THE COMING DELUGE? REGULATION IN THE AFTERMATH OF THE CREDIT CRISIS

Each year in its Annual Survey, the *Columbia Business Law Review* selects a major business law topic and presents a group of notes exploring the relevant legal and economic developments in the area. Not surprisingly, perhaps, this year's Survey topic focuses on the legal and commercial implications of the renewed appetite in Washington, D.C., and around the nation, for the regulation of business. As foreclosures soared and jobs disappeared in the wake of financial distress widely perceived as being caused by reckless governance and foolish strategies on Wall Street, many demanded new rules to govern these institutions. The notes included in the Survey explore a variety of issues directly impacted by new and proposed regulatory reforms. From calls for a return to Depression-era banking practices to tools available to state and local governments for the enforcement of tax laws and the collection of sorely needed revenues to say-on-pay shareholder proposals, the authors of the 2010 Survey analyze the diverse implications of a changing business law landscape in which power has appeared to shift from New York to Washington.

In the first note, *Glass–Steagall Through the Back Door: Creating A Divide in Banking Functions Through the Use of Corporate Living Wills*, Roshni Banker discusses how debate on banking regulatory reform in the wake of the financial crisis has centered on proposals to bring back features of the Glass–Steagall Act of 1933 which imposed a separation between the investment and commercial banking activities of financial institutions. The note examines why current proposals to resurrect Glass–Steagall may not adequately address the modern boundary problem in banking regulation, and ultimately advocates that greater attention should be given to the use of corporate living wills to incentivize the private-sector creation of a Glass–Steagall-like divide.

In the second note, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, Elizabeth Broomfield explores recent proposals to cap the amount of recovery available through litigation over sovereign debt purchased on the secondary market. Over the past two years, sovereign debt has captured international attention as questions of sustainability and default plague both developed and developing countries. As these concerns escalate, vulture funds have faced increasing criticism for a strategy of purchasing discounted sovereign debt on the secondary market in order to pursue litigation for the full face value of the newly acquired claims. The desire to prevent such profiteering at the expense of the world's poorest countries has prompted responses from creditor governments such as the United States and the United Kingdom. This note analyzes the merits of these recent proposals.

In the third note, *Enforcement of State and Local Tobacco Taxes after* Hemi Group, C.B. Buente discusses the methods state and local governments have to address the challenges they face in collecting cigarette excise taxes. This note examines regulatory failures that have led to rampant evasion and harmed state and local budgets, as well as the regulatory approaches these governments may take in trying to improve compliance. This note concludes that state and local governments cannot rely on federal enforcement programs but should instead make their own investments in regulatory improvements and investigation to improve the collection yield.

In the fourth note, *Structuring Say-on-Pay: A Comparative Look at Global Variations in Shareholder Voting on Executive Compensation*, Jeremy Ryan Delman discusses how a renewed focus on executive compensation growing out of the global economic calamity has led to calls for shareholder votes on executive pay. This note argues that while such votes do not address the underlying causes of the financial crisis, they are nevertheless a necessary reform because, if properly structured, they can align executive compensation with shareholder interests. After reviewing

say-on-pay regulations in other countries, this note suggests that making shareholder votes not merely advisory but binding on boards may be appropriate in this country because of the difficulties U.S. shareholders face in replacing directors.

In the final note, *The Freedom of Information Act Exemption 4 Tested: Protecting Corporate Reputation in the Post-Crash Regulatory Environment*, Kathleen Vermazen Radez considers the increasingly active role of federal regulators in the aftermath of the recent economic collapse. As government regulators adopt a more assertive posture, institutions subject to government review run the risk that confidential business and financial information will become subject to public disclosure under the Freedom of Information Act ("FOIA"). The Court of Appeals for the Second Circuit recently ruled on a pair of cases raising the issue of corporate confidentiality and reputational harm. The court's ruling left open an important question: whether it is possible under FOIA for agencies and courts to appropriately account for corporate reputational harm in an era of increased government regulation without undermining FOIA itself. This note examines the current jurisprudence on reputational harm within FOIA, and proposes solutions to help courts better determine whether the reputation in question is that of the corporation or the regulating agency.

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