

Business Compass

A discussion of hot topics facing today's business industry

March 2008 Volume 3 Issue 1 www.bdblaw.com

IN THIS ISSUE

FEATURE ARTICLES

- Buy-Sell -- A Must ...**Page 1**
- Form 990 Gets a Makeover ...**Page 2**
- Mandatory Compliance with FACTA Identity Theft Rules by November 1, 2008 ...**Page 3**

UPDATES AND INSIGHTS

...**Page 3-6**

KUDOS ...**Page 6**

SAVE THE DATE ...**Page 6**

OFFICES

Akron

3800 Embassy Parkway
Suite 300
Akron, OH 44333
800.686.2825

Boca Raton

5355 Town Center Rd.
Suite 900
Boca Raton, FL 33486
800.682.2825

Canton

4518 Fulton Drive NW
Canton, OH 44735
888.811.2825

Cleveland

1375 E. 9th Street
Suite 1700
Cleveland, OH 44114
888.843.2825

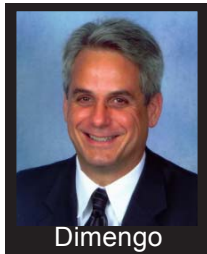
Columbus

191 West Nationwide Blvd.
Columbus, OH 43215
888.686.2825

West Palm Beach

Northbridge Centre
515 N. Flagler Dr.
West Palm Beach, FL 33401
866.448.2825

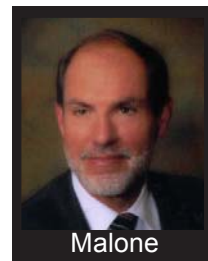
Welcome to the *Business Compass*



Dimengo

Welcome to the March issue of the *Business Compass*. This issue presents feature articles discussing Buy-Sell Agreements, Form 990 for nonprofit organizations and the Fair and Accurate Credit Transactions Act of 2003. We also provide helpful tips from each of our nine core areas of expertise.

In conjunction with my service on the Firm's Board of Managers, **Robert Malone (Akron)** is succeeding me as the Business Law Practice Group Leader. Rob needs no introduction, as he is highly visible both in and outside our Firm. He is a proven leader by example with tremendous integrity, intelligence, creativity and energy. Please welcome Rob.



Malone

I hope you enjoy this edition of our newsletter. If you have any questions about any of the articles, or about any other business law issue, please contact any of our practice group members. As always, we welcome your opinions and feedback. Thank you.

Steven A. Dimengo
Business Practice Group Chair

FEATURE ARTICLES

Buy-Sell -- A Must

By: Craig S. Marshall



Generally, there are a number of filings and agreements that are typically required to implement a new business venture on behalf of its owners.

None, however, may be as important as a buy-sell agreement. Business owners may claim that they have known each other for years and therefore do not anticipate any problems, or that they trust each other enough to achieve a quick and amicable resolution. At some point, however, be it due to death, disability or a difference of opinion, the occasion may arise requiring a determination as to how to purchase the interest of one or more owners. Without a buy-sell, a business owner could sell his interest to a third party,

leaving the remaining owners to deal with an unknown commodity. Without a buy-sell, the untimely death of one business owner may find the remaining owners in business with the deceased's spouse or children. The time to consider how to handle such situations is not when they occur, but rather in advance, when everyone has similar interests.

The ease of negotiating a buy-sell agreement diminishes over time. As unexpected events occur and personal commitments change, there must be a road map to work through these.

A buy-sell agreement serves multiple purposes. It provides a framework within which to "unwind" a business ownership relationship, and it provides certainty as to which party will be required to sell and which parties may be granted an option or be required to

Continued on page 2

Buy-Sell --A Must

Continued from page 1

buy, at what price, and under what payment terms. Just imagine having to negotiate these terms with a surviving spouse of a deceased owner or with a disgruntled business partner. By planning ahead for exit strategies, all parties can agree, in advance of the circumstances that would trigger a buy-out situation, on how to handle the events in a structured manner.

THE AUTHOR

Craig Marshall is a Shareholder and Chair of the Corporate Business Law Group. He is a member of the *Business Law, Real Estate & Construction Law* and *Trusts & Estates Practice Groups*. He can be reached at cmarshall@bdbl.com or 330.258.6531.

Form 990 Gets a Makeover

By: Andrew W. Bernat



For the past year, the IRS has been working on giving the Form 990, *Return of Organization Exempt from Income Tax*, its first major makeover in almost thirty years. On December 20, 2007, the IRS finalized its efforts, and nonprofit organizations will be

required to use the new Form 990 for tax years beginning on or after January 1, 2008.

The IRS redesigned Form 990 with three principal purposes in mind: (1) to enhance transparency, (2) to promote tax compliance, and (3) to minimize the reporting burden on filing organizations. Major changes include increased reporting of governance policies and compensation information. Specifically, nonprofits must now report their organizational policies concerning conflicts of interest, whistleblower protection, document retention, and joint ventures. Nonprofits must also report compensation information of directors, officers, key employees, and highly compensated independent contractors. To prepare for the new Form 990, nonprofits should:

- Have their board members immediately review the new Form 990 and its Instructions (both are available at <http://www.irs.gov/charities/article/0,,id=176637,00.html>).

Major changes include increased reporting of governance policies and compensation information. Specifically, nonprofits must now report their organizational policies concerning conflicts of interest, whistleblower protection, document retention, and joint ventures.

- Review their governance policies and amend them, if necessary.
- Adopt new policies and procedures to address issues that must now be reported, such as a whistleblower or document retention policy.
- Make any operational changes necessary to record information that must now be reported.

Please contact a Buckingham attorney for assistance.

THE AUTHOR

Andrew Bernat is an Associate and member of the *Business Law Practice Group*. He can be reached at abernat@bdbl.com or 330.258.6504.

Mandatory Compliance with FACTA Identity Theft Rules by November 1, 2008

By: Gerald B. Chattman and Kara D. Beverly



Six financial institution regulatory agencies have created final rules to implement sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003 (FACTA). The final rules became effective on January 1, 2008, and all covered financial institutions and creditors must comply with the rules by **November 1, 2008**.



These new rules apply to any entity that extends credit, including financial institutions and small businesses. The rules apply only, however, to "covered accounts," which are accounts maintained primarily for personal, family, or household purposes and are designed to permit multiple payments or transactions, such as a credit card account, checking or savings accounts, cell phone or utility accounts, or a mortgage or automobile loan.

The rules require each financial institution or creditor that holds any such covered account, or other account for which there is a reasonably foreseeable risk of identity theft, to develop and implement an **Identity Theft Program** for combating identity theft in connection with new and existing accounts. The Program must include reasonable policies and procedures for detecting, preventing, and mitigating identity theft and must enable a financial institution or creditor to:

- Identify relevant patterns, practices and specific forms of activity that are red flags signaling possible identity theft and incorporate those red flags into the Program;
- Detect red flags that have been incorporated into the Program;
- Respond appropriately to any red flags that are detected to prevent and mitigate identity theft; and
- Ensure the Program is updated periodically, to reflect changes in risks to customers or to the safety of the financial institution or creditor from identity theft.

The Program must be written and approved by the Board of Directors, a committee of the Board, or a designated manager. The Board is also responsible for the oversight, development, implementation and administration of the Program.

THE AUTHORS

Gerald Chattman is a Shareholder and member of the Business Law, Nonprofit Law and Employment & Workers' Compensation Practice Groups. He can be reached at gchattman@bdbl.com or 216.615.7354.

Kara Beverly is an Associate and member of the Business Law Practice Group. She can be reached at kbeverly@bdbl.com or 216.615.7333.

UPDATES & INSIGHTS



Andrew W.
Bernat

Corporate Law...

Insuring Your Business

The most diligent businesses cannot completely eliminate risk. Depending on specific circumstances, business insurance policies address various types of risk with different coverage options and limits, which include loss protection on buildings, personal property, business income, pollutant clean-up, electronic data, outdoor signs, employee dishonesty, utility services, burglary, robbery and more.

Continued on page 4

Updates & Insights

Continued from page 3



Craig S.
Marshall

All businesses should annually review the coverage options and limits of their policies to ensure they have the appropriate types and adequate protection. We can work with your insurance agent and risk manager to help your business identify potential risk areas and determine the coverage options and limits that will give you peace of mind.



Lisa M.
deFilippis

Employee Benefits Law... Multiemployer Pension Plans: Potential Pitfalls for Employers

Many employers who employ union employees provide for their retirement by contributing to a union-sponsored Multiemployer Pension Plan and Fund, also known as a "Taft-Hartley Plan and Fund." An employer can, however, incur significant liabilities to the Fund if it

withdraws from the Fund, either by selling its assets, closing a plant, or otherwise ceasing contributions. If a Multiemployer Plan is underfunded (for example, because of poor investment performance), an employer who withdraws may be subject to "withdrawal liability." Once assessed, withdrawal liability is difficult to appeal and abate, and can be very costly. Therefore, it is crucial that an employer who participates in a Multiemployer Plan, and who is contemplating an event which will result in the significant reduction or cessation of contributions, consult with counsel to evaluate the extent of any withdrawal liability and to devise strategies to mitigate it.



William L.
Caplan

Environmental Law... U.S. Supreme Court Divided in Three Key Environmental Cases During 2007

Three relatively recent U.S. Supreme Court decisions highlight the fact that the Court remains divided on environmental matters. In *Rapanos*



David J. Hrina

v. U.S., 126 S. Ct. 2208 (2006), a divided Court determined that the U.S. Government had authority to regulate wetlands under the Clean Water Act only when they have a "significant nexus" to navigable waters.

In *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the Court held that Massachusetts had the ability to regulate carbon dioxide emissions from new automobiles if those emissions could endanger public health or welfare.

In *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007), the Court held that the U.S. EPA did not have to abide by certain mandates in the Endangered Species Act when required to take action pursuant to the terms of the Clean Water Act.



Stephen M.
Hammersmith

Finance & Public Law... Hedging Your Interest Rate Bets

Interest rate swaps and hedges are becoming a popular way to fix rates on variable rate debt. Many banks are now requiring in their loan commitments that at least a portion of variable rate debt be hedged with a swap to decrease the borrower's interest rate risk.

An interest rate swap is a hedge contract where the borrower contracts to purchase a separate interest rate (usually a fixed rate) to correspond to new or existing loans. If the swap is terminated early, the borrower may owe the swap provider a premium for early termination. However, it is also possible that the swap provider will owe the borrower a premium if market rates are then higher than the fixed rate being paid by the borrower. Commercial lenders would never pay the borrower a premium if a fixed rate commercial loan was prepaid when market rates were higher than the fixed rate on the loan.

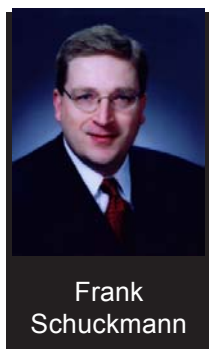
The swap contract documentation is based on standard documentation proposed by the International Swap Dealers Association (ISDA), but it is complex and

Continued on page 5

Updates & Insights

Continued from page 4

there are several important optional provisions that should be included in the documents. It is important for the borrower to understand these provisions and properly negotiate them to match his or her financial goals. Proper legal counsel can be very beneficial in this process.



Frank
Schuckmann

International Business Law... European Data Protection – Transfer vs. Collection

The European Commission's Directive on Data Protection, which went into effect in 1998, requires that transfers of personal data take place only to non-EU countries that provide an "adequate level of privacy protection." In consultation with the European Commission, the U.S.

Department of Commerce developed a "Safe Harbor" framework that would permit U.S. companies to more easily comply with the mandates of the Directive. This framework is of particular importance to any company that desires to collect data in Europe over the Internet. U.S. companies should keep in mind that the Safe Harbor does not deal with each EU country's national requirements as they relate to the collection of data, which require separate compliance.



Steven A.
Armatas

Mergers & Acquisitions... Buying the Rights to Intellectual Property

When purchasing the assets of a business, it is critically important that the buyer obtain all the rights it needs in the seller's intellectual property. In the case of any copyrighted work other than a "work-made-for-hire," the author may terminate all transfers of copyright ownership 35

years after the transfer. This right to terminate cannot be waived. Therefore, buyers must take into account that copyrights in works expected to generate revenue over a significant period of time, such as movie rights, could revert back to the seller at a time when those works are still profitable.



Gerald B.
Chattman

Nonprofit Law... New Guidelines for Nonprofits

Recently, both the National Panel for Non-Profit Governance and the Internal Revenue Service have both put out "suggested" guidelines promoting transparency and suggesting that organizations develop a Code of Ethics and an active Audit Committee. Nonprofit organizations will have to ensure that their Board members are financially literate and also provide much more information to the public as part of their Form 990 filings or otherwise. See also, article on page 2.



Steven A.
Armatas

Securities Law... Revising the Definition of "Accredited Investor"

Companies seeking to raise capital without preparing an initial public offering often do so by relying on specified exemptions contained in Regulation D of the federal securities laws, which permit offerings to so-called "accredited investors" without preparing a detailed disclosure document. In late 2007, the Securities and Exchange Commission ("SEC") proposed revising the definition of accredited investor to add an alternative "investments-owned" standard based on the investor's total assets; to adjust dollar-amount thresholds periodically to take future inflation into account; and to add categories of entities to the list of investors that may be deemed accredited.



David J. Lewis

Tax Law... FIN 48 Disclosures: Tax Impact on Audits

Financial Accounting Standards Board Interpretation No. 48 (FIN 48) mandates disclosure in financial statements of potential income tax liabilities resulting from uncertain tax positions, for both current-period and prior-period transactions. Uncertain

Continued on page 6

Business Practice Group Members

Practice Group Chair

Steven A. Dimengo 330.258.6460 sdimengo@bdblaw.com

Akron

Ronald C. Allan 330.258.6484 rallan@bdblaw.com
 Andrew W. Bernat 330.258.6504 abernat@bdblaw.com
 Robert W. Briggs 330.258.6558 rbriggs@bdblaw.com
 William L. Caplan 330.258.6458 wcaplan@bdblaw.com
 Steven A. Dimengo 330.258.6460 sdimengo@bdblaw.com
 Nicholas T. George 330.258.6498 ngeorge@bdblaw.com
 Cathy C. Godshall 330.258.6449 cgodshall@bdblaw.com
 Stephen M. Hammersmith 330.258.6417 shammersmith@bdblaw.com
 David J. Hrina 330.643.0212 dhrina@bdblaw.com
 David Kern 330.258.6489 dkern@bdblaw.com
 James D. Kraus 330.258.6483 jkraus@bdblaw.com
 David J. Lewis 330.258.6407 dlewis@bdblaw.com
 Robert W. Malone 330.258.6545 rmalone@bdblaw.com
 Craig S. Marshall 330.258.6531 cmarshall@bdblaw.com
 Patricia A. McIntyre 330.258.6418 pmcintyre@bdblaw.com
 Patricia A. Pacentia 330.258.6444 ppacentia@bdblaw.com
 Richard P. Rohrich 330.258.6401 rrohrich@bdblaw.com
 James S. Simon 330.643.0268 jsimon@bdblaw.com
 Jon R. Stefanik II 330.643.0209 jstefanik@bdblaw.com
 Eleanor J. Tschugunov 330.258.6490 etschugunov@bdblaw.com
 Patrick J. Weschler 330.258.6410 pweschler@bdblaw.com

Boca Raton

Stacie K. Daley 561.241.0414 sdaley@bdblaw.com
 Rana M. Gorzeck 561.241.0414 rgorzeck@bdblaw.com
 Michael G. Platner 561.241.0414 mplatner@bdblaw.com
 Jeffrey D. Weinstock 561.999.3093 jweinstock@bdblaw.com
 Solomon B. Zoberman 561.241.0414 szoberman@bdblaw.com

Canton

Ralph D. Amiet 330.491.5246 ramiet@bdblaw.com
 Steven A. Armatas 330.491.5216 sarmatas@bdblaw.com
 Dianne Blocker Braun 330.491.5222 dbraun@bdblaw.com
 Jeffrey A. Halm 330.491.5221 jhalm@bdblaw.com
 John L. Kurtzman 330.491.5330 jkurtzman@bdblaw.com
 Richard J. Lolli 330.491.5249 rlolli@bdblaw.com
 John P. Van Abel 330.491.5235 jvanabel@bdblaw.com
 Dustin J. Vrabel 330.491.5238 dvrabel@bdblaw.com

Cleveland

Kara D. Beverly 216.615.7333 kbeverly@bdblaw.com
 Gerald B. Chattman 216.615.7354 gchattman@bdblaw.com
 Lisa M. deFilippis 216.615.7345 ldefilippis@bdblaw.com
 Christopher M. Ernst 216.736.4216 cernst@bdblaw.com
 Terry W. Vincent 216.615.7326 tvincent@bdblaw.com
 Grant M. Yoakum 216.615.7356 gyoakum@bdblaw.com

Columbus

Donald A. Antrim 614.227.4292 dantrim@bdblaw.com
 Thomas J. Bonasera 614.227.4263 tbonasera@bdblaw.com
 Brian C. Close 614.227.4209 bclose@bdblaw.com
 Jodi S. Diewald 614.629.5712 jdiewald@bdblaw.com
 Richard S. Gerber 614.227.4210 rgerber@bdblaw.com
 Frank Schuckmann 614.227.4297 fschuckmann@bdblaw.com
 Susan G. Sheridan 614.227.4291 ssheridan@bdblaw.com
 Thomas J. Sigmund 614.221.1222 tsigmund@bdblaw.com

West Palm Beach

Brian J. Cooke 561.653.3318 bcooke@bdblaw.com

Updates & Insights

Continued from Page 5

means the position does not satisfy a more likely than not, i.e., 50 percent or greater, chance of success. FIN 48 disclosures could help an IRS revenue agent focus on the merits of the disclosed issue. The impact of disclosure must be cautiously considered, given both the need to satisfy the FIN 48 financial standards and the tax consequences that could result upon audit. BDB can help you and your accountant evaluate the more likely than not standard as the technical merits of the issue must be evaluated based on tax law, legislative history, regulations, rulings and case law.

Kudos

Rob Briggs (Akron) was the center of an article written in the *Cleveland Plain Dealer* on March 2. The article was entitled, "Rob Briggs got nonprofits to cooperate, focus on Northeast Ohio economy." Recently, Rob stepped down as the only Chairman that the Fund For Our Economic Future had ever had.

The Board of Managers appointed **William L. Caplan (Akron)** as the new Managing Partner of the Firm's Akron office. Thanks to **Patrick J. Keating (Akron)** for his many years of dedicated service in this role.

Save the Date for these Upcoming Presentations:

May 7

Succession Planning

Jeffrey A. Halm, Steven A. Armatas and Dustin J. Vrabel (Canton)

Canton, Ohio

Sponsored by: Jackson-Belden Chamber of Commerce

June 12

Community Service

Jeffrey A. Halm (Canton)

Canton, Ohio

Sponsored by: Leadership Stark County

BUCKINGHAM
DOOLITTLE & BURROUGHS, LLP

*The material appearing in **Business Compass** is meant to provide general information only and is not a substitute for legal advice. © 2008 Buckingham, Doolittle & Burroughs, LLP. No article may be reprinted without permission.*