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# FOCUS

## President's Message

**Joseph Santos**

**Dear CONNACCA Members,** Our fall series of continuing education seminars got underway at The Hartford Club on September 28. Thirteen attendees heard Brian Moriarty — principal at Hamilton Brook Smith Reynolds in Concord, MA, former federal prosecutor, registered patent attorney, and veteran patent trial attorney — make a lively and interactive presentation on ***IP Litigation: A Business Tool to Help Your Company Stay On Top***. In the presentation he discussed practical and cost-efficient ways to leverage a company's intellectual property.

Moriarty also discussed the importance of ediscovery in patent litigation, tips and tactics for cost effective patent litigation, and staying focused and efficient, while also being prepared for patent infringement jury trials forcing a favorable settlement short of trial.

The series of seminars continued during the week of October 21, with ***MySpace in the Workplace: What Employers Need to Know About Social Media***, presented by Pamela Moore, a partner at McCarter & English in Hartford. Moore concentrates in preventive employment relations, EEO agency proceedings and employment litigation. She dedicates an extensive part of her practice to preventive counseling, employee/supervisory training, and the drafting and enforcement of various types of employment agreements including non-compete agreements, executive compensation agreements, confidentiality

agreements and severance agreements. Moore is recognized among *Chambers USA "Leaders in their Field"* 2009 and 2010 editions.

This program reviews recent legal developments in the area of social media used by employees in the workplace and while off duty. Recent decisions at both the state and federal level that impact an employer's right to access employee communications and discipline employees for misconduct involving social networking activities occurring at work, at home, using company systems and home systems, was discussed. This discussion included:

- Limitations on the right to privacy,
- Requirements of the Stored Communications Act,
- FTC requirements for internet endorsements by corporate representatives, and
- Discrimination and harassment implications of social media, whistle blowing and limitations on employee speech.

A sample social media policy was provided as well as advice on best practices to implement for avoiding liability arising out of an employee's misuse of Web 2.0.

### Member Spotlight

The Member Spotlight will be a new feature in our Quarterly Newsletter. We will feature a different CONNACCA member



in each edition. Chapter President Joe Santos is highlighted this quarter. If you are willing to have a short article written about you, please email Chapter Administrator Ann Coolidge Randall at [connacca.ann.randall@comcast.net](mailto:connacca.ann.randall@comcast.net).

JOSEPH A. SANTOS "Joe" was born in Portugal and moved to the United States when he was nine-years-old. Santos received a BA in English from the College of the Holy Cross, a MALD in International Law from The Fletcher School of Law & Diplomacy and a JD from Boston College. From 1987-1993, he was an associate with Thompson, Hine & Flory in Cleveland and then at Riemer & Braunstein in Boston. In 1994, Santos joined UTC as assistant general counsel at Otis. In 1999 he moved to UTC's Pratt & Whitney Division as associate general counsel where he eventually became vice president and counsel in 2003. He remained at P&W until 2009, at which time he moved over to the company's Hamilton Sundstrand Division where he currently serves as vice president and general counsel. Santos is admitted in Massachusetts and is currently on inactive status in Ohio. He has served as president of CONNACCA since 2009.

# The Bounty Boondoggle: Dealing A Devastating Blow To Corporate Compliance

Susan Hackett, Senior Vice President and General Counsel, ACC  
hackett@acc.com

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 inciting 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](mailto:hackett@acc.com), or ACC's new staff director on advocacy issues, Associate General Counsel Amar Sarwal at [sarwal@acc.com](mailto: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.

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## Welcome New Members

**William Jordan**, Cornerstone  
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**Alan Forman**, STR Holdings, Inc.

**Theresa Szymanski**, Jefferson Radiology, P.C.

## ACC News

### 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](http://www.NACDonline.org/acc).

### Mini MBA – Bring More Than Your Legal Skills to the Table

In today's dynamic business environment, in-house counsel are facing new challenges everyday to manage increasingly complex business issues. The Mini MBA for In-house Counsel, jointly developed by the Boston University School of Management and ACC, is designed to strengthen your business skills and help you make better decisions. It explores key business principles and covers various topics such as corporate strategy, risk analysis, and management skills. The December 1–3, 2010 session has sold out. Remaining upcoming program dates in 2011 are: March 21–23; June 13–15; and June 15–17. To learn more and to register, go to [www.acc.com/minimba](http://www.acc.com/minimba).

### Back to Basics at Corporate Counsel University®

If you are new to in-house or are looking for ways to sharpen your basic in-house practice skills, Corporate Counsel University® (May 15–17, 2011, New Orleans, LA) is the right program for you. At this program, you will quickly learn the critical elements of corporate legal practice and earn up to 12 CLE/CPD credits. You will also meet fellow in-house counsel and expand your professional network. For more information and to register, go to [ccu.acc.com](http://ccu.acc.com).

### Mark Your Calendar for ACC's 2011 Annual Meeting

The ACC Annual Meeting is the largest gathering of corporate attorneys from around the globe. It is the one place where you can glean best practices, fulfill annual CLE requirements, network with in-house peers, and find best solutions from leading service providers. Mark your calendar for the 2011 Annual Meeting October 23–26, in Denver, CO. Be sure to take advantage of the early bird rates. For more information, visit [www.acc.com/education](http://www.acc.com/education).

### Concerned About Compliance?

The new Compliance Training Portal can help. Developed in conjunction with our ACC Alliance partner, WeComply, the Compliance Training Portal brings together a variety of resources specifically designed to help you meet your internal compliance and ethics training needs. Access to the portal is free for ACC members and contains a valuable assortment of resources including "Train the Trainer" and "Do-It-Yourself" courses, tips of the week content, and articles and analysis specific to compliance and ethics training. ACC members receive a 20% discount on DIY training through WeComply. The portal can be accessed at [www.acc.com/compliance](http://www.acc.com/compliance). There is also a mobile application for the iPhone, the iComply Toolkit, available through the Apple iTunes store.