OSB Corporate Counsel Section

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Letter From The Chair

Welcome to the Spring/Summer 2010 edition of the Corporate Counselor, the official newsletter of the Corporate Counsel Section of the Oregon State Bar. The Corporate Counselor is just one of the benefits we offer, in our efforts to serve and provide value to all Corporate Counsel Section members. Other benefits, in the form of resources and activities, include the Section's website, roundtable discussions with expert moderators, CLEs on topics of interest to Section members, and a scheduled social and networking event.

To take advantage of these benefits, please join us for the following events:

- June 3, 2010 networking luncheon at Oswego Lake Country Club
- October 7, 2010 roundtable discussion followed by our Annual Meeting
- December 2, 2010, a free CLE on Child Abuse Reporting

Please check out our website at www.osbcorporatecounsel.com, which contains our Corporate Counsel Section calendar, list of Corporate Counsel Section Executive Committee members, previous issues of the Corporate Counselor, and other useful information.

Every member of the Section is invited to participate in the planning, preparation, and implementation of Section functions. If you have suggestions, comments, questions, or concerns about the Section, what we do, or how you can become involved, please contact me at joseph.pugh@tqs.com, or feel free to contact any of the other Corporate Counsel Section Executive Committee members.

Best Regards,
Joseph Pugh, Section Chair for 2010

Minimizing FCPA Risks in Mergers and Acquisitions

By Merrill Keane, Miller Nash LLP

In mergers and acquisitions, due diligence can be a whirlwind. Piles of documents covering all aspects of the target's business lie between you and the closing date—which is in a week. The target has a global presence, and you feel confident that you have the bases covered . . . .

After closing, you discover a series of questionable payments by the target to consultants in Latin America. Digging further, you find that the ultimate recipients were employees of the state-owned company that controls your market in Honduras. It appears that your target paid these people in order to obtain contracts and gain a pricing advantage. You realize that these payments could violate the U.S. Foreign Corrupt Practices Act (the "FCPA"), which prohibits payments in certain circumstances to foreign officials—including employees of state-owned companies. The next thing you know, you're working with outside counsel on an internal investigation into the worldwide practices of the target, disclosing the payments to the Department of Justice (the "DOJ"), and negotiating criminal and civil resolution of the matter.

This situation may sound far-fetched, but in April 2009, Latin Node, Inc., a company acquired in 2007 by eLandia International, Inc., pleaded guilty to one count of violating the FCPA and agreed to a fine of $2 million[1]. While eLandia was not held liable, Latin Node's plea was the result of almost two years of investigation and cooperation with the DOJ. ELandia ended up adjusting the original purchase price for Latin Node down over $20 million[2], and could very well have spent hundreds of thousands—if not millions—of dollars in investigating and dealing with the matter.

ELandia is not an isolated case. Preclosing FCPA discoveries caused Lockheed Martin to abandon its $2.2 billion acquisition of Titan Corporation[3]. Fines in the amount of $50 million

Continued

were levied against Tyco International for, among other things, FCPA violations by acquired companies.[4] GE's acquisition of InVision Technologies, Inc., was significantly delayed as a result of FCPA discoveries, resulting in post-merger fines of approximately $1.2 million assessed against the surviving corporation[5].

The conventional wisdom is that the DOJ and Securities and Exchange Commission (the "SEC") have stepped up FCPA enforcement—including prosecutions of individual officers and agents involved in improper payments. A company's best defense, especially in competitive and fast-paced business combination deals, is to have a plan for identifying and addressing FCPA issues immediately when they arise. This article discusses approaches to minimizing the risks of potential successor liability for FCPA matters, including preclosing due diligence and postclosing strategies.

The FCPA

The FCPA has two components: the anti-bribery provisions, and the books and records provisions[6]. Generally speaking, the anti-bribery provisions apply to U.S. individuals and entities (including public companies), and prohibit corruptly paying—or even offering, promising, or authorizing payment of—money or anything of value to foreign political parties, political candidates, or government officials—a term that includes employees of state-owned companies—in order to obtain or retain business. The books and records provisions apply only to "issuers,"[7] and require accurate records and a system of adequate internal controls.

Penalties under the FCPA are high. Violations of the anti-bribery provisions can bring fines of $100,000 per count and five years in prison for individuals, and $2 million per count for entities.[8] Criminal penalties under the books and records provisions can be as high as $5 million and 20 years in prison for individuals, and $25 million for entities.[9] Furthermore, under the Alternative Fines Act, liability may reach as much as twice the gross gain from the conduct.[10]

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Pre-Preclosing: Adopt a Compliance Program

Long before the deal—even before you might have the slightest inkling of the deal—you should seriously consider implementing an internal FCPA compliance program at your own company. An internal compliance program will help sensitize your colleagues to risks and better enable you to deal with any bribery-related issues that might arise in a business combination. Additionally, an effective compliance program will act as a mitigating factor if you encounter problems with past actions of an acquired target.

What constitutes an acceptable compliance program? Some of the common elements, set forth in DOJ guidance, deferred prosecution agreements, and the Federal Sentencing Guidelines, include:

- Clearly articulated policy against bribery and corruption;
- Financial and accounting controls to ensure accurate books and records;
- "Compliance code" applicable to all company personnel—including, when appropriate, agents, distributors, and other representatives;
- Someone at the top responsible for compliance;
- Periodic training and certifications to ensure communication of the policy;
- Effective system for reporting violations;
- Appropriate disciplinary procedures;
- Periodic evaluation of the program. [11]

Preclosing: Looking for Red Flags

Even if you do not have an FCPA compliance program, you can keep a number of easy-to-remember red flags in mind when undertaking international business deals. First, where is the target located? As the annual "Corruption Perceptions Index" published by Transparency International indicates, some areas have more pervasive reputations for corruption than others.[12] Second, have there been corruption issues in your industry, and are any competitors involved in scandals? Third, and somewhat relatedly, how much government contact does the company have—for example, does it deal with state-owned enterprises, or is it in a highly regulated field? Answering these questions will give you a high-level idea about your potential FCPA risks.

When you get to the nitty-gritty of due diligence, some of the major areas to cover on your "FCPA Checklist" include corporate structure and governance; agents, distributors, and consultants (who they are and what their fees/commissions and agreements look like); travel and entertainment expenses; charitable contributions; write-offs; and cash transactions and petty-cash accounts. Preclosing may also be a good time to initiate FCPA compliance training. Often, compliance training is the very situation in which violations are uncovered.

In international transactions, it is very important to include FCPA-related provisions in your purchase agreement. If your target is unwilling to discuss these issues or sign an agreement with FCPA representations and warranties, that reluctance could be a red flag. If you do uncover issues during preclosing, consider the possible postclosing repercussions: Will you need to conduct an investigation? Hire outside counsel? Is there a litigation risk? Does the bribe-based business have any value at all? You may wish to condition closing on resolution of FCPA-related matters, renegotiate the sale price, or ask that a percentage of the sale price be held in escrow until the matters are resolved. Furthermore, if you uncover any violations during due diligence, they must be addressed swiftly to ensure that they do not continue postclosing.

Postclosing: Target Adopts Compliance Program

Postclosing is the time to fully implement an FCPA compliance program for the target. Where FCPA risk or violations are perceived, the DOJ has held that a postclosing compliance program is imperative.[13] If you already have a program, get the new employees on board. If you do not, then develop a program moving forward. While U.S. companies may consider our local legal regime as second nature, our laws (and attitudes about compliance) are sometimes viewed as out of the

ordinary—even naïve—to international affiliates. An internal compliance program can promote awareness and understanding, and even give foreign employees an excuse to say "no" if they are solicited for bribes. Corporate culture is one of the ultimate weapons in preventing and detecting bribery and corruption, and if your compliance program is taken seriously and consistently applied and enforced, future FCPA risks will be minimized.

Conclusion

FCPA liability is one of the many risks involved in international business combinations, and it carries with it potentially enormous penalties. The Siemens enforcement actions in the United States and Germany, resulting in around $1.6 billion in combined U.S./German penalties,14 and the more recent BAE Systems settlements of $400 million and £30 million in related U.S./British actions,[15] additionally highlight that liability is no longer only a U.S.-based risk. But with preparation, analysis of red flags, a due diligence plan, and a compliance program, FCPA risks can be addressed and minimized throughout the stages of the deal.

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[1] Latin Node, Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million in Criminal Fine (Apr. 7, 2009), http://www.justice.gov/opa/pr/2009/April/09-crm-318.html.

[2] The reduced purchase price was disclosed on eLandia's 10Q, filed with the SEC, available at http://www.sec.gov/Archives/edgar/data/1352819/000119312508191126/d10qa.htm.

[3] Renae Merle, Lockheed Martin Scuttles Titan Acquisition, The Washington Post, available at http://www.washingtonpost.com/wp-dyn/articles/A8745-2004Jun26.html.

[4] Press Release 2006-58, SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud (Apr. 17, 2006), http://www.sec.gov/news/press/2006/2006-58.htm.

[5] SEC Settles Charges Against InVision Technologies for $1.1 Million for Violations of the Foreign Corrupt Practices Act, available at http://www.sec.gov/litigation/litreleases/lr19078.htm.

[6] 15 USC §§ 78m, 78dd-1, 78dd-2, 78dd-3.

[7] Generally, "issuers" means "public companies."

[8] 15 USC §§ 78dd-2, 78dd-3, 78ff.

[9] 15 USC § 78ff.

[10] 18 USC § 3571(d).

[11] DOJ Op Proc Rel 04-02 (July 12, 2004), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.html; Federal Sentencing Guidelines, available at http://www.ussc.gov/2008guid/GL2008.pdf; for an example deferred prosecution agreement, see the Fiat S.p.A. deferred prosecution agreement, available at http://www.justice.gov/opa/documents/fiat-dpa.pdf. The FCPA Blog and FCPA Professor discuss these standards at FCPA Blog, A Straight Shot at FCPA Compliance, http://www.fcpablog.com/blog/2008/2/11/a-straight-shot-at-fcpa-compliance.html; FCPA Professor, Benchmarking FCPA Compliance, http://fcpaprofessor.blogspot.com/2009/09/benchmarking-fcpa-compliance.html.

[12] The Corruption Perceptions Index for 2009 is available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009.

[13] DOJ Op Proc Rel 03-01 (Jan. 15, 2003) and 08-02 (June 13, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.html and http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.html.

[14] Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

15 News Release, BAE Systems plc Announces Global Settlement with United States Department of Justice and United Kingdom Serious Fraud Office (Feb. 5, 2010), http://www.baesystems.com/Newsroom/NewsReleases/autoGen_1101517013.html; BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-209.html; BAE Systems plc (Feb. 5, 2010), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx.

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"Mean Girls" at Work: Employer Liability for IIED

By Lance A. Brooks and Sean P. Ray,
Smith Freed & Eberhard, P.C.

Most people, at some point in their careers, experience some form of unpleasantness from peers or supervisors in the workplace. Courts recognize that this is largely an attribute of the human experience and will typically not award financial damages. However, there is a line between behavior that we need to tolerate and behavior that is "outrageous" and merits judicial protection. When unpleasant behavior from a fellow employee becomes "outrageous conduct" in the minds of a jury, as it did for Erica Schoen in a recent Oregon Court of Appeals case (*Schoen v. Freightliner, LLC,* 224 OrApp 613, 199 P3d 332 (December 24, 2008)), businesses can find themselves liable for Intentional Infliction of Emotion Distress (IIED).

One can almost imagine the awkwardness Erica Schoen must have felt as she stood guard over a table, not protecting multi-million dollar trucking equipment as one would expect, but safeguarding baked goods being sold to fellow employees to raise money for charity. Schoen normally worked in the truck production department at Freightliner, but after suffering an injury at work, she was restricted to performing only light-duty work according to company policy. Schoen was assigned to work under Jennifer Marple, a clerical worker, in the nurse's station. Assigning Schoen to guard and sell the baked goods was only one of many unpleasant acts. Marple's additional obnoxious behavior included: calling Schoen "worthless" on a near-daily basis in front of other employees; giving Schoen the nickname of "Ms. Thing;" assigning duties to Schoen that far exceeded her well-known work restrictions (and thereby causing her additional injuries); assigning Schoen to humiliating tasks not typically undertaken by employees such as the aforementioned guarding of baked goods and organizing an illegal gambling pool with strict instructions not to let Human Resources find out about it; suggesting that Schoen wear more revealing clothing to work; ordering Schoen to purchase food and drinks for

Marple and her friends without reimbursement; requiring Schoen to spend her entire 8-hour shift sitting in a chair doing nothing despite the existence of work that needed to be done; and instructing Schoen to perform non-related tasks to increase Marple's chances of getting a bonus.

After five months of this treatment, Schoen sought assistance from the human resources manager, who happened to be Marple's friend. The manager responded to Schoen's complaints by repeatedly telling her she was "worthless," "nobody wants you," and "I don't know what you are going to do." Schoen left work early that day and sought psychiatric care. Schoen filed a lawsuit against Freightliner alleging, among other things, IIED. A jury found Freightliner liable for IIED and awarded Schoen $250,000.

On appeal of the verdict, the Oregon Court of Appeals recognized that "rude, boorish, tyrannical, churlish and mean" behavior does not rise to the level of IIED. However, the court stated that determining whether conduct is "outrageous" is a fact-specific inquiry reached after viewing the facts based on the totality of the circumstances. The most important factor when making this determination is whether a special relationship existed between the plaintiff and the defendant, such as "employer-employee, physician-patient, counselor-client, landlord-tenant, debtor-creditor or government officer-citizen." Since all of the alleged wrongdoings in this case occurred between an employer and an employee, Freightliner had a higher duty to prevent this behavior. Although a plaintiff must show the conduct was intentional, the court of appeals also held that when a jury finds the employer's conduct is "outrageous," the jury may infer that the employer intended to inflict emotional distress.

The *Schoen v. Freightliner* case currently stands as guidance in Oregon as to where the line exists between unpleasant behavior that needs to be tolerated and outrageous conduct that warrants judicial protection. Businesses must be sensitive to workplace bullying because, as the *Schoen* court held, the employee-employer relationship places onto employers a heightened duty to avoid causing or allowing their employees to suffer emotional distress. It is important for businesses to implement policies to ensure an employee may safely bring inappropriate behavior to management's attention. The court of appeals noted that, taken individually, Marple's and the other employees' unpleasant acts might not have crossed the line from improper to "outrageous." However, given the repetitive nature of the conduct that was ratified by management, a jury could more easily find the behavior as a whole to be intolerable and outrageous. This distinction is essential for businesses seeking to protect themselves against IIED claims.

Lance Brooks is an associate focusing his practice on insurance defense of personal-injury claims. He regularly handles dram shop and premises liability matters in addition to auto cases. Mr. Brooks also maintains an active title insurance practice and represents several national title insurance companies.

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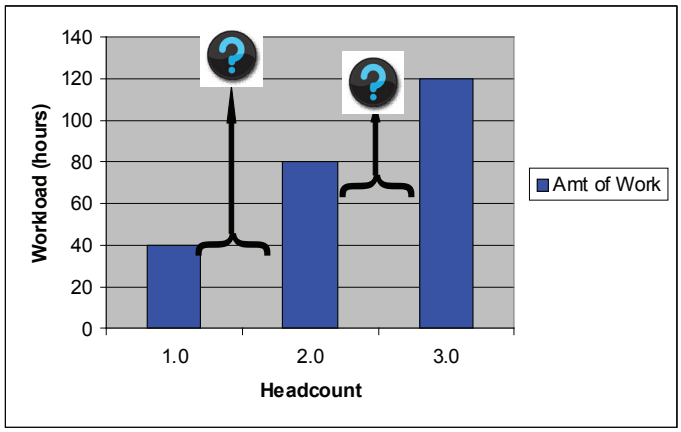
Covering the Gaps

By Greg Zaffris, Accel Legal

As a business grows, so will the volume of legal work that the business generates. Hiring full-time in-house counsel is a good way to manage that increasing volume, but is not a perfect solution. Work can rise steadily over time, but hiring full-time in-house counsel is a step function (see the picture below). Having your existing staff work harder to cover the increase can be tough; overwork may lead to inefficiency and delay, which can slow down business growth. Fortunately, there are alternatives: outsourcing the work to a law firm or to a "virtual in-house counsel."



In-house counsel are a very cost-effective way to manage legal work. While in-house positions demand relatively high compensation (particularly for senior counsel or higher), the cost is not based on hours worked and is therefore relatively lower on a per-hour basis. Furthermore, since they work in the business every day, in-house counsel are usually more efficient in managing a legal matter.

Full-time in-house counsel can only work so many hours, however, and your business may be stuck with a gap in need for full-time level work. Having existing staff handle the additional matters will work for only so long. In the meantime, inefficiency and delay may slow the growth of your business. At some point, you must look at other alternatives.

One alternative is to hire outside firms. A business can use multiple firms, shopping for the best deal or expertise, or a large, single firm that covers multiple areas. While outside firms will cost more on a per hour basis, they may cost less overall since you pay them more or less as the work goes up and down. That flexibility, however, comes with additional costs. Unless you are relatively large client, you may not get the attention that you would with a dedicated resource (and getting a dedicated resource from a firm tends to be quite expensive). Therefore, you may spend time getting strangers "up to speed" on your business. Furthermore, most firm lawyers have only worked in law firms. They may lack the perspective that can come from working within an in-house environment, and may not be as efficient or effective in managing an issue.

Recently, a "hybrid" alternative for managing legal work has surfaced: the "virtual in-house counsel." Simply put, in these models an attorney works part-time as in-house counsel. They are not employees,

but have practices that focus on only a few clients, enabling them to get more familiar with each client's businesses. They tend to work on-site, integrated often with the client's business team both virtually and physically. They can be brought in to handle big projects, or on a more regular basis. They tend to work on a retainer with a cap: a set daily, weekly or monthly fee that provides an agreed number of hours of legal work, with additional work over that number charged an hourly rate. This results in these hybrid firms costing more per hour than a full-time employee, but much less per hour than a firm. Furthermore, the lawyers who provide these services usually have in-house experience, giving them a perspective that allows them to more effectively manage the work.

At some point, the legal work generated by your business may justify another full-time hire. But until then, law firms and "virtual in-house counsel" can provide a great way to cover the gap.

Greg Zaffris is with Accel Legal (www.accellegal.com)

Tune Up Your Ear, Whistleblowers Have Some New Notes

By Robert Barsocchini, Goodwill Industries

Corporate attorneys often address matters of employee discipline and termination. If that is one of your responsibilities, then consider the implications of a new statute. HB 3162, effective January 1, 2010 amends ORS 659A.885 by expanding "whistleblower" protection to private sector employees. Previously private employee protection was limited to certain defined activity such as initiating or aiding in criminal or civil proceedings, filing an OSHA complaint, filing a worker's compensation claim or engaging in a public duty or fulfilling a societal obligation.

Under the new law, it is an unlawful employment practice for an employer to discharge or otherwise penalize an employee for reporting information in good faith that the employee believes is evidence of a violation of a state or federal law, rule, or regulation.

Moreover, the aggrieved employee may file a civil action against the employer and seek to collect both compensatory and punitive damages as well as attorney fees.

Under this new law employers must be very careful in determining whether an internal complaint touches on a state or federal law, rule, or regulation. The law is expansive and could cover many possible scenarios ranging from apparently significant to seemingly minor. For example, an employee complaining about, or exposing circumstances such as lack of required breaks or lunches, drinking on the job, unfair trade practices, or violations of consumer laws, could not be terminated for what is now protected behavior.

In a case decided last year, before the statute took effect, an employee claimed he was retaliated against for reporting an OLCC violation for on the job drinking. The court rejected that claim stating that such reporting was not a job related right of the nature sufficient to support a claim for wrongful discharge. Nor was it in the nature of a public duty that enjoys protection from an employer's ability to terminate an employee at will. The court stated: "The reporting of OLCC violations, although potentially in the employee's personal interest, is not a right of employment; no statute, rule, constitutional provision or case law confers it." *Handam v. Wilsonville Holiday Partners, LLC* 225 Or.App.442 (2009). That issue would likely be decided differently now. It is not clear whether complaints about conduct occurring before January 1, 2010 would be covered by the statute if the retaliatory action took place after the effective date.

Further, the statute does not spell out how such complaints are to be made. Obviously, an employee will not typically cite statutes, case law, or regulations when making a report. It will be up to counsel to determine if a complaint touches on a law, rule, or regulation. Often, this will be a question of fact whether an employee's report contains information that the employee believes is evidence of a violation of a state or federal law, rule, or regulation. For example, if an employee complains about the careless driving of a co-worker while on a business trip he or she may enjoy whistleblower protection under this new law.

Documentation will be especially important. Every employee complaint will have to be analyzed in light of this statute. Employers will have to carefully review all terminations and adverse employment actions so as to avoid a claim of discrimination or retaliation under this statute. Tone deaf counsel and HR decisions makers should pay careful attention to the aggrieved employee. This is sweet music to the plaintiff's bar.

Robert Barsocchini is the General Counsel for Goodwill Industries.