



Proceedings & Recommendations of the Working Group On Legal Liability & Resilience

Special Focus: the Voluntary Private Sector Preparedness
Accreditation and Certification Program

Hosted by:
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DRAFT SUMMARY PROCEEDINGS DOCUMENT

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ABOUT INTERCEP

- The International Center for Enterprise Preparedness (InterCEP) is the world's first academic research center dedicated to private sector preparedness & corporate resilience.
- The Alfred P. Sloan Foundation funds InterCEP's research on incentives for business preparedness. The Center is currently addressing the following areas: insurance, rating agency acknowledgement, mitigating legal liability, supply chain management, corporate governance and business reporting
- InterCEP's research focus is on the linkage of "what" & "why" of private sector preparedness and resilience.
 - What: best practices and standards
 - Why: business & economic motivations to develop greater preparedness and resilience

THE WORKING GROUPS INITIATIVE

The objectives of InterCEP's initiative to organize Working Groups focused on the voluntary business preparedness accreditation and certification program are as follows:

- To identify existing practices and principles in specific topical areas relevant to private sector preparedness;
- In view of these practices and principles, to identify issues, opportunities and potential strategies relevant to the design and implementation of the voluntary private sector preparedness certification program (PS-Prep); and,
- To gather these outputs generated by Working Group participants and communicate them to program stakeholders including where appropriate the U.S. Department of Homeland Security (DHS), and accrediting and certifying bodies.

Building on InterCEP's ongoing research on the business case for preparedness, there are currently five Working Groups, each focused on a particular area of business benefit that could potentially be enhanced by the PS-Prep certification program:

- Supply chain resilience
- Legal liability mitigation
- Rationalized business reporting of preparedness
- Insurance acknowledgement
- Rating agency acknowledgement

WORKING GROUP GROUND RULES

- Both online and face-to face forums are facilitated.
- Participants are encouraged to contribute directly to the conversation but should be recognized by the moderator first.
- Back-and-forth discussion is welcomed, especially in clarifying diversity in perspective.
- The forums are recorded to assure that key insights were captured but all comments are not-for-attribution.

EXECUTIVE SUMMARY

Executive Summary:

Businesses may be vulnerable to significant legal liability if they do not undertake appropriate emergency preparedness efforts. Liability can result from several sources including common law negligence tort, specific legislation/regulations and contractual obligations.

With regard to negligence liability, it can be a major exposure for companies of all sizes in the aftermath of an emergency. When another party is impacted by an event, it is often argued that the company did not do enough to prepare for emergencies. Yet, it can be difficult to ascertain “what is good preparedness,” especially given the diversity of risks that face a company and the limited resources that any organization has to apply towards preparedness activities.

While there are most definitely differing perspectives in the legal community and among members of the Working Group over the course of multiple meetings, it has been argued that advance and documented conformity with an established recognized standard for preparedness could potentially be used to demonstrate that prudent and appropriate levels of preparedness efforts were undertaken by a company in advance of an emergency. Such a demonstration could serve to support what is termed an “affirmative defense” to liability claims after an emergency and thereby minimize the liability exposure of a conforming company.

The new voluntary private sector preparedness certification program (PS-Prep) could potentially enhance the ability of a business to document an appropriate level of preparedness in advance of an event and thereby support an affirmative defense to post-event liability. Key factors in this regard include:

- PS-Prep utilizes consensus-based standards.
- The program provides not only preparedness criteria (through the designated standards) but also a vetted methodology to confirm that those criteria are in place.
- It is a government-established and sanctioned program thereby increasing the prominence of both the standards utilized and the methodology to confirm conformity with them.

Regarding liability arising from legislation and/or regulations, this area appears to be growing. Preparedness requirements have been evident in the financial services and electric utilities industries for some time now; recent additions have been made in the chemical industry. Overall, critical infrastructure has been receiving increasing scrutiny. The PS-Prep Program could provide a vehicle to address growing concerns but accomplish this based on industry-developed criteria as opposed to those that might be developed solely by regulatory or legislative bodies.

As to contract liability, the PS-Prep Program could also be valuable in contract law in identifying a clear measurement of preparedness which could be stipulated in an agreement, for example between a customer and a supplier of critical goods or services.

Through the active engagement of key stakeholders, the PS-Prep certification program should optimally be structured to minimize the legal liability of businesses which pursue preparedness in conformity with the program. Key recommendations in this regard include:

- An affirmative statement issued by DHS that conformance to, and certification under, a PS-Prep designated standard is indicative of the reasonableness of the entity that holds the certification.
- The development of a 'self-evaluative privilege' to insure that the documentation and findings of the PS-Prep certification process would not be used in court against a participating business.
- Legislation providing "safe harbor" from litigation to any certified firm.

KEY POINTS & RECOMMENDATIONS

The following reflects an integration of key points from both the Working Group discussions as well as independent research by InterCEP which was provided in advance of the Working Group forums. It includes insights from an InterCEP white paper entitled "The Legal Obligation for Corporate Preparedness" discussed in greater detail later in this document.

Vulnerability of the Business to Litigation:

- Corporations are vulnerable to significant legal liability if they do not undertake emergency preparedness efforts. This liability can result from several sources including common law negligence, specific legislation/regulations and contractual obligations.
- In the U.S. legal system, a company can be sued in the aftermath of any crisis. The relevant issue generally is how successful that suit will be, that is whether the company will be held liable for any damages and if so to what extent.

Mitigating Liability Through Preparedness:

- In view of the common law, legislative/regulatory and contract liability surrounding emergency preparedness, companies would be prudent to undertake preparedness efforts to mitigate or avoid exposure to these risks, as well as for the primary rationale: that of protecting their people and business operations.
- Regarding negligence, when another party is impacted by an event, it is often argued that the company did not do enough to prepare for emergencies.
- In addressing "what" is appropriate preparedness," general industry practice and standards are often cited in the legal community as indicative of appropriate actions which should be taken by a company.
- With the potential of future litigation in mind, it has been further suggested that confirming and documenting that these practices were in place in advance of and applied during any incident could be valuable in any future proceedings. Such documentation would support what is termed an "affirmative defense" to any claims that the company did not prudently prepare for an emergency.
- Yet, it was noted that the extent to which defendants (that are PS-Prep certified) may be liable may depend on the outcomes of the first several cases that are litigated after the PS-

Prep Program is implemented, and how juries decide if a minimum standard of preparedness is an acceptable defense.

- In sum, it has been argued that advance and documented conformity with an established and recognized standard for preparedness could be used to demonstrate that a prudent and appropriate level of preparedness was undertaken by a company in advance of an emergency. Such a demonstration could serve to support an “affirmative defense” to liability claims after an emergency and thereby minimize the liability exposure of a company.

The Potential Role of the PS-Prep Program:

- Given that conformity with generally accepted industry standards could be an indication of prudent care and therefore support affirmative defense in litigation, the question arises: How can conformity with industry standards be documented?
- The new voluntary private sector preparedness certification program in PS-Prep could substantially enhance the ability of a business to document an appropriate level of preparedness in advance of an event and thereby support an affirmative defense to post-event liability.

Potential Enhancements:

- DHS should issue an affirmative statement that indicates certification to a PS-Prep designated standard, using an approved verification process under the PS-Prep Program, defines the standard of care for organizations. The wording would indicate that the conformance to and certification under a designated PS-Prep standard is indicative of an appropriate standard of care.
- A common law precedent would substantiate certification as a way to mitigate potential liability. Such a precedent could be established overtime after the implementation of the PS-Prep Program.
- Optimally, from a legal perspective, new legislation should establish a statutory “safe haven” limiting or excluding any liability for companies which conformed with or were certified as conforming to a designated preparedness standard under the PS-Prep Program.
- Alternatively, the PS-Prep certification program could potentially follow the model of Workers’ Compensation Programs which limit liability by legislation.

Issues & Challenges:

- It is important to note that there is not unanimity within the legal community or the Working Group on all of the preceding and following points. There was consensus, however, that the legal value of the PS-Prep Program will be determined over time.
- In the case of a potential legal action post-event, the determination of negligence or prudence on the part of the company may be based on how the verification of conformity to a recognized standard assessment was documented and how management made their decisions.

- While the development of statutory guidelines would provide additional legal motivation to pursue certification, there are hurdles.
- A concern was expressed as to the potential use of assessment records and documentation in future litigation against a company.
- It is important to note that none of the leading standards suggest that all risks must be eliminated.
- The type of certification (second-party or third-party) and the role of auditors in the certification process, vis-a-vis their stance in determining a company's conformity to a standard, were raised as potentially significant issues for both those being certified and the certification bodies themselves.
- From a legal perspective, a more stringent and rigorous design of the program is desirable to enhance the legal rationale for seeking certification. At the same time the program must be appropriate in scale and relevant to the organization to avoid potential liability issues.
- Some participants suggested that a maturity model may make the program more compelling from a legal perspective.
- The designation of one or more consensus-based standards by the U.S. government may have additional legal value in establishing the prominence of the particular standards and thereby strengthening their potential role as a measure of prudent action and an indication of appropriate standard of care.
- Once the PS-Prep certification program is put in place, it may be viewed as the basic level of expected preparedness, regardless of whether the program is voluntary.
- While there was no consensus on the number of standards, it was suggested that the introduction of multiple standards into the certification process could be problematic from a legal perspective.
- Potential jurisdictional issues may arise in post-incident litigation.
- It was suggested by some participants that regardless of whatever standards are designated under the PS-Prep certification program, from the legal perspective, the gathering of information and the prioritization of resources should be initially focused on that relevant to health and safety of employees and people in general, and later on other non-human elements of the standard(s).
- One or more PS-Prep standards may cover elements already addressed in other guidance (both compliance and voluntary in nature) that a company is already following. It will be important to note where the new PS-Prep standards overlap or differ from existing guidance. This could be accomplished with a "crosswalk" approach.
- The relationship between the certification program and other preparedness guidelines, regulations, policies etc. will also have a bearing on the legal incentives associated with certification.

- The global footprint of multinationals and their extended supply chain poses challenges for a US-based voluntary certification program.

Key Summary Recommendations:

- DHS should issue an affirmative statement that indicates certification to a PS-Prep designated standard, using an approved verification process under the PS-Prep Program, defines the standard of care for organizations. The wording would indicate that the conformance to and certification under the standard is indicative of an appropriate standard of care.
- New legislation should establish a statutory “safe haven” limiting or excluding any liability for companies which conformed with or were certified as conforming to a designated preparedness standard under the PS-Prep Program.
- A ‘self-evaluative privilege’ should be developed to insure that the findings of the risk and vulnerability assessment process would not be used in court against a proactive corporation.
- All relevant segments of the legal community should be engaged in the dialogue at this time, since the certification program may have different significance among different stakeholder groups.
- The auditing community should also be engaged in dialogue as well.

THE LEGAL PERSPECTIVE

InterCEP’s ongoing research was framed the general topic of legal incentives for preparedness in terms of the duty of care.¹ With regard to the potential legal significance of the voluntary certification program, discussion among participants in the meetings of the Legal Working Group was framed by the following key questions:

- How can voluntary compliance with industry best practice standards potentially mitigate legal liability in the aftermath of a crisis?
- How should corporations document their preparedness programs to mitigate the risk of post-event litigation? What are current best practices? What are current obstacles?
- How should the preparedness certification process of the PS-Prep Program be designed and implemented to mitigate legal liability of businesses?

DETAILED POINTS FROM RESEARCH & WORKING GROUP DISCUSSION

¹ Cf. <http://www.nyu.edu/intercept/Legal%20Case%20for%Preparedness%2016%20oct%2006.pdf>

A series of teleconference and online forums were held in the fall of 2007 after the passage of the initial legislation regarding the PS-Prep Program. Legal issues were an important topic during these forums. Beginning in March 2008 and November 2008, a diverse group of private sector executives, public sector officials and practicing attorneys convened in online, conference call forums of the Legal Liability Working Group to discuss potential legal issues associated with the PS-Prep Certification Program. On June 8, 2009, a group of members of the Working Group convened on a face-to-face basis at New York University's campus to continue earlier discussion threads and to provide additional insight on the PS-Prep certification program developments. Communication has continued among the Working Group members between and since these structured forums.

InterCEP has identified general themes addressed during these the Working Group discussions. In this summary, these themes are briefly articulated, and then specific issues relevant to each theme are presented. Comments by participants have not been independently confirmed by InterCEP.

The following also draws on content from the white paper entitled "The Legal Obligation for Corporate Preparedness" developed by InterCEP in collaboration with Denis Binder, S.J.D., Professor of Law, Chapman University (a summary of the paper is provided in this proceedings document starting on page 19) as well as other research undertaken by InterCEP.

A. Vulnerability of the Business to Litigation

- **Corporations are vulnerable to significant legal liability if they do not undertake emergency preparedness efforts. This liability can result from several sources including common law negligence, specific legislation/regulations and contractual obligations.**
 - *Negligence Law:* Negligence law requires corporations to exercise reasonable care under the circumstances of any situation, including care to prevent an accident or other injury. The basic principles of negligence law readily apply to specific emergency preparedness efforts undertaken by organizations that focus on the prevention or mitigation of the impact of foreseeable hazards.
 - Core legal concepts of liability suggest that a firm can be held liable for losses that occur due to a lack of preparedness. It has been advanced that a firm essentially has a duty to prepare for those emergencies that can be reasonably anticipated. If an event does occur and there is injury or other loss, it can be argued that a firm did not prepare adequately.
 - Since the essence of negligence is the failure to exercise reasonable care under the circumstances of any situation, much attention has been paid of late to practical cases in which the circumstances have arguably changed. For example, hurricane projections as well as business risk analyses indicate that the probability of an event occurring, the gravity of the resulting injury, and the burden of adequate precautions are all changing to potentially increase corporate liability.
 - *Legislation and Regulation:* As legislators and regulators attempt to respond to reports of increasing risks and related vulnerabilities, corporations may increasingly be held liable for emergency preparedness based upon specific legislation and/or regulations that address their industry. The clear beginnings of this trend are visible in specific areas including firms operating in financial services, electric utilities, chemicals and other critical infrastructure industries.

- **Contract Law:** Finally, corporations may also have liability based upon requirements that arise from specific contract obligations with other parties. Such “push down” obligations have increasingly appeared in supply chain relationships, where procuring corporations require suppliers to validate their emergency preparedness programs as a condition of doing business.
- **In the U.S. legal system, a company can be sued in the aftermath of any crisis. The relevant issue generally is how successful that suit will be, that is whether the company will be held liable for any damages and if so to what extent.**
 - If a company has a good program and nonetheless there is an injury or loss to others, the company may be sued; alternatively the company may be sued after an event if the company didn’t have a program. One of the practicing attorneys commented that “unfortunately, you’re damned if you do, and damned if you don’t.....someone will find a way to sue you.”

B. Mitigating Liability Through Preparedness

- **In view of the common law, legislative/regulatory and contract liability surrounding emergency preparedness, companies would be prudent to undertake preparedness efforts to mitigate or avoid exposure to these risks, as well as of course for the primary rationale: that of protecting their people and business operations.**
- **Regarding negligence, when another party is impacted by an event, it is often argued that the company did not do enough to prepare for emergencies.** Yet, in advance of an incident, it can be difficult to ascertain “what is good preparedness,” especially given the diversity of risks that face a company. This is further complicated by how much can be effectively done with the limited resources that any organization has to apply towards preparedness activities.
- **In addressing, “what” is appropriate preparedness,” general industry practice and standards are often cited in the legal community as indicative of appropriate actions which should be taken by a company.**
- **With the potential of future litigation in mind, it has been further suggested that confirming and documenting that these practices were in place in advance of and applied during any incident could be valuable in any future proceedings.** Such documentation would support what is termed an “affirmative defense” to any claims that the company did not prudently prepare for an emergency.
- **Yet, it was noted that the extent to which defendants may be liable may depend on the first several cases that are litigated** after the program is implemented and in place, and how juries decide if a minimum standard of preparedness is an acceptable defense.
- **In sum, it has been argued that advance and documented conformity with an established and recognized standard for preparedness could be used to demonstrate that a prudent and appropriate level of preparedness was undertaken by a company in advance of an emergency.** Such a demonstration could serve to support an “affirmative

defense” to liability claims after an emergency and thereby minimize the liability exposure of a company.

C. The Potential Role of PS-Prep

- **Given that conformity with generally accepted industry standards could be an indication of prudent care and therefore support affirmative defense in litigation, the question arises: How can conformity with industry standards be documented?**
- **The new voluntary private sector preparedness certification program in PS-Prep could substantially enhance the ability of a business to document an appropriate level of preparedness in advance of an event and thereby support an affirmative defense to post-event liability.** Key factors in this regard include:
 - PS-Prep utilizes consensus-based standards.
 - The program provides not only preparedness criteria (through the designated standards) but also a vetted methodology to confirm that those criteria are in place.
 - It is a government-established and sanctioned program thereby increasing the prominence of both the standards utilized and the methodology to confirm conformity with them.

D. Potential Enhancements

- **DHS should issue an affirmative statement that indicates certification to a PS-Prep designated standard, using an approved verification process under the PS-Prep program, defines the standard of care for organizations. The wording would indicate that the conformance to and certification under a designated PS-Prep standard is indicative of an appropriate standard of care.**
 - The suggested wording offered by several participants was “Certification under the standard defines the reasonable standard of care owed by a company for legal purposes.”
 - This would reflect and forward the recommendation of the 9/11 Commission: “We believe that compliance with the standard [ANSI/NFPA 1600] should define the standard of care owed by a company to its employees and the public for legal purposes.”
- **A common law precedent would substantiate certification as a way to mitigate potential liability. Such a precedent could be established overtime after the implementation of the PS-Prep Program.**
 - Common law court decisions that reference a company’s certification to a preparedness standard as some form of defense could promote certification as a way to mitigate potential liability.
 - In such a case, the litigation might indicate that a company has been certified as conforming to a preparedness standard. This certification might then be used as a factor in determining damages or in determining whether or not punitive damages, for example, are appropriate.

- For example, a similar situation is being litigated currently with the Food and Drug Administration, where compliance with certain standards would insulate a company from liability. This case raised the question: if the statute doesn't expressly state that a company is protected from claims under state common law or Federal common law, does compliance with the standards protect a company from a claim in the future?
 - This issue hinges on the concept of preemption, which the courts have been grappling with; where compliance with some standard means that a company is immunized under state law from a product liability or negligence action.
 - The issue before the U.S. Supreme Court currently focuses on the question of expressed preemption versus implied preemption.
- **Optimally, from a legal perspective, new legislation should establish a statutory "safe haven" limiting or excluding any liability for companies which conformed to or were certified as conforming to a designated preparedness standard under the PS-Prep program.**
 - This could be established federally or could parallel the workers' compensation laws which establish limits of liability for various events on a statewide basis.
 - The probability of securing a statutory safe harbor, however, was viewed as very small.
- **Alternatively, the PS-Prep certification program could potentially follow the model of Workers' Compensation Programs which limit liability by legislation.**

E. Issues & Challenges

- **It is important to note that there is not unanimity within the legal community or the Working Group on all of the preceding and following points. There was consensus, however, that the legal value of the PS-Prep Program will be determined over time.**
- **In the case of a potential legal action post event, the determination of negligence or prudence on the part of the company may be based on how the verification of conformity to a recognized standard was documented and how management made their decisions.**
- **While the development of statutory guidelines would provide additional legal motivation to pursue certification, there are hurdles.**
 - There is an open question whether or not any kind of statutory guidelines might be set down that would mitigate liability through safe harbors or preemption, either on the state or Federal level, or even via affirmative defenses.
 - The safe harbor could be established federally or could parallel the workers comp laws which establish limits of liability on various events.
 - It was strongly suggested that a cap on liability associated with the certification program be established, akin to the Safety Act. This could be designed along the lines of the workman's compensation approach whereby there could be stated statutory liability based upon varying levels of preparedness.
 - It was noted however that going back to Congress at this point to ask for statutory limits may be premature relative to the way Congress works. It was

suggested that four or five years of experience will be needed to establish a credible basis for new or revised preparedness legislation.

- Moreover, it was noted that the Safety Act was part of the Homeland Security Act which was one of the most bitterly fought sections during the legislative process. It was also suggested that based on political realities, opening up this issue with Congress would mean losing the Safety Act as it currently exists and there may not be any greater indemnity achieved.
- **A concern was expressed as to the potential use of assessment records and documentation in future litigation against a company.**
 - All leading preparedness standards call for undertaking an assessment of a company's risks and vulnerabilities to them.
 - Once a company has identified its risks and vulnerabilities, there is arguably an obligation to follow-up and make a determination of how to deal with those vulnerabilities with decisions regarding allocation of time and resources to address them. Common practice suggests that there needs to be a prioritization in addressing the risks as it is generally impractical from a financial and overall resource standpoint to address all vulnerabilities and risks.
 - This prioritization must be addressed carefully however so that it is not viewed as a willfully negligent action in not addressing identified risks.
 - A specific issue regarding documentation of preparedness involves discoverability of that risk assessment and related documentation and whether any form of immunity to liability would be afforded to an organization which had gone through a process of self-examination and evaluation.
 - Absent some legal privilege such as attorney-client privilege or work product privilege, documents generated during the assessment process could become discoverable and could be used against the company in any future litigation or investigations.
 - Historically, this has been a reason why some companies are afraid to look at their status, because they say "why should we build a record against ourselves."
 - This scenario could represent a disincentive to undertaking and documenting preparedness actions.
 - Thus absent particular legislation or new evidentiary rules or civil procedure rules, anything done in connection with the PS-Prep Program and conformity with relevant standards would likely be discoverable in any setting.
 - Some participants suggest that a self-evaluative privilege may exist whereby if a company conducts an internal investigation, then the company can claim a privilege for that (i.e., the findings of the internal investigation could not be used in litigation against the company).
 - However, it was reported that the courts have been very reluctant to uphold the self evaluative privilege and it is usually done, when it is done defensively, in the context of some kind of investigation. This privilege is an offshoot of the work product privilege.
 - It was noted there have been a number of recent challenges to many types of legal privileges: self-evaluation privilege, work product privilege, attorney-client privilege, etc.
 - Nonetheless a self-evaluative privilege would be helpful once the PS-Prep program has been implemented and companies have been certified.

- Although, if such a privilege were established, one additional consideration is how would the documentation be treated for a firm that did not fully complete the certification process.
 - In contrast to those that suggest a firm ought not to assess its risks and vulnerabilities, there is alternatively an argument that an organization has an obligation to undertake reasonable efforts to ascertain its risk exposures and consider how it should address those risks within the constraints of available resources.
- **It is important to note that none of the leading standards suggest that all risks must be eliminated.** Indeed, prudence suggests that any organization has limited resources and it must allocate them wisely. Arguably, an organization could deplete all its funds in attempting to eliminate the entirety of its risks. Rather, most standards call for an organization to:
 - identify their risks,
 - evaluate them in terms of vulnerability of the organization to each risk and the potential impact on the organization,
 - consider the cost/resources required to prevent or mitigate this impact,
 - then develop a strategy as to how to address identified risks based upon available resources.

This approach encompasses a cost-benefit analysis and reflects the likelihood that some, indeed many, risks will not be actively prevented or mitigated. Rather the risks will be accepted.

- **The type of certification (second-party or third party) and the role of auditors in the certification process, vis-a-vis their stance in determining a company's conformity to a standard, were raised as potentially significant issues for both those being certified and the certification bodies themselves.**
 - It was suggested by one participant that the goal of an auditor is not to be adversarial but to be a partner and to "find compliance." From legal liability and plaintiff's perspective, that approach may appear to be collusive.
 - Reliance by other companies on second-party certifications (for example in a supplier-customer relationship), could potentially expose the party relying on the others' certification in a lawsuit.
 - Independent third-party certification may provide more protection to those seeking certification.
 - Certification bodies also face legal liability exposure and likely have insurance for protection in any legal action.
 - Optimally the certification process and the sector-specific requirements / guidelines should be standardized in order to reduce variation of interpretation among auditors, during certification audits.
- **From a legal perspective, a more stringent and rigorous design of the program is desirable to enhance the legal rationale for seeking certification. At the same time the program must be appropriate in scale and relevant to the organization to avoid potential liability issues.**
 - To achieve rigor, the desired characteristics of the PS-Prep certification program are objective standards, credibility of the accreditation body, quality (in terms of the level and type) of program oversight, sanctions for nonconformance, review on a regular basis, and recertification.

- High rigor however may not be feasible for small businesses that don't have the resources to dedicate to business continuity and emergency preparedness.
- **Some participants suggested that a maturity model may make the program more compelling from a legal perspective.**
 - Maturity model approaches to preparedness have already been developed and utilized in several different applications. For example, Virtual Corporation has developed a Business Continuity Maturity Model (BCCM), and the Financial Services Technology Consortium (FSTC) in cooperation with Carnegie Mellon University has developed another maturity model.
 - A maturity model approach could also potentially be applied based on the size of an organization, with the notion that smaller to medium-sized entities are expected to reach a relatively "lower" particular level of activity versus larger entities with more resources and more diverse operations which might be expected to reach the "higher" levels.
 - The maturity model approach may also be relevant to different businesses with different levels of criticality.
 - During the assessment activities undertaken to pursue certification, a maturity model approach to preparedness would allow auditors to identify different levels of preparedness activity. In addition, different businesses or business units could be assigned different levels of maturity based on their relative level of implementation of a preparedness program.
 - Optimally, both large and small businesses should have some legal protection and legal benefits from certification.
- **The designation of one or more consensus-based standards by the U.S. government may have additional legal value in establishing the prominence of the particular standards and thereby strengthening their potential role as a measure of prudent action and an indication of appropriate standard of care.**
- **Once the PS-Prep certification program is put in place, it may be viewed as the basic level of expected preparedness, regardless of whether the program is voluntary.**
 - If the standards adopted by DHS are consensus-based standards with input from a variety of parties, these might be considered a "lowest common denominator" of what every party could agree on and therefore would be considered a reasonable standard in the context of common law.
 - It was suggested that the PS-Prep Program will establish a standard of operations from a legal liability perspective. In litigation the certification may be presented as a "threshold" that was met (from the defendant's perspective). Alternatively from the plaintiff's perspective the certification may be viewed as a "floor" from which additional preparedness actions should have been taken to avoid subsequent loss or injury.
- **While there was no consensus on the number of standards, it was suggested that the introduction of multiple standards into the certification process could be problematic from a legal perspective.**
 - As referenced earlier, in order for voluntary compliance with any standard to mitigate potential liability most effectively, it would need to be either

- established as a precedent in a common law case, or designated by Congress or another authoritative body.
- While some Working Group participants indicated it did not matter how many standards were designated, others believed that introduction of multiple standards into the certification process could be an opening for plaintiff's attorney to say a particular standard for which conformity or certification was achieved was not appropriate to the company.
 - One issue is that to the extent that common law legal precedent might be established at the U.S. state level, it may not always be applied the same way in other states. This problem would be especially relevant to organizations that have operations in multiple states or multiple countries.
 - Another issue is that if the program were to include multiple standards, then a precedent involving compliance with one of them may not necessarily hold in cases where compliance with another standard is presented as justification for limitation of liability.
- **Potential jurisdictional issues may arise in post-incident litigation.**
 - Juries in different states will interpret the adequacy of preparedness standards implementation differently.
 - Multinational firms may be subject to litigation whereby another country could sue based on the Alien Tort Act. This act, enacted in the 1700s to deal with piracy, has reached new prominence in response to the global footprint of multinationals.
 - **It was suggested by some participants that regardless of whatever standards are designated under the PS-Prep certification program, from the legal perspective, the gathering of specific information and the prioritization of resources should be initially focused on that relevant to health and safety of employees and people in general, and later on other non-human elements of the standard(s).**
 - **One or more PS-Prep standards may cover elements already addressed in other guidance (both compliance and voluntary in nature) that a company is already following. It will be important to note where the new PS-Prep standards overlap or differ from existing guidance. This could be accomplished with a "crosswalk" approach.**
 - Issues of differing terminology between industries will need to be addressed in implementation of the PS-Prep certification program, as it will have a direct bearing on vertical industry sectors' understanding and endorsement of the PS-Prep certification program.
 - Once the standards are selected, there will be a need to identify those regulations, best practices, sector-specific standards and other compliance requirements that contribute to preparedness within each critical infrastructure sector. Once identified, these elements could be cross-mapped to one or more of the selected standards, and then a common set of implementation guidance could be developed to take some of the "guess work" out of readying for certification. This was envisioned ultimately as a step process of: 1) identifying what the elements are and cross-mapping, 2) developing a guideline and going back to the sector to vet, and then 3) working with the accrediting body, ANAB, to make sure that in the end there is a product that both the certifying bodies and the industry sectors could use. The Private Sector Coordinating Councils, as part of the National Infrastructure Protection Plan partnership framework, could be the vehicle to accomplish this.

- In any case, Working Group participants acknowledged that the existing standards such as those referenced in the Framework for Voluntary Preparedness have a number of similar core elements.²
- **The relationship between the certification program and other preparedness guidelines, regulations, policies etc. will also have a bearing on the legal incentives associated with certification.**
 - For example, the Federal Financial Institution Examination Council (FFIEC) business continuity guidelines should be considered for recognition in the program. These guidelines are becoming more and more comprehensive with a new version due to be published very soon, and many financial institutions are already required to meet these guidelines.
 - Another example is Standard & Poor's revised practice of including enterprise risk management (ERM) as one of the factors in the ratings analysis process for all companies, not just financial sector companies. To the extent that ERM can be seen as inclusive of the elements of business continuity and emergency preparedness, ratings agency input may be helpful in the design of the certification process to ensure that the certification process outputs are useful to ratings analysts.
- **The global footprint of multinationals and their extended supply chain poses challenges for a US-based voluntary certification program.**
 - It was recommended that the designated standards be capable of being applied internationally which would be useful for multinationals and those with large global supply chains.
 - It was noted that all three of the leading standards under consideration can be applied internationally.

Key Summary Recommendations

- **DHS should issue an affirmative statement that indicates certification to a PS-Prep designated standard, using an approved verification process under the PS-Prep program, defines the standard of care for organizations. The wording would indicate that the conformance to and certification under the standard is indicative of an appropriate standard of care.**
 - The suggested wording offered by several participants was "Certification under the standard defines the reasonable standard of care owed by a company for legal purposes."
- **New legislation should establish a statutory "safe haven" limiting or excluding any liability for companies which conformed to or were certified as conforming to a designated preparedness standard under the PS-Prep Program.**

² Cf. "Framework for Voluntary Preparedness – Briefing Regarding Private Sector Approaches to H.R. 1 and public Law 110-53 'Implementing Recommendations of the 9/11 Commission Act of 2007' Title IX" prepared by representatives of ASIS International, DRII, NFPA, and RIMS. Available at www.sloan.org

- **A ‘self-evaluative privilege’ should be developed to insure that the findings of the risk and vulnerability assessment process would not be used in court against a proactive corporation.**
 - Next steps may include identifying parallel self-evaluative privileges where they currently exist, defining the justification for a self-evaluative privilege, reflecting findings in written form, and preparing draft legislation or other appropriate initiative to forward the establishment of a self-evaluative privilege.
- **All relevant segments of the legal community should be engaged in the dialogue at this time, since the certification program may have different significance among different stakeholder groups.**
 - Ongoing input from the legal community will be critical to assure that the new certification program is designed so that it can most effectively mitigate corporate liability by supporting an affirmative defense and potentially other strategies.
 - The following organizations and associations were suggested for outreach: the American Law Institute (ALI); the American Bar Association (ABA); the Defense Research Institute (DRI); the American Trial Lawyers Association (ATLA); the Judicial Arbitration and Mediation Service (JAMS); and the American Arbitration Association (AAA).
- **The auditing community should also be engaged in dialogue as well.**
 - It was reported that the Institute of Internal Auditors (IIA) has published its own maturity model-based standard on business continuity.
 - American Institute of Certified Public Accountants (AICPA) was identified as a stakeholder of interest.

INTERCEP’S ACTIVITIES

InterCEP is committed to supporting the Working Group by undertaking the following activities:

- Produce high-level summary proceedings of Working Group meetings, to be drafted by InterCEP, then vetted with participants, and finally distributed for stakeholder consideration;
- Develop greater awareness within the general business community of the voluntary business preparedness certification program;
- Produce research output that presents knowledge generated by the Working Group relevant to the design and implementation of the voluntary business preparedness accreditation and certification program;
- Develop an online clearinghouse of documentation relevant to the voluntary business preparedness accreditation and certification program including outreach to other educational, research and industry associations for relevant information and research.

SETTING THE WORKING GROUP AGENDA MOVING FORWARD

With the overall goal to promote private sector emergency preparedness and resilience through the removal of legal impediments to organizational preparedness and/or the establishment of

legal incentives for organizational preparedness, the next steps possibly to be undertaken by InterCEP with the support and involvement of members of the Legal Working Group include:

1. Write an article focused on the legal rationale for private sector emergency preparedness, especially in reference to certification program, to be published in a general business publication.
2. Write an article focused on the legal rationale for private sector emergency preparedness, especially in reference to the certification program, to be published in a professional legal publication.
3. Convene a subsequent meeting of the Legal Working Group focused on rationale, challenges, incentives and best practices associated with the documentation of corporate preparedness activities, especially in reference to the certification program.
4. Convene a subsequent meeting of the Legal Working Group focused on the potential benefits of developing legislation to provide safe harbor for companies that undertake the certification.
5. Convene a special forum focused on the significance of the common law precedent set by the NY state appeals court decision holding the Port Authority of New York and New Jersey liable for damages caused by the 1993 terrorist bombing in the World Trade Center.
6. Work with key stakeholders to address the use of risk and vulnerability assessments in litigation as a legal disincentive to undertake preparedness efforts including preparedness certification.

With respect to each of these possible next steps, InterCEP seeks feedback and indications of interest from Working Group participants and readers of this document in response to the following questions:

- Do you think these next steps would have value?
- Do you have any information relevant to these next steps?
- Would you like to get involved and help craft these next steps?

In general, InterCEP is committed to shaping an agenda for the Working Group, including additional next steps and other action items, based on the feedback gathered from participants in response to these additional questions:

- Who else should be at this table?
- In what forums should this discussion be taking place?
- Who/what are the most relevant individuals, job titles, organizations, associations, etc.?
- What concrete next steps can be taken to acknowledge, integrate, and credit existing efforts?
- Additional next steps – what are we missing?
- What meeting formats are most appropriate to maximize participation and productivity?
- How regularly should Working Group meetings be scheduled?

InterCEP encourages readers of this document and other stakeholders to contact us on an ongoing basis with questions, comments and suggestions regarding the Working Group agenda, as well as in reference to the broader process of developing and implementing the certification program. InterCEP's efforts to support this process are undertaken independent of any government agency or accrediting body with the financial support of the Alfred P. Sloan Foundation.

SUMMARY OF KEY POINTS FROM THE WHITE PAPER “THE LEGAL OBLIGATION FOR CORPORATE PREPAREDNESS”

The following reflect key points from the white paper, “The Legal Obligation for Corporate Preparedness” authored by William Raisch, MBA, Director, Matt Statler, Ph.D. – Associate Director, New York University International Center for Enterprise Preparedness and Denis Binder, S.J.D., Professor of Law, Chapman University, October 16, 2006. The document in its entirety is available at:

<http://www.nyu.edu/intercep/Legal%20Case%20for%20Preparedness%2016%20oct%2006.pdf>

Executive Summary:

Corporations are vulnerable to significant legal liability if they do not undertake emergency preparedness efforts. This liability can result from several sources including common law negligence, specific legislation/regulations and contractual obligations.

Negligence law requires corporations to exercise reasonable care under the circumstances, including care to prevent an accident or other injury. The basic principles of negligence law readily apply to specific emergency preparedness efforts undertaken by organizations that focus on the prevention or mitigation of the impact of foreseeable hazards.

Since the essence of negligence is the failure to exercise reasonable care under the circumstances, much attention has been paid of late to practical cases in which the circumstances have arguably changed. For example, hurricane projections as well as business risk analyses indicate that the probability of an event occurring, the gravity of the resulting injury, and the burden of adequate precautions are all changing to potentially increase corporate liability.

As legislators and regulators attempt to respond to these same changing circumstances, corporations may increasingly be held liable for emergency preparedness based upon specific legislation and/or regulations that address their industry. The clear beginnings of this trend are visible in specific arenas including firms operating in financial services and other critical infrastructure industries.

Finally, corporations may also have liability based upon requirements that arise from specific contract obligations with other parties. Such “push down” obligations have increasingly appeared in supply chain relationships, where procuring corporations require suppliers to validate their emergency preparedness programs as a condition of doing business. Thus in view of the common law, legislative/regulatory and contract liability surrounding emergency preparedness, corporations would be prudent to undertake preparedness efforts to mitigate or avoid exposure to these risks.

Key Points:

- **The corporation faces a diversity of risks in its day-to-day operations:** Whether the source is natural or human, the number of ways an accident can occur, a facility fail, or system malfunction is probably infinite.

- **Emergency preparedness efforts by corporations can avoid or lessen the impact of these risks, including resulting injuries, should they occur.** Benjamin Franklin’s “ounce of prevention” or “pound of cure” axiom reflects the age-old understanding of the value of preparedness and prevention activity.
- **Corporations may be subject to significant legal liability if they do not undertake preparedness efforts in advance of a crisis.** This liability can result from several sources including common law negligence, specific legislation/regulations and contractual obligations. Potential sources of liability from legislation and regulation include Occupational Safety & Health Administration regulations, Security Exchange Regulations (for financial services firms) as well as a suggestion by some that Sarbenes-Oxley may be interpreted to include disclosure and business continuity planning responsibilities.
- **Under negligence law, corporations as with any other actors must exercise “reasonable care:”** The essence of negligence is the failure to exercise reasonable care under the circumstances. More technically defined, negligence is the failure to exercise the standard of care of a reasonable person under similar circumstances.¹ Thus, corporations or any parties must exercise reasonable care under the circumstances or be liable for any resulting impacts on others.
- **The standard for “reasonable care” can be multi-faceted with the “common law standard” considered as the default:** The standard of care may be established by case law, statutes,² regulations,³ and contracts,⁴ as well as by industry, professional⁵ and building codes.⁶ These measures will usually establish the minimum standard of care. The actor will be held to a higher standard, the common law duty of reasonable care, if they are inadequate.⁷
- **The common law standard of care can be wide ranging and is based on probability, gravity and burden:** The essence of reasonable care was set out by Judge Learned Hand in *United States v. Carroll Towing Co.*⁸ as a calculus of three factors: the probability of an accident occurring, the gravity of the resulting injury, and the burden of adequate precautions.⁹
- **Increasing risk increases responsibility:** A corollary to this basic analysis is that as the risk increases, so too does the standard of care.¹⁰
- **The global business environment is changing to potentially heighten corporate liability under the common law standard:** Increasing globalization and its widening connectivity of business has effectively increased the operational footprint of the corporation. Many corporations have off-shored or outsourced their operations to areas remote from their primary locations making them essentially larger geographic “targets” for both natural hazards and man-made threats. Corporate supply chains can span the world. Advancing technologies bring with them new vulnerabilities. Enhanced global transportation can widen the impact and accelerate the spread of contagious diseases worldwide. Interconnected power grids coupled with ever increasing power demands set the stage for cascading power outages. Both the probability of emergencies and the gravity of their potential impact have arguably increased as a result of these and other factors. Yet, with the advancement of the disciplines of risk management, business continuity, crisis management, emergency management and other studies, the capability

to address these risks has also increased. Arguably, at least in terms of fundamental preparedness capability, these evolving disciplines developments have provided new tools and somewhat lessened the “burden” of adequate precautions. Thus, increasing probability and gravity of crisis coupled with a decreased burden of precautions (at least on a fundamental basis) supports a climate for increased corporate liability.

- **Duty is a key element in establishing negligence:** In any negligence action, plaintiffs have the burden of proof to establish four basic elements: duty, breach, causation, and damages. Establishing the breach, causation and damages tend to be by their nature very specific to the individual case. The concept of duty, however, can be more generally discussed as it relates to emergency preparedness.
- **Duty is based upon the reasonable foreseeability of the risk¹¹,** with the critical issue being how should a reasonable person act in light of the foreseeable risk. The reasonable foreseeability of these risks creates a duty¹² to employ reasonable care to reduce the risks of a disaster.
- **The event need not have ever happened before to be foreseeable.** The issue is not whether a similar event has occurred before, but the foreseeability of the risk that this particular mishap may occur. Standard negligence analysis requires the exercise of reasonable care to prevent an accident. Liability may exist if reasonable design,¹³ construction,¹⁴ operation,¹⁵ inspection,¹⁶ or maintenance procedures¹⁷ should have anticipated and prevented or minimized the failure.
- **Duty is owed to all who may be foreseeably injured.** The duty of reasonable care extends to those foreseeably injured by the negligence, and not just those in privity of contract with the defendant.¹⁸ Even inspectors, who are neither in a relationship to the victims nor operating a facility, may be liable for negligence for failure to discover the problems.¹⁹ Liability thus extends to any person who foreseeably is at risk through the failure to exercise reasonable care.
- **In sum, the duty to undertake emergency preparedness is consistent with the basic principles of negligence law and constitutes a significant exposure for the corporation.** Plans to respond to disasters are just as critical in minimizing the resulting damages as reasonable steps to prevent an accident. The law’s interest in minimizing the costs of an accident is shown by a number of well-established liability scenarios, such as products liability and safety measures.

Endnotes to above Summary:

¹ Charvoz v. Bonneville 1rr. Dist., 235 P.2d 780, 783 (Utah 1951).

² Violations of a statute or ordinance may constitute negligence. Burran, Jr. v. Dambold, 422 F.2d 133 (10th Cir. 1970); Henry v. Britt, 220 So.2d 917 (Fla. Ct. App. 1969).

³ Henry v. Britt, 220 So.2d 917, 920 (Fla. Dist. Ct. App. 1969). Of course, a plan which does not conform to statutory or regulatory requirements will fail. For example, the Iowa Beef Processing Co. had a “disaster readiness plan” in effect for its Council Bluffs, Iowa, plant. This plan provided for immediate evacuation in case of a major ammonia leak. The readiness plan was an alternative to an emergency action plan. 29 C.F.R. §1910.120 (q)(1) (2002). The employees were trained to evacuate immediately. However, when a major ammonia leak occurred on June 30, 1993, two employees, only one of which was wearing a self-contained breathing apparatus, attempted to rescue a downed employee of a sub-

contractor. Because the plan provided for rescues as well as evacuations, it did not qualify for an exception from the requirement to prepare a more detailed emergency action plan. See *IBP, Inc. v. Iowa Employment Appeal Bd.*, 604 N.W.2d 307 (Iowa 1999).

⁴ “The principle which seems to have emerged . . . is that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract – which is to say, whenever such misperformance involves a foreseeable, unreasonable risk of harm to the interests of the plaintiff.” William L. Prosser & W. Page Keeton, *The Law of Torts* 602 (5th Ed. 1984)(*hereinafter referred to as Prosser & Keeton*).

⁵ An example of a professional code is National Fire Protection Association, NFPA 1600 Standard on Disaster/Emergency Management and Business Continuity Programs (2000 Ed.) http://www.nfpa.org/Codes/NFPA_Codes_and_Standards/listof_nfpa_documents/nfpa_1600.asp. NFPA 1600 contains provisions on Hazard Identification and Risk Assessment (3-3), Hazard Mitigation (3-4), Resource Management (3-5), Planning (3-6), Direction, Control, and Coordination (3-7), Communications and Warning (3-8), Operations and Procedures (3-9), Logistics and Facilities (3-10), Training (3-11), Exercises, Evaluations, and Corrective Actions (3-12), Crisis Communications, Public Education, and Information (3-13), and Finance and Administration (3-14). The standard requires not only a plan but also that businesses fund it (*Id.* at §3-14). NFPA 1600 was approved by the American National Standards Institute on February 11, 2000 as an ANSI Standard. *Id.* at 1600-1. The National Fire Protection Association prepares standards for fire fighting and protection. ANSI Standards are in a sense purely advisory, but they are often admissible as evidence of the reasonable standard of care. See *e.g.* *Hansen v. Abrasive Engineering & Manufacturing Co.*, 856 P.2d 625 (Ore. 1993) (holding that the advisory safety standards of the American National Standards Institute may be considered in deciding whether defendant has met the standard of care); *Arkansas Valley Elect. Coop. Corp. v. Davis*, 800 S.W.2d 420, 422 (Ark. 1990) (holding that defendant’s violation of the national electric safety code can be used as evidence of negligence); *Norman v. Ogallala Pub. School Dist.*, 609 N.W. 2d 338 (Neb. 2000); *Kent Village Associates Joint Venture v. Smith*, 657 A.2d 330 (Md. App. 1995). See *also*, *Miller v. Yazoo Mfg. Co.*, 26 F.3d 84 (8th Cir. 1994).

⁶ See *e.g.* FLA. STAT. ANN. §553.84, *Burran v. Dambolo*, 422 F.2d 133, 135-136 (10th Cir. 1970) (holding that building codes create standard of care); *St. Joseph Hospital v. Corbetta Construction Co.*, 316 N.E.2d 51, 61-62 (Ill. Ct. App. 1974) (holding that violation of building code creates cause of action); *Virginia Elec. & Power Co. v. Savoy Const. Co.*, 294 S.E.2d 811, 817 (Va. 1982) (holding that violation of building code creates negligence per se).

⁷ See *e.g.* *Alvarado v. J.C. Penney Co., Inc.*, 737 F.Supp. 371, 374 (D. Kan. 1990); *Gryc v. Dayton Hudson Corp.*, 197 N.W.2d 727 (Minn. 1980); *Dawson v. Chrysler Corp.*, 630 P.2d 950 (3rd Cir. 1980); *Helling v. Carey*, 519 P.2d 981 (Wash. 1974); *The T. J. Hooper*, 60 F.2d 737 (2nd Cir. 1921); *Clark’s Adm’r v. Kentucky Utility Co.*, 158 S.W.2d 134, 137 (Ky. 1941).

⁸ 159 F.2d 169 (2nd Cir. 1947)

⁹ *Id.* at 173. See *also* *Conway v. O’Brien*, 111 F.2d 611, 612: “The degree of care demanded of a person by an occasion is the resultant of three factors: The likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.”

¹⁰ PROSSER & KEETON, *supra* n. 4 at 171. “[I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach . . . As the gravity of the possible harm increases, the apparent likelihood of its reoccurrence need be correspondingly less to generate a duty of precaution.” (Let us add that the railroad’s duty will often include posting warning signs and installing crossing gates.). This principle goes back to the germinal negligence case in the United States, *Brown v. Kendall*, 60 Mass. (6 Cush.) 292

(1850) (“[W]hat constitutes ordinary care will vary with the circumstances of the case.”). See *also* Erickson v. Bennion 503 P.2d 139, 140-141 (Utah 1972); Willie v. Minnesota Power and Light Co., 250 N.W. 809 (Minn. 1933); City Water Power Co. v. City of Fergus Falls, 128 N.W. 817, 818 (Minn. 1910); Herro v. Board of County Road Commission for County of Chippewa, 118 N.W.2d 271 (1962); Dover v. Georgia Power Co., 168 S.E. 117, 118 (Ga. Ct. App. 1933); Mackay v. Breeze, 269 P. 1026, 1027 (Utah 1928); Erickson v. Bennin, 503 P.2d 139, 140-141 (Utah 1972).

¹¹ Charvoz v. Bonneville Irr. Dist., 235 P.2d 780, 783 (Utah 1951)

¹² Indeed, an OSHA guideline recognizes EAP’s “should address emergencies that the employer may reasonably expect in the workplace,” including fire, toxic chemical releases, hurricanes, tornadoes, blizzards, and floods. 29 C.F.R. §1910.38, Appendix to Subpart E (2002).

¹³ See *e.g.* Barr v. Game, Fish and Parks Commission, 497 P.2d 340 (Col. Ct. App. 1972).

¹⁴ The concept of liability for construction defects long precedes the common law, going back to the hallowed Code of Hammurabi, which provided that in the case of “a house being so carelessly built as to cause death to the owner’s son,” the builder’s son was to be put to death. Gibson B. Witherspoon, ARCHITECTS’ AND ENGINEERS’ TORT LIABILITY, 16 D.L.J. 409 (1967).

¹⁵ See *e.g.* Gutierrez v. Rio Rancho Estates, Inc., 605 P.2d 1154 (N. Mex. 1980) and Bruton v. Carolina Power and Light Co., 6 S.E.2d 822 (N.C. 1940).

¹⁶ See *e.g.* Ingram v. Howard-Needles-Tammen & Bergendoff, 672 P.2d 1083 (Kan. 1983).

¹⁷ Curtis v. Dewey, 475 P.2d 808 (Idaho 1970); Hayashi v. Alameda County Flood Control and Water Conservation District, 343 P.2d 1048 (Cal. Ct. App. 1959); Bowling v. City of Oxford, 148 S.E.2d 624 (N.C. 1966); Carlson v. A&P Corrugated Box Corp., 72 A.2d 290 (Pa. 1950).

¹⁸ See *e.g.* Navajo Circle, Inc., v. Development Concepts, 373 So. 2d 689 (Fla. Ct. App. 1979), where a condominium association and a unit owner were allowed to seek damages to the roof and the exterior walls from the architect for negligently supervising the construction and subsequent repairs of the roof, and also from the contractor for negligently constructing the roof. See *also* Kristek v. Catron, 644 P.2d 480 (Kan. App. 1982) (contractor liable to a third party); Seiler v. Levitz Furniture Co., 367 A.2d 999 (Del. 1976) (liability of architect/engineer to tenant); Heigh v. Wadsworth, 361 P.2d 849 (Okla. 1961) (contractor liable to purchaser’s tenant); Waldor Pump & Equipment Co. v. Orr-Schelen-Meyerson & Co., 386 N.W.2d 375 (Minn. App. 1986); Montijo v. Swift, 33 Cal. Rptr. 133 (Cal. App. 1963); Lumber Products, Inc. v. Hiriart, 255 So.2d 783, 787 (La. Ct. App. 1971); S.K. Whitty & Co., Inc. v. Laurence L. Lambert & Assoc., 576 So.2d 599 (La. Ct. App. 1991); Evans v. Howard R. Green Co., 231 N.W.2d 907, 913 (Iowa 1975); Mudgett v. Marshall, 574 A.2d 867 (Me. 1990); Miller v. DeWitt, 208 N.E.2d 249, 284 (Ill. App. 1965) which results in the erection of an unsafe structure whereby anyone lawfully on the premises is injured.”) In terms of measuring the potential liability to third parties, the court in Coburn v. Lenox Homes, Inc., 441 A.2d 620, 624 (Conn. 1982) stated:

A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from the act or failure to act.

¹⁹ See *e.g.* Ingram v. Howard-Needles-Tammen & Bergendorf Corporation, 672 P.2d 1083 (Kan. 1983); Phillips v. United States, 801 F. Supp. 337, 348 (D. Idaho 1992), *aff’d* 15 F.3d 1088 (9th Cir.); Johnson v. Burley Irrigation Dist., 304 P. 2d 912, 915 (Idaho 1956)(existence of gophers should have been discovered through an inspection).

OVERVIEW OF THE LAW ESTABLISHING A PRIVATE SECTOR PREPAREDNESS ACCREDITATION & CERTIFICATION PROGRAM

“The Implementing Recommendations of the 9/11 Commission Act of 2007” (Public Law 110-53 – Title IX, Section 524) was signed into law on August 3, 2007. Section 524 calls for the creation of a voluntary business preparedness accreditation and certification program. The legislation stipulates that the program should:

- Provide a method to independently certify the emergency preparedness of private sector organizations, including disaster/emergency management and business continuity programs;
- Be administered outside of government by third party organizations with experience / expertise in managing and implementing voluntary accreditation and certification programs;
- Be voluntary;
- Designate one or more preparedness standards. NFPA 1600 is referenced as an example;
- Integrate/recognize existing industry efforts, standards, practices and reporting in this area;
- Give special consideration to small businesses; and
- Protect proprietary and confidential information of companies.

DEPARTMENT OF HOMELAND SECURITY’S RESPONSIBILITIES UNDER THE LAW & SUMMARY OF CURRENT STATUS As of December 1, 2009

The legislation also assigns the following specific responsibilities to the U.S. Department of Homeland Security (DHS):

- DHS is to designate one or more organizations to act as the accrediting body to develop and oversee the certification process, and to accredit qualified third parties to carry out the certification program;
 - In July, 2008, DHS designated ANAB as the accrediting body, the same organization that has been administering private sector certifications in the United States in such areas as quality management systems (ISO 9000) and environmental management systems (ISO 14000) for over twenty years.
- DHS is to separately designate one or more existing standards for assessing private sector preparedness;
 - Over the course of late 2007, 2008 and 2009, DHS reached out to the private sector seeking input into their planning for the new program.
 - On December 24, 2008, DHS released an announcement in the Federal Register which discussed the essential elements of the program, described the consultation that has taken place to date and will take place with the private sector, and further announced that it seeks additional recommendations in a number of areas, including the private sector preparedness standards that DHS should adopt, both initially and over time. The announcement included for comment tentative target criteria to be used in determining which standards to designate. These criteria closely paralleled those in the Sloan Report.

- On January 13 and February 23, 2009, DHS held two stakeholder meetings in Washington DC open to the public to engage in dialogue with DHS leadership and program managers regarding the Voluntary Private Sector Preparedness Accreditation and Certification Program (PS-Prep). Announced topics included the adoption of private sector preparedness standards; comments regarding a maturity model process improvement approach; small business participation and concerns; comments regarding the business case; and comments regarding the accreditation process and certification process.
- On October 16, 2009, DHS issued a Federal Register Notice announcing proposed standards for PS-Prep. The proposed standards include those developed by the National Fire Protection Association, the British Standards Institution and the ASIS International, and were selected based on their scalability, balance of interest and relevance to PS-Prep from a group of 25 standards proposed for consideration.
- DHS is to provide information and promote the business case for voluntary compliance with preparedness standards.
 - DHS is currently undertaking research efforts in this regard and InterCEP is assisting based on its historical research on the business case for resilience.
- Monitor the effectiveness of program on an ongoing basis.
 - A committee has been established within DHS to coordinate activity on the PS-Prep Program consisting of representatives from FEMA, the DHS Private Sector Office, Science & Technology Directorate and the Office of Infrastructure Protection.

CURRENT STATUS & TIMELINE OF ACTIVITY

As of December 1, 2009, key activities in the development of the Private Sector Preparedness (PS-Prep) Certification Program development process include the following. Note this timeline is not all inclusive and focuses on government, accrediting body and Center activity.

- **Legislation Enacted Calling for the Creation of Private Sector Preparedness Accreditation Program (August 3, 2007).** Public Law 110-53 signed into law.
- **DHS Begins Outreach Efforts (Fall 2007).**
- **13 Online Forums to Held to Discuss & Solicit Input on New Program, hosted by InterCEP (Fall 2007):** Several hundred organizations participated nationally in a series of thirteen online forums were held both to provide a platform for exchange of information on the evolving program and to begin to solicit input from key stakeholders on how the program should be developed. Each of these forums addressed a different facet of the prospective program. InterCEP hosted these forums and subsequently summarized their findings and communicated them to key stakeholders including the U.S. Department of Homeland Security (DHS) which is responsible for initiating the program. <http://www.nyu.edu/intercep/events/20081010-415.html>
- **Meeting of Key Private Sector Associations & Leading Companies Held to Discuss Program, Hosted by Sloan Foundation (October 23, 2007):** The Alfred P. Sloan Foundation, a leader in supporting preparedness initiatives and a primary funder of InterCEP, convened a forum of key stakeholders to discuss the evolving program and investigate cooperative approaches. InterCEP collaborated in this effort. Consensus was reached at this forum that “flexibility within a framework” of existing

preparedness guidance should be promoted and that there was substantial commonality of core elements among existing preparedness standards and guidance. The forum members included representatives from four major industry associations (ASIS, DRII, NFPA, and RIMS), who later collaborated to develop a framework to identify relationships between existing private sector preparedness approaches. A report outlining their findings was released entitled “Framework for Voluntary Preparedness.”

- **Stakeholders Outreach Meeting Held at InterCEP with Support of Sloan Foundation (December 10-11, 2007):** More than fifty representatives from industry associations and private sector firms met with DHS and other government officials participated in this Sloan sponsored forum on the National Voluntary Private Sector Certification Program, facilitated by InterCEP at NYU. A summary of proceedings was developed which identified several key points of wide agreement around the design and operation of a certification program, the designation of an accreditation body, the selection of preparedness standards, and the business case for preparedness. A key next step identified in this regard was the development of working groups dedicated to specific incentive areas, such as insurance, supply chain, rating agencies, etc. that could assemble key stakeholders around each incentive area and act to promote the advancement of that incentive through the certification program.
- **Multi-Disciplinary Report Released Finding Common Core Elements of Preparedness Practice across Disciplines (January 2008):** A ‘Framework for Voluntary Preparedness’ encompassing multiple preparedness standards and other guidance was developed by key organizations (RIMS, DRII, ASIS, NFPA) with the support of the Alfred P. Sloan Foundation.³ The “Sloan Report” argues for flexibility within a framework in terms of preparedness standards and related certification activity. It underscores the commonality of core elements of practice across various disciplines of risk management including security, business continuity, enterprise risk management and emergency management. A copy of the full document is available at: http://www.nyu.edu/intercep/document-clearinghouse/alfred_p_sloan_foundation_fram.html
- **Five Working Groups Established to Inform the Development & Implementation of New Program with Focus on Bottom-Line Incentives/Economic Impacts, hosted by InterCEP (March 2008):** The Center seeks to serve as a catalyst and collaborator with the goal to work with other organizations to promote both awareness of the new program and input into its development. To that end, the Center began hosting a series of working groups in order to expand and focus stakeholder involvement in the ongoing development of the program. These working groups built upon on the momentum established in various forums in the fall of 2007 but promote more focused discussion and input around targeted topics. The overall objectives guiding these groups have been initially set at (1) to identify existing practices and principles in specific topical areas relevant to private sector preparedness; (2) in light of these practices and principles, to identify issues, opportunities and potential strategies relevant to the design and implementation of the voluntary business preparedness certification program; and, (3) to gather these outputs generated by working group

³ Op cit.

participants and communicate them to program stakeholders including where appropriate DHS, accrediting and certifying bodies.

InterCEP's research suggests that the success of the accreditation and certification program will depend largely on the extent to which the program addresses operational needs of organizations and to which bottom-line incentives can be forwarded through the program. Working groups were therefore organized around topics that correspond to key elements of potential business value. Additional information is available at: <http://www.nyu.edu/intercep/events/20080219-296.html> Initial online forums were held as follows:

March 7, 2008: Legal Working Group
March 14, 2008: Supply Chain Working Group
March 18, 2008: Insurance Working Group
March 27, 2008: Rating Agency Working Group
March 28, 2008: Business Reporting Working Group

- **InterCEP Testifies to Congress on the PS-Prep Certification Program and Insights from Working Group Activity (May 14, 2008):** InterCEP Director Bill Raisch testified before the U.S. House of Representative's Homeland Security Subcommittee on Transportation Security & Infrastructure Protection Subcommittee. The hearing focused on partnering with the private sector to secure critical infrastructure. Mr. Raisch delivered testimony on private sector resiliency, and in particular on the voluntary certification program for business preparedness and findings from private sector input. Additional information and testimony available at: <http://www.nyu.edu/intercep/events/20080524-389.html>
- **Accrediting Body for PS-Prep Certification Program Formally Announced by Homeland Security:** On July 30, the U.S. Department of Homeland Security announced that "it has signed an agreement with the non-governmental ANSI-ASQ National Accreditation Board (ANAB) to establish and oversee the development and implementation of the accreditation and certification requirements for the Voluntary Private Sector Preparedness Accreditation and Certification Program." Specifically, ANAB is to "develop and oversee the certification process, manage the accreditation, and accredit qualified third parties to carry out the certification in accordance with the accepted procedures of the program."
- InterCEP anticipates that ANAB will set out the basic structure, processes and quality control for the accreditation program and will be responsible for "accrediting" the organizations that will undertake the actual certification efforts. These accredited organizations will in turn audit individual companies and if appropriate "certify" the companies that conform to the designated preparedness standard(s).
- ANAB has for many years played a similar role as the accrediting body for the voluntary private sector certification programs addressing quality management (ISO 9001), environmental management (ISO 14001), information security management (ISO 27001) and numerous other industry requirements. As such, ANAB has had significant business interface and is expected to be sensitive to the concerns and needs of business. ANAB is headquartered in Milwaukee, Wis. and is a certified member of the International Accreditation Forum. ANAB is the only accreditation organization for process/management system certifiers based in the United States.

The full release is available at:

<http://www.fema.gov/news/newsrelease.fema?id=45280>

- **Initial InterCEP Working Group Proceedings Released and Provided to Accrediting Body & U.S. Homeland Security (July/August 2008):** Proceedings of Working Groups were released generally and provided directly to both the U.S. Department of Homeland Security (DHS) and the accrediting body for the Voluntary Private Sector Preparedness Certification Program, ANAB. These proceedings are informing initial planning activity for the program. These proceedings reflect issues and recommendations identified in earlier forums held on the new program by the various Working Groups. These proceedings were distributed in draft form to registered Working Group participants for comment. InterCEP then prepared the proceeding for public release. The Working Groups are being hosted by InterCEP to facilitate input on the design and implementation of the new certification program and to assure that the program reflects the concerns and needs of the private sector. Information on the Working Groups and the proceedings are posted on the InterCEP website at <http://www.nyu.edu/intercep/certification/>
- **U.S. Department of Homeland Security Lays Out Initial Direction for Voluntary Certification Program (July 30, 2008):** DHS set out its initial direction for the certification program in a media release. Selected excerpted points follow:
 - *Program Management Structure:* FEMA Administrator R. David Paulison has been named the designated officer responsible for the program on an overall basis. In this role, the administrator will chair the Private Sector Preparedness Council comprised of Department leadership from the Science & Technology Directorate, Office of Infrastructure Protection, and Private Sector Office; all of which will advise on the development of the program.
 - *Accreditation Body:* As previously discussed (above), DHS has established an accrediting body by designating the ANSI-ASQ National Accreditation Board (ANAB) to develop and oversee the certification process
 - *Preparedness Standards:* Per the legislation, DHS is to designate one or more standards for assessing private sector preparedness. The department has stated that “in developing and implementing the program, DHS will consider preparedness standards, business continuity standards, and best practices established under other provisions of Federal law, regulations, and as established by sector-specific agencies. DHS will coordinate with other preparedness and business continuity programs in other Federal agencies.”
 - *Request for Comment:* DHS announces an outreach to a diversity of private sector stakeholders including soliciting “public comment through a coming Federal Register Notice” with the stated goal by DHS of obtaining input on the following:
 - The scope of the Program;
 - The desired content of the voluntary “preparedness” standards to be designated;
 - Existing standards that should be evaluated and selected in this process;
 - Target criteria that should be the foundation for evaluation of comprehensive voluntary preparedness standards to be developed in the future; and
 - Views concerning standards and approaches for small businesses.
 - DHS further states that “after the receipt, review, and adjudication of public comments, DHS will select target criteria to evaluate preparedness standards for

use in the Program. DHS will coordinate with standards development organizations (SDOs) in the update of their current preparedness standards and the development of new standards. DHS will work with private sector stakeholders and the critical infrastructure and key resources (CIKR) sectors to determine what sector-specific additions, guidance, or other expansion of the selected standards or target criteria are appropriate and desirable.”

- *Business Case:* As per the legislation, the department additionally “will provide information and promote the business case for voluntary compliance with preparedness standards.”
 - *Program Monitoring:* An ongoing program monitoring function will be established for the program to “ensure its effectiveness, to include the operations and management of any of the accreditation and certification bodies and the standards designated. The annual review will also provide recommendations for improvements and adjustments to the program as necessary and appropriate.”
 - *Public Listing of Certified Companies:* Per the requirements of the legislation, DHS will also “maintain and make public a listing of any private sector entity certified as being in compliance with the program, if that private sector entity consents to such a listing.”
 - *Small Business Considerations:* The DHS announcement also cited the need that “small business concerns are taken into consideration, including any need for separate guidance, recommendations, or best practices, as necessary and appropriate.” The Department also indicated that it is considering “in coordination with the Ready Campaign (www.ready.gov) ... the option of developing a self-assessment preparedness tool [and that] compliance for small business may be in the form of a formal self-declaration of conformity.”
 - For additional information, see the DHS release:
<http://www.fema.gov/news/newsrelease.fema?id=45287>
- **Follow-on Forums for the InterCEP Working Groups Held (October – November 2009)** In response to recent activity by DHS and the newly designated accrediting body, online forums for each Working Group were held. These conference call / web sessions allowed for wide access for the consideration of the recent announcements by DHS. Additional information is available at:
<http://www.nyu.edu/intercep/events/20081010-415.html>
 - **Federal Register Notice of Information & Request for Recommendations on Private Sector Preparedness Accreditation & Certification Program (December 29, 2008)** The notice both provided information on DHS activity as well as invited recommendations from the private sector on program development. The announcement included target criteria, i.e., “a draft list of possible elements that can be included in private sector preparedness standards and which may be used by the designated officer in evaluating standards for adoption in the program.” Additional information available at:
http://www.nyu.edu/intercep/document-clearinghouse/federal_register_notice_reques.html
 - **DHS Holds Two Public Meetings on Private Sector Preparedness Program (January 13 and February 23, 2009):** Two stakeholder meetings, open to the public, were held “to engage in dialogue with Department of Homeland Security (DHS) leadership and program managers regarding the Voluntary Private Sector Preparedness Accreditation and Certification Program (PS-Prep). The first was held on January 13, 2009 at U.S. Chamber of Commerce in Washington D.C. The second public meeting

was held on February 23, 2009 at the headquarters of the American Red Cross in Washington, DC. InterCEP presented at both these events based on input from the Working Group activity on the program. Additional information available at: http://www.nyu.edu/intercep/document-clearinghouse/first_of_two_public_meetings_o.html

- **Announcement & Request for Interest to Participate in National Roundtables on Enabling Bottom-Line Impacts for Business Resilience through Certification, hosted by InterCEP (February 11, 2009)** InterCEP announced a series of National Roundtables on Enabling Bottom-Line Impacts for Business Resilience through Certification. These roundtables, supported by the Alfred P. Sloan Foundation, are to build on continuing InterCEP Working Group activities and focus on five main economic and potential incentive areas that could be advanced through the new Voluntary Private Sector Preparedness Certification Program, currently in development by the U.S. Department of Homeland Security. Additional information available at: <http://www.nyu.edu/intercep/events/20090211-424.html>
- **InterCEP Testifies Again to Congress on New Private Sector Preparedness Certification Program (March 11, 2009)** InterCEP Director Bill Raisch was requested to provide an update on the Private Sector Preparedness Program activity by the House Homeland Security Subcommittee on Transportation Security and Infrastructure Protection. The hearing focused on the recent Mumbai attacks and their role as a “wake-up call to the private sector.” Raisch provided ongoing insights from related Working Group activity as well as recommendations to forward the PS-Prep program. Additional information available at: <http://www.nyu.edu/intercep/events/20090319-427.html>
- **National Roundtables on Enabling Bottom-Line Impacts for Business Resilience through Certification, hosted by InterCEP (March-June, 2009)** InterCEP held a series of National Roundtables on Enabling Bottom-Line Impacts for Business Resilience through Certification. These roundtables, supported by the Alfred P. Sloan Foundation, focused on continuing InterCEP Working Group activities in five main economic and potential incentive areas that could be advanced through the new Voluntary Private Sector Preparedness Certification Program, currently in development by the U.S. Department of Homeland Security:
 - March 30, 2009: Supply Chain Working Group
 - April 15, 2009: Business Reporting Working Group
 - May 12, 2009: Rating Agency Working Group
 - June 2, 2009: Insurance Working Group
 - June 8, 2009: Legal Working Group
- **On October 16, 2009, DHS issued a Federal Register Notice announcing proposed standards for PS-Prep.** The proposed standards include those developed by the National Fire Protection Association, the British Standards Institution and the ASIS International, and were selected based on their scalability, balance of interest and relevance to PS-Prep from a group of 25 standards proposed for consideration.