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How Will Tax Reform Affect Entity Selection? Should You Advise Your Clients to Become a C Corporation?

By Ayla Ercin, Attorney at Law

When the Tax Cuts and Jobs Act (TCJA) was signed into law on December 22, 2017, the lead story for the business community was the reduction of the corporate tax rate from 35% to 21%. Politicians argued for the rate reduction by pointing to the U.S. corporate statutory tax rate as one of the highest in the world—which it was, if the U.S. system of deductions and credits was not taken into account. When those deductions and credits were considered, U.S. corporations probably were not losing on the international stage; but corporations were, and have been, losing on the domestic stage for decades.

The share of business income attributable to C corporations has precipitously declined since 1980, when C corporations were the dominant business form and saw more than 80 percent of all business net income attributable to them. Thirty-three years later, that percentage had been cut almost in half, and most business income was coming from sources other than C corporations (U.S. Department of the Treasury, Office of Tax Analysis, Working Paper 107). Their rival, and the ascendant business type, wasn't one form of entity, but a hodgepodge of business structures that shared one characteristic: they were not subject to the corporate tax system, but instead saw income "flow" or "pass through" to be taxed as the business owners' individual incomes. These "flow-through" or "pass-through" entities can be S corporations, limited liability companies, partnerships, or a host of other entity types that are more or less desirable based on the relative appeal of individual rates over corporate rates, and the differing deductions and credits applicable to each. Of course, lawyers and accountants are keenly aware of these differences and, prior to the TCJA, have often judged flow-through taxation to be more desirable. After the passage of the TCJA, business professionals have to ask if that same calculus still applies, and advise clients when they ask if the well-publicized reduction in corporate taxes means their new businesses should be C corporations, or if they should convert their existing businesses to C corporations.

Choosing an entity has always involved a deep dive into a client's business plan and a consideration of the particular facts at hand. That those particular considerations have shifted may not have made entity selection harder, but it does require a fresh review in light of changed circumstances, and many companies will need to check in with their tax attorneys or accountants. For those entities with little choice in their form, the corporate rate change may be an unalloyed good: almost all publicly traded companies are C corporations, and startups seeking outside equity are often required to be C corporations by their investors. Smaller industry considerations also appear. Cannabis

Continued on page 2

In this Issue

Articles

Tax reform and entity selection 1
New shell-company legislation 3
Fundraising with cryptocurrency 5
Independent contractors 7

Business Law Section News
Annual CLE program 8
Subcommitee Reports 9

Upcoming Events 10

Job Posting 10

Choice of entity

Continued from page 1

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companies may face pressure from investors to eschew pass-through taxation to limit their liability for tax-deduction constraints unique to that industry. For most owners, however, the evaluation will be more nuanced. One starting place for this evaluation should be the availability of the TCJA's new qualified business income (QBI) deduction.

The qualified business income (QBI) deduction allows a business owner to deduct 20% of qualified business income earned by that taxpayer. Because QBI is generally income derived from a pass-through business, and because most owners of pass-through entities are in the highest individual tax brackets, this deduction can equal significant savings. It is, of course, subject to a number of limitations and exceptions. One important limitation starts to appear for business owners whose individual income is more than $157,500 or joint income is more than $315,000. Once this threshold is exceeded, certain service businesses, including law firms, health care providers, accountants, and consultants, among others, see their deduction phase out until it is totally eliminated. For other businesses at this threshold, the deduction begins to be limited by considerations of the amount of W-2 wages the business pays and the unadjusted basis of the businesses' qualified property. Because the QBI is currently set to expire on December 31, 2025, business professionals will have to base their long-term advice not only on the objective calculation of the immediate effect of the QBI deduction, but also on a best guess as to whether it will be extended or left to expire.

Although the TCJA saw corporate rates cut drastically, one thing the TCJA did not do was alter the historical oddity of "double taxation" on the distribution of corporate profits. Until 1894, all taxation was flow-through taxation, and there was no accepted concept of taxing a business separately from its owners. Even after the introduction of a separate corporate-level tax, "double taxation" of distributed profits didn't appear until 1936, when business owners lost their ability to deduct the amount of the previously taxed corporate dividends from their income. Under today's surviving double taxation scheme, the 21% corporate rate only accounts for what the corporation itself pays on its earnings. If the corporation chooses to make a distribution of its earnings to its shareholders, those shareholders can pay up to an additional 23.8% in taxes on that income.

Under previous rates, that meant corporate profits were subject to a combined tax rate of up to 50.47%, whereas business owners under pass-through forms would pay rates only up to 39.6% on their earnings. After the TCJA' s corporate tax cut and its top individual tax reduction to 37%, however, that gap would have been narrowed to under a 5% difference—certainly small enough to encourage a corporate comeback. With the QBI deduction, however, that approximately 10% difference at the highest levels is largely maintained.

While some taxpayers may find that the relative merits of a pass-through entity versus a C corporation will hinge on the availability of the QBI deduction, the TCJA made a number of other significant changes in the tax law. The TCJA maintained the availability of the state and local income-tax deduction for corporations, but capped it at $10,000 for individuals. The alternative minimum tax was also eliminated for corporations, but was maintained in an adjusted form for individuals. Businesses with international operations will likely also find that TCJA changes tend to favor C corporations.

One thing that has not changed is the need to consider the existing landscape as it relates to entity choice: the capital needs of the business and whether profits will be retained instead of distributed, plans for an imminent sale or other disposition of the company that will be affected by its tax structure, the anticipated generation of net operating losses and their treatment, the effects of state and local tax laws, and timing constraints on the ability to convert between entity types. Although the individual evaluation may be fact-specific and require an accountant to run through a company's unique numbers, as the TCJA changes are implemented and interpreted, the broader and long-term effects on business choice of entity will come into greater focus. ◆

New Legislation Focuses on Shell Companies

By Ryan Flatley, Attorney at Law

Ryan Flatley is an attorney with Thede Culpepper Moore Munro & Silliman LLP in Portland. He practices business law, estate planning, real estate, and tax law.

In order to combat the use of shell companies, the 2017 Oregon State Legislature passed a law that ushered in sweeping changes to the way all companies are now formed in the state, provided the Oregon Secretary of State with investigatory powers to prevent the use of shell companies, and extended personal liability to certain individuals deemed associated with shell companies.

Background

In October 2015, the *Portland Business Journal* published a cover story entitled "The Shell Game."[1] The story detailed the activities of a California corporation named U.S. Corporation Services, Inc., which maintained an Oregon office at a small house in Aloha. U.S. Corporation Services, Inc. formed and sold shell companies—companies that exist only on paper—and the Aloha house was the home for more than 1,300 companies.

As detailed in the *Portland Business Journal*'s article, some of these companies were tied to illicit activities, including fraud and money laundering. U.S. Corporation Service, Inc.'s founder, Bengt Stenbock, committed suicide in 2012. Prior to his death, Stenbock had been investigated numerous times by various law enforcement agencies, and served time in jail for wire fraud and drug smuggling. In another article in the *Portland Business Journal*, Stenbock told investigators that he preferred to form companies in Oregon because it lacked a sales tax.[2] Beth Stenbock, Bengt's widow, who ran the company after Bengt's death, said that Oregon also quickly handled the paperwork required to form a business.

After the reporting by the *Portland Business Journal*, the state enacted House Bill 2191, effective January 1, 2018. A discussion of all the changes implemented by HB 2191 would be outside the scope of this summary, and a thorough reading of HB 2191 is recommended to all OSB members. You can download the full text of House Bill 2191 at: https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2191/Enrolled

New Organizational Requirements

This article will concentrate on the changes related to how limited liability companies (LLCs) are formed and the new powers granted to government agencies to investigate any suspected shell LLCs. Similar requirements apply to the formation of new corporations, nonprofit corporations, and limited partnerships.

An LLC's articles of organization filed in Oregon must now list the LLC's principal office, as defined under ORS 63.001(29)(a), and the principal office may not be "a commercial mail receiving agency, a mail forwarding business or a virtual office." ORS 63.047(h), 63.001(29)(b). A representative from the Oregon Secretary of State's office informed the author that an LLC will be permitted to use an attorney's address as the address for the principal office for the LLC.

The articles of organization must now also list the name of one individual "with direct knowledge of the operations and business activities" of the LLC. ORS 63.047(i).

The articles of organization for the LLC—and any other document filed with the Secretary of State's office—must provide that the document is being signed under penalty of perjury, and that it "does not fraudulently conceal, fraudulently obscure, fraudulently alter or otherwise misrepresent the identity" of anyone involved with the LLC. ORS 63.004(7)(a).

It is worth noting that the articles of organization form offered by the Secretary of State's office adds the following additional certification after the language required under ORS 63.004(7)(a): "This filing has been examined by me and is, to the best of my knowledge and belief, true, correct, and complete." This language would seem to insulate the signatory against any mistake that "otherwise misrepresents the identity" of anyone involved with the LLC. Members of the OSB should strongly consider including similar language in their articles of organization.

Forming an LLC for any illegal purpose or with the intent to fraudulently conceal business activity is now expressly prohibited. ORS 63.074(1).

Continued on page 4

Shell companies

Continued from page 3

Investigative and Dissolution Powers

The term "shell entity" is somewhat vaguely defined under ORS 63.001(31) as "an entity that has the characteristics described in ORS 63.661(1)(a)(C)(i)."

The referenced statute provides:

"A court may find that a limited liability company is a shell entity if the court determines that the limited liability company was used or organized for an illegal purpose, was used or organized to defraud or deceive a person or a governmental agency or was used or organized to fraudulently conceal any business activity from another person or a governmental agency." ORS 63.661(1)(a)(C)(i).

Based on the above language, it appears that the key for determining whether a company is a shell entity is whether the company was organized for illegal, deceptive, or fraudulent purposes. Regarding illegal purposes, query how HB 2191 may impact cannabis businesses in Oregon.

HB 2191 grants the Oregon Secretary of State's office investigatory powers to determine whether the LLC is a shell entity. ORS 63.032. Failure to cooperate with the Secretary of State's investigation can result in penalties or administrative dissolution of the LLC. ORS 63.032(2)(a). The Director of the Department of Revenue may now also recommend that the Secretary of State dissolve an LLC for failure to comply with the tax laws of the state. ORS 63.032(3)(a).

The Attorney General's office can also bring an action in circuit court to dissolve an LLC by proving that the LLC is a shell entity. ORS 63.661(1)(a)(C). If the LLC is dissolved by the court because it is a shell entity, the court can also award the Attorney General's office attorney fees, and the costs of investigation, preparation, and litigation against the shell entity. ORS 63.661(2)(a). If an LLC is deemed to be a shell entity by the court, a public body, as defined under ORS 174.109, may also seek to enjoin the members, managers, and other persons that exercise significant control over the shell entity from engaging in commercial activity in Oregon, "including, but not limited to incorporating or organizing another entity" in Oregon. ORS 63.661(2)(b).

As of the date of this article, the Oregon Secretary of State and the Oregon Department of Justice are each pursuing a handful of investigations of shell entities, but there have been no dissolutions or penalties assessed.

Personal Liability

Any member, manager, employee, or agent of a shell entity can also now be liable to any person if the member, manager, employee, or agent of the shell entity caused the person to suffer an ascertainable loss of money or property. ORS 63.992(1).

ORS 63.992(1)(a) broadly lists the following as actions by the member, manager, employee or agent of the shell entity which could result in liability:

"Making, issuing, delivering or publishing, or participating in making, issuing, delivering or publishing, a prospectus, report, circular, certificate, financial statement, balance sheet, public notice, or document concerning the shell entity or the shell entity's shares, assets, liabilities, capital, dividends, earnings, accounts, or business operations that the member, manager, employee, or agent knows is false in any material respect."

The individual could also be liable for making or causing another person to make an entry in a shell entity's books, records or accounts that the individual knows is false in any material respect. ORS 63.992(1)(b). The individual could also be liable for removing or causing another person to remove an entry in a shell entity's books, records, or accounts with the intent to deceive another person. ORS 63.992(1)(c).

If the individual engages in any of the actions described in ORS 63.992(1) when interacting with a public agency, the individual could also be liable for a "false claim" in dealing with a public agency under ORS 180.750 to 180.785. ORS 63.992(2)

The language should be of particular concern to attorneys and accountants, who now run a substantial risk of personal liability for their clients' activities under ORS 63.992, if they touch or draft documents or tax returns for a shell entity and the attorney or accountant knows that the document or tax return is false in any material respect. While preparing documents for a new or existing business, the attorney should ensure that he or she fully understands the nature of the business. The attorney should also thoroughly document in the client's file the attorney's discussions with the client regarding the nature of the business. ◆

Footnotes

1."The Shell Game," *Portland Business Journal*, October 2, 2015

2. "The Shell Game: Oregon, the 'Delaware of the West,'" *Portland Business Journal,* October 2, 2015

ICOs in the Spotlight: Securities Aspects of Fundraising with Cryptocurrency

By Jacob S. Gill, Attorney at Law

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Initial coin offerings (ICOs) have seized the spotlight, and fundraising with cryptocurrencies has boomed over the past year as companies and individuals increasingly look to ICOs as a way to raise capital or participate in investment opportunities. But as ICOs have boomed, so have the familiar problems and regulatory oversight that invariably accompany such rapid financial and technological innovation.

On August 28, 2018, the North American Securities Administrators Association (NASAA) announced that, as part of an ongoing initiative dubbed "Operation Cryptosweep," state and provincial securities regulators throughout the United States and Canada had, over just a few months, initiated hundreds of active investigations and dozens of enforcement actions related to ICOs and cryptocurrency-related investment products. In its announcement, NASAA explained that, "While not every ICO or cryptocurrency-related investment is a fraud, it is important for individuals and firms selling these products to be mindful that they are not doing so in a vacuum; state and provincial laws or regulations may apply, especially securities laws."[1]

The efforts of state regulators are in addition to the ongoing efforts of the U.S. Securities and Exchange Commission (SEC), which has itself announced more than a dozen enforcement actions against illegal and fraudulent ICOs and other cryptocurrency schemes.[2] Indeed, late last year, the SEC's Enforcement Division announced the creation of a new "Cyber Unit" to target "cyber-related misconduct" such as securities violations "involving distributed ledger technology and initial coin offerings."[3] The SEC and its staff have consistently noted that "by and large, the structures of initial coin offerings … involve the offer and sale of securities and directly implicate the securities registration requirements and other investor-protection provisions of our federal securities laws."[4]

The courts have weighed in as well. On September 11, 2018, Judge Raymond Dearie of the Eastern District of New York, in U*nited States v. Zaslavskiy*,[5] upheld an indictment asserting federal criminal securities-fraud charges based on materially false and fraudulent representations and omissions in connection with two ICOs and their related virtual currency investment schemes. The court rejected the defendant's argument that the virtual currencies promoted in the ICOs were "currencies," and therefore, by definition, not securities, explaining that "simply labeling an investment opportunity as 'virtual currency' or 'cryptocurrency' does not transform an investment contract—a security—into a currency."[6]

So what are ICOs and why have they drawn such attention from state and federal securities regulators and law enforcement? Although the specific details may vary from offering to offering, an ICO is nothing more than a method for raising capital through the sale of a digital asset (or virtual currency) that represents a defined set of rights. Instead of selling shares, issuing notes, or obtaining bank financing, a promoter who seeks to finance an idea, project, or some other enterprise creates this new virtual currency, often referred to as a "coin" or "token," which is then marketed and sold online to interested investors (or participants), usually in exchange for a more well-established and tradable cryptocurrency such as Bitcoin or Ether (which participants must purchase with cash). Transactions in the new virtual currency typically are enabled and supported on platforms that employ public blockchain (distributed ledger) technology.

Looking through the "cyber" overlay reveals that the fundamental economic substance of an ICO is not materially different from that of a conventional securities offering. The newly created virtual coins or tokens are purchased with the expectation that the promoter will successfully execute its idea or project, and as a result the participants (investors) will profit from the accompanying increase in the value of the virtual currency, usually by selling the coins or tokens in the secondary market. This is the "touchstone" of an investment contract.[7] Consequently, as state and federal regulators have emphasized, ICOs typically involve the offer and sale of securities.[8] It is irrelevant that the offering involves coins or tokens rather than shares or notes.[9]

This means that ICOs, like all other securities offerings, must comply with the registration and disclosure requirements under federal and state securities laws. The general rule requires registration of the offered securities (the ICO's virtual currency) with the SEC and ongoing compliance with the reporting obligations under the Securities Exchange Act. The burden of compliance leads issuers who seek to raise relatively small amounts of money to look for exemptions from the registration requirements. Regulation D under the Securities Act offers several exemptions for smaller transactions, the most attractive of which is Rule 506.[10]

Rule 506(b) provides a heavily used safe harbor exemption for non-public offerings

Continued on page 6

Cryptocurrency

Continued from page 5

that meet certain requirements. The exemption is particularly attractive because it allows an issuer to raise an unlimited amount of money from an unlimited number of accredited investors (i.e., investors that meet certain minimum income or net-worth thresholds). And an offering that satisfies the requirements of Rule 506(b) is exempt from state blue-sky registration requirements.[11] Critically for ICOs, however, the exemption is only available so long as the securities are not offered or sold by any form of general solicitation or general advertising, a restriction that the SEC has interpreted as prohibiting offers or sales to any person with whom the issuer does not have a substantive pre-existing relationship.[12] The wide and unrestricted online dissemination of ICOs makes reliance on Rule 506(b) problematic.

Rule 506(c) is a relatively new addition to Regulation D. Like Rule 506(b), it imposes no ceiling on the number of accredited investors or the amount of money raised. Unlike Rule 506(b), it allows for general solicitation and advertising. Unsurprisingly, however, this unlimited option comes with significant limitations: Rule 506(c) offerings cannot be sold to any nonaccredited investors, and the exemption is only available to issuers who actually undertake substantial independent due diligence to "verify" that each and every investor has the financial means necessary to qualify as an accredited investors. Thus, even though an ICO promoter/issuer would not be prohibited from marketing and selling its virtual currency, the practical reality of the verification requirement would impose a genuine and significant limitation on how widely the ICO could be sold. Moreover, the administrative burden of the mandatory due diligence creates the real risk of a lapse by the issuer that would void the exemption. Unlike Rule 506(b), a promoter that relies on, and then loses, the Rule 506(c) exemption cannot fall back on the general non-public-offering exemption under the Securities Act; unwinding the ICO and proceeding under a registration is the only real option.

ICOs frequently fail to make the substantial disclosure required under state and federal securities laws. A basic object of the disclosure requirements is to eliminate the information disparity between the promoter and prospective investors. Accordingly, the promoter must disclose all material information concerning the offering and the underlying idea, project, or other enterprise. Such information includes basic information about the offering, including the pricing of the coins or tokens, the target offering amount and any deadlines for reaching that amount, and a description of how the proceeds of the offering will be used, including detailed discussion of the underlying idea, project, or other enterprise and any attendant risks. Material information may also include information about the promoter and its officers, directors, controlling shareholders, and significant personnel; the promoter's financial condition; and material obligations to or transactions with third parties.

The failure of an ICO to satisfy the registration and disclosure requirements has real consequences for both the promoter and investors. In addition to potential regulatory enforcement actions such as "Operation Cryptosweep" (as well as potential criminal charges such as those asserted in *Zaslavskiy*), non-compliance also allows investors to unwind their purchases, thereby potentially unrolling the entire ICO. And under the Oregon Securities Law, this potential liability extends to those who participate or materially aid in the offering, and may reach the attorneys and accountants of the promoter.[13] All of this recommends caution for lawyers whose clients seek counsel in connection with the promotion or investment in an ICO. ◆

Footnotes

[1] http://www.nasaa.org/45901/nasaa-updates-coordinated-crypto-crackdown/

[2] https://www.sec.gov/spotlight/cybersecurity-enforcement-actions

[3] https://www.sec.gov/news/press-release/2017-176

[4] https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11#_ftn5

[5] *United States v. Zaslavskiy*, Case No. 17CR647(RJD), 2018 WL 4346339 (E.D.N.Y. Sept. 11, 2018).

[6] *Id.* at *7.

[7] *United Housing Fund., Inc. v. Forman*, 421 U.S. 837, 852 (1975); see also SEC Release No. 81207 at p.11 (July 25, 2017). An investment contract is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. *SEC v. Edwards*, 540 U.S. 389, 393–95 (2004); see also *Zaslavskiy*, 2018 WL 4346339 at *4–*7.

[8] Federal and state securities laws define a security broadly as including an "investment contract." See, e.g., Section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. § 77b(a)(1)); ORS 59.015(19)(a).

[9] In determining whether something is a security, "form should be disregarded for substance," *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), "and the emphasis should be on economic realities underlying a transaction, and not on the name appended thereto." *Forman*, 421 U.S. at 849.

[10] 17 C.F.R. § 230.506.

[11] 15 U.S.C. § 77r(b)(4)(F). An offering that fails to satisfy the requirements of the Rule 506(b) safe harbor may still rely on the exemption for "transactions by an issuer not involving any public offering" under Section 4(a)(2) of the Securities Act. 15 U.S.C. § 77d(a)(2). Importantly, however, such an offering—even if exempt under Section 4(a)(2)—would not benefit from the preemption of state registration requirements.

[12] See, e.g., *Mineral Lands Research & Mktg. Corp.*, SEC No-Action Letter (Dec. 4, 1985); *Citizen VC, Inc.*, SEC No-Action Letter (Aug. 6, 2015); see also *S.E.C. v. Tecumseh Holdings Corp.*, 2009 WL 4975263 at *4 (S.D.N.Y. 2009) (securities offering does not satisfy this requirement if "(1) it has the potential to reach a large number of people; (2) it has the potential to reach people throughout a large geographic area; and, perhaps most importantly, (3) it generally targets people with whom the issuer does not have a prior relationship and who are unlikely to have any special knowledge about the offered security.").

[13] See, e.g., *Ciuffitelli for Tr. of Ciuffitelli Revocable Tr. v. Deloitte & Touche LLP*, No. 3:16-CV-580-AC, 2017 WL 2927481 (D. Or. Apr. 10, 2017), report and recommendation adopted sub nom. *Ciuffitelli v. Deloitte & Touche LLP*, No. 3:16-CV-00580-AC, 2017 WL 2927150 (D. Or. July 5, 2017).

Independent Contractors versus Employees: The Latest from the Oregon Supreme Court

By Nicole Elgin, Attorney at Law

Nicole Elgin is an attorney with Barran Liebman.She represents employers in traditional labor and employment-law matters.Nicole's labor practice ranges from negotiating collective-bargaining agreements to representing employers in hearings before arbitrators, the Oregon Employment Relations Board, and the National Labor Relations Board. Nicole's employment-law practice includes working with employers to adapt workplace policies to the latest legislative changes at the state and national levels, including Oregon's Pay Equity law.

The question of whether a person qualifies as an independent contractor versus an employee is an increasingly important one in the rise of the gig economy. For business owners, it can also be an expensive question to get wrong, considering the various taxes, insurance, and benefits—not to mention the penalties—that a business owner might owe if the state determines that what the business called "contractors" are actually "employees."

As recently as May 2018, the Oregon Supreme Court weighed in on the test for determining whether an individual qualifies as an independent contractor for purposes of unemployment insurance tax in *ACN Opportunity, LLC v. Employment Department*, 362 Or 824 (2018). ACN Opportunity sold satellite-television, telephone, internet, and home-security services, as well as other items related to those services. The company used a network of direct-to-consumer sellers that it called "independent business owners."

In auditing the company, Oregon's Employment Department found that the company was an employer, and therefore required to pay unemployment-insurance tax on the earnings the company paid to the independent business owners for their sales. On appeal, the Oregon Supreme Court addressed the statutory interpretation questions and affirmed that the independent business owners were not independent contractors.

To understand the court's legal analysis, it is important to know the facts surrounding the nature of the relationship between ACN and the independent business owners, which was governed by a written contract. The contract between ACN and the sellers states that each seller agreed to pay ACN an initial fee for a one-year license to sell ACN products and could pay a renewal fee each year. The contract also specifically stated that the sellers would sell ACN's products as "an independent contractor," not as an employee, and that sellers received commissions and bonuses from ACN from selling the product and getting new customers' subscriptions. The contract also restricted the sellers' marketing, prohibiting "cold marketing" techniques like trade shows, door-to-door sales, and pamphlet-distribution.

After paying the initial fee, the sellers received a "Team Trainer Kit," and access to ACN's customer tracking services, ACN's website to submit customer orders, and ACN's back office and call center services. ACN did not provide computers, telephones, training, or marketing materials, but those items could be purchased from ACN. The contracts allowed the sellers to choose where and how many hours to work, as ACN did not offer office space to the sellers and ACN did not even have an office in Oregon. The Oregon sellers worked out of various locations, including coffee shops, hotel conference rooms, and the homes and offices of their customers.

The court's analysis first reminded business owners that, "for purposes of unemployment insurance tax liability, Oregon law begins with the presumption that a person who performs services for remuneration is an employee, and the employer must pay unemployment-insurance taxes on that person's wages." *Id.* at 826–27. In explaining the presumption, the court cited ORS 657.505(2), which reads that "an employer shall be liable for taxes on all wages paid for services performed on or after the first day of a calendar quarter." Thus, to avoid unemployment insurance tax liability, a business owner must prove that the worker is an independent contractor under ORS 670.600 or qualifies for one of the exemptions from "employment" under ORS 657.087.

First, the court analyzed ORS 670.600, which provides: "independent contractor means a person who provides services for remuneration and who, in the provision of the services:

(a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;

(b) … is customarily engaged in an independently established business;

(c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701; and

(d) Is responsible for obtaining other licenses or certificates necessary to provide the services."

Continued on page 8

Independent Contractors

Continued from page 7

Those surprised by the some of the court's application of the statutory language to the realities of the modern-day workforce are not alone.

The court found that the company's independent business owners failed the "customarily engaged in an independently established business" factor of the test because the sellers did not "maintain a business location." 362 Or at 838; ORS 670.600(3)(a). Specifically, the court reasoned that to maintain a business location, the contractor "must take some affirmative action—more than, for example, temporarily occupying a table at a coffee shop." 362 Or at 836. Additionally, the court highlighted that the independent business owners did not have sufficient authority to hire others to provide the services, which is another important factor to the independent contractor test. *Id*. at 842; ORS 670.600(3)(e).

The court then looked to the "in-home sales" exemption in ORS 657.087(2): "Employment does not include service performed: ...By individuals to the extent that the compensation consists of commissions, overrides or a share of the profit realized on orders solicited or sales resulting from the in-person solicitation of orders for and making sales of consumer goods in the home." This exemption was found only to apply to those sales made "in the home," basing its reading and legislative history analysis on the Tupperware business model. 362 Or at 843–46. Following this application, the exemption could not apply to all of the sellers' work because they sometimes worked in other locations, such as coffee shops or customers' offices. *Id*. at 846. Because the company did not meet its burden to prove that the sellers were independent contractors or that they qualified for the employment exemption for in-home sales, the court upheld the Employment Department's assessment against the company for unemployment insurance taxes.

Those surprised by the some of the court's application of the statutory language to the realities of the modern-day workforce are not alone. In his concurring opinion, Judge Balmer agreed with the majority's holding, but urged the Oregon legislature "to consider revising some of the many statutes that regulate the relationship between those who perform work and those individuals or businesses who pay them, in light of the far-reaching changes that have occurred in the workplace and in the economy over the last two decades." *Id*. at 847. Reflecting on the increasingly mobile and flexible nature of the growing gig economy, Judge Balmer concluded that "it is apparent that existing statutes and regulations do not address the realities of important parts of today's work environment." *Id*. at 850.

This case has several good takeaways for lawyers who advise Oregon business owners on independent-contractor tests:

- There are many state and federal "independent contractor" tests, including ones for unemployment insurance, workers compensation, and wage-and-hour laws;
- It is almost always the company's burden to show that the worker is not an employee and does qualify as an independent contractor; and
- Each case is highly fact-specific, requiring an attorney to know many details of its client's operations in order to give the best advice on whether a worker qualifies as an independent contractor. ◆

Save the Date!

The Business Law Section will hold its annual Continuing Legal Education program on Friday, November 2, 2018, at the Multnomah Athletic Club in Portland. The theme is "**Law Practice in the Modern (and Digital) Age**."

Topics include:

- Accounting for Lawyers 101
- Nuts and Bolts of Digital Recordkeeping: Laws, Tips, and Best Practices for E-signing and Electronic Corporate Records
- The Attorney's Role(s) in Representing Startups and Emerging Companies
- The Economics of #MeToo: Good Policies are Good Business
- Structuring Equity Compensation in Limited Liability Companies and Partnerships
- Ethical and Risk Management Issues for Business Lawyers
- Down the Rabbit Hole: Tax Update 2018
- Negotiating and Drafting Common M&A Post-closing Adjustment Provisions
- Regulatory Matters for Business Lawyers —A View from the Corporation Division of the Secretary of State's Office

Complete information on the speakers, schedule, and registration will be posted on the Section's website.

Business Law Section News

Subcommittee Reports

Newsletter

In 2016, the Executive Committee (EC) relaunched our Section newsletter, and in 2018, the EC remains committed to increasing communications with our large and diverse group of Section members located throughout Oregon. To that end, the EC hired a paid newsletter editor to ensure that quarterly newsletters are published.

We are pleased to announce Carole Barkley as our 2018–2019 newsletter editor. Carole has been the EC's valued website editor for many years, and we are very excited to expand Carole's role. Carole is assisted by our volunteer newsletter editorial committee, made up of Section members. Volunteers suggest topics, recruit potential authors, and review articles. If you would like to contribute an article, or serve on the editorial committee, please let me or Carole know. Carole can be reached at carole424@aol.com or 503.224.0098.

We hope you find useful information in this issue and invite you to connect with other members at our upcoming CLE and social events!

Genny Kiley, Newsletter Subcommittee Chair

Continuing Legal Education & Annual Meeting

The Section presented two CLE programs:

- "Eight Steps to Decreasing Your Client's Data Security Risk" at Perkins Coie LLP in Portland and livestreamed to Karnopp Peterson LLC in Bend
- "Best Practices in Crafting and Defending Buy-Sell Provisions" in June at Perkins Coie LLP in Portland; and livestreamed to Karnopp Petersen, Bend, and Brophy Schmore LLP, Medford

Another CLE presentation,**"How to Avoid Post-closing Disputes,"** will take place on Friday, November 16, at the Oregon Electric Station in Eugene. The presentation will be from 3:00 to 4:00 with a social from 4:00 to 5:00.

The **annual all-day CLE program** is scheduled for November 2, 2018 at the Multnomah Athletic Club in Portland.

The **annual meeting** of the Business Law Section will be on October 10, 2018, at 12:00 p.m. at Tonkon Torp LLP, 888 S.W. Fifth Avenue, Suite 1600, Portland, Oregon 97204.

During the annual meeting, the following nominations will be made for 2019 Executive Committee positions. Additional nominations will be accepted from the floor.

Officers *Terms ending December 31, 2019*
Chair-Elect: Genevieve AuYeung Kiley
Treasurer: Jeffrey S. Tarr
Secretary: Kara Ellis Tatman

Members-at-Large *Terms ending December 31, 2020*
James K. Hein
Benjamin M. Kearney
Charmin B. Shiely
Tyler John Volm

Officers previously elected and continuing through December 31, 2019, include Valerie Sasaki, Chair, and David R. Ludwig, Past-chair. Members previously elected to the Executive Committee and continuing through December 31, 2019, include Anne E. Arathoon, Lauren DeMasi, William J. Goodling, Douglas Lindgren, Jennifer Nicholls, and David G. Post.

Proposed Dues Increase. The Executive Committee proposes to the members of the Business Law Section a dues increase from $30 to $35 per year.

Fund Balance. The Section's fund balance as of August 31, 2018, was $53,542. All Section financial statements can be found at http://www.osbar.org/sections/financials.html.

New Business Lawyers

The New Business Lawyers Subcommittee meets monthly and its members participate in the following working groups: education, mentorship, social, pro bono, law schools, and newsletter.

At the subcommittee's September meeting, the education working group hosted a presentation by Mia Getlin and Alex Berger entitled "A Brief Introduction to Cannabis Law for the Non-cannabis Attorney."

Mia Getlin of Gleam Law, PLLC and Alex Berger of Emerge Law Group discuss merger-and-acquisition activity and related legal issues in the cannabis industry.

If you would like to get involved with the subcommittee or its activities, please reach out to the subcommittee's chair, Will Goodling of Stoel Rives LLP, at 503.294.9501 or william.goodling@stoel.com.

Outreach

We will again have a joint social event with the Oregon Society of CPAs. Date and location of the fall event will be posted on the Section's website.

Upcoming Events

CLE Programs

Buying, Selling, and Exchanging Partnership and LLC Interests
WebCredenza Audio Seminar via telephone
October 2, 2018/10:00–11:00 a.m.
https://or.webcredenza.com/catalog.aspx?browse=ViewProg&catid=23630

The Ins and Outs of Licensing Technology
WebCredenza Audio Seminar via telephone
October 4 & 5, 2018/10:00–11:00 a.m.
https://or.webcredenza.com/catalog.aspx?browse=ViewProg&catid=23632

Letters of Intent in Business Transactions
WebCredenza Audio Seminar via telephone
October 9, 2018/10:00–11:00 a.m.
https://or.webcredenza.com/catalog.aspx?browse=ViewProg&catid=23635

Emerging Technologies—Charting the Future Course of the Law
OSB CLE Live Seminar/Webcast
October 12, 2018/9:00 a.m.–4:15 p.m.
Oregon State Bar Center, Tigard
https://www.osbar.org/cle/2018/TECH18.pdf

S Corporations
October 17, 2018/Noon–1:00
Oregon State Bar Center, Tigard
https://www.osbar.org/

Law Practice in the Modern (and Digital) Age
Business Law Section Annual CLE program
November 2, 2018/All day
Multnomah Athletic Club, Portland
See page 8 for more information.

How to Avoid Post-closing Disputes
Business Law Section CLE program
November 16, 2018; 3:00–5:00
Oregon Electric Station, Eugene

ABA Business Law Section Fall Meeting
November 21–22, 2018
Washington, D.C.
https://www.americanbar.org/groups/business_law/events_cle/fall.html?sc_cid=CL1811FM-B1

Other Events

Business Law Section Annual Meeting
October 10, 2018/Noon
Tonkon Torp LLP, Portland
Details on page 9

Joint Social with Oregon Society of CPAs
Fall date and location TBA

2018 Oregon State Bar Annual Awards Luncheon
Wednesday, November 7, 2018
Sentinel Hotel, Portland

The Bar's highest honor, the Award of Merit, recognizes an Oregon lawyer who has made outstanding contributions to the bench, the Bar ,and the community at large, and who exhibits the highest standards of professionalism. The 2018 Award of Merit will be presented to Andrew J. Morrow Jr., who served as Chair of the Business Law Section in 1993 and 2006.

Job Postings

Stewart Sokol & Larkin LLC, a Pacific Northwest law firm, seeks a quality attorney to join its dynamic practice as a full-time associate. The firm specializes in complex commercial and construction litigation. Candidates should have at least three years of experience in litigation and strong academic credentials.

Please submit resume, transcript, writing samples, and references via U.S. Mail or email to:

Jan Sokol
2300 SW 1st Ave, Suite 200; Portland, OR 97201
Email: jdsokol@lawssl.com

For more information about Stewart Sokol & Larkin LLC, please go online at: http://www.lawssl.com

Buckley Law P.C. is looking to add a business associate to our experienced team in Lake Oswego. We offer a collegial culture, excellent benefits, and an opportunity to learn from and work with an incredible group of client-focused attorneys.

Our ideal candidate has 3–5+ years of law-firm experience and is looking for a firm in which he or she can leverage a passion for business by working hard with smart people. Email to gch@buckley-law.com or go to https://www.buckley-law.com/people/careers/ for more information.

Oregon State Bar Business Law Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business-law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

Articles in this newsletter are for informational purposes only, and not for the purpose of providing legal advice. The opinions expressed in this newsletter are the opinions of the individual authors and may not reflect the opinions of the Oregon State Bar Business Law Section or any attorney other than the author.