HeadNotes

As this issue was going to press it appeared that significant progress was finally being made on President Trump's stated agenda of tax reform and reduced regulatory burden. The Senate has passed its tax reform package by the narrowest of margins, with all 48 Democrats and one Republican voting against. Earlier the House passed a package, also along strict party lines. Both would reduce the basic corporate tax rate from 35 to 20 percent. But the two bills differ significantly in a number of areas, including controversial proposals to limit or eliminate the deductibility of state and local taxes and mortgage interest—changes that could dramatically affect individual taxpayers and the housing markets in blue states. Thus, while it seems likely that tax reform will be enacted, the exact form it will take was not clear.

On the financial regulatory front, it appears that a bipartisan consensus has emerged in the Senate regarding a package of reforms to the Dodd-Frank Act, the 2010 law passed in the wake of the financial crisis—something of a minor miracle, the words "bipartisan" and "consensus" having been largely banished from the vocabulary in Washington in recent years. The reforms mainly benefit smaller community banks, but also provide some relief for larger institutions. The House earlier had passed a more far-reaching package, the Financial CHOICE Act; however, that version was generally considered dead on arrival in the Senate, as it was aimed, among other things, at reducing the power of the Consumer Financial Protection Bureau (CFPB). The CHOICE Act would have made the CFPB subject to a governing board, similar to the Securities and 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. The Senate bill does not address the CFPB.

Meanwhile, fulfilling its mandate under an Executive Order signed by President Trump in February, the Treasury Department has been releasing a series of reports outlining and advocating reforms in various aspects of the markets, aimed at enhancing growth and reducing regulatory burden. The first three reports dealt with banks and credit unions, capital markets, and the insurance and asset management industries. The fourth report, due in December, will address financial technology (fintech). The reports issued to date generally have been moderate and balanced in tone; however, they do contain a large number of recommended changes, some of which can be implemented by regulators but others that would require legislation.

In a closely watched case with major implications for the power of the CFPB, the D.C. Circuit in May reheard *en banc* the case of *PHH Corporation v. Consumer Financial Protection Bureau*. 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. In arguing that the retroactive application of the new interpretation was invalid, the plaintiff also contended 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*. Oral arguments were heard on May 24, and a decision is still pending at this writing. Just before press time CFPB Director Richard Cordray resigned, reportedly to run for Governor of Ohio in 2018, and appointed his hand-picked deputy to replace him. But President Trump promptly appointed Budget Director Mick Mulvaney, who in the past has stated his opposition to the CFPB, to the post, creating an anomaly whereby two people showed up for work for the same job on the same day. A federal court promptly affirmed the President's right to fill the job. But the "red-blue" controversy around the agency continues to swirl.

David L. Glass

Another area of law that has been subject to bitter partisan 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. As it did in other areas of controversy, the Dodd-Frank Act kicked the can down the road by not resolving the issue, but instead instructing the CFPB to evaluate the widespread use of mandatory arbitration clauses in consumer financial contracts, most notably in the credit card area. This summer the CFPB finalized a controversial rule proposed a year earlier, which would prohibit mandatory arbitration clauses—but only to the extent they prohibit the consumer from participating in a class action lawsuit. But the House during the summer, and the Senate in October, voted to block implementation of the rule, and President Trump promptly signed the joint resolution of the two Houses.

Leading off this issue, Joseph Neuhaus and Thomas Walsh discuss the CFPB's arbitration rule, what it was intended to accomplish and the mechanism by which it was defeated. In "Senate Votes to Overturn CFPB Arbitration Rule," the authors explain that the Congressional Review Act enables Congress to overturn agency rules with which it disagrees by adopting a joint resolution of both Houses, which is then approved by the Senate (by a filibuster-proof simple majority) and signed by the President. The authors provide the background for the rule—its statutory authorization and the process, much criticized by the Republicans, by which it determined that rule-making was needed. With the demise of the rule and the Republicans in control of the government, the ability of financial firms to continue to use mandatory arbitration rules in consumer agreements appears unimpeded. Messrs. Neuhaus and Walsh are a partner and special counsel with Sullivan & Cromwell in New York; Mr. Neuhaus coordinates the firm's arbitration practice.

Next up is some practical and timely advice for New York attorneys who advise on business formations. As business lawyers know, unlike a corporation or an LLC a partnership can result from the acts and intentions of the parties, even without any effort to establish a formal agreement or reduce it to writing. In "Recent Trends in New York Partnership Law—Written, Oral and Implied Partnerships, Fiduciary Duties, and Remedies," Gerard Mantese and Emily Fields outline the factors cited by New York courts in determining whether the acts and intentions of the parties actually do give rise to a partnership. The article begins by quoting a scene from the movie "The Social Network," based on the founding of Facebook, in which Mark Zuckerberg orally commits to partner with several fellow students to create the new website—or does he? Mr. Mantese is the CEO and Ms. Fields is an associate at the firm Mantese Honigman, PC, with offices in New York, Michigan and Missouri.

Another practical concern for attorneys advising businesses is the potential environmental liability a business might incur when it acquires another company or its assets. In "Top Ten Environmental Due Diligence Considerations for Acquiring Companies, Assets, and Real Property Interests," Christine Fazio, Christopher Rizzo, and Julie Weisman provide a useful and timely checklist for the basic considerations any lawyer should take into account to assure that her client has not overlooked the environmental risks inherent in any acquisition. In addition to recommending a comprehensive environmental review, the authors note the importance of being aware of potential new rule-makings by the Environmental Protection Agency (EPA). Ms. Fazio is managing partner and with Mr. Rizzo is a co-head of the Environmental Practice group at Carter, Ledyard & Millburn in New York; Ms. Weisman is counsel with the firm.

In the *Upjohn* case in 1980, the Supreme Court held that the attorney-client privilege does apply in the corporate context; but as applied to internal investigations the privilege continues to be a source of confusion and vexation, for business practitioners as well as their clients. In "Mad Dogs and Englishmen (Part Deux)," the *Journal's* ethics guru, Evan Stewart, tells us that the situation may be even more confusing across the pond. Reprising an earlier article on this subject, Mr. Stewart discusses how two recent English cases have laid new traps for the unwary international practitioner. In his inimitable style, as always he displays his erudition in the area of '60s popular music, while offering several suggestions (emphasizing that they are only suggestions) on how to approach internal corporate investigations where English courts may be involved. 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.

Employment is an area of law that is in continuous dynamic change and that affects every business in New York. For this reason, "Employment Law Update," a regular feature of the *Journal*, is required reading for business practitioners. In our latest installment David Douglas and Pamela Gallagher address new legislation enacted by New York City and New York State, respectively, both of which may significantly impact the employment practices of private employers. In "New York City Shakes Up the Freelance Sector," Mr. Douglas discusses the City's first-in-the-nation ordinance, the Freelance Isn't Free Act, which was enacted last May. The new law mandates that any agreement with an independent contractor calling for compensation of $800 or more must be in writing, and imposes additional requirements with respect to payment and other matters. Any employer inside the City, and any employer elsewhere who might retain a City-based independent contractor, will need to be aware of and comply with the law, which gives remedies to the freelancer and allows the Corporation Counsel to impose civil money penalties in certain circumstances. In "New Regulations Clarify NY's Upcoming Paid Family Leave Benefits Act," Ms. Gallagher discusses the regulations implemented by the New York Workers' Compensation Board to implement the Act, which takes effect January 1, 2018. The law applies to virtually all New York employees, full or part time, and mandates the provision of paid family leave on a schedule that depends on a number of factors. All New York employers and their counsel would be well advised to closely review the regulations with respect to their own employment situations. Mr. Douglas is a partner in the New York firm Gallet, Dreyer & Berkey; Ms. Gallagher is an associate with the firm and is a current member of the NYSBA's House of Delegates.

No issue of the *Journal* would be complete without "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 Representation to Statute of Limitations. Among the featured cases are recent decisions relating to insider trading, liability for securities fraud, and pleading requirements for securities fraud cases. "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.

An area of ongoing tension for financial firms and their counsel is the interplay of anti-money laundering (AML) requirements, which mandate that financial institutions closely monitor transactions by their customers and report on those that appear suspicious, and a customer's expectation of privacy in his or her financial records. The reconciliation of AML and privacy becomes even more complex in the international context, due to differing standards and expectations in different jurisdictions. In "Anti-Money Laundering and Privacy: Are They Interrelated or in Conflict?" Davide Szep compares and contrasts how these laws are applied in the U.S. and the European Union. In the seminal U.S. case of *California Bankers v. Schultz*, decided in 1970, the Supreme Court held that the bank was the owner of customer records in its possession and, therefore, there was no expectation of customer privacy in those records. The decision paved the way for the subsequent expansion of AML regulations. But there are differing, and overlapping, privacy requirements under state law, including some embedded in state constitutions. In the EU context, the first AML Directive was issued in 1991 and has subsequently been expanded; but recently data protection concerns have come to the fore. Mr. Szep, a 2017 cum laude graduate of Fordham Law School, explains the differing approaches, and discusses efforts by the Financial Action Task Force (FATF), an international body concerned with AML enforcement, to harmonize and reconcile them.

The spectacular increase in value of bitcoin and other virtual currencies in the past year has attracted the attention of not only investors, but also regulators concerned by overheated speculation in these markets. In "LabCFTC Primer: The CFTC's Views on Regulation of Virtual Currencies," Byungkwon Lim and Gary Murphy discuss the CFTC's efforts to regulate virtual currencies. The key points are that the CFTC has determined that these currencies are commodities—as with other commodities, it does not regulate cash or spot trades—and that various trading platforms are subject to regulation as swap exchanges (one such exchange, Coinflip, was the subject of an article in the *Journal's* Summer 2016 issue). "LabCFTC" refers to an initiative launched by the CFTC in May 2017 to serve as the focal point for its consideration of issues related to financial technology, or "fintech," pursuant to which the agency has published an online Primer (while emphasizing that the Primer is an educational tool and not intended as an official statement of CFTC policy). Messrs. Lim and Murphy are partner and counsel, respectively, with Debevoise & Plimpton; Mr. Lim leads the firm's Hedge Funds and Derivatives & Structured Finance Groups.

Beginning with the Sarbanes-Oxley Act enacted in the wake of the Enron failure in 2002 and extending through the 2008 financial crisis and beyond, the Securities and Exchange Commission (SEC) has increasingly relied on whistleblowers to unveil corporate wrongdoing and enforce the securities laws. The Dodd-Frank Act of 2010 extended the same authority to the Commodity Futures Trading Commission (CFTC), which finalized its rules earlier in 2017. Both laws provide protection to whistleblowers against retaliation, and both agencies obviously have a vested interest in rewarding whistleblowers and in protecting them from retaliation. Our next two articles deal with two different aspects of this issue.

In "What Is the Impact of the Recent Ninth Circuit Case of *Paul Somers v. Digital Realty Trust, Inc.* on Dodd-Frank's Anti-Retaliation Provision Involving Whistleblowers?" Ronald Filler reviews and discusses a recent case in the context of earlier litigation surrounding whistleblower protection. In the *Somers* case, the plaintiff pursued his complaint not with the SEC, but internally with the company. Eventually he was dismissed, and he sued alleging violation of, among other laws, the provision of the Securities Exchange Act of 1934, added by Sarbanes-Oxley, that protected whistleblowers. Professor Filler explains the significance of the court's holding that the whistleblower protection applies in this context, as well as when the whistleblower goes directly to the SEC. Professor Filler is Director of the Financial Services Law Institute at New York Law School and a member of the *Journal's* Advisory Board.

In "The Supreme Court's Dodd-Frank Dilemma: Should Internal Whistleblowers Be Protected?" Grace Nealon provides a more comprehensive overview of the question regarding the reporting requirements that must be met for a person to receive whistleblower protection. Ms. Nealon reviews the case law in different federal circuits, noting that while the Ninth Circuit *Somers* case followed precedent in the Second Circuit that whistleblower protection extends to an internal whistleblower, a Fifth Circuit decision followed more literally the definition of the term "whistleblower" in the Act, holding that it did not apply unless disclosure had been made to the SEC. The resulting "circuit split" is, of course, a classic reason for the Supreme Court to review a case, and it in fact granted *certiorari* in the *Somers* case. So the status of whistleblowers is up in the air: both politically, as Professor Filler questions whether the SEC will be as vigorous in encouraging and defending whistleblowers in the Trump Administration, and legally, pending the outcome of the *Somers* case in the Supreme Court. Ms. Nealon is a third year law student at Albany Law School

Concluding this issue is a review of the newly published fourth edition of the treatise *Business and Commercial Litigation in Federal Courts* by John McCahey, a partner at Hahn & Hessen LLP in New York City and a member of the Business Law Section. Originally conceived by Robert L. Haig, a partner of Kelley Drye & Warren who serves as its Editor, the treatise is now a joint venture between Thomson Reuters and the American Bar Association's Section of Litigation. Since the first edition it has expanded dramatically in size and scope, with articles on substantive areas of law by some 296 different authors, as well as detailed procedural guides for practitioners.