

message from partner in charge

With summer upon us, we often find ourselves looking for diversions. We hope you'll take some time out of your day and divert your attention to our latest *Orange County Update*.

Steven London and Matthew Gilman have recently formed the firm's Shareholder Activism Team. In this issue, you'll find an article by Steve and Matt which describes how shareholder activism grew in 2007 and is expected to substantially increase in 2008 and the steps directors need to take to be more proactive in addressing this activism.

You also will find information about our recent Pepper and Eggs Webinar on Privacy & Security Compliance. Information security compliance is being demanded by the public and government alike. Pepper partners Michael Hordell and Peter Adler discussed these requirements and approaches that companies can take to comply.

Lastly, Rob Auritt and I have an article on the new CAN-SPAM Act rules issued by the Federal Trade Commission, which will go into effect 45 days after they are published in the Federal Register.

As always, thank you for reading and please let us know if you have any comments or suggestions.

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Best Practices for Working With Shareholder Activists

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Corporate boards of directors and management can — and should — be more proactive in preparing for and addressing increasing activism by shareholders.

Shareholder activism, which grew in 2007, is expected to continue to increase in 2008. Several factors led to this rise, including greater pressure to increase returns to shareholders and hedge funds seeking a variety of individual gains.

In addition, new Securities and Exchange Commission rules were established that permit less costly electronic proxy solicitations. This allows shareholders to avoid the burden of complying with numerous laws and communications rules, and they are not required to file and distribute significant amounts of paperwork. Also, the establishment of electronic forums allows shareholders to communicate and generate support for a cause without being in violation of proxy rules.

Shareholders now hold boards of directors and management more accountable for company performance and corporate governance, and dissident shareholders have achieved some notable successes.

Vocal and active shareholders often promote one particular issue that may not be in the best interests of the remaining shareholder base. Their objectives also can force board members to focus on short-term, rather than long-term, goals. At times, shareholder activists can distract boards of directors from focusing on their primary duties to provide strategic direction and oversee management.

While management and the boards of directors of public companies have always tried to balance Wall Street's demand for quarter-to-quarter performance with actions aimed at long-term growth, the now pervasive scope of activist shareholders makes that balance more difficult to achieve.

For example, hedge funds pressure management with the ultimate goal of obtaining board seats, special dividends and stock buybacks. Often, they also seek the board's commitment to explore the sale of the business or force a company to negotiate better terms for shareholders.

Shareholder activism is forcing boards of directors to respond more directly to the concerns and demands of large shareholders. These demands include greater accountability for executive compensation, board representation and short-term strategic options to enhance shareholder value. Shareholders' concerns are particularly prominent with respect to companies with languishing returns.

Companies can adopt several proactive approaches to address increased shareholder activism, thus enabling them to be ahead of, rather than behind, the trend, including:

- educating directors regarding the tactics of activist shareholders, as well as the obligations of management and boards of directors to individual shareholders
- continually reviewing, analyzing and improving corporate governance
- thoroughly analyzing executive compensation, linking pay to performance
- evaluating periodically the composition and performance of the board of directors
- holding meetings with prominent shareholders and listening to their concerns
- communicating to shareholders the key priorities of management, realistic benchmarks and milestones that shareholders can use to evaluate progress

- monitoring shareholders, including chat rooms, to understand who they are
- fully analyzing takeover defenses.

These are appropriate corporate governance measures regardless of the activist shareholder initiative. Furthermore, the measures can serve to address the concerns of all shareholders before potentially disruptive activities of shareholder activists.

The goal of any company should always be to alleviate shareholder concerns before they reach a crisis point. However, should a lawsuit, proxy contest or activist shareholder challenge arise, boards of directors and management need to be informed, deliberate and consistent in their response. They also need not be fatalistic, despite the significant power activist shareholders have gained in recent years. Each situation requires individual attention, the ability to develop and implement appropriate, measured responses, along with a realistic assessment of when to fight and when to forge a suitable settlement.

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Mr. London and Mr. Gilman have formed Pepper's shareholder activism team.



Peppercast: The Perils of the Employee Free Choice Act

As the 2008 election cycle intensifies, the organized labor movement is devoting substantial resources to support candidates who will advance its ambitious legislative agenda in 2009, including passage of the Employee Free Choice Act (EFCA).

Jonathan Kane, a partner in the Philadelphia and Berwyn offices of Pepper Hamilton and chairman of the firm's Labor and Employment Group, discusses what passage of the EFCA would mean to employers and what they can do now to ensure that union organizers do not target their employees.

Listen today by visiting the Labor and Employment section of Pepper's podcenter at www.pepperpodcasts.com.

FTC Issues New CAN-SPAM Act Rules

The Federal Trade Commission (FTC) recently approved four new rules intended to clarify certain requirements of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or the CAN-SPAM Act.

The CAN-SPAM Act was enacted in 2003 and regulates the sending of commercial electronic mail messages, with a commercial e-mail defined as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet Web site operated for a commercial purpose).” For more on the underlying provisions of the CAN-SPAM Act please see Pepper’s *Privacy and Security Law Update* titled “What’s a ‘Commercial’ E-Mail Under CAN-SPAM?” available at http://www.pepperlaw.com/pepper/publications_update.cfm?rid=638.0.

The new rules, which will go into effect 45 days after they are published in the *Federal Register*, are as follows:

- (1) A definition of the term “person” under CAN-SPAM was added to clarify that the term applies not only to natural persons, but also to groups, unincorporated associations, limited or general partnerships, corporations or other business entities.

Nonprofit clients should note that the FTC specifically rejected an argument that all unincorporated nonprofit associations should be excluded from the definition of *person* under the Act, and thus exempted from CAN-SPAM regulation.

- (2) The definition of the term “Sender” under CAN-SPAM was modified to make clear that when a single e-mail is sent from multiple marketers (for example where a commercial e-mail sent from an airline also contains advertisements or promotions from a hotel chain or car rental company), that the sending parties may, under certain circumstances, designate one of the parties as the sole “Sender” of the message for purposes of CAN-SPAM compliance. Under CAN-SPAM, a “Sender” is currently defined as “a person who initiates [a commercial electronic mail] and whose product, service or Internet Web site is advertised or promoted by the message.” Under the new rule, the designated

Pepper and Eggs Series Webinar Recording

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Information security compliance is being demanded by the public and government alike. The problem this presents is how to place all the disparate pieces into a unified approach. Information security officers, privacy officers, compliance officers and attorneys are being confronted with an increasing number of laws and regulations affecting their organizations. These include HIPAA, GLBA, FISMA, and the FTCA, numerous state laws on privacy and notice of breach laws and private contractual standards such as the Payment Card Industry Data Security Standard (PCIDSS).

After providing a brief overview of these requirements, attendees at the most recent webinar learned about a unified approach to security compliance that leads to simultaneous compliance with multiple laws and regulations.

Listen to the webinar by visiting http://www.pepperlaw.com/pepper/webinars_update.cfm?rid=12.0.

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“Sender” but not the other parties marketing under the same e-mail must honor all opt out requests. Likewise, it is the designated “Sender” and not the other co-marketers whose physical address must appear in the message.

Clients that participate in co-marketing programs involving the sending of commercial e-mail messages should take care to agree in writing with their co-marketers as to which will be the designated “Sender” of such e-mails for purposes of CAN-SPAM compliance. The designated sending party must then initiate the e-mail, and be identified in the “From” line. In certain circumstances, it may be advisable to ensure that representations, warranties and indemnification provisions in co-marketing agreements specifically include CAN-SPAM compliance language.

- (3) The definition of the term “valid physical postal address” under CAN-SPAM was modified to allow for the use of an accurately-registered post office box or private mailbox established under United States Postal Service regulations.

Clients that are consultants or otherwise use a post office box or private mailbox can now comply with the CAN-SPAM Act’s requirement that each commercial e-mail sent include a valid physical postal address, without revealing the address of a place of business or private residence.

- (4) A new requirement was added to the opt-out provisions of CAN-SPAM that makes it clear that an e-mail recipient seeking to opt out of receiving future commercial e-mails from a sender cannot be required to pay a fee, provide other than his or her e-mail address, opt-out preferences, or take any steps other than sending a reply e-mail message or visiting a single Web page to effectuate the opt out.

Under the original language of the Act, senders merely had to provide for a means for the recipient to opt out of receiving future commercial e-mails. The vagueness in the language allowed senders to, for example, require recipients to sit through a sales pitch before effectuating their opt out. The new rule makes clear that forcing a recipient to visit multiple Web pages or providing any information other than an e-mail address and/or a recipient’s opt-out preferences is a violation of the Act.

Please contact the authors if you have any questions about the new FTC rules or other matters dealing with CAN-SPAM Act compliance.

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