HeadNotes

As this issue went to press, the markets were being roiled by uncertainty over whether the latest saber-rattling between China and the Trump Administration was, or was not, the precursor to a full-fledged trade war. One area in which the Administration clearly does seem determined to move forward is in imposing export controls on emerging technologies. In November the Commerce Department published an Advance Notice of Proposed Rulemaking (ANPR) pursuant to the Export Control Reform Act of 2018 (ECRA), asking for public comment regarding which technologies should be included. Companies, and their attorneys, that may be affected should be gathering data on the effect they would feel from controls on sectors likely to be targeted, such as biotechnology, artificial intelligence, advanced materials, and computer processing. They should also be mindful of new regulations from the Committee on Foreign Investment in the United States (CFIUS) that require high technology businesses to declare certain foreign investments in these areas before the investment is made.

While controversy continues to surround many actions of the Administration, to date President Trump's appointments to the Federal Reserve Board of Governors and other bank regulatory agencies remain relatively non-controversial. In October the president nominated Nellie Liang to the remaining vacancy on the seven-person Board; if she is confirmed the Board would be fully staffed for the first time in more than 20 years, as both parties have systematically blocked appointments by the other party's president during that time. Ms. Liang is a career Fed staff member who holds a Ph.D in Economics, worked closely with former Fed Chair Ben Bernanke during the global financial crisis, and is considered a leading authority on stress-testing, which has been a major focus of the Fed in enhancing its supervision over the largest banking organizations. She is also a Democrat, and would be the first Asian and only the tenth woman to sit on the Board. The appointment has been widely praised on both sides and appears headed for confirmation.

Meanwhile, a lawsuit filed in the Southern District of New York in August represents a potential threat to the Fed's conduct of monetary policy. In *TNB USA Inc. v. Federal Reserve Bank of New York*, the plaintiff, a newly state-chartered bank based in Connecticut, is challenging the Fed's refusal to open for it a Master Account, without which the bank cannot participate in the payments system. The bank does not propose to take deposits or deal with the public; its business model consists entirely of holding reserves with the Fed on behalf of its customers, large financial institutions, earning interest at the Fed's Interest on Excess Reserves (IOER) rate, while paying its customers a slightly lower rate—in effect, arbitraging the gap between the IOER and the federal funds rate. Apparently fearful that this would compromise the Fed's ability to conduct monetary policy by "targeting" the federal funds rate—the rate charged by large banks for overnight loans to each other, transacted on the books of the Fed—the Fed cited policy reasons in denying it from establishing an account. But under applicable law, it appears, and the bank so argues, that the Fed must grant it such an account, since it holds a valid charter as a bank. We will be following the case closely as it develops.

David L. Glass

Digital currencies continue to be an area in which the law is developing rapidly, as both federal and state regulators grapple with the question of how transactions in such currencies should be regulated. The *Journal* has tracked these developments in recent issues by publishing articles from a number of practitioners and scholars, and this issue is no exception. In "The SEC Goes After Cryptocurrency Issuers for Selling Unregistered Securities: *Howey* Doing?" Professor James Redwood discusses and analyzes two recent Securities & Exchange Commission (SEC) enforcement actions in which the Commission concludes that they are securities, in addition to two recent federal cases addressing this question. In 2017 the SEC fired several "shots across the bow," alerting issuers that it was looking at these currencies to see if they might be "securities" subject to registration and regulation under the Securities Act of 1933, which defines the term "security" to include any "investment contract." Noting that in the seminal case of *SEC v. Howey*, decided in 1946, the Court defined the term "investment contract" to be a "flexible rather than static principle," Professor Redwood expresses the view that the SEC's interpretation is likely to be upheld. His article provides considerable insight into the SEC's thinking, as well as a useful refresher of the underlying law. Professor Redwood, who teaches at Albany Law School, also has long served as the managing editor of the *Journal*.

Another area of recent regulatory controversy is the proposal by the Office of the Comptroller of the Currency (OCC), an office within the Treasury Department responsible for chartering and supervising national banks, to issue a limited national bank charter to financial technology, or so-called "fintech," companies. New York and other states have sued the OCC, contending that its proposal to grant such a charter exceeds its authority under law. Meanwhile, in July the Treasury Department released a comprehensive Report on fintechs, nonbank financial companies more generally, and innovation in financial services, the fourth report issued by the Department in response to President Trump's executive order of February 2016, which set forth certain core principles for the overhaul of the financial system. In "If Only: U.S. Treasury Department Report Creates a Wish Tree of Financial Reform for Fintech," the attorneys of Mayer Brown provide a thorough and comprehensive analysis of the Report, evaluating its recommendations with respect to digital communications, cloud technology, data aggregation and numerous other areas in which the traditional role of the banking system is being challenged by nonbank competitors. It is an invaluable resource for practitioners seeking to understand the changes that may be forthcoming in this fast-moving area.

Commercial contracts routinely contain a so-called *force majeure* clause, which purports to excuse performance for events beyond the control of the parties, such as an earthquake or other "Act of God." In "*Force Majeure*: What Is It Good For?" Stuart Newman and Allison Rosenzweig conclude that the answer is "not much," noting that *force majeure* clauses "are routinely assigned to the scrap-heap of boilerplate at the tail end of an otherwise well-crafted contract." The authors argue that a more carefully drafted clause can also cover a wide variety of less drastic, but potentially just as damaging, circumstances. The problem is, of course, that specifying too many circumstances that constitute *force majeure* runs the risk of creating an inference that those not specifically named are excluded. Their article contains much useful and practical advice for New York attorneys, including drafting tips. As of January 1, 2019, Mr. Newman and Ms. Rosenzweig have joined the multistate law firm Offit Kurman. Mr. Newman is the founder of the *Journal* and serves as Chair Emeritus of its Advisory Board. We are pleased to announce that, in recognition of these and other contributions to the Business Law Section, the Section has awarded him the David Caplan Memorial Award for 2019 for distinguished service to the Section.

The attorney-client privilege continues to be a source of ongoing confusion among practitioners. One manifestation of that confusion is the question whether, and when, an attorney may "rat out" (i.e., act as a whistleblower) with respect to an act of his client. For example, if the client is about to offer a potentially harmful product, and dismisses its attorney for arguing against that action, may the attorney report this to a regulatory authority without violating the privilege? In "Lawyers as Rats: An Evolving Paradigm?" Evan Stewart, the *Journal's* ethics guru, reviews this and related questions with his usual unique mixture of wit and erudition. While noting that different states have reached different results, he cautions that the New York courts have not been at all friendly to attorneys "ratting out" their clients—and indeed have expressed the view that it would take an act of the legislature to authorize this.

The "rat out" problem highlighted by Mr. Stewart is, of course, just one in a panoply of problems related to the attorney-client privilege, especially as it applies to in-house counsel. While there is no doubt that communications between a corporation and its in-house counsel are entitled to the privilege, this is only true if the attorney is communicating in her capacity as an attorney, rather than, say, rendering business advice. But the line is not easy to draw in practice. In "The Attorney-Client Privilege and Communications Between Company Employees and Their In-House Counsel," Professor Michael Hutter reexamines this question in light of *SodexoMAGIC, LLC v. Drexel University*, a recently decided case that considered whether certain emails between a company's employee and its in-house counsel were properly withheld from disclosure on grounds of attorney-client privilege. In the course of deciding whether these were business or legal communications, the court laid out a series of "ground rules" that provide guidance for future applicability of the privilege in similar circumstances; although the case was decided under Pennsylvania law, the author notes that New York law is essentially the same on this issue. Professor Hutter teaches at Albany Law School, and has contributed to the *Journal* in the past.

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No issue of the *Journal* would be complete without "Inside the Courts," in which the attorneys of Skadden Arps share with our readers their incomparable 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. We remain indebted to Skadden and its attorneys for sharing their knowledge and insight so generously with our readers.

It is a cliché that business decisions should never be driven solely by tax considerations, but in the real world, tax considerations inevitably loom large in how transactions are structured, and whether they are economically viable in the first place. Our next two articles explore different aspects of the tax law and how they affect business planning. In "Ten Reasons to Prefer Tax Partnerships Over S-Corporations," Professor Bradley Borden reconsiders the relative merits of two types of business organization from a tax standpoint. The S-Corporation is a popular form, as it is relatively easy to create and is taxed on a pass-through basis rather than at the entity level. But especially since the enactment of the Tax Cuts and Jobs Act of 2017, this form has certain pitfalls. The author lays out ten clearly explained, practical reasons why an S-Corporation may not be the optimum choice in all circumstances. Professor Borden is a professor of law at Brooklyn Law School and the author of numerous books and articles on various aspects of taxation.

The second article deals with the federal estate and gift tax, or "death tax" as it is sometimes called. In "The Trump Family's Wealth Transfer," Greg Kiley begins by explaining the origins of the federal tax and its evolution over the years, noting that the tax has always been politically controversial, notwithstanding that at the current cutoff of $11.8 million it actually affects only about 1,800 estates per year. He then lays out in detail, based on the public record, how the parents of Donald Trump used various tax-avoidance strategies to increase their wealth—emphasizing that none of these strategies was illegal at the time it was employed. Thoroughly researched and clearly written, the article offers a fascinating insight into the practical application of tax strategies, as well as a primer on the underlying law. Mr. Kiley is a candidate for the JD degree at Albany Law School.

Historically the London Interbank Offered Rate, or LIBOR, has been a key reference rate for financial transactions of all types. LIBOR refers to the rate at which large financial institutions are willing to lend money to each other, and historically has been unregulated. In recent years, however, a series of scandals broke in which it became clear that certain institutions were manipulating the LIBOR rate they reported for their own advantage. As a result, in 2017 the Financial Conduct Authority (FCA) announced that LIBOR was being phased out, with a target date of 2021. Concluding this issue, in "LIBOR: London's Interbank Bridge Is Falling Down," Danielle Wilner looks at the effects and consequences of the impending phaseout. Her article, which is also thoroughly researched and clearly written, provides invaluable background on the history of LIBOR. She then turns her attention to the proposed replacements—noting that each of them has significant shortcomings that may make the cure worse than the disease. Ms. Wilner is a candidate for the JD degree at Syracuse University School of Law.