BUSINESS VISIONS

The Newsletter of the Committee on Small Business

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FROM THE CHAIR

By: Lawrence A. Goldman
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The Spring Meeting of the Business Law Section, April 6-9 in Tampa, Florida, is only a few weeks away. The Committee has a full agenda on Thursday, April 6, which is reported on in detail elsewhere in this newsletter. If you are not able to attend the meeting in Tampa, program materials from the Committee-sponsored programs will be available on the Section's website.

The Committee will also be participating in the programming for the ABA Annual Meeting in Hawaii in early August. If you've been looking for an excuse to travel to a special place, consider registering for this year's Annual Meeting.

Once again, this issue of *Business Visions* highlights the multi-faceted focus of our Committee and why the Small Business Committee is an ideal base within the Business Law Section if you consider yourself a general corporate and transactional lawyer and advise clients on business "lifecycle" issues ranging from choice of entity and business organization, to capital formation, securities law compliance, business growth and development and planning for the founder's liquidity event.

This newsletter features articles on raising capital for small business, the current status of the activities of the Private Placement Broker Dealer Task Force and the application of the Robinson-Patman Act to services and consumer sales.

Finally, continuing our recognition of the lighter side of Small Business Committee comradeship, this issue's *"From the Kitchen Cabinet"* feature is once again from former Committee Chair Harry Henning and offers his personal reflections on the special nature of the Committee's stand alone meeting in January.

I hope to see you in Tampa.

Committee Mission Statement

The objective of the Committee on Small Business is to guide US and international corporate and transactional lawyers who counsel clients ranging from closely-held entities to smaller public companies on the myriad of business "life cycle" issues they confront in their practices. These life cycle issues include (i) entity organization and owner agreements; (ii) capital formation, financing and strategic partnering; (iii) employment and compensation matters; (iv) intellectual property protection; (v) corporate governance; (vi) securities law compliance; and (vii) business combinations, restructurings, and breakups. The Committee maintains three substantive Subcommittees focusing on Closely Held Business Entities, Emerging Companies and Securities Regulation. The Committee has long been an advocate before the Securities and Exchange Commission, the Internal Revenue Service and other regulatory agencies of reforms to address the special problems in capital formation confronted by small businesses, including smaller public companies. The annual Government-Business Forum on Small Business Capital Formation, sponsored by the SEC, is one result of past Committee initiatives and was a leading force in the SEC's adoption of Regulation D. A present Committee initiative, through the Private Placement Broker Dealer Task Force, advocates a simplified registration system for "finders" of financing for early stage companies.

Committee Meetings

January 2006 Meeting. The members of the Committee who attended our January meeting at the Wigwam Golf Resort & Spa in Litchfield Park, Arizona on January 12 and 13, 2006 were treated to three wonderful programs in addition to our traditional collegial atmosphere, pleasant setting and enjoyable social events.

The Thursday, January 12 CLE program, "*IP Reps and Warranties in Business Transactions: What to Give and What to Get*", was chaired by David Pamenter of Gowling, Lafleur Henderson LLP, Toronto. He was joined by panelists Andy Halaby of Snell & Wilmer, Phoenix, Arizona and Jeffrey Mitchell of LeClair Ryan, Blacksburg, Virginia. The Friday, January 13 program, *"Business Lawyers in the Crosshairs - Issues to Spot and Liabilities to Avoid"* was chaired by Cy Johnson of Womble, Carlyle, Sandridge & Rice, Charlotte, NC. His colleague from the firm, Alison Bost, and Aaron Hoffman, Senior Vice President for Loss Prevention, Attorneys' Liability Assurance Society, were the panelists.

A portion of the materials from *IP* program is available on the Small Business Committee website at http://www.abanet.org/dch/committee.cfm?com=CL650000.

Also on Friday morning, Jared Kaplan of McDermott, Will & Emery LLP, Chicago, Illinois and Helen Morrison of Deloitte & Touche, Chicago, Illinois, presented a short program on the nuts and bolts of new Internal Revenue Code Section 409A. This provision of the Federal income tax law, a reaction, in part, to certain abuses of the Enron financial scandal, contains potential traps for the unwary.

Spring 2006 Business Law Section Meeting. The Committee will be sponsoring a full set of programs and events during the Spring Meeting of the Business Law Section in Tampa, Florida, April 6-9. Indeed, set aside **Thursday, April 6** as Small Business Committee Day.

The morning will kick off will a plenary meeting of the Committee from 8:00 to 9:00 a.m. and will be followed at 9:00 to 11:00 a.m. by our first CLE Program *"The Other Player - The Role of the Investment Banker in Business Transactions."* The Program Chair and Moderator is A. John Murphy, Wickersham & Murphy, Palo Alto, California, who heads up our Emerging Companies Subcommittee. He will be joined by panelists Philip Marshall, Managing Director, SunTrust Robinson Humphrey Capital Markets, Orlando, Florida, Chet Paulson, Founder and Chairman, Paulson Investment Company, Inc., Portland, Oregon, Mark Salter, Managing Director, Wedbush Morgan Securities Inc., Los Angeles, California and Michelle Facktor, Managing Director, Renaissance Capital Group, Chicago, Illinois. The program will focus on the role of investment bankers in (i) private and public financings and (ii) mergers and acquisitions. The panelists will discuss the corporate-investment banking relationship as well as customs and practices from the beginning to the end of a transaction. Topics will include the engagement letter, the role of finders, placement agent and underwriting documents, compensation practices, opinions, and NASD and other regulatory considerations.

We will continue with a Forum from 11:00 a.m. to 12:30 pm. on *The SEC Advisory Committee on Smaller Public Companies*. Committee Chair, Larry Goldman, will moderate a discussion among a distinguished panel comprised of Herbert S. Wander, Katten Muchin Zavis Rosenman, Chicago, Illinois, Co-

Chair of the Advisory Committee, Richard M. Leisner, Trenam Kemker, Tampa, Florida, a member of the Advisory Committee, Phoebe Brown, Special Counsel, Public Company Accounting Oversight Board, Washington, D.C. and Gerald J. Laporte, Chief, Office of Small Business Policy, the United States Securities and Exchange Commission, Washington, D.C.

The Small Business Committee Lunch will be at 12:30 p.m. and will feature a guest speaker.

Our second CLE Program, *"Going Public Try-Outs: TSX Venture Exchange and London AIM as Farm Teams for the U.S. Public Market Big Leagues"*, Chaired by Eric M. Levy of Heenan Blaikie, Montreal, will follow lunch from 2:30-4:30 p.m. Joining Eric on the panel will be Louis Doyle, Vice-President of the TSX Venture Exchange, Montreal, Canada, Francois Carrier, Vice-President, Investment Banking of Canaccord Adams, Montreal, Canada and Clare Grayston, Partner at Nabarro Nathanson, London, England. The program will include a discussion on the TSX Venture Exchange and AIM market as alternative markets for U.S. private companies to access the capital markets and the cost advantages of going public on AIM and TSX Venture Exchange.

Cap off the day following the Section Reception by attending the Small Business Committee dinner at The Tampa Club. If you have misplaced registration information, please contact Committee Chair Larry Goldman.

On the afternoon of Friday, April 7, the Private Placement Broker Dealer Task Force will meet from 3:00 to 4:00 p.m. followed from 4:00 to 5:00 p.m. by a joint meeting of our Subcommittee on Securities and the Federal Regulation of Securities Committee's Subcommittee on Small Business Issuers.

ABA Annual Meeting, August 3-7, 2006. The Committee will be participating in the Business Law Section's offerings at this year's Annual Meeting in Honolulu, Hawaii. Programming at this year's Annual Meeting will begin earlier in the morning than usual in order to give meeting attendees afternoons to sightsee and otherwise enjoy the pleasures of Hawaii.

On Friday, August 4, the Committee will sponsor a program *"Going Global with you Small Business Clients"*, Chaired by Robert L. Brown, Greenebaum Doll & McDonald, Pllc, Louisville, Kentucky. Joining Robert on the panel will be Joseph S. Cha, Heller Ehrman, Hong Kong, Dana Tait, Advanced Solutions, LLC, Summerville, South Carolina and Alice Young, Kaye Scholer LLP. Being a small company does not mean being a domestic company. Increasingly, small businesses find themselves involved in foreign sales when meeting the needs of US customers going overseas, through the often unexpected development of relationships with foreign customers and as a result of having an online presence. This program will describe processes for setting up international sales, as well as monitoring, evaluating and managing those processes.

The plenary meeting of the Small Business Committee will be from 7:30 to 9:00 a.m. on Saturday, August 5. On Sunday, August 6 from 7:00 to 9:00 a.m., the Committee will co-sponsor a program *"Practice and Perils of Opinions on Alternative Entities"* together with the Committee on Legal Opinions and the Committee on Partnerships and Unincorporated Organizations.

Planning Ahead

Small Business Committee Mid-Winter Meeting, January 12-13, 2007, Charleston, SC

Spring Meeting, Business Law Section, March 15-18, 2007, Washington, D.C.

Annual Meeting, ABA, August 10-14, 2007, San Francisco, CA

SEC ADVISORY COMMITTEE ON SMALLER PUBLIC COMPANIES

In December 2004, then Securities and Exchange Commission Chairman William H. Donaldson announced the establishment of an advisory committee to assist the Commission in examining the impact of the Sarbanes-Oxley Act and other aspects of the federal securities laws on smaller public companies. Commissioner Donaldson appointed Herbert S. Wander, a former Chair of the ABA Business Law Section, as one of the Co-Chairs of the Advisory Committee. In March 2005, Commissioner Donaldson appointed 19 additional members of the Advisory Committee, including Richard Leisner, a former Chair of the Small Business Committee.

As reported in the December 2005 issue of *Business Visions,* prior to the Advisory Committees' hearings in San Francisco in September 2005, active members of the Small Business Committee were invited to and subsequently filed recommendations for reducing unnecessary regulatory burdens on Smaller Public Companies. The full text of the letters containing the recommendations was published in *Business Visions.*

The Advisory Committee was organized into four Subcommittees focusing on: (i) Accounting Standards, (ii) Capital Formation, (iii) Corporate Governance and Disclosure and (iv) Internal Control Over Financial Reporting. Each of the four Subcommittees presented its preliminary recommendations during the meeting of the Advisory Committee held in Washington, D.C. on December 14, 2005. The full text of the preliminary recommendations, as well as other materials pertaining to the activities of the Advisory Committee, including the Draft Final Report, may be accessed at http://www.sec.gov.

Of particular note is the inclusion in the Draft Final Report of a recommendation that the SEC should spearhead a multi-agency effort to create a streamlined NASD registration process for finders, M&A advisors and institutional private placement practitioners substantially in accordance with proposal of the Private Placement Broker Dealer Task Force.

The Advisory Committee's Draft Final Report, as noted above, will be the focus of a Small Business Committee Forum on April 6, 2006.

Surfing the Section Committee Newsletters

Newsletters of other substantive Committees of the Business Law Section may be accessed through the Committees' respective webpages. The following are articles that appeared in recent Committee newsletters that should be of interest to members of the Small Business Committee:

Deal Points, The Committee on Negotiated Acquisitions, Fall 2005, "Clarity or Confusion: The 2005 Amendment to Section 271 of the Delaware General Corporation Law"

The Blue Sky Bugle, The Committee on State Regulation of Securities, December 2005, "From the Chair: Preemption and Other Matters" and "Form D - Changes are Coming"

Pubogram, The Committee on Partnerships and Unincorporated Business Organizations, Every Issue - "LLC / LLP Case Law Update"

PRIVATE PLACEMENT BROKER DEALER TASK FORCE ACTIVELY PURSUES ITS GOALS

A present Committee initiative, through the Private Placement Broker Dealer Task Force, advocates a simplified registration system for "finders" of financing for early stage companies. The PPBD Task Force continues actively to pursue its work. The most recent activities of the PPBD Task Force are reported below.[1]

1. <u>Presentation to SEC Advisory Committee on Smaller Public Companies</u>

On September 19, 2005, Gerald Niesar made a report to the SEC Advisory Committee's Forum on Small Business Capital Formation Issues at its hearings in San Francisco. His statement and a copy of the Task Force Report are available on the SEC's web site, www.sec.gov./rules/other/265-23.shtml#091905. The statement was drafted with the participation of Lawrence Goldman, Greg Yadley, and other members of the Small Business Committee, Dixie Johnson and Stan Keller of the Committee on Federal Regulation of Securities, and others. This report was received very well by the Advisory Committee.

On February 28, 2006, the Advisory Committee released an exposure draft of its recommendations.[2] This document cites the PPBD Task Force Report[3] and supports the concept of developing a more appropriate system for registration and regulation of "finders."[4]

2. <u>Meeting with SEC Staff</u>

On November 18, 2005, Faith Colish, a Co-Chair of the PPBD Task Force, met in Washington, DC, with Robert Colby, Deputy Director of the Division of Market Regulation, Catherine McGuire Chief Counsel of the Division, and three members of her staff. The Division staff members complimented the Task Force on the compilation of authorities (including no-action letters) that have shaped the definition of "broker" in the area of finders and

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[1] This article is taken from a report prepared by Faith Colish.
[2] http://www.sec.gov/news/press/2006-32.htm. The Exposure Draft itself is at http://www.sec.gov/rules/other/33-8666.
[3] Exposure Draft, Footnote 151.
[4] Exposure Draft, Recommendation IV.P.6, pp. 77-78.

indicated that nothing important had been omitted and nothing had been cited out of context. The discussion included the SEC's plans to issue a new interpretive release, pulling together these authorities, possibly addressing some "gaps" in the existing analyses, and potentially modifying some of the positions taken over 20 years ago. This project has been underway for some time there has been no clear indication of a deadline for its completion.

The staff was also receptive to the concept of streamlining the application process and the regulatory requirements for PPBDs. The proposals in the Task Force Report were discussed, including a possible exemption from the net capital rule. Ms. McGuire suggested that the Task Force draft proposed SEC rule amendments and/or new rules which are in line with the goals of the Report for the staff's consideration.

The importance of working closely with the NASD and the states in order to achieve a coordinated and useful result was also discussed.

3. **Meeting with NASD Senior Officials**

On January 9, 2006, Ms. Colish met with several senior staff members of the NASD in Washington, DC. Fortunately, Ellen Lieberman, Chair of the State Regulation of Securities Committee was able to accompany me and participate in the discussion. The NASD staff members included Elisse Walter, Mark Menchel, Jeff Holik, Gary Goldsholle, Grant Ward and Patty Glinietki.

The NASD staff focused on some of the burdens that they perceived would be imposed on their organization by any change in the rules or procedures. Among the challenges discussed were:

- The NASD is funded by member dues. Larger members "subsidize" smaller members whose dues are not sufficient to cover the costs of supervising them. Any significant increase in very small members, who would pay very little dues, could adversely affect this balance. This position was countered by the fact that business now conducted by unregistered brokers would become part of the dues base of the NASD. Also, relatively light-handed regulation, based on limited business activities, could be less expensive than the oversight to which other NASD members are subject.

- It is difficult for the NASD to create a "special class" for PPBDs. If this were done, other members with a niche business might ask for similar special treatment. This was discussed in the context of the fact that both the membership application process and the current regulatory oversight are already somewhat "modular," being adapted to the business mix of different kinds of members. This led to a discussion of the delays that all applicants experience with membership applications.[5]

- The NASD has no jurisdiction over unregistered brokers. The SEC should play a more active role in clarifying which activities require registration, and should be prepared to back up its position with a more palpable risk of enforcement actions.[6]

- The industry, the regulators and the Bar should increase its efforts to educate finders and issuers as to the need for broker registration and the potential consequences of non-registration.

- The NASD staff raised and rejected the concept of a simple notice filing by PPBDs. The concern was that eventually a notice filer would get into trouble and the press, the SEC, and others would point a finger at the NASD who "should have known" what was going on.

4. **Blue Sky Contacts**

In July 2005 on Hugh Makens' invitation, Ms. Colish was invited to speak at a NASAA Corporation Finance Training Seminar in Fort Lauderdale, Florida. The co-panelist was Tanya Solov, the Illinois Securities Commissioner and chair of the NASAA Broker-Dealer Committee. The Seminar was attended by approximately 50 representatives of numerous state securities commissions and several Canadian provincial blue sky regulators. The Task Force Report was included in the course materials and it was well

[5] Currently the average time from receipt of the application to issuance of a Decision Letter and proposed Membership Agreement is about 170 days, which the NASD considers to be too long. The maximum permitted by rule is 180 days.

[6] Ms. Colish is personally not aware of any SEC enforcement actions based solely on the fact that a broker was not registered.

[7] The Distribution of Private Fund Securities: Regulatory Considerations and Potential Liabilities When Using Unlicensed Finders, pp. 3-10.

received. Questions from the floor included a request for assurance that the approach recommended by the Task Force would result in greater visibility of finders to the state regulators. The participants were assured that this was a key part of the concept. Some attendees suggested some other alternative approaches, such as formation of an SRO for business brokers or other private placement brokers. The subject of "amnesty" came up and there was no immediate reaction. This is not conclusive, however, it leads one to the possibility that some traction in that area can be gained.

Kenneth MacRitchie in New Jersey is currently working on a draft of PPBD rules for his state. The Task Force will work closely with Ellen Lieberman to map out a plan of action to approach the blue sky regulators.

5. **<u>Industry Contact</u>**

Ms. Colish has been invited to address a meeting of the Association for Corporate Growth (ACG) in Orlando, Florida that is scheduled for April 28, 2006. The ACG has over 1,000 members located in chapters around the country. Their membership includes issuers, lawyers, and "intermediaries" both registered and unregistered.

6. **<u>Miscellaneous</u>**

In her own practice Ms. Colish has had dozens of occasions to send the Task Force Report to brokers, potential finders, and other counsel. The recipients of the report have expressed keen interest in its contents. The reactions can be grouped into: "Oh, so that's what you have been talking about," and "I have been telling this to people for years and now I have something to hand them to back up what I have been saying."

An article published in the September 2005 issue of *Investment Lawyer* supports the position taken by the Task Force on the definition of "broker."

Application of Robinson-Patman Act to Services and Consumer Sales

By: Robert L. Brown and Alan S. Gutterman

Many small businesses are only vaguely aware of the Robinson-Patman Act (15 U.S.C. § 13), which makes it unlawful for any person engaged in commerce to discriminate in price between different purchasers of goods of like grade and quality. The commodities in question must be sold for use, consumption or resale within the United States and its territories. This has usually been held to mean that imports are covered, but that exports (other than commissions and brokerage paid in the US) are not covered. In addition, the effect must be to substantially lessen competition, create a monopoly or injure competition.

Exceptions exist under the Act for different prices reflecting different circumstances, such as customers on different levels of distribution or buying different volumes, and sales at different times. Sellers are also allowed to reduce their prices to meet (but not beat) competition in particular cases.

Even fewer small businesses, however, understand the application of the Act to sales of goods and services or to consumer sales.

Act Applies Only To Sale of Goods, Not Services

Robinson-Patman provisions apply to the sale of commodities by persons "engaged in commerce." 15 U.S.C. § 13(a)-(f) (2003). Act Sections (b), (d) and (e) refer to the furnishing of "services or facilities" as one possible means of discrimination in a transaction rather than as the underlying subject of the transaction. Id.

According to the courts, the term "commodity" in the Act is restricted to "products, merchandise, or other tangible goods." T.V. Signal Co. v. American Tel. & Tel. Co., 462 F.2d 1256 (8th Cir. 1972). The term does not include stand-alone intangibles or services not associated with sales of tangible goods. See, e.g., Kennedy Theater Ticket Service v. Ticketron, Inc., 342 F. Supp. 922, 926 (E.D. Pa. 1972)(Congress intended to limit the application of Robinson-Patman to tangible things, not services; detailed discussion).

Sales to Consumers Fall Outside the Intent of the Act

Purchases of commodities by 'ultimate consumers' do not fall within the Robinson-Patman Act. Specifically,

> [t]he Robinson-Patman Act proscribes price discrimination only if injury to competition flows from that discrimination. Thus, a supplier who charges a different price to his distributors than he does to his consumer accounts will not stand in violation of Section 2(a) of that Act. This is because consumers, whether they are ultimate consumers or commercial users, do not compete with distributors in the resale of the particular goods. Von Kalinowski, 9 Antitrust Laws and Trade Regulation, § 68.04(3) at 68-57.

The Act was intended to "curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their purchasing power." David Oliveiri, 60 A.L.R. Fed. 875, 2a (2001). See generally, 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 140. The Act's purpose was to protect small businesses, that are unable to buy in large quantities, from the competing operations of large interstate concerns. See, e.g., FTC v. Morton Salt Co., 334 U.S. 37 (1948); Standard Oil v. FTC, 340 U.S. 231 (1951).
Congress sought generally to eliminate price discrimination and to ensure that businesses at the same functional level would start on equal competitive footing in regards to price. See FTC v. Sun Oil Co., 371 U.S. 505 (1963).

This is supported by the statutory language itself. The Federal Trade Commission, charged with enforcement of the Act, noted in its 'Guides and Trade Practice Rules' that a 'customer' or 'purchaser' within the meaning of Robinson-Patman is "any person who buys for resale ..." 16 C.F.R. 240.4 (2003)(emphasis added). Although without the force of law, such guidance provides insight into the Commission's interpretation of the statute's language, legislative history, and subsequent administrative decisions and case law.

The plain language of Section 2(e) is explicit, governing "purchasers of a commodity bought for resale." 15 U.S.C. § 13(e)(2003). The plain language of Section 2(a), when read in its entirety, governs only purchases involved in discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition ..." Id., § 13(a).

Logically, to have anti-competitive effect on purchasers in commerce, a purchase involved in discrimination must be made by a person who is not the 'ultimate consumer'–the 'ultimate consumer' removes the commodity from the stream of commerce. "By definition the consumer customers would not be involved in the resale of the products which they purchased. Thus they [are] not in competition ..." American Oil Co. v. McMullin, 508 F.2d 1345, 1353 (10th Cir. 1975). See O'Byrne v. Cheker Oil Co., 530 F. Supp. 70 (N.D. Ill. 1981)(oil company selling gasoline to wholesale distributors at higher prices than to own retail customers not in violation of Section 2(a) of Act).

Robert L. Brown is a member of Greenebaum Doll & McDonald Pllc in Louisville, KY. Alan S. Gutterman is General Counsel of ASI Computer Technologies, Inc.

You may have a Robinson-Patman Act issue if:

- You sell goods
- Your customers are not consumers
- You charge different prices to different customers
- You do not have justifiable reasons for the different prices based on volume, services or timing.

Raising Capital through Equity Investments in your Small Business

By: Thomas G. Komaromi

INTRODUCTION

More than half a million new businesses are started each month in the United States.[7] One of the most important components of a successful business start-up and expansion is the ability to obtain and secure capital. Finding a source of capital to finance company growth can be a major challenge, particularly for small and midsized businesses. The financing options available to a start-up are dependent on several factors, including the company's immediate high growth potential and its choice of business entity.

LOANS VS. EQUITY FINANCING

For many entrepreneurs, the prime source of capital to start a new business and keep it up and running are loans from debt financers including banks, credit unions and credit card companies. The advantage with this form of financing is that the small business owner retains all of the equity in the company, and the lender will not have any say in how to run or manage the business. Even better, a lender is not directly entitled to any of the business profits; all the business needs to do is repay the loan and interest on time. Furthermore, interest payments may be deducted as a business expense. The downside is that starting a small business and nursing it into a healthy company can burn through a loan faster than a rock star at the Chateau Marmont, and the start-up may have to make loan repayments when the need for cash is greatest, such as during a quick expansion.

[7] *The Kauffman Index of Entrepreneurial Activity is the first study to measure business start-up activity for the entire U.S. adult population at the individual owner level. The data are derived from the monthly Current Population Survey (CPS), a national population survey conducted by the U.S. Bureau of the Census and the Bureau of Labor Statistics. The Kauffman Index finds that over the period from 1996 to 2004, an average of 0.36 percent of the adult U.S. population created a new business each month. The rate of overall entrepreneurship activity remained relatively constant over the period despite major changes in the economy. Entrepreneurship activity increased the most in the West and South in the past few years. The entrepreneurship rate in the West increased from 0.42 percent in 2001 to 0.49 percent in 2004, and the entrepreneurship rate in the South increased from 0.35 percent to 0.41 percent. The construction industry has the highest rate of entrepreneurship of all major industry groups. Press Release,* The Kauffman Foundation *(September 22, 2005).*

Equity financing is a smart option for start-ups that have a compelling enough business to attract investors because they generally only need to repay investors if the business turns a profit. In addition, investors are sometimes partners or board members and often offer valuable advice and experience that can strengthen the company. The catch with equity financing is that it can dilute the ownership of the company for the shareholders as well as take up a greater share of company profits than interest on a loan. Moreover, a company's equity investors have a legal right to be informed about all significant business events and a right to ethical management. This translates into a responsibility to take the investor's interests into account when making business decisions, even if it's not in the best interest of the entrepreneur.

Equity financing is generally recommended for a start-up experiencing very high growth with high investment risk. For example, an early-stage, high-growth company with limited revenues and prospects for negative operating income for the next few years should probably select this option. Assuming the start-up has such high growth potential, let's examine the choice of business entity that makes the most sense for a start-up in connection with equity financing.[8]

SOLE PROPRIETORSHIPS AND GENERAL PARTNERSHIPS

The simplest and cheapest way to start up a business is as a sole proprietorship: someone doing business in an individual capacity and not through any type of business entity. Sole proprietorship is not a separate entity for income tax purposes. Income and loss is reported on the individual's income tax return on Schedule C (or Schedule F if the business is a farming operation). However, a sole proprietorship is probably the least favorable choice of business entity for equity financing because the equity investment is limited to the personal funds of the individual business owner, and personal liability is an issue for each investor.

If a small business organized as a sole proprietorship recruits people to invest in it, the business will, by

[8] *Although the main advantages and disadvantages of different business entities are covered, no magic formula exists for making the determination of which entity is best for a particular business, and this article's focus on equity financing does not fully address important considerations relating to taxes, personnel, marketing and business strategies, and a variety of other factors that influence choice of business entity.*

default, become a general partnership. The upshot is that the equity investors will be considered general partners, each of whom is personally liable for business debts and liabilities, whether or not he or she takes part in running the business. Investors probably want to protect themselves from such personal liability for business debts, especially if they are not actively participating in running the business. Therefore, a small business is less likely to gain equity financing if it is organized as a sole proprietorship.

A general partnership is an association of two or more persons to carry on a business for profit but excluding an association formed under a non-partnership state statute. A partnership is an entity that is distinct from its partners. The partners raise equity funds through their own capital contributions, by adding a new partner, or by restructuring the relative ownership interests of the existing partners to reflect new contributions. One of the disadvantages of a general partnership is that a general partner can be held responsible for all debts and liabilities of the partnership. For example, a general partner with only a 1 percent interest is a start-up may still be held liable for 100 percent of the debts and liabilities of the partnership. Furthermore, obtaining financing, especially long-term financing, is often difficult for smaller partnerships. Additional equity financing is generally limited to increased contributions from existing partners in exchange for a greater ownership percentage, or by adding a new partner, which ordinarily requires the unanimous approval of all existing partners.

LIMITED PARTNERSHIPS

A limited partnership is a partnership formed by two or more persons under state law having one or more general partners and one or more limited partners. The general partners assume personal liability for the start-up's debts and liabilities, while the limited partners are shielded from personal liability. One of the resulting tradeoffs, though, is that an investor must take a passive role in the management of the business in order to maintain the status of a limited partner. The start-up must have at least one general partner who takes an active role in the management of the business. A limited partnership may be attractive for equity financing because an investor has limited personal exposure and does not need to be involved in day-to-day management responsibilities. However, the limited partnership's advantage of limited liability is available through other entity forms (a limited liability company, a limited liability partnership, or a corporation), and unlike a limited partnership, these alternative entities also provide each investor the option of playing an active role in the business without forgoing their limited liability.

LLCs and LLPs

A limited liability company (LLC) is a hybrid entity formed by one or more persons under state law. It is treated as a corporation for limited liability purposes, but is treated as a general partnership for tax purposes. The members enjoy limited personal liability for the company's liabilities. As with a partnership, there is no taxation of the business itself, but all income, deductions, credits etc., "pass through" to the individual members and are reported by them on their individual returns. The LLC is one of the most popular entity forms for small businesses because it provides limited liability to the members, yet it may be operated with the simplicity and the tax benefits of a partnership.

A limited liability partnership (LLP) is similar to an LLC in that the LLP provides limited liability for partners and partnership tax treatment; however, unlike an LLC, the LLP is often available only for certain occupations (e.g., professional groups such as attorneys or physicians.) LLCs and LLPs are appealing to equity investors who may forgo investing in a risky general partnership. Yet unlike a limited partnership, investors in an LLC and LLP may take an active role in the management of the company.

CORPORATIONS

A C corporation is an entity created under state law that is distinct from its owners. The entity may be closely held, where there are only a few shareholders, or may be publicly held, where there are a large amount of shareholders and the stock is sold on a public market. The corporation is taxed separately from its owners, and thus may result in a double tax: one at the corporate level and one at the shareholder level.

An S corporation is an entity created under state law that is formed as a corporation but may elect to have only its shareholders subject to tax. Limitations exist as to the type and number of shareholders and the classes of stock.

For purposes of equity finance, many small businesses choose to form a corporate entity since it provides the easiest method for raising capital from multiple investors, particularly those investors who are not necessarily interested in actively participating in the business. For example, it may be easier to persuade 20 people to invest $5,000 than to convince one person to contribute $100,000, and a corporation

permits this kind of widespread ownership. Moreover, a shareholder of a corporation who does not participate in corporate activities and decision making is virtually free from liability for corporate debt or activity. Other advantages of the corporate form are the flexibility in structuring ownership and control over the business, and ease of transfer of shares.

Equity financing of corporations may be achieved through the sale of stock in exchange for a capital contribution of money or property. There are a variety of different types of stock and, depending upon the entrepreneur's negotiating strength and the interests of the investors, a small business can limit the extent of ownership control being sold by limiting the number of shares for sale and/or the rights associated with each class of stock. Some possibilities include nonvoting shares, preferred shares, redeemable shares, and a variety of hybrid shares.

For example, an equity investor not seeking active involvement in a small business may be satisfied with the purchase of nonvoting shares or a minority percentage of voting shares in the corporation. By contrast, venture capitalists and angel investors may demand more power in exchange for their capital contribution. They may even require a public sale of the business within a certain time period in order to ensure a quick return on their investment.

Not every small business chooses a corporation as their business entity because organizing and running a corporation involves some initial and ongoing paperwork, as well as some fairly substantial start-up costs. Other disadvantages are double taxation of profits while operating, and double taxation of capital gains upon dissolution.

VENTURE CAPITAL

Now that we have a small business entity, let's explore a few of the common methods for raising money through equity investments. As stated earlier, equity investors in a start-up may accept the risk of losing their entire investment and not insist that the company guarantee repayment. But to offset such risk, the investors usually demand substantial returns if the business is successful. This may include a large percentage of the business profits, and/or a cap on the entrepreneur's salary. In the case of venture capital, investment criteria usually includes a planned exit event (an IPO or acquisition), normally within three to seven years.

Venture capital is capital provided by outside investors for financing of new, growing or struggling businesses that require large amounts of funding (usually from $500,000 to millions). Venture capital firms concentrate on select companies that have a high, rapid growth potential and may produce a very high rate of return in a very short time. In exchange for such a high risk investment, venture capital firms gain equity in the company and seek a high rate of annual return (20 percent and above). Usually, one or more general partners of the investing fund joins the Board of Directors of the new venture, and will often help to recruit personnel to key management positions.

A venture capital fund is a pooled investment vehicle (often a partnership) that primarily invests third-party financial capital in businesses that are too risky for the standard capital markets or bank loans. Venture capital general partners ("venture capitalists" or "VCs") may be former chief executives of businesses similar to those that the fund invests in. Investors in venture capital funds (limited partners) are typically large, capital rich institutions, such as insurance companies, state and private pension funds, and pooled investment vehicles.

Many investments by VCs take the form of a convertible preferred stock equity interest. Other alternatives include an ownership option in the start-up through a combination of equity and debt obligation, often with convertible debt instruments that become equity if a certain level of risk is exceeded. Convertible debt provides the debt holder the option to convert the loan instrument into stock of the borrower. Deals done with straight preferred stock with warrants or subordinated debt with warrants gives the warrant holder the right to buy shares of common stock at a fixed price within a specified time period.

VCs desire to sell their stock, warrants, options, convertibles, or other forms of equity in three to seven years. The failure rate of investments can be high; anywhere from 20 percent to 90 percent of the businesses funded never return the invested capital. VCs usually assume that for every ten investments they make, two will be failures, two will be successful, and six will be marginally successful. Thus, venture capital firms have a reputation for negotiating tough financing terms and setting high demands on target companies. For example, it is not uncommon for a VC to demand an equity interest in 30 percent to 50 percent of a well established company. A start-up may need to transfer even more ownership to a VC in exchange for financing.

Venture capital is not suitable for many small businesses. VCs are extremely selective in deciding what to invest in. Generally, a fund invests in

approximately one in four hundred opportunities presented to it. Companies with high growth potential in fields such as technology or life sciences are more likely to attract venture capital funding, as only such opportunities are likely capable of providing the financial returns and successful exit event within the required timeframe that venture capitalists expect.[9] Moreover, the firms VCs invest in usually have revenues in excess of two million dollars and a preexisting capital investment of at least one million. Start-ups that do qualify for venture capital funding have tremendous potential for obtaining a very large amount of capital and expert business advice.

If a business does not qualify for or is not interested in venture capital, it may look to other less formal and less demanding outside investors for a source of money: angel investors.

ANGEL INVESTORS

An angel investor is a private investor who provides capital for an early stage or start-up company, usually in exchange for ownership equity. Angels are less formal than venture capitalists because they typically do not manage the pooled money of others in a professionally managed fund. Rather, they usually organize themselves into angel groups or angel networks to share deal flow and due diligence work, and pool their funds to make larger investments. Angel groups are local organizations made up of 10 to 150 accredited investors interested in early-stage investing, while angel networks are firms that will match up prospective investors with small businesses.

Angel capital essentially fills the gap in start-up financing between money raised through friends and family and money raised through venture capital. While it is usually difficult to raise more than $100,000 from friends and family, many venture capital funds will not consider investments under $1 million. Furthermore, angel investors are often willing to invest in ventures that are too risky for banks or do not offer enough profit for venture capitalists. Therefore, angel capital is a common second round of financing for high-growth start-ups, and actually accounts in total for more money invested annually than all venture capital funds combined.[10] Angel investors often provide the seed money to get a business up and running while the founders pursue alternative sources of financing, such as venture capital.

Angel financing can be an expensive source of funds since angel investments are high risk, and require a very high return on investment. However, cheaper sources of capital, such as bank financing, are usually not available for most start-ups unless fully collateralized by deposits from the entrepreneur or a sponsor. Angel financing may involve a debt instrument that allows the angel investor an option to convert the debt into an equity investment at either a specified time or if certain conditions are met. The angel is thus protected by retaining a debt claim if the start-up does not do well or can profit by converting the interest into equity ownership if the venture succeeds.

More often, however, angels seek an equity interest in the start-up and some guaranteed exit provisions, such as a mandatory buyout, a put option requiring the business to repurchase the stock at the investor's option, or an IPO. Angels might expect a five-year return of three to five times their initial investment, while a venture capital firm might seek five to ten times its original investment.

Since angel investors are often retired business owners or executives, they can usually provide valuable management advice and important contacts. Most angels invest in businesses closely related to their areas of expertise and take a significant role in the development of young companies. While they typically are not interested in controlling the business, they often want an advisory role. Often the business experience and networking opportunities angels bring to a start-up are just as valuable as the money they invest. Angel investors will frequently use their own

[9] *According to* The MoneyTree™ Survey by PricewaterhouseCoopers, Thomson Venture Economics and the National Venture Capital Association*, the Life Sciences sector inched up to a five-year high in 2005 with $6 billion in 608 deals compared to $5.8 billion in 589 deals in 2004. Life Sciences accounted for 28% of all venture capital investments in 2005, while Software held its position as the largest single industry category with 29% of all deals. Although the Telecommunications industry category has languished in recent years, the Wireless sub-category has become a hot spot. For full year 2005, 152 wireless-related companies received $1.3 billion, a 24% increase over 2004's $1.1 billion. Companies classified as Internet-specific represented 15% of all venture deals in 2005.*

[10] *$22.5 billion of angel investment vs. $22 billion of venture capital investment in the United States in 2004, according the* Center for Venture Research at the University of New Hampshire Whittemore School of Business and Economics.

connections to assist the venture in finding favorable suppliers and new customers. Most importantly, the possibilities of finding additional financing growth opportunities may be defined by the quality of the management team. A non-ideal market opportunity can be made attractive when the effort is led by management that has succeeded before.

In 2004, 18.5 percent of deals presented to angel investors attracted funding, up significantly from 10 percent in 2003, which is about the historical average.[11] On average, each firm that received angel money in 2004 got $469,000. Most of the money went to high-tech companies, and the single biggest category within high-tech was software.[12] In the first half of 2005, angel investors put their money behind companies involved in the life sciences and biotechnology, with nearly 40 percent of total angel investments nationwide backing the two sectors.[13] Life sciences, including health care services, medical devices and equipment, attracted 20 percent of the angel money.[14] Biotechnology attracted 17.5 percent of angel investments, with software investments close behind at 17 percent and IT services at 13 percent.[15] The remaining investments were approximately equally weighted across high tech sectors, with each having between 3 percent and 6 percent of the total deals.[16]

Therefore, angel capital may be an attractive source of equity financing for a small business if it resides in a high-growth sector of the economy, involves high risk, and requires a substantial amount of funding in a short period of time. For a business prepared to take it to the next level, another possible source of funding is an initial public offering.

IPOs

An initial public offering (IPO) can be a smart move for a small business depending on short-term needs, long-term goals, and investor interest in the product or service. When a business that is owned by a limited number of private investors decides to "go public," it is electing, for the first time, to sell ownership shares of the company to the general public.

A company may want to consider going public if it needs to provide an exit strategy to venture capital or angel investors who are more willing to provide the business with funding if there's a market for the equity they hold. A successful IPO escalates the visibility and appeal of the business, and increases the demand and value for shares of the company. Funds are generated for working capital, repayment of debt, diversification, acquisitions, marketing, and other business purposes. Investors may benefit from the public sale of ownership interests not only because of the potential increase in market value for their stock, but also because publicly-held stock can be readily sold if the business appears to falter or if the investor needs quick cash.

Corporate status will facilitate a public offering. A corporate form is the preferred form for public entities and although an LLC can be incorporated prior to a public offering, there is additional expense in converting. Thus, planning from the inception of the business can save a great deal of time and money.

However, there are still significant costs associated with going public, both financial and in terms of the time and effort required. The cost for a small business to comply with federal and state laws governing the sale of securities can run from $50,000 to $500,000. In addition, "being public" means being held to a much higher level of accountability than privately owned firms are held. Management must be prepared for the administrative and legal demands of widespread public ownership, particularly in the post-Sarbanes-Oxley era. Small businesses are less likely to engage in IPOs unless they are rapidly growing, successful businesses that generate over a million dollars in net annual income and have sufficient investor awareness and appeal.

If a small business elects to sell ownership shares to the general public, it will most likely be traded on the OTC (over the counter) Bulletin Board or the Pink Sheets (also an OTC exchange). The Pink Sheets is the more speculative of the two, and requires less financial reporting and disclosure. NASDAQ, on the other hand, is a more prestigious step above the two, but also much more expensive and more regulated.

[11] Center for Venture Research *(including only deals that made it through the early screens of angel groups).*

[12] *Software garnered the largest angel investments, with 22 percent of total angel investments in 2004, followed by healthcare services/medical devices and equipment, with a 16 percent share of angel investments. The remaining investments were approximately equally weighted across high tech sectors, with each having about 10 percent of the total deals.* Center for Venture Research.

[13] Angel Investor Market Analysis *for Q1 and Q2 2005 released by the* Center for Venture Research.

[14] See id.

[15] See id.

[16] See id.

Wherever the company is traded, all registrations are subject to federal and state securities laws as well as industry regulation. As a result of registering its stock under the 1933 Act and the 1934 Act, the company is required to file certain periodic and other reports with the SEC. These filings periodically update the information that the company first provided to prospective investors in the company's Registration Statement of Form S-1 in connection with the IPO. In addition, these periodic and other reports form the basis for continuous disclosure concerning the business and provide the company's stockholders and the general public with material, current information for purposes of trading the company's securities. It is important to note that a start-up can sell stock to insiders or to a small group of investors without being subject to securities laws. In essence, the venture can take advantage of alternatives to going public.

LIMITED PRIVATE OFFERINGS

As mentioned above, federal and state securities laws regulate the issuance of securities to investors. Securities may include ownership interests in a company such as corporate shares, limited partnership interests, and (usually) passive LLC membership interests, among others. Before selling an investor an interest in a business, it is vital to understand the securities laws requirements. Luckily, exemptions to the securities law permit a small business to provide a limited number of investors an interest in the business without registering the sale of securities with the SEC. In the event that a small business does not qualify for these exemptions, the company must comply with the complex disclosure requirements of the securities laws. In such an event, it may be too much trouble to do the deal unless a large sum of money is involved.

The most common exemption from the registration requirements of the federal securities laws is a private placement pursuant to Regulation D ("Reg D"). Offerings that are exempt under Rule 504 of Reg D are relatively simple to prepare, and can generally be underwritten by the offering company. Rule 504 exempts companies selling a maximum of $1 million worth of securities to any number of investors within a 12-month period. Rule 504 has no prescribed disclosure requirements, no limit on the number of purchasers, and no investor sophistication standards. While companies using a Reg D exemption do not have to register their securities and usually are not required to file reports with the SEC, they must file what is known as a "Form D" after they first sell their securities. Form D includes the names and addresses of the company's owners and stock promoters, but contains little other information about the company.

Another Reg D exemption is Rule 505, which exempts companies that sell less than $5 million worth of securities within a 12-month period to an unlimited number of "accredited investors" and up to 35 other persons who do not need to satisfy the sophistication or wealth standards associated with other exemptions. Accredited investors include company insiders (e.g., officers and directors), wealthy investors (those with more than $200,000 individual annual income in each of the two most recent years or joint income with their spouse in excess of $300,000 in each of those years or, individually or jointly with their spouse, have a net worth of over $1 million) and institutional investors (e.g., banks, brokers and dealers, insurance companies).

A more limited Reg D exemption is Rule 506, which provides an exemption for limited offers and sales without regard to the dollar amount of the offering. This exemption does not limit the number of accredited investors, but the number of non-accredited investors may not exceed 35 investors. All non-accredited purchasers, either alone or together with a designated representative must be "sophisticated investors." Sophisticated investors possess sufficient knowledge and experience so that they understand the risks and merits of the investment, or the issuer reasonably believes the investors have these qualifications. The business selling the securities typically determines the sophistication of its investors with a questionnaire subscription agreement.

In addition to a factual analysis as to the sophistication of the purchaser of the securities, issuers of securities in a private offering must ensure that the purchaser of the securities is not an underwriter who might, in turn, engage in an unregistered distribution of the securities. Thus, issuers typically require certain investment representations from the purchasers and also require that the securities be legended to put potential purchasers on notice that the securities were issued in a transaction exempt from the registration requirements of the 1933 Act. Such securities, known as "restricted securities," may not be freely transferred absent subsequent registration or the availability of a resale exemption.

The exemptions from registration provided by Regulation D do not include exemptions from the anti-fraud or civil liability provisions of any of the federal or state securities laws. These provisions are broad and include civil and criminal penalties for the misstatement or omission of facts that are relevant to making a fully informed investment decision. If the business makes a Reg D offering without providing

investors with a private placement memorandum that includes sufficient information regarding the investment, then the company, its board, and its principals are at an extreme disadvantage in defending themselves if the business is confronted with a securities fraud action.

It is important to note that qualifying for an exemption under the federal laws does not mean state registration is not required under the relevant state "blue sky" laws. Most states have relaxed their securities regulations for small business by offering a Small Company Offering Registration (SCOR) procedure. Even if a small business is not based in one of these states, it may still register and sell securities in the states that have adopted SCOR.

One of the benefits of private placements for small businesses is the high degree of flexibility in the amount of financing, usually ranging from $100,000 to $10-20 million. The financing may be in the form of either debt or equity capital, or a hybrid of both. A convertible debt warrant would enable the holder to convert the debt into an equity interest at a certain time. Such instruments provide small businesses with the power to determine the amount of immediate equity (ownership and control) to forfeit, and the amount of debt (cash outflow) to assume.

Another advantage of a private placement is that investors are usually more patient than VCs, often seeking 10 to 20 percent return on investments over a longer term of 5 to 10 years. Furthermore, private offerings incur much lower costs and can raise money faster than approaching VCs or issuing the stock in a public offering. Remember, VC's desire to exit a business within three to seven years through a sale of the business or an IPO. But since the IPO market has slowed since the 1990s, it's more difficult for a venture capital fund to foresee an exit. Furthermore, obtaining VC financing is particularly tough these days for small start-ups with little or no profitability. In any event, even if a business can get VC financing, it may opt for a private placement anyway because it can get better terms than with a venture capital fund.

It should be noted that private placements do not usually apply to start-ups that have just completed business planning and conducted a market-feasibility study. Such start-up funding often comes from angel investors. The ideal small business candidate for a private placement is a business in the third stage of financing seeking growth or expansion funding. Private placements provide an attractive alternative form of business financing without the constraints of taking a company public and conceding control.

CONCLUSION

We have seen that the type of financing a start-up decides to pursue depends on the company's immediate high growth potential and its choice of business entity. The sole proprietorship is popular for "mom and pop" start-ups because it requires virtually no formalities and no cost to create and maintain, and tax treatment is favorable and simple. On the other hand, a business that desires a sense of image, credibility, and permanence, and needs to issue stock to raise capital, may benefit from beginning as a corporation. The LLC entity may also be an option for a firm that desires the pass-through tax benefits of a partnership but also seeks to limit personal liability. Since small businesses do not begin with a large number of owners, many usually convert a more simple entity, such as a partnership, into a corporation if and when the need for greater equity financing arises.

Choice of business entity depends in large part on the degree to which there is a need to sell ownership interests to raise money for the company. The C corporation is the most flexible in terms of manipulating ownership interests through the type and number of ownership shares sold, while S corporations and close corporations limit the number and type of shareholders. A sole proprietorship has severe limits in terms of equity financing since there can only be one owner. By the same token, a general partnership limits the ability to raise equity capital since adding a new partner requires the unanimous consent of all existing partners. In addition, management decision-making becomes complicated when there are numerous partners in a general partnership. LLCs and LLPs share the same problem in this regard.

Before entering into any agreement with an equity investor, the entrepreneur should carefully consider whether he/she is compatible with that person. After all, the investor, whether passive or active, will own a portion of the business. Personality conflicts can arise and lead to conflict, litigation, and the eventual demise of the venture. Most flourishing start-up business financings follow a predictable pattern. A typical successful equity investment cycle is the issuance of founders' shares, sales to "friends and family," subsequent sales to accredited and non-accredited investors, venture capital financing, and finally, an initial public offering. However, this is not always the case, and there is a multihued palate of colors with which to paint the financing of a business.

The one constant in the life of a small business is the need for capital to increase sales, expand into new markets, or continue to sustain growth. Although there are a panoply of sources of funding available to entrepreneurs, each has its advantages. In 2002, fourteen percent of the 500 fastest growing companies in the United States started with less than $1,000.[17] With intelligent planning, management, and financing, small businesses can continue to grow, innovate, and succeed in the marketplace**.**

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From The Kitchen Cabinet

SUNNIN' IN THE SONORA!

The Small Business Committee Midwinter Meeting Rocks Again!

The 2006 meeting was a spectacular educational and social event, situated in the blissful West-of-Phoenix Wigwam Resort. Midwinter meetings are particularly valuable to Committee members as an incredible source of not only cutting edge legal thinking but also as a wonderful way to catch up on new thinking about how small business ought to be represented. Add to this a warm, spouse friendly social environment and you have the perfect meeting. If you have never been there, as they say, "you ain't never been there!" It is, simply, the best of times.

While some relish the big-city hustle of the Annual meeting or the jam of Spring Meeting conflicts and hustle, these far more cordial meetings offer the perfect opportunity to "dial back" and really get into the flow of what is being communicated, one on one, in very meaty sessions – sessions that often re-emerge as traditional talking heads programs in the following year. But – if you were not there for the birth of that program, you missed the whole thing.

Our first session this year was a lively, sometimes highly punctuated, discussion of the gives and gets in intellectual property representations and warranties. The open forum format – permitting participants to cross feed with panelists almost always leads to a greater enhancement of learning and far more personal recall. While the materials will be on our Website, those who participated in the meeting will certainly have a far more comprehensive of this evolving "monster" issue and its permutations.

Our second day was bifurcated, first discussing the horrors of lawyer liability and then the horrors of IRC Section 409A. The ethical issues were thrashed out quite well – just not our star panelists. While the posted materials will be helpful, those who attended this session are certainly far more enlightened about the many traps evolving in the day-to-day practice of providing excellent legal services when the good client turns suddenly bad or mad. It was everything from caveat emptor to caveat lawyer.

Our session on 409A was simply enlightening. Reading summaries is one thing; having a real-time jam session on the subject is completely different, especially when the moderators know the subject sufficiently well to simplify 238 pages of contorted IRS prose (the implementing regulations). There is good news – you can have most of what you did in the past; there is better news – to get it you will need a lot of pre award lawyering. If not, the downside (a 20% penalty tax on the recipient) is hardly an incentive. Like they said, though, you had to be there to really see the picture.

Socially it was fabulous – with Larry Goldman hosting what had to be one of the finest Committee dinners ever – even Harry said that! The Spouse/Significant Other breakfast is a great start for the non-lawyers in attendance. One morning, there was a putting challenge on the green just outside; this was followed by trips to the ultimate in Western Shopping Malls, plenty of golf, lying around, and lying at, the pool, fireside cocktails and a bash at Mary Beth's spacious casita for after dinner drinks (we're not sure who won the game of pool).

So, where were we really? Take a minute to think about this for a setting: When Henry Ford started mass-producing automobiles, he inadvertently

[17] Inc. Magazine *(October 2002).*

fostered a legendary, award-winning resort . When Goodyear Tire & Rubber Company discovered that cotton extended the life of the tire, the company purchased 16,000 acres of Arizona land in 1916 to begin cultivating. In 1918, Goodyear built a private company lodge for visiting executives who fondly dubbed the lodge, "The Wigwam". The facilities expanded to accommodate 24 guests and opened to the public in November 1929. In 1941, the Wigwam's location made it valuable as a base to house Army Air Force fighter pilots in training at nearby Luke Air Force Base. In 1946, the Wigwam was returned to private hands, expanded from 66 to 120 guests, and reopened to the public. Today, the resort has some 331 casita-style rooms. A portion of the original structure remains.

So, when next year rolls around and you say "Charleston?" think again. We'll bend your brain, tax you socially and leave you fully aware of how great this Committee really is. There is nothing like shrimp grits for lunch!

Articles Wanted

Business Visions encourages members of the Small Business Committee to submit articles or suggestions for articles. Please send articles or suggestions to kburns@mmmlaw.com.