

[FERC is Back and Faces a Full Plate of Electricity Issues](#)



With two new commissioners confirmed by the Senate and sworn in, FERC's seven-month period without a quorum is over and it can get back to business, reports Covington & Burling on its [Inside Energy & Environment](#) blog.

He writes that two more nominations are now before the Senate with a hearing scheduled for Sept. 7. Then the agency should be at full strength within the next few months and ready to take on important policy issues.

"There are quite a few critical generic electricity policy initiatives already teed up and awaiting Commission action. Together, the initiatives address fundamental issues spanning a broad range of FERC's electricity authorities," according to Peterson.

[Read the article.](#)

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Could State Subsidies for Renewable Energy Face Legal Challenges?



In a Maryland case, the U.S. Supreme Court rejected the state's effort to offer incentives for new gas fired power plants, ruling that the subsidies impermissibly encroached on the Federal Energy Regulatory Commission's authority under the Federal Power Act, writes [Hugh E. Hilliard](#), a senior counsel with [O'Melveny & Myers](#). But the Court left open the broader issue of whether states have the power to offer other forms of energy incentives.

"Now several cases before the courts are raising just that question, with potentially far-reaching implications for nuclear and renewable energy, although recent decisions in those cases have upheld state subsidies that are not directly tethered to sales of electric energy at wholesale, which are subject to FERC's exclusive jurisdiction," according to Hilliard.

He writes that the latest developments in federal courts indicate that state subsidies for renewable energy, including renewable-energy portfolio standards and mandated procurement programs, are safe from challenges, at least for now.

[Read the article.](#)

PwC to Pay \$1 Mln to Settle Merrill Lynch Audit Complaint



Reuters is [reporting](#) that accounting company PricewaterhouseCoopers LLP will pay \$1 million to settle a civil complaint alleging it conducted a flawed audit into Merrill Lynch's compliance with federal brokerage customer protection rules, U.S. audit watchdogs said on Wednesday.

"The PCAOB's penalty against PwC comes a little over a year after the Securities and Exchange Commission ordered Bank of America's Merrill Lynch to pay \$415 million to settle charges it had put its brokerage clients' cash at risk in violation of customer protection rules," writes [Sarah N. Lynch](#).

[Read the Reuters article.](#)

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New U.S. Rule on Class Actions Survives First

Challenge



A new U.S. rule aimed at restoring consumers' ability to band together to sue financial companies has survived its first challenge, as a top banking regulator said he would not petition for it to be suspended, [Reuters reports](#)

[Lisa Lambert](#) and [Pete Schroeder](#) write that the Consumer Financial Protection Bureau's rule abolishing "mandatory arbitration clauses" was released on July 10, and was immediately threatened by Republicans in Congress and President Donald Trump's administration.

Acting U.S. Comptroller of the Currency Keith Noreika publicly argued with CFPB Director Richard Cordray, appointed by former President Barack Obama, a Democrat, over whether the rule could endanger the banking system.

[Read the Reuters report.](#)

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[Once Again, Trump DOJ Busts Convention, Splits Government in High-Profile Employment Case](#)



The case of Donald Zarda, a skydiver who claimed his employer, Altitude, violated Title VII when it fired him after finding out he was gay, illustrates how the U.S. Department of Justice and the Equal Opportunity Commission can sometimes operate at cross purposes in litigation.

According to a [Reuters report](#), the EEOC, an independent federal agency, is representing Zarda's estate against the former employer. At the same time, the DOJ has filed its own amicus brief, explicitly disavowing the EEOC's stance.

[Alison Frankel](#) writes that the brief "argued primarily that the EEOC and the 7th Circuit, which adopted the agency's reasoning in its en banc opinion last April in *Hively v. Ivy Tech Community College*, disregarded the actual language of the statute and misread Supreme Court precedent on interpreting that language. According to the Justice Department, it's up to Congress, not the courts, to legislate protection for gay and lesbian employees, and Congress has steadfastly refused to do so."

[Read the Reuters article.](#)

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[BLM Proposes Rescission of 2015 Hydraulic Fracturing Rule](#)

The Bureau of Land Management has announced its recommendation that the hydraulic fracturing rule from 2015 entitled, “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,” be rescinded, reports Fox Rothschild in its [Energy Law Today](#) blog.

[Melissa J. Lyon](#) explains that in 2015 the BLM had issued regulations that attempted to regulate oil and gas development on federal and tribal lands by focusing on wellbore construction, chemical disclosures and water management.

But litigation kept the final rule from going into effect. Then U.S. District Court Judge Skavdahl ruled that the BLM does not have the authority to enforce the 2015 hydraulic fracturing rule.

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[Pharmaceutical Company](#)

[Celgene Settles Suit for \\$280 Million](#)

The [Associated Press](#) is reporting that Celgene Corp. has agreed to pay \$280 million to settle a whistleblower lawsuit alleging the pharmaceutical company committed fraud promoting a drug with a notorious history that was re-purposed to treat leprosy and another therapy for unapproved cancer treatments.

The agreement, announced by federal prosecutors, came out of a lawsuit filed by a former Celgene saleswoman who said Celgene submitted false claims to Medicare and health care programs in 28 states and Washington, D.C.

“The lawsuit filed by Beverly Brown was brought on behalf of the U.S. government under a federal whistleblower law. She could receive as much as \$84 million as her share of the settlement,” writes Brian Melley.

[Read the AP article.](#)

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[Can the President Be](#)

[Indicted? A Long-Hidden Legal Memo Says Yes](#)

A newfound memo from Kenneth W. Starr's independent counsel investigation into President Bill Clinton sheds fresh light on a constitutional puzzle that is taking on mounting significance amid the Trump-Russia inquiry: Can a sitting president be indicted?

[The New York Times](#) reports that the 56-page memo, locked in the National Archives for nearly two decades and obtained by the newspaper under the Freedom of Information Act, amounts to the most thorough government-commissioned analysis rejecting a generally held view that presidents are immune from prosecution while in office.

Reporter [Charlie Savage](#) writes: "It is proper, constitutional, and legal for a federal grand jury to indict a sitting president for serious criminal acts that are not part of, and are contrary to, the president's official duties," the Starr office memo concludes. "In this country, no one, even President Clinton, is above the law."

[Read the NYT article.](#)

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Former Health and Human Services Deputy GC Joins Hogan Lovells

Hogan Lovells announced that David Horowitz, the former Deputy General Counsel of the US Department of Health and Human Services (HHS) who also spent 18 years with the Food and Drug Administration (FDA) as a lawyer and in senior management, has joined the firm as a partner.

“Over the course of his 25 year career at HHS and FDA, David has earned a sterling reputation within the industry,” said Alice Valder Curran, Head of Hogan Lovells’ Government Regulatory Practice Group. “His first-hand knowledge of both organizations, coupled with his in-depth knowledge of the law, will provide invaluable insight to our clients.”

In a release, the firm said:

As Deputy General Counsel at HHS over the past seven years, Horowitz oversaw and coordinated legal services in support of FDA, the Centers for Disease Control and Prevention (CDC), and the National Institutes of Health (NIH), as well as for international and emergency preparedness programs. He oversaw more than 200 lawyers in the Office of General Counsel (OGC), and provided counsel to the HHS Secretary, as well as senior HHS, FDA, and White House officials. His primary focus as Deputy General Counsel was on FDA regulatory policy and litigation. He worked daily with the FDA Chief Counsel, participating directly in drafting regulations and guidance documents, and contributing to numerous appellate and Supreme Court briefs.

“Our strategic objectives include enhancing our policy advocacy capabilities and continuing to expand our compliance and enforcement practice,” said Philip Katz,

chair of the firm's Pharmaceuticals and Biotechnology Practice. "David is a key addition in that regard. Over the course of his long and distinguished career, David has developed not only substantial expertise in FDA law and policy, but also a deep understanding of the institutions, processes and cultures that influence how regulatory policy and compliance decisions are developed and implemented across all levels of government. We're thrilled to have him join the team."

Horowitz's service at FDA began in the Office of Chief Counsel (OCC), where he first litigated a variety of pharmaceutical regulatory matters, and then counseled officials in the Center for Drug Evaluation and Research (CDER). Horowitz moved from OCC to serve in several senior executive policy roles at FDA, including Assistant Commissioner for Policy, Assistant Commissioner for Compliance Policy, and Director of the CDER Office of Compliance. As head of drug compliance, he played a significant leadership role in major initiatives, including the modernization of the FDA's approach to pharmaceutical manufacturing quality, and the agency's efforts to develop and implement a more scientific, risk-based approach to inspection and enforcement.

"Resource constraints, a leaner government and increased deregulatory pressures will bring many changes to the FDA over the next several years," added David Fox, a leader of the firm's Global Life Sciences Industry Sector Team. "David will be instrumental in helping our clients anticipate and navigate these changes, and participate in the policy-making process."

"The world-class regulatory practice at Hogan Lovells is an ideal platform from which to make the most of my decades of legal and policy experience at HHS and FDA," said Horowitz. "I'm excited to join an extraordinarily talented and collegial group of lawyers, including many former colleagues

from HHS and FDA,” Horowitz added.

Horowitz earned his J.D. from the University of Virginia School of Law, and A.B. magna cum laude from Brown University.

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[Republicans Introduce Bills to Scrap New Bank Arbitration Rule](#)

Republican lawmakers in the House and Senate have introduced bills calling for the repeal of a just-announced regulation that would make it easier for consumers to bring class-action lawsuits against banks, reports [The Los Angeles Times](#).

The new Consumer Financial Protection Bureau rule would ban banks and other financial institutions from forcing arbitration clauses on customers to prevent them from bringing or joining class-action suits.

Some Republicans have introduced resolutions calling for use of the Congressional Review Act, which allows Congress to new regulations created by federal agencies, writes [James Rufus Koren](#).

[Read the LA Times article.](#)

Are You Prepared for GDPR? Take the Survey



The General Data Protection Regulation (GDPR) will become law in all EU jurisdictions on May 25, 2018 and will impact organizations that handle EU citizen data for any number of reasons, from employment to customer relations to marketing. Just because a company is not based in or even operating in the EU doesn't mean GDPR won't apply.

It is a broad and wide-ranging regulation that is posing significant challenges for the types of clients Yerra serves, namely global corporations in highly-regulated industries such as banking, consumer goods and pharmaceuticals.

To gauge readiness for GDPR across industries and global regions, Yerra has launched an [industry survey](#) to help benchmark where global corporations are in their preparations. The GDPR Reality Check survey is being run in collaboration with the Blickstein Group and will be open for submissions through the end of May 2017.

[Take the survey.](#)

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[Disgraced Fugitive Lawyer Sentenced in Absentia to 12 Years in Prison](#)

A federal judge sentenced disgraced former disability lawyer Eric C. Conn to 12 years in prison Friday even though Conn is a fugitive, according to [a report](#) in the *Lexington Herald-Leader*.

U.S. District Judge Danny C. Reeves imposed the sentence in absentia against Conn in federal court in Lexington, KY. The 12-year sentence was the maximum for the two charges covered in a plea deal that was in place.

Reporter Bill Estep writes that Conn, 56, was once one of the top disability lawyers in the country, representing thousands of people in successful claims for benefits from the Social Security Administration and making millions in fees. But then in March Conn pleaded guilty to stealing from the government and paying illegal gratuities to a Social Security judge.

The conspiracy outlined by Conn included using false evidence of clients' physical or mental disabilities in their claims. Some doctors were paid to sign forms with little scrutiny, and Conn bribed the Social Security judge to approve claims.

[Read the Herald-Leader article.](#)

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CFPB Hits Back at Efforts to Kill Rule Easing Bank Lawsuits



Just days after approving a controversial rule that will make it much easier for Americans to sue their banks, the U.S.'s top consumer watchdog is already fighting back against attempts to prevent the regulation from taking effect, [reports Bloomberg](#).

Bloomberg's [Elizabeth Dexheimer](#) reports that Consumer Financial Protection Bureau Director Richard Cordray said there is "no basis" to claims that his agency's action will put the nation's financial system at risk. Cordray was responding to concerns raised by acting Comptroller of the Currency Keith Noreika, a regulator appointed by the Trump administration who had a long legal career representing banks.

Under the new rule, financial firms are restricted from forcing consumers to resolve their disputes through arbitration, a practice that has been used by the industry for years to keep grievances tied to payday loans, credit cards and other products out of courts.

[Read the Bloomberg article.](#)

[Trump Faces Obstacles in Bid to Re-Shape Key U.S. Courts](#)

President Donald Trump's effort to reshape influential U.S. courts by stocking them with conservative judges faces at least one significant impediment, [reports Reuters](#): some of the courts best placed to thwart his agenda have liberal majorities that are likely to stay in place in the short-term.

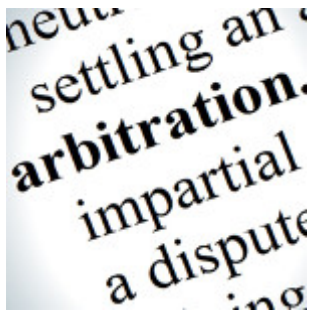
"Those courts, including an influential Washington appeals court and two appellate courts that ruled against Trump in cases involving his travel ban, all had an influx of fresh liberal blood under President Barack Obama," writes [Lawrence Hurley](#).

Hurley explains that in Obama's eight years in office, he was able to make enough appointments to leave a strong liberal imprint on the federal courts. At the end of his second term, nine of the 13 federal appeals courts had a majority of Democratic-appointed judges.

[Read the Reuters article.](#)

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Consumer Watchdog Makes It Easier to Sue Banks and Other Companies



The government's consumer watchdog has finalized a rule that will make it easier for people to challenge financial companies in court, reports [The Washington Post](#).

The new Consumer Financial Protection Bureau rule targets arbitration clauses, which can show up on user agreements for credit cards, bank accounts and other consumer products.

"As a condition for receiving services or products, consumers often give up their right to join a class-action lawsuit with these clauses, and instead agree to settle any disputes in a private process known as arbitration," writes the *Post's* [Jonnelle Marte](#).

Now the rule will ban companies from using these agreements to block consumers from joining group lawsuits. But supporters of arbitration say the clauses can help companies and consumers save money by minimizing legal costs.

[Read the *Post's* article.](#)

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Dealing With Violations In Export and Import Transactions



[Thomas B. McVey](#) of Williams Mullen has posted [an article](#) discussing a number of issues that a general counsel or CEO might present to the company in responding to a variety of hypothetical situations under the Export Administration Regulations, International Traffic In Arms Regulations, U.S. sanctions laws and U.S. import laws.

“The details of your response, of course, will vary depending upon the company and violations involved. A lot will have to happen quickly so it is important for you to be prepared in advance for this situation,” McVey advises.

The first step in responding to a possible export or import violations is to stop the potentially wrongful actions, he writes.

His article explains how to approach this task, along with the importance of collecting relevant information, analyzing possible violations, whether to consider a voluntary self-disclosure, responding to requests for information, other issues in enforcement actions, and personal liability.

[Read the article.](#)

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Tillerson in Focus as Exxon Investigation Intensifies



Image by
[William Munoz](#)

Secretary of State Rex Tillerson is expected to be deposed as New York Attorney General Eric Schneiderman expands his sweeping probe into whether Tillerson's former employer, ExxonMobil, misled investors about the impact of climate change, [reports JWN](#).

"Schneiderman's office considers the nation's chief diplomat a central figure in a case that pits the ambitious Democrat against a Texas energy giant and has divided attorneys general nationwide," according to the report.

Some state prosecutors and Exxon's legal team accuse the New York attorney general of abusing the power of his office to score political points. Schneiderman, however, says he has the legal authority to depose the secretary of state, who served as Exxon's CEO until joining the Trump administration.

[Read the article.](#)

[Fiduciary Rule Creates Breach of Contract Claim, No Private Right of Action](#)

The first part of the Department of Labor's Conflict of Interest Rule went into effect in June, and a large group of newly-defined "fiduciaries" are now subject to certain requirements of the Best Interest Contract (BIC) exemption, a portion of the Fiduciary Rule that according to some commentators creates a private right of action for investors, reports [Kilpatrick Townsend](#).

"The creation of a private right of action is one of the investment industry's chief concerns with the Fiduciary Rule," write [Paul Foley](#) and [John I. Sanders](#). "Industry leaders claim that the BIC exemption creates a private right of action because it enables investors to bring breach of contract claims and class actions against the fiduciaries with whom they contract. However, a federal judge from the Northern District of Texas flatly rejected this claim in *Chamber of Commerce of the United States of America v. Hugler*."

[Read the article.](#)

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Potential Medicaid Cuts Put Savings of Middle-Class Elderly at Risk

The health care bill the U.S. Senate is fine-tuning could have profound effects on elderly people who rely on nursing home care, says Houston-area elder law attorney [Kelley Bentley](#) of [Roberts Markel Weinberg Butler Hailey PC](#). Bentley is board certified in estate planning and probate law by the Texas Board of Legal Specialization.

“The bill proposes large cuts to federal Medicaid support over several years with reliance on states to decide funding in the future. In Texas, nearly 70 percent of nursing home residents are enrolled in Medicaid.

“While many people may assume the program pays solely for health care for the poor, it also fills a gap for long-term care, including at-home and nursing home care for the elderly population. The cost of long-term care in the U.S. can be substantial and a serious drain on an individual’s assets. That includes middle-class retirees who sometimes have managed to save substantial assets. Some people simply outlive their savings for long-term care.

“Older people should take a hard look at their savings long before any health problems. Consider a long-term care savings plan or long-term care insurance and also talk to a lawyer about how to organize and protect assets. In Texas, long-term care Medicaid programs can provide a wide range of care, including nursing home, assisted living and at-home programs. The secret is to start to plan early, before the

need arises as there are more options available for the preservation of assets. The goal is not necessarily to preserve assets for future generations, but to ensure that an individual (or married couple) has sufficient assets to cover any future long-term care needs.”

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[Ex-WellCare General Counsel Pleads Guilty in Florida Medicaid Case](#)

Reuters [is reporting](#) that an ex-general counsel of insurer WellCare Health Plans Inc. pleaded guilty on Wednesday in federal court in Tampa to having made a false statement to Florida’s Medicaid program, prosecutors said, the latest former executive to be convicted in the case.

Thaddeus Bereday, indicted along with four other former WellCare executives in 2011, faces a maximum of five years in prison.

“Bereday’s plea came after the U.S. Supreme Court in April declined to hear an appeal by former WellCare Chief Executive Todd Farha of his fraud conviction for his role in a scheme to cheat the Medicaid health insurance program for the poor,” writes reporter [Nate Raymond](#).

[Read the Reuters article.](#)

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