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FOCUS

President's Message

Steve Millsap

It is a pleasure to update you with this "year in review" of our chapter activity. You may recall that our leadership set a course earlier this year to offer new initiatives in addition to our popular, traditional programming. Along the way, we saw these new initiatives draw a variety of new member interest. Below is a highlight of these initiatives, which would not have been possible without the support of our board members, officers, committee chairs, volunteers, Chapter Administrator Jane Nohr, our Strategic Sponsors and you, the membership:

Presentations:

- Legal market trend presentation by John Lassiter of Carolina Legal (February)
- Half-day ethics seminar by Law-Humorist Sean Carter (April)
- Inaugural GC Panel event: "A View from the Top," paneled by our GC Board members (July)

Community outreach:

- We listened to over five different pro bono legal service providers present at our luncheons throughout the year to promote awareness of in-house pro bono opportunities.

- We held our first chapter community out-reach event where our members spoke at local high schools on Constitutional Law Day (September). We appreciate the support of the Charlotte School of Law Street Law student representatives who helped make this happen.
- We established our first chapter grant to help fund a law student's bar review course (matching grant by the CSL).
- At our December 1 luncheon, we held a coats/jackets donation drive for Crisis Assistance Ministry and a follow up event with them on December 7.

Networking events:

- Bowling night at Strike City (March)
- Chapter Leadership Appreciation Dinner (September)
- Wine-tasting event at Dolcetto Wine Room (October)
- New Bobcats venue for the annual GC/CLO Dinner (November)
- New Charlotte City Club venue selected for the 2011 Winter Gala (January 2011)



Other highlights:

- Our net membership growth was approximately 7 percent this year.
- We saw an approximate 30 percent increase in new committee volunteers and the Social Committee was formed.
- The 2011 Strategic Sponsorship Program includes two additional law firm sponsors (eight in total) to support additional chapter programming and funding.
- Webcasting was offered at "brown bag" CLE events.
- The chapter is now LinkedIn.

At our Annual Meeting on December 1, the membership approved the following officer slate for 2011: Tim Nohr as President; Ken Wittenauer at President-Elect; Bill Robinson as Treasurer; and Christopher Tucci as Secretary. Congratulations, gentlemen!

Thank you for all of your support of the chapter this year! It has been an honor and a privilege to work with you.

The Bounty Boondoggle: Dealing A Devastating Blow To Corporate Compliance

Susan Hackett, Senior Vice President and General Counsel, ACC
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Like many of you, I attend all kinds of corporate counsel meetings — industry legal group meetings, CLE sessions, ACC networking and education events through our chapters and committees. At these gatherings, we hear about the myriad laws, regulations, rulemakings, litigation and management issues that impact and challenge us in our work everyday. At ACC, I also think about how this growing tsunami of issues impacts our members in more than 70 countries. Given the noise and number of issues competing for corporate counsel's attention, it can be hard to discern the truly momentous "global" issues from the more mundane and routine requirements.

But at this point in time, I have to say — *never* have I seen a single issue generate such singular commonality of concern and negative response as the whistleblower/bounty hunter provisions in the US Congress' new financial reform law, otherwise known as Dodd-Frank [<http://financial-reform.weil.com/wp-content/uploads/2010/07/Dodd-Frank-House-and-Senate-Final.pdf>].

Dodd-Frank was intended to address the maladies stemming from the financial implosions of 2008 and 2009. While most of the provisions were aimed at financial service issues, the legislation was amended in the final hours of passage to include a broader provision (Section 922) authorizing the Securities and Exchange Commission to expand its whistleblower/bounty program to better encourage the submission of useful information about the violation of securities laws.

In a nutshell, under this provision, a provider of "original information" about securities law violations (broadly writ) can now be awarded between 10 percent and 30 percent of a large settlement

or verdict. Moreover, whistleblowers — who believe that they have suffered retaliation for contributing information to the SEC — can bring cases against their employers. And while the general concept of whistleblower bounty provisions is not new, this one is particularly pernicious to the efforts of in-house lawyers as it could upend the compliance and reporting systems they have worked hard to create in order to provide avenues and protections for whistleblowers within the corporate structure, and upon which they rely in order to help the company effectively police and remedy its own behaviors.

ACC members are the strongest supporters and facilitators of internal reporting and employee whistleblower protections. Indeed, it is in-house counsel who have envisioned, championed, implemented, managed, and assured that such systems are vibrant and offer robust mechanisms by which companies can assure better compliance and maintain a healthy ethical culture. It is key to note in reviewing the provisions of Dodd-Frank, that we have premised all of our efforts to date on the very internal corporate reporting mechanisms which this law threatens to gut: if employees are financially incented by the promise of large amounts of money to go *outside* to report potential violations — rather than to communicate these concerns through established internal company channels — then the employer will be *the last* to know about problems it could have investigated and addressed immediately. Even more ironically, the company will be held liable for addressing failures, losses or problems they could have prevented.

Internal reporting systems, the focus of so much time and investment by in-house lawyers, **must** be given an opportunity to identify and resolve problems first, or sophisticated compliance

programs will be toothless. How else will companies uncover their problems if their employees have no incentive to report concerns and companies can't make it a condition of continued employment that they report and contribute to internal investigations? Isn't it the *job* of every employee to act responsibly within the entity to promote its appropriate behavior?

In recent years, government has passed laws and enacted policies that require companies to create effective internal compliance and reporting programs — in recognition that such programs lead to more legally compliant companies. In fact, it is the standard by which companies are judged in the event that there is a failure and the company would like to demonstrate that they did everything possible to prevent rogue actors from succeeding (see, e.g., Chapter 8 of the US Sentencing Guidelines and the many cases resolved either through settlement with the government or in the courts).

So, it will be interesting to see in the coming weeks, as the SEC, under its authorization in Dodd-Frank, now turns its attention to the language implementing Dodd-Frank and particularly, Section 922's whistleblower provisions. If you were able to listen to the SEC webcast featuring SEC leaders discussing the rule-making process [<http://sec.gov/news/openmeetings/2010/spch110310mls-whistleblowers.aspx> for the webcast, and <http://sec.gov/news/press/2010/2010-213.htm> for the press release], and then read the proposed rule issued by the SEC staff for comments a few hours later on the same day — November 3, 2010 [<http://www.sec.gov/rules/proposed/2010/34-63237.pdf>], you will have noticed a clear and unfortunate disconnect. At this stage, it seems that officials are willing to establish two inherently contradictory tracks — one placing value on compa-

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nies owning their own internal reporting process, and the other on a newer and more problematic inclination to address failures by incenting employees to come to the government with their concerns first, and not voice their concerns through internal mechanisms.

As these regulations unfold, ACC will actively represent our members in the comment process. **Our comments are due to the SEC on Friday, December 17, 2010. We will be asking ACC leaders to co-sign our comment letter to the Commission not only to reiterate our ongoing support for the integrity and viability of internal reporting processes, but also to clarify the importance of encouraging employees to step forward internally without fear of retaliation.**

Here are some issues for you to consider:

- The government cannot possibly police all corporate misconduct; therefore continued self-policing and reporting is essential. And while Dodd-Frank applies to public companies, just as Sarbox set the standard for reasonable behaviors and responses, so too will these provisions' impact bleed into the standards by which every companies reporting mechanisms are judged.
- The SEC has no practical means by which to investigate the countless claims they will now receive from employees hoping for a huge financial windfall. Anyone familiar with sophisticated in-house corporate whistleblowing systems can tell you that the vast majority of the numerous reports into their systems are not in fact flags of serious corporate misconduct. They are often rather mistaken or uninformed employee reporting, imagined conspiracies, or personnel matters that do not uncover fraud or larger misconduct. And, those few reports that do give vital notice of percolating problems will be difficult to distinguish or weigh without context, given that the SEC staff won't know what they're looking for without intimate knowledge of the company and industry from which the report

emanates. In its proposed rule, the SEC has suggested that they will send complaints back to the company for evaluation and investigation, while the Commission opens a matter to investigate each and every one. One can only imagine the chaos this will create in compliance matters.

- Dodd-Frank contains multiple whistleblower provisions: the aforementioned one involving the SEC and bounty awards; a parallel program to be managed by the Commodity Futures Trading Commission; and a final one that the newly-created Consumer Protection Financial Bureau will initiate when it is up and running next summer. Each of these whistleblower bounty provisions was modeled on similar language in the False Claims Act. In its proposed rule, the SEC draws heavily on caselaw interpreting the FCA and companies seeking best practices would do well to rely on that caselaw as well. One long-term thought for the in-house counsel bar is whether there should be rationalization of all these various whistleblower programs so that they work hand-in-hand.

Finally, it is important to point out that there are other perverse implications of this rule:

- It is conceivable that it not only incents employees to report outside the company first, but to wait until a problem festers sufficiently that the likelihood of a higher penalty or award because of increased culpability and damage goes up, increasing the whistleblower's take.
- What about the impact on corporate personnel manuals and policies that universally state that not cooperating in an internal investigation could lead to dismissal, or that employees will be dismissed for engaging in or not reporting on fraudulent behavior? Given the anti-retaliation language of the bill, the employee who's reporting may not be disciplined for the underlying problems they've contributed to or facilitated. The bill suggests that payments should not be made to those who perpetrate the crime, but specifically notes that some involve-

ment in the fraud doesn't necessarily prevent the whistleblower from collecting. The proposed rule attempts to remedy this by preventing wrongdoers from collecting bounties on any portion of the verdict caused by their misconduct.

- What about the rules of ethics? The proposal authorizes the SEC staff to communicate directly with whistleblowers who are directors, officers, members, agents or employees of an entity that has counsel, without first seeking the consent of the entity's counsel. The rule attempts to create an exemption under state bar ethics rules forbidding lawyers from communicating directly with represented persons by permitting the SEC's lawyers to communicate with a whistleblower under these circumstances. The rules of professional responsibility should apply to all lawyers, not just those in the private sector.

Going forward, in response to the SEC's recently announced comment process and to prepare our letter, ACC's advocacy team will:

Engage with in-house counsel working on this issue through the Association. You are the infantry on the ground overseeing internal compliance and investigations. Your input will enable us to propose better solutions, while also better educating the SEC about the multiple minefields inherent in permitting whistleblowers to have the option of an end-run around internal reporting systems.

Coordinate with other like-minded groups. ACC will work with trade associations and outside counsel-leading client groups in an effort to ensure that we stay apprised of the latest developments and strategies.

We hope you will join us. Contact me at hackett@acc.com, or ACC's new staff director on advocacy issues, Associate General Counsel Amar Sarwal at sarwal@acc.com, if you are interested in signing on or have thoughts/comments to share with us to help us better fulfill our role as the Voice of the In-House Bar on this important topic.

Recent Chapter Events

On Wednesday, September 1, 2010, at Byron's South End, Rick Coughlin, Marshall Lindsay and Patti Ramseur of Smith Moore Leatherwood LLP, presented a program entitled "Seeking Immediate Relief: Preliminary Injunctions & TROs." The presentations provided information on the two primary methods for obtaining immediate relief: temporary restraining orders and preliminary injunctions. In addition, the program provided information on the substantive law on injunctions and TROs, and information on recent changes in the law that may make it more difficult to secure a preliminary injunction in North Carolina Federal Courts. Lastly, Patti Ramseur presented information on injunctive relief in the labor and employment area, including non-competes and employment agreements.

On September 15, 2010, the Charlotte Chapter enjoyed another great late afternoon CLE event at Parker Poe Adams & Bernstein with a program entitled "2010 Legislative and Regulatory Update" presented by Bruce Thompson, leader of Parker Poe's Government & Public Policy Practice Group. Mr. Thompson discussed recent and important State and Federal legislation relevant to businesses. The topics included the Federal healthcare legislation, the compensation and governance provisions included in the Dodd-Frank Wall Street Reforms, and provisions insights on the current atmosphere in Raleigh and Washington D.C. This event was followed by the popular cocktail & hors d'oeuvre reception.

On September 17, 2010, the Charlotte Chapter joined with Street Law at the Charlotte School of Law for our first Pro Bono Event, "Constitution Day" at Harding High School and West Charlotte High School. We want to especially thank the following members who volunteered their time to teach a lesson on the constitution to high school students: Kimberly Owens, Erin Russell, Garry Rice, Jane Lewis-Raymond and Paul Kinny. *See Photos at right.*

On October 6, 2010, at Byron's South End, the Charlotte Chapter hosted an informative chapter lunch on International Joint Ventures presented by K&L Gates LLP attorneys John Allison and Eliab Erulkar. Eliab and John presented strategies for structuring international joint ventures including: (1) joint venture corporate governance, capitalization and exit strategies

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ACC-Charlotte Member Garry Rice, with Charlotte Law School Student Peter Batalon & two high school students at Harding High School.



ACC-Charlotte Member Kimberly Owens & Erin Russell at West Charlotte High School.



ACC-Charlotte Member Paul Kinny at Harding High School.



Bill Robinson & Ginger Daly



Angela Lee & Richard Topping



Jim Mabon & Tim Nohr

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for US companies, and (2) best practices for regulatory compliance in foreign ventures (in particular, an overview of the US Foreign Corrupt Practices Act, export controls and government reporting requirements).

On Thursday, October 14, 2010, ACC Charlotte members enjoyed a great evening of networking and wine tasting with colleagues at the Dolcetto Wine Room near South Park. This was a member-only event, with over 30 members in attendance. *See Photos at left.*

On November 3, 2010, at Byron's South End the Charlotte Chapter hosted a program entitled "Seven Lessons Learned from the Early Years of Social Media" and was presented by Corby Anderson of McGuireWoods LLP. Ms. Anderson provided information on the risks triggered by a company's use of social media, specifically in the areas of advertising, privacy, defamation, copyright and trademark infringement, and inadvertent disclosure of information. The presentation also included a "best practices" guide for minimizing risks in the social media area, and included helpful tips concerning handling brand crisis involving social media.

On November 8, 2010, ACC Charlotte GC's & CLO's enjoyed a "Night at the Arena" and watched the Charlotte Bobcats take on the San Antonio Spurs. Our special thanks to LexisNexis for making this a great event!

On November 17, 2010, the Charlotte Chapter enjoyed a great Lunch-N-Learn at Robinson, Bradshaw & Hinson, P.A. on "Changing M&A Deal Terms in Changing Times." This program was presented by Kelly Loving and Mark Henry and discussed the current M&A environment for both strategic and financial sponsor transactions.

On December 1, 2010, at Byron's South End, the chapter conducted our Annual Meeting and elected officers for 2011 and showed our appreciation to our outstanding sponsors for 2010. In addition, we received an outstanding response from our members who brought in a large number of coats and jackets to be donated to the Crisis Assistance Ministry in Charlotte.

Strategic Sponsors Announcements

Join International Roundtable:

Calling all counsel facing international issues! Since 2004, a group of local in-house counsel has participated in an International Roundtable. The purpose of the International Roundtable is to connect attorneys with an international practice in order to share practice pointers and best practices and discuss international legal topics. New members are welcome, and if you would like to learn more about the

International Roundtable from a participant's perspective, feel free to contact Doug DeMoss (ddemoss@gdatp.com), Joe Hayes (jhayes@familydollar.com) or Bev Timm (beverly.timm@globalcompliance.com). Of course, if you are interested in joining or have other questions concerning the International Roundtable, please contact John Allison at K&L Gates (john.allison@klgates.com).

2010 Strategic Sponsors:

K&L Gates LLP

McGuireWoods LLP

**Parker Poe Adams &
Bernstein LLP**

**Robinson, Bradshaw & Hinson,
P.A.**

**Smith Moore Leatherwood
LLP**

**Wishart Norris Henninger &
Pittman, P.A.**

Upcoming Event — Save The Date!

Mark your calendar for our Annual Gala event on **Friday, January 21, 2011**, at the Charlotte City Club. Watch for further details!

ACC's Annual Meeting in San Antonio, TX

Our chapter was well represented with 19 chapter members attending the ACC Annual Meeting in San Antonio, TX on October 25–27.

We all enjoyed the valuable CLE and training offered as well as great networking opportunities.

The following chapter members attended:

Todd Chasteen	Steve Millsap (President)
Stephen Coss	Jane Nohr
Steven Crow	Tim Nohr (President-Elect)
Robert Fleischacker	John Orgain
Michael Gaither	Pamela Parsons
Jason Hildebrand	Veronica Ramirez-Briones
James Hutcherson	Michael Shor
Kevin Lilly	Christopher Weeks
Daryl Marsch	Robert Wick
	David Wilson

Going to Export? Learn the Law

By Laura C. Budzichowski, Robinson Bradshaw & Hinson, P.A.

A slowly recovering U.S. economy and increased emphasis on exports by the Obama administration may lead some U.S. companies to consider expanding their global presence by exporting their products to new markets. Before moving forward with a new export program, however, companies should take the time to understand the rules of the game to avoid potential pitfalls. With export violations bringing corporate penalties of up to \$1,000,000 per occurrence and potential criminal sanctions (including prison) for individuals, it pays to be familiar with the export controls landscape.

Other than trade sanctions with expressly political goals, the primary objective of U.S. export regulations and restrictions is to prevent the wrong people from getting access to goods and technologies that could be used to harm the U.S. or its allies. Generally, no special permission is required to export low-tech consumer goods or widely available off-the-shelf software to countries other than embargoed countries (currently Cuba, Iran, Myanmar (formerly Burma), North Korea, Sudan and Syria) or to people or entities other than those that have been identified as problematic recipients on lists maintained by various U.S. government agencies. However, a license from the relevant U.S. government agency may be required for exports of certain controlled products (regardless of destination) and exports to identified countries or individuals (regardless of the item to be exported). Companies should be aware that they might be subject to multiple regulatory agencies, each with their own regulatory regimes and protocols.

Export controls apply to the transfer (including electronically) of products, services and technologies from any U.S. person to any foreign person. A U.S. person is typically defined in the various regulations as any individual who is a citizen or permanent resident of the U.S., any U.S.

federal, state or local governmental entity or any entity incorporated to do business in the U.S. and located within the U.S. Foreign persons, include U.S. citizens with dual citizenship, international organizations, foreign business entities and foreign governments, regardless of where they are located or whether they do business in the U.S. U.S. citizens located outside the U.S., as well as foreign subsidiaries and affiliates of U.S. companies, are also considered foreign persons for purposes of receiving products, services or technologies of U.S. origin.

Determining what, if any, export controls may apply to a given export can be extremely complex, but the first steps should be to ask the five questions below, as provided by the Export Administration Regulations (administered by the Commerce Department):

1. What is it? The most critical step in the export process is to determine which federal agency has jurisdiction over the item, which will then dictate whether a license is required. The Commerce Department publishes the Commerce Control List (CCL), which will either provide an Export Control Classification Number (ECCN) for the product or a cross-reference to the agency with likely jurisdiction over the item. If the item's jurisdiction is not clear, exporters should request a commodity jurisdiction ruling from the agencies involved, particularly if there is any possibility the item may be defense-related. Note that if a more stringently controlled item is contained within a less stringently controlled item, the entire larger product will be subject to the more demanding licensing requirements.

2. Where is it going? U.S. export controls apply whether a U.S. person is sending something to another country or whether a controlled product of U.S. origin is re-exported from one foreign country to another. The regulations impose a duty on

the U.S. exporter to perform due diligence to ensure that the destination named by the customer is the actual destination and not merely a transition point. Once the destination is established, exporters can consult the Commerce Department's Commerce Country Chart to determine whether a license will be required based on the ECCN of the item and the destination country.

3. Who will receive it? The ultimate end-user of the item cannot appear on any of the lists of prohibited individuals or organizations established by any of the following agencies: The Bureau of Industry and Security (BIS) at the Department of Commerce, The Office of Foreign Assets Control (OFAC) at the Department of Treasury, or the State Department.

4. What will they do with it? Exporters have a duty to know their customers and understand the intended end-use for the products, services and technologies exported to such customers. Companies must conduct due diligence and follow up on red flags, such as a customer that hesitates to offer information about the end-use of a product or that purchases products that do not seem to fit its business. If a red flag cannot be cleared, the exporter should apply for a license or abandon the transaction.

5. What else do they do? Export controls prohibit U.S. persons from doing business with anyone known to be assisting in weapons proliferation. Prohibited conduct includes doing almost anything in support of the design, development, production, use or stockpiling of certain types of weapons and missiles. Some country-specific exceptions may apply. If an end-user is known to engage in prohibited activities, and no exceptions apply, then a U.S. exporter must apply for a license to transact business with that person or abandon the transaction.

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Member announcements

Congratulations to Peter & Heather Ryan who welcomed a son, Henry Bowen Ryan, on September 8, 2010!

We want to hear about your latest professional and personal accomplishments or exciting events in your life. Please email these to Jane Nohr, chapter administrator at charlotteacc@gmail.com.

Chapter website

Please remember that all of our upcoming events, past presentation materials, job listings, chapter leadership and committee contacts, and new members are listed on our webpage at <http://charlotte.acc.com>.

Call for articles

If you would like to publish an article in the newsletter, or know an in-house lawyer who has made a difference in the community, please consider publishing the information in our newsletter. If you are interested, please email us at charlotteacc@gmail.com.

Welcome New Members!

We welcome four new members who joined our chapter from August through October 2010:

Michelle Harding of ACN, Inc.

David Isaac of Inmar, Inc.

Brian McKay of Lowe's Companies, Inc.

Christopher McKee of Polypore International, Inc.

Free Full Board Trial Membership for ACC Members

The National Association of Corporate Directors (NACD) has partnered with ACC to offer ACC members a full board trial membership through March 31, 2011. Enrollment ends on December 31, 2010. Full board membership allows you to receive the greatest level of membership value and a wide range of benefits. Sign up today to maximize your board's trial experience. To learn more and to download the application, go to www.NACDonline.org/acc.