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EXPECTFOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS JORDEN BURT, P.A.

SCANNING THE HORIZON

SEC ADDRESSES CRYPTOCURRENCIES AND AIMS TO UPDATE THE INVESTOR EXPERIENCE

CARLTON FIELDS
JORDEN BURT

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SEC: Ether and Bitcoin Are Not Securities

BY EDMUND ZAHAREWICZ

Cryptocurrency investors were concerned following the SEC's July 2017 investigative report on digital token sales by a virtual organization known as "The DAO." The report warned that so-called initial coin offerings and other distributed ledger-based fundraisings were likely securities offerings. But they have since received a more reassuring message from SEC Division of Corporation Finance Director William Hinman.

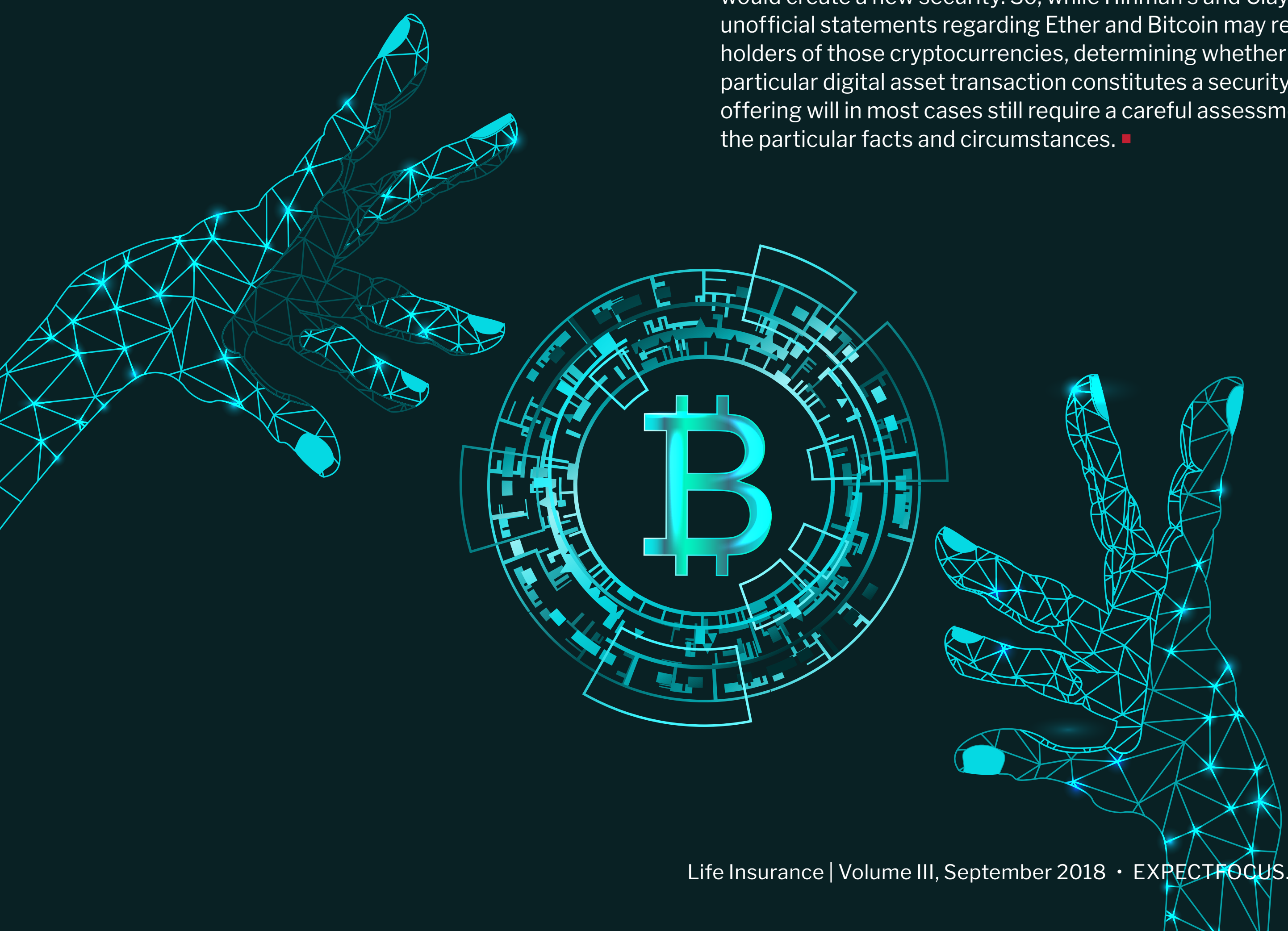
On June 14, before a Silicon Valley audience, Hinman indicated that current offers and sales of cryptocurrencies Ether and Bitcoin are not securities transactions. He applied the Supreme Court's "investment contract" test, under which a security exists if there is an investment of money in a common enterprise with an expectation of profit derived from others' efforts. In Hinman's view, a digital asset transaction may no longer represent a security offering when the *efforts of others* "are no longer a key factor for determining the enterprise's success," which can occur when the network on which the digital asset functions becomes "sufficiently decentralized."

Speaking of Ether, for example, Hinman noted:

> Putting aside the fundraising that accompanied the creation of Ether, based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions. And, as with Bitcoin, applying the disclosure regime of the federal securities laws to current transactions in Ether would seem to add little value.

SEC Chairman Clayton has publicly expressed similar views about bitcoin.

However, Hinman was careful to explain that "investment contracts can be made out of virtually any asset (including virtual assets), provided the investor is reasonably expecting profits from the promoter's efforts." If a promoter were to place bitcoin in a fund and sell interests, for instance, that would create a new security. So, while Hinman's and Clayton's unofficial statements regarding Ether and Bitcoin may reassure holders of those cryptocurrencies, determining whether a particular digital asset transaction constitutes a security offering will in most cases still require a careful assessment of the particular facts and circumstances. ■



Protecting At-Risk Seniors from Financial Exploitation

BY ANN FURMAN AND ADRIANA PEREZ

Financial exploitation of senior citizens and other vulnerable adults results in substantial losses each year. This article discusses two of the many recent legislative and regulatory actions targeting this abuse.

Senior Safe Act

The Senior Safe Act (12 U.S.C. § 3423) took effect May 24. The Act "extends immunity from liability to certain individuals employed at financial institutions who, in good faith and with reasonable care, disclose the suspected exploitation of a senior citizen to a regulatory or law-enforcement agency." Subject to certain conditions, this immunity also extends to the financial institution itself, such as an insurance company or agency, broker-dealer, investment advisory firm, transfer agent, or bank.

Specifically, the Act grants immunity from liability, "including in any civil or administrative proceeding," if the individual:

- makes the disclosure in good faith and with reasonable care.
- is (i) a registered representative, insurance producer, or investment adviser representative affiliated or associated with the institution or (ii) performs a supervisory, legal, or compliance function for the institution.
- may (i) come into contact with a senior citizen as part of the individual's professional duties or (ii) review or approve the financial documents, records, or transactions of a senior citizen in connection with providing financial services to that citizen.
- has received training related to reporting suspected financial exploitation of senior citizens and the financial institution maintains certain records of such training.

Accordingly, the Act alleviates any potential legal exposure when such individuals share a senior citizen's non-public personal information with a state adult protective services agency or other regulatory or law-enforcement agencies and such sharing is not covered by any other exception to applicable privacy law restrictions.

The financial institution, or a third-party it selects, may provide the required training. Many broker-dealers, investment advisers, and insurance companies may already train their registered representatives, investment adviser representatives, and insurance producers, respectively, on financial exploitation of seniors. The required training should:

> instruct any individual attending the training on how to identify and report the suspected exploitation of a senior citizen internally and, as appropriate, to government officials or law enforcement authorities, including common signs that indicate the financial exploitation of a senior citizen; … discuss the need to protect the privacy and respect the integrity of each individual customer of the covered financial institution; and … be appropriate to the job responsibilities of the individual attending the training.

Unlike the FINRA rules discussed below and a recently adopted model regulation of the North American Securities Administrators Association, the Senior Safe Act does not protect broker-dealers and investment advisers from any liability for temporarily holding disbursements of funds based on a reasonable belief that a senior citizen is being exploited.

SEC Staff No-Action Letter

On June 1, the SEC Division of Investment Management staff issued a no-action letter to the Investment Company Institute (ICI) under Section 22(e) of the Investment Company Act of 1940 that follows from FINRA Rule 2165. That rule permits a broker-dealer that suspects financial exploitation to put a hold on disbursements of funds to its customers who are seniors or have certain other types of potential vulnerabilities (collectively, "vulnerable adults").

In particular, the staff provided assurance that it would not recommend enforcement action to the SEC against an open-end mutual fund or its SEC-registered transfer agent if, subject to certain conditions, it temporarily delays for more than seven days the disbursement of redemption proceeds from the mutual fund account of a vulnerable adult held directly through the transfer agent based on a reasonable belief that financial exploitation of that customer has occurred, is occurring, has been attempted, or will be attempted.

Section 22(e) of the 1940 Act prohibits a registered investment company from suspending the right or postponing payment of the redemption proceeds for more than seven days after the tender of a redeemable security to the company or its designated agent for that purpose for redemption.

Since the mutual fund accounts at issue in the ICI letter are held directly with the mutual fund through the fund's transfer agent responsible for opening and servicing the accounts, and not in a customer account with a broker-dealer, FINRA Rule 2165 does not apply. Similar to registered representatives who suspect financial exploitation, however, the incoming letter states that mutual fund transfer agents, on behalf of the funds, may wish to protect vulnerable adults from financial exploitation to the same extent that broker-dealers may do so under FINRA Rule 2165.

The ICI letter is limited to open-end investment companies and does not address insurance company separate accounts that are organized as unit investment trusts. Similar to mutual funds held directly with the fund through its transfer agent, variable annuity and variable life insurance policies are typically held directly with the insurance company. When an insurance company suspects financial exploitation, it currently has no relief from Section 22(e) that specifically entitles it to hold disbursements for more than seven days. We understand the SEC staff may be considering a similar request for no-action that would cover unit investment trusts. Even without no-action relief, however, insurers may be able to rely on an exemption provided by 1940 Act Rule 6e-2(b)(12)(ii) or 6e-3(T)(b)(12)(iii) for holds on disbursements of variable life insurance (though not variable annuity) proceeds. ▪

SEC Proceedings Face Uncertainty After Supreme Court Holds ALJs Unconstitutional

BY NATALIE NAPIERALA

After much anticipation, the U.S. Supreme Court ruled on the constitutionality of the Securities and Exchange Commission's (SEC or Commission) Administrative Law Judges (ALJs). In *Lucia v. SEC*, Dkt. No. 17–130, the Supreme Court held that ALJs are "Officers of the United States" subject to the Appointments Clause of the U.S. Constitution, rather than mere federal employees. The Appointments Clause provides that such officers must be appointed by the President, a head of department, or a court of law, whereas the SEC's ALJs historically have been hired by the SEC staff.

The Court's decision calls into question the validity of SEC administrative proceedings held before ALJs — a process by which many SEC enforcement actions are decided — and leaves unanswered other important questions.

The Supreme Court considered that the question of whether SEC ALJs are officers rather than federal employees depended on whether the ALJs "exercise significant authority pursuant to the laws of the United States." The Supreme Court found its answer in *Frytag v. Commissioner*, 501 U.S. 869 (1991), which held that "special trial judges" of the IRS (STJs) were officers because they exercised significant authority to "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." Reasoning that SEC ALJs are "near-carbon copies" of the STJs, the Court found that SEC ALJs similarly exercise such "significant authority."

Accordingly, the Court held that the ALJ who presided over the Lucia administrative proceeding was an unconstitutionally-appointed officer, and that respondents in the proceeding were entitled to a new hearing before a constitutionally-appointed ALJ who was not the same individual who presided previously.

The Lucia decision may have no significant effect on completed administrative proceedings because the Court emphasized that respondents' "timely challenge" entitled them to the relief sought, implying that parties who did not timely challenge the SEC on similar grounds, or who otherwise settled with the SEC, will be unable to raise such arguments now.

In contrast, the Court's decision will surely impact the dozens of administrative proceedings currently pending before SEC ALJs, as well as future proceedings. In an August 23 order (Order), the SEC lifted a stay it had placed on all pending proceedings following the Lucia decision, and directed that every such case be reheard by an ALJ that — unless the parties agree otherwise — had not previously participated in the matter.

In addition to likely causing major delays, rehearing all these cases from the beginning may allow respondents to make challenges or arguments that they did not previously raise.

The Lucia decision may also play a significant role in future administrative proceedings. The Order reiterated the Commission's 2017 ratification of the appointments of its five ALJs who had been hearing cases prior to Lucia. The Court, however, specifically declined to address whether the SEC's ratification constituted a constitutional appointment. We can expect, therefore, that some respondents will challenge the ratification process as an invalid appointment. We will stay tuned to see how the SEC and the courts handle such challenges. ■

As Students Return to School, Regulators Continue Their Study of the NAIC's Suitability in Annuity Transaction Model Regulation

BY ANN BLACK, JAMIE BIGAYER AND ADRIANA PEREZ

At the 2018 NAIC Summer National Meeting, regulators continued their efforts to define the standard of care that applies to recommendations. This subject was discussed at both the Annuity Suitability (A) Working Group (Suitability WG) and Life Insurance and Annuities (A) Committee (A Committee) meetings.

The first lesson covered whether life insurance should be included in the proposed revisions to the Suitability in Annuity Transactions Model Regulation (Suitability Model). New York raised its hand with an answer, arguing at the A Committee meeting that a best interest standard should apply to life insurance. New York recognized this might exceed the Suitability WG's current lesson plan, but suggested, with California and Washington D.C.'s support, that the A Committee revisit the subject in the future.

Another lesson concerned whether the Suitability Model should apply to in-force transactions. At the Suitability WG meeting, Director Cameron lectured that, anytime a producer is in front of a consumer, she has the responsibility to review existing contracts. Unsurprisingly, New York raised its hand again to concur. The ACLI and IRI warned that this change would greatly expand an insurer's homework under the Suitability Model and impact the servicing of annuity policies. The IRI noted that extending the Suitability Model to in-force transactions would be significant because annuity holders may exercise several contractual rights over the life of the contract.

The final lesson addressed "material conflict of interest." At the Suitability WG meeting, California suggested that regulators sharpen their pencils and expand on the current definition to clarify that the consumer's interest must be placed before those of the producer and insurer. On the other side of the playground, the IRI and NAFA argued for the use of the well-established definition of "material conflict of interest" from *Basic v. Levinson*.

As the school bell rang, Director Cameron called for recess and said the Suitability WG would finish the course another day. On September 7, the Suitability WG called an end to the recess and scheduled a two-day interim meeting in Chicago on October 22-23.

We will continue to monitor the activities of the Suitability WG and the A Committee during the new semester. ▪

Dodd-Frank Rollback Benefits Insurers

BY TOM LAUERMAN

The Economic Growth, Regulatory Relief, and Consumer Protection Act (Public Law 115-174 or the Act) was signed into law on May 24. The Act can benefit life insurance companies or their affiliates in a number of ways.

Marketing Private Life Insurance Separate Accounts to Smaller Banks

Subject to certain exceptions, the so-called "Volcker rule" provisions of the Dodd-Frank Act and regulations thereunder (collectively, the Volcker Rule) prohibit "banking entities" from, among other things, investing in "covered funds" (e.g., funds that rely on the private fund exemptions in Section 3(c)(1) or (7) of the Investment Company Act of 1940). However, the Volcker Rule's so-called "BOLI exclusion" generally permits banks to purchase life insurance (i.e., bank-owned life insurance) that is funded by an insurance company's separate account that relies on Section 3(c)(1) or (7) without violating the rule's prohibition on investing in covered funds. Nevertheless, the BOLI exclusion and other Volcker Rule provisions relevant to banking entities can present interpretive, compliance, and disclosure issues that make it more cumbersome (a) for insurance companies to market such life insurance to banking entities; and (b) for such banking entities to ensure that they do not violate the rule.

The Act, however, provides a new exclusion under which a bank will not be deemed a banking entity – and thus will not be subject to the Volcker Rule's prohibitions – if it does not have (and is not controlled by a company that has) (i) more than $10 billion in total consolidated assets and (ii) "total trading assets and trading liabilities … that are more than 5 percent of total consolidated assets." This new exclusion can streamline the marketing of life insurance funded by private separate accounts to banking entities. Issuers of such insurance may need or want to consider revising their current procedures and disclosures to reflect the new exclusion.

Sharing Name with a Covered Fund

The Volcker Rule also prohibits a banking entity from sharing a name (or variation thereof) with a covered fund for corporate, marketing, promotional, or other purposes. "Covered funds" include entities that rely on Section 3(c)(1) or (7) (as noted above), as well as certain commodity pools. Also, for purposes of the rule, "banking entities" generally include both FDIC-insured banks and their affiliated entities. Therefore, if a life insurance company has an affiliate that is an FDIC-insured bank, covered funds have generally been precluded from sharing the name, or any derivative of the name, of that insurance company or of any other affiliated entity of that insurance company.

Under the Act, however, such name sharing will generally be permitted if (a) an investment adviser to the covered fund also uses that name; (b) no entity that is, or controls, an FDIC-insured bank uses that name or any variation thereof; and (c) that name does not contain the word "bank." This change, as well as the Act's above-described $10 billion threshold for banking-entity status, significantly reduces the instances in which the Volcker Rule may prevent an insurance company's (or its affiliate's) name from being shared with a covered fund.

SIFI Threshold Increased to $250 Billion

The Dodd-Frank Act empowered the Federal Reserve Board to apply enhanced prudential regulation to systemically important non-bank financial institutions (SIFIs) to prevent or mitigate risks to the financial stability of the United States that could be caused by large, interconnected financial companies. Such SIFIs can and have included large insurance companies or their holding companies. Although Dodd-Frank limited this enhanced regulation by the Federal Reserve Board to SIFIs with total consolidated assets of at least $50 billion, the Act increases this threshold to $250 billion.

The Act also *requires* that, in exercising its authority to impose enhanced regulation on a SIFI, the Federal Reserve Board differentiate among companies on an individual basis or by category, considering their capital structure, riskiness, complexity, financial activities (including those of their subsidiaries), size, and any other risk-related factors that the board deems appropriate. Before now, Dodd-Frank merely permitted (rather than required) the Federal Reserve Board to differentiate in this way.

These changes will reduce the number of insurance companies or insurance holding companies that could potentially be subject to enhanced prudential regulation as SIFIs by the Federal Reserve Board.

The changes relevant to SIFIs will take effect 18 months after enactment, in contrast to the other changes discussed above, which took effect immediately. ■

XBRL Amendments Have Limited Impact on Insurance Products

BY THADDEUS EWALD

On June 28, the SEC amended existing requirements for public operating companies and mutual funds regarding the use of eXtensible Business Reporting Language (XBRL) for financial statement information and risk/return summaries.

These amendments will affect certain filings made by some insurance companies (or their affiliates) that (a) register securities on SEC Forms S-1 or S-3, or (b) are reporting companies under the Securities Exchange Act of 1934. They will also affect filings by insurance-dedicated mutual funds that register on SEC Form N-1A. However, the amendments will not affect insurance product registration statements on SEC Forms N-3, N-4, N-6, or S-6.

For affected filings, the amendments mandate the use of “Inline” XBRL format. The Inline format imbeds the XBRL data in the filing itself, departing from the currently-prevalent practice of including XBRL data in a separate filed document. The amendments also eliminate a current requirement that XBRL data additionally be posted on public operating companies’ and mutual funds’ websites. However, the amendments generally do not modify substantive XBRL requirements, such as those regarding what entities must file, or the scope of the XBRL data.

Affected operating companies that are “large accelerated filers” must comply with the Inline XBRL amendments in filing required financial statement information for fiscal periods ending on or after June 15, 2019, with “accelerated filers” following suit for periods ending on or after June 15, 2020, and other filers for periods ending on or after June 15, 2021. Mutual fund groups with net assets over $1 billion will need to comply with the Inline XBRL amendments as to risk/return summaries in filings that take effect on or after September 17, 2020, which compliance deadline is September 17, 2021 for all other mutual funds.

The SEC touts these changes as part of its “continued efforts to modernize reporting and to improve the accessibility and usefulness of disclosures to investors.” It argues that, over time, the amendments will lower compliance and filing costs.

SEC Proposes New Rule Impacting ETFs

BY CHIP LUNDE

On June 28, the SEC proposed new rule 6c-11 to allow open-end exchange-traded funds that satisfy certain conditions to operate without obtaining an SEC exemptive order. The proposed rule would apply to open-end ETFs, but would be unavailable to unit-investment trusts, multi-class ETFs, and leveraged or inverse ETFs.

Among other things, proposed rule 6c-11 would allow ETF sponsors to use "custom baskets" (baskets that do not reflect a pro-rata share of the fund's portfolio or that differ from other baskets used in transactions on the same business day) in connection with creation unit purchases and redemption transactions with authorized participants. ETFs using custom baskets must adopt written policies and procedures for the construction and use of custom baskets that are in the best interests of the ETF and its shareholders.

Proposed rule 6c-11 also would require an ETF to disclose on its website:

- its portfolio holdings each day, and
- historical information regarding premiums and discounts and bid-ask spread information, designed to inform investors about the ETF's arbitrage efficiency.

The SEC also proposed amending Form N-1A to require open-end ETFs to disclose certain ETF-specific information, including trading costs borne by secondary-market investors.

It is unclear whether the proposed rule would increase the use of ETFs in connection with variable insurance products. Historically, such use has been quite limited, because of, among other things, federal income tax constraints on using publicly-traded funds as investment options under variable products. However, a final rule that makes ETFs more attractive could spur increased variable product use of ETFs, particularly in a "fund of ETFs" structure. ■

SEC 'Investor Experience Initiative' Expressly Includes Variable Insurance Products

BY GARY COHEN

The SEC, on June 5, announced that it would be exploring "modernization of the design, delivery and content of fund disclosures" in order "to improve the investor experience and help investors make more informed investment decisions." The SEC issued a sweeping request for comment on the disclosure requirements for retail investment funds of many kinds, including insurance-dedicated mutual funds and presumably insurance company separate accounts.

In dealing with mutual fund disclosure in the past, the SEC hasn't always specifically referred to variable insurance products and entities. Here, however, it stated that it "also may consider a rule proposal designed to provide variable annuity investors with more user-friendly disclosure and to improve and streamline the delivery of information about variable annuities through increased use of the internet and other electronic means of delivery." This probably refers to the authorization of a variable annuity summary prospectus that the SEC has included on its publicly released short-term agenda. SEC staff members have informally stated that any proposed summary prospectus may well cover variable life insurance as well as variable annuities.

In addition, as to insurance-dedicated funds, the SEC said that "[b]ecause of the unique nature of these types of funds, they are subject to different disclosure requirements. We are seeking input on how to appropriately tailor disclosure requirements to these types of funds." The SEC also specifically requested comments on how to improve performance advertisements for mutual funds and variable insurance products. Finally, the SEC said that its primary motivations for its investor experience initiative are to keep up with technological innovations, the broadening markets for investment company products, and the increasing complexities of products.

The SEC's deadline for comments is October 31. ■

SEC Regulation Best Interest: Charting a Course for Securities and Annuity Sales

BY JAMES JORDEN AND BEN SEESSEL

In June, we circulated our fifth article on the continuing saga regarding the standard of conduct for sales of securities and annuities — and the efforts of federal and state regulators to impose new conditions on the existing standards. Our earlier articles focused on the potential for regulatory and litigation issues arising under the Department of Labor's fiduciary rule adopted in 2016, which was struck down by the Fifth Circuit Court of Appeals. Soon after the court's opinion, the SEC proposed a new regulation governing the regulation of broker-dealers in the recommendation and sale of securities — the Regulation Best Interest — which was the subject of our article in *Expect Focus*, Vol. II, June 2018. From the outset, we predicted that the change in regulatory treatment may create potentially significant changes in litigation involving sales of both securities and annuities. We predicted the following results for the DOL's fiduciary rule before it was vacated.

"From a litigation perspective, this change to a fiduciary status for the sales agent is substantial and in many cases will afford litigants unhappy with investment results or the ultimate characteristics of a particular form of security or annuity the opportunity to second-guess the original decision applying a significant range of issues."

This article is the first in a series that will focus on what potential new or different litigation issues the SEC's RBI standards present. We will soon provide similar predictions and analysis on potential new/different FINRA enforcement issues.

Q What are the key differences between the BIC and RBI standards as they relate to litigation exposure?

A Starting with the enforcement mechanisms, as we pointed out in June, there are two key operational differences. First, on the type of transactions covered; and second, on the "standards" for best interest. Each of these differences result in significant differences for potential litigation issues. There is a third difference which we did not highlight in our earlier piece — the difference in the vehicles for "enforcement" of the two standards.

__The DOL's BIC Rule__: This rule imposed best interest (fiduciary) standards on all recommendations and sales of both securities and annuities (and many other forms of "investments") to ERISA plans or IRAs, (characterizing such recommendations or sales as "Investment Advice"). Thus, the BIC applied to all forms of advice to ERISA plans and IRAs involving the purchase or sale of annuities, mutual funds, and virtually all other forms of investment transactions. The BIC, as a separate contract, effectively operated as its own enforcement mechanism creating a new private right of action to enforce the promises made in the BIC.

__The SEC's RBI__: The proposed RBI imposes a best interest requirement, but only on "recommendations" and sales of securities to "retail customers" (a defined term). The RBI applies to all such recommendations, regardless of the amount or type of compensation paid. It applies to both the "purchase" of a security and the "sale" of a security and specifically applies to transactions involving "rollovers" to IRA plans. Thus, only variable annuities or other registered security annuities are subject to the RBI requirements.[1] Enforcement of the principles under the RBI will rely on the existing SEC and FINRA enforcement tools.

Q Are the different standards for what constitutes "best interest" really different under the BIC and the RBI?

A Yes, clearly, but the differences, according to the SEC's release, are fewer than the similarities. There are two key differences:

__The BIC Standards__: The BIC exemption had required the acknowledgement of "fiduciary" status of the broker or agent rendering the "investment advice" and established a series of best interest requirements for the advice and sale, including the impartial conduct standards that formed a part of the BIC. These standards are:

1. Act in the "best interest" of the customer, defined as acting with prudence and loyalty.

2. Charge only reasonable compensation.

3. Make no misleading statements.

The RBI Standard: The RBI will require broker-dealers "to act in the best interest of the retail customer at the time a recommendation is made without placing the financial or other interest of the broker-dealer or natural person who is an associated person making the recommendation ahead of the interest of the retail customer."[2] It will effectively replace the current broker-dealer "suitability" standard.[3] The RBI standard will be met if four component obligations are satisfied:

1. The Disclosure Obligation — requires brokers to disclose the "scope and terms of the relationship" and all "material conflicts of interest." The SEC release contains an example of a disclosure format — a client relationship summary (CRS) setting forth the capacity, fees and charges, and type and scope of services, as well as the nature of any conflicts of interest.

2. The Care Obligation — requires broker-dealers to exercise reasonable diligence, care, skill and prudence to:

   a. Understand the potential risks and rewards of a recommendation and have a reasonable basis to believe it is in the best interest of at least some of their retail customers. This "new" obligation will require the broker to be prepared to demonstrate a process of study and comprehension of the product before offering.

   b. Have a reasonable basis to believe the recommendation is in the best interest of the particular retail customer to whom the recommendation is being made. This broker obligation will presumably require analysis of customer information beyond that normally developed in a "suitability" determination.

   c. Have a reasonable basis to believe that, if the broker-dealer is making a series of recommended transactions – that such recommendations, even if in the best interest in isolation, are not excessive and are in the best interest when viewed in total. This is a "new" obligation and raises the question of what information and analysis is required to make such a determination.

3. The Conflict of Interest obligations contain two related requirements as follows:

   a. Establish and enforce policies to identify, disclose, or eliminate all material conflicts of interest associated with each recommendation covered by RBI.

   b. Establish and enforce policies to identify and disclose and mitigate, or eliminate, material conflicts of interest that arise from financial incentives associated with all recommendations covered by RBI.

Q What is the likelihood that, by establishing particular detailed standards and obligations, the RBI will raise the possibility of asserting a private right of action for failure to meet its terms?

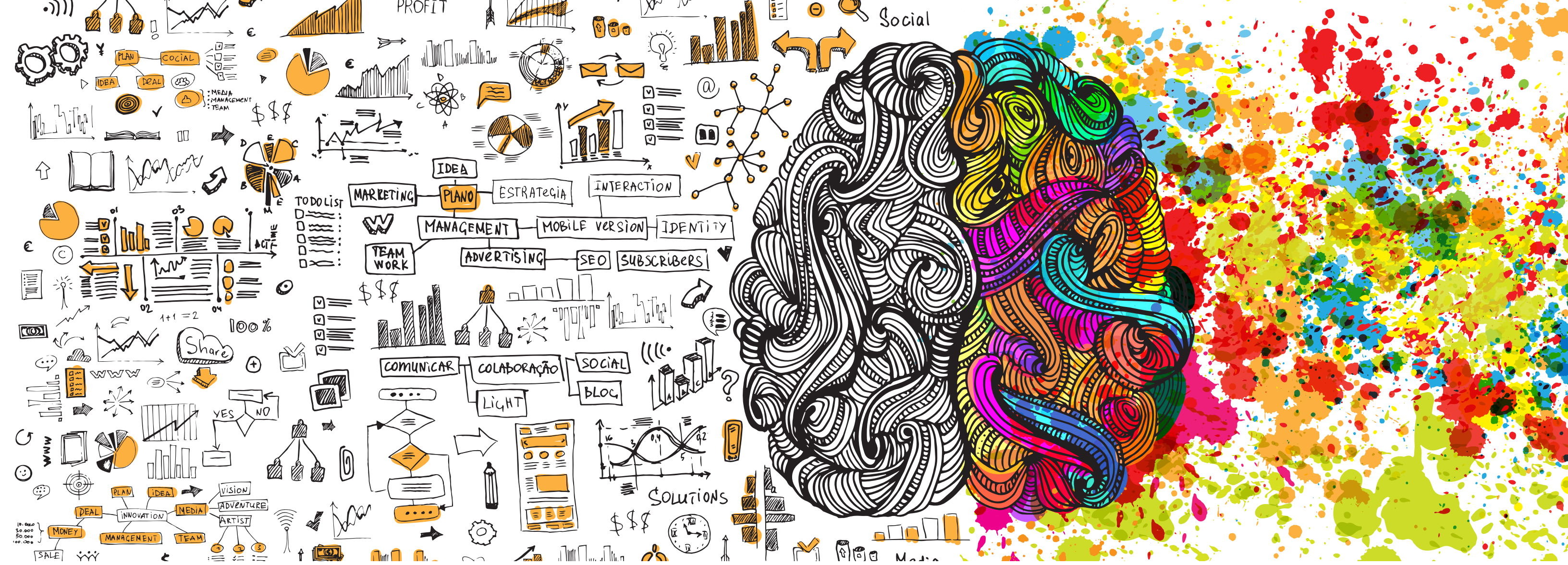
A The SEC's release states that it does "not believe" that adopting the proposed RBI will create a new private right of action and adds that it does not "intend such a result."[4] We can expect individual claimants in particular transactions involving sales or purchases of securities by brokers to raise the failure to meet the RBI standards in normal FINRA arbitrations. For example, the new care obligations that impose requirements for a broker to have a "reasonable basis" that a particular transaction is in the customer's best interest may well entail requiring brokers to obtain, and make judgments about, a customer's financial status beyond that normally entailed in developing a "suitability" analysis. What are the analytical standards, how can they be reached and how should they be documented?

On the other hand, many of the "best interest" requirements under the care obligation appear to be modest enhancements to existing FINRA standards. For example, since 2012, the standards applicable to the recommendation and sale of complex products[5] impose the same two-step process outlined in the RBI; first, determine that the product is suitable for at least some customers, then apply a second step to ensure that it is suitable for the particular customer for whom the product is being recommended. To that extent, such standards will not result in any new or novel arguments in the context of a common law fraud or state unfair practices lawsuit.

Further SEC pronouncements on the proposed RBI standards will likely address the Commission's views and direction on these issues.

This version of the article has been shortened to focus on important differences between BIC and RBI. The full version contains additional Q&A's on the expected application of the RBI to broker-dealer operations and sales, and can be found at https://bit.ly/2oWsMV2. ▪

[1] *See* Regulation Best Interest, SEC Release No. 34-83062 (April 18, 2018) (the "release") at 1, https://www.sec.gov/rules/proposed/2018/34-83062.pdf.
[2] *Id.*
[3] *Id.* at 40-43 ("we are proposing to enhance existing broker-dealer conduct obligations").
[4] *See* release at 42 n.88.
[5] See FINRA Regulatory Notice 12-03, http://www.finra.org/industry/notices/12-03.



NAIC Summer National Meeting Spotlights Innovation and Insurtech

BY ANN BLACK, BEN SEESSEL AND JAMIE BIGAYER

In response to the accelerating pace of change, the NAIC's Summer National Meeting in Boston focused on innovation and insurtech. The different NAIC groups discussing these topics included the Big Data (EX) Working Group (Big Data WG), the Innovation and Technology (EX) Task Force (Innovation and Technology TF), and the Life Insurance and Annuities (A) Committee (Life and Annuity Committee). The Center for Insurance Policy and Research (CIPR) was also interested in the topic, offering a summer program titled, "Can Regulation Keep up with Innovation?"

During the Big Data WG meeting, Eric Sondergeld of Life Insurance Management Research Association (LIMRA) presented on the "Use of Data for the Underwriting of Life Insurance Products." According to LIMRA's study, over the past two to three years most life insurers have started or are planning to streamline or automate their underwriting processes. Because the presentation appeared to be an eye opener, members of the Big Data WG raised a number of questions, including:

- What consumer disclosures are made about the data sources used? The regulators discussed issuing a consumer alert explaining the changes in life insurance underwriting and the types of data being considered. The Big Data WG's chair, Iowa Commissioner Doug Ommen, favored this suggestion, and promised to consider the topic in the next Big Data WG call.
- Whether the predictive models used in the automated underwriting processes are tested outside the companies?
- Whether insurers are using data from wearable devices?

In addition to discussing LIMRA's presentation to the Big Data WG, the Innovation and Technology TF discussed its efforts to understand states' readiness to deal with innovators and innovative products and to publish the names of each state's innovation contact. The Innovation and Technology TF also sought information on the issues or barriers to innovation, noting three initial issues – anti-rebating, notice of cancellation/renewal, and e-signature. The Innovation and Technology TF is forming a small group of regulators to compile information on what states and other U.S. and foreign regulators are doing with respect to innovation. As a first step, Paul Worthington of the U.K. Financial Conduct Authority (FCA) presented on the FCA's innovation and technology efforts, including its sandbox.

The Life and Annuity Committee seeks to use technology to aid consumers and adopted a charge to "develop an online resource on life insurance, including the evaluation of existing content on the NAIC website, to be published digitally for the benefit of the public." To reflect the new charge, the Life and Annuity Committee agreed to change the name of the Life Insurance Buyer's Guide (A) Working Group to the Life Insurance Online Guide (A) Working Group.

Regulators, along with industry participants, continued the innovation discussion during the CIPR's Summer Program "Can Regulation Keep up with Innovation?" The panel, moderated by NAIC CEO Mike Consedine, included Commissioner Ommen, former Iowa Commissioner Nick Gerhart, Vermont Commissioner Mike Pieciak, Professor Chester Spatt (an MIT economist), and Julie Sherlock from startup accelerator Boost. The topics discussed included:

- Role of regulation: Commissioner Ommen and former Commissioner Gerhart agreed that regulation must keep up with innovation, not be ahead of it. Commissioner Ommen noted that too many rules can stifle innovation. He and Commissioner Pieciak commented that regulators and innovators need to work together, and they encouraged industry participants to speak with them about their innovative ideas. In this regard, Commissioner Ommen noted that it is better to knock on a regulator's door than vice versa.

- Sandboxes: Commissioner Ommen noted that innovators need to test their ideas with regulators, though others expressed concern that time spent in a sandbox might burn all of a startup's capital with no guarantee of regulatory approval.

- State-based system: Commissioner Ommen stressed the advantages of the U.S. state-based system because individual states can be used as laboratories, though they can also act collectively through national standards. He offered principles-based reserving as an example. Other panelists commented, however, that differing state laws and regulations, and even differing interpretations of the same laws and regulations, can be confusing and difficult for innovators to navigate.

- Big data use: Mr. Consedine and Professor Spatt discussed who owns the data — the consumer, the insurer, or the third-party who collects it? Commissioner Ommen voiced concerns regarding over-segmentation through the use of data, particularly for life insurance where insureds may have little control over certain data points.

Innovation promises to be a hot topic for the foreseeable future and brings with it uncertainty. As the regulators noted, it is too difficult to know "what an insurance policy will look like in ten years." ▪

FINRA Targets Variable Annuity Practices

BY TOM LAUERMAN

FINRA's reported enforcement actions as to certain variable annuity practices increased in 2018. For example, FINRA announced more than half a dozen settlements – via Letters of Acceptance, Waiver and Consent (AWCs) – for broker-dealers' failures to meet their obligations in connection with their customers' exchanges from one variable annuity to another.

One such AWC imposed various sanctions on a firm for failing to implement a reasonable supervisory system and procedures to determine if any of its registered representatives had inappropriately high rates of variable annuity exchanges. Specifically, the broker-dealer selected for review only a limited number of its representatives based on criteria unrelated to their volume of variable annuity recommendations and not designed to determine if the representatives had problematic rates of exchanges. Interestingly, the AWC did not indicate that the firm's representatives had, in fact, improperly recommended any exchanges.

Another AWC was based on FINRA's review of a 250-case sample set of a broker-dealer's documentation of the information provided to customers relative to whether a recommended variable annuity exchange would be in the customer's interest. FINRA concluded that, in a high percentage of these samples, material misrepresentations were made to the customers and that, in many cases, they made the recommended exchanges look more favorable to the customer. Accordingly, the AWC imposed various sanctions on the firm for making negligent misstatements and omissions, failing to have a reasonable basis for recommendations, and failure to implement adequate surveillance and supervisory procedures.

In recent months, FINRA has also published several AWCs imposing a range of sanctions on broker-dealers for inadequate supervisory procedures and training for the sale of multi-share class variable annuities. Typically, such AWCs focus on the suitability concerns raised by the sale of L-share annuity contracts that have shorter surrender charge periods and higher ongoing charges than other share classes, if issued under circumstances that include, for example, the presence of certain types of "living benefit" riders, suggesting that the customer has a longer-term orientation.

Accordingly, issuers and distributors should be mindful that FINRA is continuing its historical enforcement focus on variable annuities, particularly as to exchanges and L-share contracts. ▪

In California, a New Era in U.S. Privacy

BY JOSEPHINE CICCHETTI, STEVEN BLICKENSDERFER AND LAURA WALL

In June, California passed a sweeping new privacy law that will impact an estimated 500,000 businesses in the United States. The California Consumer Privacy Act of 2018, AB 375 (CaCPA) is the first U.S. law to grant consumers extensive rights as to their personal information and how businesses handle it. Similar to the European Union's newly-minted GDPR, the CaCPA is intended to further the right of privacy, which is constitutional in nature in California. The law requires companies to be transparent with consumers regarding the categories of personal information being collected and how that information is disclosed and shared. Specifically, the law will grant consumers increased access to their personal information, the option to direct businesses to delete that information, and additional control concerning the sale and sharing of their personal information. Should any consumer exercise these rights, the CaCPA prohibits businesses from discriminating against them by charging a different price or providing a different service in response. As the law will not take effect until January 1, 2020, amendments are expected in the interim. The California legislature approved the first set of amendments in late August to make technical corrections.

New Rights and Obligations Under the CaCPA

The CaCPA grants "consumers," defined as California residents, more power and control over their personal information held by businesses than ever before. Under the new law, California consumers will have the power to direct businesses to delete or refrain from selling their personal information under certain circumstances. The CaCPA also completely prohibits businesses from selling the personal information of a consumer between 13 and 16 years of age unless the sale is affirmatively authorized by the consumer or their parent or guardian. In the case of consumers under the age of 13, the authorization must be by the parent or guardian.

The CaCPA grants rights that will give consumers access to information about the data collection and processing practices of businesses, including information concerning:

1. the categories and specific pieces of personal information businesses are collecting and processing about the consumer;
2. whether personal information is being sold;
3. the purpose for which the personal information is being collected or processed; and
4. the categories of third parties with whom the business shares or sells the personal information.

The CaCPA also contains detailed requirements regarding consumer requests. First, businesses must make available to consumers two or more designated methods for submitting requests for information, including a toll-free telephone number and website if the company maintains one. Second, businesses must disclose and deliver the requested information to consumers free of charge within 45 calendar days. Businesses will also be expected to comply with the Act's specific instructions regarding the content of their websites and online privacy policies. Websites must contain clear and conspicuous links that enable customers to opt out of the sale of their personal information, although the law allows for some flexibility on how to implement certain of these new changes.

Businesses will be prohibited from discriminating against consumers who exercise their privacy rights by denying them goods or services, providing a different level of quality of those goods or services, or charging different prices or rates. Businesses will even be prohibited from ***suggesting*** that they may deny services or charge a different price if consumers exercise these privacy rights. However, the law allows businesses to charge a different price, or offer a different quality of goods or services if the difference "is directly related to the value provided to the consumer by the consumer's data." Despite these restrictions, the new law does authorize businesses to offer financial incentives for the collection of personal information, including payments to consumers.

The Scope of the New Law

Similar to the GDPR's definition of personal data, the CaCPA applies to "personal information" that is broadly defined to include IP addresses, browsing history, and even inferences drawn from any of the identified information that creates a profile reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

As for who the law will impact, the CaCPA specifies that it will only apply to certain types of businesses that collect and process the personal information of

California consumers. Specifically, the law defines "business" to mean one that is either a sole proprietorship, partnership, LLC, corporation, association or other legal entity organized or operated for the financial benefit of its shareholders or other owners, that (1) collects consumers' personal information, (2) determines the purposes and means of the processing of consumers' personal information, and (3) does business in California. The business must also satisfy one of the following conditions:

1. have annual gross revenues in excess of $25 million;
2. alone or in combination, annually buy, sell, or receive or share for commercial purposes the personal information of 50,000 or more consumers, households, or devices; or
3. derive 50 percent or more of annual revenues from selling consumers' personal information.

The CaCPA will also apply to any entity that controls or is controlled by a qualifying business and that shares common branding with that business. While the definition of "business" makes clear that bigger businesses like Google and Facebook will fall within the scope of the CaCPA, even small startups could be subject to CaCPA requirements if they are in the business of buying, selling, receiving, or sharing the personal information of California consumers.

Importantly, the law will not apply to protected health information that is already regulated under HIPAA, the Gramm-Leach Bliley Act (GLBA), the Driver's Privacy Protection Act (DPPA), or personal information covered by the Fair Credit Reporting Act. Because the exemptions apply specifically to *information* that is subject to regulation, and not entire entities, businesses will need to pay close attention to the particular information at issue in each instance.

The CaCPA also includes an extraterritorial limitation which states that the law will not restrict a business' ability to collect or sell consumer personal information so long as "every aspect of that commercial conduct" occurs outside California. This means that the consumer must be outside of California while their data is being collected and processed, and the collection and processing must occur outside of the state as well.

Consequences of Non-Compliance

The statutory damages allowed for under the CaCPA could be staggering, as they can range between $100 and $750 "per incident or actual damages, whichever is greater." In determining the amount of damages, courts may consider the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct and length of time over which it occurred, the willfulness of the misconduct, and the defendant's assets, liabilities, and net worth. After certain requirements are met, the law allows consumers to bring a private right of action in the event their personal information is subject to unauthorized access or disclosure.

The Attorney General may also institute a civil action, and can seek up to $7,500 for each intentional violation. The law will create a new Consumer Privacy Fund to offset costs incurred by the Attorney General and the courts in these efforts.

What Prompted the New Legislation?

A brief history of the CaCPA's passage helps to contextualize the new law. The bill was passed swiftly in a last-minute effort to evade a ballot measure initiated by a real estate mogul. The ballot initiative was the first attempt at this sweeping privacy law, albeit a stricter version, and would have been voted on in November 2018. However, an initiative passed by the people would be much more difficult to amend in the future than a law passed by the legislature. The technology industry and the legislature negotiated with the ballot initiative campaign, which ultimately agreed to withdraw the proposal if the CaCPA, in its current form, was passed. The legislature fast-tracked the bill and it was passed in a matter of days.

The Future of the Act

As businesses continue to lobby for modifications to the Act, the California legislature approved the first set of amendments on August 31. Although the amendments were mainly aimed at fixing technical errors, they also made substantive changes to certain provisions of the Act. Notably, the Act initially gave the Attorney General until January 1, 2020, to adopt implementing regulations. The amendments extended that deadline until July 1, 2020, at least with respect to the privacy requirements of the Act. Furthermore, the Attorney General is not required to begin enforcing the privacy requirements until six months after the publication of final regulations or until July 1, 2020, whichever occurs first. The amendments also expanded the scope of the HIPAA, GLBA, and DPPA exceptions, and narrowed the private right of action to instances involving data security breaches. Businesses should continue to be vigilant in tracking the development of the Act and preparing for its effective date in 2020. ▪

NIST Provides Guide and Example Solution for IT Asset Management

BY STEPHEN CHOI AND TERESSA GETZ

On September 7, the National Cybersecurity Center of Excellence (NCCoE) and the National Institute of Standards and Technology (NIST) published *Special Publication 1800-5 – IT Asset Management Practice Guide* (the Guide) to help financial services companies tackle challenges in managing both the hardware and software components of their information technology assets. The three sections are: *Volume A – Executive Summary*, *Volume B – Approach, Architecture, and Security Characteristics*, and *Volume C – How-To Guides*. The publication is available at https://bit.ly/2NZ3EYD.

The Guide notes that the wide spectrum of hardware and software used by financial services organizations "makes it difficult to assess vulnerabilities or to respond quickly to threats, and to accurately assess risk in the first place." The Guide's example demonstrates how an entire IT asset portfolio can be monitored and managed through a centralized system using commercially available and open source products. The modular architecture gives companies flexibility to adopt only those solutions needed. It incorporates best practices from various standards organizations, including the NIST framework, Payment Card Industry Data Security Standard (PCI DSS), Federal Financial Institutions Examination Council's IT Examination Handbook and Cyber Assessment Tool guidance, and SANS Critical Security Controls.

The Guide has all the required characteristics of an effective information technology asset management solution, providing these benefits:

- allows faster response to security alerts;
- increases cybersecurity resilience;
- provides auditors with detailed system information;
- keeps track of software licenses in use compared to licenses paid for;
- reduces response times to users by help desk; and
- ensures that software is correctly patched. ■

Court Invalidates California Unclaimed Property Law Regulations

BY BRENDAN GOOLEY

A California state court recently enjoined the state from enforcing two rules adopted by the Office of the State Controller without compliance with the California Administrative Procedure Act (APA) concerning the state's Unclaimed Property Law (UPL). The court concluded that the rules were regulations that were improperly promulgated under the APA, and barred their application.

The Office of the State Controller promulgated the regulations under a provision of California's Unclaimed Property Law that provides that life insurance or annuity proceeds become state property if they are unclaimed three years after they become due. The first regulation, the External Database Regulation, required insurers to search the Social Security Administration's Death Master File or a similar database to determine whether any insureds were deceased. The second regulation, the Dormancy Trigger Regulation, required insurers to report policy proceeds as unclaimed no later than three years after the insurer had reason to know that the insured had passed away, regardless of whether the insurer's own records showed that the insured had died. The state controller had been actively enforcing the regulations in UPL compliance audits and had imposed substantial fines for noncompliance.

Thrivent Financial for Lutherans brought suit seeking an injunction barring the enforcement of the regulations and a declaration that they were improperly promulgated. Both Thrivent and the Office of the State Controller moved for summary judgment. The court granted Thrivent's motion. It explained that there was no dispute that the regulations were being enforced and that they had not been adopted in conformity with the APA. The court also rejected the state's argument that its "regulations" were not in fact "regulations," as well as the state's contention that the Controller's interpretation of the governing statute was the only reasonable one. The court explained that the language of the UPL was "reasonably susceptible" to an "interpretation that the triggering event for the reporting of a policy is the disclosure by an insurer's own records that its insured is deceased." The court therefore barred California from enforcing the regulations or imposing financial penalties on insurers for failing to comply with them. The relief included an order that the controller remove all references to the regulations in materials disseminated to life insurers unless the references were accompanied by conspicuous disclaimers.

The court's decision is a win for insurers who will — at least for the time being —not be subject to the regulations' costly requirements and the threat of substantial penalties for noncompliance. ▪

Even Disclaiming 'Magic Words' Won't Save Plaintiffs from SLUSA Preclusion

BY LAURA WALL

In 2016, a putative class action lawsuit was filed in California state court on behalf of all persons over the age of 60 who were issued a variable annuity policy by defendants within the state. The complaint in *Davis v. Riversource Life* alleged that the defendants failed to comply with California's Unfair Competition Law by neglecting to include certain required disclosures. Specifically, the law mandates that any annuity contract issued to a senior citizen must disclose all surrender periods and charges and display a 30-day "free-look disclosure" plainly on the policy's cover page. The purpose of a free-look period is to allow the policyholder the chance to return the policy and receive a full refund of the premiums without penalty. The plaintiff claimed that defendants' failure to include this information on the policy's cover page caused him to incur surrender charges that he would not have incurred had he been provided with proper notice of the potential penalties and free-look period.

In July, the court entered an order dismissing the action as barred by the Securities Litigation Uniform Standards Act (SLUSA), which precludes plaintiffs from bringing class actions based on state claims involving the use of deceptive practices in connection with the purchase or sale of a covered security. In an attempt to save his claims from dismissal, the plaintiff argued that the amended complaint explicitly disclaimed fraud, thereby bringing it outside SLUSA's reach. However, the court summarily rejected this argument as the plaintiff's complaint was still based on deceptive practice claims, including misrepresentation and omission. In its order, the court asserted that plaintiff could not avoid SLUSA preclusion by "scrubbing the [complaint] of the 'magic words'" while leaving in concepts intended to be covered by the Act.

When faced with a class action lawsuit, defendants should always be on the lookout for potential ways to preempt those claims at the outset. The *Davis* holding is a reminder that SLUSA preemption can be a useful tool for defendants seeking to defeat class action claims early in litigation. ▪

Louisiana Appeals Court Affirms Class Certification in Lingering Litigation Against Department of Insurance

BY CHRISTINE STODDARD

A Louisiana appeals court recently affirmed class certification in consolidated lawsuits, pending since 1991, against Louisiana's Department of Insurance, other related state entities, and the state's excess insurance carriers. In *Abshire v. State Through Department of Insurance*, life insurance and annuity policy owners and corporate noteholders from three Louisiana life insurance companies sued alleging that the state assented to the insurers' fraudulent transfer of funds out of the companies in which plaintiffs had invested to support failing affiliated companies in which plaintiffs had no interest. The state allegedly approved of these plans in order to protect the Louisiana Insurance Guaranty Association, which served as guarantor for the three insurers that benefited from the transactions. When the three insurers later collapsed, plaintiffs' losses were not protected by the guaranty association.

Following class certification, plaintiffs appealed. The appellate court, however, affirmed, finding the "numerosity, commonality, typicality, adequate representation, and an objectively definable class" requirements for certification in Louisiana, which mirror the federal rule, were met. It likewise found plaintiffs satisfied the requirements of predominance and superiority necessary to certify the class.

In particular, with regard to commonality, the court rejected defendants' arguments that individual issues of reliance prevented certification in light of plaintiffs' fraud claim. The court acknowledged that "plaintiffs may have had different reasons for investing, invested in various financial instruments, and suffered varying types and degrees of damages." Yet, despite these differences, it still found a common issue suitable for class treatment: "the common issue is that all suffered loss as a result of the alleged actions or inactions of the defendants in perpetration of the fraudulent scheme." Therefore, the court did not consider individual issues of reliance an impediment to class treatment.

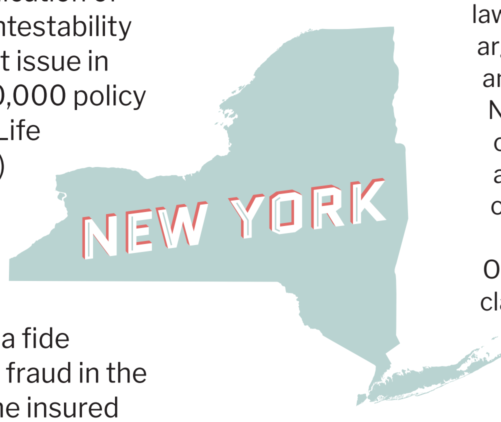
The court similarly found no error in the lower court's determination that plaintiffs had met the other certification requirements, which it explained were not demanding. Because it found the class satisfied numerosity on a prior appeal, it noted this decision was the law of the case. The court disposed of defendants' argument that there was no typicality due to the different damages, legal theories, and insurance policies involved, affirming the trial court's holding that all of plaintiffs' claims arose from the same conduct, namely, the state's acquiescence to the insurers' fraudulent transfer of funds out of the companies in which the plaintiffs had invested to support failing affiliate companies. The court also affirmed the lower court's finding as to adequate representation, finding no conflicts existed between the interest of class members and representatives, and determined the class could be defined in terms of ascertainable criteria.

Regarding the additional predominance and superiority requirements needed to certify the class, the court looked at numerous relevant factors, including the individuals' interest in controlling the litigation, the difficulties in managing a class action, and the ability of class members to otherwise pursue their claims. The appellate court noted that the trial court had undertaken a full analysis of relevant factors and found no manifest error in the trial court's conclusions that a class action was the superior procedural device to prosecute this case. Thus, it affirmed certification of the class. ■

Second Circuit Affirms Summary Judgment for Bona Fide Purchaser in STOLI Action

BY GAIL JANKOWSKI

In a June 8, ruling in *AEI Life v. Lincoln Benefit Life Co.*, the Second Circuit upheld the District Court for the Eastern District of New York's application of New York's two-year incontestability period to a STOLI policy. At issue in the litigation was a $6,650,000 policy issued by Lincoln Benefit Life Company (Lincoln Benefit) and ultimately purchased by AEI Life LLC (AEI). AEI – deemed by both the district court and Second Circuit to be a bona fide purchaser, unaware of any fraud in the policy's procurement by the insured and initial policyholder – had sought a declaratory judgment that the policy was incontestable due to the lapse of the two-year contestability period.



In the district court, the central issue was whether New York or New Jersey law, and the states' respective rules as to incontestability, applied to the policy. While both states have two-year incontestability periods prohibiting insurers from successfully challenging the validity of life insurance policies after accepting premiums for two years or more, New Jersey's law, unlike New York's, contains an exception for fraudulent policies. The issue turned on whether the policy's "Conformity with State Law" clause, which stated that the policy was "subject to the laws of the state where the application was signed," governed as a choice of law provision. Lincoln argued that the application was signed in New Jersey and, therefore, New Jersey's incontestability law applied, along with its fraud exception. AEI, however, argued that the provision was not a choice-of-law clause and, in any event, that the application was signed in New York. The district court ultimately interpreted the conformity clause as a choice-of-law provision and applied New York substantive law, resulting in a grant of summary judgment for the plaintiff.

On appeal, while it disagreed with the district court's classification of the conformity clause as a choice of law provision, the Second Circuit affirmed summary judgement for AEI. Specifically, the circuit court found that the conformity clause was "not a choice-of-law clause [and was] instead, exactly what it is called in the policy: a conformity clause [which] has the effect of excising a provision of an insurance policy that conflicts with or is voided by state law and replacing the provision with the prevailing state statute or judicial rule of law."

It stated further that "[i]f the parties intended this provision also to act as a choice-of-law clause, we would expect it to bear a title that indicated it was serving both purposes." The Second Circuit thus upheld the application of New York's two-year incontestability law and found that Lincoln was precluded from contesting the policy's validity. ■

NEWS & NOTES

The ALI Life Insurance Company Products Conference will occur on November 7-9 in Washington, D.C. Shareholder **Ann Black** will speak during a session titled, "NAIC 'A' Committee Initiatives and the Latest Innovations in the Design, Distribution, and Administration of Fixed and Fixed Indexed Annuities and Life Insurance Products." Shareholder **Josephine Cicchetti** will speak during a session on "Disruptive Technologies in the Life Insurance Industry." Of Counsel **Gary Cohen** will speak on a session about "Mutual Funds and Advisers: Key Regulatory and Litigation Developments."

The National COLI Directors Meeting will be held on November 8 in New York. Shareholder **Josephine Cicchetti** will speak about cybersecurity's impact on the financial services industry.

The ACLI Annual Conference will be held on October 7-9 in Washington, D.C. Shareholder **Richard Choi** will speak on a panel discussion titled, "Legal/Compliance: In Search of the 'Perfect' Regulatory Balance."

The firm sponsored the PCI General Counsel Seminar on September 24-25 in Cambridge, MA. Shareholders **Josephine Cicchetti**, **Kristin Shepard**, and **Barry Weissman** spoke on the topic of cyber insurance and legal risk.

The IRIVISION2018 conference was held on September 24-25 in White Sulphur Springs, WV. Shareholders **Josephine Cicchetti** and **John Pitblado** spoke on a session titled, "Protecting Consumers Against Cyber Threats in the Digital Age," and **Josephine Cicchetti** also spoke and moderated a panel discussion titled, "Responding to Growing Threats: How the Retirement Income Industry is Fighting to Protect Older Investors."

Carlton Fields sponsored this year's ACLI Compliance & Legal Sections Annual Meeting, held July 11-13 in White Sulphur Springs, WV. Shareholder **Kristin Shepard** spoke during a session titled "Hot Topics in Litigation," covering such subjects as lapse litigation, age 100 litigation, and non-guaranteed elements litigation. Shareholder and privacy and cybersecurity task force co-chair **Josephine Cicchetti** spoke during a session titled "Cybersecurity," focusing on the latest in threat intelligence and collaboration, implementation challenges of the various new regulatory requirements, and current best practices in breach preparation and response.

Carlton Fields was ranked as one of the top 15 law firms in the country for "Overall Diversity" according to *Vault's 2019 Best Law Firms for Diversity Rankings*. The firm also ranked in the top 15 for "Diversity for Individuals with Disabilities" and "Diversity for Minorities," the top 20 for "Diversity for Women," and the top 25 for "LGBT Diversity."

BTI's Legal Innovation and Technology Outlook 2019: Clients Rank Their Needs and Law Firm Performance singled out **Carlton Fields** as one of the most innovative law firms. The firm was highly ranked by corporate counsel for providing the most impactful and robust innovation and technology strategies.

Firm shareholder **Steven J. Brodie** will co-chair United Way of Miami-Dade's 2018-19 annual campaign, his second consecutive year in the role. He will work alongside co-chairs Matthew B. Gorson of Greenberg Traurig and Jose R. Mas of MasTec.

Firm attorney **Justin Wales** was promoted to senior counsel. He chairs the firm's blockchain and digital currency task force, advising blockchain, financial technology, and financial services clients on fundraising and regulatory matters.

Carlton Fields is pleased to announce that 79 of its attorneys were selected by their peers for inclusion in *The Best Lawyers of America 2019*. Seven firm attorneys were also named to the "Lawyers of the Year" list. Lawyers receiving this accolade earn some of the highest ratings in the Best Lawyers surveys based on a high level of respect among their peers for their abilities, professionalism, and integrity.

Carlton Fields welcomes the following attorneys to the firm: Shareholders **Steven Weisburd** (business litigation, Los Angeles) and **Emil Hirsch** (business litigation, Washington, D.C.), Of Counsel **Jonathan "Tre" Dixon** (health care, Tampa) and **Jennifer Tschetter** (government law and consulting, Tallahassee), and Associates **Andrew Gay** (construction, Tampa), **R. Quincy Bird** (labor and employment, Tampa), **Frank Moya** (construction, Tampa), **Rachel Schwartz** (property and casualty insurance, New York), **J. Ryan Yant** (creditors' rights and bankruptcy, Tampa), **Stephanie Chau** (business litigation, Los Angeles), **Kelley Godfrey** (property and casualty insurance, Orlando), and **Andrew Daechsel** (property and casualty insurance, Miami).

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