



The Legal Working Group

On the Voluntary Business Preparedness Accreditation and Certification Program

Hosted by:
International Center for Enterprise Preparedness (InterCEP)
New York University

Initial Meeting
March 7, 2008

DRAFT SUMMARY PROCEEDINGS

(6/12/08 Version)

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EXECUTIVE SUMMARY

On March 7, 2008 a diverse group of public sector officials, private sector executives and practicing attorneys convened in an initial meeting of the Legal Working Group to discuss legal issues pertaining to the Voluntary Business Preparedness Accreditation and Certification Program. The online forum discussion focused on issues including:

- **A common law precedent would substantiate certification as a way to mitigate potential liability.**
- **The development of statutory guidelines would provide additional legal motivation to pursue certification.**
- **Some corporations are concerned about possible disincentives associated with certification.**
- **The introduction of multiple standards into the certification process could be problematic from a legal perspective.**
- **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.**
- **A maturity model may make the program more compelling from a legal perspective.**
- **All 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.**

ABOUT INTERCEP

- 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 in the following areas:
 - Insurance, rating agency, mitigating legal liability, supply chain, corporate governance
- InterCEP's research focus is on the linkage of "what" & "why"
 - What = preparedness standards and best practices
 - Why = business & economic motivations to develop greater preparedness

MEETING AGENDA

- 11:00 – 11:10: Overview of New Law: "The Implementing Recommendations of the 9/11 Commission Act of 2007" (Public Law 110-53 – Title IX, Section 524)
- 11:10 – 11:20: Focusing on the legal perspective: Key questions
- 11:20 – 12:00: Open, facilitated discussion
- 12:00 – 12:30: Defining the Working Group agenda, including: possible next steps, activities, recommendations, etc.

GROUND RULES

- Participants may contribute directly to the conversation but should be recognized by the moderator first.
- Conference call will be recorded.
- All comments are not-for-attribution.
- Those not participating verbally, please forward your questions and comments throughout the discussion via Question & Answer Function.
- For post-forum comments, please email to intercep@nyu.edu.

OVERVIEW OF NEW LAW

"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/credit 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

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

- 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;
- Separately designate one or more standards for assessing private sector preparedness;
- Provide information and promote the business case for voluntary compliance with preparedness standards; and
- Monitor the effectiveness of program on an ongoing basis.

CURRENT STATUS

As of March 7, 2008, the current status of the program development process is (to the best of InterCEP's knowledge) as follows:

- A 'Framework for Voluntary Preparedness' encompassing multiple preparedness standards and other guidance has been developed by RIMS, DRII, ASIS, NFPA with the support of the Alfred P. Sloan Foundation.¹
- DHS is scheduled to be reporting soon to Congress on a plan for program development.
- A potential accreditation body has been identified and published in Federal register: ANAB
- One or more standards are still to be designated.

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 business preparedness certification program; and,
- To gather these outputs generated by working group participants and communicate them to program stakeholders including where appropriate DHS, 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 certification program: legal, insurance, rating agency, supply chain, and business reporting requirements.

¹ 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

THE LEGAL PERSPECTIVE

InterCEP's ongoing research has framed the general topic of legal incentives for preparedness in terms of the duty of care.² With regard to the potential legal significance of the voluntary business accreditation and certification program, discussion among participants in the initial meeting of the Legal Working Group is 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 risk of post-event litigation? What are current best practices? What are current obstacles?
- How should the preparedness certification process be designed and implemented to draw from and reinforce the documentation of preparedness programs?

DISCUSSION THEMES

InterCEP has identified general themes touched on during the Working Group discussion. In this summary, these themes are briefly articulated, and then specific issues relevant to each theme are presented.

- **A common law precedent would substantiate certification as a way to mitigate potential liability.**
 - 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 compliant with 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.
- **The development of statutory guidelines would provide additional legal motivation to pursue certification.**
 - 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.
 - 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 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.
- **Some corporations are concerned about possible disincentives associated with certification.**
 - There is a potential disincentive pertaining to undertaking preparedness certification and the related documentation of preparedness actions undertaken by a company, especially with respect to the identification of risks to the company and its current vulnerabilities.
 - Absent some legal privilege such as attorney-client privilege or work product privilege, documents generated during the certification process could become discoverable and could be used against the company in any future litigation or investigations. That scenario functions as a disincentive to undertaking and documenting preparedness actions.

² Cf. <http://www.nyu.edu/intercep/Legal%20Case%20for%20Preparedness%2016%20oct%2006.pdf>

- One relatively uncommon form of privilege is called the self-evaluative privilege, whereby if a company conducts an internal investigation, then the company can go ahead and claim a privilege for that (i.e., the findings of the internal investigation could not be used in litigation against the company). However, the courts have been very reluctant to uphold that 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.
 - Such a privilege would be helpful once the whole program is put in place and a company has been certified. However, if a company stops short of certification then it must be considered as to how that would impact the documentation process. 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.”
 - Absent some legislation or some evidentiary rules or some civil procedure rules, anything done in connection with compliance of these standards would likely be discoverable in any setting.
 - There is alternatively an argument that an organization has an obligation to undertake reasonable efforts to ascertain its risk exposures and prepare to mitigate them.
- **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.
 - 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.
 - 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.³
 - **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 may need to be considered for inclusion or 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 provisional intention to include enterprise risk management (ERM) as one of the factors in the ratings analysis process for all 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.
 - **A maturity model may make the program more compelling from a legal perspective.**
 - Maturity models allow auditors to identify different levels of preparedness activity, and different businesses or business units can be assigned different levels of maturity based on relative quality of effort,

³ Op cit.

- If there were a legal or market rationale, and if it made sense from the perspective of the accreditation body, one could potentially see a certification that had Level 1, Level 2, Level 3, suffix to it.
 - A maturity model approach could also potentially be applied to 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 might want to reach the “higher” subsequent levels.
 - The maturity model approach may also be relevant to different businesses with different levels of criticality.
 - 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.
- **All 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.**
 - Relevant segments of the legal community should be identified in reference to the following organizations and associations: 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).

INTERCEP’S ACTIVITIES

InterCEP is committed to supporting the Legal 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 wider 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.

SETTING THE WORKING GROUP AGENDA MOVING FORWARD

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 process.

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 forward 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 independently with the support of the Alfred P. Sloan Foundation.

International Center for Enterprise Preparedness, New York University (NYU)
113 University Place, 9th Floor, New York, NY 10003
+ 1- 212-998-2000 (t) + 1-212-995-4614 (f)