HeadNotes

As this issue was going to press, President Trump had just imposed a new round of tariffs on some $50 billion of goods from China, and predictably China promptly retaliated, unsettling the markets. But while controversy swirls around the Administration in this and a number of other areas related to business and economics, to date Mr. Trump's appointments to head the bank regulatory agencies have been remarkably non-controversial, as they have been generally perceived as qualified and moderate in terms of their policy views. While he chose not to reappoint Janet Yellen to another four-year term as Chair of the Board of Governors of the Federal Reserve when her term expired in January, Mr. Trump's selection of sitting Governor Jerome Powell was widely praised and greeted favorably by the markets. Mr. Powell, an attorney, is a moderate Republican who was appointed to the Board by President Obama in 2012 and, in his tenure on the Board to date, has been supportive of Ms. Yellen's monetary policy. Mr. Trump also appointed Randal Quarles, a moderate Republican and veteran of the Treasury Department, to the Board as Vice Chair in charge of bank supervision. As we went to press two other appointees, Columbia Professor Richard Clarida and Kansas bank commissioner Michelle Bowman, had been cleared by the Senate Banking Committee and appeared headed for approval by the full Senate. Mr. Clarida, an economist respected by both Republicans and Democrats, is seen as complementing Mr. Powell's lack of a doctorate in economics. As Vice Chair, he would preside over the Board in Mr. Powell's absence. Another Trump nominee, Marvin Goodfriend, has encountered significant resistance – both from the Democrats, who remain unanimously opposed, and from Senator Rand Paul (R-KY). As this issue went to press, his appointment was in doubt.

Previously Mr. Trump appointed Richard Otting, a career banker, as Comptroller of the Currency (in which capacity he oversees the national bank system, including nearly all of the nation's largest banks); Mr. Otting was confirmed by the Senate in November. And on May 24 the Senate approved, 69 to 31, the nomination of Jelena McWilliams, chief legal officer of Fifth Third Bancorp in Cincinnati and a former member of the staff of Senator Mike Crapo (R-ID), chair of the Senate Banking Committee, to head the Federal Deposit Insurance Corporation (FDIC). Ms. McWilliams replaces Obama appointee Martin Gruenberg, who has generally been resisting attempts to roll back provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") favored by the other regulators.

In particular, Mr. Gruenberg has opposed any weakening of the eponymous "Volcker Rule," named for former Fed Chairman Paul Volcker, which is aimed at preventing banks from engaging in speculative trading for their own accounts, as distinguished from trading on behalf of customers. The Volcker Rule is simple enough to state in principle; but as implemented by the regulators, the final Rule comprises 297 pages of three-column fine print in the Federal Register, imposing substantial compliance costs and burdens even on smaller banks that were not to blame in causing the global financial crisis. Part of the reason for the complexity of the final Rule is that with five regulators responsible for its drafting and implementation—the three bank regulators, plus the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) —the final Rule is the proverbial "horse designed by a committee." Nonetheless, Mr. Gruenberg had remained steadfast in his opposition to reforming the Rule, and as a general matter it is unusual for a major change in bank regulatory policy to move forward unless the Fed, OCC, and FDIC all agree. So it is not a coincidence that, just one week after Ms. McWilliams was confirmed, the three bank regulators, along with the SEC and CFTC, published for comment a proposal to reform the Volcker Rule, mainly aimed at easing the compliance burden for smaller banks.

David L. Glass

And the same day Ms. McWilliams' nomination was confirmed by the Senate, President Trump signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act, a bipartisan measure that provides some welcome relief from Dodd-Frank, especially for small community banks. Predictably, the Democratic left has portrayed the new law as a rollback of critical provisions necessary to protect "Main Street" from the presumed depredations of "Wall Street" but the reality is more nuanced. In our lead article, "Banking Regulation: The Pendulum Swings Back (Slowly)," David L. Glass discusses both the new law and some of the other significant reductions in regulatory burden that have been proposed. Mr. Glass, who serves as editor in chief of the *Journal*, is a Division Director in the Risk Management Group of Australia's Macquarie Group Ltd. and special counsel to Hinman, Howard & Kattell, Binghamton.

One of the principal rewards of serving as editor in chief has been the opportunity to identify and promote talented law students through the Annual Student Writing Competition. And that satisfaction is that much greater when one's own student achieves this recognition. In "Too Big for the CRA: Why Benefit Corporations Provide a Better Legal Framework for Banks to Serve Their Communities," adapted from a paper submitted in

the Banking Law course at Pace University's Elizabeth Haub School of Law taught by the editor, Monica Lindsay makes the case for a new and different approach to enable banks and thrift institutions to serve their local communities, as required under federal (and, in New York and certain other states, state) law. The Community Reinvestment Act (CRA), a federal law dating back to 1978, mandates that all banking institutions that take deposits insured by the FDIC serve their local communities by making mortgage and small business loans or by providing other services. Banks have long complained that CRA takes a "one size fits all" approach and is really about paperwork— "proving" a bank is actually serving its community, rather than taking innovative approaches to doing so. The benefit corporation, or "B-Corp," is a comparatively recent development, dating from 2007, whereby a company can organize under a charter under state law that explicitly recognizes that it has a fiduciary duty to broader constituencies than just shareholders. Thus, a bank that organizes as a B-Corp under state law has a freer hand to pursue strategies that will maximize its service to its community. Thoroughly researched and well-reasoned, Ms. Lindsay's article provides a clear and concise discussion of B-Corps and CRA, and a compelling argument on how the B-Corp structure can be used to enable a bank to fulfill its statutory obligations under CRA. Ms. Lindsay is a candidate for the JD degree at Pace University's Elizabeth Haub School of Law.

Perhaps the dominant issue for businesses and their attorneys today is cybersecurity—certainly there are few areas that pose greater risks, not only in terms of reputation and financial loss, but also to a firm's ability to continue in business. The massive Equifax breach last fall, potentially compromising the financial privacy of more than 150 million people, is just one graphic example. To date, regulatory responses to the potential for cyberattacks have been sporadic and not well coordinated. In "Cybersecurity Guidance With No Teeth: SEC Recommendations Alone Are Not Enough to Protect Investors," Melanie Lupsa addresses one such regulatory response—recent guidance by the Securities and Exchange Commission (SEC) aimed at protecting investors in publicly traded companies by enhancing disclosure requirements regarding a company's cybersecurity exposure. The objective of the guidance is to provide greater transparency regarding the SEC's expectations of the disclosures that are required in filings submitted by public companies. While the new guidelines expand upon previous guidance released in 2011, Ms. Lupsa, a candidate for the J.D. degree from Seton Hall Law School and an editor of its *Law Review*, argues that they are inadequate in relation to the actual risks presented. She notes that 48 of the 50 states, as well as foreign jurisdictions such as the European Union, have imposed requirements that are more stringent and more effective. Her article includes an analysis of the Equifax breach, and is well worth the attention of attorneys who advise public companies—as well as those who recognize the need to stay abreast of developments in this critical area.

Another area of rising importance to publicly held companies and their attorneys is the increasing activism of shareholders, particularly with respect to the environmental, social and governance (ESG) aspects of corporate behavior. In "Review and Analysis of 2017 Shareholder Activism," Melissa Sawyer and Marc Trevino present a comprehensive and exhaustive analysis of developments in this area in 2017. Beginning with an analysis of the institutional and other activist investors behind these developments, they then review the size and nature of target companies; types and objectives of activist campaigns; proxy contests; settlement agreements; and other activism developments. They conclude with suggested measures that a company should take in anticipation of activist campaigns. Ms. Sawyer and Mr. Trevino are partners in Sullivan & Cromwell; we are indebted to them and the firm for their generosity in sharing with us this extraordinarily valuable and insightful research.

"What happens if the attorney's work product is rendered orally, rather than in writing? Is the protection lost?"

And speaking of generosity, the attorneys of Skadden Arps have once more shared with our readers their incomparable "Inside the Courts," a compendium of substantially all significant litigation currently in the federal courts that affects or could affect the practice of corporate and securities law. For each such case they have provided a thorough, yet concise, description of the issues involved and their significance. Whether or not one is a litigator, "Inside the Courts" is an invaluable heads-up of trends and new developments in these rapidly changing areas of law.

The attorney work product doctrine essentially protects an attorney's written advice to her client, especially in the litigation context, from disclosure to the other side. As noted by our ethics guru, Evan Stewart, its purpose is to prevent a litigant from gaining an advantage "on wits borrowed from the adversary," and to avoid "discourag[ing] companies from seeking legal advice and candidly disclosing that information to independent auditors." But what happens if the attorney's work product is rendered orally, rather than in writing? Is the protection lost? In "Mom (as Always) Was Right: Don't Talk to Strangers," Mr. Stewart discusses the recent case of *SEC v. Herrera*, in which General Cable Corporation (GCC)

had retained a law firm to investigate suspicious doings at an overseas affiliate. The law firm disclosed its investigation to the Securities and Exchange Commission (SEC), which then launched its own investigation. The law firm cooperated with the SEC by giving it an "oral download" of its witness interviews. But in so doing, did it waive the attorney work product doctrine—which generally protects documents, not oral statements? In his usual clear and entertaining fashion, Mr. Stewart, a partner of Cohen and Gresser in New York, puts the resolution of the case in the context of existing precedent. Along the way, he entertains us with his usual erudition regarding popular music—footnote 3, in particular, is a *tour de force* well worth the reader's attention.

The past year has witnessed a sea change in the treatment of sexual harassment in the workplace. As women—and in some cases, men—have felt increasingly empowered to come forward and the #MeToo movement has gained momentum, powerful men in every field of endeavor are being held to account for behavior ranging from the inappropriate to the outright abusive. For businesses of all types, preventing sexual harassment and dealing with victims and perpetrators have emerged as one of the most critical challenges in employment law.

Concluding this issue, in "Strategies for Preventing Sexual Harassment," Jeffrey S. Klein, Nicholas J. Pappas, and Larisa K. Ramsini, attorneys with Weil Gotshal in New York, provide useful and practical guidance to businesses and their attorneys regarding measures they can take to minimize the occurrence of sexual harassment. They note that the starting point is a "loud and clear statement from senior leadership" articulating the employer's commitment to respecting the rights of all employees. But "tone at the top" is only the starting point.

The firm should adopt fact-gathering methods suited to its size and business model, including, for example, establishing focus groups to get input from employees and assess whether existing reporting channels are adequate. They caution against pitfalls, such as having a double standard for higher performers or the "Graham Rule," which states that a man should never be alone in a room with a woman, even for legitimate business reasons, since this can deprive women of mentoring opportunities and create a culture of distrust.

As recent well-publicized cases have shown, with respect to sexual harassment an ounce of prevention is indeed worth a pound of cure—and then some.

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