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# GC Agenda

*A round-up of major horizon issues for General Counsel*

**DECEMBER 2013/JANUARY 2014**

## ANTITRUST

### MERGER REVIEW

Companies conducting a merger analysis should evaluate their current market conditions and the competitive landscape, rather than solely rely on prior merger enforcement actions in similar markets. The antitrust agencies' 180-degree turns in the US Airways/American Airlines and Office Depot/OfficeMax mergers emphasize that even if the antitrust agencies previously permitted a merger in a similar market, they may still seek to block a merger in a particular market (or vice versa).

Although the antitrust agencies had permitted several mergers between large airlines, the Department of Justice (DOJ) sought to block US Airways' merger with American Airlines. The airline industry views consolidation and capacity reductions as a way to increase prices and ancillary revenues, and the DOJ believed that the US Airways/American Airlines merger would harm an already too concentrated industry. The parties have since entered into a proposed settlement, requiring the largest ever divestitures in an airline merger.

The Federal Trade Commission (FTC) recently permitted the Office Depot and OfficeMax merger to close without divestitures, even though the FTC successfully blocked Staples' acquisition of Office Depot in 1997. In the Staples/Office Depot merger, the FTC was concerned about consolidation in brick-and-mortar office supply superstores. However, due to the broadened competitive landscape, including a large increase in office supply sales in club stores and online, the FTC found that the Office Depot/OfficeMax merger would not likely harm competition.

Search Corporate Transactions and Merger Control and How Antitrust Agencies Analyze M&A for more on antitrust merger review.

Search Federal Merger Enforcement Actions in What's Market to analyze merger enforcement actions across industries.

### CANADIAN PRIVATE ANTITRUST ACTIONS

Companies doing business in Canada may face increased antitrust liability now that the Supreme Court of Canada has recognized a private right of action for indirect purchaser claims for damages and restitution under Canada's Competition Act.

Indirect purchasers are typically retailers or consumers who purchase products indirectly (through distributors or other resellers) from manufacturers or suppliers. In the US, indirect purchasers are precluded from bringing federal antitrust claims (known as the *Illinois Brick* rule) against manufacturers or suppliers if their anticompetitive conduct artificially increases the prices of those products. This is due in part to the remoteness of indirect purchasers from the conduct at issue and the likelihood of double recovery if both direct and indirect purchasers sue for the same conduct. While allowing indirect purchaser claims, the Supreme Court of Canada acknowledged that indirect purchasers must still overcome the class certification screening process.



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This is another example of foreign jurisdictions expanding antitrust private rights of action. Earlier this year, the UK introduced its first opt-out collective action regime, making it easier for businesses, consumers and trade groups to bring antitrust class actions.

Search Private Antitrust Actions and State Illinois Brick Repealer Laws Chart for more on the *Illinois Brick* rule and certain states' attempts to repeal that rule.

Search Competition Law: Country Q&A Tool to compare foreign antitrust laws.

## COMMERCIAL

### DATA COLLECTION FOR ONLINE BEHAVIORAL ADVERTISING

Website operators must ensure that they include an enhanced notice link on every page where a third party collects data for online behavioral advertising (OBA), in accordance with recent clarification from the Better Business Bureau's Online Interest-Based Advertising Accountability Program (Program).

The Program issued a compliance warning explaining that under the *Self-Regulatory Principles for Online Behavioral Advertising* (Principles), first-party website operators and publishers must include an enhanced notice link on every page where a third party collects data for OBA (including pages containing tags that deploy cookies enabling third parties to re-market to visitors when they later access other websites). This requirement applies unless the third party's ad bears an in-ad OBA notice (for example, the AdChoices Icon).

Under the enhanced notice requirement, first-party website operators must:

- Provide consumers with clear, meaningful and prominent notice of OBA data collection on each page where data is collected.
- Include an enhanced notice link that takes the consumer directly to the website's disclosure of third-party OBA activity that points to either an industry developed page (such as the Digital Advertising Alliance's Consumer Choice Page) or the third party's opt-out page.

The warning indicates that many websites that are otherwise in compliance with the Principles have violated the enhanced notice requirement. Website operators that are unsure of whether a page violates the Principles should contact the Program for more guidance.

Search Online Advertising and Marketing for more on online behavioral advertising.

## CORPORATE GOVERNANCE & SECURITIES

### ENGAGING PROXY ADVISORS

Issuers planning to discuss corporate governance and proxy matters with proxy advisor analysts should reach out to schedule calls and appointments as soon as possible.

The 2014 proxy season will mark the first time in which issuers that adopted a triennial say on pay vote following the enactment of the Dodd-Frank Act must submit a resolution for stockholders to approve the compensation of executives as disclosed in their proxy statement. Institutional Shareholder Services, Inc. (ISS) has suggested that this will be a particularly busy proxy off-season for them, with higher than normal engagement with issuers.

While issuers cannot discuss specific proxy items without having filed their proxy statements, they can correspond with proxy advisor analysts on broad topics and issues which may appear in the proxy statement. Issuers can use this opportunity to address specific practices or policies that they believe are likely to receive negative attention from proxy advisor analysts.

Issuers should also start thinking early about corporate governance issues that might trigger negative attention and how to craft appropriate proxy statement disclosure. This is especially true for disclosure that will be reviewed by the board and its applicable committees, their outside advisors (for example, counsel and compensation consultants) and the investor relations department.

Search Developing Relationships with Proxy Advisory Firms for more on proxy advisor engagement.

## EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION

### CARRYOVER OF HEALTH FSA BALANCES

Under the IRS's significant change to the "use-or-lose" rule for health flexible spending arrangements (health FSAs) offered under cafeteria plans, employers now have the option of permitting a carryover of up to $500 of unused health FSA amounts in the immediately following plan year.

The use-or-lose rule requires that unused benefits or contributions remaining at the end of a plan year be forfeited. However, cafeteria plans may include a grace period under which amounts remaining from the previous year can be used to pay for certain benefits for up to two months and 15 days immediately following the end of the plan year. Notably, under the new rules, a plan that adds a carryover cannot also have a grace period in the plan year to which unused amounts are carried over.

The new $500 carryover:

- Can be used to pay or reimburse health FSA medical expenses incurred during the entire plan year to which it is carried over.
- Does not count against the annual $2,500 (indexed) salary reduction amount.

Plans can choose a carryover amount of less than $500 (or not permit a carryover at all), but the same carryover amount must apply to all participants.

Employers wishing to adopt a carryover must timely amend their cafeteria plans to add the provision and eliminate any grace period. For plan years beginning in 2013, the amendment can be adopted at any time on or before the last day of the plan year

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beginning in 2014. Plan participants must also be informed of the carryover provision.

Search Cafeteria Plans for more on cafeteria plans and health FSAs.

## FINANCE & BANKRUPTCY

### MAKE-WHOLE PREMIUMS

A recent decision by the US Bankruptcy Court for the District of Delaware reflects a judicial trend in which courts permit make-whole payments based on whether the provision clearly entitles parties to the payments, and not on whether make-whole provisions are generally enforceable in bankruptcy.

In *In re School Specialty, Inc.*, the bankruptcy court approved a settlement made between School Specialty, Inc. and certain of its affiliates (Reorganized Debtors), the creditors' committee (Committee) and Bayside Finance, LLC (Bayside), allowing Bayside to keep $21 million of a $26.4 million make-whole payment it received from the Reorganized Debtors. This settlement resolves the Committee's appeal to the US District Court for the District of Delaware of the bankruptcy court's decision enforcing a make-whole provision, which yielded an amount representing 37% of the outstanding principal of a loan.

The outcome in this case differs from that in *US Bank Trust National Ass'n v. American Airlines, Inc. (In re AMR Corp.)*, in which the Second Circuit affirmed a bankruptcy court's rejection of payment of a make-whole premium following acceleration and maturity based on the plain language of the indentures. However, in both cases, the courts based their decisions on the language of the underlying agreements.

Search In re School Specialty for more on this decision.

## INTELLECTUAL PROPERTY & TECHNOLOGY

### CUSTOMER PRIVACY POLICIES

The recent objection by the Texas Attorney General (AG) to the proposed sale of a bankrupt dating website's customer database demonstrates the importance of maintaining privacy policies that clearly address customer data transferability.

True.com filed for Chapter 11 bankruptcy protection and the trustee sought consent for the sale of the company's assets, including its database of customers' personal information, to rival dating website PlentyOfFish. The AG petitioned to block the proposed sale on the grounds that it would expose True.com's millions of customers to unexpected privacy risks. In response, PlentyOfFish withdrew its offer to purchase the assets.

In his petition, the AG noted that True.com informed its customers during sign-up that their personal information would not be transferred without consent. However, its privacy policy stated that customers' personal information would be a transferable asset if the company was acquired by a third party, in which case True.com would provide notice before the transfer and an opt-out opportunity. The AG argued that this created an ambiguity that should be construed against True.com and that True.com should provide customers with an opt-in process to approve or object to the transfer of their personal information.

Companies that collect customers' personal information should ensure that:

- Their privacy disclosures clearly grant the company sufficient rights to customer data and unless commercially impracticable, include the right to transfer the data in the event of a merger, sale, bankruptcy proceeding or other corporate event.
- They comply with their own customer privacy policies.

Search Website Privacy Policy for a model website privacy policy.

## LABOR & EMPLOYMENT

### RELIGIOUS ACCOMMODATION

Employers should revisit their religious accommodation practices given a split among circuit courts regarding the sufficiency of notice required for triggering an employer's accommodation obligations.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Tenth Circuit held that an employee or applicant must provide explicit notice of a need for a religious accommodation before an employer's duty is triggered. The EEOC sued Abercrombie after an applicant, who was Muslim and wore a headscarf, was not hired because the headscarf did not comply with the company's Look Policy.

The Tenth Circuit held that the EEOC failed to make a prima facie case because the applicant did not inform Abercrombie during an interview that she wears her headscarf for religious reasons and needed an accommodation of its Look Policy. This holding conflicts with an Eleventh Circuit decision which held that an employer's awareness of tension between an employee's religious beliefs and its policy was sufficient to put the employer on notice.

To minimize the risk of religious accommodation claims in light of the conflicting authority, employers should:

- Monitor the law in their jurisdictions regarding notice requirements triggering an employer's duty to provide religious accommodation.
- Train managers on religious accommodation issues, including:
  - the need to consider the specific facts in situations potentially implicating these issues; and
  - when and how to involve the legal department.
- Understand that in jurisdictions other than the Tenth Circuit, an employer's obligation may depend on whether:
  - there is an obvious clash between an employer's policy and a sincerely held religious belief; or
  - the employer should have known of a clash and the need for accommodation.



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Search Religious Discrimination and Accommodation under Title VII for more on religious accommodation.

### PROPOSED DODD-FRANK ACT DIVERSITY STANDARDS

Financial services companies regulated under the Dodd-Frank Act and their contractors should anticipate more regulatory action to increase diversity in employment and contractor selection.

On October 25, 2013, six federal agencies published a proposed interagency policy statement setting diversity standards for the companies they regulate concerning recruiting, retaining and promoting employees, and selecting suppliers and contractors. Comments on the proposed regulations are due by December 24, 2013.

All employers should consider creating or improving diversity programs to both get ahead of the agencies' pending standards and position themselves for greater contracting opportunities with the regulating agencies and the regulated companies. In particular, employers should consider:

- Gaining executive support for a diversity program and assembling a team responsible for improving diversity. The team might include individuals from the legal, business, human resources and public relations departments.
- Assessing employee and contractor diversity and the protocols for measuring and increasing diversity.
- Setting realistic diversity goals and procedures to reach them, while preserving attorney privileges that may apply to diversity program planning and legal analysis documents.
- Broadening the prospective employee and contractor pool by, for example, advertising job and contracting opportunities in untapped markets. However, employers must conduct due diligence and not select candidates just to increase diversity.
- Publishing non-privileged data and information about the diversity program to meet pending transparency requirements.
- Training managers to lawfully and effectively implement the diversity program.

## LITIGATION & ADR

### FCA AND PRIVILEGED INFORMATION

Following a recent Second Circuit decision, an attorney cannot use or disclose privileged information to bring a whistleblower suit under the False Claims Act (FCA) against a former client.

In *United States v. Quest Diagnostics Inc.*, a former general counsel (GC) and two former executives brought a *qui tam* action under the FCA against Quest alleging violations of the federal Anti-Kickback Statute. The Second Circuit affirmed the district court's dismissal of the action, holding that:

- By participating in the lawsuit, the GC violated New York state ethics rules, which prohibit attorneys from revealing client confidences.
- The GC could not rely on exceptions to the rule permitting disclosure when necessary to prevent a crime because the lawsuit could have been brought based on information known to the other two executives and without disclosing the privileged information.
- The FCA does not preempt New York state ethics rules.

The Second Circuit also affirmed the disqualification of all three relators and their counsel from bringing subsequent *qui tam* actions against Quest because:

- The two former executive relators and outside counsel were tainted by the GC's disclosure of confidences.
- Other potential whistleblowers or the government could still pursue an FCA action.

The *Quest* decision instructs that:

- Privileged information is afforded substantial protection.
- Inside counsel's ethical duties almost always prohibit them from being FCA relators.

This decision also promotes candor between companies and their inside counsel to create a culture of compliance without the risk of counsel using that information in an FCA action.

### CONFIDENTIAL ARBITRATION PROGRAM VIOLATES THE FIRST AMENDMENT

Companies wishing to have their arbitrations remain confidential should be aware of a recent Third Circuit decision affirming that Delaware's state-run arbitration program must allow public access.

In *Delaware Coalition for Open Government, Inc. v. Strine*, the Third Circuit upheld the district court's ruling that the Delaware Court of Chancery's arbitration program, which only permits "parties and their representatives" to attend arbitration, must be open to the public under the First Amendment. The program grants Court of Chancery judges the authority to arbitrate "business disputes" involving at least one Delaware business entity (but no consumers), and at least $1 million in damages. As enacted, the program enables companies to have confidential arbitration in a Delaware courthouse during business hours, with a sitting Court of Chancery judge as the arbitrator. The fee for a court-sponsored arbitration is $6,000 per day, plus a $12,000 filing fee.

In light of the Third Circuit's ruling, court-sponsored arbitration in Delaware is unlikely to remain confidential. Nonetheless, arbitration under the program may continue to provide a potentially faster and more flexible option than a regular trial. Further, court-sponsored arbitration may remain attractive to companies who wish to have a sitting Court of Chancery judge act as arbitrator. If confidentiality and judicial experience are both non-negotiable, however, companies may still choose private arbitration with former Court of Chancery judges over court-sponsored arbitration.

Search Third Circuit Finds Delaware Judicial Arbitration Procedure Unconstitutional for more on this decision.

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## TAX

### FATCA

The IRS recently issued in *Notice 2013-69* (Notice) the long-awaited draft agreement to be used by foreign financial institutions (FFIs) to comply with the Foreign Account Tax Compliance Act (FATCA). FFIs not covered by a Model 1 intergovernmental agreement (IGA) and FFIs in countries that have signed a Model 2 IGA must enter into an FFI agreement to avoid FATCA withholding tax on specified US-source payments.

The Notice also previews helpful changes that will be made to existing Treasury regulations, including:

- Modifying the transitional reporting requirements for calendar years 2015 and 2016 so that participating FFIs only report foreign reportable amounts paid to a financial account that it maintains for a nonparticipating FFI. The current rule requires participating FFIs to report all foreign reportable amounts paid to nonparticipating FFIs.
- Coordinating the account holder reporting rules under FATCA with the IRS Form 1099 reporting rules.
- Creating two new categories of non-financial foreign entities (NFFEs), direct reporting NFFEs and sponsored direct reporting NFFEs, that will not be treated as passive NFFEs. A direct reporting NFFE, and the sponsor of a sponsored direct reporting NFFE, will report substantial US owner information directly to the IRS instead of to a withholding agent.
- Coordinating the backup withholding rules under Internal Revenue Code (IRC) Section 3406 with the FATCA withholding rules for payments made by participating FFIs to recalcitrant account holders.
- Providing that a passive NFFE does not include an NFFE that is:
  - acting as a qualified intermediary; or
  - a withholding foreign partnership or withholding foreign trust.
- Modifying the definition of US person under FATCA to include certain foreign insurance companies that elect to be subject to US income tax under IRC Section 953(d).

The IRS expects to finalize the FFI agreement by December 31, 2013.

Search FATCA: FFIs and NFFEs for an overview of the due diligence, information reporting and registration rules applicable to FFIs and NFFEs under FATCA.

## GC Agenda Interviewees

GC Agenda is based on interviews with Advisory Board members and leading experts from Law Department Panel Firms. Practical Law would like to thank the following experts for participating in interviews for this month's issue:

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