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Providing for Alternate Members on Planning and Zoning Boards: Drafting Effective Local Laws
Patricia E. Salkin, Albany Law School

It is not uncommon for members of planning and zoning boards to have conflicts of interest with respect to applicants and applications before the board. When these members disclose and recuse themselves from further involvement in pending matters, it can lead to problems including a lack of quorum for the conduct of business and to tie votes resulting in either inaction or in default approvals. A number of states specifically authorize, but do not require, the appointment of alternate members to these local land use boards. However, many of these statutes fail to provide necessary guidance as to how alternate members are to be selected and appointed, and what their responsibilities and powers are during their term of office. This article offers lawyers, municipal officials and other community leaders best practices with respect to the drafting of effective local laws for the appointment of alternative members of planning and zoning boards.

To (B) or Not to (B): Is that the Question? Twenty-First Century Schizoid Plans Under Section 403(B) of the Internal Revenue Code

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Albany Law School Research Paper No. 25

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It is not uncommon for members of planning and zoning boards to have conflicts of interest with respect to applicants and applications before the board. When these members disclose and recuse themselves from further involvement in pending matters, it can lead to problems including a lack of quorum for the conduct of business and to tie votes resulting in either inaction or in default approvals. A number of states specifically authorize, but do not require, the appointment of alternate members to these local land use boards. However, many of these statutes fail to provide necessary guidance as to how alternate members are to be selected and appointed, and what their responsibilities and powers are during their term of office. This article offers lawyers, municipal officials and other community leaders best practices with respect to the drafting of effective local laws for the appointment of alternative members of planning and zoning boards.
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The year 2008 marked the 50th anniversary of the enactment of Section 403(b) of the Internal Revenue Code, which provides a special type of tax favored retirement arrangement available to certain employers. Revisiting a previous article by the same author, this article provides a comprehensive review of the rules governing 403(b) plans, as well as recent developments in the rules' application. Topics covered include: important 403(b) plan rules; the major remaining differences between 403(b) plans and qualified plans; reform proposals; and whether the retention of section 403(b) plans can be justified on policy (as opposed to historical) grounds.

"Signs of Change or Clash of Symbols? FDA Regulation of Nutrient Profile Labeling"  
Albany Law School Research Paper No. 26

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A new generation of food labels uses symbols and ratings on the front of packages and on supermarket shelves to indicate a product's nutritional value. Proponents of these new labels assert that they help consumers make healthier dietary choices. Critics contend that the new labels are confusing and misleading. This article argues that, with some minor reforms, the FDA's existing regulatory framework governing nutrient content claims on food labels is well suited to balance these competing considerations. With regard to the most novel and complex labels - those that rate the overall nutritional value of food products based on detailed algorithms - the article proposes that the FDA provide minimum standards that would prevent fraudulent or misleading claims while allowing for genuine experimentation and competition within the private sector that is likely to advance knowledge in the areas of nutrition and food labeling as a public health strategy.

"Trust in the Shadows: Law, Behavior and Financial Re-Regulation"  
Albany Law School Research Paper No. 27

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In the deep throes of the Great Depression, in an effort to restore faith in America's economy, the Roosevelt Administration promoted the development of voluntary codes of conduct to govern employment and manufacturing practices across hundreds of industries. Compliance with these codes permitted a company to display a Blue Eagle, which was supposed to signify support for New Deal efforts, and that the company was trustworthy. In this way, the Blue Eagle served as a heuristic - a cognitive shortcut - that helped consumers identify those companies engaged in fair practices so that those consumers could show their support for the recovery effort by patronizing compliant companies. Could this Depression-era technique - the use of the Blue Eagle or some similar, useful symbol - serve important ends today? Could it help restore consumer trust in institutions and actors in the financial system so that they might earn consumer trust, and prove trustworthy?

At present, the United States faces a crisis of trust not unlike that which plagued recovery efforts during the Depression. This crisis is one of a lack of trust in our financial institutions. Efforts to restore trust to the financial system are foremost on the agenda of the Obama Administration and Congress. While restoring trust to the financial system will be no small feat, the financial crisis was, in many respects, a product of too much trust: in lenders, brokers and the Bernie Madoffs of the world. And this faith operated within a regulatory philosophy that believed that the market, left to its own devices, could operate at optimal efficiency. In the end, this web of trust fostered predation, overconfidence and unregulated risk; it brought about financial ruin for many and has caused incalculable hardship across the globe. For all the talk of restoring trust in the financial system, the proper focus of such efforts must be the restoration not just of trust, but of trustworthiness. To accomplish one without the other would simply invite the same set of pathologies that helped to bring about the current crisis.

An approach directed at restoring trustworthiness to the financial system will require an appreciation for what makes such a system - and the actors within that system - trustworthy. Informed by the principles of Behavioral Economics, psychology and game theory, research shows that there are certain conditions likely to foster either trustworthy or untrustworthy behavior: with weak rules against cheating, and little oversight, it is more likely that people will cheat; that when in long-term relationships in which cooperative behavior can be developed, nurtured and rewarded, individuals are more likely to cooperate in the pursuit of mutually beneficial ends; that in situations with greater social distance between people, they are more likely to act in a less trustworthy fashion towards others; that where communication encourages cooperation, people tend to act in a more cooperative and trustworthy fashion.

After assessing the role these principles can play in informing efforts at re-regulation in several key areas within the financial sector, in concluding this piece I propose that regulatory agencies develop a set of voluntary codes of conduct for financial sector firms. To the extent such firms follow these codes, they will be able to market this information to consumers in an easily communicated manner: in the same way the Roosevelt Administration
utilized the symbol of the Blue Eagle to reflect compliance with codes of conduct across a range of industries. These codes will reflect an appreciation for the fact that most lay people will be unable to assess for themselves the extent to which financial institutions are trustworthy or not. Instead, through the development of voluntary codes of conduct, built around the principles that are more likely to lead to trustworthy behavior, consumers will be well positioned to place their faith in those firms following these codes, which will, in the end, generate strong market share for such firms.

"Divided Loyalties: How the Metlife v. Glenn Standard Discounts ERISA Fiduciaries' Conflicts of Interest"  
*Albany Law School Research Paper No. 28*

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Since Firestone Tire & Rubber Co. v. Bruch was decided two decades ago, federal courts have been giving employer health and disability benefit plans, regulated under the Employee Retirement Income Security Act of 1974 ("ERISA"), the enormous advantage of deferential review whenever plan members and beneficiaries challenged benefit denials by plan fiduciaries. As a result, ERISA plan members and beneficiaries faced a substantial, and often insurmountable, hurdle. In order to reverse a denial of benefits, the claimant needed to prove that the fiduciary’s decision was arbitrary and capricious, or unreasonable.

Making for an even tougher challenge for plan members and beneficiaries, often the fiduciary that had denied the claim had operated under a conflict of interest. A claim denied was a claim that the fiduciary employer or insurance company providing coverage did not have to pay, so that the fiduciary was arguably incentivized to deny claims due to financial self-interest. Although courts considered whether the fiduciary had operated under a conflict of interest as a factor in determining whether the fiduciary had abused its discretion, often the presence of a conflict did not influence the outcome.

In the recently-decided Metropolitan Life Ins. Co. v. Glenn, the Supreme Court had an opportunity to revisit the deferential standard of review applied to claims denials by conflicted ERISA fiduciaries, and opted to reaffirm the Firestone standard. As a result, the substantial obstacles faced by ERISA plan members and beneficiaries when they challenge a benefit denial remain unchanged. For ERISA health and disability plans in particular, this is a harsh result, for an unfairly denied claim may leave a member without benefits for an expensive and urgently needed medical procedure, or without financial support after suffering a catastrophic disability.

This Article examines the historical development of the standard of review applied to ERISA plan benefit denials by conflicted fiduciaries, and takes a critical look at the Supreme Court’s recent reaffirmation of the Firestone standard in Metropolitan Life Ins. Co. v. Glenn. Ultimately, the author concludes that the standard operates to discount a fiduciary’s conflict of interest as a determining factor in the review. This means that conflicted decisionmaking in the context of ERISA health and disability plans will continue to be a key feature of these plans, raising a question of whether the “undivided loyalty” promised by ERISA to plan members and beneficiaries truly can be achieved.

"A CRA for the 21st Century: Congress Considers the Community Reinvestment Modernization Act of 2009"  
*Albany Law School Research Paper No. 29*

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The Community Reinvestment Act of 1977 (CRA) has received a great deal of attention over the last year. For some commentators, it was one of the main causes of the current financial crisis. According to its critics, the CRA forced banks to make risky loans to unworthy borrowers. The CRA has had its defenders, however, bank regulators and bankers alike, who cite the value of the CRA in encouraging banks to explore previously untapped markets and to lend in previously underserved communities in a safe and sound manner. The reality is that the CRA is narrow in scope; it requires only that depository institutions meet the credit needs of the communities in which they receive deposits, including low- and moderate-income communities. Because of this fact, it is difficult to blame it for the present financial crisis. Quite the contrary, the narrow scope of the CRA meant that the overwhelming majority of risky lending at the root of the crisis was beyond the reach of the CRA. Most subprime lending was beyond the scope of the CRA because it was carried out by non-depository institutions, or by depository institutions acting beyond their CRA “assessment areas” (the communities from which such institutions receive their deposits), or by the exempt subsidiaries of depository institutions. Thus, the CRA was powerless to stop the subprime mortgage frenzy.

On Capitol Hill, Congress has taken up the cause of strengthening the CRA in light of the gaps in its coverage exposed by the financial crisis. This article provides a brief overview of the current CRA and then outlines some of the key features of legislation currently pending before Congress that would strengthen the CRA: the Community

Reinvestment Modernization Act of 2009. It concludes with an assessment of some additional amendments that Congress might consider to make the CRA even stronger, including the recognition of a private right of action through which community members could bring suit against regulators for their failure to enforce the CRA according to its terms.

"The Constitution, the Supreme Court, and History"
Albany Law School Research Paper No. 30

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This article is a book review of The Supreme Court: An Essential History by Peter Hoffer, Natalie E. Hoffer, and William James Hull Hoffer as well as The Supreme Court and the American Elite, 1789-2008 by Lucas Powe. Here, Professor Finkelman briefly surveys the books. He contrasts the two books and discusses their general strengths and weaknesses. Further, Finkelman examines how the authors deal with the way slavery affected both the United States Constitution and Supreme Court.

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