DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Marc S. Firestone

Executive Vice President, Corporate & Legal Affairs,
and General Counsel, Kraft Foods, Inc.

THE SPEAKERS

Marc S. Firestone
Executive Vice President,
Corporate & Legal Affairs, and
General Counsel, Kraft Foods, Inc.

Philip Gelston
Partner,
Cravath, Swaine
& Moore, LLP

Gary Jay Kushner
Partner,
Hogan Lovells, LLP

Dean Panos
Partner,
Jenner & Block, LLP

Thomas Durkin
Partner,
Mayer Brown, LLP

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 in his career and his leadership in the profession, we are honoring Marc Firestone, General Counsel of Kraft Foods, Inc. His address will focus on key issues facing the General Counsel of a global food company. The panelists' additional topics include mergers and acquisitions, food industry regulation, product litigation, and corporate litigation.

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

Marc Firestone

Executive Vice President, Corp. & Legal Affairs & General Counsel

kraft foods
make today delicious

Marc Firestone is Executive Vice President, Corporate & Legal Affairs and General Counsel for Kraft Foods Inc. Marc is responsible for the company's corporate and government affairs, legal and compliance functions worldwide.

Marc previously served as Kraft Foods' Executive Vice President, General Counsel and Corporate Secretary. In that role, he was responsible for the company's legal function worldwide and also served as Corporate Secretary of Kraft Foods, Inc.

Prior to joining Altria Group, Inc. (formerly Philip Morris Companies, Inc.) in 1988, where he held a number of senior management positions within Legal and Regulatory affairs, Marc was an attorney at Arnold & Porter. In 1993, Marc was named Regional Counsel for Philip Morris Europe, covering Central and Eastern Europe, the Middle East and Africa, based in Switzerland. From 1995 to 1997, Marc was Senior Vice President, Worldwide Regulatory Affairs and Associate General Counsel for Philip Morris Companies in New York.

Marc returned to Switzerland in 1998 as Chief Counsel for Philip Morris Europe. In 2001, he became Senior Vice President and General Counsel for Philip Morris International. Marc joined Kraft Foods in 2003 as Senior Vice President and Associate General Counsel, and later that year was named Senior Vice President and General Counsel.

Marc earned his Bachelor of Arts in Romance Languages and Philosophy from Washington & Lee University and received his Juris Doctor from Tulane University School of Law.

JACK FRIEDMAN: Good morning. I am Jack Friedman, Chairman of the Directors Roundtable. Many of you have been to our events in the past, but for those who haven't been with us before, I will give a brief background.

We are a pro bono civic group. This is our twentieth year. We've done 750 events throughout the United States and in 14 countries. As a pro bono group, we've never charged the audience to attend. Our mission is to provide the finest programming for Boards of Directors and their advisors, including General Counsel.

This series started in response to Directors' concern that their companies hardly ever receive a positive word. Since we are not a public relations group and are independent, the feeling was that it is important to have the top level of management, including General Counsel, speak publicly about what's happening with their companies and from their particular perspective. In this case, it will be the perspective of the General Counsel.

I would like to explain how we will be organized and then give a brief introduction of the speakers.

We are going to have opening remarks by each of the speakers, starting with Marc Firestone, who is our Guest of Honor today. Marc has a distinguished career both in the law firm and corporate worlds. He has worked in different parts of the world, and will be discussing several key international issues. You have an incredible title, which is "Executive Vice President, Corporate and Legal Affairs, and General Counsel." Do they pay you for one position but make you work for four?

MARC S. FIRESTONE: I wouldn't ever want to say that!

JACK FRIEDMAN: He's not going to comment on that! In any case, the point is, he has extreme responsibilities at the firm. He went to Washington and Lee as an undergraduate and to Tulane Law School.

Seated here are Gary Kushner, a partner at Hogan Lovells; Dean Panos, a partner at Jenner & Block; Tom Durkin, a partner at Mayer Brown; and Philip Gelston, a partner at Cravath, Swaine & Moore. Each one will make their opening comments, and then we will have a Roundtable discussion where people can discuss each other's topics and other things that come up, and eventually open up the discussion to dialogue and questions from the audience.

The transcript of the event today will be made available nationally and globally. We will have a very elegant, full-color publication which will go out to about 150,000 business leaders afterwards. One of the things that makes this a Global Honor is the fact that we're able to reach this broad audience.

Without further ado, I'd like to thank Marc for joining us today, and let him begin the comments.

MARC S. FIRESTONE: Thank you very much, Jack, and thank you for this great honor and thank you all very much for coming this morning. It's a thrill for me to see so many friends and colleagues from my current practice and from Philip Morris and other days. I really do feel unworthy to accept this honor in my own name, particularly in light of the eminent panel and this distinguished audience. So allow me to accept it on behalf of our management, my colleagues at Kraft, and our Board of Directors. It's to them that I owe my thanks for the luck that I've had in the career that Jack briefly described.

As Jack has said many times, for all the stories about Boardroom scandals or articles that merely scare the hell out of anyone who would ever think about going on the Board, we don't read much about the many Boards that provide management their informed judgment, external perspective, common-sense advice and calming influence. Directors promote constructive debate. They test premises; they test assumptions. That is incredibly valuable to management.

Every company will confront the rollercoaster of a takeover, the nastiness of litigation, the turmoil of reorganization and other situations that call to mind the fast talk in drug advertising: "Side effects may include dizziness, nausea, insomnia, anxiety"... and conditions unmentionable in such a distinguished setting as this. The antidote is a Board that not only honors its duty of care, but really *does* care about the company. It has been my privilege, both at Philip Morris and Kraft, to work with such Boards. So I applaud the Directors Roundtable for giving them the credit they deserve.

I would like to request about 20 minutes to describe in-house practice from my perspective

as I've learned it from wonderful outside counsel and wonderful colleagues, many of whom are in this room.

Now, the first description I ever heard of "in-house practice" came as a first-year associate at Arnold & Porter, where we had a mandatory orientation program. Part of this was to watch a videotape on which a very senior partner – on Betamax format, if I recall – gave *his* views of inside counsel. With a vaguely ominous tone, he said we needed to know what to expect in case we might have to meet one of these people some day. If I recall correctly, he said that general counsel and other in-house lawyers were typically those who couldn't make it in a law firm, or simply preferred the ease of corporate life to the real work of outside counsel. Aside from second-rate skills and a propensity towards sloth, he listed drinking problems and various other personal issues in his brief guide to spotting general counsel in a crowded room.

At the time, I had no basis to know whether the description was ironic, defamatory, or in fact accurate. So in retrospect, I'm not sure what to say about my own decision shortly thereafter to go in-house. But what I can say is I have come to consider in-house practice a type of hybrid profession. I've never been of the school of thought that our law department is an in-house law firm. I think that what we do is different. Not better or worse, harder or easier; just different from what lawyers do in law firms.

To state the obvious, our advice needs to promote a business goal based on high standards of ethics and legal expertise. But we are part of a business that is *not* in the business of providing legal advice. Kraft's revenues come from selling delicious foods, not memoranda of law. We need to think of ourselves and learn to be corporate executives; executives with J.D.s, just as the head of R&D might have a Ph.D. or the CFO an MBA. It's the approach and the role, as much as the degree, that matter.

Being part of the management team requires us to understand the risks and opportunities from *within* the context of the business, while addressing the classic challenge of helping to support business goals, which are typically measured quarterly, with a view towards an objective, long-term perspective.

Sometimes we deal with discrete issues, but most often, what we must produce are insights to help the business navigate situations that are multi-dimensional with interconnections that are critical but difficult to spot. At our best, in-house counsel can act like a gyroscope that keeps a ship steady in roiling waters. We therefore need to move beyond the reductionist analysis that we learned in law school to non-linear thinking, and get comfortable teetering on the trembling equipoise between order and chaos. As one of our Directors likes to remind management, we need to play chess, not checkers – a metaphor I'd alter slightly to say, "three-dimensional chess with pieces that are often invisible."

Not for a second will I pretend to have cracked the code to in-house practice, but my colleagues and I at Philip Morris and Kraft have tried hard to come up with a model that takes these abstract analogies and makes them concrete through specific tools and disciplined training. What I would like to describe, therefore, is this approach. I emphasize that it's an approach, a work in progress, really an experiment, of four major elements: one, systems thinking; two, organizational dynamics; three, truth; and four, improvisation.

Let me begin with "systems thinking." If someone asked me to form a mental image of a violin and a glass, I'd probably come up with something like this. If you said, "Think of a glass and a violin," I'd probably come up with something like this. Now here's a different way, not just a picture, but to perceive a violin and glass. It's a 1915 painting by the cubist master, Juan Gris. You might not like it as art or you might love it as art. But my point is that it's an example of learning to look at objects from all angles simultaneously, and from there, learning to detect relationships and interconnections. This is the essence of systems thinking, the approach we have adapted to our strategic planning at Kraft. Without systems thinking, our strategic planning can too easily become a rote exercise in making a to-do list of things we should have already done.

So, in mid-2008, we mapped the environment in which the company was operating from the perspective of corporate and legal affairs, and here is the actual map. The major items we identified are in blue: food safety, which Gary will discuss; agricultural supply, financial conditions, which Phil will talk about; new media, obesity, and health and wellness, which Dean will cover; retail power, board expectations, and corporate identity.

Factors that are *specific* to Kraft are in the center; items on the edges are general. Roman type indicates the known knowns, and the italics indicate the known unknowns. Now, I know Secretary Rumsfeld took heat for those phrases, but they actually come from a well-respected article called *Clausewitz and Modern War Gaming.*

Now, our goal is to imagine the map as three-dimensional, rather than a linear outline or set of groups, just as a cubist painting tries to show multiple sides of objects in a two-dimensional plane. The task is to connect the dots by looking for interactions among items, such as the connections among the financial crisis, the pressure on government budgets, the health care costs associated with obesity, and our

corporate reputation – all of which combine to create the issue of "snack taxes."

Now, from the map, we derive our strategies and priorities, as the slide shows. The keyword is *derive*, because we must focus on what is most important to the business, in light of the environment in which it's operating. This helps avoid the trap of doing absolutely brilliant work that has absolutely nothing to do with what really matters to the company.

Now, we are only beginning to use these tools and conventions, but I'm convinced continued practice will dramatically increase the accuracy and commercial benefit of the insights we provide to Kraft.

Element two in our approach concerns organizational dynamics and the role of human nature in the projects we handle. Think of the game show *Jeopardy*, and imagine Alex Trebek, or if you are of my age, Art Fleming, asking, "The answer is, 'The Entity'." "What is the science fiction movie starring Barbara Hershey?" is an appealing response, but every General Counsel knows that the correct answer is, "Who is your client?"

Now, we all have a solid understanding of the laws governing corporations, but to what extent do we, as a legal function, actively study and seek to understand "the entity?" Not just its organic documents, corporate policies and governing law, but its true nature. Do we investigate its anatomy... its psychology? Do we remind ourselves that the entity is both a collection of the soaring strengths and troubling quirks of each employee, and somehow an organization that is more than the sum of those parts?

Now this might sound like metaphor, metaphysics, or just Metamucil, but I'm convinced that a deep understanding of, to crib a title, *What Makes Sammy Run,* is essential to the role of a General Counsel.

In-house lawyers are like a Greek chorus: seeing connections, anticipating outcomes. But we need to be more than insightful observers. In areas such as compliance, for example, we want to influence the course of action to a happier ending than the typical Greek tragedy. In all instances, we want to be a partner in, rather than an obstacle to, long-term business growth.

All of this requires that we reflect on human nature, especially as it manifests itself in the cauldron of the corporate world.

Having spent my entire career in service of large corporations, I certainly believe in the positive role they play in society. But in-house lawyers need to study the good, the bad, and yes, the ugly; all in the spirit that loyalty to the company includes – indeed depends on – a sense of realism and objectivity.

In his Nobel lecture, Bertrand Russell stated that, "Most current discussions of politics and political theory take insufficient account of psychology." He listed four factors that are relevant to the present discussion, in red on the slide: acquisitiveness, rivalry, vanity, and love of power. A tremendous example of what Russell describes is found in the peace negotiations after World War I, accounts of which vividly reveal how individual personalities and desires led to decisions that have plagued the world ever since. On a smaller scale, but of the same nature, are the sorts of negotiations that we've all confronted, in which logic and common sense fall victim to the characteristics that Russell describes.

Now, in 1950, Russell may well have been right, that political discourse had lost sight of psychology. But it was very much in evidence when the Constitution was debated, and which structured our government based on a clear understanding of human nature. In a famous passage from the *Federalist Papers* describing the separation of powers, Madison writes, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government." He continues, "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

I find this a timeless reminder for countless situations, from contractual provisions that balance the parties' rights, to the perennial question of centralized vs. decentralized law departments.

One more example which speaks for itself: the classic scene from *Casablanca*, in which Captain Renault shuts down Rick's Café, saying he's "shocked to find gambling is going on." The croupier then walks up, "Your winnings, sir," to which Renault replies, "Oh, thank you very much."

Acquisitiveness, rivalry, vanity, love of power, ambition, hypocrisy, double standards and other elements of human nature, along with intellect, integrity and imagination, are present in any organization, at least one with humans in it. Perhaps management consultants will someday find a way to outsource everything and everyone and just leave a super-computer in charge. But until then, general counsel must be students of human nature and organizational psychology, particularly in the area of compliance.

Now, I'm very superstitious about talking about compliance in public, fearing that every time a general counsel does so, something blows up the next day. But at the risk of tempting the fates, I'll describe three aspects of how we're reorganizing and redesigning our compliance programs based on research outside the areas of the law.

First, beyond giving people summaries of the law and helping them to apply it, we've started to model the specific commercial context in which we want to apply a policy or code of conduct. Using the metaphor of an ecosystem, we look at the primary factors that determine how people act in light of organizational demands and commercial expectations. There are three that we focus on: motive and opportunity, individual typologies, and how people make cost-benefit assessments in any given situation.

Here's a bit more detail on the individual typologies. Now, we're not trying to play armchair psychologist, but the reality is that in no group of 100,000 people are people the same. We can't just issue a statement of policy and expect everyone to read it the same way and act on it

the way we intend. Instead, we need to target our compliance efforts in light of the typologies, which we've here listed as "the unfortunate," "the wayward," and "the willful".

Mapping typologies is similar to doing consumer demographics, and that leads to viewing compliance as a marketing initiative. Audits, investigations and help-lines are absolutely key tools. But I think it's helpful to build on those tools and other elements by thinking of compliance as marketing a particular way of doing business, and then using marketing techniques to increase sales, as it were.

It's all about understanding the consumer and figuring out how our messages, and the media that we use, will most likely lead to the desired outcome. It really is no different from how our companies market their products.

My third element is "truth and truthiness." One of my mentors at Arnold & Porter liked to use the expression, "Commit truth." It's a phrase that stuck with me, particularly since truth is often a victim of both hostile and friendly fire in the ever-more-controversial world of multinational business.

Allow me to cite another Nobel lecture, that of Harold Pinter in 2005: "In 1958 I wrote the following: There are no hard distinctions between what is real and what is unreal, or between what is true and what is false. A thing is not necessarily either true or false; it can be both true and false." Pinter goes on to say, "I believe that these assertions still make sense and do still apply to the exploration of reality through art. So as a writer I stand by them but as a citizen I cannot. As a citizen I must ask: What is true? What is false?"

Pinter makes two points, both of which are central to the role of a general counsel. The first is asking, "What is true? What is false?" Even when no one intends to lie or deceive, complexity, ambiguity, uncertainty and the inherent intricacy of global operations can make it hard to get the facts. Ask three people the same question, and you might get three different answers. Ask someone the wrong question, and you might get the "truth," but it's not useful. This

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assumes people are answering honestly; sadly, that's not always the case.

In-house lawyers need to learn a particularly difficult skill – a form of cross-examination that's highly effective in getting truthful answers to the *right* questions, while maintaining collegial working relations with the people we're putting in the witness box. It's tough, but we have to do it.

What about Pinter's second point, that there are no hard distinctions between what's true and false, real and unreal? He's talking about ambiguity in art, but we've all seen that there's ambiguity in the corporate world, as well – a murky zone between truth and falsity, puffery and deception, acceptable spin and misleading assertions. There's an impolite word for all of this, but I'll borrow Stephen Colbert's word, "truthiness." It comes in many forms. It might be an allegation that proves durable, not because it is accurate, but because it is too fuzzy to refute. It might be a precisely worded public statement about corporate responsibility that nonetheless leads the public to expect more than you intended. It might be a compelling technical argument that nonetheless defies common sense.

While it can be hard as a matter of forensics to find the truth with a capital "T," it is even harder to know where to draw the line and when to intervene when we're dealing with truthiness. Especially as a general counsel who wants to be neither the grim censor nor the glib spinmeister.

I'll give you two examples of where we've come out in Kraft. Over the last five years, there's been great enthusiasm to publish codes of conduct that describe a company's expectations of its suppliers. Unlike provisions in a contract, however, these are freestanding documents, often with sweeping language about the expected conduct of hundreds or thousands of other companies. Is it practical to stand behind a code that the public is likely to perceive as vouching for everything our suppliers do? Are we assuming a form of duty, which some have called "associative liability" for the suppliers' conduct, even if it's unrelated to our business?

Now, to be clear, we conduct rigorous due diligence, and have tight contracts. But we have resisted issuing the type of broad code that could, at a minimum, impose a burden and might even lead to criticism or litigation, however ill-founded, because it might fall within the zone of "truthiness."

The second topic is one that Dean will cover, and it comes up often in food and other consumer goods companies: Where to draw the line on labeling and marketing claims. Now, obviously, we won't make claims in violation of a regulation or that are false or misleading. But there's fierce competition based on product attributes and health and wellness benefits, and that means that there will be close calls that require a balancing of competitiveness, legal risk and criticism. Particularly worrisome is the risk of litigation based on economic loss rather than physical injury, especially where aggressive claims about a product's benefits lead a plaintiff to say, "But for your marketing claim, I wouldn't have bought this product, so give me a full refund." Even if the direct damages aren't huge, it can cause enormous reputational damage.

Within Kraft, we've distilled the various legal and regulatory standards into a simple test that we call "The Knowledge Gap." Obviously, a manufacturer will always know more about its products than the consumer. But the question is whether there's a meaningful gap from the consumer's perspective. Even without intent to deceive or misrepresent, we want to avoid having our consumers feel that we've breached their trust. The test is between what we know and perceive, and what the consumer knows

and understands. The wider the gap, the more we move into the danger zone. Often the difference is how aggressively we execute the ad or label. A claim about product benefits with disclaimers in mouse type is probably on the edge, but it's often possible to preserve the marketing goal while tempering the claim language and making the explanatory information more prominent.

For this sort of analysis, we find that a graphic of green, yellow and red zones helps crystallize the issue within the legal function and in discussions with the business. By including a yellow zone, we acknowledge that there's always a possibility that *anything* we do could lead to criticism, which means the goal isn't the elimination of *all* risk, but making *sound* commercial decisions in light of the risks.

Now, one of the advantages of being in consumer products is that even the lawyers are consumers, and aren't going too far out on a limb when we say the difference between a disclaimer in mouse type and one that's more prominent isn't going to hurt sales, but could make the difference if challenged.

Finally, there is improvisation. A former CEO of Philip Morris, from whom I learned a great deal, regularly warned to expect the unexpected. That's the essence of improvisation, which derives from the Latin for not seeing an advance. Improvisation starts with knowledge, but really takes flight when imagination comes into play. I'm sure many of you have read *The 9/11 Commission Report*. It's a remarkable analysis, with lessons that apply to all of our work. The Commission identified four failures: imagination, policy, capabilities and management. I find it fascinating that the Commission listed "imagination" first. Acknowledging that, "Imagination is not a gift usually associated with bureaucracies," the Commission used the phrase "institutionalizing imagination," and went so far as to assert, "It is crucial to find a way of routinizing, even bureaucratizing, the exercise of imagination."

It might seem a contradiction, if not a paradox, to talk about bureaucratizing imagination. Bureaucracies surely can kill off creativity.

Senseless rules surely can stifle innovation. But too often we overlook the difference between process and bureaucracy – two things that people often group together as equally obstructive. Process, technique, or method — or whatever word is free of the negative connotations of bureaucracy — is *not* a barrier to freedom of expression.

Here is "Lavender Mist," one of Jackson Pollock's most famous drip paintings. What could appear more *un*restrained in expression, more unfettered by rules, more improvisational? But Pollock insisted, "I can control the flow of the paint. There is no accident." For the scientifically minded, there is an interesting body of work by physicists and computer scientists that looks at the patterns in his drip paintings, measures the consistency, and draws comparisons to the visual appeal of patterns in nature.

But the key point for me is that discipline and method are *part of*, not anathema to, spontaneous, creative work. The National Gallery summed up Pollock's methodology in a way that also states perfectly the standards to which I believe we should aspire in our work as in-house counsel: "The convergence and mastery of chance, intuition, and control."

Moving from art to music, a symphony orchestra is an appealing metaphor for in-house legal groups. They typify excellence, discipline and other qualities. But the orchestra knows in advance every note it will play, and typically has many rehearsals. By contrast, the most important projects we handle often have little precedent and little predictability. They require individual expertise and close collaboration, but without so much structure that it limits imagination and agility.

Last year was the 50th anniversary of the album *Kind of Blue*, widely regarded as the greatest accomplishment in jazz improvisation. *Kind of Blue*, and jazz generally, have inspired not only musicians but experts in other fields, including corporate management; and there are many interesting articles on the topic that are worth reading for their connection to in-house legal practice.

Miles Davis had worked out only basic sketches of the music, much of which was in unusual modal forms. There were no rehearsals. The album is all first takes – a contemporaneous record of highly skilled musicians inventing new forms at the moment of discovery.

The famous liner notes, by Bill Evans, the pianist, include an eloquent description of the beauty that comes from the spontaneous expression that is at the heart of jazz. After describing the challenge of a solo, Evans writes, "Group improvisation is a further challenge. Aside from the weighty technical problem of collective coherent thinking, there is the very human, even social need for sympathy from all members to bend for the common result." Evans captures what is so remarkable about great jazz. As one author explains, it is excellence emerging from potential chaos. It is individuals willing to take risks for the sake of innovation. It is a group collaborating in an almost telepathic way to create a coherent statement.

To quote from an article by a professor of management at the U.S. Naval Academy: "In order

for jazz to work, players must be actively listening and responding to one another, attuned to the unfolding work that they are simultaneously creating and discovering."

Kraft's recent transaction regarding Cadbury had many of these elements: great lawyers from different firms working together for the first time. Issues that had never come up before. Opportunities and risks in equal measure. And the need to solve unexpected problems on the fly.

I'll never know the excitement of playing great jazz or creating great art, but to me, in-house practice can be almost as fulfilling, thanks to the imagination, creativity and collaboration of the many wonderful lawyers with whom it's my privilege to work. I also believe that in looking for ideas, insights and inspiration from fields outside the law, such as art, music and literature, we become better lawyers and better general counsel. And maybe, for all the dark days that make up part of the bargain of being a general counsel, we *can* make the work *fun*, which is, at least the last time I looked, still allowed under Sarbanes-Oxley.

In summary, we are all working in a fluid, unpredictable, dynamic environment that requires us, 1) to think three-dimensionally, to see the world like cubist artists; 2) to understand human nature and how it plays out in an organization; 3) to be steadfast in seeking and insisting on truth, while being alert to pernicious truthiness; and 4) to nurture a spirit of improvisation so that we can handle unexpected situations and even have *fun* doing so.

Thank you again for this tremendous honor and for the delight to be with all of you this morning. Thank you so much.

JACK FRIEDMAN: One of the interesting problems of law in general, and I don't mean just General Counsel, is the fact that many people go into the field loving justice and the ideals of the profession, although many feel that they later focus so much on billable hours.

How do you try to encourage your attorneys to have a broader values-oriented part of their life that might be an input in the legal work that they do?

MARC S. FIRESTONE: I think it is a couple of things. First, is letting people know that within the company, there's nothing sacred to anything we do. At work, I'll use the examples of Beethoven's *Seventh Symphony* and *The Great Gatsby* as defying improvement. Everything else is open for grabs. So the first is to say: innovate, create. The second is explicitly to talk about art and music and literature and science and other things that people are interested in, as ways to figure out better ways to do our jobs, so that everybody feels that they are there from these multiple perspectives. We really encourage it, and we've done off-sites at art museums. Our executive team had a tremendous session – we brought in a conductor who led us for two hours, and taught, can you imagine this, 40 senior corporate executives learning to sing the chorus from Beethoven's Ninth Symphony. It was a remarkable experience, to get people out of their box and thinking a little bit differently.

JACK FRIEDMAN: Thank you very much. Gary Kushner will talk about his presentation.

GARY JAY KUSHNER: Thank you, Jack. Good morning and thank you for coming today to help honor our friend and colleague, Marc Firestone. He certainly deserves this well-

earned recognition; he is also a very difficult act to follow.

I've been asked to spend just a few minutes, precisely five to seven minutes, discussing the regulatory scheme with which the food industry, including Kraft Foods, must comply on a regular basis, and how the industry is being affected in the current environment. At breakfast with the other panelists this morning, I noted that if I could do that in five to seven minutes, Marc would think he didn't need me. But I'm going to try, nonetheless. I am going to touch broadly upon some of the key legislative and regulatory issues, and hopefully generate some questions for the time that we'll have later in today's session.

Although the food industry has been under what I would refer to as "pervasive regulation" by Food and Drug Administration, the Department of Agriculture, and many other federal and state regulatory agencies for more than a century, the basic food laws have not fundamentally changed. Regulations have been amended, and the industry and technology have evolved, but the basic food laws are functionally the same as the ones that were passed in 1906.

Meanwhile, regulatory agencies have been testing the limits of their existing authority, and have been doing more and more of that in the current environment.

Much of the renewed focus on food industry regulation is the result of advancements in food science and technology, including an enhanced ability to detect pathogens in food, as well as the source of the pathogens and food-borne illness. That kind of scientific advancement does not mean food is less safe now; in fact, it helps ensure that food is safer than ever.

Nonetheless, the media has helped promote the opposite perception. Every day, you merely need to pick up a newspaper, listen to the radio, or turn on the TV, and you are likely to see some report of a food recall or illness outbreak attributable to food. Of course, it is important for consumers to know the facts about the food they eat, but I find much of the rhetoric to be misleading and unfortunate. Regrettably, I

suspect we are going to see more of this kind of reporting, at least for the foreseeable future.

We are currently experiencing a political environment that is receptive to regulation of corporate America in general, and the food industry in particular. Food is sacred. Even President Obama in one of his early addresses to the nation commented on the safety of peanut butter, expressing concern that his daughters eat peanut butter sandwiches every day. That got the attention of members of Congress, and coming from the President, was a call for legislation.

As I said, our current political climate is conducive to regulation. It is not that Democrats always support regulation and Republicans always support deregulation. I have represented the food industry in Washington for over 30 years through many different administrations. Frankly, after all is said and done, the ultimate regulatory effects are not very much different, regardless of who is in office. But the rhetoric and the initiation of regulatory and legislative activities are often a function of politics. Right now, the Senate is dominated by Democrats. It was filibuster-proof until Senator Kennedy's untimely death recently. In addition, several members of Congress have decided not to run for reelection, so there will be a number of open seats in contention next election. It will be interesting to see how that affects the political landscape. Despite bipartisan claims, there is still party line bias.

Politics notwithstanding, even before the 2008 election, there were bipartisan bills introduced and moving in Congress to modernize the food safety laws, some of which the food industry helped craft. One comprehensive bill actually passed the House of Representatives, and another bill, different in important respects, was reported out of committee in the Senate. Both of those bills are still pending in the Congress and could come up for a vote any time. You should have received with your conference materials, a chart that compares the pending legislative initiatives with current law. For those of you who do any work in the area of food regulation, it should be useful to you to see how the bills would change the laws.

> "... we must focus on what is most important to the business, in light of the environment in which it's operating. This helps avoid the trap of doing absolutely brilliant work that has absolutely nothing to do with what really matters to the company." — *Marc Firestone*

The House and Senate bills are different, so their provisions will have to be reconciled at some point by a Conference Committee or other mechanism. But both would substantially increase FDA authority and impose strict new requirements on the food industry. In my opinion, although it has taken a momentary back seat to health care, Wall Street, jobs, and other politically charged issues, I predict that food modernization legislation will be enacted during this session of Congress.

Meanwhile, federal and state agencies have intensified their regulation of food, and are testing the limits of their current statutory authority. They are doing as much as they can do; improvising and being creative within the context of their authority, to regulate more and more aggressively.

In short, the food industry is under the looking glass, and increasingly subjected to new rules and regulatory enforcement action. In many respects, the industry has taken the lead in producing safe products, developing programs designed and implemented to assure the safety of foods, including programs that enable companies to know their suppliers, as well as the destination of their products, so that if necessary, a product can be recalled and the source of a food-borne illness can be detected. Nonetheless, the food industry is under great scrutiny and does not always receive credit for what it does voluntarily, especially in the current environment. Yes, there is a new sheriff in town.

Thank you very much.

JACK FRIEDMAN: Before we start with the next speaker, I want to ask you a quick question. A number of the people who are here, and will eventually get the transcript, are parents, and they may be active in their local school system in some way, whether they hold office or are in the PTA or are just concerned citizens.

I know it's a complicated issue, but what things in the food safety area are basically federal issues vs. state or local issues? What are examples of what parents at the local level can have as an input such as what food is served in schools?

GARY JAY KUSHNER: That's a quick question, but a complex answer. Let me try to answer it as simply as possible.

Basically, the USDA and FDA have regulatory authority over the processing, distribution and sale of all food products in interstate commerce. USDA primarily regulates meat and poultry; FDA regulates everything else. The meat and poultry laws that the USDA administers, include express preemption provisions; the federal rules governing labeling, transportation, and inspection of meat and poultry products take precedence over any state requirement. States may not impose additional or different requirements applicable to products in interstate commerce.

The Federal Food, Drug, and Cosmetic Act, under which FDA regulates all other food, includes limited express preemption, and before 1990, had *no* express preemption. However, there is case law that gives FDA implied preemption in certain areas. The bottom line is, the federal government generally has primary responsibility for ensuring the safety of the food that ultimately winds up on the consumer's table. State and local regulatory agencies possess concurrent authority to enforce the federal laws, but also some authority to enforce the federal laws and even state law at least within that state. For example, USDA adopts standards for products that are sold through the

School Lunch program, and those affect what is provided at the local level. But state agencies, school boards, PTAs, and parents have opportunities to influence what kind of products are purchased for their individual schools.

JACK FRIEDMAN: The classic issue is how many things with sugar should be served in the vending machines. That's a classic local issue.

To move ahead, our next speaker is Dean Panos.

DEAN PANOS: Good morning. Having heard Marc make reference to Greek tragedies in his comments, I now know why I was asked to speak here this morning!

I think, as Marc eloquently described, there are many challenges that he and other General Counsels face in organizations. Gary gave reference to food pathogens and it sounds like making safe food is pretty easy, but these pathogens are ubiquitous in our environment, and it's not an easy task. Which is why we need lawyers like Gary, and it's what keeps Marc up at night, I'm sure, at times.

One of the challenges, that I'd like to talk about that face Marc in the food industry, but also anybody who sells consumer products today, is the increasing litigation and claims on false and deceptive advertising that seems to be gaining a lot of momentum today. It is because marketers and brand developers today understand that the cycle times of their messages are so much shorter than ever before, because of all of the social media tools that are out there. Because of the short shelf life of all of their messages, they have to come up with new ones more frequently, and in less time. They have to be eye-catching; they have to be provocative.

No industry's marketing is more in the crosshairs than that of big food or of big beverages. With today's increasing focus on nutrition issues, health and wellness, such as child obesity, adult obesity, cholesterol and heart disease, food and beverage companies are in the process of having to innovate healthier products and then trying to sell those to people who ordinarily would not look for healthier alternatives, or reformulate some of their flagship brands and make them more nutritious and then try to market around those reformulations, which is not easy.

All of these marketing efforts have actually gained a lot of attention by the plaintiffs' class action bar. Let me just go through a couple of examples for you of some very recent cases, all within the last six to nine months, just to give you a sense of what's going on out there – but this is really just the tip of the iceberg.

Coca Cola recently had two lawsuits filed against them – one over its advertising of vitamin water as a healthy alternative to soft drinks; because the product allegedly contains 33 grams of sugar, which is approximately the same amount which is contained in most soft drinks. A lawsuit alleges that Diet Coke Plus, in which Coke uses the term "Plus" along with the tag line, "Diet Coke with vitamins and minerals," is deceptive, because it seems to imply that Diet Coke now has some health benefits.

This past summer, Unilever was sued in a class action case involving a claim that it's "I can't believe it's not butter" brand as being more nutritious than regular butter, because it is made with "a blend of nutritious oils," and plaintiffs allege that that claim is inherently false and misleading, because it is also made with partially hydrogenated oils, which contain some trans-fatty acids.

Products that are being marketed as containing antioxidants to help support or build consumers' immunity are really under attack. Many companies have been trying to highlight the benefits of antioxidants in their products in the wake of the H1N1 scare. Several lawsuits have alleged that juice makers of Tropicana, which is Pepsico, and Minute Maid, which is Coca Cola, have sought to cash in on the reported health benefits of antioxidant-rich pomegranates by prominently featuring pomegranates in their marketing, but which allegedly contain very little pomegranate juice.

Products that claim digestive health benefits have been under fire recently. General Mills and Kellogg, for example, have been sued over marketing of their fiber, cereal bars, alleging that the fiber used in these products is not of the same quality or health benefits as the so-called natural fibers that appear in whole grains.

Yogurt products that make claims of having probiotic bacteria, which have been particularly marketed toward women, have been in the legal news lately. Last month, a federal judge in Florida granted class certification on a consumer fraud claim for allegedly misleading consumers about the digestive health benefits of the Yoplait YoPlus product line.

A few months ago, Dannon announced that it had reached a settlement of a nationwide class related to Activia yogurt, which also boasted about its probiotic bacteria, and they announced a settlement of $35 million, which has not yet been approved by the federal court, but that had sent shockwaves across the food and beverage industry as being a very high settlement.

So this is just a few examples of what really is a very long list, but the same applies to consumer products in other fields, as well.

What we've also seen is that federal regulators and state regulators are really *much* more active in trying to police, in one sense, or to

overzealously prosecute these claims of health and wellness.

If you went on the FTC's website, you would see that more and more, they are getting consent decrees from companies over claims of false and deceptive advertising. To make matters worse for these companies, when it shows up on the FTC website, like night follows day, there will be a class action lawsuit filed by some plaintiffs' firms within 48 hours that almost reads verbatim from what is on the FTC website in their Complaint.

Many state Attorney Generals are being extremely active today in pursuing claims for allegedly false advertising and are getting involved in the food and beverage area much more so than in the past. Everybody here knows about how active the New York Attorney General has always been in terms of deceptive advertising, but California is very active, Illinois is very active, and now Oregon, Washington and a couple other state Attorney Generals' offices have made it a focus of their offices to go after what they perceive to be overly aggressive and deceptive advertising.

Connecticut is probably the *most* aggressive as it relates to food and beverage claims. In late October, the Attorney General of Connecticut announced his investigation into the Smart Choices Program, which is a program that the food and beverage industry created for products that met certain nutrition criteria. It was started, this past summer, and hundreds of products have been given the "Smart Choices" logo, which you may recall seeing on products: a green check mark logo on the front of packages indicating that the product was a smart choice. But that label designation has been challenged by the Attorney Generals as being inappropriate, because it has been put on products such as Fudgesicles and Lucky Charms cereals, which contain a fairly high amount of sugar. You'll be happy to know Kraft does not sell either one of those products!

But the difference for companies, what they're starting to realize today, is dealing with these Attorney Generals' offices is a different animal. Some government investigations can be done quietly, outside the public. They can be resolved amicably, without publicity. That's not the case with Attorney General investigations. People forget that Attorney Generals are elected officials, so they seek the spotlight on their investigations, and usually when they investigate a company on a deceptive advertising claim, they issue a press release saying they're investigating the company. Oftentimes, the day after or the next day, they issue another press release that says the matter has been resolved, to somehow suggest that they quickly got the company to capitulate. In fact, the reality is that the investigation, from the time the investigation began to the resolution, may have actually been many, many months, but companies are often very frustrated with the publicity that the Attorney Generals seek.

> "... in-house lawyers need to study the good, the bad, and yes, the ugly, all in the spirit that loyalty to the company includes, indeed depends on, a sense of realism and objectivity." — *Marc Firestone*

The only other point I'd like to make related to this is that more and more, the FTC and the Attorney Generals' offices are actually working in concert with the plaintiff class action bar. They are sharing information about their investigations, and they are also sharing resources, so that's not a great development for business.

One last thought is today companies are touting the environmentally friendly aspects of nearly everything they're doing, from their products, their packaging, their plants and facilities. I believe that perhaps the next big wave of claims you may see will be challenging these green claims that are so prevalent today.

Thank you.

JACK FRIEDMAN: I just want to ask you a quick question. One of the great values of a law firm litigator for a corporation is his or her giving advice before there's a problem, rather than just being hired to solve a problem after it's arisen. What sort of recommendations do you make to companies about how the legal considerations and the claims being made could be reviewed, resolved, and documented? What lessons do you wish you could have told some clients about bringing you in earlier to review things?

DEAN PANOS: Well, we certainly have seen that. I think Marc will tell you that his company, for example, has a fairly robust review process that goes through many different channels, including the Law Department, to make sure that they feel comfortable with a claim. As Marc also referenced, just how difficult that is when you have competitors who are talking about their attributes and seem to be successfully marketing their products. Yet your marketers are pushing you, saying, "Cheerios is out there saying look at the cholesterol-related health benefits of their product, but we have the same ingredients in ours." It's a tough act. These issues often come down to a business decision, ultimately, whether the claim is supportable and most companies believe that they have adequate support for it. The question has always been whether the small percentage of people might be deceived by that claim. Unfortunately, the consumer fraud statutes, state laws, don't require a very high burden of proof to make a claim in that regard. Thank you.

JACK FRIEDMAN: Our next speaker is Thomas Durkin of Mayer Brown.

THOMAS DURKIN: Good morning. My name is Tom Durkin. Thank you for having me here today. Marc had mentioned a moment ago that it's bad luck to talk about compliance, but I will talk for six to seven minutes about some things that may result in bad luck, but hopefully not.

Any company that sells their products overseas has to be aware of the Foreign Corrupt Practices Act, whether you're selling Oreos,

Mac & Cheese, ammunition, or guns. If you sell overseas, you are at risk under the Foreign Corrupt Practices Act.

I'm going to talk about some recent events. Many of you probably already know what the Foreign Corrupt Practices Act is, but in simple terms, it says, "Thou shalt not bribe." You cannot bribe government officials in another country to get your product sold. The long arm of the federal statutes relating to the FCPA provide – if you have any contact with the United States, the government is going to find a way to bring you within its jurisdiction. There is a lot of law out there on the details of what you can do to come within the jurisdiction of the United States government. But just take it as a given – the Department of Justice will find a way. The jurisdictional reach as interpreted by the courts is enormous.

So, some trends I'd like to talk about. The first is the very aggressive tactics law enforcement is now using in the enforcement of the Foreign Corrupt Practices Act. Less than a month ago, 22 people were arrested in a joint investigation conducted by the FBI and City of London police. It involved undercover agents from the FBI posing as representatives of procurement officers for a high-ranking official of an African country. The defendants paid the undercover FBI agents, thinking it would help them sell military and law enforcement supplies to the African country. There were 14 search warrants executed in the United States and seven executed in London, simultaneously.

Most FCPA cases come from voluntary disclosures, civil lawsuits, whistleblowers, or unhappy competitors. This new case is unusual, because it was proactive. It's the first time I'm aware of where they've had a proactive sting operation where the Foreign Corrupt Practices Act was the focus of the investigation.

So I think what you're going to start seeing in this area is the use of aggressive but traditional law enforcement techniques typically reserved for drug dealers, gang members, and terrorists, such as wiretaps, bugs, hidden cameras, undercover agents, and body recorders. They are not going to give you a subpoena to ask for records; they're going to execute a search warrant. So that's a trend that I think any company that does multinational business should at least be aware of.

The second trend is that there is a greater amount of cooperation between law enforcement authorities around the world relating to the FCPA. Is that a remarkable fact in and of itself? I believe it is, actually. I was a federal prosecutor for a number of years, and cooperation between law enforcement authorities around the world – for many, many years – didn't exist or was limited. People were very protective of their turf, and they did not want to be sharing sources, sharing informants, or sharing information with other law enforcement agencies, either out of fear that it would be disclosed improperly, or just because of simple territorialism.

The case I just spoke about involved a joint investigation between the FBI and the London police. In addition, about a week ago, the British defense company BAE Systems reached a separate agreement with the Department of Justice and the UK Serious Fraud Office to conclude investigations relating to whether BAE made payments to foreign officials to secure defense contracts. BAE is the largest military contractor in Europe, and the fine was not pocket change – they are paying $400 million to the U.S. as a fine related to payments they made for deals in Saudi Arabia, the Czech Republic and Hungary. They are paying another $50 million to the United Kingdom authorities relating to improper payments made in Tanzania.

What is interesting about this is the charge to which the company plead guilty. It was not the Foreign Corrupt Practices Act, but in fact it was making a false statement to the Department of Defense, where the then-CEO said in a letter to the Department of Defense that the company and its affiliates were complying with anti-bribery laws.

So the government is setting up a number of different traps for the unwary. If you're going to seek to get export licenses to sell products to a foreign government, you may often have to certify that obtaining such business with that foreign government was done in compliance with the Foreign Corrupt Practices Act and not in violation of any bribery laws. That is a certification that is not signed by a low-level individual. In this case, it was signed by the CEO. It could be a CEO or the CFO. It will almost always be people high up in the organization signing it and certifying compliance. If that certification is wrong, it doesn't necessarily mean you committed a crime. But that person's knowledge of the bribery will be examined, after the fact, under a microscope. You do not want to be on the wrong end of that microscope if you're signing a certification relating to activities taking place in a far-away country by people you've never met, never trained, and are often many steps removed from your chain of command.

Another trend to note is the indictment of individuals, not just companies. The company may pay a fine and can often negotiate either a deferred prosecution agreement or a guilty plea by a related entity. Such a plea may prevent debarment, so the conviction will not prevent you from doing business with the government. The company lives on for another day. But the government is now holding individual officers and employees accountable for their conduct, and these are jail cases. The federal sentencing guidelines, although they're not mandatory now, are still advisory and these are all jail-types of cases because of the dollar amounts involved.

It's not probation, it's not just "pay a fine and do some community service." People go to jail for these kind of cases.

One troubling part of the FCPA is the "knowledge" or "intent" requirement. In a Foreign Corrupt Practices Act context, just like many criminal statutes, you must knowingly commit a crime. I don't want to fill this up with legalese, but it's not a remarkable concept. You have to know what you're doing. You have to "knowingly" commit a crime. If you know you're going to go in to pay a foreign official to influence their decision to award you business, you have acted knowingly. That is not an unusual concept.

A common defense of an executive is, "I didn't know this person, he was three steps removed from me and in another country, he was going to be paying a consultant. I didn't know that consultant was going to pay the procurement officer for the government entity in Brazil."

Well, the FCPA has a peculiar definition of "knowing," and it basically is, if you're aware of a high probability that a payment may occur, but you intentionally avoid checking it out, you have the requisite knowledge. Once you get past all the legalese, an Assistant U.S. Attorney is going to argue that instruction to death to a jury when you're sitting there as a defendant.

So if you do business in a country with a reputation for paying bribes, if there are cash payments involved, if every penny of the payment is not accounted for, if you didn't do due diligence on your consultant who is helping you obtain the foreign business, these are all red flags you have to follow up on.

How does this operate in real life? There was a case involving a man named Frederic Bourke, who was just convicted in July of last year. He had invested with a Czech-born promoter named Viktor Kozeny, in an attempt in 1998 to gain control of Azerbaijan's state oil company. Kozeny planned to bribe government leaders to gain this control. His defense was, "I didn't know." He denied having actual knowledge of the payment of bribes. The judge instructed the jury using the instruction I just described.

> "... I think it's helpful to build on those tools and other elements by thinking of compliance as marketing a particular way of doing business, and then using marketing techniques to increase sales, as it were."
> — *Marc Firestone*

Here's what the jury foreman said: "It was Kozeny, it was Azerbaijan, and it was a foreign country. We thought he knew about the bribery, and definitely could have known. He's an investor; it's his job to know."

I do a lot of criminal defense work. I would not want my client to be on the wrong end of an indictment with a jury foreman saying, "He should have known; he could have known; it was his job to know." I always thought, you *have* to know something to be guilty of a crime! The Foreign Corrupt Practices Act has this peculiar definition of "knowing," which is a very difficult thing to overcome if you are a defendant.

Where does this fit into the broader picture of corporate compliance? If you are employed at a high level and something goes wrong, it's not just a matter of "did you know." You will be examined by the government in the worst of all worlds, with hindsight. They are going to ask you, "Why didn't you know?"

It is not just military contractors involved in this. The food industry is not immune. Monsanto has been caught up in problems. American Rice, Chiquita, a company called Nature's Sunshine – these are all food companies that have had issues regarding the Foreign Corrupt Practices Act.

I'm hitting the end of my time, and I know the next speaker is going to talk about M&A work, but Foreign Corrupt Practices Act issues are often uncovered during due diligence involving acquisitions. One big issue to decide is whether you self-report.

When I was a prosecutor, if someone self-reported, we sometimes said: "Thank you – you've just confessed." There is always an issue of whether you are hurting yourself by self-reporting. It leads to real dilemmas for companies that are household names, whether it's Kraft or General Electric or other companies where they have built up enormous trust with the consumer because their name is enormously tied into good feelings about their products. It leads to difficult issues which are situational. Do you hold tight and wait and see if you're discovered – often not a good idea – or do you go in and confess, which inevitably leads to government action. Can you really afford not to go in and self-report if you find a problem, if your name is someone like Kraft or G.E. or General Motors, and there is great consumer trust associated with that name.

So, a variety of topics, but I thank you for your time!

JACK FRIEDMAN: Just a quick question. There are many countries in the world where bribery is not only common, it's considered legitimate. People there say, "Hardly anybody earns a living in our country if they're not getting a little extra payment on the side. That's how we survive in our poor country." The question is, what is the reason why the United States should, in a competitive world, have such a law? What is our concern about bribing people in other countries? If suppliers from other nations do the bribing, and we lose the sale, why do we have a law that is protecting other people outside our borders?

THOMAS DURKIN: Well, the Foreign Corrupt Practices Act was passed during the Watergate era, when investigations at that time showed that there were slush funds within a lot of companies to be used for making bribe payments.

Can the United States legislate morality? A lot of countries say no. On the other hand, a lot

of businesses in the United States, if this is the law, they sure as heck don't want to be competing with another company in another country that *can* pay bribes. So there's been a lot of pressure over the years, and it's been successful, to have other countries signed on to an international agreement, prohibiting bribery in the particular countries in which they are involved. It's called the OECD Convention and it has hopefully leveled the playing field, where if a U.S. company is competing with a German company, for instance, the German company is at just as much risk going out and competing improperly as the U.S. company is.

You can either go with the basic proposition, "Bribery is bad," with which I think most people would agree, or you can throw up your hands and say, "Anything goes!" The United States made a decision in the 1970s: bribery is bad. Since then, no company in the United States wants to have their hands tied, and say, "I'm going to jail if I pay bribes, but that company over in Europe can do it, and they're going to get the business, and they're not going to be penalized."

JACK FRIEDMAN: They might even be praised for being practical!

THOMAS DURKIN: Yes. That's the reality, though, and a lot of countries now have fallen into line in the same way and penalize people and companies the same way.

JACK FRIEDMAN: Let me just finish with our final speaker. We turn to a very interesting business topic. If you like something that has money and huge numbers, you will enjoy the next presentation.

PHILIP GELSTON: I might start by saying that the part of Marc's presentation that I found hardest to believe was the description of his introduction as an associate to what a General Counsel does. I think I described it more accurately in a class I gave a couple of months ago to some pre-law students. When one of them asked, "What is the difference between in-house counsel and outside counsel," my response was, "Well, the real difference is, do you like being the boss, or do you like being

the subordinate? Because if you like being the boss, you want to go in-house!"

On a panel of lawyers, I'm going to deviate a bit and talk about a few non-legal topics involving the state of the M&A market. I do that with some trepidation. If I really knew where the market was going, I would be running a hedge fund, not sitting in a law office. Also, as my partners would tell you, whenever I talk about matters like these, I am an optimist only in the sense that when a pessimist says, "It can't get worse," an optimist says, "Yes, it can!"

By the numbers — and people gather all sorts of numbers on this — 2009 was not a very impressive year, despite an initial burst of large pharmaceutical deals in the early part of 2009 and a last-minute push from several large, high-profile deals at the end of the year, which included Burlington Northern's deal with Berkshire Hathaway, XTO's deal with Exxon, NBC's deal with Comcast, and a relatively small, low-profile deal involving a chocolate company in the UK.

Dollar volume overall, the statistics say, was down 34% from 2008, which was already way down from 2007 and 2006. The size of deals was also down. The statistics show that the average size of a deal was $1.36 billion, compared to $1.67 billion. That decline is deceptively small, because a really interesting statistic is that the number of transactions with a value over $1 billion fell from 144 to 35. So it really was a year where the mega-deal was quite rare.

The other thing that was almost absent was private equity. There was a bit more private equity in 2009 than in 2008 – because there was almost none in 2008 – but still, nothing compared to what it had been. According to the one chart I saw, Carlyle, one of the leaders in the industry, did three deals with an aggregate value of $940 million. Well, there were times in the good old days where the *fees* that Carlyle paid in connection with its deals probably exceeded $940 million a year.

No private equity, of course, means that M&A activity was overwhelmingly driven by strategic buyers. In fact, by volume 94% of deals last year were by strategic buyers, and that's a level that hasn't been seen since 2001 and 2002, which was about when the cheap credit frenzy began. So there may be a link between those two things.

There were some foreseeable side effects from the return of strategic buyers. The first is that stock returned as a form of consideration. In fact, more than half of the deals last year included stock as either part or all of the consideration. There are some reasons for that. First, strategic buyers have stock. Second, use of stock mitigates against some of the difficulties caused by the continuing credit freeze which, while it eased a bit for investment-grade borrowers, was still quite a restraint on deal activity. Third, the use of stock can help overcome valuation differences, because stock has upside, and if you are substituting one stock for the other, you preserve upside that may result from the reversal of depressed general valuation levels.

Another interesting side effect of the resurgence of strategic buyers is that hostile activity became more common. Hostiles used to be something that brand name companies didn't do, but those days are long over. Once the psychological restraint goes away, a hostile bid really is often more attractive for a strategic buyer than a financial one.

When a strategic buyer is interested in a transaction, the desire to complete it is likely

to be stronger than with a purely financial buyer. There is often a compelling business reason why this particular deal makes sense, and therefore, there's more motivation to get it done, even over the objection of the other side. For the same reason, a strategic buyer is often more prepared to pay the kind of premium needed for a hostile bid to succeed. Hostile bids generally are not the best way to buy at a bargain price.

Another reason strategic buyers are more likely to do hostile deals has to do with due diligence. You can do little or no due diligence in a hostile deal, and even if you get access to non-public information at the end of the fight, as a practical matter it's not likely that you're going to be able to walk away because of what you find. Strategic investors are better than financial buyers at dealing with the uncertainties of not having due diligence. In part, that is because they're usually in the same or a similar business; they understand the business; they have greater confidence in their ability to deal with unexpected problems. Also, often their time horizon is greater. In a financial deal, if something goes wrong and it means you are going to have to hold ten years instead of five, that's a catastrophe. In a strategic deal, you may not be happy about it – it may mean that things are not as successful as you expected – but over the longer term, you just work your way through those problems.

So I think those are a few of the reasons why we started seeing more hostile activity last year.

Another trend in 2009, not surprisingly, was that sales in bankruptcy under Section 363 of the Bankruptcy Code became much more important. In fact, one of the largest deals last year was the "sale," and I'll put that in quotes, of General Motors to the U.S. Government for $50 billion. (It perhaps tells you how the people who try to keep statistics are straining to make things look better than they were that they list that as an M&A transaction.)

Putting on my hat as a prognosticator, I think for 2010 almost everyone thinks that most of these trends are going to continue. It's going to be largely strategic; it's going to be stock; the things we saw last year, we are likely to see continue.

The big question this year, as every year, is how much activity is there going to be? 2009, as I mentioned, ended on an uptick of confidence. There were some big deals. Activity was actually up 60% compared to the quarter the year before, although again, this is like an automobile company saying that their sales went up 20 or 30% – you have to remember at what level they started.

However, a promising development was that most of the activity towards the end of the year was more people doing deals because both sides thought they were going to make money, as opposed to transactions with an element of distress. When you start seeing people with the confidence to do transactions, and you start seeing a valuation gap narrowing, that makes you more optimistic about where activity is going.

Nevertheless, most of the evidence is anecdotal, and the problem with anecdotal evidence is that it's personal. If I'm busy, then I think that the world is going really, really well; and if I'm coming in to work and don't have much to do, then I think it's very slow. That may not necessarily be a very accurate indicator.

Even the optimists are worried that any recovery is fragile, that any kind of hiccup could affect confidence, which is really very important for merger and acquisition activity to be robust.

I also think that almost no one is predicting the return of private equity to the magnitude that it was. Even the most optimistic see fewer and smaller deals. The optimists think that there may be PE deals in the range of $4–5 billion. No one thinks that the $20 billion, $30 billion club deals are returning anytime soon. There may even be a shift to minority investments, which is a very different kind of activity. From the perspective of those of us in the deal business, this means it's unlikely that we're going to see the kind of frenzy generated in the days when the people who are in the business of doing deals – as opposed to people who are in a real business – were the drivers of activity. There is going to be a different sort of environment.

Now let me shift to something I do know about – the practice of corporate law. I'm going to comment on how the experiences of the past few years may impact the negotiation of transactions. Of course, whenever you negotiate a transaction, you spend most of your time on issues from that particular deal, starting with price and price related issues. You might be spending a great deal of time on environment indemnity. (This is something Marc and I know about from recent history.) You might be wor-

rying about a particular intellectual property issue, something else Marc and I know about. But I predict that in almost any public deal you're going to be thinking about three matters, at least a bit.

The first is closing risk. This always was important, but the experiences of the past two or three years have really intensified the focus. One provision related to closing risk is the material adverse change clauses. MACs tend to be negotiated very heavily, perhaps too much so because in the real world courts look at material adverse change outs, no matter how intricate and complicated they may be, as rather extreme things. Any buyer that thinks a material adverse change clause is going to provide a second look at the transaction is really kidding himself in all but the most egregious cases.

Another thing that's new is the increased emphasis on the enforcement of anti-trust laws. That results in more negotiation of the provisions of the agreement allocating anti-trust risk. That often revolves around the difference – or perceived difference — between "best efforts," "reasonable best efforts," or "commercially reasonable efforts," as well as whether you're going to specify an obligation to divest, whether there's going to be a reverse breakup fee, and importantly, who controls the process with the regulatory agencies.

Financing risk in a deal is another thing that people focus on. Having just spent a lot of time on a UK deal, I'm curious why American sellers don't emulate European sellers and refuse, by making the buyer put up all the money up front. However that is something that almost never happens in the United States.

Another item is how to deal with buyer's remorse. We learned from the end of the last boom that it's not always easy to force someone to close an acquisition when they don't want to. Three years ago people often didn't worry about this very much. Now, most people focus on a specific performance clause, a provision which is intended to make it easier to go in court and get an order from a judge to force your counter party to do what it promised to do.

> "... the most important projects we handle often have little precedent and little predictability. They require individual expertise and close collaboration, but without so much structure that it limits imagination and agility."
> — *Marc Firestone*

I think there also should be more attention paid to the incentive to close that the risk of damages creates. Let's face it, if a buyer is seriously worried a refusal to close could result in paying billions of dollars of damages, the target isn't likely to need a court order to get the buyer to do what he promised to do.

There is, however, some New York case law which says absent an express agreement on measuring damages, the premium the stockholders are giving up is *not* the proper measure of damages for a breach of a merger agreement. More sellers are focusing on fixing that, saying, "Specific performance is fine, but in case something goes wrong, I also want to be able to collect damages." That often becomes a major issue, in part because people aren't used to dealing with that issue and in part because buyers realize that if the only viable remedy for a breach is specific performance, they can be aggressive in interpreting their rights to terminate without incurring much risk.

There's a related issue with private equity buyers, which is: to what extent are they risking capital. They like a structure with a reverse breakup fee, which really can be a relatively modest amount, that serves as a cap on damages. What a savvy seller will want, at the least, is the right to collect damages equal to the full amount of the equity commitment for the deal (which, these days is getting to be a significant percentage of deal value).

Deal protection is something that should continue to get a lot of emphasis. Deal protection provisions make it less likely that someone will come along and take away a deal from the original buyer, or at least make sure the original buyer is fairly compensated for setting a floor price. Deterring a competing bid is a somewhat quixotic goal, because the way the law works, particularly when you're dealing with a public company, if another buyer is willing to pay more for the target than the original buyer, the second buyer is going to buy the company. You can put impediments in the way of that; you can provide that the original buyer wins ties and you can make sure that you get a consolation prize. But I always tell clients who have never dealt with this before – particularly European clients who just don't understand why they should have to worry about an interloper – that it's not a realistic objective to eliminate interlopers altogether.

There is one possible exception to that when you have a stockholder or stockholder group with a controlling vote in the target company. Then it's technically possible to have a completely "locked up" deal. There is, however, a case in Delaware called *Omnicare* which raises legal questions about the propriety of losing an agreement with a dominant stockholder to lock up a deal.

I'd just like to close with one other comment about corporate governance. I believe that among the things that we're going to see reduced as a result of the return to more strategic acquisitions, as opposed to private equity acquisitions, is the use of measures to address potential conflicts of interest. During the private equity boom, there were so many special committees that some directors came to believe that a special committee should be part of the process for any big, important transaction, not just for a transaction with a potential conflict of interest. I believe that is a mis-learning of the lessons from 2005–2008. Although even with a strategic transaction, there may be special circumstances which make a special committee appropriate; in my view, a special committee in a non-conflict situation usually is a bad idea. Use of a committee can balkanize the Board,

creating a black box where the people with the most knowledge of the company are excluded from the process. This is not good governance. It's actually often bad governance. It is *great* for advisors, because it requires you to hire a whole different set of lawyers and investment bankers and so forth, and therefore, I guess it's a little against my own self-interest to say this.

JACK FRIEDMAN: A quick question before we open up the conversation to the audience – what is the role, the willingness, or the attitude of lenders now for these deals?

PHILIP GELSTON: As I said, it's getting easy to borrow money if you are an investment-grade borrower who is likely to pay it back. There has been a lot of high-yield activity, too but much of that involves refinancing existing high-yield debt, in anticipation of the high-yield debt issued during the last LBO boom coming due in the next three or four years. I was talking to one of my partners, who represents high yield underwriters, a couple of days ago, and he told me, the amount of net *new* money from the high-yield sources that has gone into new deals is still pretty small. So, for deals where you're essentially financing the deal off of the deal itself, it's still very challenging. But it is getting easier.

JACK FRIEDMAN: Thank you very much.

Since the Carlyle group was mentioned, we recently had an event with the General Counsel of the Carlyle Group. He mentioned that they had approximately 450 investments in different companies in the U.S. and about 450 outside the U.S. – that's interests in 900 companies in their portfolio with 400,000 employees. This business is huge, it's really unbelievable! So, in any case, that impressed me very much.

I want to let the audience ask questions. Go ahead.

QUESTION FROM AUDIENCE: The fact pattern is, you run a company, your controls work, your accounting group says to an employee, "What do you mean, you want to make a payment to a government official? Absolutely not." Okay? So you stop it. Fact pattern. What are your problems with a promise, trying to decide whether there were benefits there, particularly if third parties are involved? What are the practicalities you see, if you see anything in that area?

THOMAS DURKIN: Well, if I understand your question, you learn of something, you stop it. What else is there to do? Well, certainly, if you learn of something in the course of an internal audit, through a whistleblower, some way – if you've learned of it, your controls presumably have been working, because somehow it came to your attention. But what the government will be looking to see what you've done is, once you've learned of a problem area, where, whether it's a consultant who you hired, who wanted to make the payment, they're going to wonder if you still kept that consultant. You know, whoever it was who wanted to make the bribe, are they still employed? Are they still part of your corporate structure, in the sense they are either an employee or hired as a consultant? Are the people that internal audit should be looking at to see, was this just the tip of the iceberg where this popped up but had been something going on for a while? If that's your question, of what do you do once you learn it happened, you don't just say, "Great! We caught it, end of story." You have to examine, I believe, these circumstances that came up, and find out whether the person who wanted to make the bribe is still in a position where he could do it in the future. In some ways, if you do nothing, you're almost in worse shape, because the government will say, "Why didn't you?" If that person goes off the railroad down the track.

QUESTION FROM AUDIENCE: If you are going to a foreign government and saying to the foreign government, "One of your officials has been seeking payments." Is that what the Justice or DOJ or SEC is going to look for?

THOMAS DURKIN: I think they would view that – on the one hand, as a practical matter, I'm not sure that's a *great* idea – if you're doing business in that country and you go drop a dime on somebody who is in the government there, you could be cutting off your ability to do work there in the future. So as a practical matter, you may not want to do that.

I'm not sure the government would require that. Again, they want, they're trying to – the government's policing the company, not necessarily the foreign official. If you think that, "Look, this person has his hand out; we're never going to be able to do business in that country unless we pay him," the only way to be able to do business in that country is to have that person removed from that position, well, then, yeah – maybe you do make, maybe you do go to a local lawyer or someone, a local law firm or a local organization or the U.S. Embassy in that country, and say, "Look, we can't do business with this government, because this individual here is requiring us to pay before we do it. And we *want* to do business in this country. We want to do it right. What do you suggest we do?" So it's situational. I can't say "yes" or "no" – the government would probably, and everything is black and white with them, so they'd say, "Go ahead and turn the person in." I think the realities are much more nuanced, and I think it all depends on whether you have to go through that person in the future to get business done.

JACK FRIEDMAN: Yes, ma'am?

QUESTION FROM AUDIENCE: Also for Tom Durkin. What is the benefit of doing a prior disclosure to the government if you're always going to be prosecuted? Is there any civil penalty that can be reduced on this, or is there some prosecutorial discretion for them not to pursue it if you disclose?

THOMAS DURKIN: Sure–

QUESTION FROM AUDIENCE: Or why would you ever disclose it?

THOMAS DURKIN: Well, that's a great question. The reason – at least the carrot that is stuck out there by the government – is, "If you hadn't disclosed and we discovered it, it would have been worse for you." And the reality is, if you do self-disclose, you can often – not always – it depends on the severity of the conduct; you can often negotiate a deferred prosecution agreement, or a guilty plea by an unrelated, by a subsidiary that is not the main company itself that you need, that can't afford to take a felony, because they'd be debarred.

You can also at least go in – when I represent a company and they make a decision to self-disclose, I'm pointing out to the government I've saved them a lot of time. We're telling them some things they probably wouldn't have found without our telling them that.

The real problem comes in – and this was my point earlier about individual prosecutions – a board of directors of a company is likely, when they get a report from internal audit or from a special counsel that's doing an investigation and say, "You've got sales reps in Brazil making payments." A board of directors would say, "Fine – self-report it. We're not going to be on the hook for this! We're not going to sit and wait and see if they come to us! Self-report. Protect the company." But what that does is ultimately hang out to dry the individuals who are doing it. That's the real problem if it's corruption that may go to a high level, with the head of sales, head of marketing, a CFO or a CEO, and the board of directors said, "Company, self-disclose." You may do that, but you may end up having a management change!

JACK FRIEDMAN: We had an event once with a General Counsel who said that he noticed, as a father, that the kids look closely and have an intuitive insight into your efforts as a parent. They notice where the parents cut corners or not. He said that as an employer, the people who work for you have the same instinct. They will notice the words, but also the little subtleties and so forth. Leadership truly is at the top, and everybody wants to know what the boss's real values are in terms of cutting corners. So he said you're always under pressure to set an example when you're in a high position in a company. I've always taken that to heart.

I'd like to ask Marc to educate us more about Kraft itself. As obvious as it may be to some people, what are some of the major products of Kraft that we see in the grocery store and elsewhere? We look at a product and don't even know it's from Kraft.

MARC S. FIRESTONE: Wish I'd brought a reel of our advertising!

DEAN PANOS: I thought you were going to say, "Cadbury Creme Eggs!"

MARC S. FIRESTONE: Cadbury Creme Eggs, our latest addition! Very briefly, I will give you a few facts about Kraft. With the Cadbury acquisition, about a $48 billion company, with revenues roughly 50% North America, 50% international. Famous products include Mac & Cheese, the Oscar Mayer line, all of the wonderful biscuits and cookies – Oreos, Chips Ahoy, Ritz – Maxwell House coffee, and so on.

We have, including Cadbury employees, about 145,000 people in about 160 countries around the world. From a legal perspective one thing I'd say that's particularly interesting about Kraft, aside from the products and the statistics, is the transition that we've been though. Until March 31 of 2007, we were 85% owned by Altria, so we were a controlled subsidiary. We were then spun off and then became fully listed, had a fully independent board, only one inside director. Then, as I mentioned earlier, just recently executed the unsolicited acquisition of Cadbury, a kind of transaction I've never worked on before, with Clifford Chance, Gibson Dunn, and Cravath. So, it's been a period of enormous change at Kraft as a company.

JACK FRIEDMAN: And tell us a little bit about the Legal Department?

MARC S. FIRESTONE: Our group is a little bit different from what other companies have. It's called "Corporate & Legal Affairs," and it combines five functions: the law function, corporate affairs – both internal and external communications – compliance, corporate secretary, and government affairs. We're about 450 people across those five functions, all working together.

JACK FRIEDMAN: That's 450 lawyers, or including all employees?

MARC S. FIRESTONE: Those are all the groups. There are about 130 lawyers in 30 locations.

JACK FRIEDMAN: Now, one of the most popular, maybe possibly the most popular question that I can ask for the audience – what is your philosophy on selecting and working with outside law firms?

MARC S. FIRESTONE: Yes, that's actually something we've put in writing and I'd be happy to send it out – it's a two-page description of what we look for. And it's I think what most companies look for. You look for legal expertise, resources, and capabilities and so on. But I think that what we're particularly looking for are firms that work with us in the manner I described: that are good collaborators, that bring innovation and imagination and diversity, and that understand the business context in which their project fits. I think most importantly, law firms that have multiple speeds and good judgment. Sometimes, you need a lawyer who's going to be the attack dog, and sometimes you need a lawyer who's going to be very conciliatory. Part of that is something Phil mentioned, is the thing that I most value and that's common-sense judgment, a lawyer who will have the courage to say, you know, "This really isn't important to fight for in the contract." Or will have the courage to say, "This is a very difficult decision, but you don't have to self-report," and who are willing to make those tough calls using judgment and common sense.

JACK FRIEDMAN: You have very extensive experience internationally. What are the type of issues that come up for you internationally, where you have to take into account the different legal, ethical, ethnic, religious, or other values of the society at various locations? What are examples of you having to be sensitive to each culture that you are dealing with?

MARC S. FIRESTONE: Well, I'll give you a substantive one. I think that, interestingly, there are tremendous differences, but for our business, when we're making food, there are tremendous taste differences and so on, but there's universality on what Gary talked about. People expect the food to be safe and wholesome, and they expect us to keep the promise about whatever it is we're selling and that's universal. So, for us, I think while taste preferences differ, the ethical premises are universal.

Substantively, I think an emerging area of interest for multinationals is anti-trust or competition law. Whereas I think ten years ago, most countries either didn't have a competition law or looked to the U.S. standards, the EU has now become the world's leading exporter of competition law. There are more people who live in countries governed by EU law or principles than U.S. law, and what's happening is there's a growing divergence between U.S. anti-trust concepts and principles and EU anti-trust concepts and principles, and that's something that is increasingly an interesting challenge for multinationals in doing business around the world.

JACK FRIEDMAN: What would be an example, by the way, of a taste difference? Is there something particular that comes to mind?

MARC S. FIRESTONE: Some people, the preference is for salt vs. sweet, or, for example, in certain parts of the world, there's a strong preference for a vinegary flavor. So anybody who eats Japanese food notices the prominence of the vinegar flavor. So there are things like that, where it's very important, particularly when we buy a local business, not to go in and

reformulate the product in a way that's insensitive to the local taste preferences.

JACK FRIEDMAN: The General Counsel of a food company said that they had given away millions of dollars of milk formula in Africa. He said that they were unfairly attacked that somehow the local babies got sick, even though the same formula was used in Europe and the United States and elsewhere. He said that if you give free milk to children in a poor country and you're still attacked as imperialistic and insensitive and so forth, what good can you ever do? I'm sure that it is very aggravating when you are not appreciated for the good that you do.

I'd like to go back to the litigation side.

What is the attitude of juries toward large corporations, when they're being attacked in a class action or whatever it might be. What is the trend right now? I assume it may be different whether you're in Texas or in New York or some other place.

DEAN PANOS: I think the word "hostile" applies whether you're in Texas or not!

JACK FRIEDMAN: People are anti-big company, generally?

DEAN PANOS: There certainly is that. But that said – I mean, I'm still a believer, and I bet you Tom would agree with me, as well – but the facts, juries will try to get it right most of the time. If you have the case to present to the jury, then you can present it to the jury.

JACK FRIEDMAN: So you have to try to bring them around. You know where they start, but it doesn't mean they are going to be rigid.

DEAN PANOS: That's exactly right. But I did see somewhere yesterday, and I can't remember what publication circulated it, was that jury verdicts are getting higher on product liability cases than ever before. I did mention that point.

THOMAS DURKIN: I think – I've tried some product cases and patent cases, representing corporations, and often, the plaintiffs'

lawyers will overstate things. It'll demonize the company, and then what is a company? It's a group of individuals. It's generally, in these cases, it was scientists I brought in from the company. They didn't have horns, they didn't have a tail. They were human. They were likeable.

JACK FRIEDMAN: They clearly did not want to hurt people.

THOMAS DURKIN: No! They were making medical devices or pharmaceutical products, or making a, manufacturing an invention that helped people, and helped not just shareholders, not just the bottom line, but were making a product line that was useful. Making a pharmaceutical product that saved lives. When that's emphasized to a jury, you at least chip away at the concept that this gigantic corporate structure is nothing more than a profit-making venture out to hurt people, which couldn't be further from the truth. You present it one brick at a time through individuals who come in and testify on behalf of the company.

You're not stupid – you don't go in and pick, if you have any choice on witnesses, you make sure they are likeable, present well, and are good representatives of the corporation, if you're lucky enough to have the ability to choose witnesses. But it's not an impossible task to humanize a company.

JACK FRIEDMAN: I imagine that any food company, not just Kraft, is in such a sensitive position because of popular expectations about the company and the products. The industry has the problem that companies can't really enforce all their legal rights or defend themselves to the hilt, because they have to appear to have a heart. So they tend to settle, because they don't want to get a reputation for fighting a class action on behalf of parents or moms. Is that a strategy?

DEAN PANOS: It is.

JACK FRIEDMAN: You have to be a little kinder to the plaintiff.

DEAN PANOS: Food companies do fulfill the most basic need we have, right? Which is to feed our children, feed our families. So they have to be very careful what cases they take on. They have to decide, no, this one we are not going to litigate, because this one is just silly, or this one is unfair. Food-borne illness cases, which I've done a lot of, and Gary's got a lot of experience dealing with helping companies through those issues too. Those are tough cases. Oftentimes, there are viable defenses, but do you really want to make them, and get your company's name out there associated with it?

JACK FRIEDMAN: Or you have to prove that all these moms made a mistake or it's the customer's fault that the kids got sick. You don't want to do that.

DEAN PANOS: Yes.

JACK FRIEDMAN: I wanted to go back to Gary. You mentioned that the outcome of the political process, whether it's Democrats who are dominant in Washington, or Republicans, often there are similar outcomes. There is some common ground – first of all, there's common decency. Everyone wants people to be safe. So there's common decency in both parties. What is the common ground that people build on?

GARY JAY KUSHNER: First, I agree with you absolutely that companies want food to be safe; everybody wants food to be safe; including members of Congress, the regulators and, of course, consumers. That is a common denominator that everyone shares, regardless of politics.

For example, the food industry has been on the ground floor in trying to help shape the pending legislation to modernize the food safety laws. I didn't enumerate all the different provisions in these bills that would impose new requirements on the food industry, but the reality is that many of those provisions simply codify practices that have been voluntarily employed by the food industry for many, many years.

Part of the reason the food industry supports this kind of legislation is to raise the bar and make sure that everybody who is producing and selling food is producing and selling safe food.

JACK FRIEDMAN: The lowest denominator that drags down the rest?

GARY JAY KUSHNER: No, I think it's quite the opposite; and frankly, there are good commercial reasons for this. Aside from the ethical obligation to make food that is safe, wholesome, nutritious, and properly labeled, headlines reporting about food-borne illness hurt the entire food industry. Many companies buy products and ingredients from other companies. It is extremely important that everybody use good practices to make food safe.

As to political bias, historically, Democrats are more likely to support bigger government, which usually means more regulation, and Republicans are more likely to support smaller government, and hence less regulation. Ultimately, however, the professionals – the career regulators – are responsible for writing and enforcing the regulations that implement the laws. In addition, there is a balance of power in the Congress. Right now, we are seeing gridlock in Congress. There is no doubt that partisanship is one reason for this, but it is also because the system does work. Based on my experience, there is more regulatory activity in a Democratic administration, but over time a reasonable balance is typically achieved, irrespective of who is in the White House or controlling Congress.

JACK FRIEDMAN: I'd like to open up the conversation to the audience. Are there any questions? Yes, sir.

QUESTION FROM AUDIENCE: Mr. Firestone, you gave an eloquent description of the type of person you'd like to have in your company, with imagination, creativity, etc. – all of which are desirable attributes. What can Boards of Directors do in terms of policies within a large company to encourage that type of activity and creativity? What I have in mind is a history in this country of extraordinary inventors, starting with Alexander Graham Bell, Edison, the Wright brothers, the developers of Google, Bill Gates, Steve Jobs, in contrast to people who are complacent. Such as what we read in the newspapers about the problems with certain automobile companies. How do you, on one hand, guard against complacency, and on the other hand, as a Board of Directors, encourage the attributes that you described?

MARC S. FIRESTONE: Okay. It's an excellent question, and one that's come up in real life, and so I'll tell you exactly the way our Board does it, which is to insist on hearing about innovation, on hearing about our new marketing campaigns. Because it's easy to go into a strategic planning presentation and essentially give a three-year financial projection. Then the Board says, "That's wonderful, but make that a day and then give me two days on what you're doing on R&D and your five-year product pipeline, and tell me about how you've changed your advertising, tell me about the new media you're using." For example, at our last Board meeting, we actually had a presentation on the use of Twitter and Facebook and all of that.

So I think the more that the Boards of Directors ask the management and, using as strong words as may be necessary to talk about those subjects, the more that inculcates itself in the corporate culture of an organization.

JACK FRIEDMAN: Any other questions? Yes, sir?

QUESTION FROM AUDIENCE: What is the concept of corporate giving related to the FCPA? Is corporate charitable giving ever looked at with a very keen eye such as an environmental issue, for instance?

THOMAS DURKIN: Absolutely. But you can give money to a foreign government. You can't give it to a foreign government official. There's a recent DOJ opinion released dealing with that issue. But distinguish between a bribe to an individual and payments by a company to a foreign government. If you choose, as a matter of goodwill, to make charitable contributions to a foreign government and it's properly accounted for, and it's not going into the pocket of someone after it goes to the government, that's permissible. If, on the other hand, you direct money to a particular charity that a procurement officer wants you to give it to, and that charity has some affiliation with a relative of that procurement officer, that's the areas that you examine very closely.

JACK FRIEDMAN: I have one more question about the recent Cadbury deal. Then I'd like to invite the audience up to meet with the speakers one-to-one, if you would like.

What is the colossal effort that goes into a huge mega-deal, whether you want to talk about Cadbury or just in general. It must be unbelievable, the time that goes into it, the number of experts that you have, all the advice that you have that is inconsistent with each other, and you have to sort through it?

PHILIP GELSTON: Well, when I was listening to Marc's presentation, it struck me that you could apply a lot of the metrics he was talking about to an M&A transaction. You could put up the same sort of map as to all the elements that are involved in a complicated merger acquisition. The agreement is a very important part, but by no means the only part. You have issues about where the financing is coming from. You have issues about governance. You have issues about employee benefits. You have issues about senior executive positions. You have issues about anti-trust in multiple jurisdictions, each of which requires manpower.

JACK FRIEDMAN: For example, with a government, do you have to go to 27 agencies?

PHILIP GELSTON: You sometimes do.

JACK FRIEDMAN: You don't go to the prime minister of a country and say, "Could you coordinate in one room all your ministers that are going to be involved with this?" How do you do it without having to go office by office?

PHILIP GELSTON: Well, you generally will try to map it and then you try to figure out the interrelations between the various jurisdictions and the various issues. It's not just managing it from a logistical standpoint. You have to think about the impact that one issue has on another. That is something which I think gets back to what a General Counsel does. Keeping tabs on what's going on, even in areas where you actually don't have much personal expertise or experience, is one of the real challenges of those deals. What you offer up to an anti-trust agency in Germany may end up impacting something having to do with your financing, and the people who are doing the anti-trust work in Germany have no idea how it ripples through. Someone has to be on top of it, so that on a real-time basis, you're making the adjustments that are necessary. Often that is the General Counsel, assisted by the senior deal lawyer.

JACK FRIEDMAN: What was the effort that you had make for the whole global deal to make sure all the pieces were covered?

MARC S. FIRESTONE: Well, it was enormous! It was really a testament to the three law firms that we worked with, as well as the banks, because it was 160 countries that we had to check on. The EU has centralized anti-trust clearance, but we still had to do a lot of work at the national level. So it really depends on the ability to have a team that works well together and that is aware of what the other parts of the team are doing, so that we have air traffic control as much as anything, is what I would call it!

PHILIP GELSTON: Really in the end, you have to triage it – you're not going to get everything perfect, and you have to make decisions about what things you're just going to hope work out, or you'll deal with later, because it's not possible.

JACK FRIEDMAN: One final question: What is the significance of Kraft being one of the 30 companies in the Dow Jones Industrial Average?

MARC S. FIRESTONE: Joining the stocks of the Dow Jones index reflects our leadership in the food sector and our progress in delivering sustainable growth to investors and delicious foods to consumers. Our products are present in more than 99 percent of U.S. households, so it's natural that we are now present in the cupboard of leading stocks in the Dow Jones Industrial Average.

JACK FRIEDMAN: I want to thank our Guest of Honor. I want to thank our Panelists and the people at Kraft Foods. I know Kraft better and I appreciate that.

Philip A. Gelston

Partner, Cravath, Swaine & Moore, LLP

CRAVATH, SWAINE & MOORE LLP

Philip A. Gelston is a partner in the Cravath, Swaine & Moore LLP Corporate Department and the Chairman of the Firm's Mergers and Acquisitions Practice. Philip has extensive experience in mergers and acquisitions, joint ventures and general corporate counseling. His practice encompasses hostile transactions (both offense and defense), complicated negotiated transactions, cross-border transactions and advising boards and senior executives. Philip's clients have included Ciba Specialty Chemicals; Novartis AG; Kraft Foods, Inc.; White Mountains Insurance Group, Ltd.; OneBeacon Insurance Group, Ltd.; BAE Systems; FPL Group; Kerzner International; the independent directors of General Motors; the independent directors of Fannie Mae; British American Tobacco; The Tengelmann Group and London Stock Exchange Group, plc.

Philip's recent assignments include representing Kraft in its successful bid for Cadbury and the sale of its frozen pizza business to Nestlé, the independent directors of General Motors in connection with the financial and operational restructuring of GM as well as in connection with the conversion of GMAC into a bank holding company; White Mountains Insurance in its disposition of two run-off business to Berkshire Hathaway through a tax free "cash rich" split off; Kraft in the tax free disposition of its Post cereal business to Ralcorp and its negotiations with Trian; Applebee's International, Inc. in its proxy fight with Breeden Partners and its sale to IHOP; Novartis AG in the sale of Gerber to Nestlé; BAE Systems in its acquisition of Armor Holdings and Tengelmann in A&P's purchase of Pathmark Stores. He also represented the LSE concerning the United States aspects of the Nasdaq takeover bid; GTECH Corp.'s independent directors in the merger with Lottomatica and the Special Committee of Kerzner International in the buyout of Kerzner. Other representative assignments include advising B.A.T plc and Brown & Williamson in the combination of Brown & Williamson with RJR; White Mountains Insurance Group, Ltd. in its acquisition of CGU Corp., its restructuring of certain insurance operations with Liberty Mutual and its acquisitions of Sirius Reinsurance and Safeco Life; IGEN International Inc. in its acquisition by Hoffman La Roche, BAE Systems in its acquisitions of United Defense and the AES Business of Lockheed Martin as well as in the examination of a number of other strategic transactions; Financial Security Assurance Holdings Ltd. in its sale to Dexia S.A. and White Mountains Insurance in its redomestication to Bermuda.

Philip has also advised boards and senior management of clients, such as White Mountains, General Motors, Kraft, OneBeacon, FPL Group, Fannie Mae and Kerzner on governance and takeover defense issues.

Philip was cited as being one of the country's leading practitioners in the mergers and acquisitions area in *Chambers* USA: America's Leading Lawyers for Business in 2008 and 2009. He was also named The Best Lawyers in America in 2009 and 2010 as a leader in mergers and acquisitions law. In addition, Cravath's mergers and acquisitions practice received a high ranking in the publication for being "knowledgeable and responsive, with excellent levels of service."

Philip was born in New York, New York. He received an A.B. cum laude from Harvard College in 1974, where he was elected to Phi Beta Kappa, and a J.D. magna cum laude from Harvard Law School in 1977, where he was the Supreme Court Note Editor of the Law Review and awarded the Sears Prize. After a one-year clerkship with Hon. John M. Wisdom (U.S. Court of Appeals for the Fifth Circuit), he joined Cravath, Swaine & Moore in 1978.

Philip became a partner in 1984.

Cravath

Cravath has been known as the premier U.S. law firm for nearly two centuries. Each of our practice areas is highly regarded, and our lawyers are recognized around the world for their commitment to the representation of our clients' interests. Throughout our history, we have played a central role in developing how law is practiced, how lawyers are trained and how business risk is managed.

At Cravath, we hire only the top students from the nation's finest law schools, we train those associates through rigorous rotation of practice, we elevate partners exclusively from within and we compensate partners on a lockstep model throughout their careers. The Cravath model has been adopted by many prominent law firms and consulting firms. While some firms have abandoned the model over time to promote lateral growth and global expansion, we have not. We do not seek to be the largest firm by number of offices, lawyers or specialty groups. We promote excellence in client service, at the expense of short-term profit. We believe that maintaining a true partnership of the finest educated and trained lawyers is the single, best manner of handling our clients' most challenging legal issues, most significant business transactions and most critical disputes.

Gary Jay Kushner
Partner,
Hogan Lovells, LLP

Hogan Lovells

Gary Jay Kushner has been a food industry lawyer for more than 30 years. He represents trade associations and corporations before government agencies, Congressional committees, and the courts in a variety of matters. Gary has particular experience with the development, interpretation, and enforcement of laws and regulations governing food production, processing, and distribution throughout the United States and internationally. He also serves as general counsel to a number of national associations.

As counsel to trade associations and companies involved in the public policy arena, Gary analyzes legislation introduced in Congress and state legislatures, as well as regulations proposed by the U.S. Department of Agriculture, the Food and Drug Administration, and other federal and state government agencies. He routinely evaluates their impact on the food industry from farm to table, and prepares amendments, testimony, and comments on such initiatives. He anticipates how laws and regulations might be changed to facilitate the marketing of food products.

Gary also represents food companies including manufacturers, distributors, and retailers in matters involving regulatory compliance. He advises them on labeling and advertising regulation; counsels them in product recalls, seizures, detention, government inspections, and related actions; and represents them in enforcement actions before government agencies and law enforcement bodies.

Before joining Hogan Lovells, Gary served as Vice President and General Counsel for the American Meat Institute where he directed the organization's legal, regulatory, and legislative activities. Before first entering the private practice of law, he served as Staff Counsel for Scientific Affairs at the Grocery Manufacturers of America. He began his legal career as a law clerk to The Honorable John R. Hess in the Superior Court for the District of Columbia.

Gary is a frequent lecturer and regularly contributes to numerous trade publications. He is co-author of *A Guide to Federal Food Labeling Requirements*, prepared for the U.S. Department of Agriculture and the U.S. Department of Health and Human Services, Government Printing Office, Washington, D.C., 1990; *HACCP Management Manual: A Guide to Food Regulatory Compliance*, published by Food Chemical News, Washington, D.C., 1996; and Summary of Law on Warranties and Disclaimers in the Sale of Seed, published by the American Seed Trade Association, Washington, D.C., 1996.

Hogan Lovells

In a world where both business risks and opportunities are continuously evolving, Hogan Lovells is a law firm that sees the whole picture and is dedicated and equipped to help clients across the spectrum of their critical business and legal issues.

Building on the foundations of our previous success as two firms, Hogan Lovells and Lovells, Hogan Lovells is deeply rooted in the largest and most developed markets in the United States and Europe and has an established presence in the fastest-growing regions of the world, including Asia, Latin America, and the Middle East.

Hogan Lovells provides legal services based on the principles of teamwork, collaboration, and commitment to client service. We take time to understand our clients' businesses so we can work as an extension of their team. We help them navigate a challenging global landscape through focused, innovative, high-quality service. Clients come first at Hogan Lovells.

We have a strong commitment and track record in citizenship. We invest in our people and promote diversity, seeking out the best and with the highest potential from a variety of backgrounds. We believe that an environment that supports achievement and contribution inside and outside of the office is one in which people thrive. We share a commitment to help others and give back to communities in which we live and work. We support the fair administration of justice, and all pro bono matters are undertaken to the same high standard as our commercial matters.

Hogan Lovells commitment to our clients and to one another, our depth of experience, global reach, and comprehensive industry focus distinguish us from other law firms and inspire our clients' and colleagues' loyalty and satisfaction.

Dean N. Panos

Partner, Jenner & Block, LLP

JENNER&BLOCK

Dean N. Panos is a partner in the Firm's Litigation Department. He is Co-Chair of Products Liability and Mass Tort Defense Practice and a member of the Complex Commercial Litigation, Class Action, and Real Estate and Construction Litigation Practices. He is also a member of the Firm's Management Committee. Mr. Panos is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability.

Mr. Panos represents Fortune 500 companies and other public and private companies in complex commercial litigation across the country in both state and federal courts. He currently is representing a public REIT in security and ERISA class actions involving hundreds of millions of dollars in claims. He is also currently representing the City of Chicago in litigation brought by the City to recover damages from its architects, design engineers, and building contractors concerning the rehabilitation of the terminals at O'Hare Airport (FACE Project). Mr. Panos had lead trial responsibility on behalf of the City of Chicago in successfully defeating the attempt by DuPage County and communities surrounding O'Hare Airport to enjoin the City from proceeding with its multi-billion dollar expansion of O'Hare, known as World Gateway. On behalf of the City, Mr. Panos also defeated DuPage County's and surrounding communities' attempts to enjoin the City from acquiring land around O'Hare Airport for the construction of additional runways.

Recently, Mr. Panos represented American Airlines in litigation in New York, against Airbus Industries, involving $1 billion in cross-claims arising from the November 2001 aviation disaster known as *In Re Belle Harbor – AA Flight # 587*, which was successfully settled in June 2008.

Mr. Panos is lead litigation counsel to food and consumer product manufacturers on a number of complex commercial litigation matters, class action claims of consumer fraud and deceptive practices and product liability, including high-profile national class action claims for deceptive advertising and child obesity. Mr. Panos has also served as lead counsel on several consumer and food product recalls and has substantial experience in counseling clients on recall implementation and coordination with the Food and Drug Administration, the U.S. Consumer Product Safety Commission and the U.S. Department of Agriculture.

Jenner & Block, LLP

Jenner & Block is a national law firm with approximately 470 attorneys and offices in Chicago, Los Angeles, New York and Washington, DC. Founded in 1914, the Firm has grown and prospered because of an unwavering commitment to our clients, to the Bar, to our people and to public service. Jenner & Block has been widely recognized for consistently delivering excellent legal representation in the courtroom and the boardroom. The Firm has also traditionally served as a leader in public service and pro bono advocacy, having been consistently ranked as one of the top ten pro bono firms in the country by *The American Lawyer* magazine. In 2009, *The American Lawyer* recognized Jenner & Block as the number-one law firm in the country for pro bono service for the second year in a row.

Companies from around the world trust Jenner & Block with some of their most complex and challenging matters. Our clients range from the top ranks of the Fortune 500, large privately held corporations and financial services institutions, to emerging companies, family-run businesses and individuals. We make extensive use of technology and knowledge management systems to enhance the efficiency of the legal services we deliver to our clients. Our attorneys are actively involved in writing, speaking and representing clients on issues at the leading edge of the world's business community. To learn more about Jenner & Block, please visit www.jenner.com.

Thomas M. Durkin

Partner, Mayer Brown, LLP

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Experience

An experienced litigator, Tom Durkin has tried over 55 federal and state jury trials to verdict. Much of his trial work focuses on patent litigation along with product liability and medical device defense. He has tried patent infringement cases before juries, courts and arbitration panels, and argued before the Federal Circuit. Representative clients in patent cases include Abbott, Baxter and Brunswick. Reflecting the full range of his trial practice, *Chambers USA* 2007 calls Tom a "'seasoned trial lawyer' with 'the ability to master really complex science.'"

In addition to commercial and business litigation, Tom also handles a wide variety of white collar criminal matters, especially in the fraud, tax, and public corruption areas. *Chambers* 2006 has said of Tom that "...[his] trial strength is well documented...Clients commented on his 'strong practical abilities and easygoing manner,'" and earlier complimented him on his "thriving federal criminal litigation practice" *Chambers USA* 2004-2005.

In related compliance counseling, Tom conducts internal investigations of corporate clients involving various fraud allegations and compliance with the Foreign Corrupt Practices Act. He uses this experience to provide review and counseling related to corporate compliance programs.

Clients benefit from the significant prosecutorial experience that Tom had before joining Mayer Brown in 1993. He served as Assistant US Attorney in the Northern District of Illinois from 1980 to 1993, during which time he held positions as First Assistant US Attorney, Chief of the Special Prosecutions Division, Chief of the Criminal Receiving & Appellate Division, and Deputy Chief of the Special Prosecutions Division. During his time with the US Attorney's office Tom received the Excellence in Law Enforcement Award by the Chicagoland Chamber of Commerce (1993) and the Attorney General's John Marshall Award from Attorney General Thornburgh (1991).

Education

- DePaul University College of Law, JD, with honors, 1978; Illinois Law Issue Editor, Law Review
- University of Illinois, BS, with honors, 1975
- Certified Public Accountant, Illinois, 1975

Mayer Brown

Mayer Brown is a leading global law firm with offices in key business centers across the Americas, Asia and Europe. Our global platform has been enhanced recently by two important combinations. In December 2009, we formed an association with Tauil & Chequer Advogados, one of the largest and fastest-growing law firms in Brazil. In Asia, we are known as Mayer Brown JSM as a result of our 2008 combination with JSM (formerly Johnson Stokes & Master), a leading Asia law firm.

The firm's global presence is also enhanced by alliances with Ramón & Cajal, a Madrid-based law firm, and Tonucci & Partners, a Rome-based law firm with offices across Italy and eastern Europe.

Mayer Brown advises on both regional and international transactions and litigation and its lawyers have extensive experience managing pan-European, transatlantic and global projects. The firm takes a cross-practice, cross-border approach to solving the needs of its clients through the seamless integration of its lawyers across the globe.

Mayer Brown is noted for its commitment to client service and its ability to solve the most complex and demanding legal and business challenges worldwide. The firm serves many of the world's largest companies and financial services organizations, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and most of the major investment banks.