



# MIDDLE MARKET AND SMALL BUSINESS COMMITTEE NEWSLETTER

February 2018 [View PDF](#) | [Homepage](#) | [Committee Roster](#) | [Join the Middle Market and Small Business Committee](#)

## In This Issue

### [Message from the Chair](#)

### [What is the Middle Market and Small Business Committee, and What Do We Do?](#)

- [Our Mission](#)
- [Committee Facts](#)
- [Areas of Expertise](#)

### [Start-Up Activity Series](#)

#### [Focus: Antitrust](#)

- [Minimum Advertised Pricing Policies](#)
- [Gun Jumping Violations](#)

### [SEC Update](#)

#### [Meeting Information](#)

- [Recap of Programs at the Annual Meeting in Chicago, September 2017](#)
- [Overview of Spring Meeting to be held in Orlando, April 2018](#)

### [Leadership List of Middle Market and Small Business Committee](#)

### [Contact Information; Disclaimers](#)

### [Listserv Protocols](#)

### [Requests for Submissions/Sponsors](#)

### [Law Student Committee Associate Program](#)

### [Stout Risius Ross](#)

## Important Dates

### [Business Law Section Spring Meeting](#)

April 12-14, 2018  
Orlando, FL

## Editorial Board

## Message from the Chair

Dear MMSB Committee Colleagues:

I hope that 2018 is off to a great start!

I look forward to seeing many of you April 12-14 in Orlando for the Business Law Section Spring Meeting. Please join us for our usual array of informative subcommittee and task force meetings, CLE programs, and social activities as we continue our tradition as the 'best damn committee' in the whole ABA!

Among other programs of interest, the committee will be offering a program on fund formation basics, and will be introducing the Model Short Stock Purchase Agreement for the first time to the broader BLS. Additionally, if you have not met him already, you will have the opportunity to speak with our Business Law Advisor, Mike Halloran, a partner with Halloran Farkas + Kittila. Business Law Advisors are legal luminaries who are assigned to Committees to share their wisdom, knowledge, and experience. Mike has had a distinguished corporate and securities law career having served as General Counsel of Bank of America, Counselor to the Chairman and Deputy Chief of Staff at the SEC, and as a partner at Pillsbury Winthrop.

We continue to look for members interested in serving on one of our task forces or subcommittees... or, members who are looking to expand our offerings. Please reach out to me ([erik.kantz@saul.com](mailto:erik.kantz@saul.com)) or my MMSB co-chairs, George Flint ([gflint@parsonsbehle.com](mailto:gflint@parsonsbehle.com)) or Sara Stock ([sara.stock@stocklegal.com](mailto:sara.stock@stocklegal.com)).

Until we meet in Orlando, all the best!



[Erik L. Kantz](#)

Chair, Middle Market and Small Business Committee  
Business Law Section

## What is the Middle Market and Small Business Committee, and What Do We Do?

**Mark D. Hobson (EIC)**  
**Erik L. Kantz**  
**Evangelos "Andy" Kostoulas**  
**Thomas J. Walsh**

#### A. Our Mission

The mission of the Middle Market and Small Business Committee ("MMSB Committee") is to serve, educate, and bring together corporate, transactional, and securities lawyers—in an effort to improve the legal profession—who regularly counsel and advise small and mid-sized entities and business ownership groups controlled by matriarchs and patriarchs of family offices, entrepreneurs, private equity groups, venture capital firms, and other groups, and smaller publicly-held companies. To achieve this objective:

[Read more...](#)

#### B. Committee Facts

Some interesting facts about the MMSB Committee are:

- The MMSB Committee comprises over 1,400 members, both in the United States and abroad.
- The MMSB Committee holds live and in-person meetings 3 times a year in conjunction with the ABA Business Law Section Meetings. For 2018, these meetings include:
  - the Spring Meeting, held from April 12-14 in Orlando,
  - the Annual Meeting, to be held from September 13-15 in Austin, and
  - the Fall Meeting, to be held from November 16-17 in Washington, D.C.
- Meetings of the MMSB Committee typically feature a mini-presentation on a substantive practice area and provide an opportunity to share practical advice relevant for smaller and medium-sized companies as well as the lawyers who counsel them.
- An area in which a great deal of the MMSB Committee's efforts are directed involves the federal and state securities regulations that affect smaller public companies and capital-raising activities of private companies, including qualifications for exemptions from registration, qualifications for exemptions from registration for private placement brokers, and implementation of scaled disclosure regulations to help smaller and medium-sized businesses be able to raise legally the capital they need to expand their operations and without the need to comply with unnecessary, burdensome, and expensive regulatory requirements.
- Membership in the MMSB Committee provides numerous opportunities to participate in CLE panels and workshops, writing opportunities, and opportunities to comment on regulations proposed by the SEC and other regulatory agencies. Participation is strongly encouraged and the MMSB Committee welcomes all levels of experience. Come learn why the Middle Market and Small Business Committee is called *The Best Damn Committee in the whole ABA!* Please see the Leadership List in [Section VII](#) for people you can contact to get more involved.

#### C. Areas of Expertise

Some of the specific areas that are frequently covered by the MMSB Committee in our panel presentations, programs (CLE and otherwise) and workshops include the following:

- Entity organization and owner agreements
- Capital formation, financing, and strategic partnering
- Employment and compensation matters
- Intellectual property protection and transference
- Corporate governance
- Securities law compliance
- International expansion and cross-border transactions
- Business combinations and M&A activities

## Start-Up Activity Series

In our continuing series highlighting start-up activities around the globe, Sofia Lingos discusses the start-up scene in Beantown.

### [The Cost of Operating a Small Business in Boston](#)

By: [Sofia Lingos](#), Managing Attorney, [Trident Legal](#)

Home to research and entrepreneurial powerhouses MIT and Harvard, as well as 50 other institutions of higher education, Massachusetts's capital is a rich environment for inspiring innovation and opening opportunities to seed small businesses. This has led to the development of the hottest new area in the city, the Innovation District (the first "innovation district" in the United States, launching over 200 new companies in the area since 2010, and home to MassChallenge, the world's largest start-up company accelerator, and District Hall, the world's first public innovation center). According to [Starthub](#), Greater Boston's official homepage for the startup ecosystem, Boston currently has 2,003 start-ups operating within city limits. Though the community clearly exists, there are a number of costs associated with running a small business in Boston that make it a less attractive option for sustaining operations (aside from the obvious expense of real estate in such a geographically-limited city). As counsel to emerging entities, careful consideration regarding formation and employment can be especially valuable, and there are a few hot topics that are currently taking center stage.

[Read more...](#)

## Focus: Antitrust

In this issue, we feature two articles on antitrust issues that potentially affect middle market and small business companies. Our first article discusses legal issues related to resale price maintenance agreements and our second article addresses "gun-jumping" in healthcare M&A transactions.

### **A. Resale Price Maintenance Agreements**

#### [Price Maintenance: Strategies to Protect Profits and Brands](#)

By: [Anshu Pasricha](#), Partner, and [John Fraczek](#), Associate, [Koley Jessen P.C., L.L.O.](#)

As Apple Inc. (AAPL) inches ever closer to a one trillion dollar market capitalization, one must recognize the immense value of the Apple brand. Branding is especially powerful in a world full of consumer choice, instantly available information, and easy comparison shopping. There are many strategies that can be utilized to develop a brand, but regardless of the strategy, consistency is essential in order to build consumer trust and cement good qualities about your company in the consumer's mind. Developing consistency is a long process that impacts every aspect of an organization, including product or service pricing. As such, price maintenance has become an important part of a successful company's strategy. However, implementing price maintenance policies must be done carefully, for the risk of violating federal and state antitrust laws is omnipresent and the consequences of such violations can be devastating. This article discusses the legal landscape of price maintenance approaches and develops a guideline for drafting enforceable minimum advertised pricing ("MAP") policies.

[Read more...](#)

## B. Gun Jumping Violations

### Gun-Jumping Violations: A Trap for the Unwary

By: [Brian Adams](#), University of Tennessee Law School, Class of 2018

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA") to address a number of issues facing the United States health care industry. Its primary objectives were to improve the quality and cost of health care services. These efforts impacted health care providers in two significant ways. First, the ACA changed reimbursement rates and calculations for Medicare, Medicaid and other federal health care programs. Second, and relatedly, it linked reimbursement rates to quality metrics by transitioning from the traditional fee-for-service model to a value-based purchasing model.

To lessen the impact of these financial pressures and gain leverage with private insurers, health care entities are consolidating at a rapid rate. In fact, studies indicate that mergers and acquisitions ("M&A") between hospitals grew by 70 percent from 2010 to 2015. This trend does not appear to be slowing, as hospitals continue to consolidate in an effort to leverage their scale and market positions to enhance profitability.

Importantly, depending on the benchmark chosen for success, most mergers are not successful. However, pre-integration efforts have been shown to dramatically improve the chances for success. Nonetheless, this behavior raises "gun-jumping" concerns—an offense that carries significant risk of fines and litigation. Accordingly, parties to an M&A transaction must determine how to conduct pre-integration efforts in compliance with applicable antitrust laws.

[Read more...](#)

## SEC Update

### 36th Annual SEC Government-Business Forum on Small Business Capital Formation

By: [Gregory C. Yadley](#), Partner, [Shumaker, Loop & Kendrick, LLP](#), and [Mark D. Hobson](#), [Hobson Firm](#).

The Securities and Exchange Commission ("SEC") recently partnered with the Business School at The University of Texas at Austin ("UT at Austin"), where the SEC held its 36th Annual Government-Business Forum on Small Business Capital Formation (the "Forum"). This annual Forum provides a platform for government regulators, professionals, and the public to come together in an effort to highlight and improve small business capital formation, including the elimination or reduction of unnecessary, duplicative, or outdated regulations.

[Read more...](#)

## Meeting Information

### A. Recap of Programs at the Annual Meeting in Chicago, September 2017

1. Choice of Entity-Planning without a Crystal Ball

Co-Chairs: [Sara Stock](#); [George M. Flint](#)

Panelists: [Steven Keeler](#); [Roger Royse](#)

Description: Entity selection remains a hot topic for start-ups due to the interplay of investor preferences and the resulting tax and other impacts. Tailoring the right choice for your client's current and possible future circumstances requires both legal knowledge and practical business judgement. This panel offered an analytic framework for entity choice, illustrated the legal and underlying tax-driven economic considerations, discussed the implications and feasibility of changing to a different form of entity after business commences, and examined market trends.

Co-Sponsors: LLCs, Partnerships and Unincorporated Entities; Private Equity and Venture Capital; Taxation

#### [Program Materials](#)

2. Funding a War of the Roses: The Basics of Indemnification, Advancement and Director and Officer Insurance in a Business Divorce

Chair: [Tarik Haskins](#)

Panelists: [John DiTomo](#); [Leslie Kurshan](#)

Description: This program explored the fundamentals of financing a business divorce, including a discussion of advancement, indemnification and directors and officers insurance. The panelists explored (i) the basics of director and officer insurance and (ii) drafting provisions to address advancement and indemnification issues arising out of a business divorce.

#### [Program Materials](#)

3. SNAP Judgment: The Legal and Investment Issues Associated with Non-Voting Stock

Presented by: Corporate Governance

Chair: [Charles Elson](#)

Panelists: [James Andrus](#); [Jack Jacobs](#); [Marc Treviño](#)

Description: The recent initial public offering by SNAP which was distinguished by its use of non-voting stock, giving its founders complete control over the newly public company, has raised some significant legal and governance issues. Institutional investors have argued that this structure negatively affects their rights as shareholders and have suggested that the stock be kept out of the indexes that would compel them to own such shares. Others have suggested that the absence of a shareholder vote would affect the application of the business judgement rule to director decision-making at such companies and would force the Delaware courts to intervene in reviewing managerial behavior in a much more active way than in the past. This panel, comprised of individuals from all sides of the controversy, discussed these and other issues created by the use of non-voting stock and how investors, lawyers and the courts should respond to these phenomena.

Co-Sponsors: Federal Regulation of Securities; Middle Market & Small Business

#### [Program Materials](#)

4. The Business and Legal Case for LGBT Inclusion in the Workplace: What is Required and What Clients Demand

Presented by: Diversity and Inclusion

Chair: [Peter Sullivan](#)

Panelists: [Eric Klinger-Wilensky](#); [Julie Paul](#); Edward Pierce Blue; [Mark Purpura](#)

Description: This program covered (i) a survey of laws and regulations impacting LGBT employees; (ii) Client Demands in RFPs and Engagements - discussion of examples of requirements imposed by clients prior to awarding work and keeping firms on preferred counsel lists; and (iii) Recruitment & Retention - importance and success of inclusion initiatives (such as LGBT parental leave and Transgender Healthcare Policy Development), including Case Studies (Examples of successful inclusion initiatives to create inclusive spaces for LGBT attorneys and staff (affinity group activities, mentorship, unconscious bias training, etc.).

Co-Sponsors: Corporate Counsel; Middle Market & Small Business; Private Equity & Venture Capital; Project Finance & Development; Securitization & Structured Finance

#### [Program Materials](#)

5. Vendor Risk: The Weakest Link in Your Cybersecurity Strategy

Presented by: Cyberspace Law

Chair: [William Denny](#)

Panelists: [Paige Boshell](#); Tracey Hawkins; [Mike Richmond](#); Isvara Wilson

Description: Vendors represent one of the most significant cybersecurity risks for businesses. Companies should take urgent steps to manage this risk through the lifecycle of the customer/vendor relationship. The program discussed the phases of this relationship: due diligence, negotiation of contract terms and monitoring the relationship, from both the customer and vendor perspective. The program also covered how customers organize their responsibilities relating to vendor risk management and the promises and pitfalls of cyber insurance.

Co-Sponsors: Banking Law; Corporate Compliance; Corporate Counsel; Middle Market & Small Business

#### [Program Materials](#)

### **B. Overview of Spring Meeting to be held in Orlando, April 2018**

#### **1. Thursday, April 12, 2018**

- (a) Business Entities Governance, 9:00 a.m. - 10:00 a.m.
- (b) Program: Introducing the Model Stock Purchase Agreement, 10:30 a.m. - 12:00 p.m.
- (c) Middle Market & Small Business Luncheon, 12:30 p.m. - 2:00 p.m.
- (d) Emerging Companies, 3:00 p.m. - 4:00 p.m.
- (e) Private Placement Broker Task Force, 4:30 p.m. - 5:30 p.m.
- (f) Middle Market & Small Business Dinner, 7:30 p.m. - 10:00 p.m.

#### **2. Friday, April 13, 2018**

- (a) Securities Regulation Joint Subcommittee Meeting, 8:30 a.m. - 9:30 a.m.
- (b) Family-Owned Businesses, 9:00 a.m. - 10:00 a.m.
- (c) Contractual Governance of Business Entities Joint Task Force Meeting, 9:30 a.m. - 10:30 a.m.
- (d) Short Form M&A Documents Task Force, 10:00 a.m. - 11:00 a.m.
- (e) Meeting of Subcommittee Chairs, Task Force Chairs, Vice Chairs, and Advisory Committee Chairs, 3:30 p.m. - 4:30 p.m.

(f) Middle Market and Small Business Committee Meeting, 4:30 p.m. - 6:00 p.m.

### 3. Saturday, April 14, 2018

(a) Program: Basics of Private Equity Fund Formation, 10:30 a.m. - 12:00 p.m.

## Leadership List of Middle Market and Small Business Committee

The following is a list of the MMSB Committee leadership. Please contact the Chairs or Vice Chairs of our MMSB Committee or any Subcommittee, or of our Task Forces or any of our Liaisons, to get involved in the particular MMSB Committee activities that interest you and which can benefit you, your practice and your clients. All levels are welcome, and we hope to see you soon in Orlando!

[Read more...](#)

## Contact Information; Disclaimers

The MMSB Committee prepares and delivers the *Business Visions* Newsletter to its members and the public to enhance our members' understanding of, and access to, the MMSB Committee's abundant programs and activities. This is a free service that is continually under development. While we try to keep the information timely and accurate, we cannot make any guarantees. We will and do strive to rectify all errors brought to our attention, and we ask for your vigilance in bringing to our attention any inaccuracies. Readers of our *Business Visions* Newsletter should be aware that information available in our newsletter may not reflect official positions of the ABA, the Business Law Section, the MMSB Committee or its members, or any regulatory agency or governmental authority. Additionally, the views expressed in any article in the *Business Visions* Newsletter may not necessarily be the views of any organization with which the author is affiliated. Neither the ABA nor the MMSB Committee is responsible for the content or accuracy of any articles or other submissions included in our newsletter.

The *Business Visions* Newsletter may contain links to information or websites created and maintained by other public and private organizations. Our newsletter also contains links that direct the reader to other websites, both ABA websites and third-party websites. By clicking on any links provided in the *Business Visions* Newsletter, you assume any risks associated with accessing a website controlled by a third party, and you further agree to hold the ABA and the MMSB Committee harmless from any damage you may suffer as a result of going on or surfing such third-party websites. Please be aware that the MMSB Committee does not control or guarantee the accuracy, relevance, timeliness, or completeness of any information provided by any source other than the MMSB Committee.

If anyone has any ideas concerning future editions of the MMSB Committee's newsletter, or would like to get more involved with the Newsletter Subcommittee, please contact Evangelos "Andy" Kostoulas (at [EKostoulas@myneil.com](mailto:EKostoulas@myneil.com)) or Mark D. Hobson (at [markhobson@hobsonfirm.com](mailto:markhobson@hobsonfirm.com)), Co-Chairs of the Newsletter Subcommittee.

## Listserv Protocols

a) [Listserv](#). The MMSB Committee encourages all of its members (especially those who have recently joined) to become active participants in all committee activities, including participating in discussions on our Listserv. It is a great way to learn about current legal issues affecting your practice. The Listserv provided by the MMSB Committee ("[MMSB Listserv](#)") is a great medium from which to solicit the advice of your peers, benefit from their experience and participate in an ongoing conversation about relevant topics. To be able to send a message through the MMSB Listserv, however, you must first be a member of the MMSB Committee. All Listserv participants are also required to comply with the Rules & Etiquette Guidelines described below.

b) [Listserv Archive](#). Members of the MMSB Committee who are fully signed up for the Listserv can access the extensive MMSB Listserv archive at the following link: [Listserv Archive](#)

c) [How to Manage Listserv Emails](#): The following link provides instructions on how to set up a subfolder on your computer, so that all emails that you receive from the MMSB Committee Listserv automatically will be filed into that subfolder: [Managing Listserve E-Mails](#)

d) [Rules & Etiquette Guidelines for Use of the MMSB Listserv](#).

The MMSB Committee has established Rules & Etiquette Guidelines that govern all participants' use of the MMSB Listserv. If a participant fails to adhere to these Rules & Etiquette Guidelines, the MMSB Committee may suspend or terminate that person's future participation on the MMSB Listserv.

The Rules & Etiquette Guidelines for the MMSB Listserv can be found here: [MMSB Listserve Rules & Etiquette](#). If you have questions, contact Evangelos "Andy" Kostoulas at [ekostoulas@myneil.com](mailto:ekostoulas@myneil.com), Co-Chair of the Newsletter Subcommittee.

## Requests for Submissions/Sponsors

Dear Middle Market and Small Business Committee Members:

Our Committee is always actively seeking sponsors and volunteers, and we need your continued help. Please continue reading below to learn how you can contribute to our Committee's success.

Having sponsors will provide a financial contribution to help fund Committee dinners. But perhaps more importantly, sponsors can provide a strategic relationship with our committee and provide substantive content and market intelligence during Committee meetings as well as participate in our CLE programs. Efforts to secure additional sponsors are being led by Michel Gélinas ([mgelinas@stikeman.com](mailto:mgelinas@stikeman.com)). If you have any leads or suggestions, please let Michel know.

We want to continue to express profuse thanks to our current sponsor, Stout Risius Ross, Inc. Please be sure to thank its representatives in person when you see them at our meetings, lunches, and dinners. The last page of this newsletter contains more information about our current sponsor. Please check it out!

If you are interested in preparing a short, substantive article on a topic that is relevant for our Committee, please contact Evangelos "Andy" Kostoulas (at [EKostoulas@myneil.com](mailto:EKostoulas@myneil.com)) or Mark D. Hobson (at [markhobson@hobsonfirm.com](mailto:markhobson@hobsonfirm.com)), Co-Chairs of the Newsletter Subcommittee.

All articles for the newsletter should be minimal in length (up to 2,000 words). In addition to being circulated to our approximately 1,400 members, your article may also be eligible for publishing in the Business Law Section's [Business Law Today](#),

a monthly publication circulated to approximately 37,000 members.

Thanks to everyone for your support!

Erik L. Kantz  
Chair, Middle Market and Small Business Committee  
Business Law Section

## Law Student Committee Associate Program

### ABA Committee Associate Program

The ABA's [Committee Associate Program \("CAP"\)](#) is designed to build relationships between law students and members of the ABA Business Law Section (the "Section"), by giving students the opportunity to gain experience through substantive and administrative projects with committees of the Section.

The MMSB Committee is continually seeking up to 3 associates to help write (i) articles and (ii) summaries of the various activities of the MMSB Committee's subcommittees and task forces for inclusion in our newsletter. Articles and summaries will be based on live programs from the MMSB Committee's Fall, Spring and Annual Meetings as well as other MMSB Committee meetings, webinars, and lunches that feature one or more speakers. CAP Associate(s) will work with the program presenters and speakers to write certain articles, and also have the opportunity to work with program presenters and speakers to help draft and eventually possibly submit article(s) for publication in the ABA's [Business Law Today](#). Published articles will be drafted primarily by the program presenter or speaker. Attending meetings is required and since travel is not reimbursable, the MMSB Committee is seeking primarily law students who are local to each of the next Fall, Spring and Annual Meetings. The date and location of upcoming meetings are:

- Spring Meeting 2018 â€" April 12-14, 2018 â€" Orlando, FL
- Annual Meeting 2018 â€" September 13-15, 2018 â€" Austin, TX
- Fall Meeting 2018 â€" November 16-17, 2018 â€" Washington, D.C.

The duration of the position is for at least the applicable meeting and completion of article(s) arising from the same meeting that the CAP Associate(s) attended.

Law students may apply by visiting the [CAP website](#) for an application.

If you are interested in participating in the CAP and helping the MMSB Committee, please contact Evangelos "Andy" Kostoulas at [EKostoulas@myneil.com](mailto:EKostoulas@myneil.com).

**Stout Risius Ross, Inc.**



## Trusted for the pivotal moments of business.

**STOUT INVESTMENT BANKING.** Relentless on your behalf.

Merge, acquire, restructure, raise capital. All are on the table and thoroughly evaluated by senior bankers. From the initial engagement letter through closing, this is how Stout has approached each of the hundreds of successful middle market transactions—representing more than \$20 billion in value—we've advised on over the past 20 years. And it's how we'll approach yours. Let us relentlessly deliver for you.

**Nick Jachim, Managing Director/Group Head**

+1.312.752.3396  
njachim@stoutadvisory.com

**stoutadvisory.com**

Investment Banking | Valuation Advisory | Dispute Consulting | Management Consulting



Stout is a trade name for Stout Risius Ross, LLC and Stout Risius Ross Advisors, LLC, a FINRA-registered broker-dealer and SIPC member firm.

{{AA\_HTML LSSpecial - Chicago Footer}}

## **A. Our Mission**

The mission of the Middle Market and Small Business Committee (“MMSB Committee”) is to serve, educate, and bring together corporate, transactional, and securities lawyers—in an effort to improve the legal profession—who regularly counsel and advise small and mid-sized entities and business ownership groups controlled by matriarchs and patriarchs of family offices, entrepreneurs, private equity groups, venture capital firms, and other groups, and smaller publicly-held companies. To achieve this objective:

- The MMSB Committee provides a forum for its members to share information, to deliver and receive continuing legal education, to address current and practical legal issues affecting smaller and mid-sized businesses, and to learn best practices concerning relevant areas of law, legal ethics, and technology applicable to the delivery of legal services in the 21<sup>st</sup> Century.
- The MMSB Committee zealously advocates before various regulatory agencies, and has been doing so for decades. Such advocacy concerns current issues and laws that relate to specific problems and needs of small businesses, including smaller public companies. Agencies before which the MMSB Committee and its members regularly advocate include, among others, the Securities and Exchange Commission (“SEC”), the Internal Revenue Service, the Financial Industry Regulatory Authority (“FINRA”), and the National Association of Securities Dealers. For example, our Private Placement Broker Task Force and some of its individual members lobby the SEC, FINRA, and other regulatory agencies to implement a simplified registration system for finders of financing for early-stage companies.
- The MMSB Committee brings scrutiny and discourse to the entire business “life cycle” of our member’s clients with expert panels focused on highly relevant topics such as:
  - (i) entity organization and owner agreements
  - (ii) capital formation, financing, and strategic partnering
  - (iii) employment and compensation matters
  - (iv) intellectual property and trade secrets protection
  - (v) corporate governance
  - (vi) securities law compliance
  - (vii) international expansion and cross-border transactions
  - (viii) business combinations, restructuring, and breakups

In this issue, the *Business Visions* Newsletter continues its ongoing series on start-up activity around the globe, and features a special section addressing the new President and the impact his administration may have on the legal landscape. The MMSB Committee is grateful to its members for their contributions. We hope you will read and enjoy these articles.

## **B. Committee Facts**

Some interesting facts about the MMSB Committee are:

- The MMSB Committee comprises over 1,400 members, both in the United States and abroad.
- The MMSB Committee holds live and in-person meetings 3 times a year in conjunction with the ABA Business Law Section Meetings. For 2018, these meetings include:
  - the Spring Meeting, held from April 12-14 in Orlando,
  - the Annual Meeting, to be held from September 13-15 in Austin, and
  - the Fall Meeting, to be held from November 16-17 in Washington, D.C.
- Meetings of the MMSB Committee typically feature a mini-presentation on a substantive practice area and provide an opportunity to share practical advice relevant for smaller and medium-sized companies as well as the lawyers who counsel them.
- An area in which a great deal of the MMSB Committee's efforts are directed involves the federal and state securities regulations that affect smaller public companies and capital-raising activities of private companies, including qualifications for exemptions from registration, qualifications for exemptions from registration for private placement brokers, and implementation of scaled disclosure regulations to help smaller and medium-sized businesses be able to raise legally the capital they need to expand their operations and without the need to comply with unnecessary, burdensome, and expensive regulatory requirements.
- Membership in the MMSB Committee provides numerous opportunities to participate in CLE panels and workshops, writing opportunities, and opportunities to comment on regulations proposed by the SEC and other regulatory agencies. Participation is strongly encouraged and the MMSB Committee welcomes all levels of experience. Come learn why the Middle Market and Small Business Committee is called *The Best Damn Committee in the whole ABA!* Please see the Leadership List in [Section VII](#) for people you can contact to get more involved.

**C. Areas of Expertise**

Some of the specific areas that are frequently covered by the MMSB Committee in our panel presentations, programs (CLE and otherwise) and workshops include the following:

- Entity organization and owner agreements
- Capital formation, financing, and strategic partnering
- Employment and compensation matters
- Intellectual property protection and transference
- Corporate governance
- Securities law compliance
- International expansion and cross-border transactions
- Business combinations and M&A activities
- Business divorces, breakups, and restructurings

In our continuing series highlighting start-up activities around the globe, Sofia Lingos discusses the start-up scene in Beantown.

### The Cost of Operating a Small Business in Boston

By: Sofia Lingos, Managing Attorney, Trident Legal

Home to research and entrepreneurial powerhouses MIT and Harvard, as well as 50 other institutions of higher education, Massachusetts's capital is a rich environment for inspiring innovation and opening opportunities to seed small businesses. This has led to the development of the hottest new area in the city, the Innovation District (the first "innovation district" in the United States, launching over 200 new companies in the area since 2010, and home to MassChallenge, the world's largest start-up company accelerator, and District Hall, the world's first public innovation center). According to Starthub, Greater Boston's official homepage for the startup ecosystem, Boston currently has 2,003 start-ups operating within city limits.<sup>1</sup> Though the community clearly exists, there are a number of costs associated with running a small business in Boston that make it a less attractive option for sustaining operations (aside from the obvious expense of real estate in such a geographically-limited city). As counsel to emerging entities, careful consideration regarding formation and employment can be especially valuable, and there are a few hot topics that are currently taking center stage.

#### **EXCESSIVE LLC FILING FEES**

The Limited Liability Company ("LLC") is a legal business structure controlled by state statute. The hybrid business model is flexible and permits members to invoke limited liability similar to a corporation, while forgoing much of the mandated corporate compliance and allowing favorable tax election, therefore often being the ideal option for a small business. Formation requirements are state-specific, but generally accomplished by filing a certificate with the state, paying a formation fee, and paying an annual filing fee to maintain active status.

#### **Comparative Cost**

The formation and annual filing fee for a Massachusetts LLC is \$500 (\$520 if you file online or via fax). The high cost of Massachusetts's annual filing fee is solely surpassed by one state, California, which has a price tag of \$800 (California has also adopted a tiered system based on a company's profits). In an article published in *Massachusetts Lawyer's Weekly*, Priya Lane, director of the Economic Justice Project of the Lawyers' Committee for Civil Rights and Economic Justice noted that "in only 10 other states do annual fees exceed \$100, and ... Massachusetts' is about six times greater than the average across the other 49 states — approximately \$83."<sup>2</sup>

#### **Servicing the Small Business**

Many filers without representation make the incorrect assumption that this excessive fee can be avoided by filing in a more cost-considerate state (often Delaware), however that is not the case.

---

<sup>1</sup> Starthub Boston, *Your guide to the startup community, events & jobs in Boston*, <https://www.starthub.org/> (last visited Dec. 21, 2017).

<sup>2</sup> Kris Olson, *Baker asked to consider impact of high LLC fees on minority, low-income entrepreneurs*, *Mass Lawyers Weekly*, Oct. 19, 2017.

Pursuant to M.G.L c 156C s. 48 a company must register as a foreign LLC in the Commonwealth within 10 days of commencing operations (defined under M.G.L c 156D s. 15.01 as transacting business or having a usual place of business, subject to some limitations) and the cost of doing so is an additional \$500/year.

Those who have bigger budgets may not realize what a profound impact these fees have on a bootstrapping business. When assessing a small start-up's budget, it is challenging to find the funds to create a desirable legal structure in addition to other requisite costs of doing business (e.g. to hire an employee, buy necessary equipment, or purchase insurance), yet risky to forgo the protection. A judgment may be rendered against future assets, and if there is no separate legal entity, the judgment is against the proprietor as an individual. Forming an entity down the road will not provide retroactive protection.

### **Partaking in the Political Process**

LLC filing fees are actively on the legislative agenda. There are currently a number of Bills such as An Act Reducing the Costs for Small Businesses Senate, No. 1703, and An Act Relative to LLC Annual Filing Fees, Senate, No.176, that would cut the filing fees by 50% or more. A reduction in filing fees would mean a lot to aspiring entrepreneurs in Boston.

### **EMPLOYEE EXPENSES**

#### **Increase in Minimum Wage**

As of January 1, 2017, the Massachusetts minimum wage was increased to \$11/hour (compared to the federal minimum wage of \$7.25). The only states with higher minimum wages are Washington and the District of Columbia, even though Boston currently comes in at #15 on the Cost of Living Index with a score of 86.92. There are also active Bills on the table to increase the minimum wage to \$15/hour by 2021. The small business community seems split regarding this decision and their interests often align with the level of skill required of their workers. Some employers argue that paying \$11/hour to a teenager scooping ice cream while living at home is excessive and restrictive to their ability to operate. How is the increased cost of labor passed along to the consumer? By raising prices of course. How much, however, is a family willing to pay to end an evening with a sweet treat? Others are thoughtful of the excessive expenses required to survive in this city and understand that, without a living minimum wage, they will not be supporting their workforce's ability to subsist. Dr. Amy K. Glasmeier of the Massachusetts Institute of Technology has indicated that a living wage for 1 adult in the greater Boston area working full time is \$13.02 per hour. Employers must institute legal best practices and policies to preserve their employee investments.

#### **Restrictive Covenants**

Since 2008, based on the seminal case *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, California has declined to enforce non-compete agreements. In Massachusetts, since 2009, there has been immense pressure politically and from the innovation community in Boston to follow California's lead. On October 31, 2017, the Massachusetts Joint Committee on Labor and Workforce Development had submitted before it eight Bills involving non-competes and trade secrets with some proposing an outright ban and others more limited reform. A decision has not been reached on these Bills, but

further discourse is certain to follow. Even those who advocate for less restrictions often include non-competes in order to maintain a competitive edge. Preparing clients for any changes in the law will facilitate a smooth transition if in fact any of these proposals do actually become law.

### **Sick Leave**

Massachusetts also requires some basic benefits regardless of a company's size. As of July 1, 2015, all Massachusetts employers must allow their employees to accrue and use sick leave. For those employers with more than 11 employees, this leave must be paid. Eligible employees accrue sick time at a minimum rate of 1 hour of sick time for every 30 hours worked, up to a cap of 40 hours per benefit year. Benefits are usually used as a tool to attract, reward, and maintain employees. Boston businesses are already starting off on similar footing, so counsel can assist in drafting creative, clear, and thoughtful benefit programs to ensure the ability to retain quality employees.

### **Independent Contractor Classification**

The Commonwealth has recently seen another crackdown on the misclassification of employees as independent contractors. Massachusetts has a stricter standard than the federal standards used by the IRS, with the presumption that workers are employees by default. To overcome this standard, employers must demonstrate that the individual's work is (1) done without the direction and control of the employer; (2) is performed outside the usual course of the employer's business; and (3) is done by someone who has their own, independent business or trade doing that kind of work. The Massachusetts attorney generals have made it a consistent priority to proactively prosecute those in violation. Many small businesses incorrectly assume that an agreement between parties (written or otherwise) is adequate to overcome the requirement. Advising clients regarding proper classification and assisting them in completing all requirements to properly bring "employees" onboard can protect them from debilitating damages down the road.

### **Conclusion**

It is undeniable that there is a great need for small business representation in the Commonwealth. These are just a few of the challenges faced daily from those seeking to start their enterprise in Boston. Massachusetts is incredibly employee-friendly and assisting a business in navigating all the complexities of properly hiring is critical. Recent political agendas have been refocused to corporate behemoths like General Electric, who broke ground to relocate its headquarters to Boston on May 8, 2017 (with a \$145 million package of incentive deals from the city and state) and pitching Boston as a host for Amazon's HQ2. A combination of accessible, competent and affordable legal representation, electing officials who support these missions, advocating for relevant legislative priorities, and helping clients comply with our complex regulations, will assist in achieving these goals. Hopefully, Massachusetts can continue cutting costs and inspiring more small businesses to stay in Boston to expand its entrepreneurial rich ecosystem.

## Price Maintenance: Strategies to Protect Profits and Brands

By: Anshu Pasricha, Partner, and John Fraczek, Associate, Koley Jessen P.C., L.L.O.

As Apple Inc. (AAPL) inches ever closer to a one trillion dollar market capitalization,<sup>1</sup> one must recognize the immense value of the Apple brand. Branding is especially powerful in a world full of consumer choice, instantly available information, and easy comparison shopping. There are many strategies that can be utilized to develop a brand, but regardless of the strategy, consistency is essential in order to build consumer trust and cement good qualities about your company in the consumer's mind. Developing consistency is a long process that impacts every aspect of an organization, including product or service pricing. As such, price maintenance has become an important part of a successful company's strategy. However, implementing price maintenance policies must be done carefully, for the risk of violating federal and state antitrust laws is omnipresent and the consequences of such violations can be devastating.<sup>2</sup> This article discusses the legal landscape of price maintenance approaches and develops a guideline for drafting enforceable minimum advertised pricing ("MAP") policies.

### A. Legal Environment

A decade has passed since the Supreme Court upended nearly a century of precedent and caused a disconnect between federal and state law related to resale price maintenance ("RPM") agreements.<sup>3</sup> *Leegin* established that RPM agreements instituting a minimum price at which goods could be sold were no longer *per se* illegal under federal law.<sup>4</sup> This result could have been a boon to organizations seeking to implement such policies, whether for branding or other purposes, such as to eliminate price undercutting between dealers (intra-brand competition). Unfortunately, several states, including the business and population hubs of California and New York, have failed to follow suit with their own state antitrust laws,<sup>5</sup> creating a legal minefield of enforcement policies that nationwide organizations need to successfully traverse. Such an unstable environment has prevented many organizations from pursuing such agreements, even if *Leegin* would allow for such policies.

The non-uniformity of legal enforcement of RPM agreements has driven organizations to adopt MAP policies rather than RPM agreements. MAP policies are distinct from RPM agreements because they restrict prices resellers can advertise, not the actual resale price.<sup>6</sup> However, simply labeling a policy as a MAP policy does not mean it will be deemed enforceable; the concept of substance over form applies – MAP policies must uniformly pass antitrust law's rule of reason test under both federal and state law. The rule of reason test determines whether a business practice violates antitrust laws by analyzing a variety of factors, including the condition of the industry before and after a restraint is imposed, in order to determine whether the procompetitive benefits of the business practice outweigh the competitive harm it causes.<sup>7</sup>

---

<sup>1</sup>See Apple Inc. (AAPL), Morningstar, Inc., <http://www.morningstar.com/stocks/xnas/aapl/quote.html> (last visited, September 11, 2017) (\$834 billion as of the date last visited).

<sup>2</sup>THE ANTITRUST LAWS, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited August 17, 2017) (criminal penalties of up to \$100 million for corporations and \$1 million for individuals, along with up to 10 years in prison; private actions allow for triple damages).

<sup>3</sup>See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overturning *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911) (invalidating a minimum resale price agreement as *per se* illegal as a restraint on trade with no procompetitive benefits), and its subsequent line of precedent cases).

<sup>4</sup>*Id.*

<sup>5</sup>See Michael A. Lindsay, *Overview of State RPM*, AMERICAN BAR ASSOCIATION: THE ANTITRUST SOURCE (April 2017), [https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/lindsay\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf).

<sup>6</sup>See, e.g., *People v. Tempur-Pedic Int'l, Inc.*, 944 N.Y.S.2d 518, 519 (2012) (holding that while RPM agreements are unenforceable, agreements on minimum advertised prices "cannot be the subject of a vertical RPM claim, because they do not restrain resale prices but merely restrict advertising.").

<sup>7</sup>See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); see also *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

## B. MAP Policy Guidelines

Due to the application of the rule of reason test, there is not a one-size-fits-all policy that will guarantee your MAP policy is enforceable; even if a policy followed all of the following guidelines, the individual circumstances of a particular situation will determine whether the policy is enforceable. However, the following guidelines have been utilized by courts to dismiss claims that MAP policies were unenforceable. Careful drafting and enforcement of the policy are critical, and the policy should be periodically reviewed and updated to address changing circumstances.

1. **Advertised Price.** MAP policies must only restrict advertised prices. A reseller must still retain the right to determine the resale price.<sup>8</sup>
2. **Unilateral Adoption.** There should be no indication of an agreement between the manufacturer and the dealer, as this will tend to make the policy fall closer to a RPM agreement surrounding price, which can be deemed as a price-fixing arrangement under federal antitrust law. In addition, there should be no mention of adopting the policy under the influence of dealers concerned about undercutting competitors.<sup>9</sup>
3. **Alternative Communication Methods.** There should always be an effective method for resellers to be able to communicate the price of an item to consumers without violating the policy. This is especially true when enforcing the policy against online resellers. For example, organizations should consider allowing a price to be displayed online in the checkout process, or advertising that a consumer could call for a price.<sup>10</sup>
4. **General Application.** MAP policies should not discriminate between dealers.<sup>11</sup> If it is applicable to online retailers, it should also be applicable to brick-and-mortar resellers.
5. **Coop Advertising Programs and Additional Services.** If a manufacturer can establish that it provides additional services to resellers, including training or funding to help with advertising, there is clearer consideration for MAP restrictions placed upon the reseller.<sup>12</sup>

## C. Conclusion

Price maintenance is an important part of many companies' strategies, especially those attempting to promote and brand themselves as a producer of high quality goods. While there are

---

<sup>8</sup>*In re Compact Disc Minimum Advert. Price Antitrust*, 216 F.R.D. 197 (D. Me. 2003).

<sup>9</sup>MANUFACTURER-IMPOSED REQUIREMENTS, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/manufacturer-imposed> (last visited September 11, 2017) ("Legal issues may arise if it appears that the dealers have agreed to threaten a boycott or collectively pressure the manufacturer to take action."); *cf. In re Sony Music Entm't, Inc.*, No. C-3971 (F.T.C. Aug. 30, 2000) (stating that different MAP policies appeared to have been implemented at the urging of retailers concerned about discount dealers).

<sup>10</sup>*WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc.*, No. 10 Civ. 3205(BSJ), 2011 WL 2565284 (S.D.N.Y. June 22, 2011); *WorldHomeCenter.com, Inc. v. KWC America, Inc.*, No. 10 Civ. 7781(NRB), 2011 WL 4352390 (S.D.N.Y. Sept. 15, 2011).

<sup>11</sup>See 15 U.S.C. § 13.

<sup>12</sup>MANUFACTURER-IMPOSED REQUIREMENTS, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/manufacturer-imposed> (last visited September 11, 2017) ("The law allows a manufacturer considerable leeway in setting the terms for advertising that it helps to pay for.").

methods to impose certain resale prices, organizations have determined that enforcing MAP policies is an effective way to reinforce a company brand at a lower risk than attempting to navigate the current legal landscape of RPM agreements. However, MAP policies still require careful drafting, and a thorough understanding of the practical restraints it may be imposing, as each organization's circumstances are different.



## Gun-Jumping Violations: A Trap for the Unwary

By: Brian Adams, University of Tennessee Law School, Class of 2018

In 2010, Congress enacted the Patient Protection and Affordable Care Act (“ACA”) to address a number of issues facing the United States health care industry. Its primary objectives were to improve the quality and cost of health care services. These efforts impacted health care providers in two significant ways. First, the ACA changed reimbursement rates and calculations for Medicare, Medicaid and other federal health care programs. Second, and relatedly, it linked reimbursement rates to quality metrics by transitioning from the traditional fee-for-service model to a value-based purchasing model.

To lessen the impact of these financial pressures and gain leverage with private insurers, health care entities are consolidating at a rapid rate. In fact, studies indicate that mergers and acquisitions (“M&A”) between hospitals grew by 70 percent from 2010 to 2015.<sup>1</sup> This trend does not appear to be slowing, as hospitals continue to consolidate in an effort to leverage their scale and market positions to enhance profitability.

Importantly, depending on the benchmark chosen for success, most mergers are not successful.<sup>2</sup> However, pre-integration efforts have been shown to dramatically improve the chances for success. Nonetheless, this behavior raises “gun-jumping” concerns—an offense that carries significant risk of fines and litigation. Accordingly, parties to an M&A transaction must determine how to conduct pre-integration efforts in compliance with applicable antitrust laws.

### **Antitrust Laws**

The core federal antitrust laws are: (A) the Clayton Act, (B) the Sherman Act, and (C) the Federal Trade Commission Act. These laws prohibit “gun-jumping”<sup>3</sup> and may require parties to certain M&A transactions to file premerger notifications with the Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”).

#### **A. The Clayton Act**

Section 7 of the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”) added Section 7A to the Clayton Act. Section 7A “established the federal premerger notification program that requires parties or transactions meeting certain dollar thresholds to comply with statutorily prescribed waiting periods prior to closing a transaction in which stock or assets will be acquired.”<sup>4</sup> Under this

---

<sup>1</sup> Kaufman Hall, *Hospital Merger and Acquisition Activity Up Sharply in 2015, According to Kaufman Hall Analysis*, (Jan. 20, 2016), <https://www.kaufmanhall.com/news/hospital-merger-and-acquisition-activity-sharply-2015-according-kaufman-hall-analysis>.

<sup>2</sup> Paul Paulter, *The Effects of Mergers and Post-Merger Integration: A Review of Business Consulting Literature*, at 14 (“Failure rates for mergers in the range of 35% to 60% are common in academic studies depending on the benchmark chosen for success.”). But see Clayton M. Christensen, et. al., *The Big Idea: The New M&A Playbook*, (Mar. 2011), <https://hbr.org/2011/03/the-big-idea-the-new-ma-playbook> (stating that “study after study puts the failure rate of mergers and acquisitions somewhere between 70% and 90%.”).

<sup>3</sup> The term gun-jumping “refer[s] to a variety of actions that merging parties might enter into prior to closing to facilitate the merger and expedite the integration of the companies.” See Richard Liebeskind, *Gun-Jumping: Antitrust Issues Before Closing the Merger*, <https://www.pillsburylaw.com/images/content/1/8/v2/1842/16ADC9E2C53CF6E9F97E3F0A3F6F3242.pdf> (Presentation to ABA Section of Business Law, Antitrust Committee).

<sup>4</sup> Lexis Practice Advisor Attorney Team, *Overview of Antitrust Laws and the Merger Review Process*, (last visited Dec. 27, 2017), <https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000522&crd=8919b646-dad0-4d92-b11e-f46638189012&pdsearchwithinterm=40&ecomp=LsfLk&prid=dXJuOmNvbnRlbnRjdGVtOjVIM1ctRINSMS1GRk1LLU0zRjAtMDAwMDAtMDA-1asd5ef>.

program, a filing is required if one of the parties is engaged in commerce or in any activity affecting commerce,<sup>5</sup> and either of the following conditions are met:

- the value of the transaction exceeds the annually-adjusted *upper size-of-transaction* threshold, which in 2017 was \$323 million, and no exemption applies; or
- the value of the transaction exceeds the *minimum size-of-transaction* threshold, which in 2017 was \$80.8 million,<sup>6</sup> AND as a result of the acquisition, the parties meet one of three size-of-person requirements.<sup>7</sup>

Failure to comply with the premerger notice requirements outlined above may result in substantial penalties.<sup>8</sup> In fact, as of January 24, 2017, premerger filing notification violations are subject to civil penalties of \$40,654 per day.<sup>9</sup> Moreover, as the statutory language indicates, these penalties are imposed regardless of fault.<sup>10</sup>

### Gun-Jumping Issues Under the Clayton Act

In addition to these filing thresholds, M&A practitioners need to be aware of potential gun-jumping issues under the HSR Act. The HSR Act prohibits an acquiring party from acquiring “beneficial ownership” or from exercising “substantial operational control” over a target prior to the expiration of the mandatory waiting period. The FTC justified this position as follows:

In the jargon of HSR, signing the contract transfers some *indicia of beneficial ownership*. By itself, that transfer is entirely lawful. But the transfer of additional indicia of ownership during the waiting period -- such as assuming control through management contracts, integrating operations, joint decision making, or transferring confidential business information for purposes other than due diligence inquiries -- are inconsistent with the purposes of the HSR Act and will constitute a violation.<sup>11</sup>

Although the HSR Act no longer applies once the waiting period expires, parties remain subject to Section 1 of the Sherman Act until closing.

### B. The Sherman Act

---

<sup>5</sup> Federal Trade Commission, *Steps for Determining Whether an HSR Filing is Required*, (last visited Dec. 27, 2017), <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing>.

<sup>6</sup> *Id.* “Section 7A(a)(2) requires the [FTC] to revise [these] thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5).” See Federal Trade Commission, *Revised Jurisdictional Thresholds for Section 7A of the Clayton Act*, (Jan. 26, 2016), [https://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2016/01/160126claytonact7afrn.pdf](https://www.ftc.gov/system/files/documents/federal_register_notices/2016/01/160126claytonact7afrn.pdf).

<sup>7</sup> See 15 U.S.C. § 18a(a)(2)(B).

<sup>8</sup> See *United States v. Gemstar-TV Guide Int'l, Inc.*, Civ. Action No. 03-0198 (JR), 2003 U.S. Dist. LEXIS 12494 (D.D.C. Jul. 11, 2003) (ordering defendants to pay a civil penalty of \$5,676,000).

<sup>9</sup> See 82 Fed. Reg. 8135 (Jan. 24, 2017).

<sup>10</sup> “Any person . . . who fails to comply with any provision of this section shall be liable to the United States. . . .” 15 U.S.C. §18a(g)(1).

<sup>11</sup> William J. Baer, *Report from the Bureau of Competition*, (Apr. 15, 1999), <https://www.ftc.gov/public-statements/1999/04/report-bureau-competition>.

Section 1 of the Sherman Act prohibits competitor agreements that unreasonably restrain trade. Parties to an M&A transaction may violate this law by prematurely coordinating business plans or exchanging commercially sensitive information.

In *Omnicare, Inc. v. UnitedHealth Group, Inc.*,<sup>12</sup> the exchange of commercially sensitive information during merger talks between UnitedHealth and PacifiCare (“Defendants”) prompted Omnicare to file a claim under Section 1 of the Sherman Act.<sup>13</sup> Omnicare alleged “that, prior to the merger, [Defendants] conspired to have PacifiCare obtain the lowest possible price from Omnicare and then switch UnitedHealth’s plan over to the more favorable PacifiCare-Omnicare contract.”<sup>14</sup>

The District Court granted Defendants’ motion for summary judgment because “Omnicare ... failed to produce evidence of action by [Defendants] that [was] inconsistent with lawful conduct on the part of two competing entities engaged in legitimate merger discussions and planning.”<sup>15</sup> In other words, Omnicare failed to prove that Defendants were acting in concert to achieve an unlawful objective.<sup>16</sup> Instead, it appeared that Defendants were acting to advance their own independent interests and, therefore, the Seventh Circuit affirmed.<sup>17</sup> In reaching this decision, the Seventh Circuit stated:

On the one hand, courts should not allow plaintiffs to pursue Sherman Act claims merely because conversations concerning business took place between competitors during merger talks; such a standard could chill business activity by companies that would merge but for a concern over potential litigation. On the other hand, the mere possibility of a merger cannot permit business rivals to freely exchange competitively sensitive information. This standard could lead to “sham” merger negotiations. . . .<sup>18</sup>

### C. The Federal Trade Commission Act

The Federal Trade Commission Act (“FTC Act”) bans “unfair methods of competition . . . and unfair or deceptive acts or practices.”<sup>19</sup> This Act was designed “to supplement and bolster the Sherman Act and the Clayton Act.”<sup>20</sup> As such, the exchange of commercially sensitive information and other “similar M&A activities . . . [may be] . . . subject to challenge under the FTC Act.”<sup>21</sup>

### **Permissible Conduct**

---

<sup>12</sup> 629 F.3d 697 (7th Cir. 2011).

<sup>13</sup> *Id.* at 703.

<sup>14</sup> *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 594 F. Supp. 2d 945, 959–60 (N.D. Ill. 2009).

<sup>15</sup> *Omnicare*, 629 F.3d at 706 (quoting *Omnicare, Inc.*, 594 F. Supp. 2d at 974). The evidence showed that the Defendants exchanged “generalized and averaged high-level pricing data, policed by outside counsel, [which] is more consistent with independent than collusive action.” *Id.* at 720.

<sup>16</sup> This is an element of a valid Section 1 claim. *See Omnicare*, 629 F.3d at 705 (“To prevail under § 1 under any theory, plaintiffs generally must prove three things: (1) that defendants had a contract, combination, or conspiracy (‘an agreement’); (2) that as a result, trade in the relevant market was unreasonably restrained; and (3) that they were injured.”).

<sup>17</sup> *Id.* at 721.

<sup>18</sup> *Id.* at 709–10 (quoting *Omnicare*, 594 F. Supp. 2d at 968).

<sup>19</sup> *See* 15 U.S.C. § 45(a)(1) (2012).

<sup>20</sup> *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1952) (internal citations omitted).

<sup>21</sup> *See* Overview of Antitrust Laws and the Merger Review Process, *supra* note 4.

Despite these limitations, the FTC has recognized that “many forms of premerger coordination are reasonable and even necessary . . . to implement the transaction and achieve available efficiencies.”<sup>22</sup> Typically, parties may:

- Exchange information to facilitate post-integration efforts or complete pre-merger due diligence, provided adequate safeguards are in place; and
- Enter into consent agreements that require the buyer’s approval for actions that occur outside the ordinary course of business (e.g. declaration of dividends by the target).<sup>23</sup>

Given the fact-intensive nature of this analysis and the need for pre-integration efforts, it is strongly encouraged that parties to an M&A transaction consult with antitrust counsel to identify and mitigate litigation risk during negotiations.

---

<sup>22</sup> William Blumenthal, *The Rhetoric of Gun-Jumping*, (Nov. 10, 2005), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/rhetoric-gun-jumping/20051110gunjumping.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/rhetoric-gun-jumping/20051110gunjumping.pdf).

<sup>23</sup> See Mitchell D. Raup, Herbert F. Allen & Matthew C. Hans, *Avoiding the “Gun Jumping” Trap in Mergers and Acquisitions*, (Aug. 2017), <https://www.polsinelli.com/intelligence/ealert-avoiding-the-gun-jumping>.



## 36th Annual SEC Government-Business Forum on Small Business Capital Formation

By: Gregory C. Yadley, Partner, Shumaker, Loop & Kendrick, LLP, and Mark D. Hobson, Hobson Firm.

The Securities and Exchange Commission (“SEC”) recently partnered with the Business School at The University of Texas at Austin (“UT at Austin”), where the SEC held its 36th Annual Government-Business Forum on Small Business Capital Formation (the “Forum”). This annual Forum provides a platform for government regulators, professionals, and the public to come together in an effort to highlight and improve small business capital formation, including the elimination or reduction of unnecessary, duplicative, or outdated regulations.

Typically, the Forum is held in Washington, D.C. the day before the Fall Meeting of the ABA Business Law Section. This year, however, the SEC decided to move the Forum to Austin. Here is how SEC Chairman Jay Clayton addressed the change in venue in his remarks at this year’s Forum:

“The Texas capital is known for its lively music scene, but the crowd is gathered here today because Austin is known as the ‘rock star’ of small business cities. Austin has received a number of accolades in recent months, including being named the number one place in America to start a business, the top city for ‘small business vitality,’ and the top city for launching a technology startup.”

Chairman Clayton’s opening remarks at this year’s Forum can be found at this link:

<https://www.sec.gov/news/public-statement/annual-government-business-forum-small-business-capital-formation>.

This year’s Forum generally consisted of three parts. First, following the call to order by Sebastian Gomez Abero, Chief of the Office of Small Business Policy, SEC Division of Corporation Finance, opening remarks were heard from Jay Jartzell, Dean of the McCombs School of Business at UT at Austin, William H. Hinman, Director of SEC Division of Corporation Finance, and all three current sitting Commissioners: Chairman Jay Clayton, Commissioner Kara M. Stein (<https://www.sec.gov/news/public-statement/stein-2017-11-30>), and Commissioner Michael S. Piwowar (<https://www.sec.gov/news/public-statement/piwowar-2017-11-30>).

Following these opening remarks, the Forum then shifted to the next part, which was a panel discussion titled “*How Capital Formation Options Are Working for Small Businesses, Including Small Businesses in Texas.*” The two moderators of this panel were William H. Hinman, and Sebastian Gomez Abero. Panelists included Mark Elenowitz, Founder and CEO of TriPoint Global Equities; Jan Goetgeluk, CEO of Virtuix; Youngro Lee, CEO of NextSeed; Antonio Madrid, Co-Founder of The Native; Catherine V. Mott, CEO of BlueTree Capital Group; Michael S. Pieciak, Commissioner of the Vermont Department of Financial Regulation; Annemarie Tierney, Vice President and Head of Strategy and New Markets at NASDAQ Private Market; and Paul R. Tobias, Partner at Vinson & Elkins, LLP.

The opening remarks and panel discussion were webcast live and can be found at this link:

[https://www.sec.gov/video/webcast-archive-player.shtml?document\\_id=113017sbf](https://www.sec.gov/video/webcast-archive-player.shtml?document_id=113017sbf).

Written materials submitted by the panelists can be found at this link:

<https://www.sec.gov/info/smallbus/sbforum113017-panelist-materials.htm>.

A copy of the program materials provided to Forum participants can be found at this link:

<https://www.sec.gov/info/smallbus/sbforum113017-program.pdf>.

After the conclusion of the panel discussion, two breakout groups were formed to develop specific policy recommendations to present to the SEC. Gregory C. Yadley, a member of the SEC Advisory Committee on Small and Emerging Companies (and an author of this article), moderated one of the breakout groups, which dealt with "*Exempt Securities Offerings (including Micro-Offerings)*." The second group was moderated by Paul R. Tobias, a Partner at Vinson & Elkins, LLP, and dealt with "*Smaller Registered and Regulation A Securities Offerings*." That afternoon each group developed and prepared ten recommendations to present to the SEC for its consideration. Attached to the end of this article are the recommendations of the two breakout groups.

The breakout group session was not webcast. The final reports of the SEC Annual Government-Business Forum on Small Business Capital Formation since June 1993 can be found on the SEC's website at the following link:

<https://www.sec.gov/info/smallbus/sbforumreps.htm>.

In conclusion, this year we saw another successful SEC Annual Government-Business Forum on Small Business Capital Formation and owe a big thanks to the UT at Austin, as well as a very special thanks to Sebastian Gomez Abero, Anthony Barone, Special Counsel, Office of Small Business Policy, SEC Division of Corporation Finance, and the rest of the SEC team who each year work very hard in putting on the Forum. Thank you.

*Note:* The *views* and opinions *expressed* in this article are those of the authors and do not necessarily reflect the official policy or position of any other person, the ABA or the SEC.

\* \* \* \*

### **Exempt Securities Offerings (including Micro-Offerings) Breakout Group Recommendations**

1. Small or intermittent finders should be exempt from the requirement to register as broker-dealers.
2. The SEC should lead a joint effort with NASAA and FINRA to implement the basic principles of the American Bar Association Task Force on Private Placement Brokers. To achieve this goal, join NASAA and FINRA in developing a timeframe for quarterly or other regular meetings - with specified benchmarks - until a mutually agreeable regime of finder and limited intermediary registration and regulation or exemption is achieved.
3. Consistent with the recommendations of the SEC Advisory Committee on Small and Emerging Companies, the SEC should:
  - a. maintain the monetary thresholds for accredited investors; and

- b. expand the categories of qualification for accredited investor status based on various types of sophistication, such as education, experience and training, including without limitation persons holding FINRA licenses or CPA or CFA designations, passing a test that demonstrates sophistication, or status as managerial or key employees affiliated with the issuer.
- 4. To improve access for investors and portals in Regulation Crowdfunding offerings, the SEC should give consideration to the following.
  - a. Raise the investor's investment limit (cap) by:
    - i. removing the cap for investments by accredited investors;
    - ii. raising the cap for non-accredited investors by making the limit applicable to each specific investment rather than an aggregate limit; and
    - iii. rationalizing the cap for entities by entity type, not income.
  - b. Allow portals to receive compensation on different terms than the investor (e.g., warrants to purchase on the same terms as the investors) as well as to co-invest in offerings they list.
  - c. Rationalize Regulation Crowdfunding requirements for debt offerings and small offerings under \$250,000, for example, by:
    - i. limiting the ongoing reporting obligations to actual noteholders, (not to the general public); and
    - ii. scaling regulation to reduce accounting, legal and other costs that now are relatively inelastic, regardless of the size of the offering.
- 5. The SEC should clarify the relationship of exempt offerings in which general solicitation is not permitted - such as in Section 4(a)(2) and Rule 506(b) offerings -with Rule 506(c) offerings involving general solicitation in the following ways:
  - a. the facts and circumstances analysis regarding whether general solicitation is attributable to purchasers in an exempt offering in which general solicitation is not permitted (as set forth in the 2007 Regulation D Proposing Release) applies to a Rule 506(c) offering, whether completed, abandoned or ongoing, just as it does to a registered public offering; and
  - b. rule 152 applies to a Rule 506(c) offering so that an issuer using Rule 506(c) may subsequently engage in a registered public offering without adversely affecting the Rule 506(c) offering exemption.
- 6. To improve access for issuers to Regulation Crowdfunding offerings, the SEC should give consideration to the following:
  - a. increase the offering limit for Regulation Crowdfunding offerings to \$5,000,000 within a twelve-month period;
  - b. promote simplification of the capitalization table by allowing the use of special purpose vehicles (SPVs) to aggregate investors with appropriate conditions (e.g., democratically-organized SPVs, SPVs organized by a registered investment advisor, etc.); and
  - c. allow issuers to "test the waters" prior to filing.
- 7. The SEC should lead a joint effort with FINRA to provide clear guidance to participants in Regulation Crowdfunding offerings.

8. Withdraw the "Proposed Rule: Amendments to Regulation D, Form D and Rule 156" published in the Federal Register, Vol 78, No. 142 (July 24, 2013) pp. 44806 - 44855.
9. Study and propose a revised regulatory regime for true peer-to-peer lending platforms for small businesses and consumers, using current European regulatory and other models as reference.
10. To promote greater liquidity, the SEC should provide greater clarity with respect to which courts and authorized governmental entities may act to satisfy the exemption from registration for exchange transactions under Securities Act Section 3(a)(10), and communicate the same to broker-dealers.

### **Smaller Registered and Regulation A Securities Offerings Breakout Group Recommendations**

1. The SEC should issue guidance for broker/dealers, transfer agents, and clearing firms, regarding Reg. A securities and OTC securities. The SEC should revise Reg. A, as follows:
  - a. mandate blue sky preemption for secondary trading of Reg. A Tier 2 securities;
  - b. allow at-the-market offerings;
  - c. allow all reporting companies to use Reg. A;
  - d. increase the maximum offering amount in any twelve month period from \$50 million to \$75 million for Reg. A Tier 2 offerings;
  - e. consider overriding advance notice requirements of state regulators in Reg. A offerings and limiting state filing fees for these offerings;
  - f. require any portal that is conducting Reg. A offerings to be a registered portal similar to the requirements under Reg. Crowdfunding, and adhere to disclosure requirements including compensation and Section 17(b) of the Securities Act of 1933.
2. The SEC should permit an alternative trading system to file a Form 211 with FINRA and review the FINRA process to make sure that there is no undue burden on applicants and issuers (e.g. the Form 211 should be processed within 3 days on a non-merit basis).
3. The definition of smaller reporting company and non-accelerated filer should be revised to include an issuer with a public float of less than \$250 million or with annual revenues of less than \$100 million, excluding large accelerated filers.
4. The SEC should mandate appropriate disclosure of short positions. Additionally, the SEC should enforce Reg. SHO and Reg. T for all IPOs.
5. The SEC should recognize that quick response ("QR") codes suffice in lieu of a hyperlink to a prospectus or offering circular after the offering has gone effective or been qualified.
6. The SEC should amend unlisted trading privileges ("UTP") rules to allow small and medium size public companies the option to consolidate secondary trading to one or more trading platforms.
7. The SEC should allow for flexibility in tick sizes. Among the options to consider are to make the pilot program permanent, and/or consider other alternatives to address the narrowing spreads in an effort to move away from one-size fits all decimalization.

8. With regard to venture exchange legislation, Congress and the SEC should look to existing alternative venture exchanges serving small public companies and work within the existing framework, rather than mandate a primary trading venue, in order to promote competition between secondary trading marketplaces.
9. Proxy advisory firms should be brought under SEC registration so that the SEC may oversee how these firms make recommendations and mitigate conflicts of interest.
10. The SEC should expand the disclosure requirements of stock promotion activity. The SEC should update Section 17(b) of the Securities Act to require better transparency when companies engage promotional or investor relations firms pre- and post-offerings.

The following is a list of the MMSB Committee leadership. Please contact the Chairs or Vice Chairs of our MMSB Committee or any Subcommittee, or of our Task Forces or any of our Liaisons, to get involved in the particular MMSB Committee activities that interest you and which can benefit you, your practice and your clients. All levels are welcome, and we hope to see you soon in Orlando!

Chair and Vice-Chairs



Erik L. Kantz, Chair  
Asst. General Counsel M&A, ATI Physical Therapy  
Counsel, Saul Ewing Arnstein & Lehr LLP  
Chicago, IL  
[Erik.Kantz@Saul.com](mailto:Erik.Kantz@Saul.com)



George M. Flint III, Vice-Chair  
Parsons Behle & Latimer  
Salt Lake City, Utah  
[gflint@parsonsbehle.com](mailto:gflint@parsonsbehle.com)



Sara K. Stock, Vice-Chair  
Stock Legal, LLP  
St. Louis, Missouri  
[Sara.Stock@stocklegal.com](mailto:Sara.Stock@stocklegal.com)

Liaisons

**Corporate Counsel Committee**  
**Federal Regulation of Securities Committee**  
**Mergers & Acquisitions Committee**  
**Private Equity & Venture Capital Committee**  
**State Regulation of Securities Committee**

George M. Flint, III  
Bonnie J. Roe  
Tarik J. Haskins  
Dee R. Harris  
Mike Liles, Jr.

Editorial Board

Erik L. Kantz  
Thomas J. Walsh, Jr.  
Mark D. Hobson  
Evangelos "Andy" Kostoulas

Directors

Content Committee  
Diversity Committee  
Membership Committee

Henry M. Beck, Jr.  
Berna Rhodes-Ford  
Berna Rhodes-Ford

Pro Bono Committee  
Programs Committee  
Publications Board  
Technology Committee

Sarita Nair  
Jared Kaplan  
Elizabeth A. Bleakley  
Evangelos “Andy” Kostoulas and  
Sahmra Stevenson

Task Forces

Private Placement Broker

Linda Lerner, TFC  
Martin Hewitt, TFVC

Short Form M&A Documents

Eric Graben, TFC

Subcommittees

Business Entities Governance  
Corporate Counsel Triage Project

Allen Sparkman, SC  
George M. Flint, III, SC  
Madelyn Shulman, SVC

Committee Newsletter

Mark D. Hobson, SCC  
Evangelos “Andy” Kostoulas, SCC

Emerging Companies

Elizabeth DiRusso, SCC  
Michael Vargas, SCC

Family-Owned Businesses  
International Expansion &  
Cross-Border Transactions

Michael P. Connolly, SC  
Michel Gelinias, SCC  
Hermann J. Knott, SCC  
Jeffrey Van Winkle, SCC

Membership  
Programs & Planning

Berna Rhodes-Ford, SC  
Erik Kantz, SCC  
George Flint III, SCC  
Eric A. Vendt, SCC

Publications  
Securities Regulation  
Technology

Elizabeth A. Bleakley, SC  
Bonnie J. Roe, SC  
Evangelos “Andy” Kostoulas, SCC  
Sahmra Stevenson, SCC

(SC = Subcommittee Chair; SCC = Subcommittee Co-Chair; SVC = Subcommittee Vice-Chair; TFC = Task Force Chair; TFVC = Task Force Vice-Chair).