EVERSHEDS SUTHERLAND

Partnering Perspectives

Fall **2017**

Insights from inside and outside the corporate law department

In this issue

Defined contribution retirement plans in the US and the UK

US and UK regulatory differences pose challenges for financial institutions

The Congressional Review Act and energy regulation

Challenges to the SEC's enforcement remedies

Work product protection and the duty to preserve

Supplement to ACC Docket

From the editor — Patricia A. Gorham

Navigating the global regulatory landscape

With the US poised to decrease regulation and the outcome of Brexit unknown, multinational institutions face a great deal of unpredictability in the regulatory landscape. In this edition of Partnering Perspectives, we look at cross-border regulatory trends in the pension, financial services, and energy sectors. We also discuss limitations on the Securities and Exchange Commission's enforcement remedies and triggers for US work product protection and document preservation.

The US and UK face similar challenges with respect to defined contribution plans in retirement planning. **Francois Barker, Adam Cohen, Brittany Edwards-Franklin,** and **Tim Smith** analyze how such plans have evolved and provide examples of best practices in each jurisdiction.

With the US looking to decrease regulation while the UK maintains relatively robust regulation of the financial services sector, **Peter Harper, Meghana Shah, James Southworth, Lewis Wiener,** and **Sarah Chaudhry** discuss the challenges for institutions operating internationally.

David Baay, Mark Howarth, Louise Howarth, Catherine Manning, and **Robert Lemus** take a closer look at three repealed regulations impacting energy and mining companies.

Bruce Bettigole, Neil Lang, Adam Pollet, and **Laura Raden** discuss a recent US Supreme Court decision and its rippling effects on SEC enforcement remedies.

Robert Owen and **Melissa Fox** explore court decisions that conflate the triggers for work product protection and document preservation.

As always, please let me know if we can be of service in any way and if you have suggestions for future issues of Partnering Perspectives.

Patricia A. Gorham
Editor-in-Chief
Partner
Eversheds Sutherland (US) LLP

Partnering Perspectives

Subscriptions

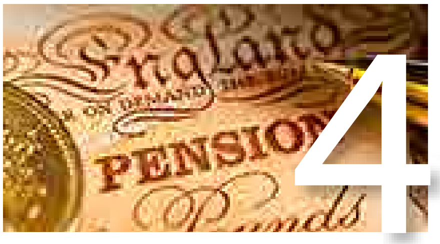
Partnering Perspectives is published by Eversheds Sutherland (US) LLP to provide an exchange of ideas across the inside and outside counsel relationship. To receive a complimentary subscription, send your name and email address to: partneringperspectives@eversheds-sutherland.com.

About Eversheds Sutherland

Eversheds Sutherland provides a full range of legal services to a global client base ranging from small and mid-sized businesses to the largest multinationals, acting for 71 of the Fortune 100, 57 of the FTSE 100, and 119 of the Fortune 200. With more than 2,400 lawyers, Eversheds Sutherland operates in 63 offices in 30 jurisdictions. Eversheds Sutherland is a global legal practice and comprises Eversheds Sutherland (International) LLP (headquartered in the UK) and Eversheds Sutherland (US) LLP (headquartered in the US), and their respective controlled, managed, affiliated and member firms. For more information, visit eversheds-sutherland.com.

eversheds-sutherland.com

Inside this issue



4

Lessons from across the pond: Defined contribution retirement plans in the US and the UK

By Francois Barker, Adam Cohen, Brittany Edwards-Franklin and Tim Smith

The US and the UK face similar challenges with respect to the critical role of defined contribution plans in retirement planning. This article analyzes how workplace defined contribution retirement plans have evolved in the US and the UK and provides examples of best practices in each jurisdiction.

8

Less is more or more is more? Differences in the regulatory ethos in the US and the UK pose challenges for financial institutions

By Peter Harper, Meghana Shah, James Southworth, Lewis Wiener and Sarah Chaudhry

The United States is poised to usher in an era of decreased regulation of financial institutions while the United Kingdom maintains relatively robust regulation of the financial services sector in line with developments since the global financial crisis. The authors of this piece discuss the challenges these differing regulatory regimes present to institutions that operate internationally.

12

A sea of change: The Congressional Review Act and energy regulation

By David Baay, Mark Howarth, Louise Howarth, Catherine Manning and Robert Lemus

Since President Donald Trump took office, the administration and Republican-controlled Congress have repealed 14 regulations. While some see a potential sea change in the US regulatory landscape, this article discusses the interplay between US rules and international regulatory regimes and the practical impact on energy and mining companies.

16

Challenges to the SEC's enforcement remedies

By Bruce Bettigole, Neil Lang, Adam Pollet, and Laura Raden

In June 2017, the US Supreme Court unanimously held in Kokesh v. Securities and Exchange Commission *that disgorgement as a remedy in SEC civil injunctive actions is subject to the five-year statute of limitations on civil penalties. This article discusses the rippling effects this decision may have on other longstanding practices and the perceived authority of the SEC.*

20

The triggers for work product protection and the duty to preserve are not identical

By Robert Owen and Melissa Fox

Some Federal Courts have conflated the triggers for work product protection and document preservation. This article explores some of the decisions that mix the preservation and work product protection triggers, and discusses why courts should reject the false equivalence between these two triggers that some have embraced.

Lessons from across the pond:

Defined contribution retirement plans in the US and the UK

By Francois Barker, Adam Cohen, Brittany Edwards-Franklin and Tim Smith

The 401(k) plan, also known as a "defined contribution" or "DC" plan, is now firmly entrenched as the primary employer-based retirement vehicle in the US. Defined contribution plans have likewise become the primary workplace pension vehicle in the UK. As a result, participation, investments, and distributions have become key concerns for employers, employees and policymakers on both sides of the Atlantic. As the search for new and innovative solutions takes on increasing importance, it is helpful to reflect on the ways in which workplace defined contribution retirement plans have evolved in the US and the UK and to learn from examples of best practices in each jurisdiction.

Plan landscape

In the US, the most prominent type of employer-sponsored defined contribution plan is a 401(k) plan, named after the tax code section that provides the plan's tax-deferred nature. A 401(k) plan is based on employee contributions and employer matching and profit-sharing contributions that are generally tax-deferred upon contribution and invested in accounts over which the employee has investment control. Unfunded supplemental plans, sometimes referred to as top-hat plans, are permitted for executives and other highly paid employees. This article focuses on 401(k) plans, but certain types of employers can sponsor other defined contribution plans.

In the UK, the most common forms of employer-sponsored defined contribution plans are occupational defined contribution pension plans, group personal pension plans, and master trusts. Like in the US, amounts held in these plans are tax-favored, the plans are funded through employee and employer contributions, and employees generally have an array of investment options from which they can choose. In order to benefit from favorable tax treatment, a plan must be a "registered pension scheme" meeting certain requirements. Employers also may operate unregistered schemes to enhance the benefits provided to senior executives.

Participation

Because defined contribution plans are funded in part (and in some cases, entirely) by employee contributions, employers and policymakers have recognized that broad participation is crucial to the success of these plans. The US and the UK have approached this problem in similar ways, but with different enforcement mechanisms.

US

In the US, one method of encouraging participation that has grown in popularity is auto-enrollment. Under this approach, newly hired employees are enrolled in the plan and are deemed to elect deferrals at a specified percentage (e.g., 3% of pay) unless they opt out. The power of inertia results in many employees simply going along with the contribution percentage. A variation on this approach is auto-enrolling all employees, including existing employees, at a specified rate (usually excluding employees who are already participating). Some employers have instituted auto-escalation, in which the contribution percentage of an automatically enrolled employee is automatically increased each year by a specified percentage (e.g., a 1% additional contribution per year) up to a capped amount, unless the employee opts out.

Auto-enrollment and auto-escalation are optional and not mandated by law. However, employers have an incentive to implement these features. The US tax code requires 401(k) plans to satisfy annual contribution testing. This testing, referred to as the "ADP test," mandates that as a condition of tax-favored treatment, the employer's highly compensated employees, on average, cannot contribute significantly more than the non-highly compensated employees, on average. Because the most highly compensated employees strongly prefer to maximize contributions to the plan, employers are motivated to find ways to encourage broad and meaningful employee participation. Of course, employers also want employees to contribute to 401(k) plans because it is in the best interests of their employees.

> *Because defined contribution plans are funded in part (and in some cases, entirely) by employee contributions… broad participation is crucial to the success of these plans.*

Although many employers have adopted auto-enrollment and, to some extent, auto-escalation, some employers may be hesitant to do so because an operational error in implementing these rules can result in significant adverse tax consequences for the employer. Also, employers might be concerned that employees will view the automatic contributions as overly paternalistic, even though they have the ability to opt out.

UK

The UK also has recognized the benefits of auto-enrollment, but it has gone a step further by mandating that all employers automatically enroll eligible workers in a qualifying pension plan that meets certain minimum quality requirements, including a minimum rate of employer contributions. The requirements were phased in, starting with the largest employers, and are now also applicable to smaller and micro employers. The requirements will apply to all employers (including those with just one worker) beginning February 1, 2018. Approximately every three years, employers are also required to automatically re-enroll workers who have opted out and who continue to meet the eligibility criteria.

> *A critical difference between a traditional defined benefit pension plan and a defined contribution plan is that the employee bears the investment risk in a defined contribution plan.*

Auto-escalation, though permitted in the UK, is not mandatory and is rarely used. However, this feature could become more common as employers become increasingly concerned about employees in defined contribution plans having sufficient savings to retire.

Investments

A critical difference between a traditional defined benefit pension plan and a defined contribution plan is that the employee bears the investment risk in a defined contribution plan. If the employee makes a poor investment choice or a chosen fund performs poorly, the employee ultimately will have less funds for retirement. For this reason, and others, there has been a great deal of attention to investment options in both the US and the UK.

US

In the US, 401(k) plans offer investment options selected by a plan fiduciary. The fiduciary is usually a committee of company employees with financial expertise, often assisted by an outside financial adviser. Plans usually offer a diversified menu of investment options.

Investment options are generally selected based on financial performance, rather than social or other factors. The US Department of Labor has taken the position that non-financial factors are generally not relevant in the fiduciary decision-making process, although it has acknowledged that environmental, social, and corporate governance factors can have an impact on financial performance and can therefore be relevant in a fiduciary's evaluation of the investment.

As a part of their fiduciary duties, plan fiduciaries closely monitor the amount of fees charged for investment management and recordkeeping. There has been a great deal of litigation in the US asserting that fiduciaries have failed to adequately monitor and limit fees, resulting in numerous costly settlements by plan sponsors. As a result, this is a topic of increasing importance and focus for plan fiduciaries, and many plan fiduciaries have made efforts to negotiate lower fees and improve the transparency of plan fees.

UK

In the UK, most defined contribution plans offer a range of investment options. The trustees of the plan (who are required to act independently of the employer) or the third-party providers are responsible for selecting the investment options available under the plan and for monitoring fund performance and ongoing suitability. An employer's role, if any, is limited.

Under UK law, trustees are required to evaluate environmental, social and corporate governance (ESG) factors in their investment decisions when these are, or could be, "financially significant." They also may consider ESG factors when they conclude that a particular factor or fund feature would be supported by an overwhelming majority of employees. It is now common in the UK for a defined contribution plan's investment options to include an ethical investment option and a Sharia law compliant fund.

ESG factors are generally a more significant aspect of fund selection in the UK than in the US, and this emphasis is expected to increase in the UK in future years. Beginning in 2019, a new European Directive on workplace pension plan governance will increase the need for trustees and providers to consider and record policies for assessing ESG risks in their plans. This directive is likely to impact the UK, regardless of the outcome of the Brexit negotiations.

With millions of people having been automatically enrolled in their employer's pension plan, the UK government is concerned about plan fees and, in recent years, has introduced the following additional requirements:

i. a cap of 0.75% on the annual fees (excluding transaction costs) that can be applied to an individual's savings held in the default fund under an automatic enrollment pension plan; and

ii. a requirement that those responsible for overseeing defined contribution plans assess and provide annual reporting on the extent to which the fees under the plan represent a good value for employee money.

Unlike the US, to date the UK has not seen extensive litigation over the amount of fees in defined contribution plans. However, this is something that could change as fees come under increasing scrutiny.

Distributions

The success of a defined contribution plan as a retirement vehicle is dependent in many respects on the manner in which employees draw down their account balances. Early and rapid distributions can lead to inadequate funds for retirement and imprudent financial choices. As a result, employers and policymakers in the US have implemented measures to encourage extended, deliberate distribution patterns in defined contribution plans. In the UK, savers have had greater freedom over how they use their retirement savings held within defined contribution plans since April 2015. Employers, providers and policymakers are still evaluating how best to support savers in this new environment of increased choices.

US

In the US, 401(k) plans generally allow distribution in the form of a lump sum upon termination of employment. The lump sum can be taken as a taxable cash amount or rolled over on a tax-free basis into an individual retirement account (also called an IRA), from which distributions in a variety of forms can be taken. Some 401(k) plans also offer installment distributions and, more rarely, the ability to purchase an annuity with the account balance.

The expense, additional administration and fiduciary risk of offering features such as installments and annuity purchases have discouraged some employers from offering any forms of payment other than lump sums. The US government has taken some regulatory actions to try to encourage 401(k) plan sponsors to offer these distribution features. One action was designed to reduce the fiduciary exposure for selecting an annuity product to offer under the plan. Another action was intended to provide a clear path to offering a new annuity product called a "qualified longevity annuity." This product is designed to be purchased with only a portion of the employee's account balance and pays an annuity benefit only if the employee lives past a certain age. This hedges against the risk that the employee will exhaust his or her account balance prematurely. Although this product has not yet been adopted widely due to concerns over administration and portability, among other things, over time it may become an attractive way to offer employees the best of both worlds—an account balance that they control, as well as protection in the event they outlive their assets.

UK

Generally speaking, individuals in the UK can access their defined contribution plan savings without penalty from age 55 (rising to 57 by 2028) or earlier if they are suffering from ill-health.

Since April 2015, individuals have had much greater freedom over distributions from their defined contribution plan savings, beginning at age 55. The tax rules prior to April 2015 allowed savers to take up to 25% of their savings as tax-free cash and then use the rest to buy an annuity. Individuals who took more than 25% of their savings as cash prior would have had to pay a 55% tax charge on the excess over 25%. As a result, very few people took this action. In addition, systematic withdrawal options were only available to individuals with large amounts of pension savings. However, significant changes were made to the tax rules in April 2015, which mean that (1) there are now no restrictions on who can make use of systematic withdrawal options, and (2) there is substantial flexibility to take any form of distribution.

The decrease in the prevalence of annuity distributions requires increased support and information as savers approach age 55 and begin to make decisions about the distribution of their pension savings. Providers are also looking at the potential for introducing default decumulation options for individuals who, for whatever reason, do not make a choice.

Conclusion

The US and the UK face similar challenges with respect to the critical role of defined contribution plans in retirement planning. The countries have implemented some common solutions, but in other cases the approaches are quite divergent. Employers and policymakers in each jurisdiction would benefit by considering the experiments, successes and issues that each country has encountered in this area.

The success of a defined contribution plan as a retirement vehicle is dependent in many respects on the manner in which employees draw down their account balances.

About the Authors: Francois Barker has nearly 20 years' experience of advising corporate sponsors and pension funds on UK and international pensions and benefits issues in relation to both defined benefit and defined contribution arrangements. Francois is actively involved in the development of pensions law and policy in the UK and Europe, and has helped to shape aspects of both UK and EU pensions legislation. He can be reached at francoisbarker@eversheds-sutherland.com

Adam Cohen develops practical solutions to the complex issues of employee compensation, benefits, retirement and pensions. He has more than 20 years of experience representing public companies, closely held businesses and tax-exempt organizations. Adam's extensive experience includes the design and implementation of tax-qualified retirement plans, nonqualified deferred compensation plans and 409A compliance, executive compensation arrangements, executive employment and separation agreements, fringe benefits and compensation clawbacks. He can be reached at adamcohen@eversheds-sutherland.com

Brittany Edwards-Franklin counsels clients on a range of employee benefits matters, including qualified retirement plans, nonqualified deferred compensation and executive compensation. She also advises on employee benefits aspects of mergers and acquisitions. She can be reached at brittanyedwards-franklin@eversheds-sutherland.com

Tim Smith keeps Eversheds Sutherland clients up to date with the latest developments in pensions law and practice. He can be reached at timsmith@eversheds-sutherland.com.

Less is more or more is more?

Differences in the regulatory ethos in the US and the UK pose challenges for financial institutions

By Peter Harper, Meghana Shah, James Southworth, Lewis Wiener and Sarah Chaudhry

The United States is poised to usher in an era of decreased regulation of financial institutions while the trend in the United Kingdom is to maintain relatively robust regulation of the financial services sector in line with developments since the global financial crisis. The parameters and potential impacts of these differing regulatory regimes remain unclear, but will present challenges to institutions that operate internationally. Though a great deal of unpredictability continues to permeate these environments, institutions in both the US and the UK should keep a close watch on and seek counsel regarding how their cross-border activities may be impacted.

The push to deregulate in the US

The Trump administration has signaled a shift in the US regulatory landscape to one of decreased regulation. The administration believes that robust regulation, including that implemented in response to the regulatory laxness that contributed to the financial crisis of 2008, has negatively impacted the ability of financial institutions to compete domestically as well as globally. While President Trump has enacted certain Executive Orders outlining a path of decreased regulation, it is unclear how these Executive Orders, which lack the force of law, will impact the functioning of financial institutions.

In addition, the President recently issued a series of Presidential Memoranda targeting Dodd-Frank by requiring the Treasury Secretary to assess and report by mid-October on whether certain provisions of Dodd-Frank comport with the administration's drive to ensure that regulation is not inhibiting the proper functioning of financial institutions. Even these directives, along with the recent passage by the House of Representatives of the Financial CHOICE Act of 2017, designed to curtail the powers that regulatory agencies enjoyed under Dodd-Frank, do not allow for an easy assessment of whether the subject rules and regulations will be changed or repealed.

In contrast to the [US] administration's belief that regulation inhibits growth, the United Kingdom appears to be shifting towards increased regulation as a means of promoting competition and optimal market outcomes.

Further complicating matters, the drive towards deregulation is not limited only to laws, such as Dodd-Frank, that explicitly govern the conduct of financial institutions. Rather, the Trump administration appears to be seeking to curtail the power of federal agencies to enforce and enact existing regulations and laws aimed at financial institutions. For instance, the administration's proposed budget eliminates the Reserve Fund, a key fund that the Securities and Exchange Commission (SEC) has characterized as necessary for it to actively monitor institutions and ensure compliance with the SEC's regulatory regime. In addition to its existing hiring freeze and the SEC's decreased use of contractors to aid enforcement, it appears that the SEC's ability to reach its enforcement goals during this administration is under threat. Moreover, the SEC has not been targeted exclusively; rather, it is one of many US agencies, including the Food and Drug Administration and the Environmental Protection Agency, that now face challenges in implementing their regulatory regimes.

It is unclear what impact the administration's deregulation efforts will have on the actual enforcement of existing laws by the SEC or other federal agencies. However, it appears likely that, if there is decreased enforcement by federal agencies, there may be increased enforcement by their state agency counterparts as well as increased litigation by consumer groups seeking to enforce existing laws (or to challenge the non-enforcement of laws and regulations). Additionally, there is the potential threat of increased criminalization of conduct if prosecutors determine that regulators are not enforcing laws and regulations that should be enforced.

The administration's inability, thus far, to actualize its aspirational goals has added to this uncertainty by creating an environment characterized by volatility and unpredictability. That being said, what is clear is that the administration will decrease scrutiny of and will work to lessen the regulatory burden on financial institutions. Such decreased scrutiny may introduce problems for cross-border institutions that seek to avail themselves of reduced regulation in the United States while remaining compliant with the regulatory regime in the United Kingdom, where the trend continues to be one of strengthened regulation.

The trend towards increased regulation in the UK

In contrast to the US administration's belief that regulation inhibits growth, the United Kingdom appears to be shifting towards increased regulation as a means of promoting competition and optimal market outcomes. A key example is the Financial Conduct Authority's Senior Managers and Certification Regime (SMCR), now in place for just over a year and due to be extended beyond just the banking and insurance sectors. The SMCR requires regulatory approval and oversight of individuals performing key functions. By 2018, another important regulatory scheme will be in effect, namely, the Second Markets in Financial Instruments Directive (MiFID II) and the accompanying Regulation on Markets in Financial Instruments and Amending Regulation (MiFIR). MiFID II and MiFIR, collectively MiFID II, seek to provide a European-wide legislative framework for regulating the operation of financial markets in the EU. The primary goals of these reforms are increased transparency of markets, a shift in trading towards more structured marketplaces, and making explicit the costs of trading and investing reforms.

Given that a substantial amount of financial services regulation has been enacted at the European level, the outcome of Brexit presents an element of unpredictability as to the United Kingdom's regulatory landscape. The expectation, however, is that much of the EU financial services legislation will continue to apply in order for the United Kingdom to maintain regulatory "equivalence" with the European Union post-Brexit. Accordingly, while Brexit presents a prospect of significant change to the domestic regulatory regime and legislative confusion at Brexit's implementation, it appears as though the United Kingdom will continue on its path of increased regulation.

Each nation's regulatory scheme will affect more than the day-to-day functioning of multinational institutions. Specifically, regulations (or the lack thereof) may impact the way in which such institutions structure their activities based on the differing regulatory environments present in the United States and the United Kingdom. While institutions can and should ensure that they comply with each regulatory regime, this seemingly uncontroversial proposition is complicated by the fact that the contours of the evolving regulatory landscape in the United States and the United Kingdom remain unclear. For instance, cross-border investigations of multinational institutions have become routine matters, but the differing regulatory ethos and rules in the US and UK present issues as to which framework will govern during these investigations.

It is therefore clear that multinational institutions operating in the United States and the United Kingdom may face unique challenges in ensuring that they are not running afoul of relevant rules and regulations. In this ever-changing regulatory environment, multinational institutions must constantly be assessing what may be required of them in each country. These institutions should also assess what potential issues may arise due to their cross-border activities spanning two (or more) different regulatory frameworks. In order to be best positioned to prevent cross-border regulatory issues, multinational institutions based in the United States and the United Kingdom should be in close contact with trusted advisers who can help them navigate this uncertain terrain.

...while Brexit presents a prospect of significant change to the [UK] domestic regulatory regime and legislative confusion at Brexit's implementation, it appears as though the United Kingdom will continue on its path of increased regulation.

About the Authors: Peter Harper, a partner in Eversheds Sutherland's Competition, EU and Trade group, has more than 10 years' experience advising clients on a broad range of competition issues working in London, Brussels and Madrid. Peter advises clients on market investigations, market studies and other regulatory inquiries as well as on behavioral investigations and compliance matters. He has particular experience in the financial services and payments sectors where he has a long track record of advising on market studies and other actions taken by regulators including the European Commission, the CMA, the FCA and the Payment Systems Regulator. He can be reached at peterharper@eversheds-sutherland.com

Meghana Shah, a partner in Eversheds Sutherland's New York office, has more than 10 years of experience managing all aspects of domestic and international litigation and investigations. Meghana's industry experience includes class action and multidistrict litigation in the environmental, toxic tort and food and beverage space, as well as investigations in the insurance and financial services space. She can be reached at meghanashah@eversheds-sutherland.com

Eversheds Sutherland UK Partner **James Southworth** advises financial services sector clients in dispute resolution and regulatory matters, including breach of mandate and conversion claims, security enforcement disputes, commercial fraud, asset and sales finance disputes, investigations and contentious regulatory work. James has considerable experience across retail, commercial and investment banking, including a secondment to the litigation & regulatory team at Barclays Bank and having acted for HSBC, Citi, BNP Paribas, Morgan Stanley and Credit Agricole. He can be reached at jamessouthworth@eversheds-sutherland.com

Lewis Wiener, an experienced trial and appellate attorney with more than three decades of trial and counseling experience, represents a broad array of clients in state, federal and appellate court litigation throughout the United States. Lew co-chairs the firm's global Financial Services Disputes and Investigations (FSDI) Practice Group. His extensive litigation and trial experience as a former prosecutor and senior trial attorney with the United States Department of Justice includes serving as class action defense counsel, conducting large internal investigations, handling complex litigation matters, and representing entities in litigation brought by and against the federal government. He can be reached at lewiswiener@eversheds-sutherland.com

Sarah Chaudhry, an associate in Eversheds Sutherland's New York office, counsels clients on a variety of commercial litigation matters, with an emphasis on financial services and securities litigation. She can be reached at sarahchaudhry@eversheds-sutherland.com

A sea of change:

The Congressional Review Act and energy regulation

By David Baay, Mark Howarth, Louise Howarth, Catherine Manning and Robert Lemus

Energy and mining companies should maintain particular vigilance in monitoring applicable changes within the US regulatory scheme, while remaining cognizant of the interplay between US rules and international regulatory regimes. The Trump administration and the Republican-controlled Congress have focused on campaign promises to roll back regulations and reduce government oversight. Congress and the administration have targeted many regulations, and to date, 15 have been reviewed and 14 repealed.

While some see a potential sea change in the US regulatory landscape, many of the US requirements are substantively redundant with what is required or mandated by other nations' regulatory regimes. As companies become more global, their advisers must become more global as well, to properly advise on requirements and potential liabilities from jurisdiction to jurisdiction.

The push to US deregulation

Since President Donald Trump and his administration took office, the White House and Republicans in control of the House and the Senate have used the Congressional Review Act (CRA), 5 U.S.C. §§ 801-808 (2006), to block 14 out of the 15 "midnight" regulations promulgated by the Obama Administration, and the global effects are yet unknown.[1] However, for at least three of the regulations which impact companies and the way they conduct business, the repeals are largely symbolic. The CRA has received a lot of attention in the first few months of Trump's presidency because of its widespread use in the White House initiative to roll back regulations. Prior to 2017, the CRA had only been used once.[2] Repealing other regulations will likely take more time and effort from Congress, and may not be as effective.

1 Only the Bureau of Land Management rule targeting methane emissions survived the use of the Congressional Review Act with a vote of 49-51 in the United States Senate.

2 In 2001, under George W. Bush, Congress rolled back an OSHA rule on ergonomics promulgated in the twilight of the Clinton administration via the Congressional Review Act.

Enacted in 1996, the Congressional Review Act allows Congress to review administrative regulations within 60 legislative days of their promulgation, with extensions for a newly seated Congress, and to give the rules a simple majority up or down vote by joint resolution without filibuster. If Congress passes a joint resolution disapproving the regulation and the resolution is signed by the President, the regulation is invalidated and cannot take effect. When the regulation is nullified under the act, the regulation cannot be "reissued in the same form" or in a variation that is "substantially the same" as the nullified regulation. The 115th United States Congress had until May 11, 2017, to use the Congressional Review Act to issue joint resolutions on regulations promulgated on or after June 13, 2016.

In 2017, Congress disapproved the following 14 administrative regulations:

1. Fair Pay and Safe Workplaces Executive Order
2. Stream Protection Rule
3. Gun Limits for the Severely Mentally Ill
4. Oil Anti-Corruption Rule
5. Unemployment Compensation Drug Test Rules
6. Women's Health Care Protections
7. Bureau of Land Management's Land Use Planning Rule
8. Every Student Succeeds Act (ESSA) Accountability and State Plan Rules
9. ESSA Teacher Preparation Standards
10. State Retirement Savings Plans Rules (I)
11. State Retirement Savings Plans Rules (II)
12. Alaska National Wildlife Refuges Rule
13. Occupational Safety and Health Administration (OSHA) Recordkeeping Rule
14. Broadband Privacy Protections

Repealed regulations impacting the energy industry

For clients operating in the US energy sector, a number of the repealed regulations are noteworthy—the Interior Department's Stream Protection Rule, the Securities and Exchange Commission's Oil Anti-Corruption Rule, and the Occupational Safety and Health Administration's Recordkeeping Rule. The repeals of these regulations are significant for at least three reasons. First, and most obviously, corporate compliance with these regulations is no longer necessary, and these regulations will not be reissued in the same or substantially the same form. Second, these repeals are evidence that the administration and the current US Congress are committed to their campaign promises to cut down on regulations and government, though the accepted expedited mechanism under the Congressional Review Act may now be foreclosed. Third, while corporate compliance with the regulations is no longer necessary, it is important to note that driving industry forces and obligations under foreign regulations that target the same issues remain untouched.

The Stream Protection Rule required coal mining companies to avoid surface coal mining practices that adversely affected water supplies, surface water and groundwater quality, streams, fish, wildlife and related environmental values. *See* 81 F.R. 93066 (2016). Members of Congress said that this regulation would kill coal-mining jobs, harming the coal industry and the American economy. The White House signed the joint resolution on February 16, 2017, preventing the Interior Department from reissuing the regulation, or a variation that is substantially the same, in the future. It is unclear if or when the Interior Department may try to address the subject matter of the regulation. That said, industry, market and consumer forces continually drive industries, like mining, to find better, safer and more efficient technologies.

While some see a potential sea change in the US regulatory landscape, many of the US requirements are substantively redundant with what is required or mandated by other nations' regulatory regimes.

The Securities and Exchange Commission (SEC) promulgated the Oil Anti-Corruption Rule under the authority of Section 1504 of the Dodd-Frank Act, also known as the Cardin-Lugar Amendment anti-corruption provision. *See* 81 F.R. 49359 (2016). At a high level, this regulation required any oil, gas or mining company that files an annual report with the SEC to include a disclosure of the type and total amount of both country and project-level payments to host governments. Members of Congress contended that the authority for the regulation may be suspect, that the regulation would put companies that are publicly traded in the US at a disadvantage, and that the regulation enforces social objectives, a purpose inconsistent with the core mission of the SEC. The White House signed the joint resolution on February 14, 2017, announcing that rejection of this regulation will bring back energy jobs to America. Notably, Canada, Norway, and the 28 countries of European Union have established largely equivalent transparency rules requiring companies to disclose this same information to other regulators around the globe. Congress appears to want the SEC to issue a new regulation that is not as anti-competitive, though what form that regulation will take is unknown. In the interim, the nullification of this regulation will have little impact on multinational energy companies that make disclosures under other regulatory regimes, although they need not make these disclosures to the SEC.

The Occupational Safety and Health Administration's (OSHA) Recordkeeping Rule addressed a 2012 court ruling that vitiated years of precedent regarding OSHA's ability to enforce recordkeeping violations that are more than six months old.[3] *See* 29 C.F.R. 1904 (2017). The regulation sought to clarify

3 *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 753 (D.C. Cir. 2012).

OSHA's recordkeeping directive and extend accurate recordkeeping of the serious workplace injuries and illnesses obligation of employers from six months to five years. Members of Congress claimed that this regulation would reduce jobs and harm the American economy. The White House signed the joint resolution on April 3, 2017. At this time, OSHA can only issue citations for recordkeeping violations that have occurred in the preceding six months. However, most companies with robust process safety policies that track key performance indicators and try to employ leading indicators will continue to maintain records for as long as they deem necessary internally. Additionally, destroying records related to an incident that then turns into litigation can subject a company to a spoliation instruction unless the company can show a business purpose for its conduct, such as a short document retention policy.

Contemplating the path forward

While the unprecedented use of the Congressional Review Act to nullify the "midnight" regulations of the previous administration may be at an end, some conservatives urge a novel continued use of the act. They advocate using the Congressional Review Act to nullify regulations going back to 1996, arguing that these regulations were not submitted for Congressional review in compliance with the act, and thus Congress may yet review these regulations once the regulators properly promulgate them. It remains to be seen whether such an action will be effective; however, it is clear that the current administration and Congress have an appetite for removing regulations, and the ones that have fallen under the Congressional Review Act are likely just the beginning of what could be a drastic sea change in the United States regulatory regime. Nonetheless, globalization and the rise of regulatory regimes around the world will likely blunt the impact of regulatory changes in the US as companies seek to comply with the greatest common global denominators of regulations for efficiency's sake.

Whether the UK can continue its move towards deregulation following the implementation of Brexit remains to be seen, as the details are still being developed.

The UK government, for example, had been seeking to reduce the regulatory burden on industry for some time. Its most recent strategy last year was to implement a "one in, three out" policy, requiring that the cost of every new regulatory burden is matched by a removal of three times the cost of an existing regulatory obligation. In relation to energy, the UK government has stood out in Europe as supporting shale gas exploration and has sought to simplify aspects of the planning regime to facilitate this. It is also looking more broadly at ways to reduce overall energy costs and complexity for businesses. This includes potential regulatory changes in respect of clean energy, including energy storage, as part of a wider industrial strategy, and abolishing the long-criticized CRC Energy Efficiency Scheme. Whether the UK can continue its move towards deregulation following the implementation of Brexit (the UK's exit from the European Union) remains to be seen, as the details are still being developed.

In determining how to navigate the shifting waters of the regulatory regimes around the world, it is important to collaborate with trusted and committed advisers who are in touch with and deal with regulations and the local administrative bodies on a regular basis. Companies should be mindful of the greatest common global denominators of regulations to ensure that they comply with, or exceed, the requirements of the various regulatory regimes they might encounter. Companies should work with their advisers to find innovative solutions to this new global uncertainty.

About the Authors: David Baay, partner-in-charge of Eversheds Sutherland's Houston office, represents the energy industry in commercial litigation. His clients include multinational oil companies, drilling contractors, pipeline operators, oilfield service companies, and multi-commodity traders. With trial and arbitration experience that spans the past 16 years, David represents his clients in high stakes litigation and other crisis situations. He can be reached at davidbaay@eversheds-sutherland.com

Mark Howarth is a UK partner in our energy sector commercial and regulatory disputes team. He handles a broad spectrum of litigation, international arbitration and regulatory work, helping clients to manage complex disputes and control commercial risks. Mark's client relationships include major energy and industrial sector clients such as DuPont, EDF, Engie, Eni, Essar, GE, RWE and Shell. He can be reached at markhowarth@eversheds-sutherland.com

Louise Howarth is a legal director for Eversheds Sutherland in the UK where she represents clients in environmental and chemicals dispute resolution and risk management. She can be reached at louisehowarth@eversheds-sutherland.com

Catherine Manning Catherine Manning advises on all aspects of environmental law including environmental due diligence on corporate and property transactions, compliance with packaging waste legislation, water law, chemicals legislation, contaminated land and emissions. A Senior Associate in the UK, Catherine has extensive experience advising chemicals suppliers and importers in respect of obligations under REACH (the European Chemicals Regulation) and the Biocidal Products Regulation. She can be reached at catherinemanning@eversheds-sutherland.com

Robert Lemus is an experienced litigator with a focus on complex commercial disputes, government and internal investigations, and privacy and data security issues. He represents a broad spectrum of commercial clients, from upstream, midstream, and downstream energy companies to manufacturers and retailers. Based in Houston, Robert has counseled clients in numerous federal and Texas courts. He can be reached at robertlemus@eversheds-sutherland.com

Challenges to the SEC's enforcement remedies

By Bruce Bettigole, Neil Lang, Adam Pollet and Laura Raden

In June 2017, the US Supreme Court unanimously held in *Kokesh v. Securities and Exchange Commission* that the availability of disgorgement as a remedy in Securities and Exchange Commission (SEC) civil injunctive actions is subject to the five-year statute of limitations on civil penalties.[1] The decision's immediate impact is to profoundly limit the ability of the SEC to seek disgorgement in its civil injunctive actions. Yet the implications of this decision may have rippling effects on other longstanding practices and the perceived authority of the SEC.

1 *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

The Supreme Court's *Kokesh* decision

Federal law applies a five-year statute of limitations to fines, penalties, forfeitures, and other punitive remedies in civil enforcement matters. 28 U.S.C. § 2462. In its 2013 decision, *Gabelli v. SEC*, the Supreme Court unanimously upheld the five-year time bar for monetary penalties in SEC enforcement actions but reserved the question of whether Section 2462 applies to claims for disgorgement.[2] In the aftermath of *Gabelli*, the SEC argued that the five-year statute of limitations did not apply to disgorgement because disgorgement is an equitable remedy, not a penalty. The US Courts of Appeals for the DC Circuit and the First Circuit agreed, finding that the statute did not apply to disgorgement.[3] But the Eleventh Circuit disagreed, holding that disgorgement is effectively the same as forfeiture and thus subject to the five-year statute of limitations.[4]

2 *Gabelli v. SEC*, 568 U.S. 442 (2013).
3 *SEC v. Tambone*, 550 F.3d 106 (1st Cir. 2008); *Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2010).
4 *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016).

In *Kokesh*, a jury found investment adviser Charles Kokesh liable for misappropriating investor money from four funds for over a 12-year period. The jury ordered Kokesh to disgorge nearly $35 million, the amount of proceeds misappropriated throughout the entirety of his scheme, the bulk of which were received outside the five-year limitations period. On appeal, the Tenth Circuit found Section 2462 inapplicable, reasoning that disgorgement is not a penalty. The Supreme Court granted certiorari to resolve the circuit split.

The Supreme Court held that disgorgement does operate as a penalty and thus is subject to the five-year statute of limitations. In doing so, the Court laid out two principles that determine whether a sanction, including disgorgement, is a penalty: 1) if the wrongful act was perpetrated against the public rather than an individual; and 2) if the sanction is used to punish the offending party and deter others from engaging in similar behavior rather than to compensate victims.

The Court applied these principles in finding that SEC disgorgement constitutes a penalty. First, it stated that courts impose SEC disgorgement as a remedy for violations of public laws against the United States rather than against an aggrieved individual. Second, it held that SEC disgorgement is imposed for punitive rather than compensatory purposes. The Court cited cases that emphasized the use of disgorgement "to deprive the defendants of their profits in order to . . . protect the investing public by providing an effective deterrent to future violations" and to punish offenders.[5] This holding prohibits the SEC from bringing an action seeking disgorgement more than five years after the underlying conduct has occurred.

Do the principles in *Kokesh* implicate the SEC's ability to seek injunctions for past conduct?

While *Kokesh* is immediately significant for its limitation on disgorgement, its holding may lay the groundwork for applying Section 2462's five-year statute of limitations to the Commission's use of injunctions for past conduct. Courts might apply the same principles from *Kokesh* in determining whether an injunction is a penalty subject to the five-year statute of limitations. In doing so, courts may consider whether the wrongful act was perpetrated against the public rather than an individual and whether the injunction is imposed primarily for punitive and deterrent purposes rather than to remedy ongoing misconduct or protect against future violations.

Meeting the first principle appears relatively straightforward. Like with disgorgement, courts impose SEC injunctions to remedy violations against the United States and the public at large rather than aggrieved individuals.

While the second principle requires deeper analysis, precedent suggests that SEC injunctions punish or deter rather than remediate ongoing misconduct. Courts often look to the extent of the collateral consequences to determine whether an injunction is punitive. Beginning in 1996 in *Johnson v. SEC*, the DC Circuit found that the "collateral consequences of the censure and suspension" suggest that an injunction is a penalty.[6] The court stated that if a permanent injunction is imposed as "a form of punishment" that "goes beyond remedying" the damage allegedly caused by the defendant, it would be a punitive measure, and thus subject to the Section 2462 time bar. Another court further found that enjoining the defendants from any future violations of securities laws "can be regarded as nothing short of a penalty 'intended to punish,' especially where [there was] no evidence (or allegations) of any continuing harm or wrongdoing [within the limitations period]."[7] More recently in *Gabelli*, the Supreme Court stated that it "'would be utterly repugnant to the genius of our laws'" if actions for penalties could "'be brought at any distance of time.'"[8]

Whether an injunction is "a form of punishment" that "goes beyond remedying" the harm caused by a defendant would likely be a fact-specific inquiry. Recently, the Eighth Circuit analyzed whether *Kokesh* bars the SEC from bringing injunctions more than five years after the misconduct occurred.[9] In that case, the court found it unnecessary to determine whether an injunction is a penalty under Section 2462, because (1) the defendant continued operating his business after the action was brought and thus there was a reasonable likelihood of future violations; (2) the injunction was meant to protect the public prospectively from the defendant's wrongful conduct rather than punish him; and (3) the injunction only required the defendant to obey the law. The outcome may differ in a case where a company voluntarily ceased the violative conduct, remediated any harm caused by the misconduct, took actions to prevent future misconduct, and self-reported. Thus, depending on the circumstances, if the at-issue conduct occurred beyond five years, a court may be inclined to find injunctive relief barred by the limitations period. Moreover, in future cases where a court may focus solely on whether to issue an injunction that merely requires obedience to the law, the court may consider that the purpose of such an injunction is to impose a "stigma" that would constitute a penalty.

5 137 S. Ct. at 1643 (quoting *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 92 (S.D.N.Y. 1970)).

6 87 F.3d 484, 489 (D.C. Cir. 1996).

7 *SEC v. Graham*, 21 F.Supp.3d 1300, 1310 (S.D. Fla. 2014); *see also SEC v. Jones*, 476 F. Supp. 2d 374, 385 (S.D.N.Y. 2007) (holding that where the SEC adduced no positive proof, aside from the defendants' past wrongdoing, to suggest some cognizable danger of recurrent violation, an injunction barring future violations of securities laws would constitute a penalty under Section 2462 because the "practical effect of such an injunction here would be to stigmatize Defendants in the investment community and significantly impair their ability to pursue a career").

8 568 U.S. at 1218 (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)).

9 *SEC v. Collyard*, No. 16-1405, 2017 WL 2803184 (8th Cir. Jun. 29, 2017).

Will the SEC be ordered to disgorge its disgorgement remedy?

In *Kokesh*, the Court expressly disclaimed opining on the availability of disgorgement generally: "Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."[10] This comment may signify a potential challenge to the long-held assumption that courts have the power to order disgorgement in SEC enforcement cases. The loss of disgorgement would prove significant: in fiscal year 2016, the SEC obtained judgments and orders totaling nearly $3 billion in disgorgement.[11]

While the SEC is statutorily authorized to pursue a wide range of remedies against securities law violators in district court proceedings, including injunctions, Congress has never expressly included disgorgement among them. But disgorgement has been an element of the SEC's enforcement arsenal since 1970, when it first sought and obtained disgorgement in *SEC v. Texas Gulf Sulphur Co.* There, the court held that "the SEC may seek other than injunctive relief in order to effectuate the purposes of [the Exchange Act], so long as such relief is *remedial relief and is not a penalty assessment*."[12] The SEC has obtained disgorgement countless times since.

This holding prohibits the SEC from bringing an action seeking disgorgement more than five years after the underlying conduct has occurred.

Despite this initial limitation, courts have often rejected defendants' assertions that disgorgement is a penalty, even when it goes beyond the sole purpose of depriving wrongdoers of their ill-gotten gains.[13] The SEC's argument that disgorgement is "remedial" in that it "lessen[s] the effects of a violation" by "'restor[ing] the status quo'" has typically prevailed.[14] But in *Kokesh*, the Supreme Court rejected the SEC's argument. It held that disgorgement is punitive because it "cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes."[15] Because of this language, the time may have come to reevaluate courts' authority to order disgorgement in SEC cases.

When courts first ordered disgorgement, there was no statutory authorization for monetary remedies. Simply put, the SEC had no way to impose financial sanctions on wrongdoers. As a result, the SEC argued that courts had the inherent ancillary authority to order equitable relief in the form of disgorgement to strip wrongdoers of their ill-gotten gains. The SEC's entire enforcement regime changed dramatically in 1990 when for the first time Congress authorized the Commission to seek civil monetary penalties for violations of federal securities laws.[16] Over time, Congress authorized the SEC to seek additional sanctions but repeatedly chose not to expressly provide for disgorgement in district court proceedings.[17]

Courts might apply the same principles from Kokesh *in determining whether an injunction is a penalty subject to the five-year statute of limitations.*

The enforcement tools at the SEC's disposal to combat violations of federal securities laws have expanded significantly since it sought and obtained its first order for disgorgement. There has also been an increasing emphasis on the punitive and deterrent aspects of its remedies. *Kokesh* and *Gabelli* place limits on the SEC's remedial regime insofar as the remedies imposed are principally viewed as punitive.

Conclusion

The immediate repercussion of the Supreme Court's *Kokesh* decision was profound even if straightforward: SEC disgorgement is subject to the five-year statute of limitations for civil penalties. Yet the Court's rationale could disturb decades-long practices at the Commission regarding the use of injunctions and its access to disgorgement generally. Recently, for example, following the SEC's decision to drop claims for disgorgement based on *Kokesh*, a defendant moved for complete dismissal as time-barred, asserting that the injunctive relief sought was punitive not equitable.[18] Over the coming months and years, defendants in SEC enforcement actions will likely continue to challenge these remedies and other previously well-accepted remedies, in particular for conduct outside the five-year statute of limitations. Thus, there is likely to be increasing uncertainty regarding the range and applicability of certain previously well-accepted SEC remedies.

10 137 S. Ct. at 1642 n.3.

11 Select SEC and Market Data Fiscal 2016, https://www.sec.gov/files/2017-03/secstats2016.pdf.

12 *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971) (emphasis added).

13 *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230-31 (D.C. Cir. 1989) (classifying disgorgement as an equitable remedy that serves the goals of depriving wrongdoers of their profits as well as deterrent, but not punitive, purposes).

14 137 S. Ct. at 1644 (*quoting* Brief for Respondent 17).

15 *Id.* at 1645 (emphasis in original).

16 15 U.S.C. § 77t(d).

17 *See, e.g.*, Sarbanes-Oxley Act § 305(b) (codified at 15 U.S.C. § 78u(d)(5)); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1376, 1862 (2012) (codified at 15 U.S.C. § 77h-1).

18 *SEC v. Gentile*, No. 2:16-cv-01619, Reply Memorandum of Law in Support of Defendant's Motion to Dismiss, Dkt. No. 39 (D.N.J. Aug. 3, 2017).

About the Authors: Bruce Bettigole has more than 30 years' experience as a securities enforcement lawyer and litigator, including 13 years in senior positions on the government/regulatory side. He has been lead trial counsel for the U.S. Securities and Exchange Commission (SEC) as Assistant Chief Litigation Counsel, Chief Counsel for NASD, now known as FINRA, Chief Counsel of NASD's Criminal Prosecution Assistance Group, and Special Assistant United States Attorney for several U.S. Attorney's offices. He can be reached at brucebettigole@eversheds-sutherland.com

Neil Lang represents clients in government and regulatory investigations, enforcement and litigation involving, among others, the Securities and Exchange Commission (SEC), the Department of Justice (DOJ), state regulatory agencies, the Financial Industry Regulatory Authority (FINRA) and private litigants. He has more than 25 years of experience in securities enforcement, compliance, corporate governance disclosure issues, internal investigations and litigation. A former chief trial attorney for the Division of Enforcement of the SEC, Neil has litigated dozens of cases involving allegations of financial fraud, fair value improprieties, market manipulation, insider trading, accounting irregularities and proxy violations. He can be reached at neillang@eversheds-sutherland.com

Adam Pollet represents broker-dealers, investment advisers, financial institutions, and their individual representatives in internal investigations and investigations by the U.S. Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA). He also represents his clients in complex commercial litigation in state and federal courts and counsels them on regulatory and compliance matters. He can be reached at adampollet@eversheds-sutherland.com

Laura Raden, previously an associate in the Washington office of Eversheds Sutherland, is a judicial law clerk to US District Court Judge James Otero in the Central District of California. She can be reached at lauraraden@gmail.com

The triggers for work product protection and the duty to preserve are not identical

By Robert Owen and Melissa Fox

Recently, some US courts have suggested that a litigation hold must be in place as soon as an entity marks any materials as work product, given the similar phrasing used to describe the preservation and work product protection triggers. "Reasonable anticipation of litigation" is the commonly accepted trigger for the duty to preserve discoverable evidence, and since *Hickman v. Taylor*[1] the work product doctrine protects materials prepared "in anticipation of litigation" from discovery, but two very different conditions are described by these similar-sounding phrases. Conflating the two standards may be an easy, mechanical shortcut for a court faced with a spoliation motion, but doing so discards the appropriate balance between preserving relevant evidence and the costs thereof, and introduces more confusion into an already muddy area. Holdings from courts that an entity is subject to sanctions if it does not have a litigation hold in place when it first marks any documents as work product threaten to encourage, once again, over-preservation and thereby undermine some of the gains realized by the 2015 amendments to Federal Rules of Civil Procedure 26 and 37. Despite similar use of the phrase "reasonable anticipation" of litigation, an entity should not be required to issue a litigation hold as soon as it first marks "work product" on a document.

1 329 U.S. 495 (1947).

Federal law on preservation affects many individual and corporate citizens every day, yet it is constantly in a state of flux and has evolved in fits and starts as a product of individual court decisions. The 2015 amendment to Rule 37(e) has done a good job of making the law on spoliation more consistent in US federal courts, but the Rules Committee dodged defining the trigger for preservation; it is still determined by the common law.[2] Moreover, opinions conflating the triggers for work product protection and preservation obligations introduce confusion into an area that needs more clarity, not less. Litigants, particularly those not equipped with large in-house legal departments and counseled by sophisticated attorneys, risk being shut out of our federal courts by the increasing complexity of e-discovery requirements. A requirement that a preservation notice be issued in every case where a company lawyer marks a memo "work product" is exactly the kind of trap for the unwary that the 2015 amendments were designed to eliminate.

This article first explores some of the decisions that mix the preservation and work product protection triggers. We then discuss why courts should reject the false equivalence between these two triggers that some have embraced.

Some federal courts have conflated the triggers for work product protection and document preservation

As noted, under US federal law, the duty to issue a litigation hold and the availability of the work product protection both nominally toggle on when a party "anticipates" litigation, and this has produced an easy equivalence between the two triggers in the eyes of some courts. Some cases have linked the triggers for work product protection and the duty to preserve, noting in dicta that the two are essentially the same.

In *Crown Castle USA, Inc. v. Fred A. Nudd Corporation*, the court determined the duty to preserve was triggered when plaintiff first marked communications with a work product legend.[3] Defendant sought sanctions for spoliation of electronically stored information (ESI). Internal emails marked as work product suggested that plaintiff explored the possibility of bringing a claim against defendant's insurance carrier eight months before filing suit. Without considering the inefficiencies associated with over-preservation, the court held that plaintiff's obligation to preserve evidence arose eight months before suit was commenced, when several of plaintiff's employees first considered filing a notice of claim and instituted a practice of labeling defendant-related communications as work product.

The US District Court for the Eastern District of New York reached a similar conclusion in an employment case, *Siani v. State Univ. of N.Y. at Farmingdale*, holding that if litigation was foreseeable for work product purposes, it was reasonably foreseeable for preservation purposes.[4] Plaintiff alleged that defendant intentionally deleted emails as shown by gaps in defendant's production of electronic messages and that plaintiff accordingly was entitled to an adverse inference finding based on spoliation. Defendant argued that the duty to preserve only arose when it received notice that plaintiff had filed an Equal Employment Opportunity Commission claim on July 16, 2008. Plaintiff maintained that a duty to preserve actually arose five months earlier, when defendant hired a law firm "to obtain legal advice in connection with issues" related to plaintiff and first marked materials as work product. The court explained that if litigation was reasonably foreseeable for work product purposes, it was reasonably foreseeable for all purposes—including affirmative preservation obligations. Subsequent courts have relied upon the decision in *Siani* to explain that the duty to preserve evidence arises no later than the first assertion of the attorney work product privilege.[5]

A similar analysis was applied by the Eastern District of Virginia in one of e-discovery's more notorious cases: *Samsung Elec. Co., Ltd. v. Rambus, Inc.*[6] Plaintiff alleged that four patents held by defendant were unenforceable. Defendant developed and licensed patents to companies that manufactured semiconductor memory devices, and had instituted a "Licensing and Litigation Strategy" aimed at several manufacturers, including plaintiff. Evidence showed that defendant's licensing and litigation strategy included a pervasive document destruction program designed to dispose of discoverable documents and ESI.

> *"Reasonable anticipation of litigation" is the commonly accepted trigger for the duty to preserve discoverable evidence… the work product doctrine protects materials prepared "in anticipation of litigation" from discovery, but two very different conditions are described by these similar-sounding phrases.*

The issue before the court was whether defendant's document destruction program constituted spoliation and warranted the imposition of sanctions. To determine if spoliation occurred, the court relied upon the work product protection test in evaluating when defendant anticipated litigation. The court held that defendant "clearly and convincingly" engaged in the spoliation of evidence while it anticipated litigation and when actually engaged in litigation. The court's reliance on the work product protection test as a "helpful guide when assessing intentional spoliation" demonstrates how some courts have equated the trigger for the duty to preserve with the trigger for the work product protection.

2 One of the authors submitted a proposal to the Rules Committee, which was endorsed by the Lawyers for Civil Justice, that the trigger for preservation be fixed as the commencement of a litigation. http://www.uscourts.gov/sites/default/files/robert_owen_adv_comm_submission_final.pdf

3 No. 05-CV-6163T, 2010 WL 1286366, at *1 (W.D.N.Y. Mar. 31, 2010).

4 2010 WL 3170664 (E.D.N.Y. Aug. 10, 2010).

5 *Lending Tree v. Zillow, Inc.*, No. 3:10-CV-00439, 2014 WL 1309305, *10 (W.D. N.C. March 31, 2014) (explaining that plaintiff's "duty to preserve evidence arose no later than its assertion of the attorney work product privilege"); *Cornelisse v. United States*, No. 09 Civ. 5049(JCF), 2012 WL 933064 (S.D.N.Y. Mar. 20, 2012) (noting that the analysis of when an entity reasonably anticipates litigation for work product and preservation "is essentially the same").

6 439 F.Supp.2d 524, 527 (E.D. Va. 2006).

The 2015 amendments to the Federal Rules of Civil Procedure

The 2015 amendments to Rules 26 and 37 were adopted to emphasize proportionality in discovery and to reduce the incentives for companies to over-preserve ESI and other materials. When the Rules Committee took up the issue of spoliation and sanctions in 2011, it became convinced that American companies were preserving too much out of fear of harsh sanctions for merely negligent loss of ESI.

Accordingly, Rule 26 was revised to narrow the scope of discovery. The troublesome phrase that led many courts to abandon all limits on discovery—"reasonably calculated to lead to the discovery of admissible evidence"—was eliminated, and relevance was redefined to include an express requirement that discoverable material be "proportional to the needs of the case." The complete rewriting of Rule 37(e) eliminated "death penalty" sanctions for mere negligent loss of data and sought to reward litigants who take "reasonable steps" to meet their preservation obligations.

Resist the false equivalence between work product protection and the duty to preserve

A rule that automatically triggers the preservation duty when an internal memo is first marked with a "work product" notation cannot be squared with the philosophy underlying the 2015 amendments to Rules 26 and 37. An entity may mark materials as work product in anticipation of litigation long before it reasonably anticipates litigation sufficient to justify the imposition of onerous preservation obligations. For example, in response to an employee comment about working conditions—that does not mention or suggest the prospect of litigation—an employer might initiate an internal investigation of the workplace. And after investigation, the legal department might draft a memo of its findings and mark it as work product. Although there is always a potential for litigation to arise, the company does not actually anticipate imminent litigation, but it has marked materials as work product. Under the cases described above, these actions alone trigger the duty to preserve. But this result is misguided. Without more reason to believe that litigation is imminent, such actions should not be construed as triggering affirmative preservation obligations *because litigation is not "reasonably anticipated."* It is simply a fact that corporate legal departments and their outside counsel are often called upon to investigate conditions "in anticipation of litigation" at a point in time when there is no "reasonable anticipation" of actual litigation. Should we really want to force companies to institute litigation holds under those circumstances?

The point is further illustrated by imagining an in-house legal department being asked to provide guidance on a changing regulatory environment, perhaps in anticipation of a new law set to go into effect. The lawyers draft a memo analyzing the predicted impact of such change. It includes a discussion of potential liability that might be imposed under the new statutory regime and is marked as work product and attorney-client privileged. It would be absurd to require that the entity affirmatively preserve all related materials simply because the memo was marked as work product. Indeed, to require preservation at that time would lead to rampant over-preservation and magnify the likelihood of overlapping litigation holds—undermining the purposes of the 2015 amendments discussed above. Yet under the rule espoused in *Crown Castle* and *Siani*, such actions would be sufficient to trigger the duty to preserve. While conflating the two triggers appeals to some given the similar language used, that approach is misguided and results in inefficiency.

> *Despite similar use of the phrase "reasonable anticipation" of litigation, an entity should not be required to issue a litigation hold as soon as it first marks "work product" on a document.*

In addition, requiring preservation at such a premature stage would be disproportionate to the civil justice system. The advisory committee's comments to the Rule 37(e) amendment provide that the "rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection." As reflected in the 2015 amendments, we do not expect or require perfection from civil litigants—some data will always be lost—but the solution to negligence is additional discovery, not imposition of punitive spoliation sanctions. Because requiring preservation at such an early stage leaves entities vulnerable to charges of spoliation—which detract from the merits of the case and sully careers—imposition of such a requirement prompts an unattainable quest for perfection that is disproportionate to the system itself. Of course, trials remain available to resolve civil disputes even where the written records are imperfect, as they always have been. Thus, requiring affirmative preservation at the first moment any document is marked as work product simply does not align with the preponderance of the evidence standard of our civil litigation system.

Conclusion

Of course, in some instances it will be true that as soon as a company begins producing "work product" memoranda it will "reasonably anticipate" litigation, and in those cases it would be proper to require, under prevailing law, that it take steps to preserve evidence. But our purpose in writing this article is twofold: to urge courts not to resort to the easy equivalence between the two "anticipation" triggers and to urge litigants to argue strongly against the assertion that the two triggers are identical for all purposes.

About the Authors: Robert Owen has decades of commercial litigation experience in New York and around the country. An adviser to financial services, energy and technology companies, Bob is known for efficient, creative and early dispute resolution. He has handled hundreds of cases before federal and state courts and arbitration panels. Bob is a nationally recognized authority in e-discovery, managing the costs and risks that e-discovery now adds to the litigation calculus. Bob currently serves as partner-in-charge of the Eversheds Sutherland New York office. He can be reached at robertowen@eversheds-sutherland.com

Melissa Fox counsels clients on a variety of business and commercial litigation matters, including financial services, labor and employment, securities litigation and enforcement. Melissa also has experience assisting major insurance companies and educational institutions in class action lawsuits, and advising clients in internal investigations and those brought by state and federal regulators. She can be reached at melissafox@eversheds-sutherland.com

EVERSHEDS SUTHERLAND

Strengthening global relationships

United by our vision, values and understanding of our clients and their business needs.

Providing legal services from 63 offices and 30 countries around the globe.

eversheds-sutherland.com