DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Deborah P. Majoras

Chief Legal Officer & Secretary of Procter & Gamble

THE SPEAKERS

Deborah Majoras
Chief Legal Officer & Secretary of Procter & Gamble

Kurt Wimmer
Partner, Covington & Burling LLP

Paul Ulrich
Partner, Dinsmore & Shohl LLP

Harold Weinberger
Partner, Kramer Levin Naftalis & Frankel 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 her career and her leadership in the profession, we are honoring Deborah Majoras, Chief Legal Officer & Secretary of Procter & Gamble. Her address will focus on the role of the General Counsel and the Legal Department in corporate compliance, in an era of increased regulation and scrutiny. The Panelists' additional topics include privacy and data security; patents; advertising litigation; and government investigations.

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

Deborah P. Majoras

Chief Legal Officer and Secretary, P&G

Deborah Platt Majoras was recently appointed Chief Legal Officer & Secretary for The Procter & Gamble Company, which she joined in 2008. In that position, she oversees a legal department that includes 320 lawyers around the globe and is responsible for the broad scope of legal functions for all of P&G and its 127,000 employees. From 2004–2008, she served as Chairman of the Federal Trade Commission, where she focused on ensuring data security and protecting consumers from emerging frauds, such as identity theft and spyware, and served as co-chair of the President's Identity Theft Task Force. She also worked to implement sound antitrust policy regarding intellectual property, increase the efficiency and transparency of the merger review process, and strengthen cooperation among antitrust agencies around the world. Prior to the FTC, she served as Principal Deputy Assistant Attorney General at the Department of Justice Antitrust Division. From law school she clerked in federal court in D.C., after which she joined Jones Day in 1991, where she ultimately became a partner in the firm's antitrust practice. Deborah is the recipient of the International Association of Privacy Professionals' 2007 Privacy Leadership Award and RSA's 2007 Award for Excellence in the Field of Public Policy. In 2006, *SC Magazine* named her one of the Top Five Influential IT Security Thinkers, and *Washingtonian* magazine listed her among the "100 Most Powerful Women in Washington."

Today, she serves as Co-Chair of the U.S. Chamber of Commerce International Competition Policy Working Group and as an advisor to the International Competition Network. She also serves on the Boards of the Cincinnati Legal Aid Society, the Georgetown Law Corporate Counsel Institute, Cincinnati Playhouse in the Park, and Westminster College, from which she has a B.A. She earned her J.D. from the University of Virginia.

AUDREY GREENBERG: Welcome. My name is Audrey Wishnick Greenberg and I am an Advisor to the Chairman of Directors Roundtable. I have the honor of introducing to you Jack Friedman, who is the Chairman of the Directors Roundtable. Thank you.

JACK FRIEDMAN: Thank you very much, Audrey.

To give you an orientation for this event in a larger context, we work with Boards of Directors and their advisors on a *pro bono* basis. The feeling has been basically unanimous among them that companies do not get favorable mention of the good things they do. The hard reality is that the good a business does, does not get recognized. It's important that the business leadership, both on the business side and the legal side, have a chance to meet with leaders in communities and talk about common issues learned from each other. So that has been the inspiration for this series.

I'm very pleased that we are presenting this distinguished world honor to Deborah Majoras of Procter & Gamble, who has also served in many other important prior positions. I also want to thank the Panelists who will be speaking this morning.

Procter & Gamble is a Dow Jones 30. If you want to know how the stock market is going to do, Deborah, of course, as the General Counsel will be able to tell you the secret.

I'm going to tell you a true story. Procter & Gamble has had a leading role in many worthwhile causes. This is something that I'm old enough to remember, because I actually saw it happen. In the early 1960s, before the Civil Rights Acts, the number of African-American actors who were in a national TV commercial was zero. The first time an African-American actor appeared was in a Procter & Gamble ad. They had an Ivory Soap ad with an African-American mother putting a towel around her child: a little girl coming out of the bathtub,

hugging her mom, which is as intimate an advertisement as you could have for television. I think it was a heroic moment and something that changed the country. Fifty years later, I'd like to thank Procter & Gamble for their contribution to the country's well-being.

Turning to today's format, Deborah will make her opening remarks. There will then be remarks by each of the Panelists in their area of specialty, followed by a Roundtable discussion. Then I'll open it up for discussion with the audience, and you'll be invited to come up to say hello one-on-one.

There is going to be a transcript of the event which will be sent out to approximately one hundred thousand people globally. An important part of this event is not only this breakfast, but also the fact that leaders will have access to the transcript on a broad and unprecedented basis.

Without further ado, I'd like to have our Guest of Honor make her opening remarks.

DEBORAH MAJORAS: Thank you very much, Jack. Thank you to the Directors Roundtable for this. This is terrific. I'm glad to see everyone. I was initially afraid that if an event had an invitation that said, "Come honor Deborah Majoras," nobody would come! It wouldn't have surprised me. But it's good to see so many friends. I'm always happy when I come back to Washington to see so many of you. I want to thank the panelists, all lawyers who work or have worked with Procter & Gamble over time. Thank you very much for being here.

Today's legal and regulatory environment is as tough, as aggressive as anybody I talk to has ever seen. In virtually every area, we're seeing new regulations. We're seeing new enforcement of old regulations. We've got expansion of all agencies' staffing and authority, increased aggressiveness in enforcement and also in the tone of the enforcement, in the quantity; and in choosing criminal prosecutions over civil, with more and more officers being prosecuted criminally. Even lawyers are not immune, as an in-house lawyer from a pharmaceutical company recently was indicted allegedly for withholding information from the FDA.

For multinational companies like P&G, one of the differences now is that this aggressiveness is global. No longer is this limited to the developed world, but in fact, we're facing the same thing in developing countries, even when they don't have fully-developed legal systems.

Then, of course, outside of our legal responsibilities, the consumers we serve are demanding more of us, in terms of ethics and in terms of our social consciousness, our social sustainability. Understandably, they're tired of some businesses letting them down, other institutions in our society letting them down when they've put a lot of faith — and, of course, in the case of companies, given their money.

All of us can agree that it is imperative today that all companies have a really strong internal ethics and compliance program. In our experience, there are several elements that go into that sound program: you've got to think about responsibility and oversight; you've got to think about building your culture; have the right standards, procedures and systems; have awareness training and communication; a way to monitor an audit; a way to assess risk; and a way to report and then respond to any violations you find in the company.

We have to start with having the appropriate structure. That is the assignment of responsibility and oversight within a company. In the compliance world, this has been a really hot debate, recently, about how to do this. I want to spend a few minutes on this, because it really goes to the heart of what lawyers do and what their role is.

The crux of the debate has been this: Can the general counsel and the legal department effectively develop and implement the company's compliance program? Do the company's lawyers have the proper incentives, independence and skill sets to do it? Or is it necessary to have a separate chief compliance officer who reports outside of legal, directly to the CEO or directly to the audit committee at the board of directors. If that's the case, then what role does the legal department play in compliance?

Some government regulators, some legislators, and some in the compliance space — I would say particularly the non-lawyers among us — have questioned whether the legal department actually should have

responsibility for a company's compliance program.

My own view — and I am fully aware that where you stand has a lot to do with where you sit, so I will say that right up front — but I think this debate is running off course. As with most complex issues, the answer to this is more complicated than just "yes" or "no," and those who definitively claim that the GC and the legal division should have no role in running a compliance program are no more right than someone who would say that the legal department has to exclusively implement the compliance program in the company.

The fact is either way is pretty dangerous. It's a pretty extreme argument, because the fact is, in all areas of a company, and most certainly in compliance, if we start operating in silos, then something gets missed. One of the things that gets missed is the synergies that come from multifunctional engagement. It's truly, in my view — I've been there two and a half years now — what makes a company effective, when you can work together on a multifunctional basis. So I *do* believe that the GC and the legal department have a strong role to play here.

So, what is compliance? Some people ask me this, because many lawyers look at this and they say, "I don't get this whole compliance as a separate thing, right? What have we been doing our whole careers, if not thinking about compliance?" Yes, I understand that. It is necessary, though, today, in the regulatory environment in which we live, to have a separate compliance program with elements that you can identify. We've called ours, formally, "a formal program specifying an organization's policies, procedures and actions to help prevent and detect violations of law, regulations and company policies, and to promote ethical business conduct." Then our practical definition is actually much simpler; it's "do the right thing every time." It's "create a culture that promotes doing the right thing, including a culture in which we can discuss what that means," because it's not always obvious; and then third, you put in place the systems and the structure to promote doing the right thing every single time.

So since arriving at P&G more than two and a half years ago, I've followed this debate very carefully. I've worked with many within our company, both with inside legal and outside, to try to improve our compliance program. We've got, as I said, more laws and regulations to abide by; we've got more demands from consumers. We also have competing cultures, not only in the United States but around the world, that weigh in on our employees when they're trying to decide "what's the right thing to do." So it's critical to constantly evaluate what you do in a company, what the program is, and what results you are getting, and we've made a lot of important changes to our program over the last several years.

One of the reasons that I've been so perplexed by the arguments against giving any compliance responsibility to the company's lawyers is because when I hear the underlying assumptions that are made about legal departments and their roles, they don't bear any resemblance to the legal department that I lead, or to the legal departments of most of my colleagues in the GC space. I'll review some of those arguments with you.

Some have said, and are still saying today, that the role of the GC and the legal department is to blindly defend whatever the company wants to do, which may interfere with making an independent assessment of violations and what we should do about them if they're found. Others have said that responsibility for compliance also requires a focus on ethics, which, apparently, a lot of lawyers won't or can't do, which is scary! Another argument is that the GC's role is to minimize any legal risks, which could conflict with the compliance role of uncovering risks and unethical behavior; or similarly, that, as lawyers, we just focus on litigation risk, and we're single-minded about that, and so we'll reject anything that increases that risk, even if it would actually be better for the culture, reputation, and integrity of a company.

Others say that running a compliance program requires project management and other skills that lawyers don't have, and at least one person I read the other day said that if we say that the legal department should be responsible, at least partially, for compliance, we're just protecting our turf. Interesting!

These arguments are worth raising, and I think they need to be considered. Lawyers tend to think very much about our roles, and in the past, I'm aware that in some legal departments, this is a more one-dimensional way of being portrayed. It may have been the case, and I do understand that. Some in-house lawyers today may view their role strictly as legal advisor; others may have failed to develop strong organizational or project management skills. But I don't think that is in itself unique to lawyers.

Evidence abounds today that the role of the GC and the legal department has changed, and the image of this one-dimensional legal department is just simply not the reality for so many of us. I don't recognize that in-house lawyer that's described, and neither do a lot of other GCs I know.

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No, our company's and many other companies' lawyers play a very strong role in the ethics and compliance program, but the role doesn't have to be exclusive.

I've heard the turf argument made, and the other arguments, and they will say, "Why is it in the legal department, as it is in many companies to begin with?"; "Well, it's just traditional;" or "Well, it's just protecting turf."

But I want to say, when I read this, "Okay, but could it also be because it works, because that might actually be a good place for us to think about putting this?"

Today, in-house lawyers to be effective have to partner with our business colleagues in the early stages of all initiatives, all programs and actions that the company wants to take, so we can build in the appropriate controls early to ensure that we are complying with all applicable laws and company policies. Some of our policies go beyond what the law would strictly require.

We need to understand our business's goals and strategies, not so we can just dress up anything they want to do and make it acceptable, but so we can help them design it in a way that's fully compliant. Yes, of course we work to avoid litigation! But that's one aspect of a larger goal.

We understand at P&G that protecting the reputation of a company that's 173 years old, that has trusted brands that have been around a long time, is part of our role. It's a big part of our role. We take very seriously our stewardship for our company's ethical touchstone, which we call "our purpose, values and principles."

We have extensive experience in investigating incidents, and I've never even heard the suggestion by anybody in our legal department that "maybe we shouldn't investigate that, because it would just be better not to know, so we could avoid litigation." It would be unheard of in our legal department to see that.

To ensure appropriate independence for lawyers, which I think is a fair question, all of the lawyers report up through me. They don't report directly to business managers, which is important to ensure appropriate independence. We have open discussions about our role as stewards, about our role for maintaining appropriate independence so that we can help the company make the tough decisions and not be just rubber-stamping.

In the end, while there's a very important ethics component to this, the fact is that most compliance that we have to think about is with legal requirements, and good in-house lawyers will take a holistic view in how they provide that legal advice.

So some say, "Okay, fine, okay, legal can have a role, but isn't it better if you just have an independent chief compliance officer? Wouldn't that just be a better way, and that person can report directly up to the audit committee?" If you look at the sentence, the new draft, the new version of the sentencing

guidelines, there is a push in that direction, and I think that's actually right.

My answer to this, having really looked at it closely, is that not every structure works for every company in the same way. I think it's a mistake for regulators or anyone to require a "one size fits all." A structure that fits within a company's own structure and culture will be much more effective than a structure that just gets imposed off the rack from the outside.

I know of some companies with compliance functions that are entirely separate from legal, but they've implemented very good and strong compliance programs. I also know of some where the compliance function is so siloed off and so independent that they're struggling with the effectiveness you get from a company when, in fact, you integrate and collaborate.

So, we make a mistake when we think that one size fits all.

The Justice Department recently began publicizing cases in which it gave companies credit for having a strong compliance program in place, and that's really a positive development. In the past, we've seen it from Justice where they might give you credit for putting one in place after something bad happened, so that going forward, that's there, but now, they're actually showing that they're looking at what you *had* in place. This is a great development, because it's really important to recognize that even in the presence of a strong compliance program, some employees are going to go astray. We're talking about large groups of human beings here, and I know that when I was with the FTC, we developed a very robust program around privacy and data security. In the cases we brought, many of them, of course, originated through a data breach that occurred at a company — naturally — and we would look and we would see whether they really did have in place appropriate controls. But what you didn't have a chance to see during that time was the number of cases where there were

data breaches but we didn't prosecute the company. Why? Because they had a good data security program in place. Sometimes, unfortunately, bad things happen, such as a hacker, and as long as the people we were dealing with were reasonable, we took that into account in making our decisions whether to prosecute.

Now, understandably, it would be easier for regulators if we all had uniform programs that look the same, and then when they look to see if you had the right one, you could check the box. But I think in the end, the goal is to prevent violations, not to check boxes, and when they can't be prevented, of course the goal is to detect them and remedy them as soon as you can. So while all programs have certain elements that they should contain, and we should be held to that, we have to have some leeway in how we structure and execute the program.

I read an article on the plane yesterday, written by Thomas McCoy, who formerly headed up the legal department at AMD. He's now at O'Melveny, and one of his partners wrote this: "Independence can be legislated, expert resources can be appropriately supplied to the board, and new best practices can be put in place. But at the end of the day, effective governance lies in the quality of decisions and actions." This is absolutely true. What works? We've got to do what works.

Now, P&G's culture has been one of very strong reliance, as I told you, in our PVPs — values and principles. That really goes back a long way for us.

In the 1860s — to tell another Procter & Gamble story, Jack — James Gamble, one of our two founders, said this: "If you can not make pure goods in full weight, go to something else that is honest, even if it is breaking stone." That's been passed down through the generations at P&G, and we've been fortunate to have a good reputation in this regard, through a focus on doing the right thing.

But what we've learned, because we have made mistakes, is that it's not enough to just have those stated values. You can't rest on your history; you can't rest on your culture; you have to take care to learn from mistakes and build the right program that works for today.

We build on our PVPs. We also have our Worldwide Business Conduct manual that's more specific about what's required from our employees. We also build on another aspect of our culture, and that's collaboration. P&G has a very collaborative culture. If you look at our ethics and compliance program today, it really reflects that collaboration.

We have an ethics and compliance committee responsible for overseeing the execution and design of the program, and on the committee are our CEO — who chairs the committee, because his belief is, "I can't delegate this; it's too important." There are also the Chief Financial Officer, the Chief Human Resources Officer and myself as Chief Legal Officer. So we, as a committee,

govern this, and of course, we report up to the Audit Committee.

We then have vice president-level folks who report to each of us, who are in an ethics and compliance working group, and throughout the company, we have ethics and compliance councils of business folks together with their stewards in Legal, HR and Finance, who work together to make sure that this is being sunk down into the work, and it's not just a layer on top of everything. Of course, our Audit Committee has ultimate oversight, and we each have the express right to go directly to the Audit Committee.

So as I close here, I can tell you that this is a collaborative system for us. It is one that requires a lot of coordination. But when you have a company of 127,000 employees, you're pretty used to coordinating and getting everybody going in the same direction. It's a program that has built-in checks and balances. For now, we've determined that this is what's best for us. I would not presume to tell another company exactly how to structure their program. In fact, I hope the point that I've made to you today is that there is no "one size fits all." We all have to do it in the way that works best. But broadly dismissing legal from the whole thing is a huge mistake. So I hope this debate that we've been having can shift to a more helpful and positive discussion that focuses on the variety of structures that might work, what works about them, what doesn't, and what we can learn from each other's successes.

With that, I thank you very much for being here. I appreciate your time.

JACK FRIEDMAN: I wanted to ask something, since we are here in Washington. You served as the Chair of the Federal Trade Commission. Could you tell us some of the issues that came before the Commission while you were in that position?

DEBORAH MAJORAS: Well, of course, the FTC has broad jurisdiction over most sectors in the economy, and it focuses on antitrust and then consumer protection. Antitrust issues tend to be the same — reviewing mergers, reviewing business conduct to see if it has any competitive impact — and so that portfolio is, other than criminal, roughly the same as the DOJ Antitrust Division. We focused a lot on trying to reform the merger review process so that it would be more streamlined and a little easier to deal with. I'm not sure we succeeded. That is a really hard one. But we gave that a shot. We focused a lot on the interface between IP and antitrust, and what that all means, in trying to sort that out.

On the consumer side, the base issue for the FTC is always fraud — protecting consumers from fraud. There's so much of it. Issues that we really focused on, the issues of the day, were clearly privacy and data security, and that focus continues for the FTC. We made some headway there, in terms of setting some standards for businesses to follow, because there is no national standard otherwise that the Congress has passed.

We also dealt with a lot of advertising issues that actually go into social issues, like advertising and childhood obesity, or violence in media, and trying to very much respect the First Amendment in all of that, but also help parents to be able to maneuver their way through these things. In the case of childhood obesity, we tried to help food companies and others think about healthy alternatives, as opposed to just continuing to beat on the industry to say, "You're completely responsible for this problem."

So those are a few of the issues.

JACK FRIEDMAN: Can you tell us more about Procter & Gamble? You mentioned it has 127,000 employees. Your company is famous for its huge collection of important brands. What about the brands? I hope everybody will run right out and buy whole trunkfuls of products.

DEBORAH MAJORAS: And stock! I'm pleased to! I came into Procter & Gamble mid-career, which is highly, highly unusual. It almost never happens. It's very anomalous that most people at Procter & Gamble start there when they get out of school, and they stay there for a very long time, and they retire there. It's a company that engenders that sort of loyalty.

I've never known a group of people as enthusiastic about our products and the ability to help consumers, even in small ways, in their lives. I've told this story before, but until you've seen a bunch of *guys* get excited about feminine care products, you've never seen anything! They can tell you all about it!

We have today 23 or 24 brands that each make a billion dollars here and around the world. We have 20 other brands that make $500 million or above. We're an $80 billion company and you're familiar with a lot of our brands. Obviously, Tide, Pampers, Gillette, Olay, Pantene, Duracell, Iams; we have a lot of products. I will do this plug apropos of what you said at the beginning, Jack, about companies not getting much credit for doing a lot of great things. A lot of us do things fairly quietly, though not entirely quietly these days, to really understand that we do have some responsibility in the world, and not just for selling. We

do have responsibility to our shareholders to make money. We're a for-profit business. But we also have a lot of folks who care about making a big difference. We're very proud of some of our social sustainability work that we do.

Our biggest project is providing safe drinking water for children, in which we are committed now to saving a child every hour through donation of our Pure Water packets. Many children in Africa and other countries around the world have, for the first time in their lives, been able to have a clean drink of water. The statistics on how many kids die from diseases related to unclean water are extraordinary. So we're very proud of that.

One program that I am particularly proud of and that you don't even think about is that a lot of teenage girls around the world, if they don't have appropriate feminine products, can't stay in school for seven days out of the month. So what happens is they eventually drop out, because they get so far behind. So we have a program in Africa around feminine care products, where we're actually working to keep girls in school, and I think it's extraordinary.

We also have a project called "Loads of Hope." Whenever you have something like a major hurricane, the situation in Haiti, other places, we send these big trucks with "Tide" on the side full of washing machines and dryers and people. We go to people who are in shelters and wash their clothes for them. It seems like such a simple thing for people in desperate situations. If you have clean clothes to wear, which we've learned around the world, because of the products we sell, every family in the world, particularly every mother in the world, feels better about the world when she sends her family out wearing clean clothes. It's just a source of pride, and it's important.

You can tell that I'm very proud to work at this company, and we don't do everything right, but thank you for letting me talk a little bit about that. Thanks.

JACK FRIEDMAN: Let me thank you very much for your comments. Steve Tyrrell of Weil, Gotshal & Manges will introduce and speak briefly on his topic.

STEVEN TYRRELL: Thank you, Jack. I thought what I would do is build a little bit on what Deb had mentioned at the outset of her remarks, which is the current enforcement environment. I thought I would provide some of the specifics of that, talk a little bit about some of the things that are going on, and then touch, at the end, upon some of the challenges that companies face now as a result of the current enforcement environment.

As Deb mentioned, we are in a period now where the enforcement environment is probably as hostile as it's ever been, and I can certainly bear witness to that, having spent 20+ years as a federal prosecutor at the Department of Justice before I joined Weil about a year ago.

During my tenure, I certainly saw an ebb and flow of enforcement activity and enforcement priorities. But I have to say that I think that the current environment, particularly with respect to corporate crime, is unique, and I'm not so sure that there is going to be that same ebb and flow that occurred with some of the other priorities in the past, where something new comes along and the enforcement community moves on to something else. I think there is going to continue to be a focus on companies as a result of the great work, frankly, that companies have done to police themselves. A result of that policing is that things arise and are reported to the authorities, and hopefully, if the companies have strong compliance programs in place and that's recognized by people in the enforcement community, they focus on the individuals as opposed to the company. This is something that will continue.

So, some of the things that have contributed to this or are a byproduct of the current environment are, of course, the increased regulation we see now, largely as a result of

the Fraud Enforcement & Recovery Act, and then Dodd-Frank. We have dozens and dozens, if not hundreds and hundreds, of rule-making processes that are underway, particularly as a result of Dodd-Frank, and all of those new rules are going to provide new challenges to business.

Another thing that has come out of the recent legislation is increased tools and resources for enforcement authorities, particularly at DOJ. FERA amended the False Claims Act and has made it easier for the Department of Justice to pursue claims under that, both against direct government contractors and people who are dealing with government contractors — that is, subcontractors. The SEC received a substantial influx of resources, although given the current state of the budget, there's some question about whether or not they will be able to bring on all of the people that they will need. Of course, some of the investigative agencies have more investigators who are focused specifically on white collar crime.

We've also seen a tremendous spike in the penalties in the cases that are being brought by the various enforcement agencies. In the last year, the Department of Justice and the SEC have resolved eight of the ten largest FCPA cases in history, and all of those involved settlements in excess of what just

a few years ago was the largest settlement in an FCPA case, in the *Baker Hughes* matter, which I think was in the $40 million range in total. All of the eight this year have been north of that, including $400 million with *BAE*, and similar numbers with a number of other companies.

Likewise, with the False Claims Act, particularly as concerns pharma companies and medical device manufacturers, we've seen dispositions there that have gone up north of a billion dollars.

The Department of Justice, in particular, though, hasn't stopped there, nor has the SEC, where we've seen a sharper focus on individuals. Debbie mentioned the GlaxoSmithKline attorney who is being prosecuted for making false statements and obstruction of justice. We had in the SEC context, the *Nature's Sunshine* products case, involving some officers of a company who resolved a matter with the SEC involving allegations of violations of the FCPA. Neither of them was actually involved in it or had knowledge of the activity, but they were held responsible under a control person liability theory. They were responsible for the people who committed the acts; they didn't take action to ensure that it wouldn't occur or to stop it, and as a consequence, they were held responsible for it. This is the first time that's been done in the FCPA context; I'm unsure whether it will be the last time.

We're also seeing an increase in enforcement in the international community. I think the U.K. Bribery Act is probably the highest-profile example of that, and that presents challenges, because it's not limited in scope to dealings or payments to foreign government officials; it actually carries over into the private context, as well.

We're seeing more enforcement in the developed world: Germany, the U.K., some of the other European countries. I think the most recent development there that's very interesting and in some ways very scary is the effort on the part of some developing countries to be more involved, particularly in anti-bribery enforcement. KBR just got hit in Nigeria with a large penalty, and I read recently that Alcatel, as a result of its recent settlement with DOJ and the SEC, is facing potential action in Malaysia, and they already had issues they were dealing with in Costa Rica.

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>
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It's not surprising to see some of these foreign countries getting involved in this sort of activity. They see the success that other countries have had; they see the large penalties. They view it as an opportunity, no doubt, to extract large payments from companies that are doing business in those countries. But obviously, when you're dealing with countries that have less-developed legal systems or, worse yet, legal systems that are rife with corruption, you can see the challenges that are presented there.

Another development is the use by authorities in the white collar context of very aggressive enforcement techniques. It runs the gamut from something that's probably a little more on the conservative scale of that — which would be sector-wide probes, which may, in some cases, be justified based upon information that has developed in a particular investigation — to letters being simply sent out to companies in a particular industry, like the letters that were recently sent out to a number of financial services companies relating to their dealings with sovereign wealth funds and whether there are potential violations of the FCPA there.

We've seen the use of sting operations; we've seen wiretaps in the recent insider trading investigations; and we've seen the use of search warrants in investigations where traditionally, the authorities would gather documents and other hard evidence through subpoenas.

People ask me a lot, now that I'm on this side of the fence, why the government does this. Why do they use these tools when it seems like they're using, you know, a hammer just to kill a fly? The answer is simple, and maybe it's a little cynical, and sometimes people chafe at it — but the reality is that it sometimes makes it easier for the government to pursue enforcement actions. The government gets better evidence, and if the tools are available to the government and it's not inappropriate to use them, they are likely to use them, even if it causes pain to the people who are on the other end of the use of the technique or the tool.

We've also seen, now, an increase in the use of whistleblowers. The Dodd-Frank whistleblower program that the SEC is in the process of standing up, promises to be a source of many challenges for companies. I know that the comment period on the proposed regulations that were promulgated recently ended. I actually submitted a letter myself in response to it. We'll see where that goes. Again, there are resource issues there that may prevent the SEC from implementing it to the extent that they'd like to, but in the draft regs, it was suggested that they estimated getting 30,000 tips per year based on the program, on a going-forward basis.

Of course, if all of that wasn't enough, often these types of circumstances that get the attention of authorities involve challenges on multiple fronts. The DOJ could be involved; the particular administrative agency, be it the SEC, the CFTC or some

other agency. Congress has been increasingly active in matters that are traditionally handled by the enforcement community, but they feel the need because of the high-profile nature of it, or for some other reason, to get involved, so there's that side. Private litigants are becoming more aggressive, trying to construct new theories of liability, particularly in the shareholder context. I also mentioned, of course, foreign authorities.

Now, one byproduct of this hostile environment, and a very important one, is the remarkable amount of time and effort that companies are forced to expend to deal with allegations of wrongdoing that arise within their organization. I can tell you that when I was in government I had heard that; I respected what I heard, but I had no concept of how much time people spend on these sorts of things, and how much they worry about them, and how they struggle to do the right thing. I mean, it really is remarkable. Not a week goes by that I don't get a least one phone call from a client to discuss a particular situation, and how they ought to deal with it, and what the implications are. I'm certain that for every call that I'm getting, other law firms are getting calls, too. I'm certain that they're dealing with at least a similar number, if not a multiple of that, in-house, so just tons and tons of effort is being put into this.

Some of the challenges and some of the common themes that come across in the discussions that I have with clients, are how should they deal with a particular allegation, and what are some of the considerations they should take into account in deciding how to deal with it. As Debbie said, I don't think that there are many companies out there, and certainly not Procter & Gamble, that wouldn't look into it and try to get to the bottom of it. For most companies, doing that is a component of their compliance program. Indeed, it's a component of any effective compliance program.

Likewise, for directors and officers of companies, they have a duty to investigate an allegation and to remediate it, depending upon the severity of it. It can help, if it's a serious allegation, to mitigate possible criminal and civil exposure, and it's always best to know what's going on so that you can plot your course—which is to say, a good offense is probably the best defense. So if you've got a problem, it's always best to look into it.

The dialogues that I have with folks tend to go along those lines, but of course, everything depends on the circumstances, and these types of decisions and these discussions are typically driven by how serious the matter is, who's involved, and what's the potential impact on the company. Is there either a legal obligation to address it or even to disclose it, or is it likely that the matter is going to come to the attention of someone outside the company and become an issue, either in the press or in the enforcement community?

Those considerations also go to the second issue I wanted to briefly touch upon, which is the question of internal investigations, and whether it's necessary to conduct a particular investigation. Maybe it's going to depend on the circumstances, and that's a conversation I have with clients all the time, and it's a difficult issue. I'd like to say I have the silver bullet, the answer for every situation, but I don't. But the considerations I mentioned before are typically the drivers.

Other issues that I think companies struggle with are, if they're going to do an internal investigation, who's going to do it? Are they going to do it in-house? There seems to be a movement in that direction, and I think it makes sense, because many allegations can be dealt with in that fashion, particularly if they involve lower-level folks and not great exposure for the company. Is it going to be regular outside counsel? If it's a more serious matter, perhaps; or, in some cases, it may be necessary to bring in special outside counsel. Then who are those lawyers going to work for? Who's the client going to be? Is it going to be the company? Is it going to be the board? Is it going to be the audit committee? Or is it going to be some other special committee? These are issues that are difficult and challenging and involve consideration of a host of circumstances.

The cloud or the shadow that hangs over this all the time, especially when you're dealing with matters that may become the subject of interest for the enforcement community, is what the expectations of the people in the enforcement community are. We hear, time and time again, from folks in the enforcement community, that they expect you to disclose the wrongdoing and they expect you to cooperate in their investigation. I can tell you, I beat that drum for years, and I can also tell you that people in the enforcement community really believe that they give companies benefits for disclosing and for cooperating.

The jury is still out, and particularly because there's not a lot of transparency about how matters get resolved and what the actual benefit was to a particular company for cooperating, or having a preexisting effective compliance program, or voluntarily disclosing wrongdoing. People in government are trying harder to be more transparent about that, but I think they still have a long way to go.

Finally, with respect to enforcers' expectations, and this is an issue that companies struggle with mightily — I'm dealing with a situation right now — is remediation. What do you do to address a particular allegation of wrongdoing, particularly with respect to the culpable people within the company? Do you discipline them, do you fire them — what's the expectation of the enforcement folks there? Typically, if it's serious, the expectation is going to be that you're going to get rid of those people. But the other wrinkle is, on occasion, they may ask you not to do it right away, for one reason or another. So that can present challenges, as well.

JACK FRIEDMAN: Let me thank you. We'll get back to this issue in the discussion.

Our next speaker is Harold Weinberger of Kramer Levin Naftalis & Frankel.

HAROLD WEINBERGER: So I'm going to be talking about a slightly different subject. The focus up until now has been on enforcement, regulatory compliance, things of that nature. The subject that I'm going to be talking about is advertising, and while there are, obviously, regulatory agencies that have some enforcement power over advertising, in the real world, in the day-to-day battle between competitors' products, like the products that Procter & Gamble sells, most of the disputes are resolved in the courts between competitors and in another forum that I'll discuss.

It's true that the FTC looks at the global issues that Debbie was referring to. The FDA, obviously, when it comes to prescription drug advertising, does have some hot buttons, but for anybody who's tried to do it, it's very difficult if you have a complaint against a competitor who is making claims about its product in comparison to yours, to get any of those agencies to focus on that and to get them to do anything in any timeframe that's meaningful.

So, the battles in this area, and P&G has certainly been involved in many of them, as the world's biggest advertiser, occur elsewhere. There are essentially two forums, and I'd like to talk about both of them — what are the plusses and minuses. Obviously, when you're a defendant, you don't have a choice where you end up. But when you're a plaintiff, you do. So I'm going to spend a little bit of time talking about the options that are available.

The first is the federal courts. There is a federal statute called the Lanham Act which originated as a trademark statute, but essentially provides for a federal remedy for false advertising. It applies not just to television and print ads; it applies to the Internet, and I even had a case about 10 years ago that was based entirely on oral statements that were made by sales representatives promoting drugs to physicians. That was also found to be covered by the Lanham Act. So it's a very wide-ranging statute, and it's actually a very broad and a very scary statute, from a substantive point of view. Because you can be held liable under the Lanham Act for what's called a "literally false claim." You say, "My product is cheaper than yours," or "my product is better than yours" on one kind of characteristic or another. But you can also be held liable for a claim that you never actually intended to make, called an "implied claim." So, an example would be, if you state that your antacid absorbs more acid than the competitor, and it can be shown that the consuming public is taking away the message that "that means that your product actually makes you feel better" or "work faster," even though you didn't say it, and even though the underlying claim is true, you can be held liable for an injunction and for damages. It's a no-fault statute, which can be very, very scary.

As I mentioned, there are these two types of claims — the literal claim, the implied claim. For the implied claim, usually what's required in the courts, under the statute, as the cases have interpreted it, is a specialized type of consumer survey to show that consumers are taking away that message from

the commercial. This is an area where we could talk for about three hours in and of itself — and we won't — about what's required and how difficult it is; but essentially, that survey, if you do it right, is what leads to this imposition of potential no-fault liability.

Most of the cases in the courts are geared towards obtaining an injunction. The whole idea in most of these cases is to get the competing ad off the air as quickly as possible. That's often easier said than done. The notion that you are going to go in and get a temporary restraining order, where the issue in the case is whether your testing or the competitor's testing supports the claim, is quite far-fetched. No judge is going to do that. So normally what you get involved in is a process of expedited discovery, where information is exchanged, including a lot of sensitive competitive information that has to be dealt with on a confidential basis with a confidentiality order. Then you ultimately have a hearing before a judge, which is the same as a trial. It can last a day or a week. You can get a decision in two days, and you can wait six months for it. It depends on the complexity of the case; it depends on the judge. At the end of the day, what you hope to get is an injunction that prevents not only the airing or dissemination of the

particular advertising at issue, but the claim that forms the basis of the ad.

So you might wonder, why do all this if it takes four or five months? Because products are developed with a goal of being able to make claims against competitors that may get articulated in an initial launch campaign and then continue for an extensive period of time.

You can also sue for damages in these cases, and when you do, you sometimes skip the preliminary injunction stage and go to a final trial. When I say you can sue for damages, you can also get sued for damages. Indeed, we had a case that we did when Crest® Whitestrips first came out with a very aggressive ad — you may remember it — some woman claimed that she put this teeth whitener on her mouth, and she couldn't talk because if she did, it would wash off, and Colgate was not happy with that. They sued for $80 million. It went to a jury trial in federal court, and it's a very scary thing, because the implication of it is not just, "Okay, you may be barred from making this claim in an ad; you may lose some money;" but the case was about the testing methodology that was used, on which the claim was based. If the jury had found that the claim was false, it really jeopardized the entire "reason for being" of this product.

DEBORAH MAJORAS: Harold won the case.

HAROLD WEINBERGER: Juries are very scary! There actually are not many jury trials in this area, but that was one.

So, that's one avenue, and when you are considering, as a plaintiff, where to go, you have to consider, is this a literal claim or an implied claim? Am I going to be able to get a survey to prove this? The burden of proof in these cases is on the plaintiff. So unlike the Federal Trade Commission, it's not enough to show that there is insufficient substantiation for the claim. The plaintiff has to show that the claim is false. They usually have to have their own testing, unless the claim is that "clinical tests prove my claim," in which case the advertiser has to have the clinical tests.

> "We do have responsibility to our shareholders to make money. We're a for-profit business. But we also have a lot of folks who care about making a big difference. We're very proud of some of our social sustainability work that we do."
>
> — *Deborah Majoras*

So that's one option. The other option exists because of the obvious proposition that you cannot take every dispute you have with a competitor to federal court — sometimes the issues are significant, involving a launch of a major product; sometimes they are run-of-the-mill advertising disputes where you're just not happy with what your competitor is saying, but you don't want to go to federal court, because it not only costs a lot of money, but it also takes up the time of the people whom you actually want to be doing other things, like marketing products.

So a lot of disputes wind up in some place called the "National Advertising Division" of the Better Business Bureau, which is a self-regulatory body. Companies like P&G belong; they pay dues to it; but you don't have to belong in order to be hauled before them by a competitor, and they serve — it's not really like an arbitration, because arbitration is voluntary, and this is not entirely voluntary — but at the NAD, they have a staff of lawyers, mostly young lawyers, who believe they have expertise in issues like this and you basically write a challenge letter, if you are the challenger. The challenge letter is then forwarded to the advertiser. Whatever data the challenger is offering in support of its challenge has to be made available to the advertiser. But if the advertiser has testing and material that it believes is confidential and the advertiser doesn't want the material to be seen by the challenger, it can submit it in confidence; which, as you can well imagine, is a major handicap to the challenger, because they don't have the ability to comment on what's being submitted by the other side.

So there's an exchange of four letters. Then there is, I would call it a "hearing," but it's really not — for those of us who litigate, it's more like a star chamber — because each side goes in separately with its lawyers, and a lot of this NAD work is done by the in-house lawyers, and you can also bring an expert. You can also bring a survey expert, if you want to do a survey. They argue their case separately. So it's often like shooting in the dark.

There are a couple of differences. Remember I said for a federal court challenge, you need a survey for an implied claim. While a survey is helpful at the NAD, you don't need it. The lawyers at NAD believe they have the expertise to look at an ad and interpret it the way a consumer would, so if you have a case where you don't want to do a survey, or you don't believe you can get one that will come out the right way — and there are lots of reasons why that might be true — you would go to NAD. The burden of proof is also very different. The advertiser, at the NAD, has to substantiate any reasonable interpretation of its advertising, and only when they do that does the burden shift to the other side.

So, again, if you have no testing of your own, but are really proceeding on the theory that your competitor doesn't have adequate substantiation, that's where you would go.

One of the problems with the NAD is what can they do? At the end of the day, they issue an opinion. Normally, companies respond by saying, "We disagree, but we will

take NAD's decision into account in our future advertising," which is kind of a code word for, "We won't do it again."

If they don't say that, and they don't comply, there are compliance proceedings. But essentially, the only remedy that the NAD has is to send the case to the FTC, which doesn't usually have the time to deal with these kinds of issues.

So it really is a process that depends upon the goodwill of the people who are participating; and by and large, that does happen, but not always. It also doesn't have the same kind of breadth in the sense that you're not likely to feel as constrained in what you do in the future, as long as you don't make the specific claims that are at issue. Finally, NAD can be somewhat political, in the sense that you get a lot of decisions that are less than unequivocal, where they say "you can do this, but you can't do this," and "one side gets this, and one side gets that." So it's not always satisfying. But again, for run-of-the-mill, everyday disputes, it is a very useful forum.

The last thing I just want to say is that there have been some cases where the parties have agreed to arbitrate advertising disputes. I personally have done three or four of them, including one for P&G. There are several reasons for it. In that particular case, we started the case in federal court, and neither of us liked the judge. So we decided to get our own judge and arbitrate the case, and we picked a former federal judge.

Another reason is publicity. Obviously in federal court proceedings, while you can keep certain documents confidential, once you get into court and pass the discovery stage, it's very difficult to get the judge to seal the court room, so some kind of material that you might not want to see out in the public very well may get there. Obviously, even if you've managed to keep the materials confidential, the results of the case are public. At NAD, the results of the case are public, as well. You can't promote it; you can't use it; but the results are published and available to anyone.

In arbitration, you can, if you've got a dispute with someone and you both don't want the result publicized, you can agree to keep it confidential. Often, in arbitration, you can agree to discovery, so you have the benefits of federal court practice, but you can limit the discovery. You can have more control over the timeline of the decision. So it's an evolving method. There are companies now that have standing arbitration agreements between them to arbitrate their advertising disputes under an agreed-upon set of rules that are in advance. We're going to see a lot more of this.

But the real message is that for companies like P&G, which is the biggest advertiser in the world, these issues aren't going to go away, and they're not going to be taken care of by regulators, so you have to take matters into your own hands to protect your brands.

JACK FRIEDMAN: I want to address some of these comments. We had an event some years ago with the global head of copyrights for an important media company. He said that a problem for corporate counsel is that some businesspeople within a company think of the legal department as a major obstacle to progress. This is a real problem. He said, "I'm sitting at my desk and someone walks in and tells me, 'We're going to be launching a new product on the Internet. We've advertised that we're going to have a website and told the trade that this is going to be up. I was told that I was supposed to come in and get your approval for us to launch.' I replied, 'Fine! I'm very happy to help you be successful. When are you launching?' The other person says, 'In an hour.'"

I'd like to have the panel comment on how a legal department should handle advertising and promotion.

DEBORAH MAJORAS: Well, as you can imagine, with all the advertising and marketing we do, we have many people who have to think about these issues, although we're trying to find more ways to simplify and also become more truly global. In the past, we've had to look country by country at claims support and so forth, and we're trying to do more of that together. The situation is one that's not completely unfamiliar, but we've rooted most of that out, because that would be a failure in the end! Our people who work on advertising claims actually spend more time with the R&D folks than they do with the marketing folks! They have to, because our job is to help the company make sure that the claims that we're making are fully supportable through our testing and R&D.

JACK FRIEDMAN: Such as, is it truly 99.44% pure! How far does that go back, 130 years?

DEBORAH MAJORAS: Yes, that goes back a long time! Those Ivory claims! But it is a big part of the legal department's work.

The other thing we're trying to do, though, is we've taken a step back, and we've said, "Okay, we have these advertising lawyers and we have all these patent lawyers and trademark and so forth; those are legal ways of thinking about getting to market. Let's try

to think about getting to market through the eyes of our businesspeople, right? They want to get the product from here, R&D, through design, and so forth, out to the marketplace. Let's try to support them in their work by thinking about this more holistically." So we're actually combining forces now and trying to be less siloed, and having teams of people who work in beauty care or whatever, who can say, "Okay, we have to get this product to market. What are all of the things we need to deal with, with claims in advertising being one of them?"

HAROLD WEINBERGER: Let me just add that the notion that somebody comes to you an hour before and says, "Can we launch this ad," is certainly not reality with this company. I live with those documents that are created when they are considering the ad, and it does start early, with the R&D process, and it's completely and fully documented.

Usually, in terms of outside lawyers, we get the ad when the ad is done. We don't get them in advance. Once in a blue moon, we get consulted about an ad before it airs, or in the case of the *Crest® Whitestrips* case, it was aired for two days, when the woman is talking with the paint on her mouth and says, "How can it whiten if it washes away?" We were able to change that, because that implies that the Colgate product doesn't work at all, to "how well can it whiten." When we talked to the jury after, that may have made the difference in winning the case.

But the kind of vetting that's done at major companies — is probably hard for people here to imagine. It's really very, very thorough.

DEBORAH MAJORAS: Yes.

JACK FRIEDMAN: This is fascinating, the idea that potentially every comma, every word, every action that a company takes, in theory, can have a legal ramification. It's just unbelievable.

DEBORAH MAJORAS: The other interesting thing to me is it really does vary by country, and by culture. For example, comparative advertising, which someone with a competition background, like mine, thinks is the greatest thing in the world, right? Outside the United States, a lot of governments and a lot of people think that competition is completely dirty and inappropriate, and you're not supposed to do it. So we have this outside the U.S., where we go round and round.

HAROLD WEINBERGER: I actually had a federal judge in Kansas tell me that it was illegal!

DEBORAH MAJORAS: Yes, even in the U.S.!

STEVEN TYRRELL: First Amendment!

DEBORAH MAJORAS: So you have to take those things into account, too.

JACK FRIEDMAN: Our next speaker is Paul Ulrich from Dinsmore & Shohl.

PAUL ULRICH: Thanks, Jack.

JACK FRIEDMAN: By the way, I want to say that Deborah and Paul have come in from Cincinnati, and we have some from New York here, so we have the national picture with this panel.

PAUL ULRICH: First off, on behalf of myself and on behalf of my colleagues at Dinsmore & Shohl, I would like to congratulate Deborah. It's truly an honor for me to be here, and we have had a longstanding relationship with Procter & Gamble — not quite as far back as Mr. Procter and Mr. Gamble, but it's been a long relationship! I can truly attest that The Procter &

Gamble Company is filled with world-class professionals, and it is an honor for me to be here today and to work with them on a daily basis.

What I wanted to talk to you about is patent law, and how it relates to the increased scrutiny and regulation that Deborah was speaking about in her remarks.

As you can imagine and Deborah mentioned, Procter & Gamble has a global presence. They have hundreds of brands, and within those hundreds of brands, hundreds of products and derivatives of those products. Then, within each of those product lines, Procter & Gamble may have one, maybe two, maybe ten patents covering the products themselves, or different nuances and/or parts of those products. Thus, if you could see it, Procter & Gamble's brands, products, and patents form an expansive network that branches out into a spider web of interrelated products and patents.

Having said that, then you have not only the U.S. to worry about, but also a global patent system out there that is not harmonized. Unfortunately, the U.S. in many respects is the oddball when it comes to harmonization with the rest of the globe.

Therefore, I thought it would be fairly relevant here to speak on what the U.S. is trying to do to enact patent reform.

The 112th Congress, as we all know, has just started, and the question is whether they are going to try to enact comprehensive patent reform, as the 111th Congress tried to do but failed, or whether Congress will attempt to enact reform via piecemeal legislation — you know, taking small, little bites at the different provisions that they want to try to reform.

Actually, they've already proposed H.R. 243, and it's directed to false marking. What is false marking, and how does that impact a company like The Procter & Gamble Company? The current false marking statute and the way it's been interpreted by the Federal Circuit in the *Bon Tool* case, reads that if a patent owner falsely or improperly marks his/her products with a patent number, a third party, including one that has incurred no injury or harm from this improper patent marking, may sue the patent owner and recover $500 per article out in the market. In a very simplified example, I could look at a product that Procter & Gamble has on the market, do some diligence and say, "Oh, look at this — there's a patent marked on this product, and it's no longer covering that patent," or, "Look, this patent has expired and they still have it on the product." Without having incurred an injury from this mis-marking, I could sue Procter & Gamble $500 per article. As you can imagine, the class action attorneys — hopefully there are no class action attorneys in here right now — have jumped on this. I don't know how many of these cases have been filed against The Procter & Gamble Company, but I do know that within a short span of time last year, over 600 class action lawsuits were filed against companies.

It's a serious matter, because just tracking all those patents is a huge deal for a company like Procter & Gamble, as well as the outside counsel that work with those patents.

House Resolution 243 is looking at changing the current law and requiring a competitive injury. So, to bring a suit, a party would have to at least show that they have incurred a competitive injury by the alleged false marking. Additionally, the $500 will be an aggregate recovery, not per article.

As you can see, this is a key piece of legislation that has already been introduced in the House. False marking reform was included in the past Patent Reform Act that was pending before the 111th Congress, but that bill was loaded in with a bunch of other provisions, which I'll talk about here in a few minutes.

Speaking on the overall patent reform, Senator Leahy, the Chairman of the Senate Judiciary Committee announced that among his top priorities is the Patent Reform Act. He also has stated that he spoke with the incoming leader of the House Judiciary Committee, Representative Smith, and that both of them have agreed that patent reform is sorely needed. Thus, it does appear that the 112th Congress is going to try to tackle patent reform again. Now, we'll see if they're successful or not.

In the 111th Congress, there were two bills directed to patent reform: Senate Bill 515 and House Resolution 1260. I've provided high-level summaries of each of these in your packets. But like I mentioned, both stalled in the 111th Congress.

Let's take a closer look at a few of the key provisions that were in these bills. First, there was a "First Inventor to File" provision, which would change our current law from a "First to Invent" system to a "First Inventor to File" system. At a real high level, Europe and most other countries are a "First Inventor to File" system. In such a system it essentially becomes a race to be the first to file the patent at the Patent Office because the first to file is considered the inventor of such technology. In contrast,

in the U.S.' "First to Invent" system, even though one may be the first to have filed his/her patent, one may be found to not be the first to have invented such technology. Changing to a "First Inventor to File" system would help the U.S. harmonize with the rest of the world. This would obviously help companies like Procter & Gamble, and its attorneys, in that its attorneys would have one less jurisdictional nuance out there in the global patent landscape.

Second, the bills included a provision directed to assignee filing. What does this mean? In other jurisdictions — such as, for example, in Europe and applications filed via the Patent Cooperation Treaty — a company can file a patent application in the name of the company, rather than in the name of the inventors as is currently done in the U.S. In the U.S., a company must file a patent application in the name of the inventors, and then, through the recordation of assignments at the U.S. Patent and Trademark Office, have the pending application changed into the name of the company.

Why is that a problem? Well, a company may have hundreds of inventors — in Procter & Gamble's case, thousands of inventors — and thus by the time an application may get filed, those inventors may have moved on to different roles within the company or even left the company, which creates some difficulties in the patent filing process. Enabling companies to file a patent in the company name simplifies things.

Third, both the House and Senate bills included provisions to reform current and add new post-grant review proceedings that would be available to third parties wanting to challenge an issued patent. Specifically, the proposed provisions would have eliminated the current *inter partes* reexamination proceeding and installed a revised *inter partes* review proceeding. Moreover, this section of the bills added a post grant review proceeding similar to an opposition proceeding found in Europe.

Fourth, the bills included provisions directed to third party prior art submissions, enabling a third party to submit to the U.S. Patent Office prior art that the third party deems is material to patentability.

Both the post grant review proceeding and the third party prior art submission provisions were directed to reducing the number of invalid patents that have been allowed by the U.S. Patent Office, which has been an increasing concern by companies.

Fifth, the bills contained provisions directed to damages within a patent infringement suit. In particular, these provisions increased the trial court's "Gatekeeper" function with respect to what type of damage theories, analysis and calculations would be allowed as evidence and thus admissible. This was probably the most controversial aspect of the bills and thus no agreement was ever reached. However, the courts appear to be tackling this aspect of patent reform and thus damage provisions may be left out of any new patent reform bill introduced in the 112th Congress. For example, in *Lucent Technologies, Inc. v. Gateway, Inc.*, the court held that the calculation used for damages must have a legally sufficient evidentiary basis.

Sixth, willful damages were addressed. The proposed Patent Reform Act would have required a jury, in order to find willful infringement, to find the infringement was "objectively reckless." The standard was defined as, "The infringer acted contrary to an objectively high likelihood that actions of the infringer constituted infringement of the patent, and the risk was known or so obvious that the risk should have been known to the infringer." The sponsors of the bills contended that this was just a mere codification of *In re Seagate Technology LLC*'s "objective recklessness" standard.

Finally, the bills included provisions, although slightly different than the current H.R. 243, directed to curbing the tidal wave of false marking suits as I previously mentioned.

Only time will tell whether the 112th Congress will be more successful than predecessors in tackling patent reform. I would like to now turn to a few of the more significant cases relating to increased scrutiny in the procurement of patents.

Inequitable conduct during the procurement of a patent is one such aspect of which the Federal Circuit has performed a deeper review. *McKesson* was a case where the court found inequitable conduct for a practitioner, where he failed to cite office action rejections from related applications in a co-pending application, although the related applications were generally cited in the co-pending application's prosecution proceedings. Generally, a patent prosecuting attorney, and anyone involved in the patent process have a requirement, a duty of candor to the Patent Office; i.e., a duty to disclose any information that would be material to patentability. What the court found here was that although the patent attorney cited that, "There's these related applications out there and here they are," he failed to cite office action rejections from these related applications wherein the Patent Office examiner had rejected the claims of these patent applications. Additionally, when the examiner finds that the examination is completed and the patent application is ready to issue as a patent, the examiner issues a Notice of Allowance to the patent owner. In *McKesson*, the examiner had allowed the claims of one of the related applications and thus issued a Notice of Allowance, but the patent attorney failed to turn around and cite this Notice of Allowance in the co-pending application that was at issue in this case.

The court found these actions as constituting inequitable conduct, despite the fact that the same examiner was examining both the co-pending application as well as the related applications. One would think that with the same examiner examining the applications and the applications identified to the examiner as being related; it would be enough for the attorney to cite, in the current application at issue, the existence

of the other related application(s), and in those related cases, to cite the existence of *this* current application.

This holding is significant, when a company such as, for example, The Procter & Gamble Company, is trying to manage and track and get a handle on all the patent applications in its spider web of inter-related applications, as well as all the allowances and rejections issuing from these applications.

So, in response, you, as a patent practitioner, patent owner, and/or inventor, have to implement standard operating procedures designed to track all of these related applications, track all the rejections from these applications, and track all the Notices of Allowances; to communicate with each other; to communicate with the attorneys in-house; to communicate with the attorneys that are outside counsel dealing with these cases; and to ensure that you have the proper systems in place to manage and track all of the related applications.

The *Therasense* case is a follow-on case to *McKesson* at the Federal Circuit that has since been vacated and an *en banc* hearing has been ordered. Generally, the court in *Therasense* found inequitable conduct by the attorney prosecuting their patent application, because this patent attorney failed to cite contrary arguments he had made in a related application in a foreign country. So, the court has made it explicit that even statements outside the U.S., if contrary to statements or representations you have made in the U.S., are material information and must be cited.

Now, as I mentioned, *Therasense* has been vacated, so we're not sure yet what the Federal Circuit is going to do with it. It does appear that they are going to take a long review of the whole inequitable conduct standard in patent cases, and hopefully revise and clarify it. As you can see, patent law is not a static area of the law, and we, as patent attorneys, get a bad reputation many times as being boring. This shows that we've got a lot going on, and we're interesting people!

Anyway, what can you do about all these changes in this active legal environment of patent law? One of the things is stay abreast of these changes. We must educate ourselves, and our clients, of these changes. But more importantly, patent prosecution in particular is a very procedural area of the law. Thus, you have to ensure that your systems, your practices and your standard operating procedures are up to date, are aligned with the current changes in the law, and then make sure you communicate these changes and work with your in-house counterparts to ensure that *their* systems and our systems are inter-cooperative, because if you make changes but they don't, or they make changes and we don't, the systems won't align, and something's going to fall through the cracks.

JACK FRIEDMAN: The comment you made reminds me of a famous securities case that was tried in the 1960s. The leading treatise was by Professor Loss at Harvard Law School. He was the guest witness for one side before an incredibly famous federal judge. The judge leaned forward and said, "Professor Loss, everything you said today contradicts what you put in your famous treatise." Loss replied, "Judge, I think more clearly when I'm being paid!"

Our final speaker, Kurt Wimmer of Covington & Burling, has a very interesting topic. Thank you.

KURT WIMMER: Thanks, Jack. I'd like to join my colleagues in congratulating Deborah. It's really a privilege to be able to work with you and your team, and Procter & Gamble is an extraordinary company.

I'm going to talk about an area of law that brings us back full circle to where we started. It's an area of law that Deborah had a lot to do with the development of: the law of privacy.

Privacy, data protection and data security, if you go back a few years, was a relatively stable and straightforward compliance issue for general counsel. You'd look at state law, usually using some sort of a chart like this one, you would also look at federal law in your own sector-specific area, and, of course, you would look at what the FTC had done. You'd look at what the EU has done, whatever countries you're working in in Europe have done, and if there are other countries in Asia or South America where you're doing business, you'd look there as well, of course.

But you'd then construct a plan and work forward on that plan, without a lot of seismic change. That's all changed, because privacy has now gone mainstream. As all of you know, you really can't have a conversation, with a lawyer or a non-lawyer, without someone bringing up their privacy on Facebook, their privacy on their mobile device, the privacy on GMail, what document WikiLeaks is going to post next, how it's going to happen, and what companies should do. So it's become a very different environment, which presents two types of challenges for general counsel. One is, your directors are exposed to these issues when *they* talk to people. They're going to be very interested in your take on what the company should be doing.

Secondly, for the same reason that it's become something that's in the mainstream for directors, it's in the mainstream for policymakers. Of course, once something gets on the radar screen for policymakers, you tend to see some rapid change. That's the era that we're moving into now.

I thought just in the next five or six minutes, I'd walk through the five groups to watch in 2011, as we begin this period which is going to produce relatively rapid change in the law of privacy. If I have time, I'll wrap up by making a projection about where we might be at the end of 2011, bearing in mind that forward-looking statements are not guarantees of future performance!

The first place to watch is, of course, the Federal Trade Commission. Deb's former agency, the FTC, really is the central place for privacy in the United States. Unlike Europe, which treats privacy as a fundamental human right, the U.S. has no overarching privacy law that applies to all economic activities. So in various sectors, we do have laws. We have the Gramm-Leach-Bliley Act, which contains data security and privacy measures for financial institutions. We've got the Health Insurance Portability and Accountability Act, or HIPAA, passed before Congress started to make snappy acronyms out of every law, which deals

with the privacy of health information. We've got the Fair Credit Reporting Act and the FACT Act for consumer privacy issues. We've got the Children's Online Privacy Protection Act for kids. We've even got something called the Video Privacy Protection Act to protect the privacy of your videotape rentals. You remember those? But no overarching privacy law that applies to everything, at least as of today.

The FTC is the closest thing that we have in the U.S. to a data protection agency. Its privacy efforts focus on the FTC's broad prohibition against unfair and deceptive acts and practices. So where consumers have been harmed by deceptive privacy practices, such as identity theft, violations of COPPA and the like, the FTC has investigated and enforced the law. This is an area where Deborah has played a leading role in her past life.

In addition, the FTC has played a really valuable role in providing guidance to companies on appropriate privacy practices, both in the privacy area and the area of data security, which really is meant to go to the practices you should take to make sure you have protected the integrity of consumer data that you hold as a company.

This focus has lead to some industry self-regulation, and a number of important developments, such as Trust-e, the Network Advertising Initiative and others, which are really now taking hold.

In a major report issued last month, however, the FTC signaled that self-regulation has not kept pace with technology. There is a summary of this in your CLE materials that will prevent you from having to carry around a rather large, two-sided report. It's a very interesting piece of work. It's tentative, so it's not a final report. The FTC has suggested in this report a new normative framework for how all companies should look at privacy. The framework would apply to all commercial entities, online *and* offline, that handle any data that can be "reasonably linked to a specified consumer." It's not the old "personally identifying information" standard that we've become used to, which is name, credit card number, Social Security number, customer number, address; but anything that could be reasonably linked to a consumer, which is really quite a broad standard.

The FCC has suggested three core principles. The first is called Privacy by Design and by this, I think the FTC is saying, in Jack's question before, "don't call an hour before something is going to be rolled out and say, 'what are the privacy implications of what we're about to do?'" The FTC is really saying that privacy should become a part of the design process for all products and services that deal with any type of consumer information. Companies ought to adopt practices to limit data collection, protect the data that's collected, implement reasonable data retention periods — that is, keep data for only as long as it's needed — and ensure the accuracy of data, all as a matter of product and services design — so, build it forward. I know a lot of companies — P&G, obviously — do that already.

The second broad principle is choice. The FTC suggests that companies provide real choices to consumers, unless data is collected for "commonly accepted practices," which would be such as asking for your address to fulfill a mail order. These choices

ought to be clear and presented at the point where the data is provided, and not buried in long, legalistic privacy policies (not that anybody in this room would ever draft a long, legalistic privacy policy!).

The FTC has come out in favor of a "Do Not Track" option for targeted advertising, which I think raises a whole host of issues.

The third principle is transparency, which is, of course, a familiar standard. The FTC is really, under this rubric, calling for privacy policies that are short, clear and standard. They've said: "Look, in some areas, agencies and the industry can cooperate and use model privacy policies for some provisions, and consumers might understand it better if we had more transparent privacy policies."

Now, as I said, this is a draft report. Comments are being filed on it by the end of this month, and the FTC is expected to issue a final report in the spring.

The second group to watch is, of course, the Obama administration, and the main player there is the Department of Commerce. Also last month, just to really round out our holiday season, they issued a very large green paper — I'm not quite sure why it's called a "green paper," but it's, again, a fairly in-depth piece of work — on privacy practices in the commercial sector. The paper was expected to endorse privacy legislation in Congress, but stopped short of doing so. It does recommend the creation of a national framework for commercial data privacy that would be built around a set of, quote, "fair information practice principles," or FIPPs — an unfortunate acronym; I don't think it'll stick — many of which will track with what the FTC has recommended. But the Commerce approach is more encouraging to industry self-regulation than the FTC, maybe because Commerce has less jurisdiction than the FTC. It has to use the bully pulpit. But it is suggested that adhering to self-regulatory guidelines might permit companies the benefit of a safe harbor, which I think would be helpful for many in industry. Comments on *this* report are also being filed by the end of this month, and so we can expect Commerce, at some point during 2011, to release a final report.

The third, and arguably most important, group to watch, of course, is Congress. Privacy bills were introduced in the last Congress. There was a lot of study and debate, but the 111th Congress expired without new legislation. What that means is the 112th Congress, which just came in, will have to start with a clean slate. It's an open issue whether there will be privacy legislation in the next Congress.

In the Senate, there wasn't a lot of change between the 111th and the 112th. The Commerce Committee virtually mirrors the Commerce Committee of the last Congress; Senator Jay Rockefeller, who's a strong privacy proponent, continues to chair the Committee. The Committee is very much up to speed on privacy issues, and many expect Senator Kerry to introduce privacy legislation.

In the Senate Judiciary Committee, which has jurisdiction over security, Senator Leahy, the chair, has been working on a data breach notification bill that would preempt the almost 50 inconsistent state laws that require you to have this chart in your desk drawer, which I think would be a helpful development in many ways, and I could see that bill moving during this year.

The House is a lot more complicated, and the change in the November elections might have the effect of delaying privacy legislation. Here's why: It's not just the change from Democratic control to Republican control; it's really the change in the composition of the committees. If you look at the Commerce Committee in the House, the number of new members is huge. It's probably the largest delegation of new members on a committee since the early 1990s on the Commerce Committee. A lot of the familiar faces, including Representative Boucher, who was a leader in privacy legislation, are gone. Chairman Fred Upton, who is now the new chair of the Committee — he was not traditionally focused on privacy before, and it's unknown what he's thinking. The Consumer Protection Subcommittee, which might focus on Do Not Track legislation, is chaired by Representative Mary Bono Mack, who has not dealt with these issues before and these are not easy issues. These are complicated issues; it's three-dimensional chess. Do Not Track is much more complicated than Do Not Call, although Do Not Call was so popular that anything that sounds like "Do Not Call" is going to be greased and ready to go. Some of you will remember when, I think it was the fastest bill I've ever seen, when the Do Not Call law was struck down in the Tenth Circuit, a law was passed and put on the President's desk in the space of 24 hours. That's how popular Do Not Call was. Do Not Track is a lot more difficult, because how are you going to do it? Are you going to do it by cookie? What happens when the consumer deletes the cookie? Are you going to do it by a national registry? I'm not so sure that I want to create a national registry that if somebody hacks into, they'll get massive amounts of data. So it's a complicated issue.

So I think what will happen in the House side is you've got a lot of new members; they're coming up to speed; you've got some folks, like Representative Bobby Rush, who introduced legislation last time, who probably will do so again. But the question is whether the Committee, as a whole, with a lot of new members looking at a lot of complicated issues, is going to feel comfortable moving very quickly. Of course, the wild card on both the Senate and House sides is these reports by the Department of Commerce and the Federal Trade Commission. Some members would like to see what the FTC and the Department of Commerce actually recommend before moving legislation. It may be, also, that those reports have the effect of spurring legislation because they bring these issues up to popular consciousness even more, and then people decide they want to provoke their legislators to do something.

So that's the scene in Congress. It's pretty complicated.

The fourth group to watch this year is the plaintiffs' trial bar. The courts have emerged as a major player in privacy regulation in the United States in 2010. There were more than 35 major privacy class actions brought in the courts overall. Some have settled; some are pending; some will move ahead. These suits tend to focus on unexpected sharing of consumer data with third parties, or the development of new technologies that consumers may not have realized were operating. So, there are technologies, such as Flash cookies, which are a type of cookie that's embedded in your video player; technical history sniffing, which sounds really awful. My favorite, though, is "cookie respawning," which is essentially what a Flash cookie does — it can actually take cookies that were deleted by the consumer and respawn them. It sounds like a science fiction movie, but also is the source of a class action lawsuit. There's also deep packet inspection, which is probing the actual packets that you're transmitting on the Internet to decide what kind of ads you might like to see. Needless to say, people aren't happy with that.

If you ever wonder about the continuing power of the major media industry, all you have to do is look at some of these lawsuits and compare them to when *The Wall Street Journal* articles on privacy were published. They followed directly after. It was quite interesting.

So I think we'll see a lot more from the plaintiffs' trial bar in the next year.

The fifth group to watch is the European Commission. As many of you know, the EU kicked off data protection regulation in the 1990s, when it drafted the EU Data Protection Directive, which was then interposed into member states' laws in 1998 for the most part. It's obviously been a long time since 1995. Technologies have moved ahead. Data retention has become a big issue — how long do you retain data so that it can be helpful for law enforcement, getting access to it for terrorism investigations and the like.

So there have been a lot of changes since 1995, and the EU has said it's really time to look at the EU Data Protection Directive again and update it. The other piece that's important to American companies is the Safe Harbor regulation, which is a regulation agreed to through the EU and the Department of Commerce that allows countries that *don't* comply with EU data privacy law, such as the United States, to nonetheless receive data transferred from the EU if the parties agree to abide by the Safe Harbor principles. There's been a lot of criticism of the Safe Harbor principles, some arising out of those SWIFT transaction reports in 2006, but others saying generally that companies haven't taken it seriously enough. I think that's not the case, but there will be a floor-to-ceiling look at the Safe Harbor principles in the next year.

So clearly a lot is going on. If I were to guess — and I hope I get half of this right — where we'll be at the end of 2011, one thing is for sure: we'll definitely have two major reports. I think those reports will spur more self-regulation, because, frankly, first, there will be time; and secondly, there will be guidance; and third, there will be incentive. We'll see more companies doing what Microsoft has proposed to do with its next version of Internet Explorer, which is to include a browser control over tracking for behavioral advertising. We'll have data security legislation, I think, that would preempt the patchwork quilt of State laws in the data notification area. This is what happens when someone leaves a hard drive in a hotel room that's not encrypted that has consumer data on it; what obligations do you have, as a company.

On broad-scale privacy legislation, it seems to me — and I may be wrong in this — but it seems to me that it's unlikely that we'll have legislation by the end of 2011, simply because we've got a lot to do before we get to the point where the House is ready to move. We've got a couple of major reports coming out, and then as we get closer to the election in 2012, as all of you know from being in Washington, it takes a lot longer to get things done. So I really don't think that we'll have legislation at this point next year, but I'd be almost happy to be wrong on that because as we discussed earlier, a reasonable floor would be a helpful thing in many ways. The European process is going to roll out, but as you all know, that takes a lot of time. So I think we'll be in the middle of that process by this time next year.

JACK FRIEDMAN: Deborah, why don't you follow up with this?

DEBORAH MAJORAS: Yes, just a couple of quick ones. One, I agree with you on legislation for this year, *unless* there's a major data breach. One that's very public, in which case they'll jump, which they almost did in '05, when they had the ChoicePoint data breach. But it's now been kicking around since '05 because we moved onto other crises after that. The other thing I was going to say, the success of the Do Not Call list really was extraordinary. So it did prompt lots of members of Congress and others to come to us and say, "Well, why don't you have the 'Do Not [This]' and the 'Do Not [That]'." One of them suggested, "Why don't you look at 'Do Not Spam'." In fact, when we looked at it, the technology didn't really exist to do it. I also wonder if the constitutionality of that one would have been as robust, because it's intrusive on our computer, but it's still different from a phone ringing when you're having dinner.

But in any event, what we did find was that we'd be creating a list that would be absolutely invaluable to pedophiles and others to have, and at the time we said, "No way." But my funniest moment was when I was upon the Hill one time, and someone's staffer said to me, "You know, the biggest problem with the Do Not Call list is you don't ban political campaign calls. We're sick and tired of them, and so you need to start banning those. Why can't you do it?" I said, "Well, because political speech is at the heart of the First Amendment, and I really don't think we can do that." She said, "Oh, for heaven's sake!"

KURT WIMMER: That's great!

JACK FRIEDMAN: I want to ask Deborah something about her opening remarks.

I don't think people really understand the enormity of the resources and effort that companies put into compliance, in terms of hardware, software, personnel, training, review and so forth. Could you just give us a sense of the magnitude and variety of what "compliance" means?

DEBORAH MAJORAS: Yes, it is an enormous undertaking, and I think the more you can try to weave it into the fabric of your business and what you do, the more efficient you become. The hardest thing is if it's just like a layer on top of everything everybody's doing, it's like what we talked about in the advertising review, right? You want to bake it in as much as you can. But still, that takes effort and resources. We have a lot of in-house lawyers — I think I have about 340 around the world today — but there are 127,000 employees, right? So, we can't be everywhere. Then even if you add in the other folks who are really working on compliance, whether they're in a finance internal audit or whether they're in H.R., we're still really outnumbered. So, first and foremost, you really have to try to create a culture in which you say, "This is everybody's individual responsibility.

It's not somebody else's that you can just turn to. But those people are there for resources."

In terms of the enormity of it, I can tell you, we do thousands of trainings every year within the company. Small ones, big ones, online training, in-person training, we have something on all the different areas. It's really tough, because you don't want people to get complete overload, where they just can't even absorb it anymore. It's also difficult when things are popping up and you're saying, "Well, what do you really want me to think about? Do you want me to think about antitrust, or do you want me to think about FCPA?" "Yes!"

So it's tricky, and one of the ways that we have found we can be most effective is if we work with really highly respected individuals in each business, and we give them special training, and so they can be on the front line. They can be the ones who recognize an issue, even before anybody else does. That's really helpful. But if you do that, you've got to do it throughout the company.

In terms of expense, I can't tell you exactly what it is. It's clearly less expensive to do it at the front end than to do it at the back end if you have a huge problem, but nonetheless, it is very expensive. When I get a chance to talk to regulators and enforcers, I think the one thing that I try to tell them, in my mind, is most costly when they do this and how they set us back the most, is when they do something that just seems very arbitrary, really makes no sense. It doesn't seem like a solid enforcement decision. Because then my people are looking at me like, "This is just random! How am I — you know, no matter what we do, they get us coming and going." When that happens, you lose the respect that your people have, that you're trying to instill in them, for the enterprise and for the system. To me, that's the worst thing we can do. Because we don't have — there aren't enough enforcers in the world, and there aren't enough compliance people and lawyers in the world, to go around, you know, policing everybody. You have to build it in, and it does take a lot of time and resources. The other thing you can't do is you can't say, "Well, this year, we're working on compliance. Next year, it'll be something else," right? It has to be a continuing process. So yes, it takes a lot of time and resources.

> "Because we don't have — there aren't enough enforcers in the world, and there aren't enough compliance people and lawyers in the world, to go around policing everybody. You have to build it in, and it does take a lot of time and resources."
>
> — *Deborah Majoras*

JACK FRIEDMAN: Let me thank you. I wanted to give anyone in the audience a chance to either make a comment or ask a question. Do I have a volunteer?

[QUESTION FROM AUDIENCE]

JACK FRIEDMAN: Can you repeat the question?

KURT WIMMER: It's a great question. I'll try to repeat it, and maybe summarize. I think the question is, there are many sorts of programs that allow benefits for giving up some amount of your privacy, such as going to the grocery store or to the pharmacy and you get a discount for using a loyalty card; on the other hand, the loyalty card is tracking very carefully what you purchase. Would this legislation, if there is legislation, or the FTC regulations have an impact on that?

I think it's a great point, and it illustrates more generally the issue that people really are willing to give up some degree of privacy for some degree of benefit, and where that continuum lies depends on the continuum between usefulness and creepiness. To the extent that it starts to become really creepy that somebody is finding out all this information about you, such as if you determine that your pharmacy and grocery store were sharing the information on the fact that you're a smoker with your insurance company, then you might not like it as much. What I think you'll see with legislation, especially if it goes the FTC approach, is saying, "We're going to focus on both online and offline." If you had this sort of broad approach, I don't think you'd see those programs stopping. What I think you'd see would be more procedure built around them. So you would get more notifications of how the data was being used. You might have the right to access it, or to correct it, in the case you gave your card just to a friend to use and they bought all the cigarettes, etc. Maybe you'd have a right to access it. You would probably have increased regulation around the security that you've got to put around that data to make sure that it doesn't get breached, and if it does, you've got to have remediation efforts.

So I don't think it would necessarily mean that the program would go away on the merits. It would just have more process built around it.

DEBORAH MAJORAS: Yes, I think that's right. You know, the other thing that's interesting around this issue is there's no question that some consumers just don't like the creepiness of it all, that people are tracking their stuff. Consumers really differ wildly on this. I couldn't care less if they know what I'm buying. Maybe if I bought lots of porn or something, I would care; but I really don't care. I'd rather get ads that are relevant, like for shoes or something, than ads for power tools! What's fascinating is, a lot of consumers, if it's not the creepiness aspect, we believe they think that they just won't get the advertising any more if they could sign up, and that's not right. You will still get advertising, because it's how we pay for the sites on the Internet. That's just the reality. It's just that you will get ads that will

be more expensive for companies, because they won't be directed and, if you can direct ads at people who actually care about them, obviously there is something to that.

I think there's some group that just doesn't want advertising. Well, okay, you've got your TiVo at home and you can do some things to eliminate it, but you can't take it off the Internet, or we won't have a way to pay for it.

JACK FRIEDMAN: You've been both in the private sector and in the public: When you have a rulemaking activity in an agency, what are the different inputs you get from the private sector, including individual citizens? Do you get emails or do you get people walking in with appointments?

DEBORAH MAJORAS: It's a great question, because when I went to the FTC I'd only done antitrust enforcement, I hadn't done consumer enforcement. One of the things that I discovered is the greatest moral hazard is because we're all consumers. You, as an enforcer, can think that what you think about being a consumer must be what everybody else is thinking, and of course, that's not true. So you have to be really careful about that, and try to get the input.

Now, you have lots of groups in Washington telling you they represent the public. "We're consumer groups, we're privacy groups, we can tell you what consumers are thinking." But, in fact, they can't completely tell you that, because they represent various points of view. The FTC has an enormous complaint database, so at least on things people *don't* like, you get some of your inputs from that. We did a lot of public meetings, town hall meetings — even outside of Washington — to try to get inputs. For me, personally, I loved going out and speaking. One time, my sister was heading up the Chamber of Commerce in this tiny town in Indiana,

and she just kept on saying, "I need you to come speak," and I finally did, and they got these local chambers to all come together, and I had all of these folks. My God, they kept me there after, for over two hours. I was starving to death, because they all had their own consumer issue they wanted to tell me about. Well, that's obviously the tiniest little slice. But my view is, if you're going to work for consumers, you'd better talk to a few once in a while, and not in your own Washington set! Because we all have our own viewpoints.

JACK FRIEDMAN: There are people in Washington, socalled lobbyists, and I'm not talking about political contributions or anything like that, who have intellectual discussions about issues with officials. You have experts or lawyers call and say, "We'd like to have an appointment and explain 'X' point of view about the implications or drafting of a proposal." Is that basically the way most of those regular meetings go, whether they represent businesses or consumer groups?

DEBORAH MAJORAS: Yes, that's right. They file things on the record, and then they come in and have meetings and try to explain to you, and it's very useful. We didn't wait for people to come in on a particular issue. At least once a year, I would get all the consumer groups together around the table and say, "Tell me what you're thinking. Tell me what people are out there wanting and thinking," and it was just a good way to stimulate discussion. It's interesting, when you go into a government position — the day you're nominated, people ask you, "What's your agenda?" I was coming from the private sector and was overwhelmed by that, and I thought, "Well, how could I know what my agenda is if I don't know what the marketplace even needs or wants." I always thought that was sort of interesting; I wasn't sitting around all my life saying, you know, "Someday, if I can do this, I will do the following things."

JACK FRIEDMAN: Right.

DEBORAH MAJORAS: So, I thought you had to listen to what was out there in order to figure out what you should do!

JACK FRIEDMAN: Listen to people — what an interesting innovation!

DEBORAH MAJORAS: Now I hope people here are listening to me once in a while on the issues!

JACK FRIEDMAN: I think an important thing that we have come away with from the program this morning is that in a company like P&G, you have smart people who care about the larger societal, individual, and consumer issues, not just their product. That message certainly came through today. So thank you very much.

Paul Ulrich

Partner, Dinsmore & Shohl

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Paul is a Partner in the Dayton office of Dinsmore & Shohl. He is a member of the firm's expanding worldwide intellectual property practice, which has met client demands with the hire of 11 IP attorneys since 2009 and boasts 40 full-time IP attorneys firm-wide.

Paul's practice focuses on patent preparation and prosecution; opinion work on infringement, market clearance, validity, and patentability; licensing; IP due diligence for M&A; and client counseling in all intellectual property matters. His experience is concentrated in mechanical, electro-mechanical, light-chemical, business methods, Internet-related areas, and software. Paul's practice includes extensive experience in design patent preparation, prosecution, and opinion work.

A sample of Paul's experience includes: serving as a lead partner in preparation and prosecution work for The Procter & Gamble Company; negotiating on behalf of a major Studio Theme Park, which resulted in a seven-figure patent infringement settlement; performing infringement and validity patent analysis on energy technologies for a *Fortune* 100 company; acting as Chief Patent Counsel for multiple companies; and managing and providing counsel regarding trademark portfolios for multiple companies.

Prior to becoming an attorney, he held management positions in engineering, regulatory, operations, and customer service with a *Fortune* 500 gas and electric utility, including managing an organization of 400 union and management employees.

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COVINGTON & BURLING LLP

Kurt Wimmer is a partner concentrating in technology and media law, as well as intellectual property and data privacy.

Mr. Wimmer's practice focuses on representing digital media, television, mobile, publishing, and new technology companies. His work includes strategic content ventures, copyright protection and strategy, content liability and newsgathering advice and litigation, television and digital content licensing transactions, privacy and data protection, and international law. He also represents companies and associations on public policy matters before Congress, the Federal Communications Commission, and international governmental entities, including representation of a 70-member media coalition seeking passage of the Free Flow of Information Act of 2010. From 2006 to 2009, he was Senior Vice President and General Counsel of Gannett Co., Inc., and he was managing partner of Covington's London office from 2000 to 2003.

Mr. Wimmer's clients include Microsoft, Yahoo!, The Washington Post Company, Newsweek, National Geographic, Gannett Co., Inc. and Pearl Mobile DTV Co., LLC, as well as the National Association of Broadcasters and the Newspaper Association of America. He also has advised journalists, associations, and legislators in more than two dozen countries concerning new media laws, protection of journalists, and freedom of information. He is chair of the First Amendment Advisory Council of the Media Institute and the D.C. Bar Committee on Media Law, and is a member of the board of directors of the Media Law Resource Center and past chair of its Defense Counsel Section.

Covington & Burling LLP

From our offices in Beijing, Brussels, London, New York, San Diego, San Francisco, Silicon Valley, and Washington, we practice as one firm, holding closely to core values that start with a deep commitment to our clients and the quality of our work on their behalf, and that includes an emphasis on teamwork among our lawyers and other professionals and a belief in the obligation of lawyers to make legal services available to all who need them.

Our lawyers are recognized nationally and internationally for their legal skills and the depth of their expertise. Many have served in senior government positions. Virtually all of them provide public service through *pro bono* representation. The diversity of our lawyers strengthens our ability to evaluate issues confronting our clients and to communicate effectively on their behalf in any setting. And because every client is a client of the firm, not of any specific lawyer, every client has the ability to call on any of our lawyers as needed.

Our national and international clients look to us for advice and judgment on a broad array of legal issues.

Our litigators handle civil and criminal cases throughout the United States, and our lawyers appear regularly in courts of the European Union. We handle arbitrations, agency proceedings, and matters before international tribunals. At the trial level, Covington litigators in recent years have prevailed in jury trials involving claims as diverse as employment discrimination, complex insurance disputes, antitrust and international commercial disputes.

In the corporate, tax and benefits area, we take a multi-disciplinary approach, resulting in an ability to deliver innovative and creative solutions. Clients benefit from the collaboration of teams of lawyers having expertise in mergers and acquisitions, securities, finance, corporate governance, tax and benefits, bankruptcy and real estate.

Our regulatory lawyers are recognized as experts in their fields and regularly combine their talents on behalf of the world's top financial institutions, pharmaceutical and life sciences companies, telecommunications and technology companies, utilities, railroads, sports leagues and consumer goods companies, among others.

In the trade, antitrust and consumer protection areas, we advise on international trade matters, including trade policy, international trade controls, national security and international boundary and investment disputes, and we handle complex civil and criminal antitrust and consumer law matters, including treble-damage actions, class actions, multi-district litigation and internal investigations.

Harold P. Weinberger
Partner

KRAMER LEVIN
KRAMER LEVIN NAFTALIS & FRANKEL LLP

Harold P. Weinberger is a Fellow of the American College of Trial Lawyers. In his 39 years of practice, all at Kramer Levin, Mr. Weinberger has handled all types of complex civil litigations in courts all over the country and in arbitrations, in areas ranging from intellectual property (licensing, false advertising, trademarks and copyright), contracts, mergers and acquisitions and real estate, among others. Mr. Weinberger has tried dozens of case to juries, judges and arbitrators and argued appeals in the New York Court of Appeals and the First, Second, Third, Ninth and Eleventh Circuits.

Mr. Weinberger heads Kramer Levin's Advertising Group and is among the leading litigators in the country in that field. He regularly advises clients on prospective advertising and has been lead counsel in the litigation of many false advertising cases under Section 43(a) of the Lanham Act, representing both plaintiffs and defendants.

Mr. Weinberger's most recent representation was of PBM Products, which manufactures store-brand infant formula for retailers such as Wal-Mart, Target and others. PBM sued Mead Johnson, makers of Enfamil, in the United States District Court for the Eastern District of Virginia for falsely claiming that Enfamil provided superior nutrition compared to PBM's products. In November of 2009, a jury found in PBM's favor and awarded PBM $13.5 million in damages, one of the largest reported false advertising verdicts. The Court also dismissed Mead Johnson's $40 million Lanham Act counterclaim at the close of the evidence, denied Mead Johnson's laches defense, and issued a permanent injunction barring Mead Johnson from making any false claims about PBM's infant formula and directing Mead Johnson to retrieve the offending advertisements from the public domain.

Mr. Weinberger has also defended class actions under state consumer fraud statutes involving products such as contact lenses, shampoos and detergents in federal and state courts throughout the country and has represented clients in connection with advertising disputes before the National Advertising Division of the Council of Better Business Bureaus. Mr. Weinberger has spoken on issues relating to advertising at cosmetics and pharmaceutical industry legal conferences and at ABA, PLI and other CLE seminars. He has authored numerous publications on the Lanham Act and related false advertising issues. In addition, Mr. Weinberger is a lecturer in law at Columbia University Law School, where he teaches a seminar in false advertising law. Mr. Weinberger has been recognized as one of The Best Lawyers in America in Advertising Law (2007–2011). He is listed in *Chambers USA* — America's Leading Business Lawyers (2006–2010) and *Legal 500* U.S. (2009–2010). He has been listed in all issues of *Super Lawyers* (2006–2010), a special supplement to *The New York Times*; in 2009 and 2010 he was ranked among the top 100 in New York. The 2008 and 2010 editions of *Benchmark: Litigation* singled out Mr. Weinberger as one of New York's "Litigation Stars" and specifically cited him for his "commercial litigation practice."

Kramer Levin Naftalis & Frankel LLP

Kramer Levin Naftalis & Frankel LLP is a premier, full-service law firm with offices in New York and Paris. Our strong focus on client service and our single-minded commitment to excellence have enabled us to build long-term relationships with major domestic and international corporations, institutions and individuals that look to us for innovative and practical solutions for both everyday and complex matters. As leading practitioners in our respective fields, we guide Global 1000 companies and emerging growth entities, across a broad range of industries, to help them fully realize their business goals.

Many of our clients are international in scope and so are we. The firm has a multi-disciplinary office in Paris and consistently cultivates associations with many other prominent law firms throughout the world. Additionally, we are actively engaged within a preferred network of firms from countries around the globe. With this panel of firms, we work with the highest caliber of lawyers of choice within each country when the needs of a particular matter arise. These non-exclusive arrangements involve representations of clients in a number of practice areas, including cross-border corporate and finance, mergers and acquisitions, intellectual property, joint ventures and other disciplines for which the associated firms and their lawyers are highly regarded.

Steven A. Tyrrell

Litigation Partner

Weil

Steven A. Tyrrell serves as co-chair of the firm's White Collar Defense & Investigations Group. His practice focuses on white collar criminal defense, regulatory enforcement matters, and internal investigations.

Mr. Tyrrell previously served as Chief of the U.S. Department of Justice's Fraud Section from 2006 through 2009. In that capacity, he led the investigation, prosecution and coordination of a broad range of sophisticated economic crime matters and enforcement initiatives, including matters involving the Foreign Corrupt Practices Act, corporate, securities, commodities and investment fraud, health care fraud, procurement fraud, stimulus and rescue fraud, mortgage fraud, consumer fraud and identity theft. He also played a key role advising Department leadership on white collar crime-related legislation, crime prevention, public education and the Department's Financial Fraud Enforcement Task Force.

Prior to Mr. Tyrrell's appointment as Chief of the Fraud Section in 2006, he served as Deputy Chief of the Counterterrorism Section of the Criminal Division, where he supervised a team of attorneys in connection with the investigation, prosecution and coordination of a variety of international terrorism and terrorist financing matters. Mr. Tyrrell also led a number of high-profile national security investigations and trained federal prosecutors and agents on relevant national security statutes, policies and practices.

Mr. Tyrrell also served as an Assistant U.S. Attorney in the U.S. Attorney's Offices in the Southern District of Florida and the Northern District of New York. During his more than fifteen years as an Assistant U.S. Attorney, Mr. Tyrrell investigated and prosecuted a variety of criminal cases, with an emphasis on white collar matters, including but not limited to securities fraud, health care fraud, government contract fraud, bank fraud, tax fraud, FDA fraud, and public corruption, as well as related money laundering and asset forfeiture work. He also was lead counsel for the United States in nearly forty criminal jury trials.

Early in his career, Mr. Tyrrell served as Law Clerk to the Honorable Thomas J. McAvoy, United States District Court Judge for the Northern District of New York.

Mr. Tyrrell is the recipient of the Attorney General's Award for Distinguished Service (2005), the Inspector General's Integrity Award, Department of Health and Human Services (1999), the Timothy J. Evans Memorial Award, U.S. Attorney's Office (S.D. Fla, 1998), and numerous citations and letters of commendation.

Mr. Tyrrell is a recognized expert and frequent speaker on a host of white collar topics, including FCPA enforcement, securities fraud, corporate charging decisions, use of deferred and nonprosecution agreements, and monitors. Mr. Tyrrell is a graduate of New York Law School where he was the Research Editor of the *Law Review*.

Weil, Gotshal & Manges, LLP

Weil is premised upon a commitment to deliver sound judgment to our clients on their most difficult and important matters. Clients turn to our world-class teams of lawyers because we listen attentively and provide them with straightforward answers – not merely a redefinition of the problems. Recognized by clients, the media, and professional commentators as best in class, our lawyers are known for the clarity, timeliness, and effectiveness of their counsel and as a result have become our clients' call of first resort for solutions to their toughest legal challenges.

Our firm's four practice departments – Corporate, Litigation, Restructuring, and Tax – deliver value with each assignment thanks to the firm's long tradition of collaborative problem-solving. Weil's "One-Firm" approach provides seamless service no matter the location or area of expertise and allows us to coordinate the work of 1,200 lawyers in 20 offices worldwide toward achieving our clients' key objectives and providing our best judgment on close calls and tough issues.

Our substantive legal knowledge and business sense is complemented by our *pro bono* and community service ethos. We take seriously our professional obligation to give back to the communities in which we live and work. Recently, our firm received both the ABA's Pro Bono Publico Award and the Pro Bono Institute's Pickering Award, the first law firm to hold these two *pro bono* honors concomitantly. We value the deep relationships we have developed in the nonprofit and philanthropic communities and view our *pro bono* work as an integral part of our firm's overall success.