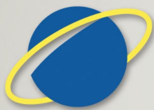

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Robert Connolly

General Counsel of BlackRock

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THE SPEAKERS

Robert P. Connolly
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TO THE READER:

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor's personal accomplishments and of his company's leadership as a corporate citizen, we are honoring Robert Connolly, General Counsel of BlackRock. His address will focus on the impact of the Dodd-Frank law on the role of Corporate Directors. The Distinguished Panelists' topics include class action defense; mergers and acquisitions; investment company regulation; and private fund governance.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel.

Jack Friedman
Directors Roundtable
Chairman & Moderator

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Robert P. Connolly

Senior Managing Director & General Counsel, BlackRock

BLACKROCK

Robert P. Connolly, Senior Managing Director and General Counsel of BlackRock, is a member of BlackRock's Global Executive Committee and Global Operating Committee. Mr. Connolly is responsible for all legal affairs and regulatory compliance for BlackRock.

Prior to joining BlackRock in 1997, Mr. Connolly was Managing Director and General Counsel of New England Funds, LP and previously, General Counsel of Equitable Capital Management Corporation. Mr. Connolly began his career as a Law Clerk to Judge Henry F. Werker of the United States District Court in the Southern District of New York and as an associate at Debevoise & Plimpton.

Mr. Connolly earned a BA degree from Union College, and a JD degree from Fordham University School of Law. At Fordham, he was Associate Editor of the *Law Review.*

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JACK FRIEDMAN: I am Jack Friedman, Chairman of the Directors Roundtable.

We'd like to thank the audience for coming. You, the audience, are what the Roundtable is all about. For those of you who haven't been to our events before – many of you have – we're a civic group with 750 events in 20 years in 14 countries and throughout the U.S. We have never charged the audience to attend any program or to receive any materials. Our goal is to organize the finest programming for business leadership on a national and global basis.

Today's program is very interesting and important. BlackRock is an important company on Wall Street. The challenges it faces are common not only to those in their industry, but also companies throughout the economy. A number of the issues here will resonate with executives, even if you're not part of investment management, Wall Street, or related financial institutions.

The way in which this series started is that Corporate Directors have told us that they are concerned that companies rarely get a favorable word for anything. We had a General Counsel who mentioned that they give free milk powder to infants in Africa. They get criticized for imperialism. So it is very discouraging. We are not a public relations organization. We're a neutral body, but we do think that it's a valuable opportunity to give Directors, top management, and General Counsel a chance to talk about what they do; what we can learn from their experience; what they're proud of; and how they work to be good corporate citizens.

We have a tradition at the Roundtable of having a bare-bones introduction of the distinguished people on the Panel. They're already well-known to the community. I'd like to say that Bob Connolly, our Guest of Honor today, is a recognized leader of the corporate bar and in the industry as General Counsel. He has had a long and fruitful career.

Without further ado, we want to very much thank Bob Connolly for honoring us by joining us today. Thank you.

ROBERT CONNOLLY: Good morning. Thank you all for coming. I really appreciate so many of my friends showing up, and for this honor, which is obviously something that I very much appreciate; but I also recognize has more to do with BlackRock – the company, and the people that work at the company than with me in particular – so I'd really like to accept the award on behalf of BlackRock, the employees at BlackRock, and in particular, the people in the Legal & Compliance Department that work with me.

Since a lot of you may not be that familiar with BlackRock, I thought I would spend a couple of minutes and just review some of our history; then, after that, I was going to spend some time talking about the new Dodd-Frank provisions which apply to *all* public companies, not just investment management companies.

BlackRock is a relatively young company. We're in the investment management business, which has existed for many centuries. BlackRock was only formed in 1988, and we're now the largest investment management firm. Looking at the slide, you can see that we manage 3.5 trillion dollars of assets. You can see the mix of assets that we manage, from equities to fixed income; cash management; advisory is when we do work for people but don't actually have a discretion over their assets; then we have multi-asset products, where we invest in lots of different types of assets; then "alternatives" is our term for hedge funds and products like that.

BlackRock is also known as one of the pioneers of risk management. The company was founded on the belief that risk management is a big part of managing assets, and we now have a product or a service called "Aladdin," which many, many large investment management firms actually utilize. There's a total of nine trillion dollars of assets that use that system.

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> "When you're a company like BlackRock, where you may have a portfolio manager in New York managing a portfolio that is then part of a fund in Europe, which is then sold to a citizen of Japan, it gets complicated. Tying it all together is a big part of my job." — *Robert P. Connolly*

In terms of history, BlackRock was founded in 1988. In 1995, we became affiliated with PNC. We went public in 1999. The Solutions business, which is the technology business, was launched in 2000. We acquired State Street Research in 2005. We acquired Merrill Lynch's investment management business in 2006, and then became affiliated with Merrill Lynch and with Bank of America through their acquisition of Merrill Lynch. In 2008, we launched our Financial Markets Advisory business. The Financial Advisory business received a lot of attention during the financial crisis when we advised the federal government on the Bear-Stearns transaction and AIG and many other aspects of the financial crisis. Then, last year, we acquired Barclays Global Investors, one of the largest investment managers in the world. BGI was known for being one of the largest indexers of the world, and also for having the iShares product, which is the largest family of ETFs.

This slide shows the growth in assets under management up until the merger with Merrill Lynch. This is all primarily organic. But then you can see the big bump-ups from the Merrill Lynch transaction and then the BGI transaction.

Today, BlackRock holds for its clients securities issued by almost every public company in the world. Here is the map of our business. We're in 24 countries, more than 60 cities, close to 9,000 employees, and we offer products throughout the entire globe, from institutional to retail to sovereign wealth funds to mutual-type funds – everything you could imagine, we offer.

This chart shows the numbers of regulators that regulate BlackRock globally. As you can see, it's over 30 regulators, so definitely a *lot* of regulation that an investment management firm has to comply with around the world.

Okay, so that's BlackRock. Now, we turn to Dodd-Frank. Dodd-Frank obviously was the biggest change in financial regulation and corporate regulation since the Great Depression. The main purposes were stated to promote the financial stability of the U.S. economy and prevent another financial crisis. The other problems: protect the American taxpayer by ending bailouts; and protect consumers from abusive financial service practices.

Dodd-Frank is 2,300 pages long. It requires 400 separate studies, and at least 250 new rules and regulations. I was in Washington recently and in talking to the regulators who have to *do* the studies and the new rules – they're justifiably overwhelmed by all this.

Obviously, the thrust of Dodd-Frank was to address some of the problems in the financial services industry, but there are many provisions which will affect non-financial service companies. One impact is dealing with financings and derivatives and other types of financial instruments and borrowing – non-financial companies will be affected by that; and also in terms of pure corporate governance, which is what I'm going to talk about today, there are many provisions which affect non-financial companies.

These are the key ones that I am going to talk about today: shareholder proxy access and voting rules, executive compensation, corporate governance, and then the best (or the worst, depending on your perspective) – the whistleblower bounty program.

Proxy access – this has been a big debate for a long time, even before Dodd-Frank – how much access shareholders should have to company proxies. In August, the SEC adopted a rule which provided for much more substantial access by shareholders to the company proxy statements. Basically, if you hold three percent of the company's voting stock for at least three years, you could then place your nominees for directors on the company's proxy and you wouldn't have to solicit yourself and go through all that expense, and you could do that for up to 25% of the total number of directors. There's a process for the timing procedures laid out and for the company to contest that in a 14-day period. Then there's a priority set among the different shareholders – the ones with the most shares get first priority – and that rule was adopted.

After it was adopted, the U.S. Chamber of Commerce and the Business Roundtable filed a legal action challenging it on many grounds, including constitutionality, and as a result of the lawsuit and the SEC's recognition that the lawsuit wouldn't be resolved in time for this coming proxy season, they have delayed the effectiveness of the rule until 2012. My guess is this rule is going to survive in some form, and it will probably be in effect for the 2012 proxy season once they get through the judicial process.

Shareholder voting has been an issue for a long time as well. As you know, many companies' shares are held in street name, in brokerage accounts, and brokers historically have had the discretion to vote those shares. The Stock Exchange passed a rule beefing up the non-routine items for brokers and then expanded the rule to cover directors. Under Dodd-Frank, it basically codified the NYSE requirements, including the director elections. Then they also included executive compensation, the say-on-pay and golden parachute provisions of Dodd-Frank. The SEC is required to determine any other significant matters, which they want to make no longer subject to the broker discretion-

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ary rules. It's another one of the rules that the SEC has to adopt.

The say-on-pay provision will be effective for this upcoming 2011 proxy season. It requires a non-binding vote on executive compensation. The company doesn't have to follow it, but presumably it will place some pressure on the company to do so. Part of this is the shareholders also get to vote on how often they can have this non-binding vote, whether they want to have it every one, two or three years. They have to have it at least once every six years.

The golden parachute provision mandates a non-binding vote on golden parachutes and disclosure of golden parachutes; all this applies unless the provision was in place before the transaction that triggers the golden parachute.

Enhanced compensation disclosure is, again, the drumbeat on executive compensation, which has been going on a while and picked up with the financial crisis, because many people thought financial incentives were a part of the reason for the crisis and that people had inappropriate incentives to take risk. So, now the proxy has to include an analysis of the executive compensation for all executives versus the company's financial performance. The proxy also has to include the annual compensation of the company's CEO, the median annual compensation of all of the company's other employees and the ratio of such median employee compensation. So you know that's now going to be a number that's cited in the press.

On hedging policies, companies are now required to disclose in the proxy statement any hedging policies that they had which allow employees to hedge against the downside risk on their equity. This expands what was in place before. It now applies to *all* directors and *all* employees, not just executive employees. I think this is going to lead to many people, such as BlackRock – we've done this – prohibiting hedging on the part of employees.

Clawback provisions are a concept that was introduced under Sarbanes-Oxley for the first time, and many firms, like BlackRock, have adopted them. Under Sarbanes-Oxley, it only applied to the CEO and the CFO. It covered a 12-month period relating to any financial statement that had a problem, and it only applied if the problem with the financial statement was a result of misconduct on the part of *someone*. Dodd-Frank has now expanded that. It would apply to any present or *former* executive officers, not just the CEO and the CFO. If the company is required to have a restatement, it goes back three years before the misstatement. So, this provision has definitely broadened the clawback provisions. They're much more extensive, and they apply to a lot more executives in the company. There doesn't have to be any misconduct. So, you could have a company that makes a mistake in the financials and they have to restate them, and they would clawback against a *former* employee who received compensation, left the company, for any excess compensation three years before that restatement.

The next item is the chairman and CEO structure. This was something which was adopted by the Stock Exchange. It's now going to be applied to everyone. You have to explain why, if you *do* have the chairman and the CEO hold the same title. Over here on the chart, I show what the current practice is in the U.S., and you can see that predominantly, the chairman and the CEO are the same person, although I think the other numbers are increasing. One of the interesting things about this is that in Europe, it's much more common to have the chairman and the CEO separate, but also in Europe, they do not require a majority of independent directors. So here in the U.S., the independent directors could replace the chairman and the CEO easily; in the U.K., they could not. So you can see why having a balance of power there is more important, but people frequently lose sight of that.

The major exchanges have had rules on the independence of the directors on the compensation committee. All the directors are required to be independent. "Independent" is defined to cover a number of different factors. Dodd-Frank basically revisits all that and is going to impose a more stringent definition of independence, and the SEC is going to adopt a rule implementing that.

These are some of the factors that the SEC has to consider in terms of adopting the rule: how much compensation the director gets; if he also does some service for the company; any relationship with the company; you know, those kinds of things.

This provision talks about the compensation committee's ability to hire independent advisors. This makes it very express that they can hire independent consultants, independent legal counsel; the company has to provide them with the resources to do that. Then all of the relationships between that advisor and the company have to be disclosed in the proxy statement, and companies now have to disclose if they do *not* hire an independent consultant. I don't think any significant company is going to

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do this without an independent consultant, and I also think it's very important that they have independent legal advice throughout the whole process.

Risk management committees would only apply to financial institutions that are deemed systemically significant. Those are the banks that already took TARP money, and then under the Act, the Financial Stability Oversight Council has to determine whether to designate any *non*-financial companies as systemically significant. If they're systemically significant, they will have to have a risk committee of the board, along with lots of other procedures. But this is probably one of the most significant in terms of corporate governance.

The whistleblower provision is one of the most significant provisions under Dodd-Frank. As you know, under Sarbanes-Oxley, people were concerned that there wasn't enough ability for employees to report problems at the company, which came to light at Enron. So Sarbanes-Oxley required anonymous complaint lines to the company; and the idea was to get information up to the company and then to the board of directors. Dodd-Frank expands on that dramatically. It now provides an explicit financial incentive for employees. Any employee that provides original information that leads to an enforcement, a successful enforcement action – *will* have to be paid somewhere between 10 to 30% of any monetary sanction assessed by the SEC or any other governmental agency. The concern is that this could open the floodgates for a lot of people to file complaints, whether or not they have merit, and with the money involved, it could also create a new industry of people who are willing to finance these things. So I would not be surprised if they are inundated with whistleblowers.

Certain people are not permitted to be whistleblowers, like counsel and compliance people and internal auditors, but other than that, almost any employee in the company is permitted to be a whistleblower. You don't have to go to the company first.

> "...it's a very complicated business. Our firm engages in tens of thousands of trades every day. Every one of those trades has a technical aspect to it, it has to be documented, it has to be reflected on the accounts' books. All the accounts have different investment guidelines, which all have to be monitored to make sure the investments are correct." — *Robert P. Connolly*

You can just alert the government. It's going to be very interesting to see what happens on this.

That's it! So that's BlackRock, and Dodd-Frank as it applies to public companies.

Thank you very much.

JACK FRIEDMAN: Before we go to the next speaker, I'd like to ask some preliminary questions. What is the variety of responsibilities you have as a corporate general counsel? I assume you meet with the Board and go to the Board meetings. We might include government relations. Plus, you have international scope.

ROBERT CONNOLLY: Sure! Yes, I have board responsibilities. I'm responsible for corporate governance. That's part of the job. I'd say the biggest part of the job is compliance with all the different regulations that I listed up on that chart, throughout the world. When you're a company like BlackRock, where you may have a portfolio manager in New York managing a portfolio that is then part of a fund in Europe, which is then sold to a citizen of Japan, it gets complicated. Tying it all together is a big part of my job. Government relations, frankly, was a very small part of my job up until Dodd-Frank. Now it's a much bigger part of the job. We're a much bigger company, so for better or for worse, we get a lot of attention now in the press, and we get a lot of attention when it comes to financial issues that are being considered by Congress and the regulators, so that's becoming more my job. Then I have the nuts and bolts window-washing – personnel, H.R., things like that – just running the daily operation. We have a very large office in the city of London. A lot of people have moved out of the city of London, but just opening that office, building out the building, financing it, that kind of thing – that's a big part of the job, too.

JACK FRIEDMAN: How large is your legal department and where are they based?

ROBERT CONNOLLY: It's just me and I do everything. That's what I tell my colleagues. No, it's 250 people.

JACK FRIEDMAN: If you could be *paid* for 250 people that would be tempting.

ROBERT CONNOLLY: Yes! Once I realized that didn't work, I started hiring people! We have 250 people in total, worldwide, and 65 lawyers, and a lot of the compliance people are *not* lawyers, but they're actually better lawyers than I am, because they have to deal with regulations, they have to deal with the requirements on the legal side. They are located in our offices around the world.

In our industry, it's very legal-intensive. Almost every product is subject to some regulation. Every marketing activity in every country; we are licensed in every country where we do business; so a lot of it is very legally intensive. It's different than being in the widget business where everything you do is not subject to a very strict regulatory regime.

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JACK FRIEDMAN: We're going to get back to many of these issues during the discussion period. Of all the long résumés and accomplishments of the various panelists, I just want to mention one position which is special. Joel Goldberg and Barry Barbash at different times have been the head of the Investment Management Division of the Securities and Exchange Commission; therefore they have a special perspective in addition to their private practice positions.

Joel, you're the next speaker.

JOEL GOLDBERG: Thank you, Jack. I will just very briefly introduce a few topics that I think might be of interest to registered investment companies, especially mutual funds. As I look around the audience, I see many people I know who work in and around the investment company industry, but I'm sure there are also many others here who are not steeped in the lore and jargon of registered funds. So if I appear to be giving blinding glimpses of the obvious, please forgive me.

There are several things pending at the SEC which might have long-term implications for the registered fund industry. Rule 12b-1 of the SEC is the rule that permits mutual funds to use some of their assets to pay for distribution. That's always been a very controversial rule, the notion being that why should shareholders of a fund have to pay to sell more shares to other investors. The other side of the argument is, if they don't, who will? The SEC has proposed not to rescind the rule as such, but to change it. The comment period expired last week – or actually earlier this month – and there is strong opposition to the changes from the industry. That's where it stands. We'll see whether the SEC at some point moves to re-propose that or to adopt it.

Another development results from the Dodd-Frank Act. Among the many new mandates for the SEC is one which requires them to hire a consultant to examine and recommend possible changes in the SEC's organizational structure. The SEC has announced that they've hired the Boston Consulting Group to conduct this study, and we shall see what happens.

A third issue involves money market funds. Generally, mutual funds are required to price every day. They have to value all their assets every day. The prices of the shares have to reflect exactly the prices of the underlying assets every day. Money funds are an exception to this. They are permitted, subject to various restrictions, to value their shares at a dollar – even if it's not *exactly* a dollar, if it's close and they meet other requirements, they can always carry the share at a dollar.

There has been considerable discussion as to whether they should continue to be permitted to have what's called a stable net asset value (one dollar) or whether they should be required to have a floating net asset value, which would fluctuate slightly every day as interest rates change. The industry is strongly opposed to any change. The industry says people really want the dollar share, and if that's changed, it'll result in a huge decrease in the assets of money funds, which will, in turn, cause short-term funding problems for many corporations.

Various individuals at the Fed, the Treasury, the SEC and elsewhere say that the problem with the stable NAV is that if anything happens to cause a fund to break the one dollar – that is if the fund's actual value gets too far from the dollar, so it has to change its NAV, that can cause a panic in the markets and can lead to systemic problems. I think there will be a lot of discussion on that over the next year.

The final thing I will allude to is that a special office has been set up in the Division of Enforcement to establish a matrix for evaluating mutual funds' advisory fees. As you will hear, I think, later in the program, Section 36(b) of the Investment Company Act permits both the SEC and shareholders to sue if a mutual fund's management fee is thought to be excessive. There's a long line of judicial decisions, including a

recent Supreme Court decision, that establishes what the guidelines are. It's unclear what this new group in the Division of Enforcement will come up with and how that might relate to the existing judicial standards.

JACK FRIEDMAN: We thank you, and by the way, I wanted to also thank your firm, Stroock & Stroock & Lavan, which I didn't mention earlier. Thank you very much.

The next speaker is Barry Barbash of Willkie Farr & Gallagher.

BARRY BARBASH: Thanks, Jack. You mentioned the connection between Joel and me was that we both held the position of Director of the SEC's Division of Investment Management. Having this opportunity to make a statement for the record, I note that Joel and I have a closer connection than the one you mentioned. Joel hired me out of law school, and in all seriousness, did serve as the inspiration for my wanting to hold the position of Investment Management Director. Joel was always a wonderful teacher. If you ask him, he'll say he never had any question about the quality of his teaching, just the quality of his student's learning!

A couple of years ago, a friend of mine asked me if I would write a chapter of a

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book that he was putting together. He was the editor, and he wanted the chapter to be entitled "Corporate Governance and Hedge Funds." I have to say my immediate reaction was to ask whether that was some kind of oxymoron, and he said no – he really was serious about the topic of the chapter. The thrust of what he was talking about, the thrust of the chapter, as written, was hedge funds as corporate activists, agents of change in corporate board rooms. He had in mind an article that was written a couple of years ago that termed a lot of hedge funds "the new sheriffs of the boardroom."

I don't question that part of the hedge fund world. Activist hedge funds certainly exist, although I would note that it seems as if some of that corporate activism has diminished over the last couple of years. I would submit, though, that an even more compelling form of corporate governance is continuing to take shape in the area of what I would call private funds, which is to say hedge funds, private equity funds and other similar kinds of vehicles. The kind of governance to which I am referring is governance of the funds themselves: how they operate. The primary agents of the evolving world of private fund governance are legislators and regulators. In the past, institutional investors as investors *in* private funds often forced changes in the operation of private funds. What we're starting to see now are legislators and regulators getting into the act. Bob mentioned Dodd-Frank and provisions of Dodd-Frank relating to public companies. Dodd-Frank also addresses areas of the financial markets that Congress believes were not transparent enough to investors and others, and one of those areas was the world of private funds. In seeking to make that world more transparent, Dodd-Frank focused on private fund governance.

Now, how does Dodd-Frank do this? It takes the least imposing of the federal securities laws, the Investment Advisers Act of 1940, and applies it, in effect, to private fund managers – that is to say, most hedge fund managers and most private equity fund managers. Conceived as a 1940s census of firms in the United States practicing in the area of money management, the Advisers Act, over time, has become loaded, through the means of rules adopted by the SEC, with all kinds of substantive provisions that affect the activity of private fund managers and, I would submit, indirectly, private funds themselves. What is the source of authority for these rules? What's the source of the SEC's efforts to change the conduct of private funds? The source is a broad anti-fraud provision, Section 206 of the Advisers Act, which was construed in 1963 by a very activist-oriented U.S. Supreme Court, to essentially be an engine for enforcing fiduciary duties that are imposed on investment advisers, including money managers and money managers who are the promoters or sponsors of private funds.

And, also in the 1960s, that anti-fraud provision was amended to provide the SEC with the ability to develop rules defining what "fraud" is within the meaning of the Act. The SEC has been very creative over the last ten to 15 years in defining "fraud," and in the process creating rules of conduct for money managers and private funds. So, for example, the SEC defined fraud so as to require a private fund manager to have a chief compliance officer and a compliance program. Fraud has also been defined to require private funds to enter into custody arrangements having specific terms and conditions. The SEC's power to define fraud has fairly recently been used to impose a "pay-to-play" rule on private fund managers. Finally, the power has been used to impose a very broad disclosure requirement on managers of pooled investment vehicles, including both private funds and mutual funds.

Supplementing its rulemaking as a means to promote governance of private funds is a very active examination program instituted by the SEC in connection with the asset management business. Through examinations and enforcement actions arising out of examinations in the asset management area, the SEC is in essence able to create even more rules for private funds and their managers.

The net effect of all these SEC activities is that hedge fund managers and private equity managers, entities that have traditionally managed money without regulation or subject to a less onerous degree of regulation, now have to reorient themselves or risk debilitating enforcement actions. In short, these managers risk being deemed to have engaged in fraud if they don't conform to SEC rules of conduct. And, being found to have engaged in fraud does not help the marketing of a money manager's services.

Dodd-Frank will, to my mind, increase the trend of the SEC's seeking to change the operations of private funds. Dodd-Frank gives the SEC, among other things, the power to define terms generally in the Investment Advisers Act. There have been rumors coming from Washington that the SEC has been thinking about using that power, for example, to require private fund investors to vote on matters involving their funds in an analogous way to shareholders. Dodd-Frank also requires the SEC to collect systemic information about hedge fund managers and provide that information to other regulators. I can see the regulators using the collected data to support even more private fund governance initiatives.

Other private fund governance developments outside the realm of the regulators

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are also taking shape today. We are starting to see advisory committees appearing in the area of private funds. Boards have started to crop up in private funds, analogous to what you have in the mutual fund area.

JACK FRIEDMAN: Thank you very much. Is a new head of Investment Management going to be selected in the near future? I understand that there are new, possibly specialized units within enforcement. What do you see as the result of the new committees in the House reviewing all these things and how will some of these factors affect the SEC over the next year or two?

JOEL GOLDBERG: Well, I think that the change in leadership of the division will have a significant effect on what the SEC does about Rule 12b-1. I think the proposal that received so much opposition from the industry was very much engineered by the outgoing director of the division, Buddy Donohue. We don't know who the new one will be. That might certainly result in a delay in the rule being either re-proposed or adopted, and it might be more than a delay.

In terms of other things under consideration in the division, I think the change of leadership in the division will have less effect on the outcome of the debate regarding the stable one-dollar asset value for money funds, because that transcends the division. That involves not only the Commissioners of the SEC, but Congress, the Fed, and the Treasury. I think larger forces will shape that.

JACK FRIEDMAN: What are the levers by which Congress can affect the policies of the SEC, such as in the area of investment management?

JOEL GOLDBERG: Well, it ranges anywhere from the highly informal to the highly formal. Obviously, they can legislate, but short of that Congressmen are becoming increasingly less shy, maybe not for the better, about expressing their views to both the Commission and the staff. The SEC is an independent agency; it isn't supposed to do just what politicians say; but on the other hand, they do read the newspaper.

BARRY BARBASH: Many Congressmen write letters to the SEC these days saying "thus and so provision or thus and so law says 'X', and we don't see that the SEC has been doing 'X'; how is the SEC going to rectify this deficiency?" In writing these letters, the legislators raise issues and try to get the SEC to focus on them. Another less subtle way for Congress to influence the SEC relates to the SEC's budget. Notwithstanding all of the increased responsibilities under Dodd-Frank, the SEC has no budget at present. It's operating under a continuing Congressional resolution, so even though the SEC has been told that it will receive 800 new job slots, the SEC has imposed a hiring freeze.

Let's go back for a second, Jack, to your question about the Director of the Division of Investment Management. My sense is that a change in the way the Division operates has occurred since the time that I was there and when Joel was there. Today, the Commission itself seems to be much more involved in the agenda of the Division. That's not to say that the Commission wasn't involved in the past – it clearly was. But today the Commission seems more interested in the nitty-gritty. I've heard, for example, that when the SEC was considering a custody rule for investment advisers, a very technical rule – the Commission itself directed the Division to write the rule in a particular way. I don't think we saw involvement of this sort by the Commission ten years ago or 20 years ago. In the past, ideas came from the SEC staff and went up to the top, to the Commission itself. So it's not clear to me how much authority any Division Director would have today. It doesn't seem to be as much as it maybe once was.

JOEL GOLDBERG: If I can just respond, Jack, to the other part of your question, which is how might the reviews that are underway affect people who work with registered funds. I think one possibility is, there is an office in the SEC that is in charge of conducting inspections and examinations. There has been some talk that that office should be eliminated and instead, the various operating divisions, such as the Division of Investment Management, should take over the inspection function. That could have practical implications in terms of the number of enforcement cases. I think in past years, when the operating divisions were in charge of inspections and examinations, they tended to handle things more informally. Since the separate office has been established, it's much more likely

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to refer matters for enforcement. So I think that's not just inside baseball; I think the outcome of that issue, whether that Office of Inspections and Examinations should be eliminated, could affect how many enforcement actions there are.

JACK FRIEDMAN: Richard Prins of Skadden, Arps is now invited to speak.

RICHARD PRINS: Great. Well, Jack said somebody needed to talk about M&A, and I think I drew the short straw, so I'm going to make a few remarks on that.

You saw from Bob's slides that BlackRock has grown very rapidly from its founding in 1988, and while, when you look at their earnings release or you listen to the conference call, Larry is always talking about how many wins they have, how much organic growth is going on in the company. But nonetheless, I would say that BlackRock is probably *the* absolute standout example of a serial acquirer in the investment management industry that has done it right. There are plenty of others who have acquired quite a few other asset managers, and some have done it with fair success; and others, of course, have rued the day that they did it. But I don't think anybody has matched the ability of BlackRock to do it and maintain an extraordinary level of brand cohesion.

On the other hand, we're here for CLE, so I don't know that I'm going to talk at all about the business side of how BlackRock did it, but rather focus on a couple of the legal aspects, and having to do primarily with some of the governance issues that came up. Also something that's a very curious artifact of the U.S. investment management industry, which is that we have a provision in the federal acts that we needed to deal with that basically says, when there's an assignment, direct or indirect, of an advisory contract, if it's with a mutual fund, the contract disappears. It goes poof – it terminates. You've got to go back and get board approval and shareholder approval. It's a very long, involved, expensive process. So BlackRock has had to live with these.

I would say its first acquisition was actually when it sold itself to PNC. But it thought very carefully and found an acquirer that had a platform that it, in effect, would be able to manage. That would give it a much larger platform to be able to expand. So over the course of the next three years after the PNC deal was done, BlackRock, in effect, inherited all of the PNC asset management businesses and transformed itself into a much larger company.

At that point, it went public, and it went public with a high-vote/low-vote structure. That was in part so that there would be a fair amount of running room to be able to make acquisitions and grow without worrying that PNC was going to shed control, lose control and wind up going through one of these assignment events. That worked fine for three or four acquisitions, including the State Street acquisition.

Then came the Merrill Lynch deal, which was a transformative deal, basically doubling the size of BlackRock. The question was, how – now that you are going to have two behemoth shareholders – how do you foster the growing independence of BlackRock as a public company. What was devised was basically a structure in which PNC gave up its high-vote stock, and Merrill, which was now going to own just about 50% of the company, and PNC, which was going to go down from 70% to 35%, both agreed to a unique governance structure in which a majority of the directors would be independent directors, and each of them would vote all of their shares on all matters in accordance with the recommendation of the board of directors, including on elections of directors. So that, in effect, put BlackRock with an independent, self-perpetuating board of directors to oversee it as an independent company, even though it had two major shareholders.

Technically, that possibly didn't quite square with the New York Stock Exchange rules on governance, but we all made a judgment and a bet that the NYSE would rather have this than have PNC continue to be a controlling shareholder. That's how it turned out. They gave a pass, and BlackRock was able to live with that structure for a period of time.

We also tried, in that transaction, to avoid having one of these assignments on the BlackRock side, and spent a fair amount of time discussing with the SEC staff various ways to avoid that; and it was a worthwhile exercise, because the tab for doing one of these resolicitations of all of the shareholders, all the mutual funds, can easily run to ten million dollars.

Ultimately, we tried to rely on a no-action letter that Barry issued that was very helpful; but in fact, the staff was, in effect, retrenching from some of the things that had gone on before and ultimately couldn't get BlackRock there, so BlackRock had to go through that step in that transaction.

Subsequently, when they came to the BGI transaction, which was another transformative one – and in fact, I noticed, Bob, on your slides, that you couldn't steal any more – you ran out of room and so instead of having the line double again, it only went up a little bit. In fact, the BGI deal almost doubled assets under management.

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There, we were able to avoid having one of these assignments going on, on the BlackRock side, even though BlackRock was issuing more than 25% of its stock to pay for the transaction; thus, which is typically one of the trigger points for triggering these assignments. But in that transaction, we used a mix of voting stock and non-voting stock, and as a result, were able to stay below that threshold.

I would say, though: one other thing that's been important to BlackRock from a legal point of view in these merger transactions is that Bob very strongly takes the position that "this is a highly regulated industry and you should have done as good a job as we've been doing at BlackRock, and consequently, I want an indemnification provision that basically says that *anything* that went on on your watch of a regulatory or fiduciary nature is entirely on your head forever." Basically, there's not a true statute of limitations or cut-off point built into the contracts, and it's an unusual form of risk sharing, as it were, but one that the company feels strongly about as a matter of principle.

Fortunately, over the years, Bob, there haven't been that many problems coming up, because, in fact, most asset management companies are run pretty carefully.

JACK FRIEDMAN: Let me thank you very much. Our concluding speaker on the opening remarks is Robert Pietrzak of Sidley Austin. He's a litigator.

ROBERT PIETRZAK: Yes, I've been asked to talk about something completely different, although perhaps not so, because however much good citizenship and ethical considerations lead to compliance with the rules and the statutes we talked about, the reality of possible litigation is also a driving force.

So where is litigation today in the context of financial institutions? It is actually very much in a state of flux. It is in a state of flux that is driven by sometimes competing

currents which themselves ebb and flow. Perhaps the most constant of the currents is that of the very restrictive current in the federal courts. It is the steadiest, because it is led by the Supreme Court.

When we talk about litigation in the context of financial institutions, we are primarily talking about securities class actions, and their related litigation. When you talk about class actions, the Supreme Court long ago recognized that while they had the very desirable goal of trying to give small investors – who could not otherwise get relief – some way of getting relief; in reality, they had often been abused and largely not achieved that goal, and in fact have really just achieved relief for a small group of people, namely the plaintiffs' class action bar. So the law in the federal courts with respect to securities class actions has gone from a rather expansive, policy-oriented and policy-directed approach to a very restrictive, very specific and granular approach applying the class action and applying the securities law in the litigation context.

So, while back in the late '60s and '70s the courts said, "Well, the policy is to give relief to investors, so we'll read very broad relief for people and we won't look too deeply into what the cause and effect might be until very later in the trial and maybe not even then," today, the courts look from the very beginning at exactly what is pled. They have very definite and very demanding requirements for what must be pled from the very beginning, so that defendants' due process rights are not stepped on, and they have the ability from the very beginning to know whether or not there's a real possible problem there and are not dragged into the courts and have these strike suits brought against them.

The results of all of this law that the Supreme Court has engendered is that it has become very difficult, particularly in fraud actions, under 10b5, for plaintiffs to bring cases and to get them to stick beyond the motion to dismiss stage. In addition to that, the Congressional enactments of the 1990s have worked with the court to make it more difficult for the plaintiffs to get discovery early in the case, before the motion to dismiss is decided, and thereby put a greater burden and a greater fear on defendants who are named in these suits.

The whole net impact is that, among other things, the lawsuits that are brought are generally fewer in number; they are less expansive; and today they are brought more as non-fraud cases under the '33 Act rather than fraud cases under the '34 Act, which are, in some ways, easier to deal with.

So, for the first time, many of us who have been doing this for a long time have most of our cases as '33 Act cases rather than '34 Act cases and they are cases involving public offerings rather than the IPO allocation, the mark-up cases, the NASDAQ mark-up cases and other rather creative litigations that plaintiffs have brought earlier. They've become a lot less creative because they don't want to spend a lot of money on cases that are going to be thrown out early.

So the numbers tend to be down. They are a little bit closer now than they were a year or two ago to where they were, but a lot of them are duplicative. The me-too actions that plaintiffs are filing, really only involve a

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few different subjects, and the numbers are significantly down.

So the second current, and this one is less constant, is legislation. As I said, in the '90s, it was restrictive, but with the Democratic Congress, the plaintiffs were somewhat hopeful that there would be a change in the ability to bring litigation – that there would either be a change in the rules to make them less restrictive, or there might be new claims that would be brought. In fact, there was some hope under Dodd-Frank that there would be broader causes of action, perhaps a reinstating of aiding and abetting claims or things of that nature.

In fact, because of the difficulty in getting Dodd-Frank through at all, aiding and abetting simply became a possible study that was going to be considered, and it really was watered down considerably, so there were really no major legislative enactments regarding litigation in Dodd-Frank at all, other than some possible studies which, given the Congressional change, is probably not likely to go anywhere right now.

So the legislative enactments and plaintiffs waiting to see what happened there also led to a slowdown in litigation, at least in creative litigation. Who knows where that path is going, because who knows where the legislature itself is going to be going.

A third component or current is federal regulation, and we heard a little bit of that from our colleagues on the investment company area. Federal regulation continues to be aggressively protective. We saw yesterday, in the paper, there was talk about having a whistleblower fund at $400 million, and it looks like, at least for the next two years, there may be continuing to be aggressive federal regulation. But again, the political winds will determine that. How is that relevant to litigation, because you can't generally bring litigation under a regulation? Well, plaintiffs hope that regulatory enforcement will provide facts that they can then use themselves as a basis for litigation,

> "...everybody is sensitive to their exposure, their responsibilities, and everybody is looking at other people. We spend more time looking at our service providers. We go to custodians, we go to processing firms, and we meet with their staffs and make sure that we're comfortable with what they're doing; because ultimately, you can be held responsible for what they're doing." — *Robert P. Connolly*

and if there's an active regulatory enforcement, that that could lead to further litigation that they could rely on. But again, we'll see where that goes. So that's an unknown, ebb-and-flow kind of situation.

Finally, there has been the more aggressive movement by state attorney generals. That's had a pro and con effect for litigation. It's been a pro effect in that, as with regulatory impact, it finds things that plaintiffs can then sue on against financial institutions and companies generally. The downside of it, though, is those often get settled by the attorney generals. So we had the auction rate securities litigations, for example, a major wave that was brought a few years ago by the plaintiffs' bar, but the attorney generals settled a lot of those cases out from under the private plaintiffs by having the large settlement funds for small investors, which really disappointed a lot of the plaintiffs' bar and made it more difficult for them to get large recoveries that they could get fees on.

So we have all these various ebbs and flows, the net result of which is that litigation involving financial institutions under the securities laws has been generally down somewhat. It has been more the traditional kind of litigation, and I think the plaintiffs' bar is still waiting around to see what happens.

JACK FRIEDMAN: Just a quick question. There are different ways in which an investment management company sells its products and services. Could you tell us a little bit about the ways in which BlackRock does it?

ROBERT CONNOLLY: Yes, it's an interesting question, actually, because we sell in a variety of different ways. For example, in the U.S., our mutual fund complex is broker sold. So we sell it through brokers like Merrill Lynch, Morgan Stanley, Citibank; and our interface is between us and the broker at those companies.

JACK FRIEDMAN: Is the name "BlackRock" in the title?

ROBERT CONNOLLY: Of the funds, yes, it's the BlackRock Mutual Funds. But we don't actually deal directly with the retail investor, the individual who invests in the company. We deal with brokers. So it is broker intermediary.

Same type of product in Europe, we don't even deal with the individual brokers; we just deal with the head office of those companies who act as gatekeepers, so UBS in Europe will decide which mutual funds to sell to through their system, but we won't even have people who talk to their brokers. So we don't have a sales force that goes out there. It's a different type of process.

Then on the institutional side, we have salespeople who deal directly with the institutions. So the Ford Motor Company pension plan, a sovereign wealth fund, we have sales folks who actually deal directly with those institutions. The rules on how you deal with those various different types of

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end users all vary by country and by the type of product you're selling.

JACK FRIEDMAN: Then you're not dealing with the individual public, generally, so there isn't the issue of arbitration. Or does the customer have to agree that disputes will be arbitrated? If somebody is upset about how the fund was managed, who do they sue?

ROBERT CONNOLLY: Well, if they're upset about how the fund was managed, they would sue us.

JACK FRIEDMAN: Even though you didn't deal directly.

ROBERT CONNOLLY: Yes, for example, Bob mentioned the lawsuits relating to the AMS products. Those lawsuits were directed at the brokerage firms because of how they sold them. They weren't claiming that the AMS products weren't managed correctly, because we had closed in funds that issued AMS. What they were claiming was that they were sold to them as something different than what they were, so in those lawsuits, they sued the brokerage firms. But on the other hand, if we managed the portfolio and there was a problem with the portfolio – for example, there's a firm in Boston that's had a lot of suits because they managed the portfolio in a way that people thought was inappropriate – then that asset management firm would be sued by the shareholders.

JACK FRIEDMAN: One of the big issues in litigation is the question of the ebb and flow of juror attitudes toward large corporations. Is the attitude now, "Well, they got us into trouble, so all those institutions are bad people?" Do they come in with a preconceived notion that they're not a sympathetic defendant? I don't know what the trend is right now, but it's always good to register the current temperature.

ROBERT PIETRZAK: There is no single answer to that, because it really depends on

a combination of geography and particular juries. There are demographic and economic strata answers that really depend on a particular jury. We find that for example, if you go to New York, you get a very different answer than you might get if you went to Atlanta. If you get a jury that has people who are middle class versus people who are either upper or lower class, you might get a different answer, but that may depend on geography; it might depend on the industry that they're in; it really – there's no single answer to that.

JACK FRIEDMAN: Is there a tremendous pressure on financial institutions, even more than there normally is for other industries, to just settle things, because of reputation and so forth? Because people often confuse their bank or their investment manager with their personal physician, and doctor or lawyer, do they somehow think that you're the personal family professional and therefore you owe them a stupendous duty?

ROBERT PIETRZAK: I think in the big class actions, there is not. That is, they have enough leverage from the judicial decisions and the arguments they have on their side. The potential for getting rid of these cases either on motions to dismiss or another very important area where there's been a lot of very favorable case laws in the class action decision context, that there's good leverage there.

JACK FRIEDMAN: So the institutions aren't too fearful because their reputation is being besmirched just by the fact of litigation and visibility in the press.

ROBERT PIETRZAK: I don't think purely by that fact. It may depend on the issue. I think Bob can address that better, but it may depend on the issue. Plain vanilla "you worked on a public offering and somebody forgot to put in a footnote" kind of litigation, really does not worry people too much. There may be other types of litigation, with unusual types of allegations that might concern the company.

RICHARD PRINS: The asset management business is different than a lot of other financial businesses. The two main acts, at least in the United States, basically don't have private rights of action except to sue on fees. Under the Investment Company Act and the Advisers Act, if you don't like what you got, you basically can complain to

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the regulator, but it's not that easy to sue. There's a *lot* of pressure to settle if the SEC is coming after you on a regulatory matter, because that's your reputation, that's your bread and butter. But there just aren't that many lawsuits against investment managers from the actual consumers of the product.

BARRY BARBASH: A type of action that I would submit is much more prevalent today in the asset management area is one based on alleged disclosure violations of the Securities Act of 1933 or the Securities Exchange Act of 1934. The 1933 and 1934 Acts are being turned to because of the general lack of private rights of action under the Investment Company Act and Investment Advisers Act.

I have a question for Bob. We're going to see the Supreme Court in December of this year, deal with its second investment management case, within roughly 12 to 18 months. It's the *Janus* case. That case deals with disclosure and I'm interested in your take on it.

ROBERT PIETRZAK: Yes, well that one deals with whether a fund advisor can actually be named as a defendant in a case, and my take on that is that I would not be surprised if the advisor wins that case, again because the Supreme Court has tended to be very restrictive in applying the law to who the defendants are. You know, we had the *Stoneridge* case and the *Central Bank* cases, for example, which found that aiders and abettors and persons who engaged in peripheral transactions which were supposedly tied to the underlying fraud, that those people could not be brought in. And along the lines of those cases, I think, it would be consistent with the Court's restrictive approach to the securities laws to keep the advisor out of it.

BARRY BARBASH: The SEC filed an amicus brief within the last couple of days arguing that the Supreme Court should not follow those cases. The SEC doesn't agree with the Court's restrictive approach.

ROBERT PIETRZAK: Does not agree with that, yes. But the Court has not always filed, followed the SEC's approach on these things!

JACK FRIEDMAN: In a few minutes, we'll open it up to interaction with the audience, but I'd like to ask a few questions here and anybody can comment.

How enormous is the effort to have compliance programs which are effective on a global basis? You have to have recordkeeping; you have to store every email, etc.

All you hear in the news is some allegation that something slipped, whereas it may be one out of a million. The other part that you do right is not newsworthy, so it doesn't get in the press.

ROBERT CONNOLLY: Yes, it's a very complicated business. Our firm engages in tens of thousands of trades every day. Every one of those trades has a technical aspect to it, it has to be documented, it has to be reflected on the accounts' books. All the accounts have different investment guidelines, which all have to be monitored to make sure the investments are correct. There is pricing for mutual funds. Some of the markets are not liquid at times.

I remember when I was a young lawyer at a mutual fund board meeting, one of the directors said, "So is there anything that could go wrong?" I was kind of stymied, and a senior lawyer from a law firm said, "There are a thousand things that can go wrong." Unfortunately, that is the nature of the business, but people expect things to go right, and they do most of the time, but it's a very costly operation.

BlackRock spends several hundred million dollars a year investing in new technology, new systems. We have thousands of people in the back office working on operations. It's a very complicated, technical business, and it requires an awful lot of resources. There's a lot of expectation.

JOEL GOLDBERG: A question you get at Board meetings is a variation of one I've heard countless times: "Can you assure me that everything's okay?"

BARRY BARBASH: It's related to, "What keeps you up at night these days?"

JACK FRIEDMAN: You mentioned thousands of employees. Does the modern large corporation have to put every email on file? Is it starting to become a business practice where every large corporation says, "Any email on any topic, no matter how trivial, on a company Blackberry… just save everything.

ROBERT CONNOLLY: No, I think it varies across the board. The SEC hasn't

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required that for every email (even though enforcement staff love emails) because people tend to use them in a conversational way. They can be taken out of context.

JOEL GOLDBERG: I think it's important to have a systematic way of keeping or disposing of emails. I think that you get into trouble when you arbitrarily start disposing of them. But I think if it's your practice to delete emails after a certain period of time and you consistently follow that, I think it's all right.

BARRY BARBASH: The hard thing in the asset management area is that the SEC's position seems to be that all emails evidencing compliance with a requirement under the securities laws need to be kept. For example, an asset manager is required to maintain books and records that show the basis for investment decisions the manager has made on behalf of clients. So, if emails evidence investment decisions, then – according to the SEC – the manager needs to maintain those emails for five years. The SEC staff's interpretation of the information that relates to an investment decision tends to be broader than the rest of the free universe.

ROBERT PIETRZAK: Yes, I know most broker dealers today, because of records requirements, for example, with respect to trades and advice, customer communications and various other things, just keep everything because it's so difficult to weed out what you need and what you don't need.

JACK FRIEDMAN: In the last two to three years, what demands of customers have changed, whether against institutions or individuals? Are they asking more questions?

ROBERT CONNOLLY: I think customers as clients are asking a lot more questions, because they're being sometimes asked questions on, for example, pension plans. The trustees of that pension plan now have a lot of sensitivity to *their* responsibilities. So we're getting asked a lot more questions by people like that, who want to come in and do due diligence on the phone, meet the compliance people, meet the operations people.

JACK FRIEDMAN: To show they're good guys.

ROBERT CONNOLLY: They want to show that *they* watch and did what they could do to oversee. The same thing is true with the gatekeepers of the brokerage firms. They don't just put you on their system with their brokers unless they come in and analyze your operations and make sure things are running properly. So, everybody is sensitive to their exposure, their responsibilities, and everybody is looking at other people. We spend more time looking at our service providers. We go to custodians, we go to processing firms, and we meet with their staffs and make sure that we're comfortable with what *they're* doing; because ultimately, you can be held responsible for what they're doing.

JACK FRIEDMAN: I have been talking to people in industries about the increasing tension for top management and boards to manage the company for success, usually measured in financial success. They have to spend so much time on compliance issues, governance requirements and so on. I assume that it's a problem because of the heavily regulated nature and political sensitivity. It's not just regulators but everybody's having hearings constantly about industry. My question is, since we started with governance, how in the world do boards have time to do anything other than comply with the requirements?

JOEL GOLDBERG: Well, I can tell you, in the mutual fund context, the major part of what the boards do is comply with regulatory requirements. They have a huge number of approvals that are required by rule or by statute, and in terms of just kind of sitting back and saying, "Let's strategize," that's the smallest part of the board meeting.

JACK FRIEDMAN: Anybody else have any comments about the problem, or how it's changing?

BARRY BARBASH: What you're starting to see is a trend towards a more specialized use of committees. In the mutual fund business, consistent with what Joel was saying, you see committees that you never would have seen in the past, such as performance committees.

JACK FRIEDMAN: There's a new committee called the "performance committee"?

JOEL GOLDBERG: Oh, yes.

JACK FRIEDMAN: Just by definition – the reason I'm laughing is *by definition*, what

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is the role of a board? It's to worry about the performance of the corporation!

JOEL GOLDBERG: Well, this is *investment* performance.

JACK FRIEDMAN: I'm just laughing. That's what the whole board is supposed to be doing. It's just an example of the delegation process because specialization is required. There's just too much to be done.

BARRY BARBASH: In the fund area, audit committees have increased responsibilities. Funds now have nominating committees and a host of other very specialized committees. Why? Because the amount of work has increased more and more over the past ten or so years. The SEC talks on a regular basis of trying to reduce the workload for directors, particularly independent directors in the mutual fund area. I don't think we've seen such a reduction except on the margins.

JACK FRIEDMAN: What are some of the issues surrounding the directors of funds or fund groups, which is different than the public company governance issue?

BARRY BARBASH: The key difference relates to the evaluation of the advisory contract between a mutual fund and its adviser that is mandated by the Investment Company Act. A board typically spends a tremendous amount of time during the course of a year assessing matters relating to the advisory relationship. The mandated review is an annual one, but a board is getting a constant flow during the year of information about the adviser, how the adviser is performing, and the nature of the adviser's service. The information is designed to enable the board to make the finding that's contemplated by Section 36(b) of the Investment Company Act. The Supreme Court dealt with that particular provision in the case *Jones v. Harris* a short time ago, which has in turn put great pressure on boards to closely monitor the advisory relationship.

JACK FRIEDMAN: What did it say about the directors in that situation?

BARRY BARBASH: Essentially, *Jones v. Harris*, as I read it, indicates that independent directors of a mutual fund have a primary role in the consideration of the advisory fees paid by the fund. How the board goes about its business in considering these fees will have a significant effect on whether a court will conclude that those fees are reasonable. *Jones v. Harris* suggests that the degree of deference a court will give to the independent directors in the setting of a fund's advisory fee depends on the information that the directors have considered and the procedure that they followed. It seems clear to me that courts will, in applying *Jones v. Harris*, look closely at what a board does and how it goes about its business.

JACK FRIEDMAN: Weren't there some complaints by the owner of the largest mutual fund complex in the world? He was complaining that they were making it harder for them to relate to their directors or to serve on boards; and all these things were counter-productive. Maybe that was a few years ago and it's been ironed out.

JOEL GOLDBERG: That could have been said by the largest or the smallest!

JACK FRIEDMAN: They're all complaining! I'd like to go back to the merger issue and dealmaking. Different Wall Street houses are spinning things off because of proprietary trading and so forth. At one time there was the hope that by combining different financial services into a supermarket-type approach, you could have economies of scale and marketing. You could have different specialists at the bank branch talk about different services. Then as a strategic change, they started to strip off some of the things and to trim down the variety of services they were doing. Now they're being required legally to do some of this. So first it was a business strategy, and now it's a legal issue. Could you talk a bit about where people in the industry think that dealmaking is going, and maybe how it's going to settle out regarding the different segments of banking versus investment management versus insurance?

ROBERT CONNOLLY: Well, actually, we've been the beneficiary of some of that, because, I think, about ten years ago, people started to focus on the inherent conflict of interest between a broker selling investment products that were also being managed by the brokerage firm. A broker should really be indifferent and impartial to what prod-

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uct they're selling. That way, the number of brokerage firms to consider spinning off of businesses so that they wouldn't be subject to those conflicts of interest – that was one of the primary drivers of our acquisition of Merrill Lynch's investment management business. Merrill Lynch really wasn't able to sell their products outside of the Merrill Lynch system, because people viewed them as Merrill Lynch people.

JACK FRIEDMAN: Right in the title?

ROBERT CONNOLLY: Yes, right in the title. They decided it would be much more effective to have it as an independent investment management firm, and so we acquired it. Essentially the same thing was true with the acquisition of Barclays Global Investors. It was a part of Barclays Bank, and by being part of BlackRock, I think people view it as an independent, non-partisan investment management firm. So that's counter to the argument that you fold all these different investment and financial products under one umbrella. There are times when there are conflicts of interest and you do that. So, I think we've taken advantage of some of the retrenching on the supermarket concept.

JACK FRIEDMAN: So it's two-step: one is the shorter-term deals that are going to go on – what type of things are going to be bought and sold. Then the next thing is after that phase goes through, how the industry's going to look. Does anybody else have some observations about that?

RICHARD PRINS: Well, I think certainly there are going to be some more spin-offs and some are in the works – or teams that leave or whole segments of business as the large banks, both here and in Europe, look at the new capital rules and look at the new regulations, in trying to figure out what businesses can they most efficiently be in, and be in at the scale that they want to be in. But that's gone on for years and years, now, and I would say that one of the things that is actually a byproduct of Dodd-Frank is going to be once again the barriers to entry are getting higher. Everybody is going to have to be a registered advisor and have a whole regulatory infrastructure. It'll be much harder than it used to be to just decide, "I'm sick of being a trader at Goldman, I want to open up my own business." It used to cost almost nothing, and now it's going to cost a fair amount more. So in that sense, that may be a driver of more acquisition activity of existing platforms, and it will be a little harder for people to start up their own platform.

BARRY BARBASH: My sense is that the middle-range companies are going to be under much more pressure trying to deal with the regulatory burdens. I think you'll see M&A activities involving companies that can't reach a critical mass of assets under management or assets sufficient to support the costs of regulation. The increased burden of regulation will lead a lot of companies to want to get out of the business, and will lead to others trying to become bigger.

JACK FRIEDMAN: In other words, regulation cannot foster diversity of competition, diversity of the numbers of competitors. What it does is to lead to consolidation, whether it was in the airlines, or different kinds of things. The regulatory environment, whether you're freeing up an industry or regulating it more, can have a very big effect on the economics of how many players there are in an industry.

JOEL GOLDBERG: I think to use a term, the anti-trust rule, lawyers use it; regulation increasingly is a barrier to entrance.

JACK FRIEDMAN: I'd like to go over the more human, people side of the business. About how many employees do you have in your company?

ROBERT CONNOLLY: Nine thousand.

JACK FRIEDMAN: They're spread out in different ways around the world. What are some of the big issues for a company in today's economy and regulatory environment pertaining to people? There are privacy issues and employee rights issues and so on. From a general counsel point of view, what are some of the issues that face the company to be a good employer?

ROBERT CONNOLLY: Yes, well again, it varies by jurisdiction, and one of the challenges we have as a global company is trying to satisfy all the different jurisdictions and have some semblance of consistency while reflecting the local culture. So when it comes to privacy issues I'll give you an

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example. On our website – our internal website – we always had the ability to look up people, and everybody had a photo, and you could look up their department and see if they're in the legal department and see their photo. That way, when you saw them it was like Facebook. But in some countries, people don't like doing that. So then we made it optional, whether you could do it or not. So now when you go to our Facebook, some people have photos, some people don't. It's just become much more complicated when you're a global company, and employment matters, people's expectations in terms of benefits and insurance and things like that all varies by country. So you don't want to have different programs in 30 different countries, but on the other hand, you do have to be sensitive to what the local expectation is.

JACK FRIEDMAN: One general counsel made a cultural comment. This was not value-laden; he was just observing something from a global standpoint. Let us say you want to move an employee around, such as moving from London to Hong Kong. He said that in some cultures like England, you talk to the employee; they go home; they talk to their spouse; they come back saying, "It's a privilege to be reassigned," and it is done. It's just simple. He said that when you deal with an American employee he or she says, "It sounds good to me," they go home; and then starts a second negotiation with the spouse. With an American family, culturally, you're dealing with greater family issues than you do with others. That's an example of an issue that came up at one of our programs.

As another employee issue, what are privacy rights now with computers? You have to make sure that you don't monitor too much, but just enough?

ROBERT CONNOLLY: Again, it's another area where it varies by jurisdiction. It's rapidly changing. You know, in this country, Congress is very focused now on privacy rights with the Internet. A number of commissions are studying that, a number of committees in the House and Senate are also. There's a big debate about to what extent you're entitled to privacy on the Internet. Then in terms of employers and employees, it varies by country and also in this country, it varies by state. So, for example, if you accidentally misplace some personal information about an employee who's a resident of New York State, under a New York State statute, you have an obligation to notify that employee and report it to a governmental agency, and provide certain remedies to the employee. That could be different in Massachusetts, or New Jersey, and then in the rest of the world, the rules are different.

JACK FRIEDMAN: I think there is a rule in the EU or in a major country that all personal communications on the company computer are privileged against the employer. So companies are struggling with the issue of how do you do an investigation of emails, when as much as one out of every three emails is private and privileged?

ROBERT CONNOLLY: Well, in most countries, if you make it clear to the employee that it's *not* privileged, and you put them on notice of that, and it's part of your policy, then it's not privileged.

JACK FRIEDMAN: I'd like to wind up the program with one general question. If you ever had five minutes a month free, for your own time, what would you do with those five minutes?

ROBERT CONNOLLY: I work for BlackRock; I never have five minutes!

JACK FRIEDMAN: What about the hobbies you had before and will have when you retire?

ROBERT CONNOLLY: Sailing, skiing, that type of thing.

JACK FRIEDMAN: Let me thank the audience for coming, and the privilege of having our Honoree and the Distinguished Panelists share their expertise. Thank you very much.

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Barry P. Barbash
Partner

WILLKIE FARR & GALLAGHER LLP

Barry P. Barbash joined Willkie Farr & Gallagher LLP in February 2006 as a partner and head of the firm's Asset Management Group. He also serves on the firm's Executive Committee. For the seven years prior to joining Willkie, Mr. Barbash was a partner and head of the asset management practice at another firm. From September 1993 until October 1998, he served as the Director of the Securities and Exchange Commission's Division of Investment Management.

Mr. Barbash has a diverse practice, covering all aspects of the asset management business. He regularly advises mutual fund and hedge fund clients on a variety of transactional, compliance and regulatory matters. His areas of expertise include mutual fund operations and regulation, hedge fund formation and regulation, private equity fund structuring and financing, venture capital fund operations and offerings, and fund governance. He regularly represents buyers and sellers in asset management merger and acquisition transactions and advises asset managers of all types in connection with administrative and court actions brought by securities regulators.

Mr. Barbash regularly advises mutual fund, hedge fund, investment adviser, and broker-dealer clients on a wide variety of regulatory compliance matters. When counseling these clients, he is often called upon to conduct detailed reviews of their investment management, administrative and marketing operations and to assist in the development of policies and procedures intended to enable them to meet their fiduciary and other legal obligations.

Mr. Barbash's recent significant matters include representing major financial services firms in organizing and operating public and private funds and in developing novel and complex investment products and services. *Chambers USA* (2010) ranks Mr. Barbash in the number 1 tier nationally for leading individuals practicing in the area Investment Funds: Registered Funds. *Chambers USA* and *Chambers Global* (2010) also rank him among the very top practitioners in the area of Hedge Funds. Mr. Barbash is also included in the 2009 edition of *Best Lawyers in America.*

Willkie Farr & Gallagher LLP

Willkie Farr & Gallagher LLP is one of the oldest and most respected international law firms providing major corporate clients with a diverse range of sophisticated legal services. We specialize in corporate and securities law, litigation and arbitration, business reorganization and restructuring, real estate, and a number of specialized fields of law. We are consistently ranked among the world's leading mergers and acquisitions and private equity firms. Structured as one integrated firm, our approximately 640 lawyers are based in some of the world's most important financial centers: New York, Washington, D.C., Paris, London, Milan, Rome, Frankfurt, and Brussels. Our clients include multinational and domestic corporations and financial institutions conducting business across the globe in practically every industry sector. We also represent sovereign governments and governmental agencies in a host of business and policy matters. Working collaboratively throughout the United States and Europe, our attorneys are regarded for their creativity, skill, leadership, decisiveness and solution-oriented approach to handling multifaceted matters.

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Joel H. Goldberg

Partner, New York

STROOCK

Joel Goldberg is one of seven corporate partners and counsel with principal responsibility for the ongoing representation of more than 700 mutual funds, closed-end funds or ETFs (or their independent board members), with more than $1 trillion in assets under management (approximately 9% of U.S. investment company assets), as well as investment advisers, industry service providers and unregistered pooled investment vehicles.

He has more than 25 years' experience advising mutual funds, as well as mutual fund management teams and independent directors. Mr. Goldberg has particular expertise in the areas of mutual fund regulation and investment adviser regulation. He regularly advises clients on complex questions relating to distribution, including issues arising under Rule 12b-1.

Mr. Goldberg has authored numerous publications on various aspects of the Investment Company Act of 1940. He has also lectured frequently and participated in many panels on these and related subjects.

Prior to joining Stroock, Mr. Goldberg was a partner at Willkie Farr & Gallagher LLP and Shearman & Sterling LLP. He also has 13 years' experience in various government positions, including his tenure as Director of the Securities and Exchange Commission's Division of Investment Management.

Related Activities

Mr. Goldberg is the author or co-author of numerous articles, including:

"Revisiting Rule 12b-1 Under the Investment Company Act" (co-author), *The Review of Securities & Commodities Regulation*, July 1998

"Master-Feeder vs. Multiple Class Distribution: Practical Considerations" (co-author), *The Investment Lawyer*, April 1994

Memberships

Member, American Bar Association

Former chairman, Mutual Funds and Investment Management Conference Planning Committee

Admitted to Practice

New York, 1971
District of Columbia, 1978

Education

J.D., Columbia Law School, 1970
B.A., Brandeis University, 1967

Stroock & Stroock & Lavan LLP

Stroock & Stroock & Lavan LLP provides transactional and litigation guidance to leading multinational corporations, investment banks and venture capital firms in the U.S. and abroad. Stroock's emphasis on client service and innovation has made it one of the nation's leading law firms for over 130 years. Stroock's practice areas include: capital markets/securities, commercial finance, mergers & acquisitions and joint ventures, private equity, private funds, derivatives and commodities, employment law and benefits, energy and project finance, entertainment, environmental, financial restructuring, financial services litigation, insurance, intellectual property, investment management, litigation, personal client services, real estate, structured finance and tax.

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Richard T. Prins

Partner

Richard T. Prins heads Skadden's Investment Management Group, which includes the firm's investment advisory, investment company and broker-dealer practices; merger and acquisition and corporate finance practices in those industries in conjunction with other practice groups; and the development of new investment products in conjunction with other practice groups. Mr. Prins actively participates in each of these areas and also handles a wide variety of general securities and corporate matters.

In the investment advisory and investment companies area, Mr. Prins has represented several prominent U.S. investment company complexes and investment banking firms in the development and offering of new investment products, including tax-deductible preferred stock, the target term trust, guaranteed equity funds, structured fund products and a variety of institutional debt and equity products, including structured regulatory capital instruments. He also has counseled numerous investment advisers, investment companies, business development companies, and broker-dealers in regulatory matters and registered and unregistered fund offerings. Among the clients Mr. Prins has represented in these areas are BlackRock, Gamco Asset Investors, Tennenbaum Capital Partners, Apollo Investment Corporation, Prospect Capital Corporation, Third Avenue Management and Tweedy Browne.

Mr. Prins has represented clients in a number of significant financial institution acquisitions and joint ventures over the past several years, including: BlackRock in its acquisitions of the Barclays Global Investors business from Barclays and the Merrill Lynch Investment Management business from Merrill Lynch; Citigroup in the sale of most of its asset management businesses to Legg Mason; the Marsico management team in its leveraged buyback from Bank of America; Nicholas-Applegate Capital Management in its sale to Allianz; Private Capital Management in its restructuring and sale to Legg Mason; and Tweedy Browne and Third Avenue Management in their sales to Affiliated Managers Group. Mr. Prins also advised BlackRock, Inc. and Gamco Asset Investors in their initial public offerings and Gamco in various subsequent corporate financings. In addition, he regularly represents issuers and investment banking firms in a variety of U.S. and international public and private financings.

Mr. Prins has been repeatedly selected for inclusion in *Chambers USA: America's Leading Lawyers for Business* and *The Best Lawyers in America*.

Skadden, Arps, Slate, Meagher & Flom LLP

With approximately 2,000 attorneys in 24 offices on five continents, Skadden, Arps, Slate, Meagher & Flom LLP and affiliates ("Skadden, Arps" or "Skadden") serves clients in every major financial center. Our strategically positioned U.S. and international locations allow us proximity to our clients and their operations and ensure a seamless and unified approach at all times.

For more than 60 years, Skadden has provided legal services to the corporate, industrial, financial and governmental communities around the world in a wide variety of high-profile transactions, regulatory matters, and litigation and controversy issues. Our clients range from a variety of small, start-up companies to a substantial number of the 500 largest U.S. corporations and many of the leading global companies. We have represented numerous governments, many of the largest banks – including virtually all of the leading investment banks – and major insurance and financial services companies. The firm has more than 40 practice areas and advises clients in matters involving, among others, mergers and acquisitions, litigation and arbitration, corporate finance, corporate restructuring, securities law, banking, project finance, energy and infrastructure, antitrust, tax and intellectual property.

Skadden, Arps emphasizes dedication to client service, teamwork across practice areas and offices, creativity, responsiveness, operational efficiency and cost-effectiveness. Skadden received the most recent *Chambers* Global award for "Client Service Firm of the Year," one of the publication's top honors. We are constantly challenging the status quo and looking for ways to improve client satisfaction.

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Robert Pietrzak

Partner

ROBERT PIETRZAK is a partner at Sidley Austin LLP, co-head of Litigation in the firm's New York office, global co-head of the firm's Securities Litigation Practice Team and a member of the Executive Committee. His practice primarily involves the litigation in U.S. courts of civil and governmental disputes for domestic and overseas financial institutions, including the defense of securities class actions and large contract actions. He has been counsel in regulatory proceedings and civil actions involving securities industry practices, bonds, public offerings, investment companies, antitrust claims and other major commercial and governmental disputes. He has represented defendants in some of the largest litigations in the U.S.

Mr. Pietrzak has lectured extensively and written articles on various litigation, securities and derivatives issues for CNN, Court TV, ALI/ABA, the Financial Industry Regulatory Authority, the Securities Industry and Financial Markets Association, the Futures Industry Association, the Futures and Options Association, the American Arbitration Association and others. He has been named as a leading New York securities litigator by *The Legal 500* and by *Chambers USA*, which has noted his "learned, almost professorial arguments" in court, "his superlative writing skills and polished representation" of institutional clients, and his ability to "organize every aspect of a case without ever losing sight of the end goal."

Sidley Austin LLP

Sidley Austin LLP is one of the world's premier law firms, with a practice highly attuned to the ever-changing international landscape. The firm has built a reputation for being a powerful adviser for global business, with more than 1,600 lawyers in 17 offices worldwide. Sidley maintains a commitment to providing quality legal services wherever they are needed, offering advice in transactional, regulatory and litigation matters spanning virtually every area of law. The firm's lawyers leverage their diversity of knowledge and wide-reaching legal backgrounds with a dedication to teamwork, collaboration and superior client service. The firm has been recognized by its clients and by the media for its leadership in its transactional, litigation and international practices. Sidley consistently ranks among the top global capital markets firms in the Thomson Reuters league tables, with strong showings as both issuer and underwriter counsel in major security type categories, including U.S. debt and equity and international, Asia Pacific and Australia bonds. Sidley is also recognized for service and responsiveness, having received the most first-tier national rankings of any U.S. law firm in the inaugural *U.S. News* – Best Lawyers "Best Law Firms" rankings for 2010; Sidley was also named as one of the "Best Law Firms to Work For." Sidley is one of just three firms to have been in the top 10 of the BTI Client Service rankings every year since the inception of those rankings in 2001, and was number one in three of those years.

Sidley has a global footprint, with offices in Beijing, Brussels, Chicago, Dallas, Frankfurt, Geneva, Hong Kong, London, Los Angeles, New York, Palo Alto, San Francisco, Shanghai, Singapore, Sydney, Tokyo and Washington, D.C.

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