HeadNotes

The 2016 elections may presage a seismic shift for the regulatory environment affecting businesses and the attorneys who advise them. The election of Donald Trump as president, along with Republican majorities in the House and Senate, not to mention record Republican dominance of state legislatures and governorships, is widely anticipated to herald at least a slowdown, if not a rollback, in the regulatory burden on most businesses. At the same time, however, the waning days of the Obama Administration have seen a full-court press by the federal agencies to complete and implement rulemakings in a number of critical areas. While it is of course too early to assess the full impact of these developments, our contributors to this issue highlight some potentially key changes affecting employers, consumers, and financial institutions.

Meanwhile, New York remains firmly in the "blue state" column, and developments in State law and regulation continue to pose new challenges for the State's businesses and their attorneys. If anything, State initiatives in areas such as consumer protection are likely to be even more aggressive, to compensate for a perceived rollback of these protections at the federal level. In particular, the State's Department of Financial Services ("DFS"), which has jurisdiction over insurance and banking and other financial service entities chartered, licensed or supervised by the State, has shown little hesitation in recent years toward being out front, even in areas where federal authorities have traditionally taken the lead. Aside from aggressive enforcement actions for violations of law, the DFS has taken a prominent role over the past year in three areas:

- *Anti-Money Laundering*: early in the year the DFS promulgated a new Part 504 of the Superintendent's Regulations, which imposed substantially heightened standards on State-chartered or licensed banking entities, and non-banking entities such as check cashers and money transmitters, with respect to anti-money laundering (AML)—notwithstanding that the principal AML laws are federal and are enforced by the federal regulatory agencies. The new Part 504 imposes enhanced procedures for transaction monitoring and "filtering" and requires that each institution file a Board Resolution or a Certification prepared by a senior officer confirming compliance with the new requirements. As originally proposed Part 504 threatened criminal liability for the institution's chief compliance officer if it failed to comply; in response to comments filed by NYSBA's Banking Law Committee and others this was softened to the annual compliance certification requirement. Still, one effect may well be to make it more difficult for state-chartered institutions to hire or retain competent compliance officers. And since Part 504 does not apply to federally chartered banking institutions as a matter of basic federal preemption, it provides yet another disincentive for banks and other financial service companies to organize under New York State law.

- *Abandoned Property*: In June the State Legislature amended Sections 1301 and 1308 of the Real Property Actions and Proceedings Law, to impose on certain banks and other holders of first mortgage liens the responsibility to maintain vacant or abandoned one-to-four family properties. The purpose of the law is to expedite the rehabilitation and repair of "zombie" properties, to establish a registry of such properties, and to assist homeowners facing foreclosure. But in the view of the New York Bankers Association (NYBA) and others, the implementing regulations adopted by the DFS (Part 422 of the Superintendent's Regulations), which took effect December 20, 2016, go well beyond the requirements of the law itself. One effect, albeit unintended, may be to make residential mortgage credit less available, or more expensive, in the State. As noted by the NYBA in its comment letter, the problem of abandoned properties is exacerbated by New York's prohibitively difficult foreclosure procedures; on average, it takes more than three years for the process to be completed, as—unlike in most other states, but protected in New York by the trial lawyers—all foreclosures must go through the judicial system. NYBA notes further that New York had one of the lowest foreclosure rates in the country before the financial crisis; now, in part due to the length of the foreclosure process, it has one of the highest.
- *Cybersecurity*: In recognition of the increasing threat posed to New Yorkers by potential attacks on computer systems which hold their private information, in August the DFS proposed major new regulations imposing heightened cybersecurity requirements on essentially all entities within its extended reach. Numerous industry groups, including the Securities Industry and Financial Markets Association (SIFMA), the New York Bankers Association, and the Institute of International Bankers, have filed comment letters. Among other things, the commenters have indicated that some of the requirements are simply unworkable, are inconsis-

tent with other laws and regulatory requirements, are out of step with developing industry standards, and cannot in any event be implemented on the tight time frame the DFS has indicated—the regulation was to become effective January 1, 2017, albeit with a phase-in for its key provisions. But perhaps most tellingly, the DFS has defined the scope of the regulation's reach so broadly—essentially, it would apply to any entity that is in any way licensed or supervised by the DFS—that it would appear to have extraterritorial application to entities based in other states, or even other countries, that have operations in New York. As a practical matter, most companies' systems are integrated to an extent that it is not possible to isolate the New York operation from other jurisdictions, and an enterprise-wide approach clearly makes the most sense in any event. As this issue went to press, the DFS was still considering the comments it had received. In future issues we will continue to follow this critical issue closely.

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Apropos: probably the hottest single topic currently for businesses and their lawyers is the increasing prevalence of cybersecurity breaches and related crimes, including identity theft. Even as the New York DFS pursues its initiative, the federal banking regulators have also issued an Advance Notice of Proposed Rulemaking (ANPR) proposing enhanced standards for cyber risk management for large institutions—generally, those with $50 billion or more in assets—under their supervision. But attorneys for other businesses need to be alert to this as well; among other things, the ANPR seeks comments on whether these standards should be applied to third-party providers of services to these institutions, and indicates that the standards would be applicable to their subsidiaries (the comment period was scheduled to end on January 17, 2017). Our lead article in this issue, prepared by the attorneys of Debevoise & Plimpton, discusses the ANPR and its ramifications, and explains the five areas covered by the enhanced standards: cyber risk governance; cyber risk management; internal dependency management; external dependency management; and incident response, cyber resilience, and situational awareness. In addition, even higher standards would be imposed on those systems identified as "critical to the functioning of the financial sector."

The protection of confidential information is on the regulatory agenda of the federal Consumer Financial Protection Bureau (CFPB) as well. But in its usual high-handed way, the CFPB is now proposing changes to its rules that parties ranging from the American Civil Liberties Union to the U.S. Chamber of Commerce have decried as violating First Amendment protections on free speech. In "Information Asymmetry: The CFPB Proposes Changes to the Rules Governing Confidential Information," attorney Ori Lev discusses the proposed changes. The Bureau's current rules, modeled on those of the Federal Trade Commission (FTC), generally prohibit the CFPB itself from disclosing the existence of a Civil Investigative Demand (CID), in order to protect the target of a CID—which is not itself the finding of any wrongdoing—from potential adverse publicity. But now the Bureau proposes to change the rule—on the one hand, to give itself more leeway to disclose CIDs to other agencies, and on the other, to prohibit the recipient of the CID from voluntarily disclosing its existence to third parties. Mr. Lev, a partner in Mayer Brown's Financial Services Regulatory & Enforcement Group, notes that, apart from its apparent violation of the right of free speech under the Constitution, this change—for which the CFPB provides no explanation or justification—could preclude companies from disclosing the existence of a CID as a material event in filings with the Securities & Exchange Commission, or to a counterparty to a contract that may require such disclosure.

The Editor would note that the CFPB's high-handed approach does not come as a surprise to attorneys who have followed its activities to date. In a recent case, *PHH Corp. v. CFPB*, the D.C. Circuit invalidated its imposition of a penalty of $109 million on a captive mortgage re-insurer, for what amounted to a retroactive violation of the CFPB's interpretation of law based on activities that were permissible at the time under an earlier interpretation by the U.S. Department of Housing and Urban Development (HUD). Among other things, the court held that the CFPB's assertion that the law's statute of limitations did not apply to its administrative enforcement actions had no basis in law, and that its action violated fundamental principles of due process. But the court also pointed to the more basic underlying problem: the way the CFPB is structured under the Dodd-Frank Act, which created it, vests all its power in a single Director who is appointed by the president but—unlike Cabinet officers and other presidential appointments—cannot be removed at will. This has the effect of giving the CFPB Director free rein to do as he pleases with no checks and balances, making him the most powerful figure in the government other than the president. This, said the court, is unconstitutional. With the court having invalidated this part of the law, one may anticipate that the current Director, Richard Cordray, will be removed by the new president prior to the scheduled end of his five-year term in 2018. While the CFPB is unlikely to be abolished outright, proposed legislation in the Congress to amend the Dodd-Frank Act would restructure the agency by creating a five-person board, similar to the SEC, the Commodity Futures Trading Commission (CFTC), and other agencies. We will report on these developments in future issues.

Another area of law likely to undergo significant changes under the new Administration is employment law, particularly in regard to health care and retirement benefits. While it is obviously too early to have any certainty, pronouncements to date by Mr. Trump and his transition team are indicative of the likely direction the new Administration will take. In "Employee Benefits in the Trump Administration: What Can Employers Expect?" Professor David Pratt of Albany Law School provides a comprehensive overview of both state and likely federal changes in areas such as employer health plans, prescription drug costs, retirement benefits, paid sick leave programs, and other areas of vital concern. Noting that employers must plan despite the uncertainty surrounding the future of the Affordable Care Act (also known as "Obamacare"), Professor Pratt brings his considerable insights to bear on the likely direction and magnitude of the forthcoming changes. It is must reading for attorneys who are seeking to guide their business clients in what looks to be a turbulent period of change.

As always, employment law remains a principal area of concern for New York businesses and their attorneys. A regular feature of the *Journal*, highly valued by our readers, is "Recent Employment Laws Impacting Private Employers in New York," prepared by attorney Sharon Parella. In this issue Ms. Parella, a recognized expert on employment law and a member of the *Journal*'s Advisory Board, reports on the federal Defend Trade Secrets Act of 2016, pursuant to which employers may now pursue claims for misappropriation of trade secrets in federal district courts. This new law, however, contains various immunity provisions that generally protect employees who disclose trade secrets in connection with reporting suspected violations of law to government officials or commencing workplace retaliation lawsuits based on their having made such reports. It also limits the scope of damages available to employers who fail to notify their employees about the immunity provisions. It is evident that companies for which trade secret protection is important will be seeking advice on how to best respond to the new law. On the local front, the New York City Council has introduced a proposed bill to promote flexible working arrangements that would, among other things, require employers to make temporary schedule changes for employees in certain emergency situations and prohibit retaliation against employees who seek flexible working arrangements. In another development, the New York City Commission on Human Rights has released new Legal Enforcement Guidance concerning discrimination on the basis of pregnancy. And in cooperation with the State, the Commission also has announced comprehensive campaigns intended to eradicate discrimination and bias more generally. Ms. Parella is the founder of the Parella Firm P.C. and Workplace Bullying Resources, Inc., which provides training and counseling services aimed at preventing bullying behavior in the workplace.

Business lawyers in New York often include, in commercial agreements of many types, a standard "choice of law" provision calling for any disputes to be decided in accordance with the laws of New York. But as ever, the Law of Unanticipated Consequences is lurking in the shadow, ready to lay traps for the unwary. In "Standard New York Choice of Law Provisions May Apply Foreign Laws to Bar Claims," attorneys William J. Hine and Sevan Ogulluk illustrate how a plethora of confusing jurisprudence, applying New York's "borrowing statute," has resulted in, for example, the application of multiple statutes of limitation to the same claim depending upon the home jurisdiction of each party, even where it was clearly intended that the New York statute should apply. Furthermore, as the authors illustrate, it is not always easy, or even possible, to draft around this problem. Mr. Ogulluk is a partner and Mr. Hine is of counsel with Jones Day in New York City. Their article is timely and essential reading for all New York business lawyers.

Another feature of the *Journal* that is highly prized by our readers is the ongoing series on legal ethics topics by C. Evan Stewart, a partner in Cohen & Gresser. Never one to mince words, in his latest entry Mr. Stewart tells us that "The New York Court of Appeals Takes the Wrong Fork in the Road on the Common Interest Privilege." With his usual witty analogy to pop music of the baby boomer era—in this case, Lesley Gore's "It's My Party and I'll Cry if I Want To!" —Mr. Stewart sheds tears over the Court's failure to confirm his prediction that the Court would "get it right" on this important issue. Specifically, he focuses on the Court's decision in *Ambac Assurance Corp. v. Countrywide Home Loans*, a case resulting from the 2008-9 financial crisis, during which Countrywide failed and was acquired by Bank of America. Before they merged, the Bank and Countrywide entities entered into a "common interest agreement," enabling them to share legal advice to facilitate compliance with the many complex legal and regulatory issues involved. The courts have recognized the "common interest privilege" as an exception to the basic rule that the attorney-client privilege is waived when the attorney's advice is shared with a third party. Reversing the lower court, the Appellate Division, First Department held that the common interest privilege applied to documents produced by the Bank. But in June 2016, the Court of Appeals reversed, holding that the privilege did not apply. In his usual clear and cogent fashion, Mr. Stewart explains the significance of the Court's ruling. As reported in our previous issue, Mr. Stewart, a member of the *Journal*'s Editorial Board, is the recipient of the NYSBA's prestigious Sanford D. Levy Award, given annually by the NYSBA's Committee on Legal Ethics to an individual or institution that contributes significantly to the advancement of legal ethics. The editors are especially proud that the Committee cited Mr. Stewart's contributions to the *Journal* as a prime factor in his selection.

The common interest privilege is not the only aspect of the attorney-client privilege that has been before the New York courts in 2016. In "Attorney-Client Privilege Update," Professor Michael J. Hutter of Albany Law School reviews three significant decisions in this area. First, he offers his take on the *Ambac* decision of the Court of Appeals, discussed in depth in Mr. Stewart's article. Second, he discusses the First Department decision in *NAMA Holdings, LLC v. Greenberg Traurig, LLP*, which concerned the "fiduciary" exception to the privilege. Under the fiduciary exception, communications between a trust's trustee and his attorney cannot be withheld from the trust's beneficiaries in a case involving breach of fiduciary duty, since they are the real party in interest. The question in the case was whether this exception applies in the context of shareholder litigation. And third, he discusses another First Department case, *Stock v. Schnader Harrison Segal & Lewis*, which dealt with the applicability of the privilege to intra-firm communications. Professor Hutter writes a regular column on matters of legal ethics for the *New York Law Journal*.

Another invaluable ongoing feature of the *Journal* is "Inside the Courts." Prepared by the attorneys of Skadden Arps, "Inside the Courts" is a comprehensive review of all significant securities-related litigation pending before the federal courts. The latest installment deals with matters ranging from class actions through statute of limitations and tolling issues, and includes a thoughtful analysis of *PHH Corp. v. CFPB*, which we discussed above. The editors remain grateful to Skadden and its attorneys for their great generosity in sharing their knowledge and expertise with our readers.

Providing a fitting capstone to this issue—and completing a triptych of excellent contributions from the faculty of Albany Law School, which sponsors and supports our *Journal*—is the *Journal*'s Managing Editor, Albany Law Professor James Redwood. In "A Hyphen! A Hyphen! My Kingdom for a Hyphen!" Professor Redwood illustrates how, in a case involving judicial dissolution of a closely held New York corporation, the omission of a hyphen in the plaintiff's complaint apparently led the Court to a remedy that was not in the contemplation of the plaintiff. Paraphrasing the famous line from Shakespeare, "A horse! A horse! My kingdom for a horse!" (Richard III), Professor Redwood makes the larger point: in the increasing complexity of modern legal practice, even minor carelessness in drafting can have major consequences. Or to expand the metaphor with the old proverb: "For want of a nail, the shoe was lost . . ."

David L. Glass