

#SCFlash

May and June Developments 2017

A summary of legal developments over the last two months that have impacted our clients' practices and industries.

FINTECH FINANCIAL SERVICES

FINRA Corporate Financing: FINRA Solicits Comments on Proposed Amendments to the Corporate Financing Rule (Underwriting Terms and Arrangements)

FINRA is soliciting comments on proposed amendments to FINRA Rule 5110 – the Corporate Financing Rule – which prohibits FINRA members from participating in public offerings with unreasonable underwriting compensation and terms. The proposal is a complete revision of the rule, makes some substantive changes, clarifies some existing guidance and interpretations and revises the format of the rule.

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EXECUTIVE COMPENSATION & BENEFITS

New York City's Mayor Signs Into Law Bill Banning Inquiry Into Salary History in Hiring: Salary History Ban Becomes Effective October 31, 2017

On May 4, 2017, Mayor Bill DeBlasio signed into law a bill passed by the New York City Council that makes it an unlawful discriminatory practice for an employer to inquire about or to rely upon an applicant's salary history in determining the compensation it will offer unless the applicant has voluntarily provided that information. Our memorandum on the law is available [here](#). The salary history ban will take effect on October 31, 2017. In advance of that effective date, New York City employers will need to review their hiring practices and written policies carefully, and provide training to those engaged in hiring on compliance with the new restrictions.

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ESTATES & PERSONAL

Amendments to the New York Non-Profit Revitalization Act

On May 27, 2017 changes to the New York Not-for-Profit Corporation Law went into effect, modifying the governance regime applicable to non-profits in New York. The changes clarify and refine some of the sweeping reforms introduced by the Non-Profit Revitalization Act of 2013. Specifically, the Amendment revised the prohibition on an employee serving as board chair, revised the concept of "independent" directors and trustees, and modified the law regarding related party transactions. The Amendment also introduced a concept of "key persons" – expanding the previously more limited concept of "key employees." Certain changes have also been made to the requirements for adoption of Conflict of Interest and Whistleblower Policies.

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COMMODITIES, FUTURES & DERIVATIVES

CFTC Requests Public Input on Simplifying and Modernizing Rules via Project KISS

On May 3, 2017, the U.S. Commodity Futures Trading Commission voted to seek public comment and input on how the Commission's existing rules, regulations or practices could be applied in a "simpler, less burdensome and less costly manner." The solicitation is part of a broader undertaking by the Commission to reduce regulatory burden.

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EXCHANGE/ALTERNATE TRADING SYSTEMS

CFTC Proposes to Amend CCO Rules: CFTC Proposes Amendments to Chief Compliance Officer Duties and Annual Reports

On May 3, 2017, the Commodity Futures Trading Commission announced proposed amendments to its rules governing the duties of chief compliance officers of registered swap dealers, major swap participants and futures commission merchants and to the content and delivery requirements of the chief compliance officer's annual report.

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FRENCH TAX PRACTICE

Landmark ECJ Decision Concerning the French 3% Tax on Dividend Distributions:

The Court of Justice of the European Union Holds That the French 3% Tax on Dividend Distributions Infringes the European Union Parent-Subsidiary Directive

On May 17, the European Court of Justice (ECJ) ruled in favor of a group composed of several CAC 40 corporations and the AFEP (*Association française des entreprises privées*), which is the main professional organization representing large French listed companies, finding the French 3% tax on dividend distributions to be incompatible with the European Union's Parent-Subsidiary Directive. The ECJ decision applies to redistributions of dividends received from subsidiaries within the scope of the Parent-Subsidiary Directive, i.e., dividends received from subsidiaries established in another Member State of the EU. Further steps are about to be taken by the same litigation group before the French Constitutional Court to expand the scope of the invalidity of the 3% tax. Sullivan & Cromwell LLP and another French tax firm represented the French corporate plaintiffs and the AFEP in the ECJ proceedings.

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HEALTHCARE & LIFE SCIENCES

American Health Care Act:

The House Passes the American Health Care Act

On May 4, 2017, the House of Representatives passed the American Health Care Act (AHCA). The AHCA, a budget reconciliation bill, is a key part of the Administration's "three-prong approach" to repealing and replacing the Patient Protection and Affordable Care Act. The AHCA would effect comprehensive changes to the regulation of health insurance and the delivery of health care generally in the United States.

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INTELLECTUAL PROPERTY & TECHNOLOGY LITIGATION

Court Opens 30 Years of Patent Venue Law: U.S. Supreme Court Restricts Where Patent Infringement Lawsuits Can Be Filed

On May 22, 2017, in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, the U.S. Supreme Court reversed the Federal Circuit and held that a domestic corporation "resides" only in its State of incorporation for purposes of the patent venue statute rather than, as the Federal Circuit has held for 30 years, any district in which the corporation is subject to personal jurisdiction. The Court's new restrictions on venue will foreseeably and significantly reduce the number of patent cases that can be filed in several plaintiff-popular patent districts, such as the Eastern District of Texas and the Eastern District of Virginia. Conversely, the decision may increase the significant existing burden on judges in the District of Delaware.

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FINTECH

CFTC Launches LabCFTC FinTech Initiative: Creates New Channel for Interaction with FinTech Companies

On May 17, 2017, the Commodity Futures Trading Commission ("CFTC") announced the creation of LabCFTC, a new initiative aimed at facilitating the CFTC's engagement with companies in the financial technology ("FinTech") sector and identifying emerging technologies that can enable the CFTC to carry out its mission more effectively. LabCFTC consists of two core components: (1) the creation of a dedicated email address (LABCFTC@cftc.gov), which the CFTC has named GuidePoint, that will allow FinTech companies to engage directly with the CFTC and its staff, learn about the CFTC's regulatory framework and obtain feedback and information on the development of innovative products and services, and (2) the launch of a new initiative (CFTC 2.0) to foster and increase the CFTC's familiarity with FinTech and its understanding of new technology that may have application within the CFTC's own operations. The CFTC expects that FinTech companies will use GuidePoint to pose questions ranging from specific registration or compliance requirements to more general questions about the CFTC's regulatory framework, but notes that feedback delivered through GuidePoint is non-binding on the CFTC.

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INTELLECTUAL PROPERTY & TECHNOLOGY LITIGATION

Supreme Court Sets New Rules for Patent Exhaustion Doctrine:

In a Highly Anticipated Decision, the Supreme Court Reverses Federal Circuit and Holds That Patent Exhaustion Is "Uniform and Automatic" — a First Sale, Whether Domestic or Foreign, Exhausts U.S. Patent Rights and Such Rights Cannot Be Employed to Impose Post-Sale Restrictions on the Buyer

In *Impression Products, Inc. v. Lexmark International Inc.*, the U.S. Supreme Court ruled that the sale of a patented product authorized by the patentee exhausts all patent rights to the product, regardless of any restrictions on the product's use or resale that the patentee seeks to impose, either directly or through a license in connection with the sale. The Supreme Court also held that an authorized sale outside the United States, just as one within the United States, exhausts all U.S. patent rights. The Supreme Court's ruling clarifies the scope of its 2008 decision in *Quanta Computer, Inc. v. LG Electronics, Inc.* and overturns longstanding Federal Circuit precedent that (i) had permitted patentees to reserve rights through otherwise lawful post-sale restrictions, and (ii) had held that sales abroad do not exhaust U.S. patent rights.

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CORPORATE GOVERNANCE

Auditor's Reports:

PCAOB Adopts New Auditor Reporting Standard and Other Amendments Relating to the Auditor's Report

The Public Company Accounting Oversight Board has adopted Auditing Standard No. 3101, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, and related amendments to its auditing standards that are intended to make the auditor's report more informative and relevant to investors and other financial statement users by requiring new information about the audit. Most notably, the new standard, which was adopted substantially in the form repropounded in May 2016, adds a requirement for the auditor to identify and discuss, in the audit report, "critical audit matters" that were addressed in the audit. The PCAOB anticipates that, subject to Securities and Exchange Commission approval, the new standard will take effect (1) with respect to critical audit matters, for audits for fiscal years ending on or after June 30, 2019, for large accelerated filers; and for fiscal years ending on or after December 15, 2020, for all other covered companies, and (2) with respect to all other provisions, for audits for fiscal years ending on or after December 15, 2017. SEC-reporting companies and their audit committees should initiate a dialogue with their auditors to understand how their auditors expect to approach critical audit matters and should consider whether additional company disclosure may be necessary or desirable in light of the new standard, including prior to the effective date for disclosure of critical audit matters in auditor's reports.

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COMMODITIES, FUTURES & DERIVATIVES EXCHANGE/ALTERNATE TRADING SYSTEMS

CFTC Issues Final Rules to Expand Its Whistleblower Authority:

The CFTC Unanimously Votes to Adopt New Rules Granting the CFTC the Power to Bring Enforcement Actions and Prohibiting the Enforcement of Confidentiality Clauses in Employment Agreements

On May 22, 2017, the Commodity Futures Trading Commission unanimously adopted new rules granting it the power to bring enforcement actions in response to retaliation against whistleblowers and prohibiting the enforcement of confidentiality clauses in employment agreements.

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APPELLATE

Kokesh v. SEC:

U.S. Supreme Court Holds That a Five-Year Statute of Limitations Applies When the SEC Seeks Disgorgement in Enforcement Actions: The Decision Builds Upon the Court's 2013 Holding That the Statute of Limitations Applies When the SEC Seeks Civil Monetary Penalties

On June 5, 2017, the U.S. Supreme Court resolved a split among three Circuit Courts of Appeals concerning whether the five-year statute of limitations of 28 U.S.C. § 2462 applies to SEC enforcement actions seeking disgorgement. In *Kokesh v. SEC*, No. 16-529, the Court unanimously held that in SEC enforcement actions, disgorgement operates as a penalty and is therefore subject to the five-year limitations period. After *Kokesh*, the SEC no longer may use disgorgement to obtain money from defendants for claims that accrue outside the five-year limitations period. *Kokesh* also may apply to enforcement actions brought by other government agencies, such as the CFTC. Companies facing government enforcement actions should consider the limitations on disgorgement during any settlement or tolling agreement discussions.

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COMMODITIES, FUTURES & DERIVATIVES

CFTC Issues Final Recordkeeping Rules: CFTC Finalizes Rule to Modernize Recordkeeping Obligations

On May 23, 2017, the Commodity Futures Trading Commission adopted final rules to amend and update Regulation 1.31, governing the recordkeeping obligations for records required to be maintained pursuant to the Commodity Exchange Act and CFTC regulations.

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INVESTMENT MANAGEMENT

DOJ and SEC Bring Insider Trading Charges for Use of Confidential Government Information Obtained by Consultant:

Cases Continue Trend of Insider Trading Charges Based on Material Non-Public Government Information Obtained Through Government Source

On May 24, 2017, the United States Attorney for the Southern District of New York announced the arrests and criminal indictment of four individuals for alleged insider trading on the basis of confidential information about upcoming federal government actions that was obtained from a government employee. A fifth defendant pleaded guilty and is cooperating with prosecutors. Four of the five individuals also were named in a civil complaint filed by the Securities and Exchange Commission for the same conduct.

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BANK REGULATORY FINANCIAL SERVICES

Financial CHOICE Act of 2017:

House Passes Financial Regulatory Reform Legislation

On June 8, 2017, the U.S. House of Representatives, voting almost entirely along party lines, passed H.R. 10, the "Financial CHOICE Act of 2017", a Republican proposal that would substantially restructure the post-crisis regulatory framework and provide significant regulatory relief to certain highly capitalized banking organizations. The vote was 233 to 186 and marks the first time either chamber of Congress has passed legislation that would significantly amend the post-crisis financial regulatory framework implemented under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.

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HEALTHCARE & LIFE SCIENCES INTELLECTUAL PROPERTY & TECHNOLOGY LITIGATION

Supreme Court Clarifies Biosimilar Drug Notice and Disclosure Requirements:

Biosimilar Manufacturers May Provide Notice of Commercial Marketing Before FDA Approval

In *Sandoz Inc. v. Amgen Inc.*, the U.S. Supreme Court held that, under the Biologics Price Competition and Innovation Act of 2009, a biosimilar manufacturer need not wait until FDA approval to provide patentees with notice of a plan to commercially market a biosimilar product. The Supreme Court also ruled that a patent owner's exclusive federal remedy for a biosimilar manufacturer's failure to provide its FDA application and manufacturing information is a suit for declaratory judgment of patent infringement.

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BANK REGULATORY FINANCIAL SERVICES CAPITAL MARKETS

Treasury Issues Comprehensive Report on Depository System Regulatory Reforms: Trump Executive Order Required Fundamental Reassessment of Existing Rules; Treasury Submits the First of Four Reports Examining Existing Financial Regulatory Framework

On June 12, 2017, the U.S. Department of the Treasury issued a report (the "Report") recommending a number of comprehensive changes in the current regulatory system for United States depository institutions to create greater regulatory balance and economic opportunities. The Report is explicitly intended to "identify any laws, treaties, regulations, guidance, reporting and record keeping requirements and other government policies that inhibit Federal regulation of the U.S. financial system in a manner consistent with [a set of] Core Principles" that were enunciated in President Trump's Executive Order 13772 (February 3, 2017). The clear majority of the recommended changes in the Report could be accomplished by modifications of supervisory policy and regulations although certain fundamental changes would require legislation.

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COMMODITIES, FUTURES & DERIVATIVES

FX Global Code—Global Principles of Good Practice in the Foreign Exchange Market: The Foreign Exchange Working Group and Market Participants Group Publish the FX Global Code to Provide Guidance on Global Principles of Good Practice in the Foreign Exchange Market

In May 2015, the Bank of International Settlements (BIS) Governors announced the formation of a Foreign Exchange Working Group, comprised of public and private sector representatives from sixteen foreign exchange ("FX") trading center jurisdictions, to facilitate the

establishment of a single global code of conduct standards and principles in FX markets. On May 25, 2017, the Foreign Exchange Working Group announced the release of the final version of the FX Global Code (the "Code"), which will be maintained in the future by the newly formed Global Foreign Exchange Committee (the "GFXC"). The Code represents a set of global principles of good practice for participants in the FX market. Voluntary in nature, the Code provides guidelines to promote the integrity and effective functioning of the wholesale FX markets, and has been described as an effort by regulators and market participants to restore trust and confidence in the FX markets.

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APPELLATE

CalPERS v. ANZ Securities—U.S. Supreme Court Holds That Securities Act's Three-Year Statute of Repose Is Not Topped by a Pending Class Action: Decision Has Important Implications for Class Action Lawsuits and Potential Opt-Out Claimants

On June 26, 2017, in a case closely watched by the securities bar, the U.S. Supreme Court held in *California Public Employees' Retirement System v. ANZ Securities* that *American Pipe* tolling is inapplicable to the three-year statute of repose for claims brought under Section 11 of the Securities Act of 1933, because statutes of repose, as opposed to statutes of limitations, are not subject to equitable tolling. As a result of the decision, the filing of putative class action lawsuits serves only to toll statutes of limitations but not statutes of repose. The ruling may encourage unnamed putative class members in cases subject to statutes of repose to file separate actions or to seek to join the putative class action as a named plaintiff before the statute of repose expires in order to protect their right to pursue individual claims at a later stage. The decision also allows class action defendants in cases where statutes of repose apply to better assess the risk they face from opt-out litigants and other potential individual actions beyond the risks faced from the putative class action.

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