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LEGAL UPDATES FOR BUSINESSES

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The future regulation of new technologies such as blockchain and virtual currency, new statutory requirements for employers to support employee retirement vehicles, the need to take steps to protect your trade secrets and ensure compliance with existing rules, are just some of the issues facing business owners and managers today. We at Schenck Price are here to assist you and hope that this edition of our business-focused *Updates* is helpful to you as you create and grow your successful businesses. Please reach out to us anytime for whatever questions you have and help you might need.

Edward W. Ahart, Esq.
Co-Chair Corporate and Business Law and Nonprofit Organizations Practice Groups
ewa@spsk.com

Cryptocurrency

NJ S4163 "Virtual Currency and Blockchain Regulation Act"

By Dominic J. Leone, Esq.

In light of the trend of virtual currency, also referred to as cryptocurrency or tokens, on November 22, 2021, members of the New Jersey State Senate took an initiative to introduce Senate Bill No. 4163 (NJ S4163), titled "Virtual Currency and Blockchain Regulation Act," for the purpose of establishing a regulatory framework governing virtual currency businesses and transactions in the State of New Jersey.

Over the past few years, the public has been fascinated and intrigued by the latest blockchain technology, a technology that creates a digitally distributed, decentralized, public ledger that exists across a network of computer systems to provide a more transparent, secure, stable and efficient means for everyday transactions, including money transfers, real estate deals or recording secure information. While the technology has been around since the early 1990s, it began gaining momentum in the wake of cryptocurrencies in the mid-2000s, including the emergence of Bitcoin, and more recently, non-fungible tokens, also referred to as "NFTs." NFTs are most commonly seen and known today in the form of digital art, some of which carry a hefty value.

Due to the emergence of the forgoing, the federal government and state governments have been discussing regulation to ensure the investing public is protected in a manner similar to the stock market, which is controlled by securities laws that protect the public from misconduct, including deceit, misrepresentations and other frauds. While it appears that the federal government will be providing a full regulatory framework for virtual currency in the near future, ambiguity remains.

The State of New Jersey has attempted to clarify some of this ambiguity in the proposed bill by (i) establishing a framework defining digital assets and their respective property distinctions, (ii) enabling the formation of decentralized autonomous organizations (DAOs) and limited liability autonomous organizations (LAOs), subject to the revised uniform limited liability company act, (iii) permitting state agencies to invoke blockchain filing systems and an electronic funds transfer systems to allow virtual currencies as payment for government imposed fees, including taxes, and (iv) creating incentives for virtual currency businesses by exempting receipts from retail sales of energy and utility services to a virtual currency servicer or registrant for use or consumption directly and primarily in the creation of virtual currency, including mining, from taxes imposed by New Jersey legislation.

While states are not uniform in how they treat virtual currency businesses, the State of New Jersey looks to take an unprecedented measure to lead the way that provides many crypto-friendly regulations. This may be an attempt to gain the attention of many virtual currency business in the hope that the state will be a leader in DAOs and LAOs formation.

For more information, contact Dominic J. Leone at djl@spsk.com or at (973) 798-4956.

Employment

New Jersey Secure Choice Savings Program to Provide Retirement Savings Options for Employees Set to Launch in March

By Joseph Maddaloni, Jr., Esq.

The New Jersey Secure Choice Savings Program, also called the NJ Auto-IRA Law, is set to launch next month. Once the Program is up and running, employers must comply within nine months or be subject to penalties. The Program requires for-profit and nonprofit businesses with 25 or more employees that have been in business for at least two years and do not offer a qualified retirement plan, to implement a payroll deduction retirement plan for employees. Employers can either participate in the state-run plan or offer employees an alternative qualified retirement savings option such as a 403(b) or 401(k) retirement plan.

The Program's implementation date was originally set for March 28, 2021; however, the Program was allowed up to a one-year extension due to COVID-19. Accordingly, March 28, 2022, is the current deadline for Program implementation, although an official schedule has not yet been published. Participation in the Program by employers with fewer than 25 employees is optional.

The Program is managed by the New Jersey Secure Choice Savings Board, which was created by the Program's enabling legislation. The Board is expected to publish more specifics prior to the implementation date. However, at this time, covered employers will be required, at minimum, to distribute an information packet prepared by the Board, set up payroll infrastructure to accommodate automatic enrollment, deposit employee payroll deductions into the program fund, offer an annual Open Enrollment period and enroll any new employee no later than three months after their hire date.

The Program comes with no long-term costs to the taxpayers or to employers because program management fees will be paid by participating employees and are capped by the enabling legislation. There is currently no mandate for an employer contribution or match.

Employers will report their compliance with the Program on the employers' state income tax returns. Employers that fail to comply with the Program face penalties from the state Treasury Department. Penalties range from a warning to a $500-per-employee fine. While awaiting further direction from the Board, New Jersey employers should consider whether they will participate in the state-run plan or offer their employees an alternate qualified retirement plan that better meets specifications.

For more information, contact Joseph Maddaloni, Jr. at jmj@spsk.com or at (973) 540-7330.

Intellectual Property

Protecting Trade Secrets: A Cautionary Tale

By Ira J. Hammer, Esq.

Non-disclosure and non-competition agreements are useful tools to protect against the theft of trade secrets, provided that the description attached to the agreements contains sufficient detail to identify the trade secrets. Often, however, the description is not sufficiently detailed.

Mallet & Company, Inc. was a leader in the field of baking release agents. Although the ingredients used to create release agents were commonly known, different products have differing requirements for the release agent and thus there were many variants tailored to produce specific baked goods. To protect its formulas and know-how, Mallet employed non-disclosure and non-competition agreements, restricted access to its labs and formulae, and used password protection for its computer networks. It was not entitled to protect all of the information it used, however, as there were numerous published patents in the field that could not be considered trade secrets. Mallet described its trade secrets as:

> "specific products sold to customers or purchased from suppliers; all information pertaining to *Mallet's* business with its customers and its suppliers; *Mallet's* sales data and cost data; the body of knowledge about the development, production, and application of *Mallet's* release agents and equipment, including the tailoring of release agents and equipment for specific customer challenges; information about the internal business affairs of any customers, suppliers, distributors, agents and contractors doing business with *Mallet*; pricing information; strategies; marketing information; and exclusive relationships with certain suppliers of release agent ingredients."

Mallet & Co. v Lacayo, 16 F.4th 364 (3rd Circ. 2021)

Thus, when Mallet found out that Lacayo, who had worked for more than 20 years in significant technical positions at Mallet, had not resigned to care for an elderly parent but rather had joined a new competitor, Synova, and that she was joined by Bowers, a forty-year employee whose positions included director of national accounts, it sought a preliminary injunction against Synova, Lacayo and Bowers to stop them from working for Synova.

Mallet had evidence to make this an attractive case for an injunction. Lacayo had concealed the fact that she was going to work for a direct competitor. Lacayo had more than 1,000 documents on her Synova computer that traced their roots to Mallet. Lacayo was able to substantially speed up Synova's development of release agent products with her knowledge. Bowers forwarded customer and product information from his Mallet computer to his wife's email account and then wiped clean all of his electronic devices at Mallet, and admitted that if Mallet searched his personal email account, it would find many emails about Mallet's dealings with Mallet's customers.

The District Court Judge determined that the *Mallet* information in question constituted protectable trade secrets and issued a very broad preliminary injunction.

The Third Circuit vacated the injunction and remanded the matter to the District Court because "the District Court did not identify with specificity the information it found to be Mallet's trade secrets." Id. While some information falling within the categories identified by the district court might well include trade secrets, the Third Circuit concluded that there was a fair probability that many categories and perhaps all of them also included information that did not qualify for trade secret protection. Moreover, the Third Circuit concluded that there was insufficient information in the record to make an informed decision as to whether Mallet was likely to prevail based on the record before it because the District Court simply enumerated thirteen broad categories of information as trade secrets without supporting detail.

Mallet may still prevail, but it must present sufficient evidence to the district court to enable the district court to satisfy the requirement of specificity if it enters a new preliminary injunction.

If you have not recently reviewed the description of your trade secrets and other proprietary information in your non-disclosure and non-competition agreements, this case stands as a reminder of the importance of taking the time to do so.

For more information, contact Ira J. Hammer at ijh@spsk.com or at (973) 631-7859.

HIPAA

New Year: Time to Freshen Up the Compliance Plan

By Deborah A. Cmielewski, Esq.

As we embark upon the new year (and approach the third year of the COVID-19 pandemic), it is important for parties subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to update their compliance plans. Covered entities and business associates are required to review and update their HIPAA compliance plans on a regular basis. Among the crucial items warranting attention include updating policies and procedures; administering security awareness and training programs; and performing the vitally important risk analysis.

Risk Analysis

The HIPAA rules require covered entities and business associates to assess the risks and vulnerabilities to the confidentiality, integrity and availability of the electronic protected health information ("ePHI") within their custody and control on a thorough and accurate basis. It is good practice to perform a risk analysis annually, as well as following any major changes in the organization that could have an effect on ePHI (i.e., implementation of a new electronic health record system; major software revision/update; etc.). Think of the risk analysis as an annual check-up, which brings to the forefront deficiencies, areas needing improvement and items to focus on throughout the course of the year. Like the annual check-up, though, the risk analysis tends to become the least desirable item on the "to do" list.

In years past, the task of performing a risk analysis was more daunting and often required parties to engage outside consultants, often at a hefty price tag, to complete the exercise. Not surprisingly, the vast majority of the HIPAA settlements entered into by the U.S. Department of Health and Human Services, Office of Civil Rights ("OCR") include penalties for failing to perform and/or to update the risk analysis. The Office of the National Coordinator for Health Information Technology ("ONC") worked together with the OCR to design a downloadable Security Risk Assessment Tool ("SRA Tool"), to enable small to medium-sized covered entities and business associates to perform their own risk analyses. Initially rolled out in 2016, the ONC and OCR released an updated (and more user-friendly) version of the SRA Tool in 2018. Given the accessibility to the SRA Tool, the OCR has little tolerance for parties subject to HIPAA to ignore this key element of the compliance plan.

Training

The HIPAA rules also mandate that covered entities and business associates implement a security awareness and training program for the entire workforce, including those performing managerial functions. Training should occur at the commencement of employment or engagement and should be repeated on an annual basis and as-needed following implementation of new processes or procedures involving ePHI or following an incident, such as a data breach or near miss. It is time to put the annual training on the calendar to keep your workforce refreshed on HIPAA basics and educated about how you intend to operate as we approach the third pandemic year.

Policies and Procedures

HIPAA requires covered entities and business associates to implement reasonable and appropriate policies and procedures to comply with the standards, implementation specifications and requirements set forth in the rules. Policies and procedures must be set forth in writing; made available to the workforce; and reviewed and updated in response to environmental or operational changes affecting the security of ePHI. Have you updated your policies and procedures since the start of the pandemic? Do they accurately reflect how you are doing business now and include any changes that you have implemented throughout the course of the pandemic? Put the policies and procedure review on your checklist of important priorities sooner rather than later.

As we (hopefully) move toward a resolution of the pandemic, now is the time to take stock of your HIPAA compliance plan in a meaningful fashion. An outdated HIPAA compliance plan is a breeding ground for problems and the potential for significant economic consequences in the event of a data breach or an audit. Now is the time to schedule your annual HIPAA check-up.

For more information, contact Deborah A. Cmielewski at dac@spsk.com or at (973) 540-7327.

Environmental Law

Beware of Upcoming Deadlines to Complete Site Remediation

By Heidi S. Minuskin, Esq. and Michael T. Seeburger, Esq.

Current and past owners, operators and other parties deemed responsible for contaminated properties (together "Responsible Parties"), who are subject to the New Jersey Department of Environmental Protection ("NJDEP") statutory and mandatory remediation timeframes (which required remedial investigation to be completed by either May 7, 2014, or May 7, 2016) as set forth in the Site Remediation Reform Act (N.J.S.A. 58:10C-27) ("SRRA") are alerted to take action and complete the remedial action by May 6, 2022. In general, Responsible Parties are subject to these deadlines if their properties were already known by the NJDEP to be contaminated or were undergoing remediation at the time the SRRA went into effect (unless NJDEP set a site-specific timeframe).

On February 8, 2021, due to the ongoing COVID-19 pandemic, the NJDEP extended the previous deadline, for one year, from May 6, 2021, to May 6, 2022, after the issuance of Executive Order No. 103 by Governor Murphy. There has been no action to further extend this deadline.

Those who fail to complete remediation by May 6, 2022, and who have not received a NJDEP approved extension, will be deemed to be in "Direct Oversight" under NJDEP regulations and subject to fines, penalties and other conditions and stipulations imposed by NJDEP not required of those who timely complete their remedial actions.

The basis to obtain an extension of these deadlines is set forth in the Administrative Requirements for Remediation, N.J.A.C. 7:26C-3.5 ("ARRCS") and is extremely limited. Extensions will be deemed granted if the failure to complete the remedial action is due to a delay by NJDEP in reviewing or granting a permit or required submittal, but only if the Responsible Party had filed a technically and administratively complete application. Also, an extension may be granted if there has been a delay in obtaining federal or state funding for the remediation provided the Responsible Party submitted a complete and timely application.

A Responsible Party who does not believe it will timely complete its remedial action must submit a written extension request by March 6, 2022, sixty days prior to the NJDEP deadline of May 6, 2022. NJDEP may grant an extension, in writing, when the Responsible Party's request is based on the following:

1. a delay in obtaining access to property if the Responsible Party undertook regulatory specified action to obtain access;
2. circumstances beyond its control like fire, flood, riot or strike; or
3. site-specific circumstances that NJDEP determines warrants an extension such as ongoing litigation or where the Responsible Party can demonstrate it is an owner of a small business without sufficient money to complete the remediation.

ARRCS describes, in detail, the information that must be submitted as part of the extension request. Requests for extensions to complete remedial actions after the March 6, 2022 deadline will not be considered by NJDEP, and the Responsible Party will automatically enter Direct Oversight.

Direct Oversight is a burdensome and demanding process for Responsible Parties since NJDEP directs all remediation activities, selects the remedial action for each site, and requires pre-approval for all disbursements from a Remediation Trust Fund. Furthermore, Direct Oversight by NJDEP imposes additional requirements on Responsible Parties including the:

1. mandatory establishment of a Remediation Trust Fund;
2. submission of an NJDEP approved feasibility study; and
3. submission of a site specific NJDEP approved public participation plan.

Therefore, it is prudent for all affected Responsible Parties to avoid Direct Oversight if possible.

Plan now to avoid the onerous pitfalls of NJDEP Direct Oversight by at least filing timely extension requests. Even if your request is denied, swiftly moving forward with the remedial action will limit the severe effects of Direct Oversight.

For more information, contact Heidi S. Minuskin, at hsm@spsk.com or (973) 798-4949, or Michael T. Seeburger at mts@spsk.com or (973) 798-4955.

Health Law

OIG Finds Joint Venture for Therapy Services Problematic

By Daniel O. Carroll, Esq.

At the end of 2021, the U.S. Department of Health and Human Services, Office of the Inspector General ("OIG") issued Advisory Opinion 21-18 in which it rejected a therapy services company's ("Therapy Company") proposed joint venture with the owner of long term care facilities (including skilled nursing facilities, assisted living facilities and full service retirement communities ("Facilities") for the provision of services to rehabilitation programs in the Facilities ("Proposed Joint Venture").

The Therapy Company proposed to form a new entity and enter into a management services agreement with that new entity to provide clinical and back-office employees, space and equipment necessary for the new entity's operations in exchange for a fair market value services fee. Then, the owner of the Facilities would acquire a 40% interest in the new entity with the owner retaining a 60% interest ("JV Entity"). The JV Entity would not have its own employees but would lease them all from the Therapy Company. The owner of the Facilities would have representation on the governing board for the JV Entity but would not be involved in any day-to-day operations. The Therapy Company advised that the investment by the owner of the Facilities would be based, in part, on the JV Entity's expected business with the Facilities though there would be no obligation to contract with or make referrals to the JV Entity. The Therapy Company noted that it is likely that the owner of the Facilities would likely terminate its current therapy services contracts (which may or may not be with the Therapy Company) to enter into new contracts with the JV Entity. The Therapy Company conceded that, at least during the initial phases, all of the JV Entity's revenue would be generated through business with the Facilities of the JV Entity member. While the JV Entity would bill the Facilities and not Federal health care programs for its services, the Facilities would bill payors, including Federal health care programs, thereby implicating the Federal anti-kickback restrictions.

Analyzing the proposal under the Federal anti-kickback statute, the OIG flatly rejected the Proposed Joint Venture structure on several grounds and concluded that it would present more than a minimum risk of fraud and abuse. First, the OIG determined that the Proposed Joint Venture would not qualify for any regulatory safe harbor. The most relevant safe harbor would appear to be the Small Entity Investment Safe Harbor, but the OIG noted that the

Proposed Joint Venture fails several of the safe harbor's requirements (including the 40% investor test, the 40% revenue test and the investment offer test). Essentially, all the owners of the JV Entity would be doing business with the JV Entity and the Facilities' owner's investment would be based, at least in part, on the expected business with the JV Entity. Furthermore, the OIG concluded that the Proposed Joint Venture carried many of the same problematic attributes of suspect contractual joint ventures that the OIG warned against nearly twenty years ago in its 2003 Special Advisory Bulleting on Contractual Joint Ventures. The JV Entity would allow the Therapy Company to do indirectly what it is not permitted to do directly, i.e., pay the Facilities' owner a share of the profits from the owner's referrals. It would likely reward the steering of Federal health care program business to the Therapy Company, lock in a stream of referrals to the Therapy Company and block out competition from other therapy service providers.

While OIG Advisory Opinion 21-18 is issued only to the Therapy Company and not binding on the general public, it underscores the OIG's continuing concern with suspect joint ventures. Those contemplating similar contractual joint ventures and seeking the protection of the Federal anti-kickback safe harbors should take care to ensure they are structured in a manner that satisfies the applicable safe harbor's requirements to the greatest extent possible. At the same time, it must be recognized that the Advisory Opinion is fact-sensitive and narrowly focuses on the elements of one anti-kickback safe harbor available under Federal regulations. There may be other factors to consider when structuring joint ventures, including statutory requirements, other available regulatory safe harbors and applicable State anti-kickback, self-referral and corporate practice of medicine restrictions.

For more information, contact Daniel O. Carroll at doc@spsk.com or (973) 631-7842.

SCHENCK PRICE, SMITH & KING, LLP CORPORATE AND BUSINESS LAW PRACTICE GROUP

Edward W. Ahart, Co-*Chair*	973-540-7310	ewa@spsk.com
Michael J. Marotte, *Co-Chair*	973-631-7848	mjm@spsk.com
Farah N. Ansari	973-540-7344	fna@spsk.com
Daniel O. Carroll	973-631-7842	doc@spsk.com
Deborah A. Cmielewski	973-540-7327	dac@spsk.com
Richard J. Conway, Jr.	973-540-7328	rjc@spsk.com
James A. Dempsey	973-540-8898	jad@spsk.com
Douglas R. Eisenberg	973-540-7302	dre@spsk.com
Cynthia L. Flanagan	973-540-7331	clf@spsk.com
Brian M. Foley	973-540-7326	bmf@spsk.com
Michael A. Gallo	201-225-2715	mag@spsk.com
Jeremy M. Garlock	973-540-7358	jmg@spsk.com
Heidi K. Hoffman-Shalloo	973-540-8234	hkh@spsk.com
Thomas L. Hofstetter	973-540-7308	tlh@spsk.com
Joseph Maddaloni, Jr.	973-540-7330	jmj@spsk.com
Michael L. Messer	973-631-7840	mlm@spsk.com
Heidi S. Minuskin	973-798-4949	hsm@spsk.com
Michael K. Mullen	973-540-7307	mkm@spsk.com
Jason A. Rubin	973-540-7306	jar@spsk.com
Mark K. Silver	973-798-4950	mks@spsk.com
John E. Ursin	973-295-3673	jeu@spsk.com
Jason J. Waldstein	973-540-7319	jjw@spsk.com
John P. Allen	973-540-7303	jpa@spsk.com
Ira J. Hammer	973-631-7859	ijh@spsk.com
Robert F. McAnanly, Jr.	973-540-7312	rfm@spsk.com
James E. Polles	973-798-4948	jep@spsk.com
Benjamin (Jamie) G. Taub	973-967-3221	jgt@spsk.com
Ryan E. Gallagher	973-798-4953	rg@spsk.com
Dominic J. Leone	973-798-4956	djl@spsk.com
Michael T. Seeburger	973-798-4955	mts@spsk.com

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