Inside 4Q2018

ACC Association of Corporate Counsel
BALTIMORE

FOCUS

President's Message

Karen Davidson

Greetings and welcome to the Q4 2018 newsletter! This is my final message as President of the ACC Baltimore Chapter. This year flew by! I thank our Board and our wonderful Chapter Administrator for their support, and all the work they do to make our Chapter "run." I offer best wishes and any help I can provide to our incoming President, Prabir Chakrabarty. I know he will do a great job as Chapter President!

If you missed any of our Fall activities, you missed great times, good food and drink, and mixing with in-house and law firm lawyers: Lunch on September 13 with Shawe Rosenthal, our first Sponsor Appreciation Happy Hour atop Exelon's new building at Harbor Point, a wonderful Fall Social and Wine Tasting at Gertrude's with Premier Sponsor Miles & Stockbridge, and lunch on October 30 with Premier Sponsor Womble Bond Dickenson.

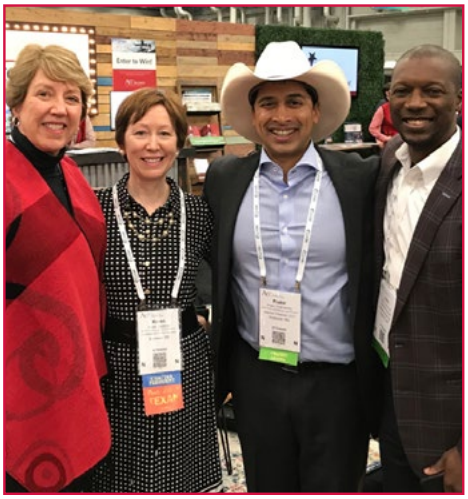
Five members from ACC Baltimore represented us at the Annual Meeting in Austin. We were able to celebrate with Chapter sponsor Jackson Lewis as they won Law Firm of the Year. If you have never attended the Annual Meeting, I encourage you to go to Phoenix next year.

By the time you receive this we will also have had a lunch and learn with Gold Sponsor Saul Ewing.

We hope you had time to catch up and connect with other in-house counsel in early December at our lunch with Gold Sponsor Anderson Kill. It is always a not-to-be missed event.

Best Regards,

Karen Davidson



Upcoming Events

April 18, 2019

MSBA Business Law Institute In-House Attorney Panel

If you ever want to share any ideas or comments with the board, here is the current list of officers and directors:

Karen Davidson —President

Prabir Chakrabarty —President elect and Treasurer

Larry Venturelli — Secretary

Cory Blumberg

Taren Butcher

Dee Drummond

Joseph Howard

Kaidi Isaac

Raissa Kirk

Kimberly Neal

Noreen O'Neill

Christine Poulon

Dan Smith

Whitney Washington Boles

Matthew Wingerter

The Eye of the GDPR Storm

By Tibor Nagy, Ogletree Deakins

The European Union's General Data Protection Regulation (GDPR) went into effect on May 25, 2018. It was preceded by years of debate, delays, and uncertainty on its final text. The months leading up to this date seemed quiet until a flood of emails barraged everyone's mailboxes — frantic requests from companies asking customers to officially opt-in or consent to receive their future messages. Now the storm seems to have abated, apart from the regular newsflash of a data breach or cyber hack at a big corporation or government institution.

GDPR is the European Union's latest answer to the privacy challenges of a rapidly digitalizing world with companies and governments controlling and processing large amounts of personal data. The regulation grants important rights to individuals or data subjects, including required consent or opt-in, the right to access, and the right to be forgotten, to name a few.

In addition, its application is not limited to the European Union and can, for instance, also affect US-based companies that process personal data of EU citizens. It is an important step up from the European Union's 1995 Data Protection Directive, which was their initial legislative answer to the first wave of digitalization and e-commerce.

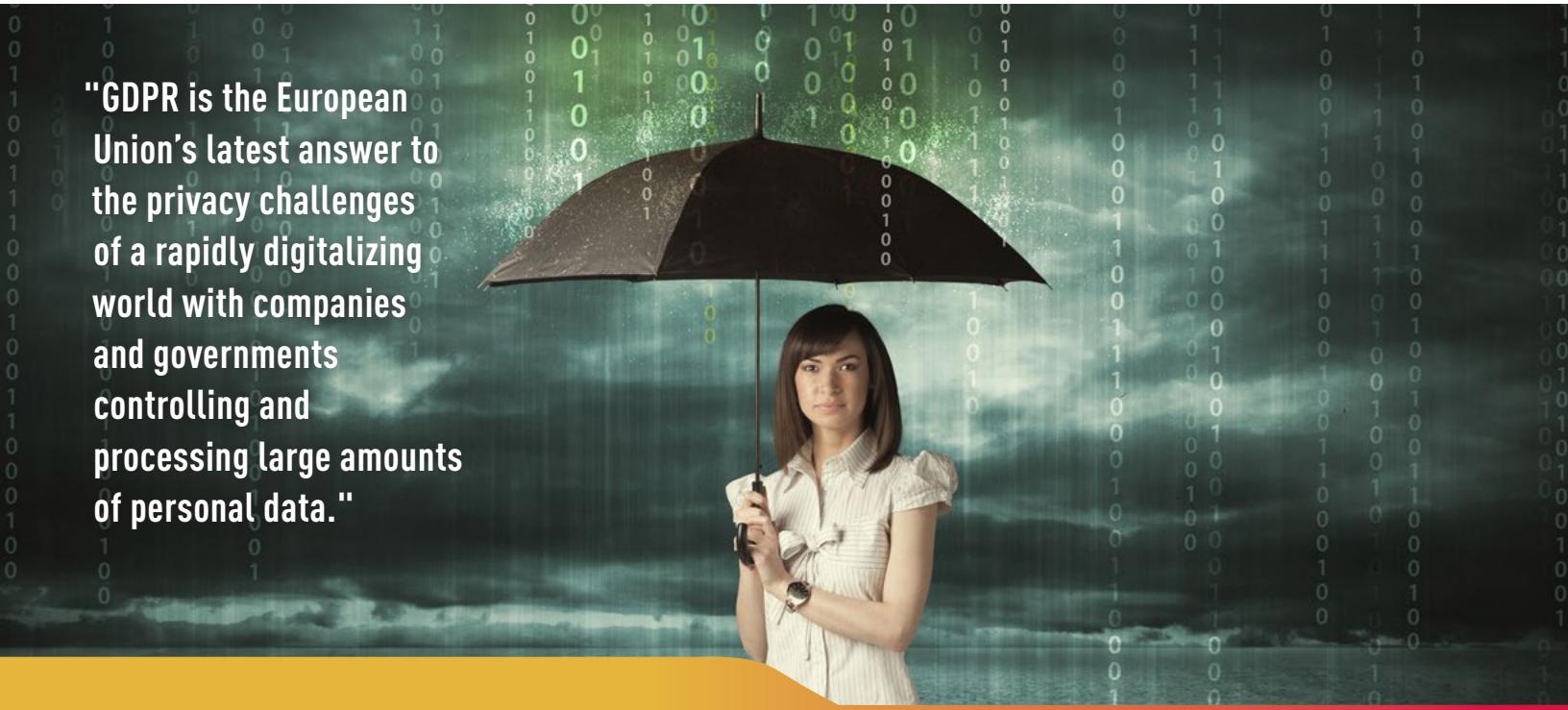
Compliance with GDPR is proving to be a big challenge for companies. Namely, interpreting many of GDPR's provisions is not always easy. In addition, many companies struggle on where to assign responsibility for GDPR compliance. GDPR requires companies to appoint a Data Protection Officer (DPO), but attracting and retaining a DPO is no easy task. A DPO should also be able to call on the support of a number of people including, the board, the GC, CIO, and COO to engineer and implement an effective GDPR compliance roadmap.

Privacy, data protection, and information security are firmly on the general counsel's current priority list. Although sometimes initially and erroneously viewed as a purely legal issue, GDPR compliance is a large-scale issue that impacts the company's business model and reputation. It provides great opportunities for general counsel to use their legal, business, and leadership skills to add value to the company. As such, general counsel cannot afford digital illiteracy and must stay on top of digital technology and cybersecurity trends.

Now that the initial excitement of GDPR has settled and the flurry of consent emails has subdued, it is tempting to carry on with business as usual. For example, the media is focused on the Brexit negotiations in Brussels, although the European Data Protection Authorities (DPAs) are convening in the city on October 22-26 during their 40th International Conference.

In fact, many DPAs already received the authority to impose much bigger fines through their national legislations. Presently, GDPR allows fines of up to four percent of annual global turnover or 20 million Euro, whichever is higher.

The DPAs are now assessing and planning for the future. Companies should use this valuable time and continue implementing their GDPR compliance roadmap to batten down the hatches. We are only in the eye of the GDPR storm.



ACC News

ACC Xchange: The Mid-Year Meeting for Advancing Legal Executives

This reimagined conference (April 28-30, Minneapolis, MN) combines ACC's Mid-Year Meeting and Legal Operations Conference into one powerful event, delivering the trailblazing programs, content, training, and networking you need all in one place, at one time. Register today for cutting-edge mix of advanced-level education at *www.acc.com/xchange*.

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Rapidly growing data privacy regulations from California to New York make you accountable for all third-party service providers that access, process, or store your company's personal data. *Download the case study* on Plaza Home Mortgage and the ACC Vendor Risk Service. Visit *www.acc.com/VRS* for more information.

2018 ACC Global Compensation Report

For companies seeking to stay competitive in the marketplace and lawyers considering career moves, access to detailed compensation data for in-house counsel and legal operations professionals is absolutely essential. Based on responses from more than 5,000 lawyers in corporate legal departments from 65 countries and 39 different industry sectors, this first-ever ACC Global Compensation Report is precisely the resource you need. Download the free Executive Summary at *www.acc.com/compenstation*.

2019 ACC Annual Meeting: Keep the Momentum Going

Exceptional in-house lawyers make attending the ACC Annual Meeting a priority. Mark your calendars for October 27-30 in Phoenix, AZ for the 2019 world's largest event on in-house counsel. Learn more at *am.acc.com*.

ACC Alliance

Have you considered that you and your professional legal services may be subject to malpractice scrutiny? Legal malpractice lawsuits can happen unexpectedly—even to in-house counsel. If you rely solely on the protection of corporate management liability coverage, your personal assets and reputation could be at risk. It may surprise you to learn that some of your peers have discovered firsthand that risky coverage gaps often exist. Since 1996, the ACC has turned to Chubb to address malpractice issues unique to in-house counsel. Learn more about Chubb at *www.chubb/acc*.

To effectively manage copyright, it is critical to understand when permission is needed and how to evaluate exceptions and limitations to copyright protection. Copyright Clearance Center's (CCC) Education Certificate Program can help. ACC members receive 25% off registrations made through 12.31.18 with promo code: ACC2018. Visit *http://go.copyright.com/acc2018/education* for a complete schedule.

Employers Beware: Your Obligations Under the ADA Are Broader Than You May Think!

By Fiona W. Ong and Lindsey A. White, Shawe Rosenthal LLP

A trio of recent U.S. Circuit Courts of Appeals opinions addressed important, but perhaps somewhat overlooked, nuances of the Americans with Disabilities Act (ADA). In each instance, the courts found that the employer fell short of meeting its obligations under the ADA – which provides a warning to other employers to avoid falling into the same traps. Below is a compilation of these opinions and key takeaways for employers.

Listen to the Employee, Not Just the Doctor, Regarding the Employee's Disability.

The U.S. Court of Appeals for the Seventh Circuit rejected an employer's assertion that the employee was not disabled under the Americans with Disabilities Act because she had been cleared by her doctor to return to work without restrictions, where the employee still complained of physical limitations.

In *Rowlands v. United Parcel Service*, No. 17-3281 (7th Cir. 2018), the employee sued her employer under the Americans with Disabilities Act for failure to accommodate her disability, among other things. The employer moved for summary judgment, arguing that the employee was not disabled since she had been cleared to work without restrictions following her multiple knee surgeries. However, the employee had informed her employer that her knee injuries still substantially interfered with her ability to engage in a number of major life activities, including walking, standing, squatting and kneeling, which was sufficient to raise the possibility of a disability.

The court noted that, "it does not follow that [the employee] did not have a disability because her doctor had cleared her to return to work without restrictions." The employer did not request a doctor's note to verify her condition, although it could have done so. It failed to engage in the interactive process. Thus, the court refused to dismiss the employee's claim, noting questions of fact remained about whether the employee actually had a disability and to what extent she required accommodation.

TIP: This case warns employers to be careful to take into account not only

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what the doctor says, but also what the employee says – and if it is different than what the doctor says, follow up with the doctor to get more information.

Full-Time Presence at Work Is Not Necessarily an Essential Job Function.

In a somewhat unsettling decision, the U.S. Court of Appeals for the Sixth Circuit held that "full time presence at work is not an essential function of a job simply because an employer says that it is." Interestingly, this seems to run counter to the Americans with Disabilities Act regulations, which state that evidence of whether a job function is essential includes, first, "[t]he employer's judgment as to which functions are essential."

In *Hostettler v. College of Wooster*, No. 17-3406 (6th Cir. 2018), an HR generalist took 12 weeks of maternity leave. Because she suffered from severe postpartum depression and separation anxiety, she requested and received approximately 4 weeks of additional leave and then a part time schedule, working until noon. For the two months following her return to work, the employee contended that she was able to do everything required of her position, even on a part-time schedule. A colleague agreed that the employee was able to complete her work on the modified schedule, and also performed much of her work from home. The employee's supervisor gave her a positive evaluation at some point during this period.

What the supervisor did not say to the employee was that her modified schedule put a strain on the supervisor and the department. There were a number of tasks that the employee did not perform, which had to be covered by the supervisor or left undone, although the supervisor did not identify them.

The employee sought to extend the period of part-time work for several more months, while potentially extending her hours to 2 or 3 p.m. However, she was terminated for being unable to return on a full-time basis. The employee sued, and the trial court dismissed her case, on the basis that full-time work was essential to her position, and she was therefore not qualified for the position.

On appeal, the Sixth Circuit held that whether the job required the employee's full-time presence was a question for the jury. The Sixth Circuit stated that, "[o]n its own, however, full-time presence at work is not an essential function. An employer must tie time-and-presence requirements to some other job requirement." Noting that the employer may have preferred full-time presence and that "it may have been more efficient and easier on the department if she were," the Sixth Circuit went on to state, nonetheless, "those are not the concerns of the ADA." Rather, employers are required to provide reasonable accommodations, including modified work schedules, and "an employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employee is needed on a full-time schedule."

TIP: This case offers several important lessons for employers. First, although employers do have the right to define the essential functions of a position, they also need to be able to offer an explanation as to why those functions are essential. Second, employers should be clear about the effect of an employee's absence on business operations; in this case, it appears that the supervisor may not have fully explained or shared where there were operational impacts. Additionally, documentation is critical. In this case, there was no documentation as to the challenges experienced by the employer as a result of the absence, and no documentation as to the interactive process following the employee's request for an extension of her modified schedule.

Reasonable Accommodations Are Not Limited to Essential Functions

In another recent case, the U.S. Court of Appeals for the Fifth Circuit highlighted an important point under the ADA that is often overlooked – reasonable accommodations are not limited only to enabling employees with disabilities to perform the essential functions of their jobs. They must also be provided to allow those employees to enjoy privileges and benefits of employment equal to non-disabled employees.

The employee in *Stokes v. Nielsen*, No. 17-11083 (5th Cir. 2018) was visually impaired. Throughout her 18-year tenure with the U.S. Department of Homeland Security (DHS), she received multiple accommodations, such as a workstation with natural lighting, special lightbulbs, multiple monitors, magnifying software and equipment.

Unlike most denial of accommodation cases, which involve allegations the employee was denied a reasonable accommodation that would permit the employee to perform the essential functions of the job, the Plaintiff here alleged that DHS denied her meeting materials in a format she could read and thereby fully participate in the meeting. Specifically, she requested on multiple occasions that, if written materials would be distributed or displayed during on-site meetings, she receive them in large font or in advance so she could review them using her magnification equipment. DHS never provided the materials as requested.

The employer argued that the employee could effectively participate in the meetings by listening and reading the materials afterwards, as she did for off-site meetings. The employee countered that her willingness to get by with inferior alternatives for off-site meetings did not make them effective accommodations for the on-site meetings.

The district court granted summary judgment, noting that "because a reasonable accommodation is only required when necessary to perform an essential function of the job," a reasonable trier of fact could not find a denial of a reasonable accommodation. The Fifth Circuit reversed the district court's ruling, however, noting that the district court's holding is contrary to circuit precedent and the ADA's implementing regulations.

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The regulations not only state that reasonable accommodations must be provided to enable employees to perform the essential functions of the job, but go on to further require "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment are enjoyed by its other similarly situated employees without disabilities." (Emphasis added). Accordingly, the Fifth Circuit concluded that receiving the meeting materials in advance or in large font at on-site meetings—which could permit the employee to enjoy equal privileges and benefits of employment—may constitute a reasonable accommodation.

TIP: Employers should be mindful that reasonable accommodations are not limited only to those that permit the employee to perform essential job functions. Rather, the ADA more broadly requires reasonable accommodations to enable disabled employees to enjoy equal benefits and privileges of employment.

If you have any questions about this information or would like to speak with a Shawe Rosenthal attorney, please visit our website at *www.shawe.com*. You may also email *shawe@shawe.com* or call 410-752-1040. If you would like to subscribe to our e-communications, please contact Liam Preis at *lp@shawe.com*.

Take My [Wife/Husband/Spouse], Please . . . Protection from Marital Status Discrimination Expanded In New and Surprising Ways

By Daniel Altchek, Principal, Miles & Stockbridge

For better or worse, when your parents disapprove of the person you've chosen to marry, there's not much recourse in the law (although some might call your parents' attitude a form of intentional infliction of emotional distress). But according to one New York appellate court, the law does protect employees when their *employer* disapproves of their spouse. What's more, it doesn't even matter whether the employee is actually married as long as the employer *believes* that to be the case, nor does it matter that the employer is not actually biased against married couples. This expansive view of marital status discrimination could potentially have a significant impact on employer decision-making when it comes to issues involving employees' spouses, certainly within New York City and potentially elsewhere if other courts adopt this approach.

In *Morse v. Fidessa Corp., et al., 2018 NY Slip Op 05975 (N.Y. App. Div., 1st Dept, Sept. 6, 2018)* the plaintiff, Christopher Morse, worked for the defendant Fidessa Corp., a financial services firm. According to the allegations in the complaint, Morse had been married to a co-worker, Lael Wakefield, with whom Morse had two children. Morse and Wakefield subsequently divorced but continued to live together, and the employer Fidessa apparently believed they were still married. Morse allegedly was suspended and then fired by Fidessa because Wakefield had left Fidessa to work for another financial services firm. Furthermore, Morse alleged that he was told that he was fired because of this perceived marital relationship, and that, if he divorced Wakefield, he would be reconsidered for re-employment (again, the employer erroneously believed Morse and Wakefield were still married to each other).

Morse claimed that this was discrimination on the basis of marital status under the New York City Human Rights Law ("NYCHRL"). In support of his claim, Morse identified a comparator: an unmarried couple where both partners initially worked for Fidessa, and one left to work for a different financial services firm, but the partner who remained at Fidessa was neither suspended nor fired. Fidessa moved to dismiss the complaint on the ground that the complaint did not state a claim of marital discrimination under the NYCHRL. The trial court denied the motion to dismiss and Fidessa appealed.

In a case of first impression, the Appellate Division, First Department, held that "marital status" under the NYCHRL refers not only to whether an individual is married or not married, but also to whether two individuals are married to each other or not married *to each other* – i.e., the marital status of two people in relation to each other. Thus, in this case, the allegation that Fidessa took adverse action against Morse based on whether he was married to *Wakefield* was sufficient to state claim under the NYCHRL. It was irrelevant that Fidessa was not alleged to be biased against married couples generally, or that Fidessa presumably had no bias against Morse being married to someone other than Wakefield. According to the court, taking adverse action against an employee based on his/her marriage to a particular person violates the NYCHRL's prohibition on marital status discrimination. Also, the fact that Morse was not actually married to Wakefield at the time did not matter, because the employer believed they were married and that belief was the basis for its actions.

Thus, under this interpretation of "marital status," employers must not only be wary of treating married employees differently

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from employees who are not married. Employers must also refrain from taking action against an employee because that employee is married to a particular person. This concern might arise if an employee with access to sensitive information is married to an employee of a competitor, for example, or if an employee is married to someone who publicly espouses views that the employer finds offensive. In those situations, the employer would be well-advised to consider how its decision might be analyzed under *Morse*.

For the moment, the geographic impact of this decision is limited to employers covered by the NYCHRL – i.e., those based or operating in New York City. Also, it is notable that the court based its reasoning on the New York City Council's express command to apply a "uniquely broad" interpretive approach to the NYCHRL, which the legislature intended to be interpreted independently and more liberally than the statute's federal and state counterparts. But many state and local employment discrimination statutes prohibit marital status discrimination, so it's fair to assume plaintiffs will be advancing the *Morse* theory in other jurisdictions, and other courts and legislatures may decide to adopt the expansive interpretation adopted by the *Morse* court. For the time being, employers should proceed with caution when making employment decisions that are based, even in part, on an employee's romantic relationships, whether married or otherwise.

For more topics, please visit the Miles & Stockbridge *Labor, Employment, Benefits & Immigration Blog.*

Disclaimer: This is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge, its other lawyers or ACC Baltimore.

Daniel Altchek is a principal in Miles & Stockbridge's ***Labor, Employment, Benefits & Immigration Practice.*** He represents private and public sector employers in a wide variety of industries in both traditional labor and employment law matters.

Deny-Then-Reverse Is Not the Right Way For Insurers to Handle Healthcare Claims

By Rhonda D. Orin and Daniel J. Healy, Anderson Kill*

While insurers routinely blame "overpaid providers" for the high cost of healthcare in the U.S., a just-released report by the Office of Inspector General of the U.S. Department of Health & Human Services suggests the pot is calling the kettle black. After a three-year study of insurers and plans in the Medicare Advantage program, the HHS OIG found that more than 75% of appealed coverage denials were flat-out wrong. Most (82%) harmed providers who had rendered care without getting paid. (*https://oig.hhs.gov/oei/reports/oei-09-16-00410.pdf* (September 2018)).

Insurers are so accustomed to blaming providers for overpayments that their leading trade association, AHIP, did not even acknowledge non-payments and underpayments to providers as a problem. In Modern Healthcare on September 27, AHIP spokesperson Cathryn Donaldson noted the study showed *only* that providers were not getting paid. It was not about "patients not getting the care they need." (*http://www.modernhealthcare.com/article/20180927/NEWS/ 180929896*).

Yet the deny-then-reverse tactic revealed by this study is an entirely different form of waste and abuse in the healthcare system. What health insurers and plans never mention, as they talk endlessly about high prices, is that they increase their own profits when they collect premiums and capitated payments, then stiff or slow-pay the providers who render the care.

As the HHS OIG warned, there is a well-established "incentive to deny preauthorization of services for beneficiaries, and payments to providers, in order to increase profits." While those comments regarded the capitated payment model, in which the federal government pays insurers a fixed amount per patient, the incentives in private plans are the same. In all plans, not just capitated ones, profits go up when spending on plan members' care goes down.

Deny-then-reverse is particularly effective in escalating insurer profits because most wrongful denials are not appealed. Only 1% of denials were appealed during the three years of the HHS OIG study. The rate is low because the process is confusing and cumbersome and, for providers who deal with thousands (or millions) of claims a year, can be prohibitively expensive. Notably, the HHS OIG did not even attempt the massive task of reviewing the 100 million denials that were *not* appealed to see if they were wrong as well. If many were, then although most claims are paid instead of denied, the profits from wrongful denials could be staggering.

Have there been such profits? Well, health insurers are doing pretty well. From the

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advent of the Affordable Care Act in 2010 to 2017, managed care stocks within the Standard & Poor's 500-stock index gained nearly 300 percent as a whole, including dividends. This gain was more than double the 135.6 percent returned by the overall index during the same period. UnitedHealth, the biggest company on the list, returned 480% over those years, dividends included. "An investment of $100 in the company's stock when Obamacare was signed into law would be worth more than $580.50" in 2017. (*https://www.nytimes.com/2017/03/18/business/ health-insurers-profit.html*).

Excessive denials of legitimate claims drags down the entire health care system. As the HHS OIG noted in its study: "Because Medicare Advantage covers so many beneficiaries (more than 20 million in 2018), even low rates of inappropriately denied services or payment can create significant problems . . ." Those problems are magnified if, as seems likely, the deny-then-reverse strategy is employed system-wide.

For providers, the path is clear: challenge wrongful denials. While expensive and inconvenient as well as fundamentally unfair, in a payment structure based on deny-then-reverse, there is no choice.

*Rhonda D. Orin and Daniel J. Healy are partners in the Washington D.C. office of Anderson Kill, a national law firm that represents policyholders, including hospitals and physicians, in disputes against insurance companies.

Has Your Organization Had A Compliance Check-Up?

By Brett Ingerman and T. Brendan Kennedy, DLA Piper

Compliance is an ever-changing discipline. In this era of unprecedented regulatory scrutiny, virtually every company – large or small, publicly traded or private, US-based or internationally focused – will one day confront a potentially damaging situation: a regulatory inquiry; an aggressive enforcement proceeding; a congressional oversight investigation; whistleblower claims; shareholder activism; or high-exposure class action litigation.

As with many corporate initiatives, there are a number of considerations that should be taken into account and harmonized with your organization's corporate culture, available resources, and best practices to devise a compliance program that fits. Regardless of what form they take, however, the foundational components of an effective compliance program are relatively constant no matter the size of organization or the industrial sector in which it operates. Those are:

- Risk Assessment. Periodically assessing the risks facing your organization – be they legal, regulatory, operational, reputational or of some other nature – is critical. A compliance program can add significant value by providing the business with tools to look past immediate issues and develop a plan to identify, assess and remediate risks that have not yet manifested. Once the risk assessment is completed, you may use it to understand and formulate your organization's risk tolerance, and to guide the development and implementation of controls intended to mitigate the risks it has revealed.
- Controls. Implementing practical controls though written policies, procedures, and guidance is a primary function of the compliance department. In a sense, this function fills the role of a standard-setting body for the whole organization.
- Responsibility. There must be adequate resources and authority for the program at all levels of the enterprise. This includes ensuring that (a) the corporate governing authority is knowledgeable about the compliance program's content and operation; (b) high-level personnel are assigned responsibility for the program; and (c) individuals are assigned responsibility for day-to-day operations of the program, with access to the governing authority or its subgroup and who periodically report to high-level personnel and the governing authority. Applicants for compliance roles should be screened to ensure that individuals who have engaged in misconduct or acts inconsistent with an effective compliance program are not included within the substantial authority personnel.
- Communication and Training. Communication of compliance messages, standards and procedures, and training that reaches all levels of the organization (and, as appropriate, agents of the organization) are hallmarks of an effective program. Ideally, a compliance program will establish training and communications benchmarks and annual plans that are oriented towards the strategic goals of the compliance program and the highest risk areas for the business. A compliance department is the key content provider for training and communications, monitors adherence to the annual plans and assesses the effectiveness of the communications and trainings.
- **Auditing and monitoring.** A companion to the implementation of controls and written standards, an effective compliance program must have a comprehensive monitoring and

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auditing function to detect violations, followed by reasonable steps to respond to and prevent further similar offenses upon detection of a violation and to modify the compliance program to reduce risks of non-compliance. Compliance personnel may use tools such as periodic risk assessments, pulse surveys, and audits to ensure that the business is operating effectively and as intended. Testing the control environment is essential to demonstrating that the compliance program is taken seriously and is not just a piece of paper. Monitoring and auditing, furthermore, allow the business to gather metrics necessary for meaningful reporting and to identify priorities and enhancement opportunities. From an internal perspective, it is essential to focus resources on the areas that will deliver the highest return on investment.

- **Reporting.** Reporting takes multiple forms. There should be an internal reporting system that enables employees and agents to obtain guidance and report noncompliance, anonymously, if desired and permitted by law, and without fear of retaliation. The compliance program, furthermore, should be prepared to collaborate with the legal department and other functional units and internal subject matter experts to investigate allegations of misconduct and remediate substantiated reports. A further critical function is management reporting. This should be considered in two directions: (1) up from the business to senior management and the appropriate board committee; and (2) out to the business units from the compliance department. A high priority for a compliance department is to create a consistent and user friendly reporting process. The compliance department should take care to control the quality and quantity of information it presents, compile a single source of truth for its analysis, ensure that strategic priorities are appropriately represented, and make sure that information from disparate businesses can be rolled up and reported in a coherent and integrated fashion. Finally, the leader of the compliance program should be comfortable representing the company before regulators and enforcement authorities.
- **Incentives and Discipline.** To promote sound business practices and adherence to organizational standards of conduct, instances of noncompliance – whether a violation or a failure to take reasonable steps to prevent or detect a violation – should be disciplined. Conversely, champions of compliance and those who take steps to advance the organization's compliance plan or exemplify its business principles should be rewarded. To this end, compliance should be treated as part of the employee goal setting, evaluation and compensation program. Annual performance objectives should contain compliance goals to ensure that every employee shares a common commitment to ethical and compliant conduct. This can be achieved by integrating compliance expectations into the compensation system – providing both financial rewards for ethical and compliant conduct and corresponding financial disincentives to deter improper conduct.

As these features reflect, the highest value that can be derived from a compliance program is the formulation and administration of a comprehensive strategy to identify and manage legal and regulatory risk for the enterprise.

Today's best practices are quickly overtaken by new regulatory requirements, better technology and real-world experience. In such a dynamic environment, with so much at stake, confidence in your compliance program can be hard to come by. An independent assessment can help your organization understand how its compliance program stacks up against what industry peers are doing, what regulators and enforcement authorities expect, and prevailing best practices. A compliance checkup may also reveal areas of potential enhancement.

COMPASS, DLA Piper's newly automated compliance assessment tool, aims to help your legal and compliance teams grasp those changes and achieve intentionality. COMPASS takes an integrated, enterprise-wide approach to analyzing legal, compliance, governance, and other risks, and provides you with a roadmap to help your company fulfil its ethical and legal obligations.

By giving you a simple but effective assessment, COMPASS helps to ensure that your company's compliance program meets or exceeds all legal and regulatory requirements as well as industry best practices. Through interviews, automated surveys and a review of key documents and procedures, COMPASS enables us to assess the current state of your company's compliance program, compare it to industry benchmarks, evaluate its effectiveness, identify strengths and suggest key enhancements. We then develop a holistic compliance plan – a level of protection that many companies find difficult, if not impossible, to generate without outside assistance. We communicate about our review, analysis, recommendations, and implementation under the protection of attorney-client privilege.

If interested in discussing how COMPASS may help your organization, please call the authors.

Are You A Smaller Reporting Company? Why You Should Care

By Sanjay M. Shirodkar, DLA Piper*

Earlier this year, the Securities and Exchange (the SEC) adopted amendments to the smaller reporting company (SRC) definition to increase the thresholds for eligibility and to adopt certain other changes. The revised SRC qualification rules became effective on September 10, 2018. Under the new SRC definition, a company with less than $250 million of public float will be eligible to provide scaled disclosures. Companies with less than $100 million in annual revenues and either no public float or a public float that is less than $700 million will also be eligible to provide scaled disclosures. The SEC made no revisions to the actual scaled disclosure requirements available to SRCs.

Are you a company that is eligible to take advantage of these new changes? Even if you are eligible, should you take advantage of these new changes? What occurs if you are initially not eligible, but, then at a later time you are eligible? And what exactly is "scaled disclosure" and which of the many SEC rules does a SRC not have to comply with? In this article, we explore these and other related topics.

What is an SRC and what did the SEC change?

The SEC has historically recognized that a single-size regulatory structure for public companies does not fit all. As a result, the agency has adopted a number of rules that, in effect, have created a graduated disclosure regime for public companies, from accelerated filing requirements for larger companies to reduced disclosure requirements for Emerging Growth Companies and SRCs. As a result of the revised definition, the SEC expects about 1,000 companies to qualify as an SRC and to possibly take advantage of the new rule changes.

The SEC's new thresholds for determining SRC status are based on (a) having a public float of $250 million or (b) a revenue test which also includes a public float component. Once a company determines that it qualifies as an SRC, it will remain an SRC until it exceeds the initial qualification thresholds.

The new rules provide three paths to becoming an SRC – one for companies doing an initial public offering, and two for existing public companies – a transition rule for this year using the IPO thresholds and, for companies that failed to meet the initial thresholds, the ability to become an SRC if it meets lower revenue and market cap thresholds.

Initial qualification

The following table summarizes the amendments to the SRC thresholds for companies making an initial determination under the revised rules or a current SRC confirming its continued compliance. A company needs to meet only one of the two thresholds.

Criteria	Old SRC Threshold	New SRC Threshold
Public Float	Public float of less than $75 million	Public float of less than $250 million[i]
Revenues	Less than $50 million of annual revenues and no public float	Annual revenues of less than $100 million[ii] and either: • no public float or • public float of less than $700 million

What if you are already a public company?

Transition rule for existing public companies

For the first fiscal year after September 10, 2018, existing public companies may qualify by applying the new initial qualification thresholds rather than the lower subsequent qualification thresholds. A calendar year company will test its status based on its revenues for the year ended December 31, 2017 and its public float as of June 29, 2018.

What occurs if you are initially not eligible, but become eligible later?

Subsequent qualification

If a public company determines that it does not qualify for SRC status because it exceeded one or more of the foregoing thresholds, it will remain unqualified unless when making a subsequent annual determination it meets one or more lower qualification thresholds. The subsequent qualification thresholds, set forth in the table below, are set at 80 percent of the initial qualification thresholds. Stated differently, this test is for issuers that are currently required to file reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended.

Criteria	Old SRC Threshold	New SRC Threshold
Public Float	Public float of less than $50 million	Public float[iii] of less than $200 million, if it previously had $250 million or more of public float
Revenues	Less than $40 million of annual revenues and no public float	Less than $80 million of annual revenues[iv], if it previously had $100 million or more of annual revenues; and Less than $560 million of public float, if it previously had $700 million or more of public float.

The SEC provided the following example in its guidance:

> *Example:* A company has a December 31 fiscal year end. Its public float as of June 28, 2019 was $710 million and its annual revenues for the fiscal year ended December 31, 2018 were $90 million. It therefore does not qualify as a SRC. At the next determination date (June 30, 2020), it will remain unqualified for SRC status unless it determines that its public float as of June 30, 2020 was less than $560 million and its annual revenues for the fiscal year ended December 31, 2019 remained less than $100 million.

What is "scaled disclosure" and which of the many SEC rules does an SRC not have to comply with?

An advantage of being an SRC is that such a company can comply with certain SEC rules and regulations that are less onerous. A

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SRC can pick and choose between scaled or non-scaled financial and non-financial item requirements on an item-by-item basis. For a side-by-side comparison of the SRC rules and rules applicable to non-SRCs, please contact the author.

There are specific rules regarding entering and exiting the SRC reporting regime and most companies solicit expert advice regarding compliance with such rules. A larger reporting company that determines it qualifies to be an SRC as of the last business day of its most recently completed second fiscal quarter is permitted to file as an SRC in its quarterly report for such quarter. When a company no longer qualifies as an SRC as of the end of its most recently completed second fiscal quarter, it can continue to use the scaled disclosure accommodations available to SRCs through subsequent annual report on Form 10-K. The filing deadline for the Form 10-K will be based on the company's filing status as of the end of the fiscal year covered by the Form 10-K.

Is it always better to be an SRC?

No. SRCs are subject to additional disclosure requirements with respect to transactions with related persons, promoters and certain control persons under Regulation S-K, Item 404. However, rather than the $120,000 threshold under Item 404, SRC's are subject to a threshold that is the lesser of $120,000 or 1 percent of total assets. The resulting disclosure must address the two preceding years. In addition, SRCs are also subject to additional Item 404 disclosure requirements regarding any underwriting compensation received by their corporate parent or any related persons. This Item 404 disclosure is mandatory for every company qualifying as an SRC, whether or not it elects to take advantage of the scaled disclosure accommodations for SRCs.

Do SRCs need to file auditors' attestation reports under Section 404(b) of the Sarbanes-Oxley Act I?

Sometimes. Only non-accelerated filers and emerging growth companies are exempt from the requirement to provide an auditors' attestation report. As a result, it is possible that a company could qualify as an SRC and be eligible to provide scaled disclosure, but at the same time also qualify as an accelerated filer and required to provide an auditors' attestation report. Note that SEC Chairman Jay Clayton has directed the SEC Staff to exempting some companies from the SOX 404(b) auditors' attestation report.

Pointers

- Companies that have completed an initial public offering in the last five years will soon lose their Emerging Growth Company eligibility due to the passage of time. Qualifying for SRC status will enable them to take advantage of the scaled disclosure regime.
- A greater number of companies will qualify as BOTH an SRC and an accelerated filer and will be required to check both boxes on the cover page.
- Companies should keep in mind the status of their competitors and whether qualifying as an SRC may negatively impact market perception of the company. Given the complexity of the federal securities laws, it is prudent to consider some of these issues well in advance. In addition, companies should keep in mind their long-term capital-raising plans as the market practices develop.
- Given the rampant use of stock buybacks, a company could plan its entry into the SRC regime based on its revenues and public float.
- It is possible for a company not to have a public float. This could occur if a company does not have any public common equity outstanding or no market price for its common equity exists.
- If you are a tech company with no revenue, it is highly likely that you will qualify as an SRC.

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[i] A registrant that qualifies as an SRC under the public float threshold does not need to meet the revenue threshold. The public float determinations is made as of a date within 30 days of the date of the filing of the registration statement and computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates before the registration plus, in the case of a Securities Act registration statement, the number of shares of its voting and non-voting common equity included in the registration statement by the estimated public offering price of the shares.

[ii] The annual revenues are as of the most recently completed fiscal year for which audited financial statements are available.

[iii] The public float determinations is measured as of the last business day of the issuer's most recently completed second fiscal quarter and computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by non-affiliates by the price at which the common equity was last sold, or at the average of the bid and asked price of common equity, in the principal market for the common equity. For a calendar-year company, this determination is as of June 29, 2018.

[iv] The annual revenues are as of the most recently completed fiscal year for which audited financial statements are available.

How AI Shapes the Future of Wealth

By Ted Claypoole, Womble Bond Dickinson

We are on the cusp of a revolution. While wealth managers have used computers to streamline complex analysis and to simplify customer service, the next wave of computational tools is already upon us. Artificial intelligence ("AI"), from predictive analysis to recommendation engines, will soon provide better decisions, more attentive client service, and a broader customer base for wealth managers willing to trust them.

Asset managers are already implementing AI into their businesses. AI includes a class of computer programs that not only follows a human-chosen algorithm but can learn from ongoing input and mistakes, improving performance over time. While its ability to crunch vast and varied numerical inputs has been explored, you may be surprised by the many ways AI can assist your business.

Of course, AI can help in data analytics, learning from patterns, consuming enormous quantities of information, and automatically generating insight into the meaning of these trends using past performance as a guide. AI is fast, analyzing books in seconds. AI never sleeps. AI makes no emotional decisions. AI plays no favorites. So wealth managers can naturally save time and money by implementing this technology into their practices.

AI can be easily customized. You can program it to reflect a client's level of risk aversion or risk tolerance and create a portfolio that matches. It can be programmed to make lightning-fast trades as the market changes. It may catch market shifts earlier and identify turning points faster than your current analysts. At worst, this technology provides inexpensive and trustworthy predictions and advice that a wealth manager can consider as part of her many relevant inputs when advising clients.

At most, the AI becomes the manager. AI currently exists to perform every primary asset management task, from data review and analytics to providing insight and effectuating trades. All firms can be quantitative analysis firms and help their clients understand market trends. The technology levels the playing field for wealth managers to exercise tools that have only been available to the elite few.

Which means that the AI can democratize the asset management business. With these tools, people with smaller investment portfolios will be able to afford sophisticated analysis directed toward their personal requirements and preferences. Millennial investors tend to seek out lower fees, regular portfolio rebalancing capabilities and transparency in reasoning. So effective use of AI can encourage wealth managers to reach further into the population of investors and build for the future.

Natural language processing is a form of AI, so that your clients may call into your office or point a browser to your website and receive intelligent help from your AI program. If the technology can address the administrative problems that lead to most client questions, then your company's personnel are freed to handle less routine tasks. Given their level of client contact, advisors should be an early beneficiary of this technology.

Focused on impressive investment performance, many people have not considered what AI can provide the rest of their practices. The perfect tool for lead generation and management, self-learning programs can both free up a manager's time for customer care and provide more and better sales tools for attracting clients. However, be aware that the new GDPR privacy rules in Europe specifically restrict the use of machine-only decision making and proscribe many of the client development tools that we take for granted in the U.S. An increasing level of computer sophistication will not be a defense for marketing to EU residents contrary to their new rights.

Finally, AI tools can be directed at your company's legal compliance programs to catch violations as they occur and correct problems before they come to the attention of regulators. Which is a good option, given the financial regulators are already installing their own AI programs to find those same problems. Regulatory AI may turn into a computerized arms race between the regulators and the companies that they observe.

Some of these applications are already being used in the industry, while others are on the way. AI's impact on every aspect of your practice is closer than you think. And if you do not capture its advantages, your competitors will.

Ted Claypoole leads Womble's Privacy and Cybersecurity Team, IP Transactions Team, and FinTech Team, and he just stepped down as chair of the ABA's Cyberspace Law Committee and stepped onto the ABA Business Law Section Leadership Council. He has managed responses to scores of data exposure incidents in all types of businesses and has served as in-house tech counsel for CompuServe and Bank of America. With former White House CIO Theresa Payton, Ted has published the books Protecting Your Internet Identity: Are You Naked Online? and Privacy in the Age of Big Data. Ted can be reached at ***ted.claypoole@wbd-us.com***.

Maryland Energy Administration Announces Series of Alternative Energy and Energy Efficiency Initiatives

By Joe Tirone and Brian Meltzer, Womble Bond Dickinson

The Maryland Energy Administration (MEA) has been busy as of late, announcing a number of new initiatives designed to build solar and electric vehicle infrastructure, increase biofuel production, and promote energy efficiency in commercial and institutional builds.

Parking Lot Solar PV Canopy with EV Charger Grant Program

For example, the MEA recently opened its Parking Lot Solar PV Canopy with EV Charger Grant Program for the 2019 fiscal year. The MEA intends for this program to address both Maryland's solar and electric vehicle infrastructure goals. The program will have two areas of interest, businesses and non-profits, and state agencies and local governments.

To qualify for a grant award, a proposed project must at least include the below, as well as certain additional items specific to the relevant area of interest.

- 75 kW of solar PV panels mounted on a canopy structure over a parking lot.
- 4 new qualified Level II or Level III electric vehicle charging stations in the same parking lot or on the same structure as the canopy.
- Evidence that the applicant controls the project site through at least 25 years after completion.
- A signed contract with a developer/ contractor.

The MEA is also interested in seeing projects that are innovative, have additional electric vehicle chargers and can reduce cost and/or wattage requirements.

The available budget for the 2019 program (running from July 1, 2018 to June 30, 2019) is $2,000,000. Grants will be up to $400/kW (DC) of canopy mounted solar PV, capped at $200,000 per project.

The application deadline for the 2019 funding cycle has passed, but be on the lookout next year for 2020 grant applications. Agreements for the 2019 program are expected to be signed by January 3, 2019. Project construction and commissioning is expected to end November 8, 2019 with reports due to the MEA by December 6, 2019.

Animal Waste to Energy Grant Program

In addition, the MEA recently announced a $2 million increase to the available funds for the Animal Waste to Energy Grant Program for the 2019 fiscal year. The program has up to $6 million in previously allocated funds, and has entered into a memorandum of understanding with the Maryland Department of Agriculture to make available an additional $2 million allocated via the Strategic Investment Fund. The program aims to encourage replacement of fossil fuels with biofuels to reduce greenhouse gas emissions, decrease dependency on foreign fuel, and build an additional revenue stream for farms.

The program has two areas of interest (AOI), farm/pilot scale (capacities less than 2MW) and community/regional scale (capacities greater than 2MW). Businesses, government agencies, and non-profits are eligible for the program. Up to $4 million will be available for the farm/pilot scale AOI, which will require a 40% cost-share by the applicant. Up to $2 million will be available for the community/regional scale AOI, which will require a 50% cost-share by the applicant.

To be eligible for a grant, projects must use animal waste through any proven process to generate electricity, reduce the volume of animal waste, and address the fate of the byproduct.

The application deadline for the program grants is December 15, 2018. Projects are to be fully commissioned by December 30, 2021.

Combined Heat and Power Grant Program

Finally, the MEA opened up its Combined Heat and Power Grant Program for the 2019 fiscal year. The program was put together to facilitate further growth of combined heat and power (CHP) in Maryland. The program will target commercial, industrial, institutional, and critical infrastructure facilities (including healthcare, wastewater treatment, and essential state and local government facilities). Grants under this program will be awarded on a first come, first served basis.

The program's available budget is $4,000,000, allocated among three areas of interest (AOIs). Up to $2,500,000 will be reserved for energy efficiency projects in institutional, industrial and commercial facilities. Up to $1,500,000 will be reserved for energy efficient projects that increase resiliency in infrastructure facilities. Up to $500,000 will be reserved for projects utilizing biomass or biogas resources as a fuel source.

$3,500,000 of the budget is reserved for projects in PEPCO and Delmarva Power territories, while the remaining $500,000 is reserved for projects outside of those territories. Award values will range from $425/kW to $575/kW, depending on the size of the applicable system, with a $500,000 project cap. Awards for fuel cell technology and non-combustion CHP will be limited to $1,000,000 of the total program budget for all AOIs.

Minimum eligibility requirements are that the CHP project must:

- Be located in the state of Maryland at an eligible facility;

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- Have materials onsite and official groundbreaking must happen by July 1, 2020;
- Be installed and fully commissioned by July 1, 2021;
- Have anticipated annual CHP system efficiency of at least 60%, on a higher heating value based on the higher heating value of the fuel, or an eligible non-combustion fuel cell system must meet a minimum system efficiency of 50% based on a higher heating value of the fuel; and
- Satisfy all applicable regulatory and environmental requirements.

The application deadline for these program grants is February 15, 2019 with award announcements expected to be made March 30, 2019. Agreements are expected to be signed in April 2019.

Joe Tirone is the co-leader of Womble Bond Dickinson's Energy & Natural Resources Sector. His practice focuses on energy project and infrastructure development, mergers and acquisitions and project finance. He has represented energy sector companies in structuring, negotiating and drafting a range of complex contracts and agreements. Tirone advises various stakeholders in a broad range of issues in the renewable generation sector, including developers, equity participants, equipment providers, and financing parties. He practices in Womble Bond Dickinson's Baltimore office.

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