

CORPORATE COUNSEL NEWS

Volume 14 • Number 2 • January 2005

Virginia State Bar Corporate Counsel Section

<http://www.vsb.org/sections/cc/index.htm>

Form 8-K Current Report — New Rapid Filing Requirements

By Edythe C. Katz, Assistant General Counsel, Foundation Coal Corporation

In response to Section 409 of the Sarbanes-Oxley Act of 2002 requirement to disclose matters on a "rapid and current basis," Form 8-K was revised by the Securities and Exchange Commission Release 33-8400 ("Release"). Release, §I. The Commission also cited the markets' need for "timely dissemination of information to accurately and quickly value securities." Release, §IV.B. In most cases, the five to fifteen day filing deadline was shortened to four days. The new rule became effective August 23, 2004. The following summarizes highlights from the Release.

The amendments resulted in eight

new disclosures: Item 1.01 - Entry into Material Definitive Agreements not in the ordinary course of business; Item 1.02 - Termination of Material Definitive Agreements not in the ordinary course of business; Item 2.03 - Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant; Item 2.04 - Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement; Item 2.05, Costs Associated with Exit or Disposal Activities; Item 2.06 - Material Impairments; Item 3.01- Notice of

Delisting or Failure to Satisfy a Continued Listing Rule or Standard, Transfer of Listing; Item 4.02 - Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review). The amendments also transferred two existing items from the periodic reports (Item 3.02, Unregistered Sales of Equity Securities; Item 3.03, Material Modifications to Rights of Security Holders) and expanded two existing Form 8-K requirements: Item 5.02 broadens former Item 6 which required disclosure that was triggered by a director's request to publicly disclose a dis-

— continued on page 4

The Corporate Counsel Section will be co-sponsoring a CLE Program at the Virginia State Bar annual meeting this summer with the Business Law, Administrative and Antitrust Sections. The program is tentatively titled "Ethical Issues in Dealing with Governmental Entities", and proposed topics include: (i) lawyers serving on public bodies before which a firm client appears, (ii) revolving door issues, (iii) agency rules on contacting agency personnel, (iv) whether ethical duties change when dealing with an agency with multiple roles, and (v) confidentiality / attorney-client privilege, and how those concepts relate to / are implicated in dealings with government agencies. We are in the process of confirming who the presenters will be. This program is tentatively scheduled for 1.5 hours beginning at 11:00 a.m. on Friday June 17, 2005. Check our website for up-to-date details: <http://www.vsb.org/sections/cc/index.html> ♦

**This
Summer
at the
Beach
VSB Annual
Meeting
2005**

more inside...

View From the Chair



Mark Your Calendars



VSB Proposal to Recognize
Foreign-Trained Lawyers



Corporate Counsel Section Supports
Rule 1A:7



Swearing In of In-House Corporate
Counsel: More Help Needed!



Foreign Lawyers and Rule 1A:5



'ListServ' is Launched

View from the Chair

By Eileen M. Johnson, National Wildlife Federation

Our goal this year is to improve the value of your membership in the Corporate Counsel Section by providing more services to you. We know how difficult it can sometimes be to fulfill the mandatory CLE requirement every year with courses that are relevant to an in-house practice. Continuing last year's initiative, the Corporate Counsel Section will be partnering with law firms to provide CLE opportunities throughout the Commonwealth on topics of interest to corporate counsel. These programs will be announced on our website and invitations will sometimes be mailed to section members in the geographic area where a program will be held. We have also submitted a proposal to host a CLE program (along with several other sections) at the Virginia State Bar's annual meeting in June.

We recently launched a "list serv" for section members, compliments of the Virginia State Bar. This enables us to send out e-mails to members who sign up for the service and alert you about upcoming CLE programs, other events, and news of interest to corporate counsel in Virginia. You can sign up on our website at <http://www.vsb.org/sections/cc/listserv.html>.

We are very excited about a new program for law students that builds on a pilot program conducted by our own David Rosenfeld the past two years. We noticed in recent years that our annual law student essay contest was not attracting the quantity

of contestants that we thought it deserved. We tried changing the timing of the contest and other tweaks but finally concluded that it was not achieving the goal of informing law students about the option of an in-house practice. So we have moved the funding for that program to support career panels at Virginia law schools. The concept is simple - panels of attorneys who are not in a traditional law firm practice meet informally with students to discuss career options as in-house or government counsel. In addition to pizza and sodas, we give the students options for career paths that they might not have previously considered. During the past two years, similar panels at The George Mason law school have met with great success. We hope to build on this record throughout the Commonwealth. If you would like to help with one of these panels, please contact David Rosenfeld at rosenfeld@drpc.com or 703-548-2600.

Finally, we are working with the Virginia State Bar's Task Force on Multi-jurisdictional Practice as they look at the issue of practicing law in today's world. Cathy Mayes, a former Chair of the Corporate Counsel Section, serves on the task force. Many of us work for multistate or multinational corporations, so the complexities of a multi-jurisdictional practice face us every day. We invite your comments in the year ahead as this issue is examined by the task force. ♦

Mark Your Calendars

February 4, 2005 – VSB Law School Professionalism Program, University of Richmond, T.C. Williams School of Law, Richmond

February 8, 2005 - Special Corporate Counsel Professionalism Course, America Online, Inc, Reston, Virginia.*

February 9-15, 2005 - ABA Midyear Meeting, Salt Lake City, Utah.

February 9, 2005 - VSB Law School Professionalism Program, Regent University, School of Law, Virginia Beach, Virginia

March 2-3, 2005 - VSB Law School Professionalism Program, University of Virginia, School of Law, Charlottesville, Virginia

May 19, 2005 - Annual Spring Luncheon for the VSB Corporate Counsel Section in Richmond, Tidewater, & Northern Virginia. Details to be announced

June 16-19, 2005 - Virginia State Bar Annual Meeting, Virginia Beach, Virginia.

August 4-10, 2005 - ABA Annual Meeting, Chicago, Illinois.

* For a complete listing of Professionalism course dates, check the VSB website:

<http://www.vsb.org/calendar.htm>

Editorial Policy

CORPORATE COUNSEL NEWS is published by the Virginia State Bar Corporate Counsel Section and is intended to provide information relating to law practice and management for the education and benefit of in-house counsel and others with similar interests. Statements or expressions of opinion or comments appearing herein are those of the editors, authors and contributors and should not be deemed as endorsed by the Corporate Counsel Section or the Virginia State Bar.

CORPORATE COUNSEL NEWS welcomes articles of interest to fellow members of the Corporate Counsel Section for publication in future editions.

Newsletter Editor

David Ross Rosenfeld

Rosenfeld@drpc.com

(703-548-2600)

VSB Proposal to Recognize Foreign-Trained Lawyers

By Catherine Mayes

The State Bar's Task Force on Multi-Jurisdictional Practice has made its first recommendation to Bar Council: permit lawyers trained outside the United States to practice law in Virginia in limited circumstances. Foreign-trained lawyers, called Foreign Legal Consultants, currently cannot qualify as attorneys in Virginia, even as corporate counsel. The proposed rule, based on an ABA model rule, would allow lawyers from countries with legal traditions similar to ours to advise Virginia clients on the law of other countries and on international law, so long as their country allows Virginia lawyers a reciprocal privilege.

Ours is already a global economy: many Virginia companies buy and sell products and services overseas. The proposed rule, if adopted, should have four beneficial impacts on these Virginia companies.

(1) The proposed rule expects to preserve the ability of Virginia-licensed corporate counsel to advise employees and conduct business transactions overseas relatively free of limitation by foreign governments. The countries of the World Trade Organization (WTO) are currently negotiating conditions for

trade in legal services. There is some concern that these negotiations could actually impose new restrictions on the activities of U.S. lawyers abroad, particularly if the U.S. states continue not to recognize here the credentials of persons trained and licensed in other countries.

(2) Corporations that employ persons trained outside the United States to advise them on foreign and international law could, under the proposal, be assured that the work of those employees is afforded the same privileges and protections as that of their domestically trained counsel.

(3) It should make it easier to find attorneys with expertise in the laws applicable to their foreign trading partners and foreign operations. Virginia law firms would be able to associate with non-U.S. lawyers to provide better, more comprehensive advice to their corporate clients.

(4) Many of our employees have family and property interests in other coun-

tries. By regulating foreign legal consultants, they can be assured that foreign lawyers in Virginia who are advising them about issues in their native land are properly trained and subject to discipline for malpractice.

Under the proposed rule, Foreign Legal Consultants would be required to register with the bar and comply with our Rules of Professional Conduct. The rule would prohibit Foreign Legal Consultants from providing advice that is inherently based on Virginia law, such as family and property law, and from appearing in a Virginia court.

The text of the proposal and more background information can be found at page 16 of the December 2004 issue of *Virginia Lawyer*, or on the Web at http://www.vsb.org/profguides/proposed/rule_1A7.html. If your company is engaged in foreign trade or have foreign operations or employees, I urge you to submit comments on the proposal. ♦

Catherine Mayes, formerly associate general counsel of Sallie Mae, is currently advising foreign governments on student loan programs for higher education. She is a member of the Multi-Jurisdictional Practice Task Force and former chair of the Corporate Counsel Section.

Electronic Data Discovery: A Co-Sponsored CLE

by David Ross Rosenfeld

On Friday, December 17, 2004, the Corporate Counsel Section co-sponsored a continuing legal education program with the law firm of Barnes & Thornburg, LLP. Held at the Barnes & Thornburg Indianapolis office and at the firm's Washington, D.C. offices via webcast and teleconference, the CLE, titled "Electronic Data Discovery: Cost-Effective and Ethical Management," focused on the challenges facing companies in the 21st

century electronic age of word processing, spreadsheets, databases, and presentation materials.

Speakers at the CLE included Robert MacGill, Charles Edwards, Mark Dinsmore, and Todd Vare, all Barnes & Thornburg attorneys from the Indianapolis office. Specific topics covered during this program included: Party and counsel obligations during litigation; Collecting and managing e-discovery in litigation; How

your trial team can use electronic evidence and computer-assisted tools in litigation; and a panel discussion addressing practice tips and hot topics.

There was no fee for attendees and the program was open to all members of the Corporate Counsel Section and in-house and outside counsel from the Washington D.C. metropolitan area. ♦

Corporate Counsel Section Supports Rule 1A:7

On December 21, 2004, the following letter was sent to the Executive Director of the Virginia State Bar by Eileen Johnson, the Chair of the Corporate Counsel Section, expressing the Section's support for the proposed Foreign Legal Consultant Rule:

December 21, 2004

Thomas A. Edmonds
Executive Director
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, VA 23219-2800

Re: Proposed Foreign Legal Consultant Rule

Dear Mr. Edmonds:

The Board of Governors of the Corporate Counsel Section has reviewed the proposed Foreign Legal Consultant Rule. We support the adoption of this rule which we believe will assist foreign counsel to play an appropriate role in the in-house practice of our section's members.

We have one edit to propose to the proposed Rule 1A:7: Licensing of Foreign Legal Consultants. In subsection d(7)(ii), the words "or corporation" should be added after "the name of the law firm" so as to confirm that Foreign Legal Consultants may practice with corporations as well as with law firms. This would provide consistency with subsection e(2)(i)(B) which states that Foreign Legal Consultants may be employed "by any employer in the Commonwealth of Virginia as in-house counsel."

With that change being made, the Corporate Counsel Section supports adoption of proposed Rule 1A:7.

Sincerely,

Eileen Morgan Johnson
Chair, Corporate Counsel Section

c: Board of Governors, Corporate Counsel Section

Swearing In of In-House Corporate Counsel – More Help Needed by David Ross Rosenfeld

Once again, we are putting out a call for attorneys to sponsor in-house attorneys seeking to be sworn in before the Virginia Supreme Court. Attorneys who have become "certified" under amended Rule 1A:5 must appear before, and be sworn in by, the Supreme Court of Virginia in Richmond and they need already admitted Virginia attorneys to sponsor them. These

ceremonies usually take place at the beginning of each Court session and last from approximately 8:30 a.m. to 9:30 a.m.

If you would be willing to help, please send your name, telephone number, and e-mail address to Dolly Shaffner, Virginia State Bar, 707 E. Main St., Ste. 1500, Richmond, VA 23219, or e-mail her at Shaffner@vsb, or call Dolly at 804-775-0514. ♦

Form 8-K Current Report *(continued from page 1)*

agreement; Item 5.03, (former Item 8) was broadened to include amendments to articles of incorporation or by-laws not previously proposed in a previously filed proxy statement or information statement.

The new items require management to quickly assess materiality judgments in a shortened filing timeframe. Therefore, the Commission has made exemptions to Section 10(b), Rule 10b-5 and eligibility to use Form S-2 and S-3 in connection with Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, and under certain circumstances for Item 4.02. Otherwise a company would bear the significant burden of the loss of S-2 or S-3 eligibility.

The section 10(b) and Rule 10b-5 safe harbor relates to failure to timely file Form 8-K; material misstatements or omissions in a Form 8-K will continue to be subject to Section 10(b) and Rule 10b-5 liability. A company is also still subject to Section 10(b) and Rule 10b-5 liability if it is otherwise under a duty to disclose. The safe harbor extends until the due date of the periodic report of the company for the relevant period in which the Form 8-K was not timely filed.

In addition, Rule 144 was amended to provide that a company does not need to file all required Form 8-Ks for 12 months preceding the sale in order to meet the "current public information" condition. A security holder is still required to represent that he does not have inside information. There were also numerous conforming amendments made to Forms 10-Q, 10-QSB, 10-K and 10-KSB. Item 601 of Regulation S-K exhibit table was amended in connection with exhibits that must be filed with Form 8-K. The section 906 Chief Executive Officer and Chief Financial Officer Certification do not apply to Form 8-K.

Most notable of the changes are

items 1.01 Entry into Material Definitive Agreements not in the ordinary course of business and Item 1.02 Termination of Material Definitive Agreements not in the ordinary course of business. Pursuant to Instruction 1 of item 1.01, management contracts and compensatory plans are deemed per se material and non-ordinary course agreements. Material agreements which were previously required to be disclosed and included as an exhibit in Form 10-Q, 10-QSB, 10-K and 10-KSB must now be disclosed in a Form 8-K and included as an exhibit no later than the company's next periodic filing. The termination of a material agreement (other than the expiration or full performance of the agreement) must now be disclosed in Form 8-K. Therefore, it is advisable to send a notice of breach, reserving rights to terminate if the breaching party does not cure.

Item 3.01 requires the disclosure of a notice of delisting or the failure to meet a listing standard. Previously, this item would be disclosed under former Item 5 or in the company's periodic filing. Former Item 6 required disclosure of a director's disagreement with the company in connection with his or her resignation. New Item 5.02(a) provides for a) the disclosure of resignation; b) refusal to stand for re-election because of a disagreement known to executive officer of the company on matters relating to company's operations, policies or practices; or c) removal for cause. Item 5.02(b) requires disclosure when the company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions retires, resigns, or is terminated. The amended Form 8-K also includes disclosure requirements for director retirement, resignation, removal or refusal to stand for re-election not required

by Item 5.02(a). Item 5.02(c) requires disclosure of the appointment of principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or person performing similar functions. In addition, the material terms of employment agreements must be disclosed. Item 5.03, (former Item 8) was broadened to include amendments to articles of incorporation or by-laws not previously proposed in a previously filed proxy statement or information statement. Item 5.03 also requires the disclosure of change in fiscal year not proposed in a previously filed proxy statement or otherwise.

The practical implication for in-house securities counsel is the need to educate the various business owners within the company and to promote the implementation of a Form 8-K disclosure policy. One sample policy suggests that in-house securities counsel identify members of a "disclosure response team," set forth disclosure guidelines and implement a Form 8-K drafting process that requires the input of the disclosure response team. Another sample policy suggests the distribution of a Form 8-K compliance guide to "disclosure owners" outlining the new Form 8-K requirements while paying particular attention to material definitive agreements. Copies of each of the sample compliance policies are available on thecorporatecounsel.net. ♦

Foreign Lawyers and Rule 1A:5

By Edward Beck, Exxon Mobil Corporation

The Supreme Court of Virginia has agreed to reconsider its decision rejecting the State Bar's Petition to amend Rule 1A:5 to permit attorneys admitted in foreign countries to register as "Corporate Counsel Registrants."

In June 2003, the Virginia Supreme Court approved an amendment to Rule 1A:5 requiring all non-Virginia licensed attorneys employed as in-house counsel in Virginia to either register with, or become certified by the Virginia State Bar. However, on June 21, 2004, the Court rejected without explanation an amendment to Rule 1A:5 which would have expanded the rule to cover those lawyers admitted to practice in

foreign countries but not in the United States. On November 9, 2004, the Court, at the request of Mars Incorporated, agreed to reconsider the matter.

A formal petition and supporting brief was filed with the Court on November 19, 2004 by Mars. Exxon Mobil Corporation and the Organization for International Investment joined the brief on behalf of themselves and other similarly situated companies throughout the Commonwealth.

The Court took up this matter on January 12, 2005. As of the date of this newsletter, no decision has been handed down by the Court. ❖

'ListServ' is Launched *by David Ross Rosenfeld*

The Corporate Counsel Section has instituted a ListServ. Although non-interactive, subscribers to the ListServ will receive timely e-mail announcements of events, activities, and news of interest to section members and all in-house corporate counsel.

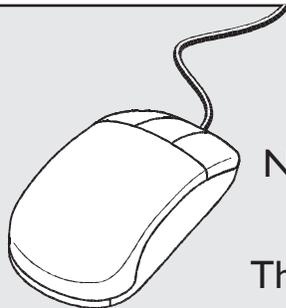
To subscribe, just log on to the Corporate Counsel Section web page (<http://www.vsb.org/sections/cc/index.html>), scroll down and click on the line "subscribe to our listserv" and type in your e-mail address. Within moments thereafter, you will receive an e-mail from Majordomo@vipnet.org

instructing you on how to confirm your subscription.

If you experience any difficulty logging on, call Dolly Shaffner at the Virginia State Bar (804-775-0514).

It's easy! It's simple! It's free! ❖

Mr. Rosenfeld is a solo practitioner in Alexandria, Virginia providing ethics counsel to attorneys and corporate counsel. He is a member of the Corporate Counsel Section Board of Governors and editor of the Corporate Counsel Section Newsletter.



Missed our newsletter?

Check out our web site.

Need the date of the next In-House Corporate Counsel CLE?

Check Out Our Web Site!

Thinking of getting active in the Corporate Counsel Section?

CHECK OUT OUR WEB SITE!!

<http://www.vsb.org/sections/cc/index.html>

VIRGINIA CORPORATE COUNSEL VOLUNTEER FORM

Last Name: _____ First Name: _____ M.I.: _____

Company / Firm: _____

Address: _____

City / State / Zip: _____

Business Phone: _____ E-mail Address: _____

Are you (check one)

Corporate Counsel Attorney working for a law firm and interested in Corporate Counsel matters

I am interested in (check all that apply)

- Corporate Counsel Pro Bono work Writing for the newsletter
 Producing a Corporate Counsel continuing legal education program
 Working on the CLE program for the annual meeting
 Hosting a regional Corporate Counsel luncheon in May, 2005
 Working with local law schools on the Corporate Counsel Career Program
 Producing materials for the website Other _____

Mail to: Dolly Shaffner, Virginia Corporate Counsel Section
Virginia State Bar
707 E. Main Street, Suite 1500
Richmond, VA 23219-2800

FAX to: Dolly Shaffner at (804) 775-0501 E-mail all information to: shaffner@vsb.org

APPLICATION FOR MEMBERSHIP

Name: _____ VSB ID: _____

Bar (if other than Virginia): _____

Employer: _____

Address: _____

City / State / Zip: _____

Work Phone: _____ Fax: _____

Dues: \$20 for July 1 - June 30.

Dues are waived during the last quarter of the fiscal year (April - June). You will be billed in July for the following year.

Please return your request to:

Membership Department
Virginia State Bar
Eighth and Main Building
707 E. Main Street, Suite 1500
Richmond, VA 23219-2800

CORPORATE COUNSEL SECTION

Corporate Counsel Section Board of Governors 2004-2005

Eileen Morgan Johnson, *Chair*
National Wildlife Federation
Reston, VA 20190-5362
703-438-6453
fax 703-438-6433
johnsone@nwf.org

David Ross Rosenfeld,
Newsletter Editor
David Ross Rosenfeld, P.C.
Alexandria, VA 22314-3218
703-548-2600
fax 703-549-8664
rosenfeld@drpc.com

Edythe Chatfield Katz
QuadraMed Corporation
Reston, VA 20190
703-904.5696
fax 703-736.2900
EKatz@QuadraMed.com

Britton (Britt) N. Murray
Freddie Mac
McLean, VA 22102-3110
703-903-2721
fax 703-903-3698
britton_murray@freddiemac.com

Jennifer L. McClellan,
Vice Chair
Verizon Communications
Richmond, VA 23219
804-772-1512
fax 804-772-2143
jennifer.l.mcclellan@verizon.com

J. Philip Hart,
Immediate Past Chair
Cornerstone Realty Group
Richmond, VA 23219
804-643-1761
fax 804-782-9302
philip.hart@tcrmail.com

Scott Edward Snyder
Chantilly, VA 20151
703/818-6930
fax 703-818-6931
scott.e.snyder@travelers.com

Randal (Randy) S. Noe
Norfolk Southern Corp.
Norfolk, VA 23510-9241
757-533-4887
fax 757-629-2607
randy.noe@nscorp.com

Edward Henry Beck, *Secretary*
Exxon Mobil Corporation
Fairfax, VA 22037
703-846-5877
fax 262-313-9452
edward.h.beck@exxonmobil.com

Douglas D. Callaway
Wachovia Securities, LLC
Richmond, VA 23219-3501
804-787-6826
fax 804-344-6599
Douglas.callaway@wachoviasec.com

M. Christina (Chris) Floyd
Hall Automotive
Virginia Beach, VA 23452
757-431-9957
fax 757-431-9967
floyd@hallauto.com

Dolly C. Shaffner
VSB Liaison
Virginia State Bar
Richmond, VA 23219-2800
804-775-0514
fax 804-775-0501
shaffner@vsb.org

CORPORATE COUNSEL NEWS

Virginia State Bar
Eighth & Main Building
707 E. Main Street, Suite 1500
Richmond, VA 23219-2803

FORWARDING ADDRESS AND CORRECTION REQUESTED

Prst Std
U.S. Postage
PAID
Permit No. 709
Richmond