# Headnotes

President Donald Trump has repeatedly promised to dramatically reduce regulatory burdens on business as well as cutting business taxes, and the stock market's relentless climb since the election apparently reflects a belief that he and the Republican-controlled Congress can make this happen. As this issue went to press, however, the outlook was at best uncertain for any meaningful regulatory changes in the short run. Mr. Trump has issued a series of Executive Orders calling for reduction of regulatory burdens by the federal agencies, including the elimination of two regulations for every new regulation promulgated; but the ability of the agencies to achieve this is questionable, as many regulations are mandated by law—for example, the Dodd-Frank Act, passed in 2010, calls for some 400 rule-makings, some of which are still not complete. The Financial CHOICE Act, which would roll back parts of the Dodd-Frank Act, has passed the House, but seems to have little chance in the Senate due its perceived weakening of consumer protections.

One of the Executive Orders sets forth a list of Core Principles, aimed at balancing regulatory burdens with economic opportunity, which the President wants to guide regulatory reform of the financial system. Pursuant to the Executive Order, in June the Treasury Department released its first of four reports, covering depository institutions (banks and credit unions); future reports will address capital markets, asset management and insurance, and nonbank financial institutions, including fintech firms. The first Report endorses many aspects of the CHOICE Act—for example, the "off-ramp" from Dodd-Frank requirements for well-capitalized depository institutions. While many of the objectives of the Core Principles can be accomplished by agency actions, it seems clear that other significant aspects will require legislation by a Congress that remains bitterly divided along partisan lines.

Another highly controversial rule-making is the Department of Labor's (DOL) Fiduciary Rule, which essentially raises the standard from "suitability" to fiduciary duty for brokers and other persons involved in advising on retirement funds. The most significant impact is likely to be on IRA accounts, which are typically held by brokerage firms. Depending on whether one is "blue" or "red" in one's political leanings, the Rule is either a vital and long-overdue protection for retirees against self-dealing, or a compliance nightmare that will drive smaller firms out of the business (there is some evidence this is happening already) and a bonanza for the plaintiff's bar. The Rule was a product of the waning days of the Obama Administration; President Trump delayed its implementation from April to June but at this writing it was still scheduled to move forward. An excellent article on the Rule, describing its background and reviewing the arguments for and against, appears in this issue (see p. 40).

Apart from legislative and executive action, several recent cases have significantly impacted the financial world. Under the National Bank Act, a national bank is permitted to charge the highest interest rate allowed by the usury law of the state in which it is located. In *Madden v. Midland Funding*, a national bank sold defaulted loans to Midland Funding, a non-bank company that specializes in acquiring and collecting on distressed consumer debt. The plaintiff argued that her loan, which was valid when made, became usurious when it was purchased by Midland. Notwithstanding the long-standing principle that a loan that is valid when made does not lose its validity when transferred to a third party, the Second Circuit Court of Appeals held that the loan was indeed usurious in the hands of Midland Funding. The Second Circuit has since declined to rehear the case, and the Supreme Court denied *certiorari*. So at least in the Second Circuit—including, of course, New York—a bank will not be able to sell loans to a non-bank without a loan-by-loan review to determine which might become usurious when sold.

In another closely watched case, the D.C. Circuit in May reheard *en banc* the case of *PHH Corporation v. Consumer Financial Protection Bureau* (CFPB). As we discussed in the last issue, the CFPB had fined PHH for retroactive violation of a CFPB interpretation under the Real Estate Settlement Procedures Act (RESPA) prohibiting certain reinsurance arrangements, even though the arrangement was concededly valid under the interpretation of the Federal Housing Administration (FHA) at the time it was made. The plaintiff challenged the fine, arguing both that the retroactive application of the new interpretation was invalid and that the structure of the CFPB itself was unconstitutional, in that it vests all power in a single director who cannot be fired by the President except for cause. In finding for the plaintiff, the court held that the structure was indeed unconstitutional and the director could be dismissed at will. But the court stayed its decision pending reargument *en banc*. The CHOICE Act would make the CFPB subject to a governing board, similar to the Securities & Exchange Commission (SEC), the Federal Deposit Insurance Corporation (FDIC) and other agencies, and would also subject its budget to the Congressional appropriations process—under the Dodd-Frank Act, the CFPB is funded by the Federal Reserve, although it is not controlled by the Federal Reserve. But

the Democrats have opposed these changes, believing they will diminish the CFPB's power. Oral arguments were heard on May 24, and a decision is pending at this writing.

Another area of law that has been subject to the "red-blue" divide is the use of arbitration, especially in consumer disputes. On the one hand, arbitration reduces the burden on the court system and often leads to effective and pragmatic outcomes, since arbitrators typically are people with experience in the industry involved. But on the other hand, for the same reason consumer advocates may argue that arbitration deprives the consumer of her "day in court" and is unfairly stacked against her. Leading off this issue, Jason Kornmehl explores these issues as they relate to disputes in the securities industry. In "Arbitration Vacatur Motions and Equitable Tolling in New York," he discusses the tension between the policy that arbitration should be "the end, not the beginning" of a dispute and the desire of an aggrieved party to obtain judicial review of an arbitration award. In a thoughtful and thorough analysis, he discusses the standards applied by the courts under federal law (the Federal Arbitration Act, or FAA) and New York law under the Civil Practice Law & Rules (CPLR) with respect to motions to vacate arbitration findings. He also discusses in depth the recent Ninth Circuit decision in *Move v. Citibank*, which held that the doctrine of "equitable tolling" could be applied to the FAA, thereby enabling an aggrieved party to pursue her day in court. At the same time, the Second Circuit has consistently rejected the notion that equitable tolling applies to the FAA, since it is a cause of action unknown at common law. Mr. Kornmehl, formerly a practitioner specializing in antitrust law in New York, now serves as a clerk to a Justice of the New Jersey Supreme Court.

The spectacular and well-publicized failure of the law firm Dewey & LeBoeuf in 2012 has resulted in multiple litigations among the firm's partners and others. But one constituency the firm apparently overlooked—its own employees—led to unanticipated and draconian financial consequences. In "How Dewey & LeBoeuf Failed to Fore-WARN," Stuart Newman and Tyler Silvey discuss how the firm failed to comply with the federal Worker Adjustment Retraining Notification Act, known as the WARN Act, which mandates that employers with more than 100 employees provide advance notice to their employees ahead of an event such as a mass layoff or plant closing. New York has a similar WARN Act, but it applies to employers with as few as 50 employees. There are exceptions—for example, a firm attempting in good faith to arrange financing in order to stay in business does not want to give its employees advance notice of a shutdown, which would destroy its ability to arrange such financing. In their usual clear and lucid style, Messrs. Newman and Silvey provide a dramatic cautionary tale regarding how lawyers can overlook their own legal obligations, as well as a primer on the federal and State WARN Acts that is invaluable for any New York practitioner who finds herself counseling a troubled company. Mr. Newman is the founder of the *Journal* and Chair Emeritus of its advisory board; he and Mr. Silvey are attorneys with the New York firm Salon Marrow Dyckman Newman & Broudy LLP.

The Nonprofit Revitalization Act of 2013 (NPRA) massively overhauled New York's Not-For-Profit Corporations Law (NPCL). But in the process it created a number of unanticipated problems—another demonstration, if one were needed, that the Law of Unanticipated Consequences is the only law that can never be repealed. Thanks in no small part to the tenacious efforts of the Business Law Section, in cooperation with the City Bar, the Law Revision Commission and others, a much-needed amendments bill was passed last year and signed into law by Governor Cuomo in November 2016. In "November 2016 Amendments to the Not-For-Profit Corporation Law," Fred Attea discusses and explains the reasons for the amendments. As one example of an unanticipated consequence, he notes that prior to the amendments the definition of "related party" could be read literally to mean that a relative of a director of a hospital could not be admitted to the hospital for treatment without prior approval. Mr. Attea, a partner of Phillips Lytle in Buffalo, is a past Chair of the Business Law Section and the founding Chair of the Section's Not-For-Profit Corporations Law Committee.

The attorney-client privilege continues to be a source of confusion and vexation, for business practitioners as well as their clients. In the *Upjohn* case in 1980, the Supreme Court held that the privilege does apply in the corporate context, but left open the question of whether it applies when counsel speaks with a person who was, but no longer is, employed by the company. In "'Exes and the Attorney-Client Privilege," the *Journal*'s ethics guru, Evan Stewart, brings us up to speed on the state of the law in this area. In particular, Mr. Stewart discusses and analyzes a narrowly divided decision of the Supreme Court of Washington. Along the way, as always he entertains us with a fascinating and humorous look at how the question of dealing with one's 'ex' has been addressed in pop music, from Pat Boone to Taylor Swift. Mr. Stewart, a partner in the New York law firm Cohen & Gresser LLP, was the 2016 recipient of the Sanford D. Levy award, given annually by the New York State Bar Association's Committee on Professional Ethics to a person who has contributed most to the advancement of legal ethics.

A recent TV commercial for a New York bank depicted a woman demonstrating to her little girl how she can deposit a check to her bank by taking a picture of the check on her smartphone. When she then uses the phone to snap a picture of a lion at the zoo, the child visualizes

the lion being transmitted to the bank and cries out, "No mommy, no!" Sending a lion to your bank by smartphone is not (yet) possible, but depositing a check certainly is, and potentially creates a whole set of new risks and problems for both the bank and the check writer—in particular, what prevents a payee from depositing the check twice, and what are the legal consequences if he does? The law in this area is only beginning to develop, but in "Electronic Deposit of Checks—Tips to Avoid Problems," Jay Hack, a partner in the New York firm Gallet, Dreyer & Berkey LLP and a past Chair of the Business Law Section, provides some practical advice both for banks and for the writer of the check. He also highlights a particular scam that has been used to victimize attorneys who write checks on their escrow accounts.

Employment is an area of law that is in continuous dynamic change and that affects every business in New York. For this reason, "Recent Employment Laws Impacting Private Employers in New York" by Sharon Parella, a regular feature of the *Journal*, is required reading for business practitioners. Ms. Parella's latest instalment unravels the complexities of New York's new minimum wage law, which differs by business size and location and phases in over the next year. Many aspects of the law are confusing—for example, the applicable minimum for a particular employee depends upon where he or she works, not where the company's head office is located. She also reviews the new New York City ordinance that prohibits employers from inquiring about an applicant's salary history—based on the premise that women, in particular, could be "locked in" to a pattern of wage inequality based on gender. Ms. Parella is the founder of the Parella Firm P.C., which focuses on counseling both employers and individuals in employment law matters, as well as Workplace Bullying Resources Inc., which provides training and counseling to combat workplace bullying.

Another regular feature of the *Journal* is "Inside the Courts," in which the attorneys of Skadden Arps provide a concise but exhaustive overview of significant corporate and securities litigation in the federal courts—in the current installment, from Class Actions to Whistleblowing. "Inside the Courts" is an invaluable tool for our readers, pulling together in one place a complete picture of what is happening in the courts at any time that is relevant for business practitioners. The editors remain indebted to our colleagues at Skadden for their continuing generosity in sharing their knowledge and expertise.

One of the truly gratifying aspects of editing the *Journal* is the opportunity to identify, and reward, exceptional work by law students. This May I was honored to present the 2016 winners of the annual Law Student Writing Competition at the Section's spring meeting: first prize to Caitlin Dance, a student at New York Law School, for her contribution "*In re Coinflip, Inc.*," which appeared in the Summer 2016 issue; and second prize to Lawrence Crane-Moscowitz, a student at Vanderbilt Law School, for "Except for All the Others: A Compromise Proposal for Correcting the Incentives of Credit Rating Agencies in the Wake of the Dodd-Frank Act." Our current issue is graced with two more outstanding student contributions, both of which are, of course, eligible for the 2017 Competition.

First up is Ms. Elena Dain, also a student at New York Law School, with a topic as timely as the headlines (see p. 40). In "The Department of Labor Fiduciary Rule," she analyzes in depth the background of the rule, the reason for its promulgation by the Obama Administration, and the controversy surrounding it in the Trump Administration. Historically, brokers in particular were able to avoid being held to a fiduciary standard for providing advice, since they did so only intermittently. But with the changeover in retirement accounts, from the traditional defined-benefit pension format to the defined-contribution approach of the 401(k) and the IRA account, the Obama Administration determined that it was now appropriate to hold brokers and others who advise on retirement accounts to be held to the higher fiduciary standard. The contrary argument is that the fiduciary standard will increase compliance costs, driving firms out of the business and consolidating the industry in a few large providers; there is some evidence of a trend in this direction. Ms. Dain's research is thorough, and her writing is clear, as she lays out the rationale for the Rule and its content, including the exemptions allowed under the Rule. She also carefully reviews and fairly presents the arguments of both proponents and opponents. She concludes that the Rule, while well-intentioned, in its current form "creates regulatory confusion and threatens financial professionals' ability to adequately serve" their customers.

If any topic in business law has received more attention than the Fiduciary Rule, it is cybersecurity. With the New York State Department of Financial Services (DFS) having promulgated a first-in-the-nation rule requiring all financial institutions and other businesses under its jurisdiction to meet stringent security standards, and with almost daily headlines about computer security breaches in retailing and other industries, it is incumbent on the business lawyer to stay abreast of developments in this critical area. In "Cybersecurity and Its Impact on the Financial Services Industry," Niyati Sangani, also a student at New York Law School, begins by reviewing the major cyber attacks on financial institutions in the past few years, including the NASDAQ Exchange, as well as numerous banks and other institutions. He then reaches back all the way to the U.S. Constitution to propose a remedy: the "letter of marque and reprisal," which effectively authorizes retaliation in the event of an attack—in the computer context, the so-called "hack

back." Along the way, in addition to the DFS rule he reviews all federal laws and regulations to date aimed at combating cyber attacks. His article is a provocative and well-researched guide to the state of the art in cybersecurity at present.

Concluding this issue is yet another hot topic, combining fiduciary and computer issues. In "Robo-Advisors: Regulation and Design Features for Risk Mitigation," Melvin Tjon Akon explores the issues that arise when long-standing law applying fiduciary standards to investment advisors is applied to "robo-advisors"—essentially, computer programs that allocate a client's investments based upon algorithms that automatically consider factors relevant to that investor's profile and investment objectives. After explaining how robo-advisors operate and the different business models that are used, Mr. Akon reviews the applicable law—the Investment Advisers Act of 1940 and the SEC rules thereunder. Since they also may direct the purchase and sale of securities, robo-advisers may also be considered brokers under the securities law. To date, the American regulators and their European counterparts have generally attempted to apply existing law to this new technology. Mr. Akon concludes by arguing for a risk-based approach for providers of robo-advisory services to address the regulatory requirements. With a JD equivalent degree from the University of Amsterdam, the Netherlands, and a Master's degree in law from the University of Chicago, Mr. Akon has recently moved to New York to establish his law practice, after having practiced law in the Netherlands and Luxembourg.

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