



## DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

Is Independence An Option? Ethical Issues In Paying Compensation To Inhouse Counsel

Alan B. Rabkin, Esq.  
Executive Vice President/General Counsel, Bankers Outsource™  
Stateline (Lake Tahoe), Nevada  
[arabkin@bankersoutsource.com](mailto:arabkin@bankersoutsource.com)

Patrick H. Hicks, Esq.  
Shareholder, Hicks & Walt, a Partnership with Littler, Mendelson  
Las Vegas and Reno, Nevada  
[phicks@littler.com](mailto:phicks@littler.com)

### 1. REVIEW OF FORMS OF COMPENSATION PAID TO COUNSEL IN COMPANIES

- A. Hourly or Per Diem
- B. Base Salary
- C. Commission, Incentive or Performance
- D. Equity, Options or Increase In Enterprise Value
  
- E. Bonus (Cash or Stock)
- F. Pension and Deferred Compensation
- G. Vacation and "Comp" Time
- H. Nonmonetary Benefits
- I. Titles

### 2. INFLUENCES AFFECTING COMPENSATION

A. Inhouse Counsel's Market Worth

A. Inhouse Counsel's Industry Influence B. Inhouse Counsel's Expertise or Skills C. Inhouse Counsel's Care or Dedication D. Inhouse Counsel's Corporate "Political" Skills

### 3. ATTRIBUTES OF A SUCCESSFUL CORPORATE LEGAL DEPARTMENT

- A. A Successful Legal Department Creates Clear Policy Favoring The Company
- B. A Successful Legal Department Provides Consistency In Interpretation
- C. A Successful Legal Department Provides Legal, Ethical and Moral Advice

D. A Successful Legal Department Is Independent

E. A Successful Legal Department Makes Decisions Without Fear of Reprisal

F. A Successful Legal Department Is Interested In Risk Avoidance and Compliance—Not Necessarily Profit and Earnings

#### 4. CLASH BETWEEN FORMS OF COMPENSATION AND ATTRIBUTES OF A SUCCESSFUL LEGAL DEPARTMENT

A. Profit or Appreciation In Stock Values As A Legitimate and/or Illegitimate Inducement Of Corporate Counsel To Act Or Fail To Act

B. Is "Managing" Corporate Events For Maximum Market Recognition or Self-Directed Opportunity (Earnings, Litigation, etc.) Not A Noble Goal?

C. Do Certain Forms Of Compensation Increase The Tendency For Self-Preservation?

E. What Is An Inhouse Lawyer's Mission And Goals Form Outside The Legal Department? Varying Perceptions Of Legal By Nonlegal Staff: Legal As Policeman? Legal As Counsel? Legal As Advocate? Legal As Business Facilitator?

F. Impact Of Independence (Or Lack Of) On Internal Compliance Programs After Caremark. Is It Hard To Square Enterprise Value Methods Of Compensation With Compliance Programs And Corporate Sentencing Guidelines Stressing Independent Efforts To Investigate Actions?

G. Impact Of Independence (Or Lack Of) On Board Advice and Board Fiduciary Duties

#### 5. DO FORMS OF COMPENSATION REALLY CREATE CONFLICTS OF INTEREST OR IS THIS "JUST THE WAY IT IS"? WHY SHOULD INHOUSE LAWYERS BE DENIED GROWTH WITHIN THE COMPANY?

A. In Merger and Acquisition Activity: Does Potential Loss Of Job Affect Independent Decisionmaking?

B. In Compliance and Risk Avoidance Matters: Does A Senior Executive's (Chairman, CEO, CFO, etc..) Desire To Cut Compliance Corners To Increase Profit Create An Inherent Conflict When That Person Is Your Direct Report?

C. In Shareholder Matters: Does Management's Activities Potentially Minimize, Cover-Up Or Adversely Impact Shareholder Rights?

D. In Litigation Matters: Does Efforts To Control Corporate Liability To Improve Corporate Performance Color Decisionmaking In Resolving Litigation?

E. In Securities Matters: Does Earnings Management Create Conflicts For Counsel Who Hold Stock In The Company?

F. Possible Other Factual Patterns.

#### 6. IF THIS IS A CONCERN: POSSIBLE COMPENSATION MODELS TO AVOID CLAIMS OF LACK OF

## INDEPENDENCE

A. Base Salary Only For The "Protectors" Of Corporate Policy and Procedure (Legal, Audit, Risk Avoidance, Compliance)

B. Incentive Selected By A Nonreport Or The Board

A. Comparison To Outside Counsel With Similar Skills

D. Separate Incentive Program For "Back Room" Legal, Audit, Risk Avoidance and Compliance Staff Based On Departmental Goals Rather Than Corporate Profitability (See Appendix)

E. Do Stock Options Really "Poison The Well" Of Advice?

7. DISCUSSION: IS THIS REALLY A PROBLEM? MUST INSIDE COUNSEL BE TOTALLY FREE OF CONFLICTS? EVEN IF YOU SAY "NO"--WHO ELSE MAY COMPLAIN ABOUT YOUR LACK OF INDEPENDENCE IN THE FUTURE?

A. Shareholders and Litigants

B. Regulators and Governmental Entities

C. Other Employees

8. OTHER METHODS TO AVOID CONFLICTS BETWEEN COMPENSATION FORMS AND CORPORATE DECISIONMAKING

A. Hiring Independent Counsel

A. Full Record Disclosure Of Conflict

B. Does Section 16 Reporting Cure The Problem?

This material is protected by copyright. Copyright © 2000 various authors and the American Corporate Counsel Association (ACCA).