Message from the Chair

Dear Cyberspace Colleagues:

As you get ready to wrap up 2017, remember to take care of your registration and travel plans for the Uniform Regulation of Virtual Currency Update on January 26-27, 2018 in Atlanta. This annual program offers innovative CLE, roundtables on hot topics, and plenty of opportunities for networking. It also is the best way to get involved with the Cyberspace Law Committee, as we reserve time for our 13 subcommittees and task forces to meet and collaborate on upcoming publications, webinars, CLE programs, and other projects. You will find a link to our agenda on the event webpage.

Plan to arrive early enough on Thursday, January 25 so you can join us for an evening reception sponsored by Womble Bond Dickinson. And remember to sign up for the Friday dinner at Mary Mac's Tea Room. While not really a tea room, it has been officially declared "Atlanta's Dining Room," offering Southern comfort food. We also thank corporate sponsor, Charles River Associates.

Look for an announcement in the next few days about publication of the committee's latest book, the Electronic Payment Systems: Law and Technology, edited by Ed Morse. Work continues on two other books: one on AI and machine learning, edited by Ted Claypoole and one on drafting and negotiating effective cloud computing agreements, edited by Lisa Lifshitz. And we will announce soon a third book to be written in 2018.

If you want to contribute to any of these publications or the updated Business Law Today, please contact the editor or Juliet Moringiello, our publications director. We also welcome your short articles for publication in the Cyberspace Law newsletter. Share your knowledge and passion, get recognized, and join us in Atlanta to help build your career.

Cheryl Dancey Balough
Chair, Cyberspace Law Committee

Subcommittee News

From the Cybersecurity Subcommittee
Co-chairs Roland Trope and Tom Smedinghoff

In mid-November, the New York Law Journal published a review of Guide to Cybersecurity Due Diligence in M&A Transactions, the book co-edited by Tom Smedinghoff and Roland Trope, and that included among its nine contributing authors, CLC members William Denny, David Flint, Candace Jones, Tom, and Roland.

Reauthorization of FISA Section 702 & Privacy Implications

David Sella-Villa
Section 702 of the Foreign Intelligence Surveillance Act (FISA) expires on December 31, 2017. Under Section 702 the National Security Agency (NSA) is authorized to search the communications and phone calls of foreign intelligence surveillance targets. These NSA searches are approved by the Foreign Intelligence Surveillance Court. The searches for communications by the foreign intelligence surveillance target - the "to" or "from" parties in an email - are generally considered constitutionally unproblematic.

Searches, however, were conducted of communications that simply mentioned the foreign intelligence surveillance target - called "about" searches. The Foreign Intelligence Surveillance Court found this practice unconstitutional without stricter protections for communications collected from U.S. persons. In April, the NSA stopped conducting "about" searches. The NSA has created databases of information collected from "about" searches. Other U.S. intelligence agencies, such as the FBI and CIA, appear to have conducted searches for U.S. targets in the "about" databases.

There appears to be strong support for the reauthorization of Section 702. Congress must decide whether and how to treat "about" searches, the databases they populate, and the circumstances under which other government actors may access those databases. The form the reauthorization takes has important security and privacy implications for the behavior of private actors and the recourse of people who believe their electronic privacy has been violated. If government's authority to conduct "about" searches and use the resulting databases is limited, then actors with less authority than the government may be expected to do more to preserve people's privacy interests. If Section 702 is reauthorized with few restrictions on "about" searches, then it may be more difficult to argue that people's privacy interests in other circumstances are quite as strong.

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**NAIC Proposes Insurance Data Model Security Law**

*David Sella-Villa*

In October 2017, the National Association of Insurance Commissioners (NAIC) passed its Insurance Data Security Model Law. The model law proposes data security practices, investigation responsibilities, and data breach notification requirements for insurers, agents, and other licensed entities in the insurance field ("Licensees"). The model law shares many elements in common with other information security regimes, such as HIPAA and Graham Leach Bliley. The model law is intended to work in conjunction with several other statutes, including the state's breach notification laws, insurance licensing laws, and insurance law enforcement acts and procedures.

The model law requires that covered parties implement an information security program, but it does not prescribe any specific information security policies or practices. Rather, the model law requires that each information security program reflect, among other factors, the complexity, size, and risk assessment of the Licensee. The content and frequency of risk assessments are prescribed by the model law.

The use of encryption plays an important role in the model law. If Nonpublic Information is encrypted, its unauthorized access, use, or disclosure does not constitute a "Cybersecurity Event." The model law's investigation requirement only applies to a Cybersecurity Event. Additionally, Cybersecurity Events would trigger notice to the state's insurance commissioner and the insurance commissioner in any other state which has at least 250 potentially affected consumers.
Uniform Regulation of Virtual Currency Update

Sarah Jane Hughes

With Bitcoin recently breaking the $15,000 threshold, it will be more important than ever for states to enact the Uniform Law Commission's Uniform Regulation of Virtual-Currency Business Act. CLC members Sarah Jane Hughes and Steve Middlebrook contributed to the act by being, respectively, the Reporter and the ABA Advisor for the past three years. A companion act to provide important commercial law user protections for virtual currencies held by third parties that have "control" over the virtual currencies is being developed and a Drafting Committee meeting is likely to be convened in March 2018. The protections are modeled after Part 5 of the UCC's Article 8. The companion act also should facilitate using virtual currencies as collateral for Article 9 secured transactions.

If your clients are interested in virtual currency regulations, please go the ULC's website and sign in as an Observer for the companion act in time to get announcements of comment periods and the time and place of the March 2018 meeting. Sarah Jane is the Reporter for this new project, and long-time Business Law Section UCC subcommittee member and Article 8 guru, Sandra Rocks, has been designated as ABA Advisor for the companion act Drafting Committee.

Virtual Currency News

Steve Middlebrook, Womble Bond Dickinson (Steve.Middlebrook@wbd-us.com)

Back in November 2016, the IRS issued a "John Doe" subpoena to Coinbase, the largest U.S. bitcoin exchange and wallet service, seeking information on every single customer of the company who engaged in a virtual currency transaction during the years 2013-2015. As you can guess, a fight ensued over the incredibly broad request. Last month, a court resolved the dispute by ordering Coinbase to turn over a limited amount of information about a significantly smaller group of customers. The exchange only has to provide information on customers who engaged in $20,000 or more worth of transactions in a year which will reduce the number of customers impacted from millions to approximately 14,000. And the information provided will be limited to name, address, date of birth, taxpayer id and account activity records and statements. Read the court's order here.

The Commodity Trading Futures Commission approved two exchanges to trade in bitcoin futures and options. The availability of these kinds of contracts on a regulated market could have a significant impact on the market for and price of bitcoin. Read the CFTC press release here.

Finally, the SEC took its second enforcement action against an Initial Coin Offering, or ICO. ICOs are a form of virtual currency issued by an entity to raise money to support software and product development. They've been used to raise several billion dollars in 2017. The SEC has stated that many of the ICOs are unregistered securities offered in violation of federal law. On December 1st, the SEC filed suit against PlexCorps and its principals, asserting the company's ICO offering was an unregistered security and a scam. The SEC noted that one of the people involved has a history of security law violations. Read the SEC complaint here.

In gossipy legal news, Bitfinex, the virtual currency exchange that has been accused of market manipulation and other bad things, has said it will sue (or maybe it's just try to intimidate) its critics and has hired Steptoe & Johnson to represent it. Read all the salacious details here.
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