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IT'S YOUR BUSINESS

EXPORT CONTROLS: INCREASED ENFORCEMENT DEMANDS AN EFFECTIVE EXPORT COMPLIANCE PROGRAM *by Louis A. Dejoie*

United States exporters are subject to an extremely complex and often overlapping system of export laws and regulations. These laws and regulations are intended to keep our sensitive technologies out of the hands of our enemies and protect our national security. For obvious reasons, this focus on national security has intensified since September 11, 2001. Despite efforts to increase U.S. exports, on the one hand, the government is subjecting exporters to significantly increased scrutiny and sanctions for violations of export controls, on the other. It is, therefore, increasingly critical that U.S. exporters adopt and implement a robust Export Compliance Program to guard against violations.

Background:

U.S. export controls are primarily administered by three government agencies. The Department of Treasury, through its Office of Foreign Assets Control ("OFAC"), administers embargoes and sanctions which have been handed down by Presidential executive order under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §1701 et seq. OFAC maintains over thirty embargo and sanctions programs against both countries and individuals.

The Department of State, through the Directorate of Defense Trade Controls ("DDTC"), regulates the export of defense articles under the International Traffic in Arms Regulations ("ITAR"), 22 CFR §120 et seq. These Regulations were promulgated under the Arms Export Control Act, 22 U.S.C. §2778 et seq., and generally require that a license be obtained in order to export those defense articles identified on the "U.S. Munitions List." Any U.S. company which manufactures, exports or imports items under the Munitions List must register with the DDTC.

The most important agency involved in export controls, at least in terms of the volume of goods and exports within its responsibility, is the Department of Commerce. Through the Bureau of Industry and Security, Commerce controls the export of "dual use" items identified in the Export Administration Regulations ("EAR"), 15 CFR §730 et seq. These items have a predominantly commercial use, but can also be used in military applications. The EAR sets out these dual use items and their licensing requirements in the Commerce Control List ("CCL"), 15 CFR §774 Supp. I.

It is often difficult to determine which agency has primary responsibility over the export of a particular product. Product descriptions on the Munitions List and the CCL often overlap. Moreover, the twenty-one product categories of the Munitions List have been drafted broadly in order to provide the DDTC with considerable latitude as to what it considers a military item. The determination of whether a product is on the Munitions List or, alternatively, on the CCL, often requires a technical analysis by engineers and scientists familiar with the products and their technologies. Where any doubt exists, it is important for the exporter to seek a "Commodity Jurisdiction (CJ) Request." Pursuant to such a Request, the Department of State will determine whether jurisdiction lies with the DDTC or the BIS.

Further complicating matters, for each of the three governing agencies, an "export" is more than simply the physical shipment or transmittal of goods or information to destinations outside the country. Rather, it includes a "deemed" export where a foreign national is provided with the product or information here in the United States. Accordingly, hiring a

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SERVING AS A BOARD MEMBER IS SERIOUS BUSINESS *by Timothy R. Deckert and Megan F. Luck*

Jim McMahon, a former quarterback for the Chicago Bears, has joined a long list of athletes who excelled on the field, but may not be well-equipped to star in the business world. Known for his sunglasses and for rebelling against authority (in the lyrics of the Super Bowl Shuffle, he describes himself as a "punky QB"), including coaches and the NFL Commissioner, McMahon led the 1985 Chicago Bears to a Super Bowl title. That team is still regarded as one of the most dominant football teams in NFL history.

Based on recent events, it looks like he should have kept his day job. This year, the Federal Deposit Insurance Corporation ("FDIC") sued McMahon, among others, for $104 million, based on his role as a director of a failed bank. According to the FDIC, McMahon treated his position as a "figurehead," missed critical board meetings, ignored bank status reports and acted as a "rubber-stamp" in approving several bad loans that helped doom the bank.

While most of us are not blessed with the type of athletic prowess that would lead to board appointments, even those of us who cannot throw a tight spiral into double-coverage are likely to have board service opportunities, including serving on the board of local non-profit organizations. McMahon's recent legal troubles should serve a cautionary tale for anyone serving on, or considering joining, a board of directors. While the following summary is focused on for-profit corporations, the fiduciary concepts apply equally to non-profit corporations as well.

Good corporate governance is essential to the success of every corporation. The board of directors of the corporation is responsible for managing the business and affairs of the corporation, and it is important that each director understands certain principles that govern their actions as a director with respect to managing the corporation. Pennsylvania law dictates that all directors of corporations "stand in a fiduciary relation to the corporation." As fiduciaries of the corporation, directors must act in accordance with the duty of care and loyalty.

The duty of care requires that a director act "with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances." A director must have a complete understanding of the corporation's business in order to make informed decisions in managing the operations and affairs of the corporation. A good way of doing this is by attending board meetings and carefully reviewing all materials that are distributed in advance of, or at, board of directors meetings. If a director believes that additional time is needed to adequately review material information or that additional information is needed prior to taking action on any matter, the board should consider postponing such action. In addition to information presented by the company's officers and employees, it is appropriate in some instances for directors to seek and rely on the opinion of legal counsel and financial professionals; however, a director cannot rely on such information when possessing actual knowledge that such reliance is unwarranted.

Directors must act not only on an informed basis but in the best interests of the corporation. In that regard, directors can consider, as appropriate, a variety of constituencies in addition to shareholders including: "the effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation and communities in which offices or other establishments

TRENDS IN HEALTH CARE TRANSACTIONS: HEALTH CARE M&A *by Julia P. Coelho*

In June 2012, the U.S. Supreme Court upheld the validity of key provisions of the Patient Protection and Affordable Care Act ("ACA"). That, coupled with President Obama's re-election, means that health care reform is here to stay. While most of the provisions in the ACA won't go into effect until 2014, the ACA's impact in the healthcare industry is already visible as evidenced by the significant increase in the number of mergers and acquisitions among hospitals, physician groups, medical device companies, and health plans.

The factors driving the rise in healthcare consolidations are numerous: increasing compliance costs, shrinking reimbursement rates, mandatory changes to Medicare reimbursement, as well as overall competition and other market forces. In addition, a key provision of ACA creates financial incentives for hospitals and other healthcare providers who join forces to establish integrated healthcare delivery systems through Accountable Care Organizations ("ACOs"). ACOs are integrated healthcare systems in which hospitals and doctors consolidate into networks that assume complete responsibility for the medical care of a certain population.

Under ACA, healthcare providers who become ACO member organizations and demonstrate value in the quality and cost of care provided to their patients will receive "shared savings payments" from the Medicare program. In theory, the distribution of Medicare program savings to ACOs would work as follows: (a) all of the savings in fee-for-service payments would accrue to Centers for Medicare & Medicaid Services ("CMS"), (b) CMS would share some of the savings with the ACOs, and (c) the ACOs would distribute their share of savings to individual member organizations. Whether the ACO shared savings model will result in increased

of the corporation are located." It should be considered whether the minutes should reflect whether a constituency other than shareholders was a factor in any particular action by the board.

Directors can prevail against challenges to their decisions by making informed decisions in the best interests of the corporation. The actions of the board of directors are presumed to be in the best interests of the corporation in the absence of any bad faith, self-dealing or breach of fiduciary duty. Despite this presumption, a director can be personally liable for his/her action, so it is important for directors to actively engage in the management of the corporation and in their responsibilities.

The duty of loyalty requires that a director "act in good faith, in a manner he reasonably believes to be in the best interests of the corporation." A fundamental aspect of the duty of loyalty is a prohibition on self-dealing. Therefore, a director should immediately disclose to the board all relevant information concerning a situation where a director's own self-interest is in conflict with their fiduciary duties owed to the corporation. A contract or transaction between the corporation and an interested director is not per se prohibited however. Such a contract or transaction may be authorized by the board if it is fair to the corporation and authorized by the requisite number of disinterested directors who are aware of the conflict. Thus, not only do interested directors have a duty to disclose a conflict of interest, but disinterested directors should thoroughly review whether the transaction is fair, which may require consulting with the corporation's outside legal counsel or financial professionals, as appropriate, and the minutes of the board of directors meeting should reflect that the appropriate consideration was given to the matter by the disinterested directors prior to its authorization.

The duty of loyalty also requires that when a director is presented with any business opportunity that falls within the scope of either the corporation's business activities or contemplated business activities, he/she must offer it to the corporation before pursuing it for personal benefit. These are just examples of circumstances implicating the duty of loyalty, but a number of other situations do arise.

While there are other important steps that you can take to protect yourself as a board member (including making sure that the corporation has a good Directors' and Officers' insurance policy in place), being aware of one's fiduciary obligations, and comporting yourself accordingly, can go a long way to protecting you against potential claims. ■

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revenues as a practical matter is still unknown. However, the impact of the new legislation can already be seen as more healthcare organizations seek strategic affiliations to better position themselves for the upcoming healthcare business climate.

In light of the changes taking effect under ACA, are mergers, acquisitions or divestitures a necessary move for healthcare organizations looking to stay afloat in a challenging health care market? Not necessarily. Although consolidation can be a good choice for many healthcare organizations, the decision should be approached with caution and the particular "wants and needs" of the organizations contemplating integration should be considered.

Organizations should evaluate whether a particular merger, acquisition or divestiture is financially, operationally, and culturally advantageous to them and the communities they serve. For example, smaller physician practices may find that it makes sense for them to align themselves with a hospital in order to minimize financial risks and gain greater access to resources needed to practice medicine. On the other hand, larger physician groups may find that their practices are economically viable and prefer to maintain their independence by aligning with other physician groups, or skipping consolidation altogether.

If consolidation is desired, the parties must carefully negotiate the structure of the merger and develop integration and exit strategies that fit their common goals. In addition, both buyer and seller must conduct a comprehensive due diligence review of the affairs of the other party to make sure that issues and opportunities are identified well in advance of the effective date of the consolidation. ■

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foreign national to work with technology at a U.S. facility constitutes an export of that technology.

Increased Sanctions and Enforcement:

Penalties for violating U.S. export control laws have increased exponentially over the years. Civil penalties now range from up to $250,000 per violation under IEEPA, to $500,000 per violation under the ITAR. In addition to civil penalties, criminal fines range up to $1 million per violation, and individuals can be imprisoned for up to ten years (again, per violation). Companies also face losing their export privileges and being forbidden to work on government contracts.

Commensurate with the increase in sanctions has come an increase in enforcement actions. The Department of Justice and the other U.S. governmental agencies involved in enforcing export control laws have stepped up their enforcement postures in each of the last several years, bringing an increasing number of cases. And, the size of the civil and criminal penalties in these cases has risen dramatically.

Export Compliance Programs:

In the current regulatory environment, any company involved in international trade operates at its peril if it has failed to adopt and implement a robust Export Compliance Program. These Programs set out in detail the policies and procedures by which the company will ensure that export controls are followed, and that no shipments to restricted countries or persons are made without the appropriate license (if permitted at all). The adoption of a Compliance Program serves a number of purposes. Obviously, it helps prevent violations. In addition, the existence of a Compliance Program can significantly reduce the sanctions should a violation occur. And, while the adoption of a Compliance Program is initially voluntary, should a violation occur it becomes a mandatory requirement.

Each company's Export Compliance Program is different and must be tailored to its particular industry, products, and business operations. The design of such programs begins with a company audit and assessment. The end result is a formal written set of detailed policies and procedures for product classification, "screens" of export destinations, screens of purchasers, licensing procedures, training and recordkeeping. Responsible parties must be clearly identified and, very importantly, support must be clearly manifested by the company's top management.

Typically, an Export Compliance Program for a medium-sized company will take three to six months to design and implement. The process must be undertaken by a team selected from the appropriate company departments. These teams are often led by the company's international legal counsel and/or an export control consultant. It can be a significant expenditure of resources. Nevertheless, given the very significant penalties and fines, even for inadvertent violations, responsible exporters find the adoption of an Export Compliance Program well worth the cost. ■

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