

THE HOWE & HUTTON REPORT

Volume 2017, Issue 1

TRENDING NOW

REPUBLICANS PREPARE TO REVERSE OBAMA’S MIDNIGHT RULES – Like previous “lame duck” administrations, Obama’s promulgated a group of regulations intended to become effective before a new President could take office. All such “Midnight Rules” must be published in the *Federal Register* on or before January 19 to have legal force and effect that cannot be immediately reversed by the new Trump Administration without the issuing agency undertaking a time-consuming public notice and comment rulemaking that would be subject to judicial review. Obama’s people had many such Midnight Rules ready for publication prior to the elections, but they were held back to avoid political issues. Now, some may not be published by the deadline because of a logjam of rules awaiting publication. Other proposed rules that are economically significant (costing more than \$100 million) will die if Congress adopts resolutions disapproving them within 60 days after the new Congress’s first 15 days of business, beginning January 3, though Congress can be expected to be very busy with other matters during that period.

Members of Congress were actually fighting over the Midnight Rules even before Thanksgiving. On November 17, the House of Representatives adopted a bill that would permit the House to disapprove all of Obama’s Midnight Rules with one vote. But that legislation was subject to an Obama veto that Congress couldn’t override. So, it was just a preview of coming events.

VISIT OUR WEBSITE

SAME GREAT SERVICE ... NEW LOCATION

We are pleased to announce that as of January 1, 2017, our Chicago office has relocated to the following address

Howe & Hutton, Ltd.
125 S. Wacker Drive, Suite 2310
Chicago, IL 60606

All phone, fax numbers, and email addresses will remain the same.

NOT FOR PROFIT LAW DEVELOPMENTS

NEW YORK DISCLOSURE REQUIREMENTS INCREASE – New York’s Governor Andrew Cuomo has signed into law new disclosure requirements and prohibitions for nonprofits. The new law dramatically increases requirements for federally tax-exempt 501(c)(4) social welfare organizations to make “source of funding” reports to the state Joint Commission on Public Ethics if they engage in lobbying expenditures. It adds requirements for reporting of state or local campaign expenditures to the state Board of Elections when such a group makes public statements referring to, or advocating for or against any candidate or public official. Further, it limits the making of such statements if the organization engages in an expanded number of activities considered to be coordinating of expenditures with a candidate or candidate’s campaign. Finally, the new law targets tax-exempt 501(c)(3) organizations (charitable, educational, religious, scientific) for required and expanded reports to the Attorney General’s Charities Bureau if the organization provides funds to a 501(c)(4) group that engages in lobbying. *There are some aspects of the new legislation that may not survive a court challenge, such as the regulation of public statements an organization may make “referring to” a public official. A good government group called Citizens Union has sued to strike down the new law as violating individual rights guaranteed by the U.S. Constitution, such as the right to free speech and the right to petition the government. We will follow that litigation with great interest.*

A.G. REACHES SETTLEMENTS WITH VETERANS CHARITY AND OFFICERS – *H&H Report Update* - The Attorney General for the State of New York has reached settlements with a veterans charity and its officers, in which they admitted to abuse, mismanagement and misspending. National Vietnam Veterans Foundation, which also operated as American Veteran Support Foundation, has collected nearly \$9 million in donations since 1992, but 90% of those donations were paid to fundraisers. Other funds were spent on expensive foreign and domestic travel, frequent visits to night clubs, and “excessive and expensive” food and drink enjoyed at the country’s top restaurants by organization officers. Meanwhile, the charity deceptively marketed how solicited money would be spent, paid large amounts of money for purported consultancies and studies to be provided by friends and relatives of the officers, paid for the personal expenses of officers and filed false reports with government agencies. Now, the organization will be shut down, the officers involved will be banned from further handling of charitable assets, and funds that can be recovered by the Attorney General will be re-directed to charities actually helping veterans. *In addition to fleecing donors and exploiting veterans, this organization’s activities, which have been heavily publicized, at least in the New York area, bring legitimate charities into disrepute.*

U.S. SUES NONPROFIT AND LEADERS FOR ASSISTING TAX EVASION – The U.S. Justice Department has sued the Oregon nonprofit South Beach Missions and its founders for allegedly running an ongoing nationwide scam that may have encouraged hundreds of people to illegally avoid paying income taxes for over a decade. The nonprofit and its founders, for a price, have helped incorporate hundreds of purported “churches,” telling individuals that, as churches, they had “natural immunity” from federal income tax and did not have to meet any of the requirements that the IRS has established for the recognition of nonprofits as truly tax-exempt organizations. Now, the Justice Department is seeking to shut down South Beach Missions and find out who its “churches” are so that the government can recover taxes owed and not paid. *This abuse of tax exemptions for churches is so common that the IRS has ranked it among the agency’s annual “Dirty Dozen” tax schemes. It isn’t that hard to be recognized as an exempt church, but the IRS has tests aimed at establishing that a group has sincere religious beliefs, whatever they are, and functions the way a church is commonly regarded as functioning, with congregations and religious*

NOT FOR PROFIT LAW DEVELOPMENTS (cont)

gatherings. Those that claim there is an easier way for “churches” to avoid taxation, based on “natural immunity” or otherwise, just make things harder for true churches. That’s why it’s surprising and maybe a little disappointing that it sometimes takes “over a decade” for government to catch up with these folks. As in other areas of the law, delay in enforcement allows all sorts of criminal activity to flourish.

MEETING AND TRAVEL DEVELOPMENTS

AIRPORT RUNWAY CLOSE CALLS RISING – The Federal Aviation Administration has reported that runway “close calls” at airports rose in the U.S. for the third year in a row during the fiscal year ending September 30, 2016, with an increase of 25% from the previous year. In total, there were more than 1,560 instances nationwide where planes came closer than permitted to each other or to vehicles, and there were 19 instances where significant chances of accidents or collisions were narrowly averted. *The FAA’s report covered all types of aircraft at airports with towers. The increase in hazardous runway incidents came despite stepped-up industry and government efforts to reverse the three-year trend. But “close calls” still affect only a small fraction of the flights in the U.S. each year.*

TRANSPORTATION DEPT ADOPTS TOUGHER STANCE ON AIR PARTNERS – The U.S. Department of Transportation has adopted a tougher stance recently in approving air-partner agreements between American and foreign airlines. The Department imposed stiff conditions for approval of a proposed arrangement between Delta Air Lines, Inc. and Aerovias de Mexico SA (Aeromexico), while denying an application for antitrust immunity coming in connection with an arrangement between American Airlines Group Inc. and Qantas Airways Ltd of Australia. *The Department has said that it needs to consider competition and whether such proposals create substantial public benefits. Small airlines contend that such partnership deals prevent them from competing in an already consolidating industry.*

DOT CONSIDERS IN-FLIGHT PHONE CALLS – The U.S. Department of Transportation may allow in-flight phone calls, it says, after doing a little further review and permitting public comment. There will be two limitations, according to a DOT announcement. Airlines will have the option of providing the service or not, and passengers will have to be given advance notice if calls will be allowed on a flight. *Advances in onboard wi-fi have facilitated in-flight calls, and cell phone calls are made frequently on other forms of public transportation. Additionally, although the government has banned in-flight calls until now because of safety concerns, the Federal Aviation Administration admits that it has no hard evidence that such calls could create safety issues.*

REGULATORY LAW DEVELOPMENTS

BILL TO SPEED DRUG APPROVAL PASSES – One of the first acts of the post-election Congress was to pass legislation promoting speedier new drug and medical device approval by the Food and Drug Administration. The bill also included funds for a “cancer moonshot” promoted by Vice President Biden, a precision-medicine initiative advanced by the National Institutes of Health, an extensive program to promote treatment of mental illness, and money for the prevention and treatment of opiate addiction. *This bipartisan measure hopefully marks the beginning of a new era of cooperation in Congress, though periods of cooperation there rarely last long.*

REGULATORY LAW DEVELOPMENTS (cont)

COURT ATTACKS INSIDER TRADING – The Supreme Court of the United States, for the first time in nearly 20 years, took on the concept of “insider trading” recently, affirming that the law prohibits corporate insiders from providing confidential information to friends and relatives at the expense of the trading public. The case involved the criminal prosecution of a Chicago man and an associate who generated more than \$1.5 million in profits by trading on tips from the Chicagoan’s brother-in-law, an investment banker at Citigroup Inc., who gave them tips about coming acquisitions of biomedical companies involving Citigroup clients. The Chicagoan maintained at his trial that he couldn’t be prosecuted because he hadn’t paid his brother-in-law for the tips. But the Supreme Court has now made it clear that the government, in prosecuting insider trading, need not prove that a tipster received anything of personal value in exchange for a tip, but just that a tip was given and acted upon. *The Supreme Court decision gives the government back some of its power to prosecute insider trading that was lost in an earlier federal court decision. Law enforcement personnel had previously dropped a number of high profile criminal cases because they believed the earlier decision prevented convictions for “insider trading” unless a tipster received something of value in exchange for information given.*

EPA ADVANCES TOUGHER FUEL-ECONOMY STANDARDS – *H&H Report Update* – As an example of the regulations the Obama Administration has rushed to finalize before Donald Trump takes office (see article on front page), the Environmental Protection Agency advanced its schedule for tougher fuel-economy standards that call for auto makers to sell light vehicles averaging 54.5 miles per gallon by 2025. They originally planned to promulgate the new rules in 2017, but rushed to get them out in late 2016. *Auto makers say they need relief from the rules because lower gas prices have sent consumers flocking to less fuel-efficient SUVs and trucks. The rules are subject to a 30-day public comment period, but if they are finalized before January 20, the regulations will be harder, though not impossible, for Trump to undo.*

TAX LAW DEVELOPMENTS

IRS ISSUES GUIDANCE ON INFORMATION DOCUMENT REQUESTS – The Tax Exempt and Government Entities Division of the Internal Revenue Service has issued new guidance for its agents concerning “information document requests” they may issue to nonprofits and other taxpayers. These are requests for documents and other information that the IRS may issue in connection with audits and review of applications for recognition of exempt status, among other things. The guidance directs agents to discuss issues being examined with taxpayers before requesting documents from them, and it requires agents to clearly describe the issues they are considering as well as the information being requested. Further, the guidance indicates that delinquency notices, and then pre-summons notices, must be issued if requested information isn’t provided to the IRS by an “agreed upon date,” giving taxpayers several opportunities to voluntarily comply with document requests from the Service. However, the guidance does make it clear that, at the end of the process, the IRS can issue a summons for information requested, with which a taxpayer must comply or risk adverse action from the Service. *We view the new guidance as helpful for nonprofits and other taxpayers who are under audit or are seeking recognition of exempt status or some other ruling from the IRS, and we commend this effort by the Service to promote meaningful communication between the IRS and taxpayers.*

EMPLOYMENT LAW DEVELOPMENTS

WORKPLACE ENVIRONMENT NOT “HELLISH” DOESN’T SHOW HARASSMENT – The U.S. District Court for the Northern District of Illinois in Chicago has granted summary judgment to an employer that was sued for sexual harassment in subjecting a worker to a “hostile work environment.” The worker’s case was based on three instances of verbal conduct by a co-worker, which the court considered to be relatively isolated, amounting to no more than “the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers,” in the words of the U.S. Court of Appeals for the Seventh Circuit in an earlier decision. This conduct, the District Court said, was not so severe and pervasive as to reach the threshold for an actionable claim based on a hostile work environment, which must involve a workplace that has become “hellish.” *Many workers may believe that they are working in a hell of sorts, but requiring a “hellish” workplace is a high standard for a plaintiff to meet in showing the existence of a hostile work environment. The court contrasted this case with one involving an “actionable claim” based on “sexual assaults, other physical contact for which there was no consent, uninvited sexual solicitations, intimidating words or acts, obscene language or gestures and pornographic pictures.”*

JUDGE BLOCKS OVERTIME RULE CHANGE – *H&H Report Update* – A federal judge in Texas has temporarily blocked enforcement of new overtime rules the U.S. Department of Labor had adopted, which would greatly expand the number of professional, executive and administrative workers eligible for time-and-a half overtime pay. Among other things, the rules would require employers to pay overtime when such workers make less than \$47,500 per year, up from \$23,660. *The rules were scheduled to take effect in December, but now are on hold pending the court’s consideration of whether they were properly adopted by the Department. The fate of the new rules in the Trump Administration was questionable anyway, and Congress is also taking steps to countermand them.*

DEADLINE FOR HEALTH INSURANCE COVERAGE REPORTING EXTENDED – *H&H Report Update* – The Internal Revenue Service has extended the due date for reporting certain information regarding health insurance coverage to insureds and the federal government under the Patient Protection and Affordable Care Act (Obamacare). Generally, the Act requires that employers having 50 or more full-time or full-time equivalent employees and providing self-insured health coverage for their employees give certain information to insureds and the IRS regarding coverage for 2016. Penalties are provided for failure to comply. But the due date for compliance has now been extended from January 31, 2017 to March 2, 2017. Additionally, the IRS has announced that relief from penalties will be provided in certain instances of good faith failure to comply. *The election of Donald Trump to the Presidency raises some serious questions about the continuing life of numerous Obamacare requirements, including this one. But, as Obamacare was enacted by Congress, it will take Congressional action to eliminate or change some of them.*

INTELLECTUAL PROPERTY LAW DEVELOPMENTS

SAMSUNG SCORES VICTORY IN IMPORTANT DESIGN PATENT CASE – *H&H Report Update* – You produce something that is a major commercial success, but somebody sues you, claiming that you owe them all of the money your product has made for you because it mimics components of something they have produced. That’s the situation Samsung was in when Apple sued them for all of the profits Samsung made from smartphones that violated three of Apple’s design patents for the Apple iPhone’s shape and icons. After Samsung was found liable of infringement in a trial court, it initially faced nearly a billion dollars in penalties, later reduced to \$399 million. But now, the Supreme Court of the United States, by an 8-0 decision, has directed the lower court to reconsider its damages award, and perhaps reduce it further, because only components of the Apple product were infringed upon and not the entire iPhone. *This important design patent case is the first such case to reach the Supreme Court in more than a century. It may limit the value of design patents and give competitors an incentive to copy the components of popular products, knowing that, at worst, they will only have to pay over a portion of what they make from that endeavor as damages.*

OTHER ISSUES

COURT REVIVES SUIT AGAINST DEBT COLLECTOR – Angered by unfair debt collection practices? Federal law provides some remedies, and a suit against one collector, previously dismissed by a trial court, was revived on appeal recently by the U.S. Court of Appeals for the Seventh Circuit in Chicago. In that case, a man sued a collector under the federal Telephone Consumer Protection Act and Fair Debt Collection Practices Act, alleging that the collector made unauthorized and illegal robocalls to a cell-phone in order to collect a hospital bill. The Court of Appeals acted because the trial court gave no reasons for dismissing the suit, and any likely reasons for doing so “would be erroneous” in the opinion of the appellate court, which ordered further proceedings in the trial court to determine if the collector’s conduct violated the Acts, as well as the appropriate remedy for them in this case. *Two lessons here: debt collectors should avoid robocalls, especially to cellphones, and judges should give reasons for their rulings. “Because I say so” may work with parents and children, but not with appellate courts.*

WATCH OUT FOR GOOLIGAN – Malicious software known as Gooligan has seized control of more than a million Google accounts since August and is taking over more than 13,000 Android devices a day. The software comes disguised as legitimate apps with names such as StopWatch, Perfect Cleaner and Wi-Fi Enhancer. Taking advantage of long-known flaws in Android 4 and Android 5, it installs unwanted apps and ad-spewing software, and it sometimes posts fake reviews with stolen user names and passwords. *Isn’t technology wonderful?*

HOWE & HUTTON NEWS AND EVENTS



Jonathan Howe will be presenting three educational sessions at the Religious Conference Management Association EMERGE CHICAGO 2017 at McCormick Place West Convention Center February 8th and 9th. The topics will be “The New World of Negotiations,” “Contract Clauses You Should Pay Attention To, But Probably Don’t!” and “Risk Management: To Risk or Not to Risk.”

Jonathan will be attending EMEC 2017 in Granada, Spain as legal counsel for Meeting Planners International.

Nathan J. Breen was featured in a roundtable article in Meetings & Conventions magazine entitled “Meeting Contracts in a Time of Flux.”

<http://www.meetings-conventions.com/News/Features/Legal-law-hotel-contracts/?p=1>



Mike Deese will be presenting a session entitled “Current Legal Issues for Association Management Companies and Their Clients” on February 10th at the annual meeting of The AMC Institute in Fort Lauderdale, Florida.

© Copyright 2017. All Rights Reserved. Republication with credit to Howe & Hutton, Ltd. and “The Howe & Hutton Report” is allowed. Please provide us a copy of your use.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or professional service through its distribution. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Past newsletters are available at www.howehutton.com

Editor — James F. Gossett
Contributors — Christina M. Pannos and Nathan J. Breen
Staff — Susan L. Colter

