

CRITICAL CONVERSATIONS: LAW & ACCOUNTING

Regulations pose problems for many South Florida companies

By Kevin Gale

Talk about regulations in Washington may seem like political theater to many observers, but South Florida attorneys and CPAs describe a real-world quagmire for clients.

This installment of Critical Conversations looked at key issues in law and accounting, including the wave of fraud in the region and the state of the economy.

The following transcript has been edited for clarity and brevity.

Q: Can you give us your perspective on the state of the economy as to how it relates to your practice area?

A: **Martin R. Press, shareholder Gunster:** A lot of my practice is federal tax related, and with the economy faltering – and the increasing debt of the U.S. government – the government is in a collection mode and an enforcement mode, both domestically and abroad.

The practice area I have has never been more active. Something that especially affects South Florida is people with foreign bank accounts and foreign trade. The IRS has set up all sorts of special programs and personnel to deal with that. There have been greater examinations of what are called “fat cats” with very, very extensive exams.

As far as the economy is concerned, we have three states that are in the worst shape: Nevada, Arizona and Florida.

Michael I. Goldberg, shareholder, Akerman Senterfitt: My area of the law, bankruptcy and Ponzi schemes, has changed quite a bit over the past few years.

Bankruptcy courts have become a mechanism for equity funds and private equity to do deals. You have five or six funds competing to purchase a company, and



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Peter T. Pruitt Jr., Jeffrey Kramer, Michael I. Goldberg and Martin R. Press discuss the issues firms have with regulators.

the bankruptcy is now a sales process to accomplish a business transaction. Corporate lawyers are more active in the bankruptcy process than they ever have been.

The liquidity crunch in 2008 caused the collapse and cleansing of all these Ponzi schemes. Warren Buffett said: “When the tide goes out, you see who is swimming without a bathing suit.”

There are about 50 more Ponzis that you don’t even know about that have been uncovered. In 1990 or ’91, when I told people I deal with Ponzi schemes, they would say: “What’s that?” I would have to take five or 10 minutes explaining it. Now, it’s part of the vernacular of everyday society.

Jeffrey Kramer, partner, Goldstein Schechter Koch: The bigger clients are doing OK now. On the smaller end, a lot of clients have gone out of business. The regulations in taxation are becoming more complex. There have been an increased number of audits. I think the IRS is using its technology more.

The states are becoming more aggressive. I have clients who work in multiple states, and they are asking more questions about sales tax and other issues.

As an auditor for public and private companies, the auditing standards are changing

rapidly, which is challenging clients.

Peter T. Pruitt Jr., office managing partner, Florida and Puerto Rico, Deloitte: The larger companies generally are in pretty good shape. They all worked hard on their balance sheets. They got their headcounts where they want them. They can weather what is coming, whether it’s a slowdown or recession.

The audit business is fairly steady. The tax business, for a lot of the reasons we have heard about, is doing OK. The consulting business is different. IT spending held up pretty good with the moves toward efficiency and reducing headcount. Now, we may be getting to the end of that cycle.

Bruce I. March, shareholder, Greenberg Traurig: My practice is broadly in mergers and acquisitions, and more specifically middle market – \$25 million to \$400 million. Through a good part of last year, there was a tremendous amount of uncertainty – deals on hold, going slow or not getting done. Florida is representative of the economy, but it is magnified here. We are one of the three states hit the hardest.

Sellers are debating whether to sell. Tax changes that didn’t happen sort of took the pressure off. A lot of private companies that

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New deals are happening and money is now more available

were targeted for equity funds came off the market.

People felt that multiples would go up and felt that earnings would go up. If the banks were willing to lend at higher multiples, the price could change even more. A \$50 million sale could become a \$65 million deal.

There was a tremendous inflow of deals in January with higher multiples and more financing. Right through the end of July, there was a high level of activity that we had not seen in a couple of years. Come August, all of that came to a screeching halt. I think it came to a halt because of the gyrations in the stock market that created a lot of uncertainty. Also, a lot of financial people were off.

We just started four new deals. The markets are going to be what they are. People have gone back to realizing money is available and the equity companies are anxious to deploy capital.

Small companies are being bought out of bankruptcy court. Strong businesses can come in and address the balance sheet and keep it strong.

We're seeing deals in restaurants, manufacturing, oil and gas service companies, and the business outsourcing space. There are companies that are viewing this economic uncertainty as a time of opportunity.

Whether this post-Labor Day spurt of activity is because people were bored and coming back or because people are really interested in getting deals done remains to be seen.

Robert S. Turk, shareholder, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.: I specialize in employment law. Some of my clients are the bellwethers,

too, especially high-tech and hospitality. In South Florida, with the economy, they seem to be doing OK.

If you were in South Beach, you would say, "what recession?" Hotels have had really good summers and are projecting well through the fall and holiday seasons. They are doing more with less people.

In employment law, there is an increase in litigation over what was promised in severance. There are more moves to enforce trade secret.

I also see what I call the NLRB [National Labor Relations Board] tsunami. The NLRB has been radicalized and is coming out with proposed rules that are going to change the dynamics of unionization in South Florida. Many businesses are concerned.

What does it mean for us? Every employer needs to put a poster up by Nov. 14, telling employees they have the right to unionize. Elections used to be 45 to 50 days out. Employers had time to talk with employees about pros and cons. The NLRB now poses that they will take place 10 to 15 days after the union surfaces.

NLRB micro bargaining units are not good. Traditionally, if someone went to a unit you would have to find employees who have a community of interest. In hotels, it would be wall to wall. The NLRB came out and said a group of nurse practitioners could unionize, and that has never been the case before. Unions can build a bulkhead with an employer and go out from that.

Press: The IRS is not involved in increased regulations; it is involved in increased enforcement. Employers are getting more notices. Employers are getting more audits. Higher net worth people are undergoing extremely intrusive audits.

I gave a talk with the ABA [American



SUSAN R. MILLER

Robert S. Turk and Bruce I. March.

Bar Association] this year where I went through some of the document requests by the IRS in these audits, asking questions such as: "Please give a list of all magazines that the CEO subscribes to and other periodicals. What exactly are the day-to-day duties of the officers? What time do they arrive in the morning?" These are the kind of things we are seeing that we have never seen before.

In defense of the IRS, it has been outmanned and outgunned by high-priced tax lawyers, high-priced CPAs and consultants – domestically and foreign. They audit one company and there are six other structures here and abroad. They have tried to put together teams to do these audits.

The CEOs and management of some major corporations are meeting with us and going over these matters and negotiating with them or litigating with the IRS. Frankly, it takes lot of time away from their normal duties.

We are seeing tremendous increased enforcement of Florida companies by other states. As we have Florida companies that



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IRS has become combative, law and accounting experts say

sell on the Internet or throughout the U.S., we are seeing audit after audit after audit, and inquiries from other states trying to collect money. And we are getting involved in litigation.

Kramer: I do find that the IRS has become a bit more aggressive in their tactics.

Press: Would you say belligerent?

Kramer: I wouldn't go that far. It does get a bit combative sometimes.

March: I think there is in other sectors, other than tax, tremendous uncertainty on where regulations are going. One is in

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Martin R. Press | Gunster

health care and Medicare reform and reimbursement rates and testing, and the other is immigration and new regulations.

Our experts that work on deals involving lots of blue-collar workers find concern about the increased compliance programs and what the cost of the workforce will be.

It is making it more difficult for employers to be bought and sold or financed – particularly with the Medicare regulations that are going on. The past used to be pretty indicative of the future, but now the past is not indicative of the future.

Political gridlock makes it harder to read the tea leaves and makes the outcome more uncertain. You have to be a little more of

a gambler, doing a deal in some of these regulated industries.

Pruitt: The regulatory environment is very active. Jeff and I are in a regulated industry with the Public Company Accounting Oversight Board (PCAOB). Mandatory audit rotation and changing the form of auditor reports are two PCAOB ideas. One option they have thrown out and given feedback on is giving an audit's qualitative evaluation of financial statements. In the end, the companies are going to have increased scope of audits, increased costs and, ultimately, the clients are going to have to pay it. There are lots of pluses and minuses on whether those have merit.

The chairman of the PCAOB is looking at how auditors are paid as well as whether long tenures may impact objectivity and independence. They don't ask for comments unless they are really thinking about going that road.

Press: What we are talking about in general, in the accounting field and other fields, is the IRS is looking for the professionals to almost be whistle-blowers. They want us, through further regulation, to come forward and give them information that normally they would have to ferret out through their examination process.

Pruitt: You saw it in the SEC's whistle-blower regulations. If a company has a whistle-blower, they don't have an obligation to tell the company what they saw.

Q: Are we in a better position to detect Ponzi's?

A: **Goldberg:** Only to the point that the public is more educated. It has always been illegal. The regulatory structure has always

been there. It is a function of people power. A lot of times, the agencies have no way of knowing a Ponzi is operating. I'm not talking about a Bernie Madoff Ponzi – there are so many Ponzi's below the SEC radar.

Q: Would regulators act faster now in moving against a possible Ponzi?

A: **Goldberg:** I certainly think it would get more attention today, based on a guy like Madoff, who was chairman of NASDAQ, operating a Ponzi of that magnitude. It boggles the mind to think a Ponzi could be in the billions like that, over 20 or 30 years. Most Ponzi's last two to three years.

March: You can't do enough diligence and protect a client against fraud – no matter how deep your diligence is done. You may see something that smells, and you can tell your client something doesn't feel right. It is rare you can find out in the diligence process what isn't right.

Goldberg: South Florida is No. 1 in Ponzi's and Medicare fraud – every type of fraud we are in the top five in the country.

Q: Is the increase in government oversight overwhelming?

A: **Turk:** The EEOC [U.S. Equal Employment Opportunity Commission] is coming out with regulations about the Americans with Disability Act, and employers need to accommodate. The FMLA [Family and Medical Leave Act] allows you to stay out 12 weeks. Beyond that, the government position is that additional accommodations may be needed to hold that job until a worker is able to return. The question is: How long? Anybody with 15 employees or less is not covered, but the mid- and small-size companies don't have the employees to cover the absence.

There's more litigation. Veteran civil

Federal government set to issue new regulations about ADA

rights attorney Robert Weisberg [who was named Miami district regional attorney for the EEOC in 2010] has hired five, six, seven attorneys, and they have a law firm in the government. They have made it clear they are going to sue.

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Robert S. Turk | Shareholder, Stearns Weaver Miller Weissler Alhadeff & Sirterson, P.A.

The NLRB had one new rule in 75 years, and in the last year they have proposed three.

A lot of cases are being prosecuted. In one, someone said: “My supervisor is a SOB. And the co-worker agrees. And someone calls the employer, which fired that person. The NLRB took the position that those employees were protected and couldn’t be fired because they were acting like a union and talking about conditions of their employer.

At the local level, cities and counties traditionally had union support. That has turned itself 180 degrees. Unions know that, if they come before public agencies, because of public anger, they are going to have their benefits and pay cut.

Some unions are bargaining slow to keep

existing benefits in place because they know, at some point, the legislative body they are going to face is going to reduce benefits.

We lead the nation in wage-and-hour cases. It sounds so simple, but it is an extremely complicated law, and every employer is probably violating some part without realizing it.

March: I was talking to someone about a case they are handling where the employee responded to emails in off hours on a BlackBerry issued by the employer. The lack of pay was arguably a violation of wage-and-hour laws. Now, you almost have to tell your employees not to use their BlackBerrys after they clock out.

Pruitt: We have a lot of clients who have done business in California, and it’s extremely tough to do business. Florida historically is easy to do business. It could be a game changer for the state, going forward.

Turk: Each state is going its own way. We have to canvass lawyers in every state you are doing business. What is fine in Florida may be the absolutely wrong thing to do in Georgia.

Q: **Has there been an evolution in bankruptcy law?**

A: **Goldberg:** The law really hasn’t changed that much. The whole bankruptcy practice has changed because it’s just a function to serve the M&A lawyers. There is so much liquidity because there are so many funds that want to bid. In most bankruptcies, the company is sold in 180 days.

March: Bankruptcy is a tool to accomplish goals: You can shed leases you want to shed. You can shed contracts, change labor relations and terminate licenses. You can almost come out and cherry-pick the assets.

The funds are moving increasingly to Europe for deal opportunities. We have been very active. We have one looking for a deal now and three that are in various stages of formation. Collectively, they will have \$5 billion to \$7 billion to invest, primarily in Europe. Funds have bid prices up here, so they are moving offshore.

Q: **Please give us an update on the IRS offshore account disclosures.**

Press: Enforcement on offshore assets is still a very hot issue. In the voluntary disclosure program, we had large numbers of people coming in – I think it was 17,000. The estimates are the government will raise several billions of dollars. In 2004, they raised a few million dollars.

The world is up in arms: “Why do we have to do these things? Can’t the U.S. regulate itself? It has to regulate us, as well?” What’s happening at this point is there has been a pattern of prosecuting foreign bankers, a number of whom came to Miami and met in hotels. There have been many bankers who are labeled as fugitives because they are in Switzerland and other places where they can’t get control of them. It seems to be a larger pattern of the U.S. going all over the world and getting information and reporting.