KANE KESSLER, P.C.

Our Business Is You℠ | October 2011

About Kane Kessler...

Kane Kessler is a midsized law firm located in Midtown Manhattan, serving clients throughout the United States and globally. Kane Kessler has been in the business of providing exceptional legal services to its clients for over 80 years, with experienced and specialized lawyers practicing in many areas of the law. At Kane Kessler, we take pride in delivering personal attention to each and every client and in our ability to offer a wide range of experience and knowledge in many legal specialties to help your business grow and prosper.

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For more information about the Firm, please visit our website at www.KaneKessler.com or call us at (212) 541-6222.

The Editors,

Judith A. Stoll

Gary E. Ostroff

SAY-ON-PAY 2011: THE FIRST-YEAR RESULTS

With the 2011 proxy season behind us, the results of the first year of advisory votes on executive compensation under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") are in. The results provide insight into how investors view the payment arrangements of top corporate executives and provide guidance on the future trend of executive compensation.

An Overview of "Say-on-Pay"

Pursuant to the Dodd-Frank Act, most U.S. public companies are required to conduct non-binding shareholder advisory votes on various aspects of executive compensation, known as the "say-on-pay," "say-on-frequency" and "say-on-golden parachute" votes. The say-on-pay vote requires companies to submit the compensation programs for named executive officers to a vote at least once every three years. Under the say-on-frequency requirement, companies must conduct a vote, at least once every six years, permitting shareholders to choose whether to hold the say-on-pay vote every one, two or three years. Last, the say-on-golden parachute vote requires companies to hold a separate shareholder vote on compensation and severance arrangements in connection with a proposed merger, sale of the company and certain other transactions.

Results from the 2011 Annual Meeting Season

Thus far in 2011, approximately 2,300 companies in the Russell 3000 Index have held say-on-pay and say-on-frequency votes. Shareholders voted down

INSIDE: Social Media and the Workplace • Federal Jurisdiction of the Computer Fraud and Abuse Act • Assigning Rights in Commercial Leases • New Strategies in Preventing Gray Market Competition say-on-pay proposals at just 40 of these companies, due primarily to poor financial and/or stock performance. While the majority of companies experiencing failed votes had significant negative multiyear returns, other factors contributing to "no" votes included tax gross-ups, large discretionary bonuses, inappropriate peer benchmarking, excessive pay and failure of the board to address prior shareholder opposition to compensation committee members. The say-on-frequency results showed that shareholders overwhelmingly support the say-on-pay vote on an annual basis. Only a slight fraction of companies reported shareholder support for triennial votes, and an even smaller number of companies reported shareholder support for biennial votes.

As of August 2011, only seven Russell 3000 companies reported say-on-golden parachute vote results, with five of these companies obtaining more than 89% support for their golden parachute compensation arrangements. Although the sample is small, these results suggest that shareholders tend to confirm a company's golden parachute payments if they support the overall transaction.

Impact of Say-on-Pay

The say-on-pay vote is intended to serve as a vehicle to allow shareholders to communicate their concerns over executive pay, management's failure to deliver satisfactory performance relative to their compensation, a lack of transparency and failure to use predetermined benchmarks in executive compensation programs. Although it is challenging to determine the ultimate effect these advisory votes will have on executive compensation programs, many investors and commentators believe that the 2011 advisory votes had a positive impact by promoting greater shareholder involvement while also pushing companies to make their executive compensation programs more investor-friendly. A number of companies even made late changes to their compensation programs or filed additional proxy materials in order to gain shareholder support. More specifically, several companies implemented additional performance-based compensation plans and addressed items often criticized by shareholders, such as excessive severance packages, tax payments, miscellaneous executive perks and pensions.

Looking Ahead to 2012

As investors anticipate the second year of advisory votes, we believe their focus will be on companies' responses to failed votes and a possible increase in votes against compensation committee members at companies that have either failed to address a "no" vote or received a substantial percentage of negative votes on say-on-pay. We expect that shareholders will examine whether these companies have made meaningful changes to their compensation programs to better link pay to performance. Companies that fail to adequately respond to this year's say-on-pay votes will likely face increased "no" votes during the 2012 proxy season.

Kane Kessler advises clients on best practices for public disclosure of executive compensation programs and strategic advice in obtaining shareholder support for say-on-pay proposals.

"...many investors and commentators believe that the 2011 advisory votes had a POSITIVE IMPACT by promoting greater shareholder involvement, while also pushing companies to make their executive compensation programs MORE INVESTOR-FRIENDLY."

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SOCIAL MEDIA & THE WORKPLACE

More than 500 million individuals use social media, and many of them are logged on during work hours. As a result, not only do employers suffer a loss of productivity, but an employee's posts may contain criticism of the company or its clients; reveal confidential company or client information; or subject employers to potential liability for harassment, discrimination or defamation claims, child pornography reporting requirements, and Federal Trade Commission restrictions on endorsements and testimonials in advertising.

Employee Protections

Before an employee is disciplined for inappropriate use of social media, employers should be aware that employees have certain statutory protections and should always consult Labor and Employment counsel before taking any disciplinary action against an employee because of information in his/her posts.

"...employee's posts may contain criticism of the company or its clients; reveal confidential company or client information; or subject employers to potential liability for harassment, discrimination or defamation claims..."

- The National Labor Relations Act ("NLRA") provides protection for all employees to engage in "protected concerted activity." This includes the right to discuss terms and conditions of work, including compensation, and also to criticize one's supervisor and/or employer. Recent National Labor Relations Board decisions have reconfirmed employees' right to use social media to engage in arguably confrontational conduct in connection with such protected concerted activity.
- Whistleblower Laws: Both federal (Sarbanes-Oxley Act) and state laws may protect employees who raise concerns about working conditions that may affect public health and safety and/or potential securities fraud violations.
- Legal Off-Duty and Political Activities: State laws prohibit employers from taking adverse action against employees because of their participation in legal off-duty activities (including off-duty alcohol consumption, for example) or because of the expression of their political views or their affiliation with a political group.
- Antidiscrimination Laws: An employer cannot take adverse action against an employee because he/she has revealed his/her membership in a class protected by federal, state or local antidiscrimination laws.

Effective Social Media Policy

An effective social media policy should warn employees that postings containing the following will not be tolerated: (a) proprietary and confidential information about the company or its clients; (b) discriminatory or sexually charged comments; or (c) defamatory statements about the company or its employees, clients, competitors or vendors. It should also advise employees to place a disclaimer in any posting that the content is their own opinion and not that of the company; warn employees against the use of company logos and brands in their posts; prohibit harassing and discriminatory comments; and prohibit illegal activities (i.e., downloading pirated software or data) or viewing or transmitting child pornography. Finally, the policy should state precisely the employer's right to take disciplinary action against an employee who violates the policy.

Best Practices/Additional Considerations

- Any social media policy must affirmatively state that the policy is not intended to prohibit or interfere with an employee's right to discuss terms and conditions of employment with others.
- Employees should be notified that the employer regularly monitors workplace communications and that employers must actually monitor and enforce policy provisions uniformly.
- Employers should train their employees regularly, promulgate written policies, and provide regular reminders of the policies and the consequences of violating such policies.

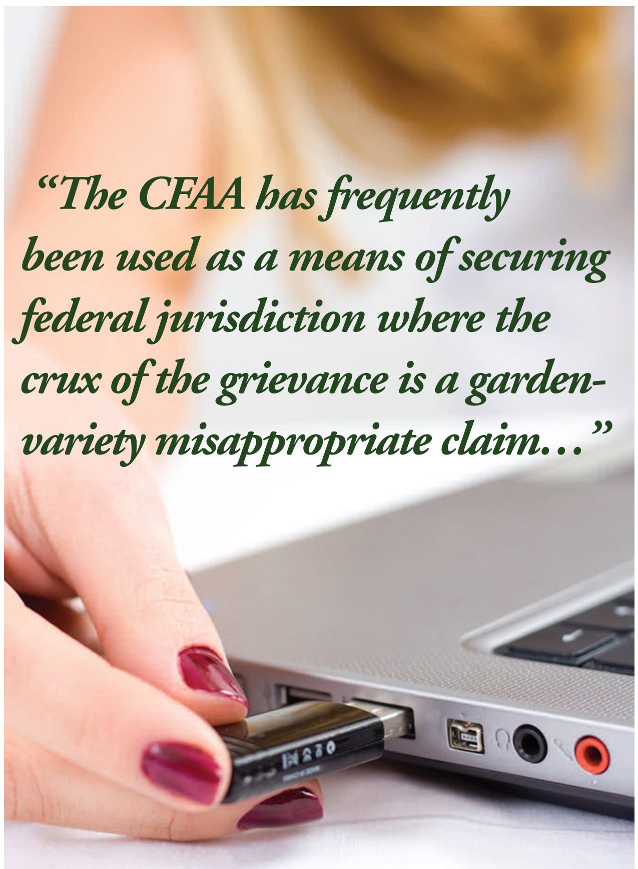
Please contact Kane Kessler's Labor and Employment practice group if you have any questions about your company's policy on the use of social media.

Judith A. Stoll is a Partner and **Alexander Soric** is an Associate in the Firm's Labor and Employment practice group. Judy can be reached at jstoll@kanekessler.com or (212) 519-5165. Alex can be reached at asoric@kanekessler.com or (212) 519-5178.

ELBOWING YOUR WAY INTO FEDERAL COURT:

Federal Jurisdiction Through an Expansive Interpretation of the Computer Fraud and Abuse Act

The computer age has greatly facilitated communication, but it has also made it easy for employees to misappropriate proprietary and confidential information. By downloading sensitive company data onto disks, thumb drives or other portable media devices, employees can readily transmit company information to start their own competing business or to give a competitive edge to a new employer.



The Computer Fraud and Abuse Act (CFAA) is a federal statute that makes it a crime to, and creates a private remedy against those who, intentionally access a protected computer without authorization or in excess of authorization and, as a result, cause damage and loss. The precursor to the current statute was originally enacted in 1984 as a criminal statute to protect against hackers obtaining access to classified defense information. The statute was amended in 1986 and officially renamed the CFAA, it was amended again in 1994 to add civil remedies and, most significantly, it was expanded in 1996 to include computers in the private sector.

Litigation under the CFAA seems to be following the same orbit as the Racketeer Influenced and Corrupt Organizations (RICO) Act. Originally intended as a tool for prosecutors to combat organized crime, RICO became a weapon by private litigants bringing garden-variety fraud actions. Adding a RICO claim established federal jurisdiction (and the opportunity for treble damages and attorneys fees). But the judiciary gradually retracted this expansive view of the RICO statute, at times harshly criticizing its overbroad application to situations beyond its intended purpose.

The CFAA has frequently been used as a means of securing federal jurisdiction where the crux of the grievance is a garden-variety misappropriation claim rooted in state common law or brought under the Uniform Trade Secrets Act (adopted in some version by 45 states). Courts have split on whether this aggressive use of the CFAA is appropriate, and competing interpretations of the statute have emerged: the narrow (minority) view holds that a person does not act without authority or in excess of authority when he accesses a protected computer that he is permitted to access; the broad (majority) view holds that if the access is undertaken for an improper purpose, such as misappropriation of confidential information, and the company has in place policies prohibiting such activities, then the conduct has not been authorized or has exceeded proper authorization.

The Supreme Court of the United States may ultimately have to resolve these competing views, or Congress may amend the CFAA yet again to clarify its proper scope and application. In the meantime, however, plaintiffs have another means of bringing what is essentially a state law misappropriation claim in federal court by relying on the CFAA to present a federal question.

The Kane Kessler Litigation practice group has experience in lawsuits involving the CFAA and other federal statutes and makes it a high priority to follow current developments in this constantly changing legal landscape.

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EXIT STRATEGY

THE IMPORTANCE OF ASSIGNMENT RIGHTS IN COMMERCIAL LEASES

Not many clauses in a commercial lease are more heavily negotiated than tenant assignment rights. The tenant wants maximum flexibility to assign, and the landlord wants as many restrictions as possible. This article sets forth some key points that tenants and landlords need to be aware of when negotiating the assignment section of a lease.

Tenant Entity

A commercial lease will typically state that notwithstanding an assignment, the original named tenant will remain liable under the terms of the lease. A tenant should give considerable advance thought as to which entity will be the named tenant in the lease. The choice as to who the named tenant is under the lease can have major implications down the road if the tenant seeks to assign the lease. In general, a tenant should avoid naming the operating entity as the tenant, because the operating entity would remain liable in the event of an assignment. From the landlord's perspective, however, it is important that the tenant listed on the lease be the operating entity that has assets that the landlord can look to in the event of a default.

> ***"The choice as to who the named tenant is under the lease can have major implications down the road if the tenant seeks to assign the lease."***

Permitted Assignment

Typically, the landlord's proposed lease will state that the landlord's consent is required in connection with any assignment. It is important for a tenant to negotiate certain instances in which it can assign the lease without the need for the landlord's consent. For instance, consent should not be required in connection with an assignment to an affiliate, parent or subsidiary of the tenant or in connection with the sale of all or substantially all of the assets, stock or membership interests of the tenant. The purpose of the foregoing is to allow the tenant some flexibility in the event of a corporate restructuring or sale of its business. However, the landlord may not be inclined to agree with such language because of the risk that the proposed assignee does not have the financial wherewithal of the tenant.

Payment to Landlord

A sometimes-confusing and regularly overlooked clause that a landlord may require in the lease is a provision that the landlord be entitled to all or a percentage of any payment that a tenant receives from the assignee upon an assignment of the lease, in excess of the rent amount the tenant is obligated to pay pursuant to the terms of the lease. The reason for this language is that the landlord does not want the tenant to profit from the landlord's space. In the event a lease is being assigned as part of the sale of a business and the real estate is only ancillary to the transaction, it is often difficult, if not impossible, to ascertain what portion of the purchase price is allocated to the lease and what portion is attributable to the business being sold. If, on the other hand, the assignment of the lease is not in connection with the sale of a business as a going concern but is rather an assignment to an unrelated entity or for a completely different use, there is a direct connection to the value of the lease, and the landlord will, in most cases, insist that the tenant pay some, if not all, of the money received in excess of the rent due pursuant to the terms of the lease.

The above are just a few items to which a prospective tenant should give some thought prior to entering into a lease. Restrictive assignment rights can severely hamper a tenant's flexibility in the event it needs or decides to sell its business in the future or wants to use the assignment clause as a potential exit strategy.

The Kane Kessler Real Estate practice group has extensive experience representing both landlords and tenants in complex leasing matters relating to office, retail, shopping center, restaurant and related venues.

Gary E. Ostroff is a Partner and **Ari M. Gamss** is an Associate in the Firm's Real Estate practice group. Gary can be reached at gostroff@kanekessler.com or (212) 519-5112. Ari can be reached at agamss@kanekessler.com or (212) 519-5135.

NEW STRATEGIES IN PREVENTING GRAY

Sometimes it seems as if competition comes at you from every angle. You bring a successful product to market, and the imitators come out. You slap a few imitators down when they get too close to your trademarks or your original copyrighted works. But they keep coming, sometimes to the point that you just can't move fast enough to prevent their latest countermoves. Fortunately, there exists in the U.S. a robust framework for the protection of your intellectual property (IP) assets, possessing aspects of which you may not be aware. Most clients are generally aware of the power that issued patents and registered trademarks and copyrights offer in maintaining a strong, exclusive market share. However, there are lesser-known remedies that the U.S. government and federal law can provide in enforcing those rights, including some important recent developments related to the unauthorized sale of genuine goods on the so-called gray market.

Kane Kessler's IP experts, with the assistance of U.S. Customs and Border Protection ("U.S. Customs"), have have years of experience helping clients leverage their portfolios of IP rights to stop potential trademark and copyright infringers at the borders of the nation.

U.S. Customs agents are empowered by Congress to interdict shipments of merchandise, the sale of which would infringe registered trademarks and copyrights in the U.S. To take advantage of this service, a trademark or copyright owner must own a federal trademark or copyright registration for the relevant mark or creative work. U.S. Customs offers a relatively simple and inexpensive procedure for recording your registered IP. Upon recordation with U.S. Customs, information is propagated to customs agents at ports around the nation who perform regular inspections of shipments of goods passing through their ports. The owner of a registered trademark, for example, can indicate to U.S. Customs where authorized shipments of goods bearing the trademark will originate and to what location in the U.S. such shipments will be directed. Customs agents will review shipping manifests to see if the information in the manifests comports with the information recorded with U.S. Customs, and if they find any discrepancies, they will contact the legal representative of the mark owner to determine how to dispose of the interdicted goods.

"The affirmation by two leading federal appellate courts... strongly indicates that the breadth of the COPYRIGHT FIRST SALE DOCTRINE is well on its way to a more narrow interpretation."

This procedure has historically worked very well for the owners of registered trademarks, but until recently, copyright owners faced some additional difficulty because importers could take advantage of the copyright "first sale doctrine" to purchase genuine goods abroad and legally import them into the U.S. (The first sale doctrine, codified at 17 U.S.C. § 109, allows the purchaser of a genuine copyrighted work to dispose of that work as the purchaser sees fit, such as in the operation of a used-book store or on Internet sites such as eBay.)

In recent years, though, federal courts have begun to narrow the copyright first sale doctrine in favor of rights owners in the context of importation. For example, in the leading case, *Omega S.A. v. Costco Corp.*, 541 F.3d 982 (9th Cir. 2008), plaintiff Omega, S.A., attempted to prevent the sale in the United States of genuine OMEGA® brand watches by

MARKET COMPETITION

defendant Costco Corp., on the basis that, although they were 100% genuine goods, the importation and sale of the watches within the U.S. (manufactured by plaintiff outside the U.S. and purchased outside the U.S. by defendant) infringed plaintiff's exclusive U.S. copyright in a copyrighted globe design displayed on the back of the watches. Costco argued that the first sale doctrine should extend to genuine goods purchased outside the United States and later imported into the U.S. Although the trial court agreed with Costco's position, the Ninth Circuit Court of Appeals reversed, holding that the first sale doctrine applied only to the resale of authorized copies manufactured within the United States. Since the allegedly infringing goods had been manufactured abroad, the first sale doctrine did not apply, and Costco was prevented from importing and selling the watches even though they were genuine OMEGA® goods.

More recently, the Second Circuit Court of Appeals decided a similar case in *John Wiley & Sons Inc. v. Kirtsaeng*, Case No. 09-4896 (2d. Cir. 2011). In this case, the defendant had imported into the U.S. and subsequently sold copies of books published abroad by plaintiff John Wiley & Sons Inc. and sold abroad by plaintiff for prices lower than original U.S. editions of the same books. (The plaintiff in this case had a practice of printing copies for the overseas markets on lower-quality paper and using other cost-saving methods of manufacture.) The Second Circuit, following the Ninth Circuit in *Omega*, affirmed the district court's finding that the first sale doctrine did not insulate the defendant from claims of copyright infringement where the defendant resold genuine goods first manufactured and sold outside the United States.

The affirmation by two leading federal appellate courts (and the Supreme Court's split decision that effectively affirmed the *Omega* ruling) strongly indicates that the breadth of the copyright first sale doctrine is well on its way to a more narrow interpretation. This will have at least two effects: (1) it should enable U.S. companies to more easily restrict the flow of copyrighted goods into the United States using the tools available through customs enforcement, and (2) it may greatly assist U.S. companies in controlling the gray market in general.

There are many strategies for dealing with IP infringement and the gray market. The *Omega* and *Wiley* decisions broaden the remedies available to owners of copyrighted works and make customs enforcement a more valuable tool in the battle to enforce intellectual property rights.

Adam M. Cohen is Chair and **Brendan P. McFeely** is a Senior Associate in the Firm's Intellectual Property practice group. Adam can be reached at acohen@kanekessler.com or (212) 519-5146. Brendan can be reached by bmcfeely@kanekessler.com or (212) 519-5188.

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Firm News...

FIFTH YEAR AS SUPER LAWYER

Congratulations to **Jeffrey H. Daichman**, Co-Chair of the Firm's Litigation practice group, who has been selected as a New York Super Lawyer for 2011. This is the fifth year that Jeff has received this extraordinary professional recognition. He was also selected as a New York Super Lawyer in 2006, 2007, 2009 and 2010.

APPOINTMENT TO MEDIATION PANEL

S. Reid Kahn, Co-Chair of the Litigation practice group, has been accepted to the Mediation Panel for the United States District Court for the Southern District of New York ("SDNY"). SDNY has not accepted new members to its Mediation Panel for many years. Mr. Kahn is also a member of the Mediation Panel for the Commercial Division of the Supreme Court for New York County, and he is included on the Statewide Roster of court-approved and qualified mediators for civil, general equity and probate cases in the state of New Jersey.

NEW ASSOCIATE

Kane Kessler is pleased to announce that **Marisa A. Jerome** has joined the Firm's Corporate and Securities practice group. Marisa's experience includes the representation of public and private companies in a broad range of corporate transactions, including initial and secondary public offerings, private offerings, mergers and acquisitions, and financing transactions.

KANE KESSLER LAWYERS' SPEAKING ENGAGEMENTS

Adam M. Cohen, Chair of the Intellectual Property practice group, will be moderating the panel "Lawyers on the Clock" at the October 2011 annual meeting of the Association of Independent Commercial Producers.

Brendan P. McFeely spoke at the annual "The Pitching Hour" panel at Comic-Con International in San Diego, California, giving advice to authors, artists and screenwriters on how to protect their work as they seek to break into the publishing and entertainment industries. Brendan was also interviewed by Christopher Byrne of Summit Security Services for the FBI's Infraguard public-private partnership on the topic of methods of protection against intellectual property infringement by foreign and domestic infringers.

ACHIEVEMENTS

Recent achievements of the Labor and Employment Law practice group include:

- Successfully negotiated a three-year renewal of a collective bargaining agreement for a large health plan with more than 600 employees.
- Obtained dismissal of a discrimination lawsuit on the grounds that plaintiff had signed an enforceable release of his discrimination claims in settling his union arbitration.

Recent achievements of Kane Kessler's Corporate and Securities practice group include:

- Successful completion of a $50 million tax-advantaged investment in commercial solar power projects for a family wealth management office.
- Successful resolution of a major sales tax audit for a hospitality industry company at less than 20% of original assessment.
- Advised a hedge fund in a proxy contest resulting in the election of the hedge fund's nominee to the board of directors of one of its portfolio companies.

A recent achievement of the Real Estate practice group:

- Negotiated and successfully closed a "New York-style" commercial loan defeasance and refinancing for a Class "A" mixed-use building located in downtown Manhattan.

PRACTICE GROUPS

Bankruptcy, Reorganization and Creditors' Rights

Corporate and Securities

Corporate Investigations

General Business

Intellectual Property

Labor and Employment Law

Litigation

Matrimonial

Mediation

Real Estate

Trusts, Estates and Taxation

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