Inside 2Q2019

ACC Association of Corporate Counsel

BALTIMORE

FOCUS

President's Message

Prabir Chakrabarty

Greetings and Happy Spring! We had a highly successful Women's History Month event at Topside, in conjunction with our terrific Premier sponsor, Womble Bond Dickinson US LLP. We had a great turnout and enjoyed wonderful views of the city!

We enjoyed a tremendous day and evening of fun and networking at our annual Golf/Spa event. Bringing together our sponsors and members for a day of golf, including a clinic, and spa treatments, followed by cocktails and dinner at the Elkridge Club is always a great pleasure! We had beautiful weather and I thank everyone for attending and making it one of the largest turnouts in our Chapter's history.

We are looking forward to our Summer Social with our Premier sponsor Miles and Stockbridge, which is tentatively scheduled for July 24th, 2019 at Under Armour—look for more details in your inbox shortly!

Please also watch out for our survey which should be sent shortly; it will help us plan the future for our Chapter and functions going forward.

If you only attend our monthly lunches occasionally, please know there are many opportunities to become more involved in ACC Baltimore. We need members for our committees, and to work with our wonderful sponsors planning our year-long series of lunching and learning. These committees are where our next level of leadership is generally found. In 2019, we have welcomed two (2) new Board members: Danielle Noe and Michael Wentworth. Your Board will have a retreat in early June, so please reach out with any ideas or suggestions you may have.

We want your input so that your Chapter delivers the programming you need in your in-house counsel role. Membership with the Baltimore Chapter will connect you with a group of talented and collegial fellow counsel. It also gives you access to all that ACC Global offers, including education, model forms, small group sections, "quick hit" learning, listservs, and, of course, the Annual Meeting. This year, make a point to come to sunny Phoenix, Arizona in October and connect with in-house counsel from all over the world.

I look forward to seeing you at one of our events soon and if there is anything at all that you want to discuss please feel to reach out to me!

Best Regards,
President
Prabir Chakrabarty

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

Prabir Chakrabarty —President

Board Members:

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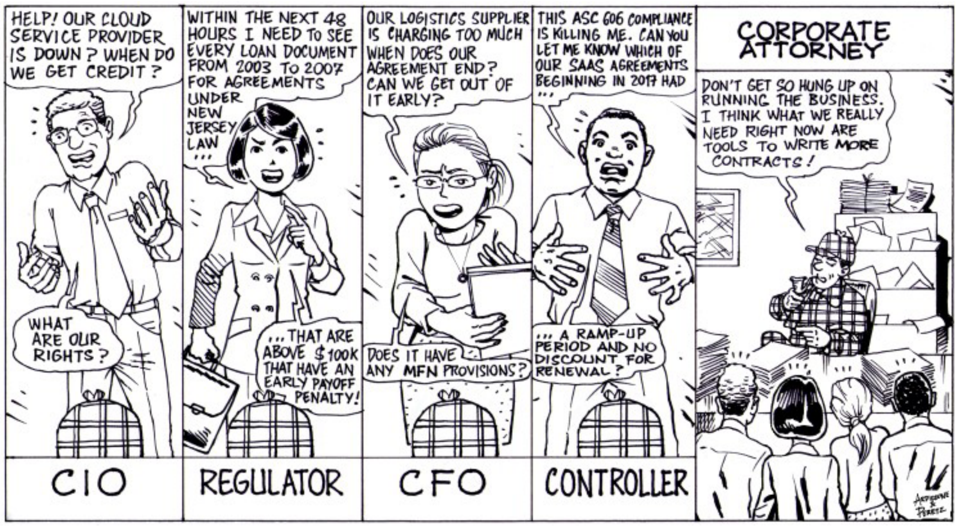
How to Elevate Your In-house Practice by Taking a Page from the CFO Playbook

By Neil Peretz, Contract Wrangler, Inc.



Art by F. P. Ardizzone. fpaoloardizzone@gmail.com

Companies need lawyers closer to their day-to-day business operations to handle the new, complicated, and increasingly global legal landscape. The proliferation of new regulations, combined with the need for businesses to move faster than ever before, present major opportunities for in-house attorneys. But before you demand a spot on the executive committee, it's time for an attitude check.

In order to truly succeed in-house, you need to become an involved business partner, rather than a detached advisor. It's no longer your job to be a detached professional advisor whose work is judged on the sheer number of hours worked or "points scored" by finding flaws and dangers around every bend.

These days, the most successful, indispensable in-house attorneys are those who become a member of the company's core senior leadership team. To do that, attorneys would be wise to learn lessons from the chief financial officer (CFO) world, where a similar transition occurred over the last decade. Previously, the CFO was considered a "scorekeeper" who would tally results and perhaps push others for budget forecasts. Today, the successful CFO has transitioned from keeping score to becoming a day-to-day partner with the CEO in growing the business.

How did the CFOs make this transition? And are there lessons for lawyers who want to follow in their footsteps from the role of specialist counselor to core decisionmaker?

Embrace digital transformation

A 2018 study by Accenture involving over 700 senior finance leaders revealed that a key contribution of top CFOs was to lead many of their organization's digital transformation efforts. The result affected the entire company, not just the financial or accounting department. The entire C-suite had new data and insights to guide the business, which led to better corporate decision-making and growth. Rather than focusing on tools targeted solely at making their own life easier, the CFOs set out to make the entire senior team smarter.

Find new value

Over 80 percent of the successful CFOs surveyed focused on how to go beyond their traditional purview of cost-cutting to finding new value or revenue streams for the business. At Adobe, for example, the CFO was integral to the decision to launch a cloud-based subscription service that has propelled the company's growth. In addition to helping the company's financial performance, this strategy also helped make other team members — ranging from legal ops to product to sales and marketing — into revenue-enhancing heroes. It's not a surprise that these other senior executives suddenly wanted more CFO involvement in key business decisions.

Share information widely

More than two-thirds (67 percent) of successful finance leaders worked to train non-finance executives how to take aspects of financial planning, budgeting, and forecasting into their own hands, according to the Accenture study. Rather than hoard information as a source of power, the top finance executives built their power base by essentially deputizing employees in other departments to add a financial perspective and fiscal discipline to their own work.

So, what can in-house attorneys looking for personal and professional growth learn from the tremendous strides made by CFOs?

1. Lawyers have a tremendous opportunity to enable the company's digital transformation because almost all of their company's core business relationships pass through their hands. The next time you work on a business agreement for a colleague, start asking how that business relationship will be operationalized after the contract is signed. Are there key systems that need to be installed to monitor performance or record goals? As a lawyer, you are at the forefront of identifying key business processes that can brought from separate paper archives into the digital shared world.

2. Lawyers often overlook the opportunity to leverage technology investments by the company to make themselves more accessible and efficient. For example, in the software industry, large engineering teams utilize systems like Trello and Jira to assign and track tasks, and cloud-based applications like Google Docs to enable team- and project-based collaboration. Your company may already have

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a license to use tools like these, along with expert users just down the hall from you. Examine your ability to utilize this technology for your law department. A task could be assigned to a lawyer through a system like Jira or Trello and be fed into a prioritization queue that each lawyer could manage, easing collaboration and communication with those outside the legal department. Similarly, using a shared Google doc across multiple departments is a low-cost way to gather feedback or seek approvals where there are many internal stakeholders in an agreement under negotiation.

3. Remember that the law does not just create roadblocks and restrictions: It can also create new opportunities for competitive advantage for your company. If you can find the most cost-effective or efficient method to comply with a new rule, you can gain a tremendous lead on your competitors. Your job as a business partner is to think about how something could be done in a compliant manner by digging into the history, spirit, and nuance of rules, a task for which you are uniquely qualified.

4. Learn what would make your colleagues successful in their jobs, rather than focusing solely on your department's accomplishments. Find out what your internal clients need most to excel in their own areas. Learn about which information will enable them to make better decisions on a day-to-day basis, rather than just serving as their scrivener at the outset of a new business relationship, or their advisor after a mishap has already occurred. You helped them form those external business relationships, negotiating and drafting agreements with everyone from software providers to landlords to investment bankers. Find a way to help everyone remember the key metrics for executing on those agreements, which is much more rewarding than developing ex post facto arguments based on bad facts.

5. Remember that corporate law and corporate contracts are not a temple, and you are not a high priest. Contracts exist to serve businesspeople and their departments. Use your legal interpretation skills to help colleagues turn contracts into day-to-day goals and tasks that they can carry out. Deputize each relevant department to ensure that the value from contracts is maximized.

None of these steps requires you to sacrifice your legal judgment. Rather, these provide an opportunity to use your legal skills from the catbird seat at the heart of business negotiations, which will make your colleagues appreciate your value to the business much more than they already do today.

Author: **Neil Peretz** General Counsel of Contract Wrangler, which brings business agreements to life through attorney-trained artificial intelligence. Peretz has been general counsel of multiple financial services companies and also served as a DOJ Trial Attorney and co-founder of the Consumer Financial Protection Bureau's Office of Enforcement. His law degrees are from the University of California, Los Angeles (UCLA) School of Law and from Katholieke Universiteit Leuven, in Belgium, where he was a Fulbright Scholar.

ACC News

2019 ACC Annual Meeting: Where In-house Counsel Connect

Mark your calendars for October 27-30 in Phoenix, AZ for the 2019 world's largest event for in-house counsel. Earn up to a year's worth of CLEs, get the essential knowledge and insights you need to navigate today's increasingly complex business environment, and make meaningful connections with your in-house peers from around the globe. No other event delivers such a wealth of education and networking opportunities for corporate counsel all in one place at one time. Group discounts are available. Check out the full program schedule at am.acc.com.

Law Department Leadership: Strategic Decision Making for In-house Counsel

Making effective decisions is arguably your most critical responsibility as a professional manager. In uncertain and changing business situations, you need a practical framework to make effective decisions quickly. Attend the Law Department Leadership program (23 September, Toronto, ON) to gain influence and advance your career by learning how to make better business decisions. Register today at acc.com/LDL.

Global General Counsel Summit: London Calling

Are you driving the discussion on corporate sustainability? Positive financial performance, regulatory pressure, material risk, and shareholder expectations are some of the reasons why you should be. Join the critical conversation on "Driving Corporate Sustainability—the Expanding Role of the GC" with your fellow CLOs from around the world, May 22-24, in London, UK. Register today.

Are you prepared to comply with new state privacy laws?

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. Visit acc.com/VRS for more information.

New to In-house? Are you prepared?

The ACC Corporate Counsel University® (June 26-28, Minneapolis, MN), combines practical fundamentals with career building opportunities, which will help you excel in your in-house role. Come to this unrivaled event to gain valuable insights from experienced in-house counsel, earn CLE/CPD credits (including ethics credits) and build relationships and expand your network of peers. Register at acc.com/ccu.

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Drive Success with Business Education for In-house Counsel

To become a trusted advisor for business executives, it's imperative for in-house counsel to understand the business operations of your company. Attend business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

- Mini MBA for In-house Counsel, June 3-5, September 9-11, and November 4-6
- Finance and Accounting for In-house Counsel, September 23-25
- Project Management for in-house Law Department, November 13-14

Learn more and register at acc.com/BU.

Connect Your Circles… Expand Your Reach!

When your in-house peers join ACC, you create opportunities to engage with colleagues, expand your professional network, and share ideas and expertise. Now through 30 September, you are automatically entered into a us $100 monthly drawing when you recruit a new member. As an added bonus, your new recruit is automatically entered into a separate drawing, too! Learn more at acc.com/MemberConnect.

Buy-Side Transactional Insurance Trends

By Tom Pilkerton and Matt Gorra, DLA Piper

Transactional risk policies, including general representation and warranty (R&W) indemnity insurance and specialty policies for specific indemnities or risks, have been available for over a decade, but they have increasingly permeated the M&A landscape over the last several years. The increased utilization of these policies, with buy-side R&W insurance as the leading product, has been fueled by many factors including:

- The legal and business communities' acceptance of the policies as viable replacements for, or support for a significant reduction of, traditional escrows and holdbacks.
- Greater familiarity with the products by serial acquirers and, in particular, private equity firms, which also often expect the products to be used in their portfolio company exits to facilitate the timely return of capital to their investors (*ie*, fewer proceeds trapped in escrow).
- Messaging in investment banker process letters that offering R&W insurance will allow potential acquirers to differentiate themselves in hot sell-side auction processes.
- Increased sell-side negotiating leverage in a market more tolerable of sellers seeking to liquidate with no post-closing indemnity obligations.
- A multitude of new carriers/underwriters offering R&W insurance products, and enhanced focus by insurance brokers on their product offerings. Claims paid under R&W policies above the retention amount are still rare and there is a large and diverse portfolio of risks.
- Expansion of industries in which carriers are willing to underwrite policies, including increased use in healthcare and government contracting deals.
- A more streamlined placement process and standardization of terms, including the adoption of customary R&W insurance deal terms in purchase agreements.

However we got here, the use of transactional policies in M&A deals throughout the US does not appear to be slowing down. The focus of this piece is to briefly describe transactional risk coverage with a focus on buy-side R&W policies, to provide some insight into trends, and to give some practical advice for those looking to incorporate a R&W policy in their deal.

What is an R&W policy?

Generally, R&W insurance policies cover losses related to breaches of the seller's representations and warranties made in the purchase agreement, subject to known or disclosed risks and other policy exclusions. The insured party is usually the buyer (resulting in a buy-side R&W policy), but seller policies are also available. Note that these general R&W policies, whether the buyer or the seller is the insured party, do not cover covenant breaches or special indemnities. Increasingly, however, pre-closing standalone tax indemnity covenants are insurable under a general policy. Moreover, other products may be available for insuring against certain known risks or other contingent liabilities/special indemnities not covered by a general policy. Known risk policies sometimes are cost prohibitive, but they are worth exploring, particularly if the seller is able to provide facts (or even better, a tax or legal opinion) supporting its position.

Sellers typically prefer R&W policies over traditional escrows, because such policies reduce their overall indemnity exposure and provide more certainty with respect to the amount of proceeds pocketed at closing. While it was once common to see

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10 percent or more of the purchase price placed into escrow to secure indemnity claims, if an R&W policy is put in place, it is not uncommon to have less than 1 percent of the purchase price placed into escrow or even the elimination of any escrow altogether (more typical in a no-seller indemnity/public style deal). Accordingly, sellers have more peace of mind following closing and proceeds can be distributed faster. Sellers may also benefit from a faster negotiation of deal terms (as all deal lawyers know, the negotiation of intricate representations, warranties and indemnities is often the most contentious part of any deal) and the buyer may be willing to assume additional, insurable deal risks without a corresponding purchase price reduction.

Buyers also increasingly seem to prefer R&W policies as the economic impact of the policy premium and retention can be factored into the overall purchase price or deal terms (or costs can be split or allocated to seller). The existence of a policy also can provide a competitive advantage in the bid process (or indeed, it may be the price of admission) and buyers may obtain better indemnity terms in the aggregate, including extended survival periods (most policies allow general representations to survive for three years and fundamental representations for six years) and an increased indemnity/coverage cap, depending on how much coverage is purchased. From a practical perspective, R&W policies also aid in preserving the relationship between financial buyers and management sellers that remain with the business after closing, because claims are made against the policy and not against the sellers.

What are we seeing?

Here are some observations we've made about the increased use of insurance products in mergers and acquisitions:

- Investment bankers and savvy sellers are demanding the use of R&W insurance in hot auction processes. While enterprise value and cash paid at closing remain paramount in the eyes of sellers, sellers are paying increasing attention to back-end liability exposure and risk mitigation.
- Deals with no seller indemnity (*ie*, no seller escrow or liability for representations and warranties) are becoming more common, especially in the private equity space. These deals result in a higher insurance premium and retention amounts (deductibles), but tend to be the most favorable to sellers.
- R&W insurance deals are reaching further down market to deals with smaller enterprise values. Not long ago, the premiums for coverage made R&W insurance cost prohibitive in smaller deals, but we are seeing more middle-market use of the product.
- Policy limits still often mirror what would traditionally be placed in escrow (*eg*, roughly 10 percent of purchase price), but excess policies are not uncommon. We are also seeing more specialized coverage for cyber-risks, environmental risks and tax issues.
- While R&W insurance is most common in deals with a financial sponsor (*eg*, private equity exit or purchase), we have seen strategic buyers more open to using insurance on the buy-side.
- Policies generally follow the purchase agreement with respect to survival periods, materiality scrapes, sandbagging provisions and limitation of damages provisions, including consequential damages and lost profits.
- Internationally, we have seen an increased use of policies throughout Europe and in Latin America with US buyers. Similar to how deal terms often vary between US-style deals and deals in other jurisdictions, the policy terms domestically and internationally may also differ (including, for example, based on whether the purchase agreement incorporates US-style disclosure schedules or makes a broad reference to a data room, which is common in certain European jurisdictions).

Some practical advice when considering transactional insurance

Every deal is different and has its own idiosyncrasies and nuances. Certainly, transactional insurance is not a one-size-fits-all product, nor is it appropriate for every deal or even every risk. That said, transactional insurance products have become mainstream enough to be at least discussed as an option in most middle-market and large cap deals. Counsel for both buyers and sellers should understand the intricacies of the policy documents themselves, the underwriting process and the interplay between the terms of the policy and the purchase agreement.

We offer the following suggestions:

- The typical diligence and underwriting process takes approximately two weeks. That said, budget extra time for "hairy" deals and deals involving international operations across multiple jurisdictions, and you should always discuss realistic time expectations with your broker. Note also that while the process could be expedited to a single week or even a few days, that is not the norm and often leads to reduced leverage on both pricing and terms (meaning more policy exclusions). Accordingly, budget adequate time and include the underwriting process as a work stream early on, if feasible.
- Address the treatment of policy exclusions early on (or at least have a placeholder for how to deal with such exclusions). If the policy will not cover a particular issue, consider whether there will need to be a separate seller indemnity, escrow, holdback or purchase price setoff. Setting expectations early can avoid or reduce eleventh hour surprises later.
- Given that policies only cover representations and warranties, buyers and sellers still need to allocate risk for covenant breaches and special indemnities. Consequently, the traditional indemnity negotiations over caps,

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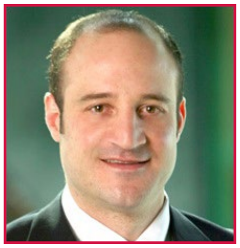
baskets, mini-baskets, materiality scrapes, survival terms, limitations of types of damages, sandbagging and seller recourse may come back into play depending on the perceived risks. Similarly, you still need to think about recourse for fundamental representations and fraud in excess of policy limits. A policy backstop provides a level of protection, but may not be sufficient coverage in certain instances.

- The core deal team for the buyer will be required to provide a no claims declaration whereby any breach of which the core buyer team was aware will not be insurable. Matters disclosed in diligence reports (*eg*, legal, tax, accounting) are deemed known and are used as a shield by insurers against their liability under the policy.
- There may be a gap in coverage for interim breaches, which are breaches that occur between signing and closing in a deal that does not sign and close simultaneously. This occurs because incepting the policy at signing covers breaches prior to signing, but will not cover new breaches that occur and are discovered by the buyer after the signing and prior to closing. Accordingly, care should be taken to address these consequences in the purchase agreement. Consider whether you should grant the buyer a walk right for uninsured breaches, add a materiality threshold, require the seller to cover such breaches, automatically place an amount in a stand-by escrow or suggest another resolution.
- From a seller perspective, ensure that the policy does not permit the insurer to subrogate against the seller in the event of a claim. Typically, fraud is carved out of the anti-subrogation provision. Therefore, care should be given to define fraud in both the policy and purchase agreement. From a seller perspective, the definition should be as narrow as possible. That said, a buyer should review the language carefully to ensure it is not implicitly waiving any rights, including with respect to reckless statements or acts committed outside of the context of the transaction.
- Sellers that are also former directors or officers of the target may have rights to indemnification or the advancement of expenses from the target that survive the closing. The parties should consider whether these rights are appropriate or could impact insurance recovery. To preclude application, buyers should consider a "no circular recovery" provision in the purchase agreement precluding such recoveries.
- From a buyer perspective, the purchase agreement should be clear that any negotiated limitations on seller liability should not inadvertently preclude or impact insurance coverage or the ability to make a claim under the policy. Conversely, sellers should make clear that the denial of a claim or failure in coverage does not result in seller liability.
- It is important to continually check with brokers to stay up to date on the latest financial and other terms of the products available in the market. Coverage amounts, premiums and retentions constantly move as more carriers enter the market and more insured deals close.

If the M&A and investment market in the region continues to be robust, we expect these insurance products to be discussed and utilized at an increasing rate. We also expect the insurance products' terms to continue to evolve as buyers, sellers, practitioners, insurers and brokers become more sophisticated and familiar with their use. Just as deal lawyers need to stay up to speed on what is market with respect to traditional indemnity provisions such as escrows, we believe that understanding what is market with respect to transactional insurance will become just as important and an integral component of the deal lawyer's toolbox.

Tom Pilkerton is a corporate and securities partner at DLA Piper. Tom has an international practice with extensive M&A and private equity experience. He has managed transactions in a wide variety of industries, including aerospace and defense, healthcare, technology, real estate and manufacturing.



Matt Gorra is a corporate lawyer and US partner at DLA Piper. Matt regularly advises US and non-US clients on M&A and private equity transactions in a broad array of industries, including technology, healthcare, health IT, manufacturing and professional services.

The authors would like to thank Nate McKitterick, from DLA Piper's Silicon Valley office, for his generous guidance on all things insurance related.

DLA Piper, a global business law firm with offices in over 40 countries across the Americas, Europe, Asia, the Middle East and Africa, is the world leader in advising clients on merger and acquisition transactions (with the #1 annual M&A deal count globally in each of the past eight years).

Data Security and Cybercrime – Reducing the Risks Presented by Vendor Relationships

By Andrew Bulgin, Gordon Feinblatt LLP

The number of cybercrime incidents has steadily increased in recent years, and that number will likely continue to climb as businesses, educational institutions and governmental agencies are increasingly relying on digitized data. Organizations across a wide range of industries rely on third-party vendors to provide services that frequently involve access to customer and other sensitive data. These organizations should ensure that their vendor contracts contain robust confidentiality and data breach remediation provisions.

Data Breaches are on the Rise

In its *2018 Data Breach Investigations Report*, Verizon noted that there were more than 2,200 confirmed data breaches worldwide in 2017. Verizon stated that ransomware – malware that makes information on file servers and databases unusable through encryption until a ransom is paid – had become the most prevalent variety of malicious code, with ransomware being used in 39% of all malware-related data breaches. Malwarebytes found in its *2019 State of Malware* that the use of ransomware declined in 2018 but it noted that bad actors attempted to use ransomware more than 5.9 million times in 2018.

Current Privacy Requirements

The U.S. Congress has enacted some industry-specific laws, but there is no comprehensive federal data security law. The Federal Trade Commission has used its authority under Section 5 of the Federal Trade Commission Act to target businesses that failed to adhere to their privacy policies, but this act does not apply to everyone and, in any event, an investigation does not return the horse to the stable. Many states have some form of data security law, but they are not uniform.

Under the federal Gramm-Leach-Bliley Act, certain financial institutions are required to safeguard the confidentiality of "nonpublic personal information" about consumers that they collect. The federal Family Educational Rights and Privacy Act requires educational institutions and other entities that receive funds for programs administered by the U.S. Department of Education to safeguard the confidentiality of a student's "personally identifiable information." And, health plans, providers and certain other health-related entities that transmit health information in electronic form (and vendors who have access to such information) are obligated pursuant to the federal Health Insurance Portability and Accountability Act to maintain the confidentiality of a patient's "protected health information."

In Maryland, each business that owns or licenses personal information about a Maryland resident is required to implement and maintain reasonable security procedures and practices to protect that information and to notify affected residents and, under certain circumstances, the Office of the Maryland Attorney General and consumer reporting agencies in the event of a data breach. It is generally a crime in Maryland for a financial institution to disclose, and for any person to induce or attempt to induce a financial institution to disclose, a customer's "financial record." Under the Maryland Attorneys' Rules of Professional Conduct, a lawyer is obligated to protect the confidentiality of electronic data about his or her clients.

Risks Associated with Using Third-Party Vendors

Providing a vendor with access to sensitive data obviously increases the risk that it will fall into the wrong hands, because protection depends on the implementation and maintenance by both parties of systems, policies and procedures necessary to prevent a data breach. Aside from the legal consequences that might arise from a breach of the vendor's systems, an attack that encrypts data and prevents its use can be enormously disruptive and can result in thousands, if not millions, of dollars in losses.

Financial institutions commonly make customer information accessible to vendors, and the federal banking regulators have issued guidance to address the associated risks. Among other things, this guidance requires institutions to conduct due diligence on potential vendors and include appropriate data security provisions in their vendor contracts. All entities can take a lesson from this guidance, as its principles can translate to any industry.

Reducing the Risks

Aside from thorough due diligence, the parties' contract should be drafted with the assumption that a data breach attack will occur. A well-drafted contract should require the vendor to safeguard and protect information in accordance with the laws that are applicable to both parties, and the vendor should be forced to institute and maintain commercially reasonable procedures to ensure the confidentiality of that information. In addition, the vendor should be required to monitor those procedures to ensure that information remains confidential, to promptly notify the client of any data breach or misappropriation, and to take all actions that the client may reasonably request to limit, cease or otherwise remedy the breach, including assisting the client with any required notifications to customers and law enforcement authorities. Finally, the contract should include indemnification provisions that require the vendor to cover losses suffered from a breach of its data security obligations (including the cost of required consumer notifications).

Although the product is relatively new, some insurers offer insurance coverage for data breaches, including ransomware attacks. Policies differ, but many will

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cover the payment of the ransom under various circumstances in addition to the insured's other losses suffered on account of the breach. Data security professionals almost universally believe that paying a ransom should be a last resort, but even the Cyber Division of the Federal Bureau of Investigation acknowledged in its February 8, 2016 memo, *Responses to Senator Wyden's Questions on Ransomware*, that it might be the victim's only solution to avoid long-term paralysis and resulting financial losses. Entities that rely on digitized data should consider the purchase of data breach coverage, and those that provide access to third-party vendors should consider requiring the vendors to do the same.

Of course, paying a ransom will not guarantee freedom. And, it is a federal crime to engage in most financial transactions with foreign terrorist organizations and persons on the Specially Designated Nationals and Blocked Persons List promulgated by the Office of Foreign Assets Control, and it will likely be difficult to determine the true identity of a hacker.

Taking steps to prevent, or at least minimize the impacts of, a data breach is the best defense, and those steps should include a thoughtful review of any third-party contract data access.

Andy Bulgin is a Member in Gordon Feinblatt's Securities Law, Business Law and Financial Services Groups. His practice is split between corporate and securities matters and regulatory compliance. Andy represents a wide variety of businesses, entrepreneurs and investors, with a particular focus on financial institutions and other regulated entities.

Navigating the Changing Landscape of Non-Competes

By Donald E. English, Jr. and Judah L. Rosenblatt, Jackson Lewis

President Barack Obama's 2016 "call to action" to reform non-compete laws in the U.S. spurred a number of state and local legislatures to introduce bills and pass laws significantly limiting employers' use of non-competition restrictions. This means that employers must carefully scrutinize their restrictive covenants to ensure compliance on the federal and state levels and watch out for future changes. Below is just a few of the state changes.

Maryland

On January 30, 2019, the Maryland legislature introduced SB 328, a bill that would prohibit the use of non-compete agreements for low-wage employees. SB 328 defines a "low-wage employee" as one who earns equal to or less than $15.00 per hour or $31,200 annually. SB 328 passed the Maryland House on April 3, 2019, and the Maryland Senate on April 5, 2019. The bill is headed to Governor Larry Hogan's desk for signature.

Virginia

On January 17, 2019, the Virginia legislature introduced SB 1387, a bill that would prohibit the use of non-compete agreements for low-wage employees. Under SB 1387, a "low-wage employee" is defined as one who earns less than the average weekly wage of the Commonwealth, and includes interns, students, apprentices, and trainees, whether or not they are being paid for their work, as well as some independent contractors. The Virginia bill would prohibit employers from entering into, enforcing, or threatening to enforce a non-compete agreement with any low-wage employee.

Low-wage workers would be permitted to bring a civil suit against any former employer (or other person) who attempts to enforce a non-compete against the employee within two years of the later of: (1) the date the agreement was signed, (2) the date the low-wage employee learned of the agreement, (3) the date the employment relationship was terminated, or (4) the date the employer attempted to enforce the agreement.

Employers who violate SB 1387 would be subject to a civil penalty of $10,000 for each violation. Additionally, employers would be required to post a copy of the law (or an approved summary) in the workplace or risk an additional penalty of up to $3,000 for the third (and subsequent) violation.

SB 1387 is currently in committee.

Pending Legislation in Other States

In addition to Maryland and Virginia, bills restricting non-competes for low wage employees pending in several other states, including Connecticut, Hawaii, Maine, New Hampshire, New York, and Texas.

Illinois, Pennsylvania, and Vermont are considering bills that would ban all non-competes, which would align those states with California, North Dakota, and Oklahoma. Other states have proposed legislation that would ban non-competes for specific professions. For example, Florida and Minnesota have pending legislation prohibiting non-competes for physicians. Georgia has pending legislation banning non-competes for information technology employees. Lastly, Texas would prohibit the use of non-compete agreements for independent contractors in connection with oil and gas operations.

Massachusetts

In August 2018, Massachusetts Governor Charlie Baker signed a bill providing that a non-compete covenant must:

- Be no broader than necessary to protect a legitimate business interest;

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- Include a geographic scope that is reasonable "in relation to the interests protected";
- Not exceed one year in duration from the date of separation (with tolling up to one additional year if the employee is found to have breached a fiduciary duty or unlawfully taken his or her former employer's property); and
- Be reasonable in the scope of the proscribed activities in relation to the interests protected.

In addition, the law permits courts to "reform or otherwise revise" an overly broad non-compete covenant to the extent necessary to protect the applicable legitimate business interests.

The law provides that non-compete agreements presented to an employee after the commencement of employment must be supported by additional consideration over and above continued employment. Further, while the law does not impose a similar requirement for agreements that are entered into in connection with the commencement of employment, no employer may enforce a non-compete covenant without complying with the law's "garden leave" provision.

For agreements that call for "garden leave" pay (as opposed to "other … consideration"), the employer must continue paying the former employee an amount defined as "at least 50 percent of the employee's highest annualized base salary paid by the employer within the 2 years preceding the employee's termination" during the restricted period.

Utah

Utah's original non-compete law imposes a one-year post-employment time limit on non-competes, except where the non-competes are part of a severance agreement or where they relate to or arise out of the sale of a business. The law also authorizes employees to seek damages and attorney's fees against employers who attempt to enforce invalid non-competes.

In a series of amendments in 2018 and 2019, the state imposed special restrictions for the broadcasting industry. A broadcasting company has to establish the following elements to enforce a non-compete:

- The employee was paid a salary of at least $913 per week (*i.e.*, $47,476 per year);
- The covenant was "part of a written contract of reasonable duration, based on industry standards, the position, the broadcasting employee's experience, geography, and the parties' unique circumstances"; and
- The employee was terminated "for cause" or had breached the employment contract "in a manner that results in" his or her separation of employment.

In addition, the non-compete cannot extend beyond the original term of the employee's written contract.

Idaho

On March 28, 2018, Idaho repealed a two-year-old amendment to its non-compete law that had made it easier for employers to obtain injunctive relief against "key" employees and independent contractors who violate their non-compete covenants. Idaho has effectively placed the burden back on companies to establish the likelihood of irreparable harm to obtain injunctive relief in these situations.

Conclusion

Given the recent changes, employers must carefully review their restrictive covenants to ensure compliance with federal and state laws. It is a good practice for multistate employers to have state-specific restrictive covenants to ensure compliance.

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Five Guiding Principles for Responding to a Governmental Investigation

By Holly Drumheller Butler, Miles & Stockbridge

Government investigations are expensive, time-consuming, and carry risks of criminal and civil penalties. No one knows these truisms more than Mobile TeleSystems PSJC ("MTS"). In March 2014, MTS, the largest telecommunications company in Russia and an issuer of publicly traded securities in the United States, received requests for documents and information from the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") relating to an investigation of MTS's former subsidiary in Uzbekistan.[i] Per the norm, the company indicated its "inten[t] to cooperate with these investigations."[ii] Fast-forward five years and, on March 6 and 7, 2019, those simple requests for documents and information culminated in a massive $850 million settlement to resolve charges stemming from a bribery scheme in Uzbekistan.[iii] While not every government-issued subpoena will spiral into an investigation spanning half a decade and result in staggering criminal fines, forfeiture, and disgorgement, there are certain guiding principles which apply no matter the scope of the underlying investigation.

1. Communicate early and often.

The fastest way to drawing the ire of the Government is to neglect or even delay a response to the initial inquiry—whether it is a letter, subpoena, or civil investigative demand. A simple and prompt courtesy introduction goes a long way towards establishing the foundation for a good working relationship during the investigation. As soon as possible after receiving an information or document request, counsel should contact the issuing attorney to confirm receipt and an intent to respond. If possible, this initial contact should be used to gain an understanding of the scope of the investigation, prioritize the Government's requests, and address realistic timing for any response.

Getting Government buy-in as to the scope of the investigation at the outset is a good way to develop a working relationship with those who will determine the ultimate resolution of the case. One way to accomplish this goal is to offer fact-finding presentations to the Government to ensure everyone is working with same factual framework and can openly discuss and respond to each other's interpretations. Such presentations are most effective at the outset of the investigation and following material developments in the case as a result of document productions or witness interviews.

2. Cooperate but don't capitulate

In 2015, then-Deputy Attorney General Sally Yates authored a new Department of Justice policy regarding individual accountability in government investigations of corporate wrongdoing.[iv] While the impact of the Yates Memo on cooperation credit determinations was hotly debated for years, the Department's practices and subsequent pronouncements have made clear that the Yates Memo was not the pivotal edict it was feared to be. In November 2018, Deputy Attorney General Rod Rosenstein relaxed the perceived rigid approach required by the Yates Memo and emphasized the flexibility and discretion of government investigators. This month, the DOJ underscored its goal to be transparent in what qualifies as cooperation in the course of a Government investigation. On March 8, 2019, Assistant Attorney General Brian A. Benczkowski, while delivering remarks to the ABA National Institute on White Collar Crime Conference, explained that "[w]e strive to be open books about which factors we find aggravating, which we find mitigating, and how each is penalized, credited, and ultimately weighed."[v]

However, while government policies provide guidance, prosecutorial discretion is not formulaic. Moreover, cooperation does not mean complying with every governmental request for documents and witnesses or abandoning legal privileges and protections; rather, it requires companies to embrace the Department's invitation to discuss the scope of the internal investigation being conducted with the prosecutor handling the case and reach agreement on the relevant and appropriate areas of factual discovery.

3. Determine target or witness—a fluid evaluation

Of course, becoming embroiled in a Government investigation does not necessarily mean that the company—

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[i]Mobile TeleSystems OJSC (2014) March 18, 2014 6-K Form, _; Mobile TeleSystems OJSC (2014) March 19, 2014 6-K Form, *https://www.sec.gov/Archives/edgar/data/1115837/000110465914020809/a14-8453_16k.htm*

[ii]Mobile TeleSystems OJSC (2014) March 19, 2014 6-K Form, *https://www.sec.gov/Archives/edgar/data/1115837/000110465914020809/a14-8453_16k.htm*

[iii]Press Release, Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019) *https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department*

[iv]Memorandum from U.S. Department of Justice, Office of Deputy Attorney General, Sally Quillian Yates (September 9, 2015), *https://www.justice.gov/archives/dag/file/769036/download*

[v]Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (March 8, 2019) *https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national*

continued from page 10

or an executive—is the target of the investigation. The company may be a potential witness, the source of information needed regarding a target, part of an industry-wide investigation, or have a corporate or contractual relationship with a target so as to be able to aid in the inquiry of the investigated conduct. Although the Government is not under any obligation to explain why a particular company has caught its eye in an investigation, it is advisable to seek the Government's input into the company's involvement. Despite relaxing the "all or nothing" approach espoused by the Yates Memo, the Government's focus continues to be on individuals—especially management, including members of a company's board of directors. To better identify and remediate any potential misconduct, it behooves both the Government and the company to target the areas or persons of concern with as much particularity as possible.

To the extent that the Government intimates that the company is not the target of the investigation, that disclosure is not akin to absolution. Rather, that assessment is only valid for that moment in time. Additional documents, information, or witnesses may shift that impression. As such, the determination of whether a company is a target of a Government investigation must be re-evaluated and re-visited throughout the investigation as facts develop.

4. Actively seek resolutions . . . and be creative

Do not think of an investigation as linear—receive subpoena, produce documents, receive subpoena, witness testimony, potential charges or indictment . . . . Every stage of an investigation should be evaluated for an opportunity for resolution. Counsel should discuss resolution options with the Government and use the cultivated relationships as a resource.

5. Incorporate lessons into compliance

Remediate before the Government does it for you. If any wrongdoing is found in the course of a company's internal investigation, immediately implement corrective actions, institute compliance policies to ensure improper conduct will not be repeated, and evaluate obligations to voluntarily disclose. Good intentions and hope cannot be the cornerstones of a company's compliance program. Rather, such programs must be tailored to the company's risk, thoughtfully implemented, and embedded in the company's leadership and culture. Bottom line: address any weaknesses in policy and operation as quickly as possible to strengthen an argument for a declination.

As Assistant Attorney General Brian A. Benczkowski advised an audience of former federal prosecutors, corporate counsel and white collar attorneys, "[a]t the end of the day, companies that voluntarily self-disclose, take steps to prevent misconduct through robust compliance programs, and take appropriate remedial steps when misconduct is detected should know that they will get a fair shake from the Department." To alleviate any doubt that the DOJ intends to live by this rule, one only needs to compare the circumstances underlying the Department's settlements or prosecutions with its declinations.

In the matter of MTS, the company did not voluntarily disclose its FCPA violations and the company's level of cooperation was deemed to be lacking and not proactive. As a result, the penalty imposed was 25 percent above the low end of the U.S. Sentencing Guidelines fine range, reflecting the company's failure to self-report or fully cooperate and remediate the conduct. Further, MTS had to agree to implement rigorous internal controls and have a three-year independent compliance monitor because the company had not yet fully implemented or tested its compliance program. Conversely, in February, 2019, the DOJ opted not to prosecute Cognizant Technology Solutions Corporation for FCPA violations because the company voluntarily self-disclosed the conduct within two weeks of the board learning of it, allowing the Department to identify the culpable executives; engaged in a thorough internal investigation; cooperated with authorities; had a pre-existing compliance program; and was willing to remediate and disgorge. Simply put, fulsome and rigorous compliance programs, coupled with effective internal detection and reporting mechanisms, may help a company avoid becoming entangled in a government investigation or, at least, provide an instrument to triage and resolve any such government inquiry on more favorable terms.

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[vi] Id.

[vii] Deferred Prosecution Agreement with Mobile TeleSystems PCSJ dated Feb. 22, 2019, ¶ 4a-c, https://www.justice.gov/opa/press-release/file/1141631/download

[viii] Id. at ¶ 4e.

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