kathleen F. Burke, General Counsel of MKS Instruments, Inc.

- H. Norm Knickle and Kevin M. Kelcourse from the U.S. Securities and Exchange Commission provided an update on recent SEC enforcement actions impacting investment advisers and investment companies. This program was co-sponsored by the Investment Companies and Advisers Committee and the Securities Enforcement and Litigation Committee.

- Daniel I. Small from Holland and Knight, LLP presented a program called "Powerful Witness Preparation". This program was co-sponsored by the Business Litigation Committee.

- Brion Bickerton, a partner at the recruiting firm of Major, Lindsey & Africa, led a discussion on career options available for attorneys at corporations and how to find the right position.

- A program was conducted on the Department of Homeland Security' s recent activism in performing site visits as U.S. employers. Panelists included Malvena S. Driscoll and Elaine Walsh from Chin & Curtis, LLP. This program was co-sponsored by the Immigration Committee, Labor & Employment Law Section, New Lawyers Section, International Public Law, and Policy & Human Rights Committee.

- A program was conducted on pro bono opportunities for in-house counsel. This program was co-sponsored by the Delivery of Legal Services Section and the Women's Bar Association (In-House Counsel Committee). Panelists included Leigh-Ann M. Durant, EMD Serono, Inc., Anne Judith Farina, Sun Life Assurance Company of Canada, Kathleen E. McGrath, Liberty Mutual Group and William O'Brien, Associate of Corporate Counsel - Northeast.

Getting the Benefit of Your Bargaining Power

By Rob Thomas and Melissa Pearlstein

Believe it or not, there is a silver lining in the dark economic cloud hovering over corporate legal departments. With many law firms struggling to attract or retain corporate clients, companies now often have the upper hand in negotiating new engagements. This increased bargaining power presents a great opportunity for corporate legal departments to re-tool their relationships to ensure that they receive more value from their outside counsel.

Managing for Savings

For the past nine years, the Association of Corporate Counsel (ACC) and Serengeti Law have published the *ACC-Serengeti Managing Outside Counsel Survey*, a report assessing the latest trends in outside counsel management.[1] Some 390 legal departments completed the 2009 survey, in which for the first time in three years in-house counsel's top concern was reducing outside counsel spending.[2] For the first time in the history of the survey, there was no increase in annual outside counsel spending, and none predicted for the coming year. And outside counsel rates increased by the lowest percentage (4.7%) since the survey began in 2000.[3] Given higher rates and static budgets, legal departments must get better control over outside legal spending.

The report also indicates that more in-house counsel find that the key to controlling spending is active management. Following are the most effective practices identified by respondents:[4]

- Requiring case/matter budgets (22% savings)
- Re-allocation of work to firms with lower rates (18% savings)
- Discounted/alternative fees (17% savings)
- Billing guidelines/expense reviews (17% savings)
- Evaluations of outside counsel (15% savings)
- Electronic bill review/audit (12% savings)

The challenge in implementing these strategies often lies in getting law firms to cooperate. Approximately 38% of in-house counsel surveyed said that 10% or fewer of their firms implemented their suggestions for increasing value; 21% said that *none* of their firms did.[5] Most cost-saving methods are grounded in the principle that clients want more communication and more participation in the strategic decisions affecting their projects. The following sections describe specific ways that both clients and firms are applying this basic principle to boost the efficiency and effectiveness of their legal teams.

Agree Upon Clear Engagement Terms; Employ a System to Monitor Compliance

Outside counsel may think that clients should agree to their engagement letters, but many corporate clients now set uniform retention terms that they require from all of their firms. Clear retention terms, consistently applied, can be very effective in controlling spending. Companies should begin each project by securing outside counsel's agreement, which may take the form of a simple letter, or a longer document complete with sample forms. Generally, the larger the project, the more likely the client will require a detailed plan and regular updates.

To realize the benefits of engagement terms, companies must have practical ways to hold law firms to their end of the bargain. At a minimum, the lead in-house attorney should calendar reminders to request periodic budgets and status reports. Many legal departments (even small ones with a single lawyer) use online e-billing/matter management systems to automatically monitor outside counsel compliance with their retention terms. For example, the most widely used system (Serengeti Tracker) includes a patented workflow to ensure that law firm requirements are fulfilled. The system allows law departments to require information, such as budgets and initial case assessments,

1 Association of Corporate Counsel and Serengeti Law, *2009 ACC-Serengeti Managing Outside Counsel Survey Report* (2009) (hereafter "ACC-Serengeti Report"); <http://www.serengetilaw.com/survey/>.

2 Reflecting the demographics of the broader in-house profession, the majority of respondents by far—84%—have 10 or fewer attorneys. *Id*. at 33.

3 *Id*. at 119.

4 *Id*. at 130.

5 *Id*. at 113.

and then checks, whenever a firm submits a bill, to see whether the required information has been entered by outside counsel within the time period established by the client. If any required information is overdue, then the firm is immediately notified that the bill will be held for processing until the requirements are completed. As a result of this systematic workflow, clients are assured that firms promptly comply with the major terms of the engagement.

Electronic systems can also automatically check compliance by auditing legal bills for elements such as the following: (1) no increase in hourly rates nor addition of new timekeepers without client approval; (2) no bills exceeding the budget; and (3) agreed limits on expenses such as copying costs, travel expenses, long-distance charges, and online legal research. The system flags any violations, and the in-house attorney reviewing the bill then decides whether exceptions to the engagement terms are warranted. As a result of this enhanced ability of in-house counsel to monitor compliance with retention guidelines, companies report that such systems result in average savings of 12% (compared with a system cost of generally less than 1%).[6]

Set Realistic Goals with Budgets and Early Case Assessments

According to the ACC-Serengeti Report, budgets reduce total outside counsel spending by an average of 21%.[7] Budgets and early case assessments force attorneys to set realistic strategies early, minimizing false starts down the road. They also require a meeting of the minds between attorney and client regarding expected levels of activity and spending to accomplish the client's goals for each stage of a project. The following are examples of terms:

- Company requires budgets for every matter. The budget should be provided to and discussed with Company before commencement of the engagement and should include, at a minimum, a timetable; personnel; a forecast of hours, fees, and expenses; and, with respect to litigation, a discussion of possible outcomes with cost-benefit analyses and potential exit points. Firm should review project budgets with Company quarterly and after the occurrence of a significant event. The review should include a summary of the work performed and an updated projection of anticipated work.

- Company requires a strategic litigation plan designed to achieve the earliest, most cost-effective resolution consistent with the Company's business objectives. Company and firm should collaborate to evaluate risk and potential exposure and then develop the most appropriate resolution strategy. An initial case assessment allows Company to make informed choices among strategic options at the earliest possible stage in the litigation. The matter should be sufficiently evaluated in the first 90 days to determine whether settlement is efficient, responsible, and prudent before engaging in lengthy discovery, complex motion practice, or other potentially expensive and time-consuming practices.

6 *Id*. at 130

7 *Id*.

Maintain Optimal Staffing

There is no one-size-fits-all approach to staffing legal projects. However, the ACC-Serengeti report found that 62% of companies now require law firm associates to have at least one year of experience.[8] Clients expect that attorneys will have a minimum level of competence so that they aren't paying for training. Yet, for certain tasks such as routine discovery or document review, a summer clerk or first-year associate may be the right person, at the right rate. In other situations, partners may provide the biggest bang for the buck because they can accomplish tasks in much less time, albeit at higher rates. Therefore, terms that offer flexibility, with oversight by the client, are often effective at reducing costs. The following are examples:

- Company must approve in advance the staffing of each matter. Once staffing has been agreed upon, Firm must consult with Company before making changes or additions. Company will pay for only one attendee at depositions, court hearings, and negotiations, unless otherwise pre-approved.

- Company expects an experienced Lead Outside Counsel to remain on the case/transaction from start to finish, unless otherwise requested by Company. Company will not pay for review time if Firm changes lawyers, nor will Company pay for training junior lawyers or support staff. Use of associates and paralegals is encouraged, but Company expects Lead Outside Counsel to maintain responsibility for the entire matter.

This is another area where electronic billing systems help clients, by presenting summaries with each bill that help in-house counsel assess the allocation of work being done by various members of a legal team.

Monitor Periodic Status Updates

Periodic status reports from outside counsel can help companies avoid expensive surprises. By regularly monitoring

8 *Id*. at 114.

progress, the client knows if a project is getting off track, not meeting major milestones, or exceeding the budget. They can then work with outside counsel to address such issues before they become much larger. Companies should communicate clear expectations on how and when they expect updates from outside counsel, such as the following:

- Firms must submit monthly status reports to Company's online matter management system, as well as whenever there is a development that materially affects the fees, expenses, duration, or likely outcome of the matter. Company will not pay invoices unless status reports have been submitted.

- Firm should discuss strategic direction with Company and inform Company of ongoing developments. Firm should send drafts of all documents and significant correspondence sufficiently in advance of filing or mailing to permit time for review.

Evaluate Firms and Assign Work Accordingly

A thorough evaluation of the law firm's performance (including costs incurred as well as results achieved) can reduce future costs by 15%.[9] By systematically evaluating performance, companies can make sure to assign future work to those attorneys who deliver the best value. In addition, by asking firms what steps they took to improve efficiency, companies can apply lessons learned to similar projects in the future.

Build Long-Term Relationships with Your Firms

Every company knows the value of retaining good employees, and it's just as important to build lasting relationships with outside counsel. Solid working relationships ease the way for the cost-saving measures described above, as well as for alternative fee agreements (AFAs), which encourage efficiency. Firms are also more likely to invest time to develop expertise that will be useful to a specific client with which they have a long-term relationship and to provide free CLEs and other substantive support for the law department. One of the central tenets of the ACC's Value Challenge—an initiative to help companies and firms derive more value from their work—is the importance of long-term relationships. The ACC suggests that the company and firm should meet, talk, and act on ideas that will result in a relationship that improves value, protects the client, maintains firm profitability, and reduces attrition rates for both company and outside counsel.[10]

With a strong working relationship between client and outside counsel, firms may feel more comfortable engaging in AFAs (including fixed fees and fees contingent upon success) that can generate significant benefits for both parties.[11] According to one 20-year attorney who has engaged in AFAs extensively since the mid-1990s:

> Under most scenarios, a well-designed alternative fee arrangement will actually strengthen relationships with outside counsel....Communication improves [and] outside counsel truly invests in understanding the client's corporate culture. Additionally, there is incentive for outside counsel to perform a serious and realistic early evaluation of the legal matter, which is exactly what the client wants. Efficiencies and optimum use of technology are realized when outside counsel's rewards are tied to performance. Nickel and dime invoicing issues vanish.[12]

Companies may have the upper hand in negotiating engagements with outside counsel—for now. But the reality is that bargaining power is a pendulum that swings back and forth over time. In-house counsel should leverage their current position to create long-term relationships with outside counsel that focus on increasing the value of the services that they provide. By implementing techniques such as agreeing upon and monitoring clear engagement terms, evaluating outside counsel performance, and building long-term relationships, companies can ensure that their firms will deliver top quality representation at the best possible price—now and in the future.

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9 *Id*. at 130.

10 Association of Corporate Counsel, *ACC Value Challenge Briefing Package*, 3 (Feb., 2010) <http://www.acc.com/valuechallenge/upload/Value-Challenge-Brief_022510.pdf>.

11 According to the ACC-Serengeti Report, nearly 90% of companies reported that their firms are resistant to AFAs, compared with only 40% who faced internal resistance. *ACC-Serengeti Report*, at 124 (2009).

12 Kevin Young, *Busting the Myths of Alternative Fee Agreements*, ACC South/Central Texas Chapter Focus Newsletter, Second Quarter 2007, at 6.

The Accelerating Development and Enforcement of International Anti-Corruption Law

By William J. Shannon

Within the United States legal and business community, there has been much discussion in recent years of increasingly aggressive prosecutions[1] under the Foreign Corrupt Practices Act (FCPA). These U.S. prosecutions, however, should not be viewed in isolation. Companies doing business abroad face an increasingly complex array of non-U.S. laws and non-U.S. enforcement actions to combat unlawful payments. Enactment of the far-ranging U.K. Bribery Act of 2010 shows that this trend continues to accelerate, upping the ante for companies that seek foreign markets for their goods and services.

* * *

International corruption has been described in the words of Robert Zoellick, the President of the World Bank, as "a cancer that steals from the poor, eats away at governance and moral fiber and destroys trust."[2] Yet for centuries the bribery of foreign public officials by private individuals to obtain business advantages was more or less an accepted way of doing business. In fact, until the later part of the 20th Century certain Western European countries permitted businesses to treat bribes paid to foreign officials as tax deductions for business tax purposes.

For U.S. companies and individuals, this situation changed radically in 1977 with the enactment of the FCPA.[3] By prohibiting the bribery of foreign officials, the FCPA was an initial and major step forward in the fight against international corruption. However, perhaps in part due to the great disadvantage placed upon U.S. business by the FCPA, enforcement of the FCPA provisions was until recently weak, resulting mainly from complaints made to the Department of Justice rather than from aggressive enforcement activities. For example, for the five-year period from 2002 to 2006, there were only 30 new cases initiated by the DOJ whereas in the three-year period from 2007 to 2009, 38 were initiated in 2007-08 and another 49 were initiated in 2009, indicating that the filing of new cases appears to be not only increasing but also accelerating. There have also been increases in new cases opened by the Securities and Exchange Commission under the accounting and record keeping provisions of the FCPA.

Increased enforcement in the U.S. is not simply a matter of more cases being filed – criminal penalties imposed have become much higher; individuals as well as entities are being indicted and convicted; and the DOJ has become much more aggressive in its investigative activities. Illustrating this last point, the DOJ made extensive use of FBI agents in the elaborate sting operation that netted indictments against 22 individuals in the military equipment industry.[4] Although cases involving large multinational corporations[5] tend to receive the most publicity, it should be noted that FCPA prosecutions are by no means just a "big company" risk. In fact, most of the individuals indicted in the military equipment industry sting were employees of small and medium-sized entities.

The rest of the world was very slow in following the lead of the U.S. in fighting international corruption, but in 1997 all 30 member countries of the Organization for Economic Co-operation and Development, including the U.S., signed (and subsequently ratified) the OECD Convention on Combating Bribery of Foreign

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1 A chronological list of enforcement actions by the U.S. Department of Justice can be found at: http://www.justice.gov/criminal/fraud/fcpa/cases/2010.html.

2 Quoted in the New York Times, "Mending Fences at World Bank" (June 26, 2007): http://query.nytimes.com/gst/fullpage.html?res=9E06EFDD1F3FF935A15755C0A9619C8B63&sec=&spon=&pagewanted=all.

3 15 U.S.C. §§ 78dd-1 *et seq.*

4 DOJ Press Release, "Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme" (January 2010) [http://www.justice.gov/opa/pr/2010/January/10-crm-048.html].

5 Two recent examples of high-ticket remedies imposed through DOJ enforcement actions are the $400 million penalty in the plea agreement entered into by BAE Systems PLC in February 2010 [http://www.justice.gov/opa/pr/2010/March/10-crm-209.html] and the $185 million penalty and disgorgement in the deferred prosecution agreement entered into by Daimler AG in April 2010 [http://www.justice.gov/opa/pr/2010/April/10-crm-360.html] .

Public Officials in International Business Transactions (OECD Convention).[6] The OECD Convention generally was modeled after the FCPA, and the FCPA itself was amended in 1998 to be consistent with those parts of the OECD Convention that went beyond the original U.S. statute.

The OECD Convention laid the groundwork for the United Nations Convention against Corruption (UN Convention), which was adopted by the General Assembly in October 2003 and has been ratified by over 130 countries, including the U.S.[7] The UN Convention deals with corruption in the broad sense by not only requiring that countries covered by the convention make corruption of or by a government official a criminal offense, but also requiring that measures such as ethics and anti-corruption codes and anti-corruption commissions or agencies be established to prevent corruption in the first place. The UN Convention also requires cooperation among the signatories in fighting corruption and recovering illicitly acquired assets.

Since the enactment of the FCPA, the OECD Convention and the UN Convention, numerous regional conventions and protocols dealing with the international fight against corruption have been enacted.[8] In addition, international institutions such as the multilateral development banks and the World Bank have established anti-corruption policies and procedures.

There has, therefore, been a sea change with regard to the development of international anti-corruption law since the enactment of the FCPA in 1977, from basically no international prohibition of the bribery of foreign officials to a wide ranging web of local and international laws prohibiting such activity. Notably, much of the development has taken place in the relatively short period from the enactment of the OECD Convention in 1997 to the present time.

With regard to the future development of international anti-corruption law, one indication may be the U.K. Bribery Act of 2010[9] (Bribery Act) enacted in April of this year. Although the Bribery Act was originally expected to take effect by October of this year, the recently formed United Kingdom government has announced that the Bribery Act will not come into force until April 2011.

The Bribery Act has sweeping extraterritorial application, by its terms reaching not only U.K. entities but also any non-U.K. entity that "carries on a business, or part of a business, in any part of the United Kingdom," regardless of where the prohibited activity takes place. The Bribery Act also represents an expansion with regard to those individuals subject to prosecution and provides for more severe penalties than does the FCPA. An innovation in the Bribery Act is the creation of a new criminal offense, <u>failure to prevent bribery.</u> This offense essentially results in a company being strictly liable if bribery takes place and the company does not have in place an adequate compliance program at the time of the offense. The following table reflects some of the differences between the FCPA and the Bribery Act and demonstrates that the FCPA (thought to be draconian at the time of its enactment) is in many ways lenient by comparison to these evolving international standards.

6 The text of the OECD Convention, and related materials, can be found at: http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

7 The text of the UN Convention, and related materials, can be found at: http://www.unodc.org/unodc/en/treaties/CAC/index.html.

8 See, e.g., UNODC Compendium of International Legal Instruments on Corruption (Second Edition, 2005), which can be found at: http://www.unodc.org/documents/corruption/publications_compendium_e.pdf.

9 Bribery Act, 2010, c.23 (United Kingdom), which can be found at http://www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1.

	FCPA	Bribery Act
Extra-territorial reach	Applies to: U.S. companies and citizens anywhere in the world; any conduct that takes place in part in the U.S. (includes bank transfers and communications); and regarding the accounting and record keeping provisions, any company that has reporting requirements to the SEC.	Applies to: U.K. companies and citizens anywhere in the world; any conduct that takes place in part in the U.K.; and *with regard to the corporate offense of failing to prevent bribery, any company that "carries on a business, or part of a business, in any part of the U.K." regardless of where the conduct occurs.*
Covered acts	Only criminalizes bribery of foreign officials.	Criminalizes c*ommercial* bribery; bribery of domestic and foreign officials; receipt of a bribe *and failure to prevent bribery.*
Treatment of expenses in connection with promotional activities	Affirmative defense for "reasonable and bona fide expenditure . . . directly related to the promotion, demonstration, or explanation of products or services."	No exception or affirmative defense.
Treatment of facilitation payments (small amounts paid for routine services)	Exception for "any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."	No exception or affirmative defense.
Treatment of corporate compliance programs	Compliance programs are not a defense to liability (but are considered a mitigating factor with regards to fines and penalties).	No company liability for failure to prevent bribery if it can be shown that the company "had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct."
Penalties for bribery	Entities: Civil penalty up to $10,000; criminal fine up to $2 million; May be increased under the Alternative Fines Act. Individuals Civil penalty up to $10,000; Criminal fine up to $250,000; May be increased under the Alternative Fines Act. Up to five years in prison. (Note: additional penalties may be imposed under the accounting and record keeping provisions of the FCPA.)	No limit as to fines and penalties; individuals may be imprisoned for up to 10 years.
Related whistleblower provisions	Pursuant to Dodd-Frank, in cases of successful SEC prosecution under specified statutes (including FCPA), qualifying whistleblowers entitled to at least 10% of aggregate sanctions collected in excess of $1 million, in that action and any related actions by DOJ or others. Broad prohibitions on retaliating against whistleblowers.	No analogous provision.

Here on this side of the Atlantic, the new Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) ups the ante for violations of the FCPA. Under Section 922 of Dodd-Frank[10], qualifying whistle-blowers who voluntarily provide information that leads to a successful FCPA enforcement action are entitled to not less than 10% (and, in the SEC's discretion, not more than 30%) of sanctions in excess of $1 million in that enforcement action and any "related" actions. Such a large inducement can be expected to increase the number of FCPA-related tips made to federal prosecutors.

The FCPA and the Bribery Act provide for criminal and civil penalties, but recent experience in the U.S. demonstrates that companies should also be concerned about ancillary civil liabilities. Bribery violations can result in forfeiture of contracts obtained through bribery, disqualification from bidding on future government contracts, liability for financial misrepresentations or tax fraud, and shareholder derivative actions against officers and directors. It should also be noted that when the DOJ makes a determination that there has been a violation of the FCPA, it often finds that there has been a violation of other U.S. statutes as well, such as the Travel Act,[11] the Money Laundering Control Act,[12] and the Racketeer Influence and Corrupt Organizations Act,[13] which can result in additional penalties and terms of imprisonment.

* * *

It is beyond the scope of this article to discuss in detail the requirements necessary to keep pace with international anti-corruption law. However, the following actions should be taken by companies (including service professionals) involved in international business activities, even in cases where foreign sales of goods and services are made only indirectly through subsidiaries, distributors, representatives or agents:

1. Retain advisors (law firms, accountants, consultants) with specialized expertise in anti-corruption laws within all relevant jurisdictions.

2. Conduct an anti-corruption risk assessment of the company's business, in part to identify functions carrying the greatest risk of corrupt practices.

3. If during the risk assessment it is determined that the possibility of corrupt activities already exists, a thorough investigation should be made, preferably by outside counsel to establish impartiality and preserve confidentiality, and if it is determined that corrupt actions have taken place, a report should be made to the board of directors and senior management, and remedial action and the possibility of voluntary disclosure to the DOJ should be discussed.

4. In conjunction with the risk assessment, a comprehensive compliance program should be established for the company starting with setting the "tone at the top." The company should establish a clear and strong company policy prohibiting bribery, develop policies and procedures for assuring compliance with the policy, and communicate the policies not only to all company personnel but also to any third parties whose functions on behalf of the company could involve corrupt activities, such as agents, joint venture partners, representatives and distributors.

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10 Adding Section 21F of the Securities Exchange Act, 15. U.S.C. § 78u-6. The whistleblower provision covers all violations of federal securities laws, including but not limited to FCPA.

11 18 U.S.C. §1952

12 18 U.S.C. §§1956

13 18 U.S.C. §§1961

Featured Committee: Corporate Law Committee

During the 2009 – 2010 year, the Corporate Law Committee sponsored lively brown bag lunch discussions on the following topics: shareholder access to corporate proxy statements, the impact of the new merger accounting rules on deal structure and management, Delaware corporate / M&A law update, insider trading issues for corporate counsel, the impact of IRC §409A on mergers and acquisitions, the nuts and bolts of transfer agent services, protecting the general partners of private investment funds in transactions with portfolio companies, and the legal aspects of the new social media. Some of these were co-sponsored with the Securities Law Committee or the ERISA Committee. The Corporate Law Committee also co-sponsored a CLE program on Corporate Reorganization & Immigration with several other committees.

Next year, we anticipate holding additional interesting programs, including an analysis of the impact of the revised FASB standard regarding disclosure of loss contingencies, a program on share lending and overvoting, and updates on developments in Massachusetts corporate law, legal opinion practice, and stockholder and director rights and duties regarding preferred stock.

Informal Corporate Disclosure in the Age of Twitter

By David A. Cifrino and Amar Murugan

For public companies listed on the New York Stock Exchange (NYSE), the long-standing mandatory use of press releases as a means of disseminating material company information finally gave way to the immediacy and near-ubiquity of the internet. Effective May 7, 2009, NYSE-listed companies were no longer required to use press releases to distribute material information, but only encouraged to do so. Instead, the amended NYSE Immediate Release Policy provided that, subject to certain conditions, material information required to be released promptly can be disclosed by means of any Regulation FD compliant method.[1]

Considered long overdue by many—the Nasdaq Stock Market made a similar change several years ago—the change was most notable for removing a relatively minor but symbolically significant obstacle to broader use of advanced technologies by public companies in their communications with investors and the public at large.

The change to the NYSE's Immediate Release Policy is consistent with guidance (the Website Guidance[2]) issued in 2008 by the U.S. Securities and Exchange Commission (SEC) on how company websites can be primary vehicles for communicating with investors without violating the SEC's general anti-fraud rule, Rule 10b-5, or Regulation FD, which proscribes the selective disclosure of material nonpublic information. The Website Guidance, in which the SEC encouraged the use of company websites for disclosure, is not considered a change in SEC regulation, but rather a principles-based interpretation of existing relevant law and regulation applied to the challenges and opportunities faced by emerging technologies.

Whether the legal framework articulated in the Website Guidance is sufficient to address the accelerating adoption by millions of corporate and individual users of communications tools and social networking sites, such as Twitter, blogs, LinkedIn and Facebook, remains to be seen, but it is essential that public companies appreciate and appropriately manage the legal risks associated with the use of these activities, and those still to emerge, in the distribution of material information to investors.

1 See McDermott's *On the Subject* dated May 6, 2009, entitled "NYSE Amends Rules Regarding Procedures for Release of Material Information by Listed Companies," available at http://www.mwe.com/info/news/ots0509b.htm.

2 See "Commission Guidance on the Use of Company Websites" dated August 1, 2008, and available at http://www.sec.gov/rules/interp/2008/34-58288.pdf.

EVOLVING COMMUNICATIONS PRACTICES AND REGULATORY BACKGROUND

"To tweet or not to tweet—For execs that is the question" read the front page headline of the *Boston Business Journal* on May 15, 2009. On April 27, 2009, the *Wall Street Journal* reported that 81 *Fortune* 500 companies sponsor public blogs, 23 of which link to corporate Twitter accounts. The article also reported that companies are starting to allow stockholders to ask questions via the internet during their annual meetings.

It is far from clear that Twitter, which allows a company to publish messages of up to 140 characters to a group of "followers" and other Twitter users, is a productive use of executive time or will become a vital and lasting part of a company's general corporate communications or investor relations practices. Its current popularity, however, does highlight the degree to which internet communication technologies have become essential business tools. This development presents challenges for public companies to mitigate disclosure risks associated with inaccurate, misleading, incomplete or summary information or, notwithstanding web posting, selective disclosure of material nonpublic information in violation of Regulation FD.

In addition, companies may need to take steps to ensure that any projections of future results or other forward-looking statements are accompanied by meaningful cautionary language within the statutory "safe harbors" set forth in the federal Private Securities Litigation Reform Act of 1995 or as suggested by court cases promulgating the "bespeaks caution" doctrine, and that any non-GAAP information is accompanied by a reconciliation to the most comparable GAAP information as required by the SEC's Regulation G. Website communications with stockholders in advance of a stockholder's meeting require consideration of the SEC's substantive and filing rules regarding the solicitation of proxies.

Companies are responding to these risks. The *Wall Street Journal* article cited above reported that one corporate blogger working at a *Fortune* 500 company had sent out dozens of apparently unmonitored tweets from his mobile phone during a prior earnings call. The blogger now includes standard securities disclaimers in the event his blogs or tweets during earnings calls contain or concern forward-looking statements or non-GAAP financial measures, and his tweets are reportedly limited to repeating word-for-word executive statements made during the call. The fact that it apparently takes at least four separate tweets[3] to cover the appropriate disclaimers (inclusive of hyperlinks to further cautionary information) is indicative of how little room there is to negotiate within narrow safe harbors when communications come in micro-sized bites of information.

More fundamentally, the SEC's rulemaking continues to recognize and encourage the use of corporate websites and the internet generally as a critical component of effective communications with investors.

The issuance of the Website Guidance by the SEC was one of several recommendations made by an SEC Advisory Committee on Improvements to Financial Reporting (the Advisory Committee) that was formed in July 2007 with a mandate to suggest improvements to financial reporting by public companies, both in SEC filings and otherwise.

The Advisory Committee's final report dated August 1, 2008[4], made recommendations to address the substantive complexity of financial information presented in SEC reports, the accounting standards-setting process, the audit process and improving the delivery of financial information generally. With regard to the delivery of financial information, the Advisory Committee made the following recommendations:

- The SEC should issue an interpretive release encouraging more robust use of corporate websites (which led to the Website Guidance).

- The SEC should require companies to furnish versions of their financial statements in an interactive data format to the SEC and post that data on their websites (as further discussed in this article, rules enacting this recommendation were adopted by the SEC in December 2008)[5].

- Industry groups, such as the National Investor Relations Institute, Financial Executives International and the CFA Institute, should update their best practices for earnings releases.

- Periodic reports filed with the SEC should include an executive summary providing a roadmap to key disclosure in the report.

- The SEC should encourage more disclosure of key performance indicators of a company's business that provide significant insight into the sources of a company's value—in effect extending financial reporting to business reporting more generally.

Under the SEC's rules that will require public companies to provide to the SEC an additional version of their financial statements in an interactive data format using eXtensible Business Reporting Language (XBRL), companies will also be required to post the same XBRL data on their corporate websites. The data must be posted for at least 12 months and must be posted not later than the end of the calendar day on which the report or registration statement was filed, or was required to be filed, with the SEC, whichever is earlier. Companies are not permitted to satisfy this requirement by including a hyperlink to the documents available electronically on the SEC's website. The rules are being be phased-in over a three-year period beginning with approximately 500 of the largest companies for fiscal periods ended after June 14, 2009.

The SEC expects that the open standard feature of the XBRL format will facilitate the development of applications and software that give investors additional ways to view and analyze company financial information. Because financial statements in interactive data format are intended to be processed by software applications, the unprocessed data are not readable by humans. Thus, viewers are necessary to convert or "render" the interactive data file to human readable format. Some viewers are similar to web browsers used to read HTML files. The SEC's website currently provides links to viewers to demonstrate the capability of software to present interactive data in human-readable form and to provide open source software for developers. Public companies will have an interest in understanding how their financial data is processed by third-party software applications, and how that information is disseminated and absorbed by securities markets.

In addition, all public companies subject to the SEC's proxy requirements must now comply with its electronic proxy (e-proxy) delivery rules. The e-proxy rules require that a compa-

3 According to IRWebReport.com, one set of disclaimers issued via Twitter included the following:
Tweet 1: Important information about the nature of this session. Forward-looking statements and non-GAAP financial measures. Click here:
Tweet 2: This session will contain non-GAAP financial measures.
Tweet 3: The presentation of this financial information is not intended to be considered in isolation or as a substitute for GAAP financial measures.
Tweet 4: A reconciliation of these measures to the nearest comparable GAAP measures can be found by clicking on the following link:

4 Available at http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf.

5 See McDermott's *On the Subject* dated February 2, 2009, entitled "SEC Adopts Final Rules Requiring Interactive Financial Data in XBRL Format," available at http://www.mwe.com/info/news/ots0209b.htm.

ny's proxy materials—*i.e.*, the proxy statement, a proxy card, the "glossy" annual report to shareholders and any other soliciting materials—be posted in a reader-friendly format on an internet website (other than the SEC's website). The website where the proxy materials are located must not contain any technology, such as cookies, that would compromise the anonymity of shareholders.[6]

Finally, in 2008 the SEC launched an internal project know as the 21st Century Disclosure Initiative, which includes a review of all existing SEC forms and reporting requirements. The stated aim of the initiative is to "outline the attributes of the disclosure system for the future that incorporates technology, the new ways in which investors get their information, and recent developments in how companies compile and report the information in their SEC-mandated disclosures."[7]

It is too soon to know to what extent, if at all, the SEC, led by Obama appointee Mary Schapiro as chair, will further pursue the 21st Century Disclosure Initiative or the Advisory Committee's recommendations, as she has indicated these are low priorities for her in the current environment of economic and market turmoil.[8] In the meantime, regardless of whether there is any further SEC action in this area, the shift from static information sparingly distributed by public companies to streams of interactive web-based communications continues to accelerate, and companies should look to the Website Guidance and best practices to effectively communicate with investors and avoid disclosure problems.

THE SEC'S WEBSITE GUIDANCE

The Website Guidance was issued partly in response to a recommendation made by the Advisory Committee to provide clarity on issues arising in connection with SEC rules against selective disclosure of material nonpublic information.

Given that the internet has changed significantly since 2000, when the SEC had last issued guidance on the use of websites and electronic media, the SEC stated that it believed new guidance was necessary. The Website Guidance is also intended to encourage the continued development of corporate websites as important means of disseminating corporate information to investors.

The Website Guidance is divided into four parts, each of which is summarized here.

Regulation FD

The Website Guidance clarifies how information posted on a corporate website can be considered "public" and provides guidance to help companies comply with public disclosure requirements under Regulation FD. Disclosure of information on a corporate website will be deemed to make such information "public" if the following conditions are satisfied:

- The corporate website is a "recognized channel of distribution."
- The posting of such information disseminates it in a manner so as to make it "available to the securities marketplace in general."
- Such information is posted for a sufficient period of time so as to allow for its absorption by the market.

The Website Guidance provides a non-exclusive summary of factors that companies should consider in determining whether these conditions have been satisfied. In determining whether the disclosure of information via a corporate website in lieu of filing a Form 8-K with the SEC satisfies the requirements of Rule 101(e) of Regulation FD's alternative method of public disclosure, companies will need to assess whether such disclosure "is reasonably designed to provide broad, non-exclusionary distribution of the information to the public."

Company Liability for Information Presented on a Corporate Website

- The Website Guidance clarifies the nature of the liability framework for information presented on a corporate website, including the manner in which companies can provide access to archived and historical data as well as how to hyperlink to third-party information. As a general matter, the SEC notes that companies are liable for statements made on the internet under the federal securities laws, including the antifraud provisions, in the same way companies are liable for statements made by or on behalf of a company—including postings accessed via hyperlinks from a corporate website to a third-party website—unless proper precautions are taken. The guidance clarifies the SEC's view of four specified areas of information:

6 The e-proxy rules also permit but do not require a company to deliver a Notice of Internet Availability of Proxy Materials in lieu of mailing the materials to shareholders, although hard copies of the proxy materials must be delivered to any shareholder who requests them.

7 See SEC press release dated June 24, 2008, entitled "SEC Announces '21st Century Disclosure Initiative' to Fundamentally Rethink the Way Companies Report and Investors Acquire Information," available at http://www.sec.gov/news/press/2008/2008-119.htm.

8 See McDermott's *Hot Topic* dated April 6, 2009, entitled "SEC Chair Sets Forth Broad Regulatory Agenda," available at http://www.mwe.com/sec0409/.

- *Previously Posted Information*. Historical or archived information made available on a corporate website will not be deemed to be republished or reissued for purposes of the antifraud provisions of the federal securities laws simply because such information remains available to the public. Provided a company does not affirmatively restate or reissue such historical or archived information, the guidance clarifies that there is also no duty to update such information.

- *Links to Third-Party Information*. Companies will not be liable under the antifraud provisions of the federal securities laws for third-party information accessed via a hyperlink on a corporate website if companies provide an explicit explanation of the rationale for the hyperlink being made available on its corporate website and companies use the appropriate "exit screen notices" or "intermediate screens" to denote that the hyperlink is to third-party information. Whether or not these steps are taken, companies are not immune from antifraud liability for hyperlinks to third-party information that a company knows or should know is materially false or misleading.

- *Summary Information*. Companies that disclose summary information should alert readers to the summary nature as well as the context of such information so as to decrease the potential that such information will violate the antifraud provisions of the federal securities laws.

- *Interactive Website Features*. Companies that use their corporate websites to blog or otherwise interact or communicate with various stakeholders, including stockholders, should take steps to implement appropriate controls and procedures to monitor statements made by or on behalf of the company through such media, as such statements are subject to the antifraud provisions of the federal securities laws. However, companies are not responsible for statements made by third parties through such media and are not obligated to respond to or correct any misstatements made by third parties through such media.

Disclosure Controls and Procedures

The Website Guidance clarifies that disclosure controls and procedures that are required with respect to the company's SEC filings are not generally applicable to disclosures made on corporate websites, except in a few instances where disclosure on a corporate website (such as a waiver from a code of ethics) is allowed to be made on a website instead of in an SEC-filed document. However, the SEC notes that it is advisable for companies to consider adopting appropriate procedures for making disclosures on corporate websites since such disclosures are subject to the antifraud provisions of the federal securities laws.

Formatting and Presentation of Information on a Corporate Website

The Website Guidance makes clear that information presented on corporate websites need not be printer friendly unless otherwise explicitly required by the rules and regulations of the SEC, as is the case with regard to the SEC's e-proxy rules.

The Website Guidance has been criticized for not breaking new legal ground, and to date there are only a few examples of substantial public companies using their websites as a primary means of delivering information that is only marginally material. Instead, companies tend to use blogs and other internet methods as a way of providing investors with additional information, not to replace other modes of disclosure. Some companies appear to be preparing for a time when their corporate website may be used as a primary disclosure vehicle. One leading company has recently included the following statement in its SEC filings regarding its results of operations, apparently for the purpose of eventually establishing its website as a "recognized channel of information distribu=tion":

> [XYZ's] web site (www.[xyz].com) contains a significant amount of information about [XYZ], including financial and other information for investors (www.[xyz].com/investor/). [XYZ] encourages investors to visit its various web sites from time to time, as information is updated and new information is posted.

As an interpretive release, the Website Guidance does not create any new laws or regulations, but it does articulate the SEC's views and interpretations of existing laws and regulations. Accordingly, as a result of the Website Guidance, companies may act with greater certainty as to the use of their corporate websites for disclosing information and have a better understanding of how to avoid the potential antifraud liability that may arise as a result of such disclosure.

COMPLIANCE RECOMMENDATIONS

Pubic companies should consider taking one or more of the following steps to ensure continued compliance with laws and regulations applicable to its website and other informal and formal corporate disclosures.

Review, update and recirculate as necessary the company's Regulation FD and corporate communications policies. The company's policy and practices with regard to Regulation FD should include at a minimum the following:

- Limit the number of persons authorized to speak—or blog or tweet—on behalf of the company and establish recognized spokespersons.
- Ensure that authorized spokespersons know what is and what is not already public, and what they are authorized to communicate and when.
- Make (to the fullest extent possible) interactions with analysts, stockholders and other market participants public events.
- Select the most suitable methods or combinations of methods for public disclosure of both routine and unexpected matters, which must in the case of the disclosure of material nonpublic information be "reasonably designed to provide broad, non-exclusionary distribution of the information to the public."
- Keep a record of public disclosures.
- Keep track of marketplace information about the company.
- Use safe harbor meaningful cautionary statements if making or affirming forward-looking statements.

Review the company's policy to prevent insider trading and "tipping" to ensure that it is clear that website information, social and business networking tools, and communications technologies are within its scope.

Review and update as necessary the company's website structure and disclaimers, especially safe harbor statements with regard to forward-looking information.

Date all documents and move older materials to an archive section; include a disclaimer of any duty to update historical information.

Take the following action in order to avoid the risk that the company be deemed to have adopted any linked information:

- Ensure that the context for the link is provided and explicitly state why the link is being provided.
- Consider using "exit notices" to notify web site visitors that they are leaving the company's website and entering a third-party's website.
- If the company seeks to establish its website as a recognized channel of distribution, it should consider taking the following steps:
- Establish an appropriate waiting period before information posted to the website can be considered to have been sufficiently absorbed by the market to be repeated in a private setting.
- Include the URL for the company's website in SEC filings and press releases indicating the kinds of information that can be found on the website, and a statement declaring that the company routinely posts important information on its website.
- Post all press releases and other material information on the company website.
- Provide advance notice of particular postings, including the date and time of such postings.
- Ensure that the investor relations portion of the website is easily identifiable, accessible and generally user friendly.
- Ensure that investor relations page reveals current press releases immediately and without a need to click to a separate news page.
- Consider using "push" technologies consistently in order to disseminate information.
- Ensure that the website can accommodate spikes in traffic volume that may accompany a major company announcement.
- Ensure that press releases and other material information are timely posted to the website and that information is updated periodically as necessary after posting.

In preparation of the issuance of a company's financial statements in XBRL format, take the following actions:

- Consider the potential use of such data by investors and other third parties, and how the company will respond and maintain maximum control over its strategic message.
- Determine whether the company should adopt any permissible data tag extensions for any non-standard financial statement line items where useful in order to enhance comprehension of the company's financial results and condition.
- Determine whether to outsource XBRL compliance.
- Consider providing links to XBRL viewers and other software tools the company finds acceptable.

Featured Committee: Mergers & Acquisitions Committee

The Mergers & Acquisitions Committee is co-chaired by Dimitry Herman and Michael LaCascia. Dimitry Herman is the founder of Herman Law, a boutique corporate law firm focusing on the media, internet and gaming industries. Michael LaCascia is a partner in the Corporate Practice Group at WilmerHale. In addition to their practice, Mr. Herman and Mr. Lacascia are adjunct faculty members at New England Law School and Boston University Law School, respectively, where each teaches a course on corporate mergers and acquisitions. The Mergers & Acquisitions Committee focuses on current issues and practices arising in connection with mergers and acquisitions, including issues on corporate law, securities law, tax and industry and market trends in business and legal issues in such transactions.

Guidance from the Courts on Distressed Assets and Successor Liability

By Dimitry S. Herman and Eric D. Levin

While the M&A marketplace seems to have heated up again, at least in certain technology sectors such as mobile and e-commerce, many other industries have yet to see a rebound. Buyers with a keen eye and a deep pocket remain poised to take advantage of distressed opportunities to grow market share, recruit talent via a so-called "acqui-hire" or otherwise pick up a complementary business. Two recent decisions by courts in Massachusetts provide practical guidance to structuring such transactions from the buyer's perspective to limit risk from potential post-closing claims by sellers or third parties.

EMCO/FGS, LLC v. Premere Color Corp., Civil Action No. MICV2007-04213-B (Mass. Super. Ct. Oct. 29, 2009) – De Facto Merger

The EMCO case provides additional guidance with respect to the "de facto merger" theory under Massachusetts law. The crux of the EMCO decision is that the "essence of a merger" is an exchange of stock and a continuity of ownership between the buyer and seller. Where such facts are not present, a de facto merger cannot be found.

In this case, Premere Color, a commercial printer, purchased some used printing equipment from ListPerfect, Inc., a database and direct mail services company that was a vendor to Premere. As ListPerfect was distressed at that time, Premere had the equipment appraised to determine its fair value and paid cash for it. Premere also offered employment to certain ListPerfect sales and technical employees, some of whom were ListPerfect shareholders. Promptly following the transaction, a key ListPerfect sales employee emailed his former clients to announce the "joining" of Premere and ListPerfect. It was undisputed that Premere and ListPerfect never discussed any merger and that the transaction did not involve any change in the officers, directors or stockholders of Premere.

Shortly following the equipment sale, ListPerfect filed for bankruptcy and EMCO, a former vendor to ListPerfect, sued Premere on a successor liability theory to recover amounts owed by ListPerfect.

Massachusetts courts generally consider four factors in determining whether a transfer of assets is a *de facto* merger: (1) continuity of management, personnel, physical location, assets, and general business operations between the buyer and seller; (2) continuity of shareholders resulting from the buyer paying for the acquired assets with stock such that the seller's shareholders become shareholders of the buyer; (3) whether the seller ceases its ordinary business operations, liquidates, and dissolves; and (4) whether the buyer assumes those obligations of the seller necessary for the continuation of the seller's normal business operations.

Because Premere paid cash for the assets and no equity was involved in the transaction, the Court held that the "absence of continuity of ownership, regarded as the essence of a merger, is enough to conclude that a de facto merger did not take place." The Court also noted that the email announcement to former clients did not transform the sale transaction into a merger. In doing so, the Court harmonized Massachusetts law with that of other jurisdictions, holding that the key factor in determining the existence of a *de facto* merger is the second factor: a continuity of shareholders between the buyer and seller.

The *EMCO* case, although a lower court decision without formal precedential authority, offers guidance for practitioners dealing in the difficult, murky areas of distressed acquisitions. This opinion illustrates the proposition that a transaction structured as a cash purchase of assets, without any exchange or issuance of equity in the buyer, should not be deemed a de facto merger. In *EMCO*, an email announcement about the "joining" of two companies was held insufficient to turn the transaction into a de facto merger; that this issue was litigated, however, is a useful reminder that deal announcements involving troubled companies should be carefully worded to limit the risk of potential successor liability claims.

Sonoran Scanners, Inc. v. PerkinElmer, Inc., 585 F.3d 535 (1st Cir. 2009) – Earnout – Implied Covenant to use Reasonable Efforts

In *Sonoran,* the First Circuit held that, under Massachusetts law, a buyer of a business involving an earnout is subject to an implied covenant to "exert reasonable efforts" to conduct the acquired business in a manner that will allow the seller to achieve its earnout.

Sonoran was a startup that developed a high-speed computer-to-plate (CTP) technology for the newspaper and graphic arts industries. As of 2000, Sonoran had developed a prototype, but had not made any sales and was running out of money. In 2001, PerkinElmer acquired Sonoran's business pursuant to an asset purchase for $3.5 million (most of which was apparently paid to Sonoran's creditors), plus an earnout of up to another $3.5 million if certain sales targets were met by the business over a five-year period after the closing. PerkinElmer offered employment to various Sonoran key employees, including its founder, and gave them the ability to manage the business unit following the closing. Upon closing, Sonoran's CTP Business became part of PerkinElmer's Lithography Systems division. Unfortunately the business failed after the closing, and by 2004 PerkinElmer laid off the CTP employees and shut down the business. Plaintiffs subsequently sued on a number of grounds, including the theory that the business failed due to unreasonable and bad faith actions by PerkinElmer.

While the First Circuit agreed that PerkinElmer did not breach the express terms of the asset purchase agreement, it held that summary judgment was not appropriate with respect to its implied covenants. Citing Justice Cardozo in the *Wood v. Lucy, Lady Duff–Gordon* case that most of us read in law school, the Court held that PerkinElmer's acquisition of exclusive rights of Sonoran's business and technology implied a requirement that it exercise reasonable efforts to promote the business and its success.

Relying on a series of Massachusetts cases from the 1940's and earlier, the Court distinguished its holding from the law in other circuits, where this implied covenant was held to apply only where the earnout is the only form of purchase consideration. The Court also held that the implied covenant to use reasonable efforts is not limited to the exclusive licensing context, as PerkinElmer contended. "Rather, the key under Massachusetts law is that the instrument as a whole must make certain that the reasonable efforts term was implicit." The Court reasoned that "[i]f the instrument as a whole produces a conviction that a particular result was fixedly desired although not expressed by formal words, that defect may be supplied by implication."

The Court concluded that the reasonable obligation regarding the earnout was "implicit" here because it was a substantial portion of the overall consideration. Because a large portion of the closing proceeds were paid to creditors, the weight of the earnout was even more significant. Most notably, the Court pointed out that that there was no language in the purchase agreement "negating an obligation by PerkinElmer to use reasonable efforts or conferring absolute discretion on PerkinElmer as to the operation of the business."

The Court recognized, albeit in dicta, that PerkinElmer invested substantial sums into the CTP business and their efforts may have in fact been reasonable. However, as this issue was not argued in PerkinElmer's summary judgment motion, the Court remanded to the District Court to make a finding on this point.

The *Sonoran* case is a reminder that earnouts, while a useful tool in negotiations, can often prove problematic following the closing. In today's uncertain markets where the value of a business can be hard to assess, there is often the temptation to use earnouts to bridge the value gap. In reality, earnouts invariably raise issues of control and incentives that can be very difficult to document comprehensively and comitously. While *Sonoran* is limited to Massachusetts law, buyers in any jurisdiction either should take care to define their post-closing duties or should clearly disclaim any obligation to promote an acquired business. Doing so may avoid litigation over the unpredictable boundaries of an implied duty to promote.

Featured Committee: Securities Law Committee

The Securities Law Committee is co-chaired by Mark L. Johnson, Partner at Cooley LLP, and Nicole G. Fitzpatrick, Senior Associate General Counsel at Akamai Technologies, Inc. As part of the Business Law Section, the Securities Law Committee provides its members with opportunities to learn about and discuss issues in securities law. It holds monthly meetings where members and guest speakers discuss topics of current interest, such as compliance and regulatory issues. The committee's programs this year have included such topics as:

- "The Current State of Play on Proxy Access," a September 22, 2009 brown bag lunch featuring Julie H. Jones, Ropes and Gray, LLP;
- "Recent Developments Impacting Director Elections," a October 27, 2009 brown bag lunch featuring Peter Casey and Domenick de Robertis, The Altman Group;
- "Lessons from Recent Insider Trading Cases," a December 3, 2009 brown bag lunch co-sponsored by the Corporate Law Committee and featuring Brian E. Pastuszenski, Goodwin Procter LLP;
- "SEC Disclosure Updates and Other Rulemaking," a February 23, 2010 brown bag lunch featuring Robert E. Puopolo, Greenberg Traurig LLP;
- "View from Inside the SEC Concerning Negotiations, Settlements, and Trials," a March 10, 2010 brown bag lunch co-sponsored with the Securities Enforcement Committee and featuring Scott Pomfret, PricewaterhouseCoopers, Ian D. Roffman, Nutter McClennen & Fish LLP, and R. Daniel O'Connor, Ropes & Gray LLP;
- "Securities Fraud 2010: The "New Deal" at the SEC, Insider Trading, and a White Collar Trial," an April 6, 2010 presentation co-sponsored with the Criminal Law Committee and featuring, Jonathan L. Kotlier, Nutter, McClennen & Fish LLP, David S. Bergers, Director, Boston Regional Office of U.S. Securities and Exchange Commission, Jack W. Pirozzolo, Esq., First Assistant U.S. Attorney, District of Massachusetts of The United States Attorney's Office, Jordan A. Thomas, Assistant Chief Litigation Counsel U.S. Securities and Exchange Commission, Washington D.C., Stephen G. Huggard, Edwards Angell Palmer & Dodge LLP, John J. Falvey, Jr., Goodwin Procter LLP, Michele L. Adelman, Foley Hoag LLP, Maureen M. Chakraborty, Analysis Group, Julie M. Riewe, Assistant Director, U.S. Securities and Exchange Commission , Division of Enforcement, Ian D. Roffman, Nutter, McClennen & Fish LLP, John Reed Stark, Stroz Friedberg LLC, Michael D. Ricciuti, K&L Gates LLP, Paul G. Levenson, Chief, Economic Crimes Unit, The United States Attorney's Office., Tracy A. Miner, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., John F. Sylvia, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and Joshua S. Levy, Ropes & Gray LLP;
- "Securities Law Issues in M&A Transactions," an April 27, 2010 brown bag lunch featuring Megan N. Gates and Scott A. Samuels, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.; and
- "Public Company Fundraising: a Beginner's Guide on Follow-Ons, PIPEs and 144As," on May 25, 2010, featuring Jason Kropp of WilmerHale LLP.

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Gregory S. Fryer

Gregory S. Fryer is a partner in the business law department of Verrill Dana and heads the firm's securities practice. His is general counsel to a wide range of businesses, and a substantial part of his practice focuses on M&A and venture capital. Areas of particular interest include the fiduciary duties of directors of troubled companies. Greg is a former chair of the Business Law Section of the Maine State Bar Association and since 1993 has served as chair of its Securities Law Subcommittee. He was involved in Bar committees responsible for reviewing and drafting comprehensive updates of several business-related statutes in Maine, including the Maine Business Corporation Act and the Maine Uniform Securities Act. In 2007 he was appointed to the board of the Maine Small Enterprise Growth Fund, a state-funded venture capital firm. In recent years, he has become an active member of the Business Law Section of the Boston Bar Association, and is a co-chair of its Communications Committee. Greg for many years has received recognition in Best Lawyers in America, Chambers USA and New England Super Lawyers. He is a 1976 graduate of Dartmouth College and a 1979 graduate of Cornell Law School.

Sarah Curtis Richmond

Sarah Curtis Richmond is a partner at Gesmer Updegrove, LLP, a full-service Boston law firm focused on the technology sector. Sarah specializes in providing general corporate, transactional and intellectual property legal services for high-tech companies and their investors. Before joining Gesmer Updegrove in 1996, Ms. Richmond was a corporate attorney with WilmerHale in Boston. Prior to that, she practiced law with Tomotsune, Kimura & Mitomi, a Japanese international finance law firm in Tokyo. Ms. Richmond received her undergraduate degree in mathematics from Columbia University (magna cum laude, Phi Beta Kappa) and she received her law degree from Harvard Law School (cum laude). Ms. Richmond is the Chair of the Attorney Group of the Boston Club, the Co-Chair of the Communications Committee of the Boston Bar Association, and the former Co-Chair of the Corporate Law Committee of the Boston Bar Association. Ms. Richmond was selected as a Massachusetts Super Lawyer in 2006, 2007, 2008, 2009 and 2010, and was named a Top 10 Corporate Lawyer in the January 2010 issue of Boston Women's Business.

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David Cifrino is a partner in the law firm of McDermott Will & Emery LLP and is based in the Firm's Boston office. He is co-head of its Public Companies group. David represents financial services, industrial, high technology, consumer products and other companies, public and private (from start-ups to Fortune 50), in securities, merger, acquisition, disposition, commercial, strategic, governance and executive compensation matters. He represents clients in both public and privately placed equity and debt financings under the Securities Act of 1933 and counsels public companies with respect to the full range of securities compliance issues under the Securities Exchange Act of 1934.

David is actively involved in all aspects of the federal corporate reform law known as the Sarbanes-Oxley Act and related SEC and stock exchange rulemaking with respect to financial and other disclosure, executive certifications, auditor independence, insider securities transaction reporting, executive compensation, director independence and requirements for audit, compensation and governance committees.

Mary Freeley

Mary B. Freeley is an assistant attorney general in the antitrust division of the Office of Attorney General Martha Coakley. Her practice includes investigating transactions and conduct that may be unfair or anticompetitive, and enforcing state and federal antitrust, consumer protection and false claims laws on behalf of Massachusetts consumers and government entities. Prior to joining the Attorney General's office, Mary was an associate with the firm of Rackemann, Sawyer and Brewster in Boston. She is a member of the adjunct faculty of Suffolk University Law School. This year, Mary served as co-chair of the BBA's antitrust committee.

Dimitry Herman

Dimitry Herman is the founder of Herman Law, a boutique corporate law firm focusing on the media, internet and gaming industries. Mr. Herman's concentrates on corporate mergers and acquisitions, venture capital and private equity transactions, joint ventures, strategic licensing and similar commercial transactions. Prior to forming Herman Law, Mr. Herman was a partner in the Corporate Department at Hinckley, Allen & Snyder and an associate in the Corporate Department at Bingham McCutchen. In addition to his private practice, Mr. Herman is an adjunct professor of law at New England Law School, where he teaches Corporate Mergers & Acquisitions, and serves as a business advisor and mentor to various technology start-ups. Mr. Herman received his undergraduate degree in Philosophy and Economics from Colgate University and his law degree from Columbia Law School.

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Eric Levin is a Partner in the Litigation Department of Hinckley, Allen & Snyder LLP. His practice focuses on intellectual property litigation and complex corporate and commercial disputes. He also teaches legal writing at Boston University School of Law. Mr. Levin and Mr. Herman represented Premere Color in connection with the case featured in this newsletter.

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Law and Politics named Amar to its 2009 and 2010 lists of Northern California "Rising Stars," published in San Francisco magazine and Northern California Super Lawyers.

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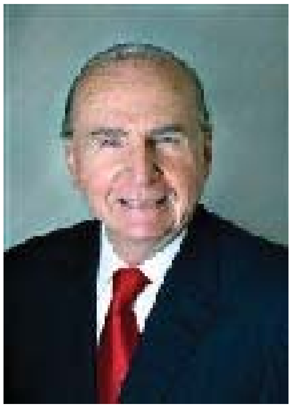

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Rob Thomas, Vice President of Strategic Development for Serengeti Law, is a widely published authority and frequent speaker on the use of legal technology for collaboration and the measurement of attorney performance. He is the author of the annual ACC-Serengeti Managing Outside Counsel Survey Report and has more than 30 years of diverse experience as a practicing attorney. Melissa Pearlstein is a former commercial litigator and technical writer who is currently Serengeti Law's Manager of Corporate Communications.

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