Message from the YLF Committee

On behalf of the Business Law Section's Young Lawyer Committee, we invite you to join us for the Eighth Annual Young Business Lawyer Institute, scheduled for Thursday, April 14, 2011, in Boston, Massachusetts, during the Section's Spring Meeting.

The Institute will feature an activity-filled day of timely and important continuing education programming targeted at business lawyers in the early years of their career (but don't worry, there is a mix of content that even business lawyers with numerous years in practice will find extremely valuable).

There will also be a networking lunch, a welcome reception, a leadership opportunity meeting, and a high-energy evening event. All of these opportunities are offered to you in a one-day package. The YLC Social Committee is busy planning our always-popular post-Institute dinner. Place, time and ticket information will be announced soon. The dinner sells out quickly. If you register for the Institute now, then you will be contacted as soon as tickets go on sale.

The YLC: A Wise Choice and Wonderful Opportunity

With more demands upon us than time, one-stop opportunities such as those offered by Young Lawyer Committee are a wise choice. The Young Lawyer Committee serves as a center of gravity for business lawyers under the age of 40. Every Business Law Section lawyer member who meets these criteria is automatically a member of the Young Lawyer Committee. The Committee provides its members with numerous opportunities for education, training, networking, socializing, leadership and business development. The Committee also strives hard to integrate its members into the Section's substantive committees and to assist them in finding a home in active Section work.

Make friends, generate business, network with lawyers from around the world, join a committee and learn something new. Your firm might even sponsor you.

We encourage your participation and activism, and look forward to seeing you in April 2011!

Featured Articles

Mergers and Acquisitions: Do I Really Have to Worry About the Securities Laws?

Attorneys are often engaged to advise their client regarding the purchase or sale of a business. These transactions are typically structured as a purchase of the assets or stock of the seller or a merger of the seller with the purchaser, or an affiliate thereof. Often a portion of the purchase price may be paid to the seller in stock of the purchaser. While practitioners often focus their efforts on drafting the purchase or merger agreement and the ancillary transaction documents, there are many other issues to consider, such as the securities laws. If not approached carefully, a seemingly straightforward acquisition can land the unsuspecting practitioner, and its client, in hot water with the Securities and
Exchange Commission ("SEC"). The focus of this article is to make attorneys who counsel businesses regarding mergers and acquisitions, whether as in-house counsel or otherwise, aware of the securities law implications of these transactions.

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Drawbacks to Clawbacks: Innocent Victim or Windfall Recipient?
Amy Rigdon

A clawback is an equitable tool existing at common law that has been codified and used frequently in bankruptcies. In the context of Ponzi schemes, however, the application of clawbacks to the investor-victims is more novel and controversial. At the ABA Business Law Conference in Denver, Colorado in the Spring of 2010, a panel discussed the benefits of and drawbacks to clawbacks in regard to Ponzi schemes and an investor's potential exposure. This program, "The Drawbacks of Clawbacks," featured Ellen S. Podgor of Stetson University College of Law, Thomas J. Coenen of Cleary Gottlieb Steen & Hamilton, Robert C. Mendelson of Morgan Lewis & Bockius, and John C. Weitnauer of Alston & Bird, as panelists. Kristin David Adams of Stetson University College of Law served as moderator.

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Cutting-Edge Legal Ethics Issues For Transactional Lawyers In A Changing, Challenging Economy
Joseph H. Flack

A lawyer logs into Facebook and reads a post by an acquaintance that describes being in an accident. The acquaintance lives in a neighboring state. Intending to be helpful, the lawyer posts in response indicating that the person may have a claim, along with some other helpful tips. The lawyer may not have considered that the liability and ethics risks of online social networking might include in this instance a malpractice suit for failing to inform the person about the relevant statute of limitations or disciplinary sanctions for the unlicensed practice of law in a state where the lawyer is not licensed. This scenario and other relevant ethics problems were discussed at a CLE panel during the ABA Business Section's Spring Meeting in Denver, Colorado. This well-attended panel entitled "Cutting-Edge Legal Ethics Issues for Transactional Lawyers" provided guidance for dealing with the challenging ethics issues that arise in a rapidly changing economy. The committees presenting this panel were the Business and Corporate Litigation, Intellectual Property Transactions, and Professional Responsibility Committees.

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The Startup Visa: Background Behind the ABA Business Law Resolution
The American Bar Association's (ABA) governing body, the House of Delegates, voted in favor of Resolution 300, authored by the ABA Section of Business Law, calling on Congress to create a new visa program designed to provide a mechanism for immigrant-entrepreneurs to enter or remain in the United States to build bona fide businesses. The initiative known as the "Startup Visa" has legislation pending in Congress that the ABA will now encourage such legislation be enacted into law. "Immigrant-entrepreneurs face a patchwork of immigration laws which they may or may not be able to piece together to come, stay and build a business in the U.S.," said Barbara Mayden in her speech to the ABA delegates. "Given the hurdles that exist here [for immigrant-entrepreneurs], many believe that greater opportunity exists elsewhere ... this represents a relief well."

The ABA resolution states that the "American Bar Association urges Congress to enact laws that provide for an immigration classification whereby foreign nationals intending to form businesses are provided a mechanism (such as Startup Visa) under which they can enter or remain in the United States to obtain permanent resident status in order to build such businesses." This resolution authorizes the ABA to publicly support and advance these efforts to enact this key immigration reform. This support of the Startup Visa was initiated by the ABA's Section of Business Law and co-sponsored by the Sections of International Law, Antitrust, and Real Property, as well as supported by the Commission on Immigration and the Section of Individual Rights and Responsibilities.

"The ABA represents a key voice of the legal community," said Eric Koester, an author of the Startup Visa resolution. "We recognize that the Startup Visa initiative is crucial to help America continue its place as the center of entrepreneurship and technology. While there is certainly more work to be done to get this enacted, another ally has lined up behind the Startup Visa movement."

With nearly 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

To replay the speech in support of the Startup Visa to the ABA by Barbara Mayden, the representative of the Section of Business Law, go to: http://www.abanow.org/2010/08/delegates-support-measure-encouraging-immigrant-us-business-formations/.

The Startup Visa Act of 2010, introduced in February 2010 by Senator John Kerry (D-MA) and Richard Lugar (R-IN), would modify the existing EB-5 visa to enable job-creating entrepreneurs to immigrate to the United States. The bill requires each entrepreneur to have a sponsoring US venture capital or angel investor who will invest at least $100,000 in their startup, and total funds raised must be at least $250,000 per company. The legislation is supported by more than 150 venture capitalists and investors who signed a letter urging its passage. While in DC, the group will be meeting with members of Congress, The White House, Commerce Department, State Department and Small Business Administration, and bringing thousands of messages from voters around the country who support the bill. The grassroots effort to create the bill began last year, prompted by a blog
post by Paul Graham of venture capital firm Y Combinator. Brad Feld, a venture capitalist with Foundry Group based in Colorado, took the next step and began promoting the idea on his website and blog. McClure and Silicon Valley entrepreneurs Eric Ries and Shervin Pishevar then joined the effort by creating the StartupVisa.com website after a previous trip to DC by Silicon Valley geeks in September, and producing a video featuring Ries and Canadian entrepreneur Eric Diep, who had been unable to get a visa to start his company in the US. Feld worked together with congressman Jared Polis (D-CO) to draft legislation introduced in the House last fall, and was later joined by Kerry and Lugar in introducing similar legislation in the Senate. This report tells more about the Startup Visa.

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ABA Materials:

100 Plus Pointers for the New Partner
Dr. Sharon Meit Abrahams, Author
Jill Eckert McCall, Editor

Transitioning from an associate to a partner is a leap of faith.

You need faith in yourself and faith in your firm. 100 Plus Pointers for the New Partner will guide you through the questions, issues and information you should be familiar with as you take on this new role. This easy to read electronic publication includes such tips as understanding your firm's governance, structure and economics, personal strategies for business and client development, and the skills and knowledge needed to step up into a leadership position. When you receive the long awaited call, reach for this publication so you know what to do next.

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Upcoming Event:

New Partner and In-House Counsel Conference
February 25-26, 2011
Philadelphia, PA

- Organized by the ABA Young Lawyers Division, co-sponsored by the ABA Business Law Section, Young Lawyers Committee

Upcoming Meetings for Young Business Lawyers
Section of Business Law

- The Institute for the Young Business Lawyer, held in connection with the 2011 Spring Meeting, ABA Section of Business Law. Boston, MA, April 14, 2011. (See 2010 Institute information [here](#)).
- 2011 ABA Annual Meeting. ABA Section of Business Law. Toronto, Ontario, August 5-8, 2011.

Young Lawyers Division


Get Published Now! Articles Needed!

Over 12,000 Young Business Lawyers Want to Hear From You! There are over 400,000 ABA members of which more than 57,000 are Business Law Section members, in addition to the general public, that will have access to your article through high ranking search engine results. Your article will also be memorialized on the ABA website. The Young Lawyer Committee is collecting articles for future newsletters which are circulated to our members worldwide. Please send your submissions to Eric Koester at eric.koester@appatureinc.com.

Articles should be 1500 words or less, and on any topic of interest to young lawyers. From short scholarly articles, to practice tips, reviews/summaries of a Section program, life in the trenches, interesting pro bono projects, humorous looks at life and the law, or even how you balance work and personal life. We appreciate your help in making this newsletter a success.

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MERGERS AND ACQUISITIONS: DO I REALLY HAVE TO WORRY ABOUT THE SECURITIES LAWS?

By Willard A. Blair

Attorneys are often engaged to advise their client regarding the purchase or sale of a business. These transactions are typically structured as a purchase of the assets or stock of the seller or a merger of the seller with the purchaser, or an affiliate thereof. Often a portion of the purchase price may be paid to the seller in stock of the purchaser. While practitioners often focus their efforts on drafting the purchase or merger agreement and the ancillary transaction documents, there are many other issues to consider, such as the securities laws. If not approached carefully, a seemingly straightforward acquisition can land the unsuspecting practitioner, and its client, in hot water with the Securities and Exchange Commission (“SEC”). The focus of this article is to make attorneys who counsel businesses regarding mergers and acquisitions, whether as in-house counsel or otherwise, aware of the securities law implications of these transactions.

Overview of Securities laws

The major federal securities laws are the Securities Act of 1933 (the “Securities Act”) and the Securities and Exchange Act of 1934 (the “Exchange Act”). The thrust of the Securities Act is to prohibit misrepresentation or fraud in, and to ensure that investors receive all material information with respect to, the offer and sale of securities to the public by an issuer. The Exchange Act established a system of mandatory disclosures for securities traded on the public markets and sets forth the periodic reporting and disclosure requirements of such issuers, such as quarterly and annual reports, proxy solicitations and tender offers, for example. These laws are administered and enforced by the SEC, whose mission is to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”

Is there a sale of a security?

It is common knowledge that “stock” is a security; it is defined as such in Section 2 of the Securities Act. What is often overlooked, however, is that a transfer of stock incidental to the sale of a business is also a securities offering to which the Securities Act applies. In 1985, the U.S. Supreme Court held that the securities laws would apply to a sale of a business through the sale of all of the outstanding stock of that business by the stockholders. Of course, the issuance of new stock by one company to the shareholders of another company in exchange for their shares of stock is a securities offering as well.

If there is a sale of securities, have the securities been registered?

If securities are being transferred incidental to the sale of a business, they must fall under one of the exemptions from registration or be registered under the Securities Act, which requires that the issuer file a registration statement with the SEC and pay a substantial fee to register the securities. The preparation of a registration statement is a time consuming task
and the accountants’ and lawyers’ fees incurred in preparing a registration statement can be high. Further, the registration statement’s preparation can take months. Also, the SEC must review and declare the registration statement effective before the stock can be issued. This evaluation period can significantly delay the consummation of the transaction. Moreover, once the securities are registered, the registrant becomes subject to the public reporting and disclosure requirements of the Exchange Act. This, in turn will require that the company engage qualified attorneys, accountants, and other professionals on an ongoing basis to assist in meeting these requirements.

Is there an exemption from registration for the securities?

Due to the time and money involved in registering securities, issuers often try to avoid registration by issuing the securities pursuant to an exemption from registration. Whenever attempting to conduct an unregistered offering of securities, the first two legal issues that must be addressed are (1) which exemption from the registration requirements of the securities laws will be available to the Company, and (2) what type of disclosure will be required. Although there are many statutory exemptions from registration, these exemptions are narrowly tailored and strictly construed. The most common exemption used for stock issued as consideration in a merger or acquisition is the private placement exemption pursuant to section 4(2) of the Securities Act, and the section 4(2) safe harbors contained in Regulation D. Generally, there can be no public solicitation of advertising and the issuer must make (or make available, depending on the specific exemption and the nature of the purchasers) certain disclosure. The securities are also “restricted” and subject to limitations on resale. Moreover, while the issuer can sell to an unlimited number of “accredited investors,” it may only sell securities to a limited number of “non-accredited” purchasers.

Blue Sky laws

Whenever unregistered securities are being sold, an exemption from registration must be found not only at the federal level, but also at the state level in each state where a transferee resides. Pursuant to many states’ securities, or “blue sky,” laws, even if an exemption from registration can be found, a notice of the sale may need to be filed with the state. Thus, regardless of which federal exemption applies, a careful analysis of the residency of each potential offeree and of these states’ securities laws should be conducted before the transaction is consummated. Also, where securities will be transferred to non-U.S. citizens or entities, counsel outside the United States should be retained to determine if there is an appropriate exemption from registration in each country of residence.

Disclosure

Regardless of whether an exemption from registration applies, the exemption from registration does not exempt the offer or sale of securities from the anti-fraud provisions of both the federal securities laws and the securities laws of the various states. Where shareholders are entitled to vote on the transaction that will result in their receipt of another
issuer’s stock, the issuer must provide (or make available, depending on the type of offering that is being made) to each offeree all available information material to an understanding of the company, its business, and the securities being offered, and the company must not make any material misstatements in connection with the offering. This disclosure is typically made by drafting and delivering a combined prospectus/proxy statement to each shareholder entitled to vote on the acquisition.

**Resale of Securities**

Securities issued pursuant to an exemption from registration are “restricted securities.” They may not be publicly resold unless the shareholder complies with Rule 144, and if the issuer is not a reporting company under the Exchange Act, until the shares have been held for at least one year. If the shares have been registered with the SEC, then they are not restricted and may be freely resold, subject to certain limitations on resales by affiliates of the issuer. Regardless of whether the securities are registered, if a recipient of a purchaser’s shares becomes an officer or director of purchaser, as often occurs in a business acquisition, he may be deemed to have insider information regarding the purchaser. Consequently, the recipient may be subject to insider trading laws, strictly limiting his or her ability to resell the securities.

**Penalties for Violations of the Securities Laws**

The penalties for violating the securities laws can be very severe. Liability for these violations is generally based on either selling unregistered securities without having an applicable exemption or engaging in fraud in the sale of the securities. Under Section 11 of the Securities Act, issuers are liable if a registration statement “contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading.” Section 12 of the Securities Act establishes liability for unregistered securities sales, creates a purchasers’ right of rescission and establishes liability for fraud regarding the offer or sale of a security. Moreover, where unregistered securities are sold and the company fails to comply with an applicable exemption from registration, not only the company, but also its officers and directors may incur severe civil and criminal fines and penalties.

**Conclusion**

The securities laws are very complex, and business acquisitions may have many securities laws implications which must be carefully considered before the transaction is structured, much less negotiated and consummated. Because of the serious penalties for violating the securities laws, whenever there is an offer or sale of a security, whether in an acquisition or otherwise, securities counsel should be consulted to ensure that the issuer is in full compliance with the securities laws. This article is not meant to be an exhaustive summary
of securities laws and should not be taken as such. Rather, it is meant to merely provide an overview of a few of the multitude of securities laws implicated in mergers and acquisitions.


4 See 17 C.F.R. § 230.144

5 See 17 C.F.R. § 230.145

About the Author: Mr. Blair is an associate in the corporate practice group in the Tampa, Florida office of Shumaker, Loop & Kendrick, LLP.
DRAWBACKS TO CLAWBACKS: INNOCENT VICTIM OR WINDFALL RECIPIENT?

By Amy Rigdon

Your client invested $100,000 in Madoff’s hedge fund in 2000 and, fortunately, redeemed and exited the fund in 2006. Your client was one of the lucky ones—she received her entire initial investment and a return on that investment, in all totaling $150,000. Your client thought she made a great investment and had no idea of the fraud that was being committed. By 2009, your client realized that she was extremely lucky to have exited when she did.

In 2010, the receiver for the Madoff fund calls your client and says that she must repay the return on her investment that she received in 2006 ($50,000). The receiver tells your client that she is subject to a “clawback.” Your client calls you in a panic, wanting to know what a clawback is and whether she really owes $50,000 when she did nothing wrong.

While the example above is fictional, thousands of investors were defrauded in the numerous Ponzi schemes of Bernard Madoff, Allen Stanford, and others like them. Some of those investors were lucky and exited before the demise of the scheme, thereby recovering their entire investment and possibly receiving an additional amount as a return on their investment. (For purposes of this article, we will assume that these lucky investors had no knowledge of the Ponzi scheme.) Other investors were not lucky, did not choose to redeem their investment before the scheme was uncovered, and lost everything. In most Ponzi schemes, the performance of the investment is fictional, consequently making the received returns also fictitious. As receivers are appointed to recover money from these schemes, they decide whether to pursue certain investors who received returns in excess of their investments since those returns were never “real” to begin with. This process is called a clawback.

A clawback is an equitable tool existing at common law that has been codified and used frequently in bankruptcies. In the context of Ponzi schemes, however, the application of clawbacks to the investor-victims is more novel and controversial. At the ABA Business Law Conference in Denver, a panel discussed the benefits of and drawbacks to clawbacks in regard to Ponzi schemes and an investor’s potential exposure. This program, "The Drawbacks of Clawbacks," featured Ellen S. Podgor of Stetson University College of Law, Thomas J. Coenen of Cleary Gottlieb Steen & Hamilton, Robert C. Mendelson of Morgan Lewis & Bockius, and John C. Weitnauer of Alston & Bird, as panelists. Kristin David Adams of Stetson University College of Law served as moderator.

Generally, clawbacks are used in commercial transactions where a debtor fraudulently transfers its assets to a third party to avoid paying its creditor. At its simplest, a transfer is fraudulent if the debtor made the transfer with the actual intent to hinder, delay, or defraud a creditor. In such a case, the fraudulent transfer can be avoided, and the receiver, or trustee if a bankruptcy, may retrieve or “clawback” the assets or money fraudulently conveyed to the third party. The receiver then distributes those recovered assets to outstanding creditors.
A Ponzi scheme is a fraud transfer scheme or pyramid scheme where proceeds received from later investors pays earlier investors their “returns” guised as “profits” from the alleged business venture. Applying commercial or bankruptcy law, the earlier investor who receives these fictitious profits (labeled as a return on his investment) is considered the “third-party transferee” and such return is considered a fraudulent conveyance, whereas an investor who loses everything is considered the “creditor.” After the scheme collapses, which they inevitably do, the receiver seeks to recover payment of fictitious “profits” made to investors. Nevertheless, most investors usually had no knowledge of the Ponzi scheme and did not know that the return on their investments was a sham.

Under the bankruptcy code and common law, there are defenses for transferees to defeat clawbacks. A transferee that is able to show that it has taken a fraudulent transfer for “value” and in “good faith” may overcome a potential clawback of that transfer. In the context of a Ponzi scheme, numerous cases have held that the repayment of an investor’s initial investment is likely for “value,” while the payment of returns or fictitious profits is likely not for value. Additionally, courts have determined that “good faith” means that the investor redeemed his investment not because he had concerns about the fund but for some other personal reason, such as the purchase of a new house, unrelated to the well-being of the fund. If an investor has inquiry notice of a potential problem with the fund, the investor must conduct a diligent investigation to allay any concerns about the fund. If an investor does not perform this due diligence, the investor cannot rely on the “good faith” defense. Unfortunately, if an investor conducts the investigation and discovers problems with the fund, the investor also cannot rely on the “good faith” defense. As one of the panelists described it, the oddity is if an investor redeems “innocently” for purposes unrelated to the fund’s well-being, the investor is better off (and can rely on the good faith defense) than if the investor redeems because he has concerns about the fund.

So what should happen with these “transferee” investors who redeemed and received a return of fictitious profits? Should receivers treat those investors as fraudulent transferees and prevent them from retaining their return because it was fictional and constitutes a windfall? Or, should receivers treat those lucky investors as innocent victims who should not be punished for leaving the fund early and allow them to retain their return? The panel was split.

In support of clawbacks in a Ponzi scheme, some panelists thought that the investors did not meet the good faith defense because if they believed the too-good-to-be-true promises of the Ponzi scheme, the investors did not perform adequate due diligence. Additionally, investors who got back their initial investment have been made whole; anything above and beyond the initial investment—the return—is another defrauded investor’s money. Thus, the clawback attempts to make all creditors whole and prevent any creditor from receiving a windfall. On the other hand, the panelists opposing the use of clawbacks countered that no one uncovered these schemes for years, so the investors should not be punished for not discovering the fraud through more thorough due diligence. Further, any investment is a risk in which some people
will fare better than others, so the lucky investors should again not be punished for being lucky that they redeemed earlier in time.

While currently there is no resolution to this debate, lawyers with clients affected by a Ponzi scheme should be aware of their client’s potential exposure as an investor or former investor in these schemes. The panelists noted that the simplest way to protect clients from potential clawbacks is to avoid falling victim to a Ponzi scheme in the first place. Thus, when clients are determining whether to invest in business ventures, lawyers should review the deal for any red flags, including promises of high returns with no risk and difficulty receiving written materials about the business.

About the Author: Amy R. Rigdon is an associate in the Orlando, Florida office of Holland & Knight. Ms. Rigdon practices in the area of corporate and securities law. Her practice includes investment management, mergers and acquisitions, general corporate law, and litigation. Specifically, her experience includes forming and providing counsel to investment advisers and onshore and offshore hedge funds.
CUTTING-EDGE LEGAL ETHICS ISSUES FOR TRANSACTIONAL LAWYERS IN A CHANGING, CHALLENGING ECONOMY

By Joseph H. Flack

A lawyer logs into Facebook and reads a post by an acquaintance that describes being in an accident. The acquaintance lives in a neighboring state. Intending to be helpful, the lawyer posts in response indicating that the person may have a claim, along with some other helpful tips. The lawyer may not have considered that the liability and ethics risks of online social networking might include in this instance a malpractice suit for failing to inform the person about the relevant statute of limitations or disciplinary sanctions for the unlicensed practice of law in a state where the lawyer is not licensed.

This scenario and other relevant ethics problems were discussed at a CLE panel during the ABA Business Section’s Spring Meeting in Denver, Colorado. This well-attended panel entitled “Cutting-Edge Legal Ethics Issues for Transactional Lawyers” provided guidance for dealing with the challenging ethics issues that arise in a rapidly changing economy. The committees presenting this panel were the Business and Corporate Litigation, Intellectual Property Transactions, and Professional Responsibility Committees.

1. Online Social Networking, Media and Marketing: Deborah G. Shortridge

Panelist Deborah G. Shortridge, Loss Prevention Counsel for the Attorneys’ Liability Assurance Society, Inc., presented on the ethics and liability risks of online social networking—a highly relevant issue for the lawyers of today. Online social networking, something with which most young lawyers are familiar, includes participating in such website programs as Facebook, Twitter, and MySpace. Online social networking also includes blogs, which are websites for thoughts, ideas, and commentary. The issues surrounding online social networking are as relevant as ever. According to Shortridge, 29 of the AMLAW 100 law firms have Twitter accounts, and 12 have Facebook pages.

Lawyers participating in online social networking should be careful anytime a person asks what the lawyer thinks about a specific matter. The lawyer should be aware that a fact-specific response to a posting or question could be interpreted as legal advice by the person to whom it was directed. As a result, an unintended attorney-client relationship may be created. Once the attorney-client relationship is created, a number of ethics rules will apply.

A major ethical risk in online social networking is the disclosure of confidential information. Lawyers who discuss their cases on blogs, Facebook, Twitter, MySpace, or other online media risk violating Rule 1.6(a) unless the client has given informed consent to the disclosure.iii Even if an unintended attorney-client relationship is not formed, a lawyer may have a duty of confidentiality to another person involved in social networking as a prospective client.iv Shortridge discussed an actual case involving disciplinary action brought against a lawyer for online postings describing matters the lawyer was handling even
though the lawyer never named the client. To avoid such risk, lawyers should adhere to the following general principle: do not post specific information online that relates to clients.

Online social networking and blogging implicates the ethics rule on unauthorized practice of law.\textsuperscript{iii} Shortridge pointed out that at least one ethics opinion has stated that giving chat-room advice online to a person in a state where the lawyer is not licensed is the unauthorized practice of law.

Ethics rules on advertising and solicitation also pose problems for lawyers involved in online social networking. Caution is recommended in online postings that relate to a lawyer or a lawyer’s services, especially given that even truthful reports might be deemed misleading in violation of the rule.\textsuperscript{iv} Model Rule 7.1 prohibits lawyers from making false or misleading communications about the lawyer or the lawyer’s services.\textsuperscript{v} Model Rule 7.2 makes electronic communications subject to Model Rules 7.1 and 7.3.\textsuperscript{vi}

Lawyers marketing their services through an online medium should be aware that their audience may cross state lines and implicate the non-uniform ethical restrictions on advertising in other jurisdictions. It is important to keep in mind that most of the population does not know what lawyers do, so what lawyers may think is obvious may be misleading to a non-lawyer. The ethics rules are generally protective of clients and prospective clients. What if a lawyer asks a client to post positive information about the lawyer on a third party website that evaluates lawyers? Some jurisdictions’ allow client testimonials. Others do not. The chance of a technical violation of another state’s ethics restrictions is great.

Conflicts of interest can also arise when lawyers share information online. Model Rules 1.7 addresses conflicts of interest as to current clients, and Model Rule 1.9 addresses them as to former clients.\textsuperscript{vii} One problem in this area arises when lawyers communicate with a party whose interests are adverse to a current or prospective client of the lawyer or his law firm. A lawyer could be prevented from representing a party in a matter because the lawyer received information online from a social networking participant that must be kept confidential under Model Rule 1.18.\textsuperscript{viii}

A lawyer should remember a few important points before sharing information online. Know the risks and rules of online social networking. Don’t share confidential information. Avoid giving legal advice—that is, don’t apply law to facts. Use disclaimers and legends, and adjust privacy settings. Talk to ethics expert when in doubt and develop a relationship with that expert. Know the rules on advertising. The ABA’s website has an analysis over 100 pages covering the differences between the Model Rules advertising restrictions and the rules of various states.

2. Representation of Multiple Lenders in a (Deeply) Troubled Economy – William Freivogel and Andrew F. Halaby

In the past when economic times were better, a lawyer would get a file from a lending client. The scope of the representation may not have been well-defined, and often not in writing. The duration of the representation may not have been clear, and recurring work
could continue for years. The understandings with the client about use of confidential information, and representation of the lender’s interest vis-à-vis other lenders remained unstated. But did it matter then? Ethically, such issues always matter. From a practical standpoint, though, these issues did not matter because loans performed and paid and loan modifications were not driven by financial duress but by other factors. Lenders routinely waived conflicts, and law firms represented multiple lenders who each made loans to entities owned and controlled by the same guarantor.

The world has changed. The new reality is that lenders are losing money, loans are not performing, security interests are inadequate, and guarantors cannot pay the deficiencies. Some lenders may not survive. The commercial real estate market may be declining, and many commercial real estate loans are underwater. Lending institutions or their receivers may be looking for ways to pass off losses to law firms, as in the 1980s and early 1990s during the savings and loan crises when the Resolution Trust Corporation targeted hundreds of lawyers and their firms, forcing them to pay huge sums of money.

Although the economic conditions have changed, the ethics rules have not. New ethics challenges have emerged. Andrew F. Halaby and widely-respected ethics consultant William Freivogel addressed these issues in their panel segment on ethics risks in representation of multiple lenders during tough economic times. Their discussion of the ethics problems centered on hypothetical fact patterns given at the outset. These provided an excellent context for their discussion of Model Rules 1.6 (confidentiality), 1.7 (current client conflicts), 1.9 (former client conflicts), and 1.10 (the imputation rule) in the lending context.

Consider one of the hypotheticals used. Lawyer A and Lawyer B work at the same law firm. Lawyer A has a client, Lender 1. Lawyer B has a client, Lender 2. Lender 1 has made a loan to Single Asset Entity X. Lender 2 has made a loan to Single Asset Entity Y. Both loans are guaranteed by the same person, Guarantor. Lawyer A assisted Lender 1 in the original loan transaction involving SAE X and Guarantor. Assume that both loans are underwater, and that Guarantor has inadequate finances to pay both lenders—a zero-sum situation. Lawyer A represents Lender 1 the matter of the defaulted loan to SAE X and Guarantor.

If Lender 2 comes to Lawyer B after SAE Y defaults and asks for a “scorched earth approach” to collection from SAE Y and Guarantor, the first question for Lawyer B is whether Lender 1 is a current client of the firm. Absent appropriate consents, this approach on behalf of Lender 2 creates an ethical problem involving a concurrent conflict of interest and problems with confidentiality duties. The imputation rule makes both lenders the clients of both lawyers. In representing Lender 2, Lawyer B cannot use the confidential information in Lawyer A’s file for Lender 1. The duty of loyalty bars Lawyer B from undermining Lender 1’s legal position and affecting Lender 1’s ability to get paid on its loan to SAE X and Guarantor. Neither lawyer, moreover, can obtain informed consent to the conflict from the other lawyer’s client. If Lawyer B tries to get Lender 1 to consent to the conflict, Lawyer B has to use Lender 2’s confidential information to explain the conflict, and to get a waiver from Lender 2 to use its confidential information in obtaining a conflict waiver from Lender 1 requires revealing confidential information about Lender 1 to Lender 2. The upshot is that
some conflicts are unwaivable because informed consent cannot be obtained without violating Model Rule 1.6.

Freivogel and Halaby presented other useful hypotheticals involving the same basic fact pattern. These can be found in the materials for this CLE panel located in the Meetings Portal of the ABA website’s Business Section. Freivogel has a website guide that is a great ethics resource for attorneys as well. xv


The risk of patent or trademark infringement and related litigation has increased a great deal during this recent recession. Intellectual property becomes more vulnerable when economic times worsen. Panelist Scott C. Sandberg xvi discussed ethical and attorney-client privilege issues arising in the context of intellectual property. He explained that the legal standards for willful patent and trademark infringement are evolving. Certain aspects of such standards, Sandberg said, are moving away from a simple or even gross negligence standard towards a standard where the risk of infringement must have been “known or obvious to the infringing party” in order to be considered willful. xvii

In a non-litigation context, clients request opinions on whether their products infringe a patent or trademark. The opinions, investigation and advice of counsel become important in the infringement litigation context later on because they are very often used as a defense to a willful infringement claim. A defendant in an infringement case argues as a defense that it relied on the lawyer’s opinion or advice. Injecting advice or opinions of an attorney into the litigation raises the issue of waiver of the attorney-client privilege.

The changing legal standards for willful infringement can also create ethical problems. Such problems include the possibility of (i) compromising the confidentiality of attorney-client communications, xviii (ii) compelling counsel to act as a witness, xix and (iii) complicating counsel’s compliance with its duty of candor to a tribunal or duty of disclosure to opposing parties. xx

Model Rules 1.7 and 1.9 are implicated when lawyers give advice or non-infringement opinions to a current or former client and then later litigate infringement cases against the affiliates or subsidiaries of same client or former client. Model Rule 2.3 prohibits a lawyer from evaluating a matter affecting a client if the lawyer knows it is likely to materially and adversely affect the client’s interests. xxi This rule is applicable, for example, in the situation in which a lawyer renders an opinion for one client as to infringement of a patent or mark that affects another client who has a competing or conflicting interest affected by the opinion.

Under Model Rule 3.1, opinion counsel’s advice to a client on an infringement issue may affect whether trial counsel has a good-faith basis to defend a willful infringement claim. In US PTO proceedings where lawyers make representations in the course of prosecuting patents and registering trademarks, Model Rules 3.1, 3.3(a)(1), and 3.4 prevent
a lawyer from making frivolous claims, false statements of fact or law, or knowingly concealing information.

It is no longer clear that a lawyer in a firm can litigate a patent when another lawyer in the same firm has prosecuted that patent for the client. The law is in flux. In any event, transactional lawyers should understand the ethical problems with the seamless representation model of a client.

(1) See, e.g., ABA MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009). This model rule has been adopted in some form in every state except California, which has its own confidentiality rule. See Cal. Bus. Prof. Code § 6068(e).

(2) ABA MODEL RULES OF PROF’L CONDUCT R. 1.18 (2009).

(3) ABA MODEL RULES OF PROF’L CONDUCT R. 5.5 (2009).

(4) ABA MODEL RULES OF PROF’L CONDUCT R. 7.1 cmt. 3 (2009).


(7) ABA MODEL RULES OF PROF’L CONDUCT R. 1.7, 1.9 (2009).

(8) ABA MODEL RULES OF PROF’L CONDUCT R. 1.18 (2009).

(9) Partner, Snell & Wilmer, Phoenix, AZ. Halaby was the Chair of the CLE panel.

(10) Chair of the Professional Responsibility Committee of the ABA Section of Business Law.

(11) Lawyer A’s scope of representation with Lender 1 may not have been adequately defined or in writing.

(12) MODEL RULES OF PROF’L CONDUCT 1.10 (2009).

(13) MODEL RULES OF PROF’L CONDUCT 1.6 (2009).

(14) MODEL RULES OF PROF’L CONDUCT 1.7(a) (2009).


(16) Partner, Snell & Wilmer LLP, Denver, CO.

(17) See In re Seagate Tech., LLC, 497 F.3d 1360, 1370 (Fed. Cir. 2007) (en banc). This case and others are discussed the CLE panel materials, which include PowerPoint slide printouts and an article by David G. Barger and Scott C. Sandberg entitled Update on
Culpable Mental States and Related Ethical and Privilege Implications in Federal Civil Litigation.

(18) See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009).


(21) See MODEL RULES OF PROF’L CONDUCT R. 2.3(b) (2009).

About the Author: Joseph H. Flack is an associate in the Anchorage, Alaska office of Birch Horton Bittner & Cherot PC. Mr. Flack’s practice includes commercial and real estate transactions, secured lending and related litigation.
RESOLVED, that the American Bar Association urges Congress to enact laws that provide for an immigration classification whereby foreign nationals intending to form businesses are provided a mechanism (such as Startup Visa) under which they can enter or remain in the United States to obtain permanent resident status in order to build such businesses; and

FURTHER RESOLVED, that the American Bar Association recommends that the laws and regulations relating to such immigration classification provide for an appropriate duration to establish such businesses.
We continue to have the best universities in the world, the best innovation and technologies in the world. We continue to have some of the best workers in the world, the most productive workers in the world. We have the kind of dynamism and entrepreneurship in our economy that’s going to serve us well in the long term.

President Barack Obama

November 23, 2009

Yahoo! would not be an American company today if the United States had not welcomed my family and me almost thirty years ago. We must do all that we can to ensure that the door is open for the next generation of top entrepreneurs, engineers and scientists from around the world to come to the U.S. and thrive. Whether they arrive as children, students, or professionals, we want the best and the brightest here. Our immigration policy should reflect that or these talents will go elsewhere.

Jerry Yang

Co-Founder, Yahoo!

The purpose of this report is to recommend the creation of a mechanism within the U.S. immigration regime to allow foreign nationals forming certain types of businesses (collectively, “Immigrant-Founders”) to obtain legal status within the United States. This report recommends the creation of a new immigration category for these Immigrant-Founders, hereinafter referred to as the “Startup Visa” classification. In particular, this report urges Congress to enact laws that provide for a Startup Visa, whereby foreign nationals forming businesses are provided a mechanism under which they can enter or remain in the United States and obtain permanent resident status to build such businesses. A Startup Visa category should provide for an appropriate duration to allow the development of such businesses and should be designed to be available only to those foreign nationals who build bona fide businesses that spur innovation and employment in the U.S.

The report will address three key areas: (1) a background on the role the immigration of foreign nationals plays in innovation; (2) the challenges of Immigrant-Founders in the current immigration system; and (3) an explanation of the key criteria of a modified U.S. immigration regime for Immigrant-Founders.

1 The primary authors of this report were Eric Koester and Bryn Weaver. In addition, the authors would like to thank the following individuals for their support and assistance: Daniel Palugyai, Brad Feld, Paul Kedrosky, Michael Lincoln, Michael Platt, Jerry Erickson and Ethan Tidmore.


INNOVATION & IMMIGRATION: THE IMPORTANT INTERRELATION

Innovation and entrepreneurship are hallmarks of the American economy. Businesses from Amazon and Microsoft to Amgen and Genentech to FedEx and Starbucks to Staples and Home Depot have all been founded in the last forty years and grown to become major contributors to society. Each of these businesses began as a small business or a small concept and grew into a market leader. And, perhaps most importantly, each of these businesses was spurred by the American economic engine which drives innovation and promotes entrepreneurship and in turn, has been a catalyst for innovation and development of the U.S. economy.

IMPORTANCE OF INNOVATION IN THE UNITED STATES

- Scientific innovation has produced roughly half of all U.S. economic growth in the last 50 years.⁴
- Based on the model of Robert Solow (who won a Nobel Prize in Economics for his theory of economic growth), nearly four fifths of the economic growth of the U.S. is the result of technological progress.⁵
- 78% of Americans surveyed believe that innovation will be more important to the U.S. economy in the next three decades than it was in the last three.⁶

Innovation is driven by the very workers President Obama described as “some of the best workers in the world, the most productive workers in the world.”⁷ Those workers continue to build small businesses. Tomorrow’s Microsoft, Amgen, FedEx and Home Depot are being created right now in cities across the country. And many of those innovative startups are being formed by immigrants. In fact, immigrants are more likely to engage in entrepreneurial activities – over 25% more likely than the rest of the population according to a report by the Ewing Marion Kauffman Foundation. Only a few short years ago, immigrants founded companies including Intel Corp., Solectron Corp., Sanmina-SCI Corp., Sun Microsystems Inc., eBay Inc., Yahoo Inc., Life Time Fitness Inc., Tetra Tech Inc., UTStarcom Inc. and Google Inc. Today, those ten immigrant-founded companies have revenues nearing $100 billion.⁸

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It is without question that immigrants are intrinsically interwoven into the fabric of U.S. innovation. Over the past 15 years, immigrants have started 25 percent of U.S. public companies that were venture-backed, a high percentage of the most innovative companies in America. The current market capitalization of publicly traded immigrant-founded venture-backed companies in the United States exceeds $500 billion. Immigrant-founded venture-backed public companies today employ an estimated 220,000 people in the United States and over 400,000 people globally.

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**Immigrant-Founded Businesses and Numbers of Employees**

1. **Intel Corp.** - Andy Grove (Hungary) 99,900 employees
2. **Solectron Corp.** (acquired by Electronis International, Ltd. in 2007) - Winston Chen (Taiwan) 53,000
3. **Sanmina-SCI Corp.** - Jule Sola/Milan Mandaric (Bosnia/Croatia) 48,621
4. **Sun Microsystems Inc.** - Andreas Bechtolsheim/Vinod Khosla (Germany/India) 31,000
5. **eBay Inc.** - Pierre Omidyar (France) 12,600
6. **Yahoo Inc.** - Jerry Yang (Taiwan) 9,800
7. **Life Time Fitness Inc.** - Bahram Akbadi (Iran) 9,500
8. **Tetra Tech Inc.** - Henri Hodara (France) 7,200
9. **UTStarcom Inc.** - Ying Wu (China) 6,300
10. **Google Inc.** - Sergey Brin (Russia) 5,680

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**The Impact of Immigrants on U.S. Innovation**

- American universities grant 50 percent of doctoral degrees in computer science to foreign born students working in industry, while doctoral degrees in engineering exceed 50 percent.
- Twenty-two percent of science and engineering jobs in the U.S. are now held by the foreign born.
- The Council of Graduate Schools found in a 2004 survey that the number of foreign students in U.S. science programs is down 24% and engineering programs is down 20%.

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10. Anderson at 6.
11. *Id.*
12. *Id.*
Yet, despite the successes of prior immigrant-entrepreneurs in building highly successful businesses, today’s immigrant-entrepreneur faces a much greater difficulty in obtain legal status in the United States. Visas obtained in order to form or build a business and visa quotas have fallen precipitously over the past 10 years. As a result, immigrant-entrepreneurs currently residing in America overwhelmingly believe that today’s immigration policies have simply made America less competitive. In particular, foreign nationals who wish to build their businesses in the United States do not have options for doing so unless they have family already located here, have sizeable amounts of money, or can devote only part of their time to their startup.

**The Challenge for Immigrant-Founders in the Current Immigration System**

The current immigration regime does not provide a clear and consistent approach whereby an Immigrant-Founder can obtain legal status in the United States. While certain Immigrant-Founders may be able to identify a unique set of facts under which they can obtain legal status and build their business in the United States, these facts are dependent upon the Immigrant-Founder having family connections, obtaining other full-time employment in the United States, demonstrating that they have already obtained national or international acclaim, or having substantial personal resources to invest into a business in the United States. As a result, an Immigrant-Founder that does not have the necessary connections or resources may have the concept for the next Amgen, FedEx or Google, and have identified investors willing to help build and support the enterprise, but will be unable to gain legal status in the United States. Under our current immigration system, businesses that stand ready to help our economy (and in fact create jobs) are oftentimes locating elsewhere around the globe.
In particular, foreign nationals who are educated in U.S. colleges and universities may be unable to apply their education, knowledge and resources into the development of a business that benefits the U.S. economy. For those foreign nationals who attend public collegiate institutions, U.S. tax dollars are being used to educate someone that will ultimately add value to another country’s economy. Additionally, tax-exempt donations are made to our higher educational system, benefiting these individuals that are unable (although many times willing) to build a business in the U.S. In any case, many of the current immigration options favor individuals that have substantial personal financial resources, which may not be the case for many of the best and brightest young entrepreneurs coming from foreign countries.

Numerous visa categories for employees/investors already exist in U.S. law. However, this report identifies certain commonly-used categories that have been discussed as options for an Immigrant-Founder. The sections below discuss the key limitations and obstacles to the use of each of these categories for Immigrant-Founders.

**Immigrant Visas**

**Family-based sponsors.** The family-based category requires that the Immigrant-Founder have U.S. citizen or permanent resident relative. The obvious limitation of the family-based sponsor is that not all Immigrant-Founders have immediate family members who can provide them an immediate immigrant visa, and for non-immediate family, the time delay may be substantial.

**Employer-based sponsors.** U.S. entities may apply for work authorization for foreign national employees on a temporary or permanent basis. In the event an Immigrant-Founder is able to obtain an employer-based sponsor, the Immigrant-Founder may only be able to work on a separate startup business on a part-time, volunteer, basis., which may decrease the possibility of the business becoming successful. Additionally, many employer-based immigration categories are not available for new businesses or start-ups in the U.S., or may be time-limited.

**EB-5 immigrant investor visas.** This visa category requires that the Immigrant-Founder invest $1,000,000 (or in certain cases $500,000) in a new U.S. business. This capital requirement often is an obstacle to young inventors or entrepreneurs without family funds. Additionally, this category does not anticipate that the new venture be funded by private equity or other third-party funds from legitimate sources.

**Proposed Reforms to Immigration Regime for Immigrant-Founders**

Because of the inadequacies in the visa structure described in the foregoing section, it is necessary to create a type of visa that will be effective in the context of an Immigrant-Founder starting a new business backed by significant investment or, in other words, a Startup Visa. An effective Startup Visa requires several key characteristics to be effective. The Startup Visa should provide an effective mechanism for an Immigrant-Founder to enter the U.S. and remain in the U.S. for an appropriate time in order to give the entrepreneur and the investors the necessary comfort that a successful business is a reasonable possibility. The Startup Visa should also be designed to be available only to those non-residents that build bona fide successful businesses that spur innovation and employment in the U.S.
These concerns are principally addressed by (1) making sure the Startup Visa can be issued in a timely manner according to clear, objective criteria that are reasonably calculated to select those businesses that are likely to meet the goals of the program, and (2) ensuring the entrepreneur can maintain and renew the Startup Visa or obtain permanent residency when operating a successful business that continues to meet the goals of the program.

**FOR MORE INFORMATION ON THE STARTUP VISA**

For more information and links to articles and additional materials on the startup founder visa initiative, visit [www.startupvisa.com](http://www.startupvisa.com).

**Timing and Criteria for Issuing the Startup Visa**

The timing and criteria for issuing a Startup Visa should be calibrated to permit the visa to be used in the context of an investment by U.S. investors into a new business that is likely to spur innovation and employment in the U.S. To achieve this goal, the application process should be quick, easy to understand and should identify and select Immigrant-Founder based on appropriate criteria that are as objective as possible.
The Startup Visa should be available through a clear application process that leads to issuing a visa in a timely manner. As discussed above, the timing and complexity of the current visa process are reasons that existing visas are inadequate to meet the needs of Immigrant-Founders seeking investment.

Procedures that yield uncertain or delayed results prevent investments. Investors in an early stage startup company are likely to invest in a particular Immigrant-Founder or group of Immigrant-Founders in addition to the business plan or technology. Also, startup companies often derive a significant portion of their potential from their ability to move quickly and adapt flexibly. It is impracticable to put a new business on hold for several months while the Immigrant-Founder waits for a visa to become effective or to rely on a process that may or may not ever provide a long-term visa. Having a quick, clear application process with criteria that are as objective as possible will reduce uncertainty and delay for investors and Immigrant-Founders and allow the visa process to proceed at a speed that meets the timing of the investment process.

The requirements for obtaining the visa should also help ensure that it is being used by the Immigrant-Founder of a real business that is likely to spur innovation and employment. Some mechanism should exist for vetting the proposed business. One method would be to provide for review by a government or government-selected panel, but this would be costly or lead to a backlog. Another method would be to rely on the “invisible hand” of the market to select high potential businesses. For example, the program can designate specific types of investors that can “sponsor” the Startup Visa by making an investment of an appropriate size. Acceptable investors could include repeat investors such as venture capital funds and frequent private, individual investors (referred to as “angel” investors). As repeat investors in early-stage, private businesses, such investors are likely to have the sophistication and investment discipline necessary to identify businesses that can grow, innovate and create jobs. Requiring significant investment amounts helps make sure bona fide investment is occurring.

“More than one venture capitalist has said that the three most important factors in making an investment are ‘people, people, and people.’” The Entrepreneur’s Guide to Business Law, 3rd Ed., Constance E. Bagley and Craig E. Dauchy, p.440 (Thompson, West, 2008).

Unless the type of investor and investment are properly defined, several “Immigrant-Founders” could funnel money through a related investment entity and effectively buy a visa.
Initial Duration and Renewal and Scope of the Visa

The Startup Visa should also be designed to encourage Immigrant-Founder and investors to take the risk of investing time and money into the business. The visa should give the Immigrant-Founder adequate time to prove the value of a new business, and to allow for the Immigrant-Founder’s continued involvement if the business is meeting the goals of the program. The initial duration and availability of renewal and transition to permanent residency should be calibrated with those goals in mind.°

The Immigrant-Founder and the investors will want to know that the Immigrant-Founder will have enough time to reasonably overcome the challenges to which new businesses are subject, or they will not be willing to make the commitment to proceed with the investment of time and money in the business. Many businesses, especially those in high technology fields, require extended periods of time to grow and adapt to challenges. The Immigrant-Founder must be able to remain in the U.S. to be involved in the company long enough to have a reasonable chance to meet and adapt to those challenges.°

The initial duration and possibility of renewal and transition to permanent residency should all be designed to encourage the Immigrant-Founder and investors to commit to the business. They should allow an Immigrant-Founder who is furthering the program’s goals to stay in the U.S. in order to continue to build the business. At the same time, the time periods and renewal criteria should give incentive to the Immigrant-Founder to quickly develop the business and spur innovation and employment. Once the initial period expires, clear criteria that are as objective as possible should be used to determine whether or not to extend the visa. If a business is not meeting those objective criteria, renewal should not be allowed.

The Startup Visa should also be designed to provide a path to permanent residency for the Immigrant-Founder that meets appropriate criteria. This will provide added security to the Immigrant-Founder and investors that an Immigrant-Founder achieving the program’s goals will not be arbitrarily required to leave the country and will serve as a strong incentive for persons willing to make a long term investment in growing a business to consider doing so in the United States. As an immigrant visa, the EB-5 visa already provides the concept of transitioning from conditional to permanent residency status. The Startup Visa could use concepts similar to those already in place with other visa programs.

°The scope of the visa should also include the immediate family of the Immigrant-Founder, which will make possible a long-term personal investment of time by the Immigrant-Founder to grow the new business in a permanent manner.

°°Indeed, the common practice of imposing two- to four-year vesting on Immigrant-Founder equity (either on the Immigrant-Founders’ own initiative or at the request of investors) is specifically designed to ensure that Immigrant-Founders are available for the extended time that is usually necessary to make a startup venture succeed. See Bagley and Dauchey, at 93 (discussing Immigrant-Founder equity vesting).
For example, an initial period of two years would be likely to give an Immigrant-Founder the opportunity to prove a business concept, while giving incentive to grow the business aggressively. Once the initial period has expired, criteria such as number of full time employees, additional significant equity investments by appropriate investors and revenues or profitability could be used to identify businesses that remain likely to spur innovation and employment. Reasonably clear criteria such as these would both provide the Immigrant-Founder and investor with confidence that the Immigrant-Founder could stay involved in a viable business while encouraging the Immigrant-Founder to meet the goals of the program and helping ensure that Startup Visas would only be maintained if acceptable progress is made. Similar criteria could be used to determine when to transition to permanent residency.

Current Legislative Initiatives

As of April 2010, federal legislation has been introduced in both the U.S. Senate and the U.S. House of Representatives to create the Startup Visa. On December 10, 2009, Representative Jared Polis (D-CO) introduced H.R. 4259, the Employment Benefit Act of 2009, which was later included as a part of the Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2009 (CIR ASAP) (collectively, the “House Legislation”). The CIR ASAP was referred to the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, while H.R. 4259 was referred to the House Judiciary Committee. On February 24, 2010, Senators John Kerry (D-MA) and Richard Lugar (R-IN) introduced the Startup Visa Act of 2010 (S. 3029), which was referred to the Senate Judiciary Committee (the “Senate Legislation”).

Each of these legislative initiatives aims to modify existing immigration policy to add the Startup Visa program. As of April 2010, H.R. 4259, CIR ASAP and S. 3029 have been referred to committees. No timetable has presently been set for committee review or votes. In the case of each of these legislative initiatives, we anticipate that changes may be made to the bills, but they will, most likely, retain the basic framework for the Startup Visa as suggested above. The following section presents a summary and analysis of each of these legislative initiatives.

House Legislation: Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2009 (CIR ASAP) and the Employment Benefit Act of 2009

Initially introduced as a stand-alone bill, H.R. 4259, the Employment Benefit Act of 2009, was later also included as a part of a comprehensive immigration reform package entitled Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2009 (CIR ASAP). In each case, these legislative initiatives provide for the creation of a new visa class aimed at Immigrant-Founders.

Note: Other than broadly stating that each of the current legislative proposals are both generally consistent with the fundamental requirements of a Startup Visa program suggested by this report, the authors of this report do not take a position with respect to one legislative proposal over another legislative proposal currently under consideration.
The House Legislation provides for amendments to the existing EB-5 Visa program in order to allow Immigrant-Founders to obtain an EB-5 Visa in connection with specified investments from qualified investment companies or angel investors. It extends the EB-5 visa to immigrants that can show they are receiving an investment of at least $250,000 from a “qualified venture capital operating company” or $100,000 from an “angel investor” for the purpose of engaging in a new commercial enterprise.

For purposes of the House Legislation, a qualified venture capital operating company is defined as (i) a registered or unregistered investment company (ii) that is organized or incorporated and domiciled in the United States of which a majority of the managing directors are citizens or permanent residents of the United States. An angel investor is defined as either (i) any individual who is a U.S. citizen or immigrant lawfully admitted to U.S. for permanent residence, or any entity wholly owned and controlled by U.S. citizens or immigrant lawfully admitted to U.S. for permanent residence, or (ii) an entity that has made at least five angel investments (investments in a commercial enterprise not owned or controlled by the investor or his immediate family) totaling at least $250,000 during the previous three years.

An important piece of the House Legislation is its focus on a quick, clear application process that would issue a Startup Visa in a situation where the Immigrant-Founder’s business is likely to create innovation and new jobs. Currently, experts estimate that the process to obtain a visa can exceed two years, which may lead an entrepreneur considering relying on the Startup Visa to move their business elsewhere during that period or force the investors to deploy their investment into another business. However, the House Legislation creates an expedited review process. In this scenario, an Immigrant-Founder may pay a $2,500 fee to expedite review and have a determination of the application within 60 days, in order to help meet the needs of obtaining the visa in the context of an impending investment in the new business.

The House Legislation is structured to provide the Immigrant-Founders and investors comfort that the visa will extend to an appropriate scope and will remain in place for businesses that meet the program’s goals and the Immigrant-Founder’s visa will not be removed prematurely or arbitrarily. Under the EB-5 visa regulations (as amended by the House Legislation) the visa may be extended or made permanent if, among other things, the Immigrant-Founder’s business creates at least 10 new full-time jobs or generates a profit and at least $1,000,000 in total revenue during the first two years. These criteria are designed to identify businesses that are creating both economic growth and employment to help insure to Immigrant-Founders and investors that the visa may be continued for successful businesses, while preventing Immigrant-Founders that have not made significant progress from renewing the visa.” The House Legislation also provides additional incentives for Immigrant-Founders starting their businesses in a Targeted Employment Area (TEA), those regions that have typically seen lower entrepreneurial activities than others. In TEAs, an Immigrant-Founder’s business shall only be required to create five new full-time jobs to have the visa extended or made permanent rather than the ten required in non-TEA areas.

The House Legislation also provides for an extension beyond the two years “if the applicant demonstrates that he has attempted to follow his business model in good faith, provides an explanation for the delay in filing the petition that is based on circumstances outside of his control, and demonstrates that such circumstances will be able to be resolved within the specified period.” Section 7.
Senate Legislation: Startup Visa Act of 2010

The Senate legislation entitled the Startup Visa Act of 2010 (S. 3029) creates a new visa category (EB-6) for foreign entrepreneurs, rather than amending the existing EB-5 Visa as the House Legislation is drafted. However, much like the House Legislation, S. 3029 provides for similar criteria to obtain and retain a visa by an Immigrant-Founder.

Under the Senate Legislation, an Immigrant-Founder may obtain a two-year EB-6 Visa by demonstrating an equity investment into his business of at least $250,000, with at least $100,000 of that investment from either a “qualified venture capitalist” or a “qualified super angel investor.” For the purposes of the Senate Legislation, a qualified super angel investor is defined as (i) a U.S. citizen (ii) who is qualified as an accredited investor and (iii) that has made at least two equity investments of not less than $50,000 in each of the previous 3 years. A qualified venture capitalist is defined as a (i) venture capital operating company, (ii) based in the United States, (iii) which has U.S. citizens as at least a majority of its partners, (iv) has capital commitments of at least $10 million, (v) has been operating for at least two years, and (vi) has made at least two investments of not less than $500,000 in each of the previous 2 years.

After obtaining the EB-6 visa status, an Immigrant-Founder is eligible for a permanent legal status if the entrepreneur has achieved one of the following after two years:

- created five full-time jobs in the United States (excluding employment of the entrepreneur’s spouse or children); and
- secured $1 million in additional investment capital; or
- generated $1 million in revenue.

The Senate Legislation does not include items such as the expedited review process or TEA criteria that are a part of the House Legislation.
ABA RECOMMENDATION GENERAL INFORMATION FORM

SUBMITTING ENTITY: ABA Business Law Section

SUBMITTED BY: Mark Danzi and Eric Koester

1. SUMMARY OF RECOMMENDATIONS:

The ABA supports full implementation of legislation by Congress to provide for the creation of a Startup Visa (by way of the creation of the EB-6 Visa Program, the reformation of the EB-5 Visa Program or similar creation, reformation and/or restructuring of the current U.S. immigration regime) to provide for a mechanism whereby Immigrant-Founders of businesses can obtain legal status in the U.S.

2. DATE OF APPROVAL BY SUBMITTING ENTITY:

April 24, 2010.

3. HAS THIS OR A SIMILAR RECOMMENDATION BEEN SUBMITTED TO THE ABA PREVIOUSLY?

No. However, recommendations relating to comprehensive immigration reform have been adopted by the ABA as set forth in question 4 below.

4. ARE THERE ANY DIVISION OR ABA POLICIES THAT ARE RELEVANT TO THIS RECOMMENDATION AND, IF SO, WOULD THEY BE AFFECTED BY ITS ADOPTION?

In 2006, the House of Delegates adopted eight policies to improve the current immigration system (recommendations 107A-G and 300). The recommended resolution is consistent with the 2006 policies and would be included as a component of the comprehensive immigration reform proposed in such policies. This recommendation does not conflict with the aforementioned policies of the ABA.

The ABA has thereby already provided for broad support of comprehensive immigration reform, which would include the support of the comprehensive immigration reform legislation currently before the U.S. House of Representatives, the Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2009 (CIR ASAP).

5. DOES THIS RECOMMENDATION REQUIRE IMMEDIATE ACTION? IF SO, WHY?

The 2010 Congressional legislative agenda is anticipated to address immigration reform, which provides a unique window of opportunity for the ABA to take a position in support of this component of reformation of immigration for individuals involved in business creation. The U.S. House of Representatives introduced the CIR ASAP on December 15, 2009 and on February 24, 2010, Senator’s John Kerry and Richard Lugar proposed the Startup Visa Act of 2010, both of which propose to make some type of the Startup Visa effective.
6. **STATUS OF LEGISLATION (IF APPLICABLE):**

The recommendation supports full implementation of legislation by Congress related to the Startup Visa. Currently both the House and the Senate have bills under consideration in committee which would create a program for the Startup Visa.

In the U.S. House of Representatives, H.R. 4259, the Employment Benefit Act of 2009, which was later included as a part of the Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2009 (CIR ASAP), contains the House of Representatives proposals for the creation of the Startup Visa by amending the EB-5 visa program. In the U.S. Senate, the Startup Visa Act of 2010 (S. 3029) provides for the creation of a Startup Visa through the creation of the EB-6 visa program. Both legislative proposals have been referred to committee for consideration.

7. **COST TO THE ASSOCIATION:**

None.

8. **DISCLOSURE OF CONFLICT OF INTEREST (IF APPLICABLE):**

None.

9. **REFERRALS:**

This Report and Recommendation was referred to all Sections, Divisions and Forums on June 28, 2010.

10. **CONTACT PERSON (PRIOR TO THE MEETING):**

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11. **CONTACT PERSON (WHO WILL PRESENT THE REPORT)**

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