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Joanne Badr
Derek Allen

Real-estate law:

Mindful development impacts more than your favorite craft brew

For a number of reasons, consumers have begun to crave a sense of familiarity where they live, perhaps in response to an innate longing for community. Americans lost grasp of the goals of local, organic and sustainable living after the Great Depression, and the industrialization and post-World War II eras of efficient mass production and competitive consumerism distracted and drew us away from those concepts. With the rise of social media and virtual connections, this trend continued well into the 2000s.

Now a shift is afoot. According to Pew Research Center, the number of millennials — generally defined as those between the ages of 20 and 36 — is quickly surpassing the nearly 75 million baby boomers — people age 51 to 69. Both of these populations prioritize the incorporation of convenience, livability and work-life balance in their communities, and many choose to move to cities and towns that have embraced those trends.

In Asheville, more than 10 million people visit every year, with approximately 35% of them there to see friends and family in what has become a "top-five" travel destination. A significant number of those visitors decide to relocate to Asheville after only a short visit, because they've spent most of their trip asking themselves, "Why does it feel like I already know this place?" Asheville and western North Carolina's geography are partially responsible for that feeling, but the instant sense of familiarity that Asheville emits has not been generated by luck or accident — it has been purposefully cultivated by residents through a consistent emphasis on art, craft, sustainability and mindful living.

A great deal of the buzz about Asheville these days centers on its craft beer scene. The fact is that this emphasis on craft is not new. It is no surprise that breweries, farm-to-table restaurants and tourism are flourishing in Asheville because Ashevillians have always focused on making livability, artisanship and craft the centerpieces of what they create. For more than 150 years, this focus has made Asheville a place for people to visit for recreation, health and quality of life. In the early 1900s, while George Vanderbilt was preparing his Biltmore Estate for visits by friends and colleagues, his wife, Edith, familiarized herself with local people and the crafts they produced, holding craft classes so residents could learn a skill to make a living. She later helped start a craft school at the Biltmore Estates Industries. In 1906 the New York Times praised the strong and fadeless quality of the yarn made from wool from sheep raised on the estate and colored with vegetable dyes. So, even as far back as 1906, Asheville's focus on the concepts of local, organic and sustainability was prized. These basic priorities embraced by Asheville and its residents remain steadfast and alive today.

The prominence of intentional living is not limited to art and saleable products. With industrialization and technology at our fingertips, we can obtain low-cost products quickly and cheaply, but with the growing national emphasis on sustainability, no industry can afford to ignore concepts related to mindful living if they want to remain relevant with today's consumers.

In today's world, developers also must consider how to carve out mindful development patterns that are built around a specific population's needs, mostly because the way that many people choose to live is changing. According to Time magazine, in 2011, for the first time in nearly 100 years, the rate of urban population growth outpaced suburban growth. The aging of baby boomers and the rise of millennials have created an emphasis on concepts of "work-life balance," and as a result, to draw these populations, a living environment must be attractive and supported by good infrastructure, including initiatives aimed at energy, water and waste efficiency.

In Asheville, as with other areas heeding the demand for local focus, the real-estate development and construction industry cannot ignore this clamor. Asheville's developers are learning that America's young working population is enticed by urban-style living, and like other smaller cities and towns, these developers have to understand where they live and hustle to recruit and retain millennials, who want to walk or bike to the grocery store, laundromat, wine bar and their children's elementary school.

Millennials also want to walk to their local arts district, putting an onus on local leaders, city officials and commercial real estate owners to create affordable residential buildings amidst continuously rising real-property values and market rents, so that communities such as Asheville do not lose the artist community that has contributed so significantly to its uniqueness. Now, when putting together a design model, Asheville's developers are wisely considering the historical designs of the past, the use of lighting technology that mimics sunlight, and the use of construction materials that are void of known toxicity, built to last and maintain the integrity of the existing building. Development in Asheville also has a strong emphasis on craftsmanship and quality in building materials and their function because that is the essence of craft, and it is what today's consumers demand.

There are other benefits to focusing on the creation of mindful, livable urban spaces in Asheville and other cities and towns because such an emphasis helps to provide access to resources that make advanced industries — such as biomedicine, energy and technology — thrive, which in turn draws high-paying jobs that continue to support a booming real-estate sector.

It is noteworthy that while less immediately enticing to millennials and the populations born after them, the suburbs are not going away, and they present an opportunity for the real-estate industry in Asheville and elsewhere to apply the principles of mindful living. Market participants cannot afford to ignore developments well beyond central business districts, but make no mistake, millennial families aren't interested in living in the suburbs of their parents' generation. The demand, in Asheville and elsewhere, is for suburbs to be made more walkable, friendly and convenient. Families still want tree-lined streets, soccer leagues and cul-de-sacs, but they can do without endless commutes and traffic jams.

Urban-style living can be made possible in suburban areas, so long as zoning accommodates this shift and commercial real estate developers and investors are willing to build communities similar to models previously only thought possible in city centers: true mixed-use developments.

No doubt zoning regulations impact city development in many ways, but by the same token, there is no reason why the opposite cannot be true. City development can both impact and change zoning regulations. While the function of zoning regulation historically has been to divide a municipality into distinct residential, commercial and industrial zones, as society's needs and demands shift, these regulations also must change.

As growing urban and suburban areas are pressed for more housing capacity, zoning ordinances will necessarily shift to accommodate the demand. In the past, planners may have interpreted a city's comprehensive plan to require that a mixed-use development was one where every separate parcel of land had to contain mixed-use development, but now planners recognize the need for a larger planning view. Mixed use, for example, may mean that within a mixed-use district, housing can exist on one parcel, with a grocery store, daycare center, school and pharmacy on adjacent parcels. Instead of the old view of many uses under a single roof, creative mixed-use development can take the shape of multiple buildings and public spaces, placed in thoughtful proximity to one another and around an existing community, creating a tapestry within, so a suburb can reinvent itself into a sustainable, closely-knit community capable of attracting baby boomers and millennials.

Suburbs also are attractive because employers are increasingly attracted to suburban office markets. Rents for class-A space there tend to be nearly half of what's paid in central business districts. Improvement in suburban office markets goes hand in hand with growth in residential development and the multifamily sector, which will create urban markets outside of central business districts. As in many communities, Asheville's young and seasoned entrepreneurial and professionally minded residents are learning that they can live where they want to live, within the communities they want to be a part of, and that their jobs and employers will come to them.

The economic boon that has been experienced in Asheville can be cultivated in other North Carolina communities. However, in today's world, in order to draw craft breweries, farm-to-table chefs, tech jobs, tourism, millennial professionals and entrepreneurs to its boundaries, a community must remain constantly aware of the indispensability of incorporating concepts of craft and livability into its real-estate development. This will be one of the most important factors that every city, town and suburb must prioritize in order to achieve conscious and mindful growth.

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DEREK ALLEN leads the alcoholic beverage law, real-estate development and zoning and land use practices at Ward and Smith PA. He has extensive experience with craft breweries from small startups to national distributors. He has experience in all aspects of civil litigation, including depositions, hearings, mediations, arbitrations, jury trials and appeals. He advises clients and litigates cases involving all forms of commercial, business, development and real-property disputes in state and federal courts.

B. Joan Davis

Property law:

Everything you need to know about the Map Act — for now

Was your property or business listed on an official North Carolina Department of Transportation Protected Corridor Map? If so, you probably have many questions. What does it mean to be subject to a Protected Corridor Map? What is going to happen to your property? And most importantly, do you need to do anything?

This article will give you the vital information that you need to know about the Map Act. The answers may surprise you, but here is the bottom line: If your property has been designated on a Protected Corridor Map, then you will need to be proactive in order to protect the value of your property. In fact, the clock may already be ticking on your legal rights.

North Carolina adopted the Map Act in 1987 as a planning tool for NCDOT to designate property that it intended to acquire for future roadway projects. The idea was to limit development in those designated areas while environmental and design studies were completed. The state's goal was to significantly reduce the acquisition costs for the state when it came time to purchase the designated properties for road construction. During that time, the designated property owners could not develop their land, add buildings or subdivide their property without pursuing a costly and time-consuming process to obtain a variance from the state. As a result, these restrictions severely reduced the value of many of the properties caught in the snare of a Protected Corridor Map.

Several of the Protected Corridor Maps remained of record for many years while their related highway projects languished in the development process, and property owners became frustrated at the loss of their valuable property rights. Some property owners filed inverse condemnation lawsuits against NCDOT, arguing that the Protected Corridor Map designation was a taking of their property. An inverse condemnation case is one where a property owner asserts that the government has taken property or property rights without following the proper legal procedure and without paying just compensation as required by the Fifth Amendment of the U.S. Constitution — "nor shall private property be taken for public use, without just compensation."

Last year, in a historic decision, the N.C. Supreme Court ruled in favor of the property owners in Kirby v. NCDOT, 368 N.C. 847 (2016). The court held that designating a property on a Protected Corridor Map was a "taking" by NCDOT that required the State to pay the property owners for the "fundamental property rights" that were taken. The Court provided a formula to be used in calculating the loss of these rights on a case-by-case basis: the value of the property before the map was recorded compared to the value of the property after the map was recorded, "taking into account all pertinent factors, including the restriction on each plaintiff's fundamental rights."

Subsequently, the legislature amended the Map Act to rescind all of the existing Protected Corridor Maps and put a one-year moratorium on the recording of any new maps. The legislature also attempted to reduce the interest rate the state would have to pay to property owners from 8% to the prime lending rate — about 4% — with a cap

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of 8%. This change in the interest rate is controversial because it was implemented without notice to property owners, and it is being challenged by many property owners as unconstitutional. Ironically, this change in the interest rate only applies to those owners who had not already filed suit, thus encouraging more property owners to file claims for fear that the state might adopt more drastic measures that would adversely impact their property or businesses.

Lawyers across the state and countless government officials have been trying to sort out the repercussions of the recent case law and last year's amendment of the Map Act. Although the court outlined a formula for determining the value of the taking, implementing that formula has proven cumbersome and problematic for the state. The types of properties that have been impacted include: family farmland, older and newer homes, large subdivisions, churches and commercial properties such as shopping centers, restaurants, convenience stores and office buildings. Each property has to be evaluated separately based on "all pertinent factors." Our firm has been working with our clients and expert appraisers to develop a comprehensive plan for addressing the various types of damages caused by the Map Act and the Protected Corridor filings.

Pursuant to the Map Act, NCDOT and related agencies recorded 28 Protected Corridor Maps in several counties, including Catawba Cleveland, Cumberland, Currituck, Durham, Forsyth, Guilford, Johnston, Lee, Lenoir, Mecklenburg, New Hanover, Pender, Pitt, Randolph, Richmond, Robeson, Rockingham, Wake and Wayne. More than 8,000 property owners in North Carolina have lost "fundamental property rights" as a result of these takings.

If your property is listed on one of these maps, then you would be wise to consult with a lawyer about what you should be doing to protect your property's value. Hundreds of property owners have already filed suit to recoup their losses. If you are not sure whether your property has been impacted, then I would encourage you to consult with a lawyer without delay. Our firm, like most law firms that handle such claims, will do so on a contingent fee basis, meaning that you only pay a legal fee based on a percentage of what you recover for your property's loss in value. Also, under state law, the State must pay interest and reimburse attorneys' fees when a property owner is successful in pursuing an inverse condemnation claim.

Currently, there are at least 10 NCDOT projects with more than 4,000 affected property owners where the maps have been rescinded but the highway project is moving forward, and the state is acquiring new rights of way and easements to facilitate construction. Property owners who are settling with the state now based on their property's current value may wind up being undercompensated unless they have taken into account the diminished value of their property as a result of the Protected Corridor Map and the damages and interest that they may be due as a result of the Map Act taking. Likewise, there are four projects where maps were recorded — one as long ago as 1997 — but the projects have been waylaid for various reasons, and acquisitions still have not occurred. These projects include the Winston-Salem Western Loop in Forsyth County and the Southern Wake Expressway in Wake and Johnston counties, which together impact nearly 900 people and businesses.

Even though the maps have been rescinded, the Map Act has not been repealed. We can expect that the state will continue to look at methods for preserving transportation corridors in the future. Stay tuned for further developments.

If your property is listed on a Protected Corridor Map, then you would be wise to consult with an attorney about what you should be doing to protect your property's value. Hundreds of propertyowners have already filed suit to recoup their losses.

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Construction law:

A specialty practice in today's complex legal environment

Many lawyers a generation ago practiced "threshold law." They took any case that crossed the threshold of their office's door. Most lawyers in today's competitive legal market focus on a specialty practice area. Although construction law has evolved over the years into a specialty practice, there is still no universally accepted definition of the practice. In 2007, for example, construction law practitioners began the process to petition the North Carolina State Bar to approve construction law as an area of law for which a lawyer could become certified as a "specialist." Currently, the State Bar recognizes only 16 areas of law with such classifications. Without such a certification, a lawyer cannot call himself or herself a "specialist" in a particular area of the law. Attempts to add construction law as a specialty in North Carolina stalled partly because practitioners were unable to a reach consensus on its definition.

The 16 recognized specialty practice areas run the gamut, from appellate practice to workers' compensation law, and include bankruptcy law, criminal law, family law, immigration law and trademark law. Interestingly, there are parts of each of these practice areas that often must be addressed by the construction-law practitioner. Today's construction lawyer must be well-versed in more than just contract drafting and interpretation, licensing and regulatory requirements, mechanic's liens and bonds, and the various forms of dispute resolution — mediation, arbitration and litigation.

As construction lawyers, we cater to the needs of the construction industry. Over the last several years, our clients' needs have broadened to include areas of the law that one might not necessarily associate with construction law, including aviation, employment and immigration, e-discovery (storage, production and forensic investigation of digital data) and insurance.

By way of example of a critical, but often overlooked, aspect of construction law, we will discuss the importance of understanding and properly addressing the last category: insurance. A large part of our practice is assisting clients in recognizing, evaluating and addressing the risks they may be assuming when they are contemplating signing a contract to participate on a construction project.

A key component of a comprehensive analysis is having the right insurance for the parties and for the project. The use of a contractor-controlled insurance program or an owner-controlled insurance program, for example, may be a better option than relying on multiple separate policies to adequately and efficiently cover the risks for a particular project. The variables from one project to the next warrant a thorough review of the project's proposed insurance coverages and allocations of risk.

A major component of a project's insurance review is complying with contractual requirements to name certain parties as additional insureds. The project contracts, for example, may require the contractor to be named as an additional insured on a subcontractor's commercial general liability insurance policy. An additional insured is a party — the contractor in this example — other than the named insured — subcontractor — who is covered on the named insured's insurance policy as if the additional insured was a named insured on the policy. The additional insured status in this scenario gives the contractor direct rights under the subcontractor's liability insurance policy. It may also avoid certain exclusions in the contractor's own liability insurance policy.

Unfortunately, we see many instances, usually after it's too late, where contractors think they have been included as an additional insured on a subcontractor's liability insurance policy only to find out when the insurance coverage is needed that they were never properly added. The only way to become an additional insured is by an endorsement issued by the named insured's insurance company.

Contrary to popular belief and practice, one may not become an additional insured only based on a certificate of liability insurance stating that the purported AI is an AI on the policy referenced in the certificate. The certificate also is known as an ACORD 25 form. Certificates of insurance often are presented as proof that the purported AI has been named as an additional insured, but that alone will not make it so. The AI should demand a copy of the actual additional insured endorsement issued by the insured's insurance company. The AI also should demand a copy of the Declarations Page of the insured's liability policy, which includes basic information such as the named insured, the insurer, the policy number, the monetary limits of insurance coverage, the policy period and an identification of the forms and endorsements to the policy.

The next issue is determining which AI endorsements should be used. There is no single standard AI endorsement form. The Insurance Services Office is an industry organization that develops many standard insurance policy forms, including additional insured endorsements. Selecting the appropriate AI endorsement largely depends on the needs of the project and the identity of the parties to the construction contract. Many projects specify the particular policy endorsement forms to be used to add additional insureds. Each endorsement form provides different insurance coverage for the AI.

Commonly used AI endorsements include ISO forms: CG 20 10 11 85 Additional Insured — Owners, Lessees or Contractors — (Form B); CG 20 10 07 04 Additional Insured — Owners, Lessees or Contractors — Scheduled Person or Organization; CG 20 10 04 13 Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization; CG 20 33 10 01 Additional Insured — Owners, Lessees or Contractors — Automatic Status When Required in Construction Agreement With You; CG 20 33 04 13 Additional Insured — Owners, Lessees or Contractors — Automatic Status When Required in Construction Agreement With You; CG 20 37 07 04 Additional Insureds—Owners, Lessees or Contractors — Completed Operations; CG 20 37 04 13 Additional Insureds — Owners, Lessees or Contractors — Completed Operations; and CG 20 38 04 13 Additional Insured — Owners, Lessees or Contractors – Automatic Status for Other Parties When Required in Written Construction Agreement.

The numbering of the forms is: CG = Commercial General Liability Insurance. The first two digits designate the specific insurance category. The next two digits are the endorsement number within the specific insurance category. The last four digits are the date of the endorsement expressed in month and year format.

In this article, we have touched on a sliver of insurance coverage issues common to most construction projects. We often deal with many other insurance coverage issues, including the interpretation of the insurance policy's insuring agreement, which defines the coverage provided by the policy, the policy's numerous complex coverage exclusions and the often overlooked exceptions to the coverage exclusions. The old saying, "what one hand giveth, another hand taketh away," is often used to describe insurance policies. However, an experienced construction practitioner does not stop the analysis there because an "exception to an exclusion" may then "giveth back." Perhaps, another old saying might be more applicable: "You have to be a lawyer to understand what that thing means."

Few people look forward to discussing insurance programs, coverage and policies. Most never fully understand the extent of their insurance coverage — or, equally important, the lack of coverage — until a claim needs to be made, at which point it's usually too late. Like a front -end alignment keeps a car traveling straight and true, a comprehensive review of a party's insurance needs before the construction project begins may help keep that project on course if a claim arises in the middle of construction.

Although construction law has evolved into a specialty practice, today's construction law practitioner must be able to analyze and address a broad range of legal matters affecting the construction industry. Whether it is working with a client in addressing their insurance needs, filing suit to collect unpaid contract funds or helping them draft their internal procedures for operating drones on a construction site, today's construction lawyer has to be skilled in many areas of the law.

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Chapin and Davis represent public and private owners, developers, contractors, construction managers, subcontractors and sureties on legal matters affecting their industry. They, along with the other lawyers at Conner Gwyn Schenck, are co-authors of NORTH CAROLINA CONSTRUCTION LAW, a treatise published by Thomson Reuters. It contains in-depth analyses of numerous aspects of construction law, including public procurement regulation, project delivery and financing systems, insurance, liens, suretyship, building codes, occupational licensing and regulatory compliance. Drew's and Paul's full biographies can be viewed at www.cgspllc.com.

Alexander Elkan

Environmental law:

A litigator's perspective on permitting considerations

Developing a project or facility often presents significant challenges, including those associated with obtaining environmental permits under federal, state and local laws and, in the most challenging cases, defending those permits in litigation. Ideally, a project may have comprehensive advance planning, few regulatory obstacles, and broad and deep government and public support. Under less ideal circumstances, there may be a condensed time frame to obtain a permit, significant legal or regulatory "roadblocks," vigorous public and political opposition, and litigation. This article does not attempt to dive into the myriad of complex environmental regulations that may entangle a project, rather it offers more general concepts that are important to keep in mind, regardless of the project and regulatory framework. Consideration of these matters may increase the chances of success, not only in obtaining necessary government approvals but also in preventing or defending against litigation.

- *Team composition* – A project permitting team must have expertise in the legal, regulatory, geological, biological, engineering, economic and other technical aspects of a project. At least some team members should have established mutually respectful relationships with relevant regulatory staff at the local, state and federal levels. Depending upon the project and the company, the team may include some combination of company executives, professionals and staff, and outside counsel and professionals. Individual expertise, capacity, cost and effectiveness should be considered when assembling a team. For all projects — especially those likely to be disputed — team leaders and outside counsel should assess the ability of individual team members to serve as potential witnesses in possible administrative or judicial litigation. Since the team's work must justify issuance of the required permits to regulators, the public and administrative tribunals and courts, competency, credibility and communication are key.

- *Scoping and planning* – Business priorities drive projects. However, input from environmental permitting experts at the earliest stages of project scoping and planning may help avoid potential set-backs that could frustrate business goals. The old adage "an ounce of prevention is worth a pound of cure" applies here. Alternative locations or configurations for a project should be assessed early in the process and considered in light of regulatory requirements for the company's preferred alternative. While planning efforts may not identify all potential permitting issues, they should be comprehensive enough to shed light on significant obstacles that could jeopardize project goals.

- *Communications* – Consider managing internal and external communications with the following objectives in mind: (1) establish a robust administrative record in support of permit applications and favorable permitting decisions; (2) address evidentiary matters in relation to potential litigation; and (3) promote favorable public opinions. Legal counsel should consider potential privilege and confidentiality issues, as well as admissibility of documents and testimony, and establish communication guidelines for the permitting team. Procedures for reviewing and editing draft documents should be established to ensure consistency and accuracy. An errant statement in a technical document can cause significant time, expense and risk both in obtaining necessary permits and in later litigation challenging permits after they are issued. It is better to spend time and effort up front to thoughtfully design and scope studies and carefully edit reports than to place the permits and project at risk by submitting reports that are not fully vetted and thus risk publication of avoidable inaccuracies or misstatements.

- *Regulators and regulations* – Government permitting staff are knowledgeable professionals tasked with a difficult job of interpreting, implementing and enforcing applicable regulations. While they have significant knowledge of the rules they enforce, they also may rely on informal agency policies and procedures and "know-how" to carry out their duties. Such informal practices do not always line up with the statutes and regulations that govern. It is beneficial to work cooperatively with regulatory staff, and while regulators may provide useful input, both formal and informal, and "advice" that should be carefully listened to and considered, the applicant should not rely solely on a regulator's "say-so." It is important to comply with the regulations as they are written and formally interpreted by administrative tribunals and judicial courts. While a regulator may exercise discretion to issue a permit based on his or her view of what the regulations require, applicants may challenge unsatisfactory regulatory interpretations, and those in opposition to the project also may initiate litigation to challenge an issued permit. In those circumstances, it is satisfaction of the regulation, rather than the regulator, that will prove decisive — the regulatory agency view, while potentially entitled to deference, does not control a court's analysis and judgment.

- *Rulemaking, variances, and litigation* – Certain projects depend upon successfully challenging initial regulatory interpretations, obtaining variances where applicable, or even revising rules or statutes through appropriate administrative or legislative processes. Timing, cost, feasibility and risk should be weighed, but under some circumstances, engaging in administrative rulemaking, legislative amendments, obtaining variances, and/or administrative or judicial litigation may all be considered as potentially appropriate means of addressing regulatory interpretations by government permitting staff that would cause a project to fall short of business goals.

- *Permit review* – Receiving a final permit for a preferred project – often after much time, effort and investment – is a welcome occurrence. However, it is important to run through the finish line. Signature and acceptance should wait until all appropriate team members carefully review the complete permit terms and conditions, including "boilerplate" text, general conditions, and all maps, figures, and materials that may be incorporated by reference. Revisions, technical or otherwise, often may be timely requested and addressed. Appeals should be considered as appropriate. Once all terms and conditions of the permit are determined to be in order, a compliance schedule should be roughed out and assessed to identify potential issues prior to signature and acceptance of a final permit.

- *Compliance and renewal* – It bears repeating: Outline a permit compliance and renewal schedule before accepting a final permit in order to identify potential issues with following all permit terms and conditions. After permit acceptance, the compliance schedule should be fully fleshed out and distributed to appropriate company executives, professionals and facility staff, and perhaps outside consultants or counsel, depending upon the project and a company's practices, capabilities and expertise. A reporting and record-keeping plan also should be developed and checks established to ensure regulatory and permit compliance as a project is carried out and a facility is operated. Many laws require specific records to be kept and the reporting and record-keeping plan should reflect those requirements. In the event of significant and/or reoccurring compliance issues, permit amendments or variances should be considered along with project changes. Permit renewal efforts should be undertaken well in advance of deadlines in order to ensure that any potential issues or delays do not impact facility operations.

- *Defending against permit-challenge litigation* – Once permits are obtained, permit-challenge litigation may be brought by those opposing a project. The evermore divisive politics of environmental issues and increasing public mistrust of government has resulted in more frequent litigation of any significant project, regardless of factual and legal circumstances or the merits of the permit or permits challenged. Consideration should be given to proceeding with a project "at-risk" during the course of litigation. Risk, cost, timing, precedent and public relations should all be considered in developing and carrying out appropriate litigation strategies and assessing potential settlement. Just as obtaining the permit or permits requires cooperation with and support of government permitting staff, so too does successfully defending permit-challenge litigation. If fully anticipated, considered and addressed during the project planning and permitting processes, permit-challenge litigation may be prevented, or at least made less risky and less expensive.

SUMMARY

It is important to consider not only the technical scientific, engineering and regulatory context of environmental permitting for a project or facility but also to strategize in light of political, legal and public-relations matters, and in anticipation of potential litigation to challenge government regulatory interpretations and to defend permits once obtained.

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Kara Gansmann

Elder law:

Planning for long-term care without spending a lifetime of savings

With more than 40 million Americans age 65 or older, seniors comprise the fastest growing segment of the country's population. The U.S. Census Bureau predicts that by the year 2050, there will be 86.7 million citizens older than 65. The senior population also is experiencing a growing health care crisis: Alzheimer's disease. This disease, affecting 5.4 million Americans, is touted as one of the most expensive diseases to manage. Those with Alzheimer's disease could require assisted living facilities with specialized memory care or nursing homes. Even seniors without Alzheimer's may need nursing home care. In considering the potential for long-term care, seniors are now growing more concerned with how to pay for that care.

In North Carolina, monthly nursing home costs can conservatively range from $7,000 to $10,000. These costs can quickly impoverish even the most fiscally responsible planners. Further, most seniors prefer to avoid spending their money on long-term care costs. While many seniors will qualify for Medicare health coverage, Medicare does not cover long-term care costs. As a result, many seniors, including mid- to upper-level wealth seniors, are seeking other options like long-term care insurance or Medicaid to pay for nursing home care.

Medicaid is a government program designed to provide comprehensive medical care to nursing home patients who are generally aged, blind or disabled. Medicaid benefits are only available to medically eligible applicants with limited income and resources. When a Medicaid applicant has assets that exceed what is allowed by Medicaid rules ("countable resources"), those resources must be spent or transferred to qualify for Medicaid. Compensated transfers contemplate an exchange of assets for fair market value. If countable resources are transferred for less than fair market value, an applicant could be penalized if the transfer occurred within the five years prior to a Medicaid application. This five-year "look back" period defines whether an uncompensated transfer will be penalized. The penalty equates to a number of months that an otherwise eligible Medicaid applicant will have to wait before Medicaid covers the costs of long-term care. Essentially, a penalized applicant may have to pay privately for nursing home care beyond the five-year "look back" and through the penalty period.

Medicaid eligibility rules vary by state, subject to federal guidelines. These rules can be complicated. Seniors often work with elder law attorneys to form estate plans that will meet three precepts: (1) protect financial assets for a spouse or loved one, (2) plan for future long-term care costs, and (3) comply with Medicaid's complex rules. Through the use of Medicaid qualified annuities, irrevocable trusts, advanced preplanning and the other tools outlined below, elder law attorneys can help seniors achieve all three goals.

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IRREVOCABLE TRUSTS

When seniors have time to plan in advance, irrevocable trusts are powerful tools in planning for long-term care.

Irrevocable trusts are generally drafted, so that they cannot be amended or revoked. Upon creation of an irrevocable trust, the grantor — the person who funds the trust — transfers assets into the trust and names a trustee to administer the trust. To comply with Medicaid rules, the grantor generally does not serve as trustee of an irrevocable trust. The assets are then retitled in the name of the trust and no longer belong to the grantor. Similarly, the assets in an irrevocable trust are intended to avoid being considered as countable resources.

Generally the transfer of assets to trust is an uncompensated transfer without an exchange for fair market value. If the transfer occurs within the five-year "look back" period, the transfer could be penalized. However, if the assets are transferred outside of the five-year "look back" period, no penalty will apply.

With irrevocable trusts, the grantor may elect to receive a stream of income or dividends generated by the trust assets. However, with a properly drafted irrevocable trust, the grantor cannot directly receive any principal from the trust. If the principal were directly accessible to the grantor, then the grantor would run afoul of Medicaid's rules for countable resources. Instead, the grantor names other people as lifetime beneficiaries of the trust principal. In this way, the trust principal can be preserved for future generations while still providing a regular stream of income to the grantor and also allowing the grantor to eventually qualify for public benefits.

An important aspect of irrevocable trusts is that the grantor can retain the power to fire the trustee. If the grantor needs money to pay for nursing home care within the five-year "look back" period, the grantor can then ask the trustee to pay for nursing home costs. If the trustee refuses, the grantor may fire the trustee.

While irrevocable trusts can be costly, these trusts provide more protection to assets than an outright gift. Additionally, there may be tax benefits to using an irrevocable trust.

LONG-TERM CARE INSURANCE

Another effective tool for preplanning for long-term care costs is long-term care insurance. This kind of insurance policy will cover long-term care costs up to a certain amount or through a certain time period. Ideally, when used in conjunction with an irrevocable trust, a long-term care policy would cover all or a portion of long-term care costs during the five-year "look back" period.

Traditional long-term care policies can be renewable, but the rates are not guaranteed. The cost of these policies is based on the age and health of an applicant. Unfortunately, the costs can increase and become cost-prohibitive over time. Hybrid long-term care policies are combined with life insurance or annuities. The advantages of a hybrid policy include guaranteed premiums.

While long-term care insurance has declined in popularity among seniors due to higher costs, these policies offer seniors more time to arrange their estate and protect their assets.

ANNUITIES

In some cases, annuities can protect seniors' assets from going entirely to long-term care costs. To be Medicaid compliant, annuities must meet a number of strict requirements or risk being penalized.

In certain circumstances, married seniors can purchase annuities to protect a significant portion of their assets when one spouse requires nursing home care. Under these circumstances, an annuity is purchased with assets that would normally be considered as countable resources. The annuity then creates a stream of income for the spouse who remains at home. Because transfers between spouses are not penalized, this transfer to an annuity during the five-year "look back" period creates no penalty.

Annuities may not be beneficial for all circumstances, but annuities can be used in preplanning for long-term care and for crisis planning.

USE OF IRAS

In certain circumstances, seniors can use IRAs in conjunction with other tools to further their long-term care planning goals. Where most IRAs can be withdrawn in a lump sum, those accounts could be considered countable resources. Unfortunately, cashing out IRAs may pose severe tax consequences.

One technique is to convert an IRA into an annuity to indirectly purchase a long-term care insurance. Certain allowances are made for use of IRA savings to pay for medical expenses that exceed 10% of the adjusted gross income or to purchase medical insurance. Seniors will first purchase a life insurance plan with a long-term care policy rider. Seniors then use IRA funds to invest in a tax-qualified annuity that makes internal distributions to the insurance carrier. The seniors can indirectly pay for long-term care insurance coverage with IRA money without incurring additional penalties. A variation of this same concept is to make a tax-free transfer of IRA funds into a qualified health savings account that includes long-term care.

Another technique is to transfer a home into an irrevocable trust. If the home still has a mortgage, seniors can use their IRA required minimum distributions to pay mortgage payments on the home, now characterized as "rent" to the trust for use of the home. Or those distributions can be used to purchase a smaller, more manageable home that would be exempt under Medicaid's rules.

Planning for long-term care costs is a complex process for seniors and their families. The amounts protected by these strategies will vary depending on each senior's needs. With advanced planning and careful guidance, seniors can learn which strategies are appropriate for their long-term care goals and unique circumstances.

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Saad Gul
Mike Slipsky

Privacy law:
You need to worry about upcoming European Union regulations

You are a North Carolina company. You have no offices in Europe. Barring the occasional employee vacation, the rare convention or isolated business trip, you have no personnel in the European Union. So do you need to concern yourself with the fact that the European Union's General Data Protection Regulation comes into effect on May 25, 2018? The answer will surprise you. In a word, yes.

By way of background, the GDPR is a European Union regulation. A regulation, as opposed to a directive, automatically becomes binding law throughout Europe on the designated day. Member states are not required to pass their own implementing legislation to render it enforceable. So on May 25, 2018, the GDPR will be the law of the land in all European Union member states. Those member states will include the United Kingdom, since the Brexit withdrawal process will not be complete by May 2018.

The GDPR is built around one fundamental principle: the data subject (the individual) has the right to control his or her data. Contrary to popular belief, the GDPR does not apply to all data. It applies only to personally identifiable information or certain types of personal data that can be connected to an individual resident of the European Union. As the result of Europe's recent historical experience with data collection at the hands of totalitarian regimes, the European Union approaches data processing with far greater wariness than the United States.

In the United States, any data processing that is not specifically prohibited, such as health information by HIPAA or educational records under FERPA, is generally permissible. The European Union takes the opposite approach. Unless a specific exemption is available — typically based on the individual data subject's permission or "the legitimate needs of the data processor — data processing is forbidden.

So why should a North Carolina company care? Frst, the GDPR applies to any entity worldwide that processes an EU resident's personal data. And many companies process more data than they may appreciate. Do you have a website? Do you utilize any sales and prospect tracking software? If either the website or the software handles the personal data of EU residents, that potentially constitutes processing. In other words, many technology and other companies that do not consider themselves to be traditional data processors — those involved in advertising, education or training — may still be subject to the GDPR.

Second, even if a company's business is not built around the collection, processing or handling of personal data, it will inevitably find that routine functions necessitate the incidental processing of personal data. Data processing regulations directly and self-evidently affect companies handling core data processing functions such as payroll or social media analytics. But the GDPR definition of processing is much broader. It encompasses virtually every conceivable category of personal data.

As a result, we have already advised medical supply, manufacturing and transportation companies regarding the new regime. These businesses could not be farther removed from the Silicon Valley behemoths from Central Casting that dominate most commentary on the FDPR. They are not Big Data mammoths such as Google, Facebook or their equivalents. But routine managerial operations in even the oldest and most traditional brick-and-mortar businesses can entail the processing of EU resident data, such as to bill orders to the right individual or to ensure that deliveries are routed to the correct address. That processing carries obligations.

At this point you may find yourself saying: Both those points entail dealing, and perhaps merely tangential dealing, with clients or individuals located in the European Union. None of my clients are located there. Is GDPR still an issue? Once again, the answer is yes.

Our third point is that domestic companies servicing domestic customers will find that those domestic customers oftentimes need to process EU resident data for their own business operations. To retain those domestic customers, the company needs to become GDPR compliant. If it does not, it runs the very real risk of risk losing that customer's business to a competitor who is.

For example, North Carolina has a well established and growing technology sector. Those familiar with the technology industry know that the vendor-client relationship does not entail a single cash-and-carry transaction. The relationship will almost certainly encompass additional services such as installation, training, consulting, customization, servicing, troubleshooting and updates. Indeed, these separate modules typically constitute a significant portion of the revenue booked against a particular relationship.

So if the technology company's own clients service EU residents, then those additional premium services will entail data processing. And should the North Carolina company have a single client that uses its product to handle EU resident data, it must comply with the GDPR. Of course, some activities, such as training, could be undertaken using dummy data. No GDPR compliance would be required in those instances. However, most premium activities, such as upgrades, legacy data migration, cloud implementation or customization, necessitate some level of data processing. And if that data processing involves the personal data of EU residants, they will require GDPR compliance.

Fourth, if the North Carolina company is ever sold or acquired, GDPR compliance will be a factor in the acquisition. We have already seen queries specifically addressing GDPR compliance representations and warranties in due diligence documentation. Many buyers consider GDPR compliance as a non-negotiable prerequisite in an acquisition. Even if it's a negotiable issue for the buyer, the perceived value of the enterprise will be affected by a lack of compliance. So, too, will the terms of the acquisition.

Fifth, the overlap between various privacy regimes means that the GDPR will become the de facto global data processing standard. GDPR provisions require that any processing of any EU resident's data anywhere in the world comply with certain requirements. The practical implication of the GDPR effect of this requirement is that even if a North Carolina company undertakes a joint enterprise with a non-European Union partner, the partner has a business incentive to require GDPR compliance. For example, consider a North Carolina company with a longstanding and profitable relationship with a channel partner in Singapore. Singapore is not part of the European Union. Therefore, the GDPR would appear to have no relevance to the relationship. But it does.

The Singapore partner will have the same concerns that domestic customers do — the loss of business to GDPR-compliant competitors. If the Singapore partner has clients, either resident in the European Union or clients who process EU resident data, then it is faced with two choices: It could forgo a considerable volume of business, or it could become GDPR-compliant. Part of its compliance efforts would entail requiring its partners – the North Carolina company in the hypothetical – to adhere to GDPR requirements. What does this mean for the North Carolina company? It also faces two choices: It could lose the Singapore partner to a GDPR-compliant competitor, or it could become GDPR-compliant itself.

In 1808, Lord Ellenborough protested against worldwide jurisdiction asking, "Can the island of Tobago pass a law to bind the rights of the whole world ? Would the world submit to such an assumed jurisdiction?" Two centuries later, his question appears to have been answered. When it comes to data protection, Brussels can indeed evidently pass a law that binds the rights of the world. North Carolina businesses need not submit to such jurisdiction. But in doing so, they will abandon a significant portion of global business.

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Cathy C. Hunt

Divorce:

Diaper mogul's divorce is reason to change your plan

In 2000, Tereson Dupuy, started an online patented cloth pocket baby diaper business called FuzziBunz. She later appeared on the television show "Shark Tank" to promote her invention. Despite having over $23 million in sales, the sharks didn't bite, noting that Dupuy was an impediment to the company's profitability. Dupuy, appearing on the show's podcast, agreed that she was burnt out after 12 years of "killing it" and six years of post divorce settlement fallout. What happened to Dupuy is not uncommon among striving entrepreneurs.

Starting a business is life consuming on all levels. It requires living with uncertainty and often working in some capacity seven days a week. For owners that are married the stakes are higher. Often, the marriage and the business become like contenders, each competing for a valued piece of the business owner's time. Perseverance, persistence and determination mark the traits of entrepreneurs who successfully find their market and outlast their learning curve. However, the division of attention between work and family can cause a marriage to unravel.

Risk management for any company should include strategic planning in the event that a founder gets divorced. Making thoughtful and considered decisions on ownership, income distribution and buyback provisions in happier times will save money, aggravation and possibly the business itself should a divorce occur.

If you're not careful in developing your business plan, you could find yourself in business with your soon to be ex or floating a loan to buy out your spouse's shares in the business. That's what happened to Dupuy, who launched her company early in her marriage. When her marriage dissolved, the company had to borrow a reported $2 million to buy the husband's interest, and Dupuy's husband was actually awarded control of the company on a temporary basis according to *Entrepreneur* magazine. Payments on that kind of debt would significantly reduce cash flow and negatively affect a company's borrowing power. Hindsight is 20/20, and if Dupuy had it to do over again, it is likely she would develop a business plan that would protect the company in the event of divorce.

Making thoughtful and considered decisions on ownership, income distribution and buyback provisions in happier times will save money, aggravation and possibly the business itself should a divorce occur.

Too often owners of closely held companies don't follow corporate formalities, especially when it comes to naming owners and creating a custom operating agreement. They give ownership to a spouse who really is not involved in the business creating income and tax consequences, and he or she has no operating agreement or one that is very generic. This casual approach to corporate governance is almost always a problem when business owners divorce.

Here are six strategies to consider as a matter of strategic planning to prevent the disruption to business if a founder divorces.

CUSTOMIZE YOUR AGREEMENT

It is important to have corporate documents formally prepared and customized. It is not sufficient to download an agreement from the internet or have a lawyer prepare a stock agreement that is not personalized for the business. The following things are critical to a company's operating agreement:

- Have a lawyer draft the company's operating agreement and understand what it says.
- Identify ownership, management and income issues related to married business owners, and determine who will run the company and what the other spouse will do for income if there is a separation or divorce.
- Review and/or update your agreement annually.
- Hold meetings, and vote consistent with what your agreement provides.

• For business owners who are married but not in business with their spouse, the agreement should provide for the right, but not the duty, of the company to buy back shares in the event of a separation or divorce.

FIRE YOUR SPOUSE

Business owners often name a nonparticipating spouse as an owner for tax reasons or to gain other advantages such as having a woman-owned business. However, it creates a myriad of problems, including management and control issues if marital problems ensue. The right to buy, sell, borrow or sign checks becomes problematic if a spouse grabs control based on their right as an owner, especially if they have never worked in the business. Frequently, income allocated to a non-participating spouse is never actually paid to the spouse or it is deposited into a joint account. However, a spouse with an ownership interest has a right to be paid consistent with other owners. If they make a demand for payment, the finances of the business and the family have to be restructured. This is especially difficult during a time where spouses have a high degree of distrust and a diminished ability to agree. Gratuitous ownership should be avoided. If there are real reasons for naming a spouse as an owner it is important at the outset to address issues of management, control and income allocation in the event of divorce or separation.

MAINTAIN ACCURATE RECORDS

Owners in closely held businesses are notoriously bad at following corporate formalities and maintaining good records. As long as there are no problems, it doesn't really seem to matter. However, when there is a dispute between owners, especially ones that are married, poor record keeping and informal accounting routinely leads to suspicion and accusations of wrongdoing. Common concerns include:

• "Loans" to shareholders for which there are no promissory notes or payments

• Income reported on the books that is inconsistent with the lifestyle of the divorcing owner(s), which may indicate unreported cash being taken out of the business

• Payment of personal expenses through the business that are not reported as income

• Financial statements that are puffed up for borrowing purposes but later minimized when an owner is getting divorce

• Appraisals of the business for purposes of marketing the company for sale that are downplayed as a real indication of value in a divorce case

GET A PROFESSIONAL VALUATION

The biggest mistake you can make is to get your business valued by someone who is not properly qualified. Your CPA can assist an appraiser, but your CPA should not value your business. FuzziBunz was valued in Dupuy's divorce based on a projection of 10 years of future growth rather than current revenue, according to *Entrepreneur* magazine. Dupuy wishes she had challenged FuzziBunz's valuation, as it took her years to pay her husband for his interest. Business valuation is a highly specialized area, and only the most-qualified expert should be retained to value the business.

SIGN A PRENUP OR POSTNUP

While your relationship is still on solid ground, you may greatly increase your odds of surviving a divorce with your business intact by entering into a prenuptial or a postnuptial agreement.

Before marriage, parties can enter into a premarital agreement that will provide for the distribution of property and terms regarding spousal support. This is often recommended when one spouse is an owner in a family business or other closely held entity where such interest is intended to stay within the immediate family or the existing shareholders.

A postnuptial agreement is a contract between spouses entered into after marriage that outlines the distribution of financial assets and debts in the event of divorce. Entering into such an agreement may help calm concerns about splitting assets in the event of divorce and may promote harmony in the marriage by reducing tension and fighting associated with financial differences.

CREATE A BUY-SELL AGREEMENT

A buy-sell agreement provides a mechanism for repurchasing shares should any owner's status change, as is the case in a divorce. The agreement might limit a nonowner spouse's ability to acquire ownership, or give the company or other partners the right but not the obligation to buy at a predetermined price in the event of divorce.

Any of these strategies would have been a lifesaver for Dupuy, especially a postnuptial or buy-sell agreement. If she had been able to establish terms regarding the business in the event of a divorce, she would have saved countless hours in litigation, legal expenses and disruption to her business through the process. The tale of FuzziBunz is a cautionary tale and underscores the old adage that an ounce of prevention is worth a pound of cure.

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Alex Pearce

Data security law:

Managing the legal risks of cloud and collaboration tools

As anyone with a Dropbox or Google Drive account knows, consumer-grade cloud storage and collaboration services are a convenient way to store and share personal photos, music, video and documents. Employees who use these cloud services outside the workplace naturally want their convenience and ease of use inside the workplace. So they often turn to familiar consumer-grade offerings. In a recent study by cybersecurity company Stroz Friedberg, more than half of information workers surveyed uploaded corporate documents and data to their personal cloud storage accounts.

This phenomenon is frequently referred to as BYOC — Bring Your Own Cloud. As with the more familiar Bring Your Own Device — BYOD — phenomenon, employee adoption of BYOC can offer certain benefits to a company, including greater productivity and increased employee satisfaction. They also eliminate purchasing or supporting equivalent corporate solutions.

But those benefits can come with serious drawbacks. This article will discuss the dangers presented by BYOC and suggest steps that companies can take to manage and mitigate their exposure.

BYOC: RISK IN THE FORECAST

Theft or loss of intellectual property

One of the most common — and dangerous — risks of a laissez-faire approach to BYOC is theft of trade secrets and other proprietary data. It often arises when employees leave and use corporate documents they've stored in BYOC accounts for the benefit of a new employer.

Indeed, numerous recent trade secret theft cases indicate that BYOC accounts are becoming the preferred means for departing employees to steal sensitive corporate documents. These cases typically involve sensitive materials such as customer lists, pricing and financial data, and proprietary technical specifications. In some, the employee's resort to BYOC was unknown and unauthorized. But in others, the company condoned the use of BYOC accounts without considering the consequences of when the employee departed.

Data breach and regulatory violations

Another significant BYOC risk is the violation of federal, state or international privacy and data security laws. These laws vary significantly in their scope and requirements, but all obligate companies to take certain steps to protect personal information from unauthorized use or disclosure.

Many require that companies take steps to ensure that third parties who receive this information are bound to protect it. Almost all impose some duty to notify individuals or regulators in the event the information is lost in a security breach or sent to parties who are not authorized to receive it.

Employees who transmit corporate data to personal cloud accounts can unwittingly violate these laws. And they may expose the data to security breaches that can result in substantial response costs, monetary fines and reputational damage for the company.

Litigation risk and electronic discovery exposure

Unsupervised use of BYOC accounts also can create substantial risks if the company becomes involved in litigation. One risk is failing to preserve and collect discoverable evidence. Electronic discovery can be challenging and expensive even when the evidence resides wholly within a corporate information-technology environment. When that evidence migrates to employee-controlled BYOC accounts, the cost and degree of difficulty can increase substantially.

Even so, courts may still hold companies responsible if relevant data in an employee's BYOC account isn't properly preserved and collected. In one recent case, a Florida court faulted a company for its employee's destruction of files stored in his personal Box.com account when the company had reason to know about those files but didn't instruct him to preserve or produce them.

The storage and sharing of sensitive information in BYOC accounts also can compromise a company's ability to assert the attorney-client privilege. A Virginia court recently found that an employee's use of an unsecured Box.com link to share a file with the company's outside attorney waived any claim of attorney-client privilege to that file. The court reasoned that the employee's actions were the cyber equivalent of leaving the file "on a bench in the public square and telling its counsel where they could find it."

WEATHERING THE BYOC STORM

Companies have several options to reduce these risks. Used alone or in combination, they can help a company take back control of its information.

Prohibit

One option is to require employees to use only company-managed equipment and systems to store and share corporate documents and data, thus prohibiting BYOC entirely.

Companies can adopt and implement policies that clearly prohibit the transmission or storage of company data using personal cloud services. Such policies also should be supported by technical controls designed to prevent the transmission of corporate data to BYOC accounts. These can include blocking employee access to known file sharing or collaboration sites and implementing "data loss prevention" tools that track or block uploads from corporate computer systems to non-approved sites.

The main problem with this approach is that it can alienate employees and cause them to look for ways to subvert the prohibition. And in a world of rapid technological change, it's likely they'll find one. In one recent case, a company blocked access to well-known cloud storage services such as Dropbox. The company later discovered that a departed employee had used a new and relatively unknown cloud service — Jottacloud — that her employer had not blocked. She used it as a workaround to steal sensitive data for her new employer.

Companies who use this approach must therefore devote enough resources to keep those policies and technical controls current and monitor and enforce employee compliance.

Permit and regulate

A second approach is for the organization to accept BYOC as a fact of life and implement a program to manage the risks without sacrificing all the benefits.

Companies inclined to take this approach should consider the following steps, at a minimum:

- Create a list of approved consumer cloud offerings that are acceptable for business use based on a review of the providers' terms of use, privacy policies and security practices.
- Restrict the use of BYOC accounts to non-sensitive or less-sensitive documents while still prohibiting their use to store and transmit sensitive data whose compromise would pose a risk to the company.
- Require registration and approval for use of a BYOC account, based on the conditions that the employee acknowledges the company's IT security and data protection policies and agrees to allow the company to access the account upon request.
- Update the company's termination procedures to incorporate a review of employees' BYOC accounts and the removal of corporate data from those accounts before their departure.

The downside of this approach is that it requires significant IT and compliance resources but still leaves the company vulnerable to the risks presented by employees' failure — innocent or otherwise — to comply with the program.

Provide a corporate-managed alternative

The safest option for dealing with BYOC is to provide employees with an alternative enterprise-grade cloud storage and collaboration solution, thereby avoiding the need to resort to BYOC in the first place. Key benefits of enterprise-grade solutions typically include:

- The opportunity to ensure the offering meets the organization's information security and privacy standards.
- Centralized management of account creation and deactivation to ensure that only authorized individuals can access corporate data.
- Data governance and auditing capabilities that allow the organization to understand and manage the locations in which its data is stored.
- Streamlined electronic discovery capabilities to facilitate legal holds and the collection of relevant data in the event of litigation.

This option provides employees the flexibility and ease of use they expect without a corresponding loss of control over corporate data. But it does have drawbacks. One is the significant cost associated with procuring a corporate solution and managing it. There also is the risk that the solution a company selects today will not be the one preferred by employees — or the company — in the future.

For companies that operate in regulated industries or that handle especially sensitive data this may be the only realistic option.

CONCLUSION

Whatever BYOC direction a company decides, it's critical to document the choice in a well-drafted policy that clearly communicates the company's expectations. The company should then train employees on that policy and remind them regularly of the risks of unapproved personal cloud use.

But simply telling employees what not to do isn't enough. To be successful, any BYOC strategy must present workable alternatives that employees actually can use to get their jobs done. Otherwise, personal clouds will continue to darken the prospects for securing corporate data.

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