WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Markus Diethelm

Group General Counsel
UBS

THE SPEAKERS

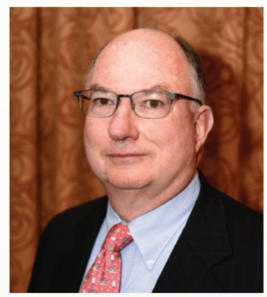
Markus Diethelm
Group General Counsel, UBS

Lord Charles Falconer
Partner, Gibson, Dunn & Crutcher LLP (London); Former Lord Chancellor of the United Kingdom

Thomas Delaney
Partner, Mayer Brown LLP

Brad Karp
Partner and Chairman, Paul, Weiss, Rifkind, Wharton & Garrison LLP

Barry Ostrager
Partner, Simpson Thacher & Bartlett LLP



Michael Wiseman
Partner, Sullivan & Cromwell LLP

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor's personal accomplishments in his career and his leadership in the profession, we are honoring Markus Diethelm, Group General Counsel of UBS, with the leading global honor for General Counsel. His address will focus on key issues facing the General Counsel of a major international financial institution. The panelists' additional topics include key operations such as asset management, lending and dealmaking; financial institution regulation; and national and global litigation.

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

Jack Friedman
Directors Roundtable
Chairman & Moderator

Markus U. Diethelm

Group General Counsel, UBS

UBS

PROFESSIONAL HISTORY AND EDUCATION

Markus U. Diethelm was appointed Group General Counsel of UBS and became a member of the Group Executive Board in September 2008. From 1998 until 2008, he served as Group Chief Legal Officer at Swiss Re, and was appointed to its Group Executive Board in 2007. Prior to that, he was at the Los Angeles-based law firm Gibson, Dunn & Crutcher, and focused on corporate matters, securities transactions, litigation and regulatory investigations while working out of the firm's Brussels and Paris offices. From 1989 until 1992, he practiced at the Shearman & Sterling law firm in New York, specializing in mergers and acquisitions. In 1988, he worked at Paul, Weiss, Rifkind, Wharton & Garrison in New York, after starting his career in 1983 with Bär & Karrer.

Mr. Diethelm holds a law degree from the University of Zürich and a master's degree and Ph.D. from Stanford Law School.

Mr. Diethelm is a qualified attorney-at-law admitted to the Zürich and New York State Bar Associations.

He was born on 22 October 1957 and is a Swiss citizen.

OTHER ACTIVITIES AND FUNCTIONS

Mandates on boards of important corporations, organizations and foundations or interest groups:

Mr. Diethelm is the Chairman of the Swiss-American Chamber of Commerce's Legal Committee and member of the Swiss Advisory Council of the American Swiss Foundation. He is member of the UBS Foundation of Economics in Society.

UBS

UBS draws on its 150-year heritage to serve private, institutional and corporate clients worldwide, as well as retail clients in Switzerland. It is committed to providing clients with superior financial advice and solutions while generating attractive and sustainable returns for shareholders. Its business strategy is centered on its pre-eminent global wealth management businesses and its universal bank in Switzerland, complemented by a client-focused Investment Bank and a strong, well-diversified Global Asset Management business.

Headquartered in Zurich and Basel, Switzerland, UBS has offices in more than 50 countries, including all major financial centers, and employs approximately 60,000 people. UBS AG is the parent company of the UBS Group (Group). The operational structure of the Group comprises the Corporate Center and five business divisions: Wealth Management, Wealth Management Americas, the Investment Bank, Global Asset Management and Retail & Corporate.

JACK FRIEDMAN: Good morning, everyone. I'm Jack Friedman, Chairman of the Directors Roundtable. We are a civic group that works with Boards of Directors and their advisors globally. We've done 750 events in fourteen countries including the U.S. over 23 years, and have never charged anyone to attend a program.

The topic that we have today is of incredible importance: global banking and all the issues involved with it. We will have a full-color transcript of the event, which will be sent out to 150,000 leaders nationally and globally. That's an important factor for why this is the leading world honor for General Counsel.

The way that this series of world honors began is that Boards of Directors have told us that they feel that virtually every company in the world today is rarely recognized for the conscientious care that they take to be good corporate citizens. We are not a PR firm trying to sell things in favor of the business community. As a neutral civic forum for education, it is of value for us to create an opportunity for leaders of the business community, particularly the General Counsel, to talk about things they are proud of and issues that they are facing.

The Distinguished Panelists are Lord Charles Falconer of Gibson, Dunn, who is a former Lord Chancellor of the United Kingdom; Brad Karp of Paul, Weiss; Barry Ostrager of Simpson Thacher; Michael Wiseman of Sullivan & Cromwell; and Thomas Delaney of Mayer Brown. Each of them will introduce his own topic.

Markus Diethelm is a well-known and well-respected global General Counsel of UBS. He has taken leadership, not only in the profession, but in the banking industry and for his company. I won't go into all the law firms and his background there, but just to highlight two or three points: he has a law degree from the University of Zürich and he has a master's

and a Ph.D. from Stanford Law School, which is a remarkable combination. He worked at one point with Swiss Re, and is now at UBS, and he's active at the Board level for the company. I'm very proud that we got the following e-mail from the University of Zürich, and I'd like to read it to you, as I think the sentiments are very well-deserved.

It says:

> "Dear Mr. Friedman: Thank you very much for giving us the opportunity to congratulate Markus Diethelm on his receiving this award. We would appreciate it if the following message from the President of the University of Zürich, Andreas Fischer, could be read out at the ceremony: 'The University of Zürich has learned with pleasure that one of its alumni will be honored with the World Honor for General Counsel. Markus Diethelm graduated from our university in 1983 with a degree in law. We are proud that the foundations of his distinguished international career were laid at the University, and on behalf of the entire executive board of the University, I would like to congratulate him warmly on this prestigious recognition of his achievements.'"

Without further ado, I'd like to invite our Distinguished Guest of Honor to make his opening remarks. Thank you.

MARKUS DIETHELM: Thank you very much, Jack. I'm actually very glad that the University of Zürich keeps a record of my attendance there — my parents never really quite believed me when I said that I studied.

When you said that this is going to hundreds of thousands of leaders around the world, naturally this creates a little feeling of apprehension, and I immediately want to stop and not say anything I was going to say. Lawyers and General Counsel are extremely careful when admitting wrongdoing when telling openly the story of a bank, such as UBS. I can tell you that my hesitation was just for a moment, and I will tell it to you anyway. I have learned, during my years of experience, that if you have an opportunity to tell your story and not leave it to others to tell their view and their beliefs on what you didn't do or what you should have done, it's much better. So transparency has been one of the key drivers of my role at UBS, and even previously.

When I joined UBS in the fall of 2008, UBS was going through a very rough time, which had already started in mid-2007. In the third quarter of 2007 and the fourth quarter of 2009, UBS had to write down more than $50 billion in illiquid securities. These were the largest write-downs by a bank in Europe, and the third-largest worldwide.

It is clear that the losses were not just due to the financial crisis, but in large part also due to internal shortcomings, inadequate control functions, and the inability to manage the risk of the firm.

UBS also had issues with its U.S. offshore wealth management business. These issues had become so significant that the bank was under the threat of an indictment by the U.S. government at that time.

Now, just to put this into perspective, today we are sitting in a building that I'm told is 147 years old. UBS is 150 years old. I owed it to the firm to help in turning from a terrible track record and returning the firm to its right place. This required all the admissions that we had to make, and it required transferring customer information to the United States government and to the IRS for them to be able to pursue tax cheats. It was the only right thing to do at the time, and it was done in the face of a history and an expectation that UBS was a bunch of incompetent people who violated the laws.

More recently, of course, we faced another bout of challenges. In 2011, in London, we had a rogue trader engaged in an unauthorized trading incident. Only last year, as you all know, we settled with various authorities in the context of the Libor case.

But we have also staged, under a renewed management team, a remarkable recovery. Today, UBS is one of the best-capitalized large international banks, and is well advanced with a clear strategy for the future.

Transparency has played a very key role in resolving the different crisis phases, and in regaining the trust of our main stakeholders. As part of the recovery in 2008 and 2009, we were the only firm issuing a transparency report identifying the reasons for our shortcomings and stating the lessons learned from both the credit crisis and the cross-border incidents that we had to face.

It is this story of the mistakes and the renewal of UBS that I would like to share with you today, but I will limit it to just the most recent experience I lived through. That is the unexpected magnitude of UBS's Libor penalties and the confluence of unpredictable developments that led to the staggering fine.

It is in the wake of the Libor settlement, and the discussions surrounding it, that I would like to tell you about my personal experience, and use this method to stage my remarks.

What led to a truly staggering fine and unpredictable treatment of the bank, including a guilty plea by our Japanese subsidiary? There are contributing factors outside the matter at hand. It is those factors which are often overlooked, and it is those factors which have become so important today, not just to UBS, but also to other firms when dealing with large legal cases. My concerns in this regard were increased as I watched the political process unfold in the U.K. Parliamentary hearings last week, and listened to some of our former executives as well as representatives of the Financial Services Authority in the United Kingdom. The clear attitudes demonstrated during those hearings are an example of the evolution which has taken place during the past twelve months.

The way I see it, at the beginning of 2012, there was a growing frustration directed at politicians and regulators throughout the world that nobody has been brought to task for causing the financial crisis. When Barclays settled their Libor matter in June, that frustration found expression, again directed at the banks, as well as those who regulate them. The result was an environment which changed, and continues to change with each iteration increasing in volume and intensity.

While much of the public dialogue is cloaked in discussing responsibility for the regulation of financial institutions going forward, it is, in reality, largely a search for retribution for the past. An additional aggravating factor for UBS was its regrettable history of prior legal difficulties during the past several years. The cumulative effect of these events has led to even harsher reactions by various regulators, even as regulators acknowledged that we have acted in an exemplary fashion upon the discovery of an issue. This has lead to an environment which the Executive Board of UBS does recognize as we embark upon the course of changes outlined in our strategy.

With each new event, we will be given less benefit of the doubt. We, as current management, will operate under this burden until the pressure of the regulator recedes and they accept that we are operating in good faith and are competent to carry out our charge.

I believe that the events leading up to the Libor settlement provide a vivid demonstration of the challenges which face us as we go forward. Understanding them in the context will help us to craft discussions and decisions in a manner that will comport with the world in which we are required to operate, and I believe this does not only apply to UBS, but to other firms, as well.

> "I have learned, during my years of experience, that if you have an opportunity to tell your story and not leave it to others to tell their view and their beliefs on what you didn't do or what you should have done, it's much better. So transparency has been one of the key drivers of my role at UBS, and even previously."
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The magnitude of the penalties imposed upon UBS by enforcement authorities in the U.S., U.K. and Switzerland in December 2012 was unforeseen and could not have been predicted. The much higher-than-expected penalties resulted from a confluence of evolving factors — all unpredictable — that gathered over the course of the investigation, accelerated after the Barclays settlement, and culminated during negotiations with the enforcement authorities in December of 2012. I'll just mention a few of those unpredictable factors: First, a political and regulatory climate in 2012, massively more hostile to banks in general and to UBS in particular, than the one that existed when we commenced our investigation in 2010. Second, the authorities' determination based on the totality of their investigations that UBS's Libor conduct was significantly worse than we, ourselves, had the ability to judge based on our own investigation. Third, the DOJ's severe and unprecedented deviation from its traditional prosecutorial policy of not bringing criminal charges against banks, selecting UBS as the first because of the severity of its conduct and its recidivism. And fourth, the CFTC's and the DOJ's novel use, in the context of the increasingly hostile regulatory and enforcement climate of their respective fining guidelines, to generate potential maximum fines totaling a number much higher than the $1.5 billion that we paid in the settlement.

The Barclays settlement led to a sea change. Everyone was surprised by the public, political, investor and enforcement authority firestorm following announcement of the Barclays settlement — not least, Barclays themselves, who could not have anticipated that their chairman and chief executive would have to step down. No one in the financial industry or the enforcement community predicted or reasonably could have predicted the furor that was unleashed by the settlement and its implications for UBS. The consensus in the media and beyond was that Barclays got off too easily, and there was an overwhelming pressure and momentum directed to harshly punishing other banks, and doing so very soon.

Public criticism and the top-down political pressure for severe sanctions, combined with timing pressures, fundamentally altered the analysis and actions of the front-line staff with whom we were dealing. The staff took policy positions and reached legal conclusions which were unprecedented.

Further, and importantly, the normal competitive pressures between government authorities investigating the same conduct were heightened by the political focus, press and public scrutiny on Libor. The practical reality was that each authority was incentivized to pursue a race to the top in terms of fines and sanctions.

The form and nature of the Barclays settlement with the authorities also had significant consequences for UBS, and I'm afraid, I believe, will for other settling banks in the future. The DOJ has been chastised for failing to take tough action against financial institutions, even when they admit to criminal conduct.

Influential commentators, like James Stewart from the *New York Times*, have written about UBS's continued leniency and the failure of regulators to file criminal charges. The DOJ's decision to offer Barclays the non-prosecution agreement further heightened this criticism, considering that the bank admitted to attempting to manipulate such an important interest rate benchmark. Although pressure on the DOJ has been building in the U.S. since the financial crisis, the settlement with Barclays served as a catalyst to cause senior officials within the DOJ to demand more severe action against the subsequent settling banks.

After the HSBC money laundering settlement, calls to pursue criminal charges against banks and bank officials grew even more. UBS was the first of the banks to settle a benchmark case after Barclays, and after the HSBC case. In this context, UBS's prior conduct in the cross-border tax, muni-bonds and other investigations made UBS a recidivist in the DOJ's view and therefore an attractive target for implementation of a new prosecutorial policy.

On December 19th, we announced that we had reached agreements to settle with the Department of Justice Criminal Division, the CFTC and the U.K.'s Financial Services Authorities. Those fines, combined with the disgorgement ordered on the same day by our home regulator, FINMA, amounted to a total of $1.5 billion. In addition, the Japanese subsidiary of the bank agreed to plead guilty on a one-count charge of wire fraud.

This acceptance of responsibility by the bank for deeply regrettable historic conduct by certain of our employees was a very bitter pill to swallow, but it bears noting that the conduct for which we were charged was conduct that we discovered ourselves. We discovered it because we decided to truly investigate internally and get to the bottom of what has been occurring. Indeed, it was conduct that, at the time of its discovery, was almost entirely outside of the scope of any known government inquiry. The bank made a choice to self-report to relevant authorities and provide extensive cooperation. When one looks at the size of the aggregate fines paid, one might ask whether — and I was asked by various people — in hindsight, these decisions to investigate ourselves in a fulsome manner and then self-report to the government were the right choices. I believe they were. In discussing these decisions in the Libor matter, one can look at the way a General Counsel, such as myself, plays a unique and critical role addressing major investigations.

I would like to limit my remarks on how to conduct such investigations to two topics. First, I will talk about the General Counsels' role in initiating and directing the internal investigation and second, the role of the General Counsel in leading the company's engagement with relevant regulators.

In the face of a government investigation or a clear indication of legal misconduct, every General Counsel is confronted with the need to investigate internally; but how the company goes about conducting the investigation can make a big difference in what is detected. First, choose to pursue the whole truth. That is an important principle that guides me, and has always guided me, as General Counsel. I believe that if one is going to investigate, one must investigate thoroughly and go wherever the evidence leads. If one does not press hard to obtain the whole truth, one often ends up with half-truths, with an incomplete story. If one does not have the whole story, the company is left exposed to additional future enforcement procedures or problems, and related credibility problems with enforcers. In addition, investigations that do not ferret out all the facts prevent the company from seeing itself accurately, and prevent it from making an informed and realistic assessment of its options.

Seeing oneself accurately is important if one is working to strengthen the company's compliance culture, to develop effective training, checks and balances, and to rid the company of corrupt actors. One cannot fix problems unless one has an accurate view of what they are and where they exist, and if one does not have an accurate view of the facts, making thoughtful, responsible decisions about whether, where and to what extent one self-reports and cooperates with the government are impossible. I believe the act of investigating thoroughly, of shining a light into what may have been dark places, has an additional benefit for the culture of the firm. The act of investigating and acknowledging what one finds, validates and reinforces a culture of honesty, as well as a commitment to accountability and compliance.

Let me go to the second point about the role of the General Counsel in directing an investigation. In conducting a truly thorough investigation, the General Counsel is indispensable in his personal attention to it. Only the General Counsel operating with the full support of his or her CEO and the Board can ensure that an investigation is launched, and ensure that this investigation is thorough. The General Counsel must hand-pick the team that investigates, convey with unmistakable authenticity his or her expectation that every stone will be examined and actively manage the effort. It is important to pick truly independent outside counsel that you are sure are willing and able to investigate thoroughly and deliver difficult news if necessary.

In addition, a thorough investigation, like any important undertaking, requires accountability. In the Libor matter, for

example, we selected outside counsel with a reputation for getting to the bottom of things, but we still told counsel that we hold them accountable for conducting an effective investigation — that if things were missed, it would be on them. The message of accountability is one that must come from the General Counsel.

Lastly, it is critical to devote the necessary resources to conducting the investigation. The General Counsel must personally ensure that those resources are made available. We had a team of 60 lawyers, and at times, 350 contract lawyers, to look at up to 200 million pages of documents around the world, speaking and investigating matters with many regulators. This has been a truly massive undertaking.

Applying these principles that I just mentioned, in Libor, we put together an exceptional inside and outside team. They worked together very effectively at all levels. The team had a clear objective of finding out what happened, and to follow the evidence wherever it led. This meant an enormous effort and the devotion of very expensive resources. Relevant sources around the globe were interviewed and re-interviewed as needed. No one was off-limits, no matter at what level of the organization or wherever they sat. The evidence and the independent judgment of our legal team guided who was interviewed and where we directed our focus.

Next is the decision to self-report and cooperate: once facts are gathered, one must decide what to do with them. If you cooperate, cooperate fully. Frequently, the correct choice is to share that information with relevant regulators. The next question is which regulators, and how much to share. It is my view that while reasonable judgments must be made, a global financial institution, such as UBS, has to be prepared to self-report and cooperate with regulators on a global basis, and self-reporting and cooperating with regulators should not be done tentatively or in half-measures. If I pledge to cooperate, the cooperation will be complete and full.

This is what we did in the Libor matter. We decided to share with appropriate authorities the information we had discovered; for the good of the bank, present and future, we saw no other course. Having decided to cooperate fully, we did exactly that. As we have reported publicly, we promptly applied for leniency with various antitrust enforcers with respect to collusion we discovered concerning the Yen Libor and Euroyen TIBOR. Because we were the first to turn in that conduct, we received conditional leniency. Where we received conditional leniency, the bank is protected from government prosecution and related fines resulting from antitrust law violations. In addition, its exposure in U.S. civil litigation is reduced by virtue of the bank's leniency status and continuing cooperation.

We also disclosed our findings and provided extensive continuing cooperation to market regulators and other enforcers with an interest in the Libor matter. What rules do you need to apply in these things? Be consistent and open. We told the same story — a full and accurate story — to every authority with which we cooperated. We did not shade the truth, repackage it for different audiences, or minimize in one jurisdiction what we appropriately featured in our disclosure to another jurisdiction. We did not play games. We conveyed what our CEO and Executive Board have made very clear: At UBS, ethics and reputation are far more important than any additional dollar of profit.

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>
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We provided exceptional assistance to authorities investigating this matter, as the DOJ expressly acknowledged in our non-prosecution agreement, and as several regulators have acknowledged in public. We provided the basis on which the authorities expanded their investigation beyond U.S. Dollar Libor. Our decision to self-disclose, and our unusual cooperation, took the investigation global, leading, we believe, to new discoveries by the regulators and new disclosures by other parties.

In dealing with the authorities in matters like this, I believe the credibility of those people, the General Counsel and the process is essential, and therefore, a clear leadership of the General Counsel and his or her presence is equally essential. Just as he or she is the face of the bank in guiding the work of outside counsel, so, too, the General Counsel can be, and usually is, the face of the company to regulators at the critical junctures.

A General Counsel's personal credibility and reputation are critical in dealing effectively with enforcers in matters like this. In the Libor matter, I and my senior team personally engaged with the key enforcers. There were no meetings of any importance where either I or a senior representative of my office was not present. We made it clear at all stages that we were directly engaged, and that not only our professional but also our personal credibility and reputations were invested fully. As we moved towards negotiating the resolutions, I was personally involved in the discussions, and indeed, at one point — as I do habitually in difficult situations — I promised to not leave town until we came to closure. There is another individual in this room who's had that experience with me, because I felt the full litigation, the presence to the very end, until all the signatures are on the paper, is essential to manifest the personal accountability of the General Counsel, and to get it to the finishing line.

So what is the conclusion? There are a number of reasons why if we had to do it again, I would not change our approach at all, however painful the outcome was. The most important reason goes to credibility and culture. Changing culture does not come overnight to our industry or to an institution as large as ours. But change comes if a company's leadership is fully and unequivocally committed to positive change, and is led by individuals who truly believe in legal compliance and a culture of honesty, transparency and accountability.

I remain personally committed to those principles; they are what I stand for, as the face of my bank and as an individual.

Of course, one often says, "What doesn't kill you makes you stronger." It is also widely accepted that reputation is built over years and can be destroyed within seconds. The reputation of UBS has suffered severely during the crisis, and to have our former executives characterized by a Parliamentary commission as "a bunch of incompetent failures" in how they dealt with the crisis is painful to watch. But today, we stand a lot stronger, and we managed to rebuild a lot of trust and recognition.

Managing through a crisis demands high-quality management. Executive Boards and Boards of Directors play a crucial role. While the Executive Board navigates the ship through the storm, the Board of Directors sets standards, provides guidance and ensures focus. That is not always an easy task. In the complex world of today, it is sometimes difficult to ask the right questions, and even more challenging to obtain the right answers. That's the increasingly challenging role of boards. For this reason, exchanging ideas, sharing experiences and learning from each other are valuable practices, and in this respect, I praise the Directors Roundtable and the role it plays to bring people together.

I want to thank you for inviting me here today. I want to thank you for giving me this honor. I want to thank you for having a public record that I actually attended law school in Zürich, and I am standing here today with a continuing unbridled energy to stay the course. We may have other mistakes that we'll discover, and with a compliance organization and the resolve of management and the right tone from the top, we will address them. I'm sure we will not be given a lot of credit if the mistakes are big, but regulators will watch very carefully whether we act the way I tried to summarize to you today.

The Libor investigation was a truly remarkable worldwide undertaking with millions of air miles and a crowd of very tired lawyers at times, but it allowed UBS to act based on accurate facts that it discovered, and guided it back in the right place. Even though the punishment was very severe, we must all recognize that we have a change in the environment, and I'm sure the panelists will echo that from their independent views.

So again, thank you very much for offering me the opportunity to stand here in front of you and give you my remarks.

JACK FRIEDMAN: I would like to thank our Guest of Honor for a truly statesmanlike presentation, which will be developed with the panelists. I want to give you a chance to talk about UBS, its history and what it is today, some of the major areas, and also something about your legal department.

MARKUS DIETHELM: Well, as I said, UBS is one of the leading banks in the world, one of the best-capitalized banks in the world — well-known, for good and for bad. I think what was relevant for me when I joined in 2008 was that I had to deal with an issue that was very deep-rooted in the bank. That under the protection of Swiss law, certain bankers traveled to the United States and other countries and aided and abetted in tax evasion, which is a behavior that's reprehensible at any time. That was my personal conviction. I started in September and by January I was the longest-serving member of the Group Executive Committee. It felt extremely lonely. I was one of the most-hated people in the firm, because many people were not facing the reality of what I faced by sitting across from a formidable famous prosecutor at the U.S. Tax Division in Washington, and I had to cut off that limb of the body, which would have infected all the rest of the body.

We then introduced a new compliance and legal organization which I was thankfully able to craft into the final prosecution agreement. The new organization complied with what I referred to as "the golden rule." That is, whoever has the gold, rules.

If you don't direct the compensation and the promotion of the people in a control function, they're not yours, and you can never actually build the trust and confidence in that organization to be truly independent — to have the courage and the audacity to cut off limbs or other parts of bodies of businesses that we truly believe no longer belong under the franchise of the firm.

I have to say, it was a major change. When you make a change such as the one that UBS had to go through, it is difficult. I was not only one of the most-hated people in the firm, but also many people in the Swiss establishment thought that I was far too aggressive, that I was exaggerating the actual threat, and that this would be resolved over time. I clearly didn't have that feeling, and I'm usually not a panicking individual. But I saw that we had to make a change, and had it not been for that big, heavy bat that I had in my hand that I could swing around — called a "deferred prosecution agreement" — it would have been very difficult to start changing the culture in the brevity of time that we were able to do it.

I'm not saying that everything was bad in the bank. The bank was over 60,000 employees worldwide, helping society in various forms and playing an extremely important role. But I think that the change that is required — and we'll see more to come, because I think the political environment will not recede in terms of the anger that's displayed towards bankers, their compensation and wrongdoing in the markets (and Libor is an absolutely perfect example against which we can hold that discussion). I believe that a culture change has to happen as quickly as possible. The Legal and Compliance Department at UBS, when I took over, had close to 2,000 people, and within 18 months, I exchanged 600 of those 2,000 people, which was very radical, bold — in many people's eyes, far too aggressive — but it gave clarity. I think the biggest insult in a human relationship is indifference.

JACK FRIEDMAN: I'm sure you've seen movies where someone goes out into outer space and comes back 300 years later. He gets on the phone and calls his Swiss banker, who says, "Hello, Mr. Jones — we've been waiting to hear from you for 300 years. I'm the great-great-great-great-great-great-great-great-great-great-grandson or granddaughter of your original banker. Everything is fine. We have the key to your box; just come by and get whatever you like." The incredible tradition of Swiss banking community is legendary.

Our next speaker is Lord Falconer of Gibson Dunn & Crutcher, who has come here from London.

LORD CHARLES FALCONER: Jack, thank you very much, indeed. I'm going to talk a little bit about the international regulatory and litigation environment, and also about how one deals with those particular problems.

Could I say, before I start, how delighted I am to be here, primarily for two reasons. First of all, I'm delighted to be here where Markus is being honored. I think what Markus has achieved, in terms of driving change, driving transparency and providing real leadership within UBS, will probably, in the history of UBS — which is 150 years — be a part of that history that really saved UBS from what might otherwise have been a disaster. I could think of no more appropriate person to honor today.

Secondly, as Jack said, I'm formerly the Lord Chancellor of the United Kingdom. Before I came here, I looked up the previous

occasions that Lord Chancellors have come to the United States of America — and you can find out when Lord Chancellors came, because if you leave the country, as a Lord Chancellor, you've got to report this fact to the House of Lords.

Lord Chancellors have come to the United States of America on three occasions since 1776.

In 1960, Viscount Kilmuir came to talk to the Jamestown Historical Society. Before he went, he told the House of Lords that he was going, and he would be back in about ten days. The leader of the opposition in the House of Lords, a man called Viscount Alexander of Hillsborough, wished him well, expressed congratulations on receiving an invitation from the United States of America, and hoped that he would deal with the perils of coming here.

It went so well for Lord Kilmuir that he went for a second time in 1962. Again, Viscount Alexander of Hillsborough wished him luck about the perils of going to the United States of America. Things worked out fine for Lord Kilmuir in the United States of America. Unfortunately, back home, the Prime Minister fired him while he was here — not, I think, because he went to the United States of America, but for other reasons.

As a result of that, no Lord Chancellor traveled to the United States of America until 2004, when I came here. I went to the United States of America for one particular reason: I had been told that the New York court system had been the prime mover in cleaning up Times Square in New York. So I went and I visited the local courts, and they did, indeed, confirm that Times Square had been a dreadful place until the courts had got hold of it, and that they had completely transformed it. I then met the then-mayor of New York, who explained that there had been some terrible misunderstanding, and it was entirely due to *him* that Times Square had been cleaned up. I then went to Washington, where I was privileged to meet the Chief Justice of the Supreme Court, then His Honor Judge Rehnquist, who was incredibly impressive. I worried, in the light of our conversation, that the Chief Justice of the United States of America thought that the Lord Chancellor was some sort of tailor, because all that we really talked about was his anxiety that the robes that he had designed for himself to

preside over the trial of President Clinton in the Senate hadn't been as good as the robes worn by the Lord Chancellor.

So, I am very, very glad to be back here for that reason. I would like to talk a little bit about the current environment, and it very much echoes what Markus said about the political and public environment.

The world economic system enjoyed the most fantastic boom, which made the public expect that the boom would go on forever. The tide went out; the countries went into recession; and much of the focus that followed was upon financial institutions and the part they played primarily in the bust, rather than in the boom.

The sense in relation to that was that not just the financial institutions failed, but also the regulators who were supposed to be regulating them failed.

The effect of that has been to cause huge unpopularity in relation to financial institutions, and also unpopularity in relation to commerce more widely.

The people who regulated the regulators were the politicians. Regulators respond very strongly to the steers that politicians give. Now what is happening in the world is that the politicians are looking at the history of the last five, ten and fifteen years, and seeking to ensure that exactly as Markus says, retribution is obtained.

In terms of the financial institutions that will survive, I believe that it is the institutions that say, "We need a new beginning, and we need to look forward in relation to what happens," because the sense that somebody has to pay is incredibly strong amongst the politicians. Of course, if the regulators, driven by the politicians, were the umpires at the time, and they failed to spot that the rules were being broken, then where does one place the blame? One places it, obviously, on the financial institutions.

Now, whether that is fair or whether that is just is not quite the question. The question is, what's the landscape in which financial institutions and those that advise them have to deal? The landscape is one where "somebody's got to pay, and nobody's paid yet." That is why the skills that are required to steer through the shoals at the moment do genuinely involve facing up to the problems of the past and convincing people that there has been change. The *only* way that you can convince people that there has been change *is by there being real change*. Without real change, there won't be the ability to convince the politicians, the regulators or the public that the appropriate price has been paid.

In terms of that large a political landscape, what, on a day-to-day basis, does dealing with a world of regulators all out to get you look like at the moment? Well, I think there are four or five rules that anybody advising financial institutions should have in mind. First of all, you need to deal with a large number of lawyers from a large number of jurisdictions. I am both an English lawyer and an American lawyer. Whenever English lawyers appear, every other country assumes that they are going to be entirely pompous and completely disconnected from reality. Whenever an American lawyer appears, every other nationality assumes they are going to be over-aggressive. Whenever a lawyer from South America appears, everyone assumes they'll be totally crooked.

Now, all of those preconceptions are — well, they're all a bit true [laughter] — but they are mostly *not* as true as you think. One of the things that you need to do when you're dealing with a worldwide regulatory issue is you've got to be able to weld a team together, where there is mutual trust. So, for the English, go short on the pomposity; for the Americans, go short on the aggression; and for the South Americans, be as straightforward as you can possibly be.

The second thing is that you'll need to deal with a lot of lawyers — not just foreign lawyers. If the lawyers don't understand right across the board what is to be said everywhere, then you will find that there is big, big difficulty.

Regulators are really being driven by politicians at the moment. The experience of Barclays, the experience of UBS, is that the regulators right across the world moved in terms of sharing information, and reaching an agreement on a shared approach, very, very quickly. If your client says something in Tokyo about what's going on, you can bet your bottom dollar it's going to be in New York and London and Brussels very, very quickly. So make sure that everybody knows the facts and is saying the same thing.

Thirdly, you are dealing with a whole range of both foreign regulators and sometimes foreign judges. They may well all have different approaches, but they will be, in a sense, in competition with each other. They will want a part of the action, and they themselves — each one of them — will want to deliver something for *their* politicians, and as a result, for their public.

You need to deal — and Markus referred to this — with a lot of documents. If you haven't got ahold of what your documents show, then (a) nobody will believe you've properly investigated what happened, and (b) people will not be able to provide a convincing picture of what the overall position is.

Finally, you need to have a plan. Markus' speech and Markus' conduct is basically based upon the proposition, "We need to know where we stand in relation to this; we need to face up to the past and look to the future." Don't just deal with it on a hand-to-mouth basis with combat and hand-to-hand fighting with the regulators, because the regulators will inevitably win.

So my last message is, if you are dealing with worldwide regulatory problems, have a strategy, have a plan, face up to the problems early. Only that way will you survive what is a completely new atmosphere and new world view about how financial institutions have to be dealt with.

Thank you very much.

JACK FRIEDMAN: You were the Lord Chancellor under Blair and were involved with the whole restructuring of the judicial system. Could you mention changes in how the legal system is set up in England? It's different in the last few years since you were in office.

LORD CHARLES FALCONER: When I became the Lord Chancellor in 2003, the Lord Chancellor was the chief judge, and sat as a judge; was the speaker of the House of Lords, and was the cabinet minister in charge of the justice system. It was widely recognized that you couldn't sit in the cabinet *and* be the chief judge; the Lord Chancellor presided over the Final Court of Appeal in the U.K., and the most prominent litigant in the Final Court of Appeal was the government. So you were both the litigant and the chief judge. So a wide-ranging collection of reforms were introduced which basically stopped the Lord Chancellor being a judge, and made the Lord Chief Justice of England the chief judge in the country.

It was something, interesting enough, that all of the judges had been calling for for about sixty years, but the moment the changes were announced, they all went completely into reverse and objected to the changes. It was partly because we announced the changes on a Friday without telling anybody this was going to happen. So there was big opposition to it; it led to the creation of a new Supreme Court in the United Kingdom. The moment the Supreme Court was set up, then, of course — you know what lawyers are like — the lawyers immediately grouped around the status quo, and now it's as if the Supreme Court in the United Kingdom had been there even as long as the Supreme Court in the United States of America.

JACK FRIEDMAN: Thank you very much. Our next speaker is Brad Karp of Paul, Weiss. I get a kick out of the fact that Brad is the managing partner.

BRAD KARP: I'm actually the Lord Chancellor of Paul, Weiss. [LAUGHTER]

JACK FRIEDMAN: I'll try to get the titles correct next time. Thank you, Brad.

BRAD KARP: When I was a young child, my mother warned me, "Never, ever follow remarks made by a Lord Chancellor." I didn't appreciate what she meant in the '70s; I now do.

I want to congratulate Markus. Markus has displayed extraordinary courage, leadership and wisdom in guiding UBS through a thicket of franchise-threatening crises, and when the history of UBS ultimately is written, Markus is going to be seen and lauded as the individual who saved UBS. That is no small feat.

> "It is my view that while reasonable judgments must be made, a global financial institution, such as UBS, has to be prepared to self-report and cooperate with regulators on a global basis, and self-reporting and cooperating with regulators should not be done tentatively or in half-measures. If I pledge to cooperate, the cooperation will be complete and full."
>
> – *Markus Diethelm*

While the Lord Chancellor spent some time giving an overview of what regulatory life is like for financial institutions in Europe, let me spend a couple of moments talking about what the litigation and the regulatory environment are like for financial institutions in the United States. When I talk about this topic, I'm usually allotted an hour, so I will try to give a dramatically truncated version of some points.

Let me make seven headline observations which I think apply today and, sadly, I think are going to apply in the years to come.

The first is, ever since the advent of the financial crisis in 2007, virtually the entire litigation and regulatory and investigative landscape in the United States has been targeted at financial institutions, and we've seen the cascading waves. It began with subprime litigation and investigations; it morphed into CDO litigation and investigation, which in turn morphed into auction rate securities litigation and investigations, which morphed into RMBS litigation and investigations, which is now morphing into repurchase or put-back litigation and investigations; and then there's Libor and money laundering.

So, the litigation and regulatory world is situated to take dead aim at financial institutions. That's the way it's been for the last five and a half years; that is the way it likely is going to continue for years to come. To give you some context of how difficult the situation is for financial institutions in the United States, consider the fact that since October, 2007 — which is really when the financial crisis began in earnest — there have been more than 4,500 credit crisis litigations filed against financial institutions. More than 400 of those lawsuits have been class actions. There have been more than 450 credit crisis regulatory and criminal investigations; there have been more than 150 financial institution Congressional investigations; and there was the Financial Crisis Inquiry Commission that published a tidy 750-page report focused on the misconduct engaged in by financial institutions. So that's headline number one.

Headline number two is continuing a very recent trend, apropos of the Lord Chancellor's reference to Chief Justice Rehnquist. When you think about the law governing the world of financial institutions, during the '40s, '50s, '60s, '70s, '80s and '90s, there were no more than a handful of Supreme Court cases that addressed issues pertinent to financial institutions. Over the last seven years there have been fifteen Supreme Court decisions that have addressed issues that relate directly to financial institutions. I'm talking about *Bell Atlantic* and *Iqbal* and *Twombly*, relating to pleading standards. *Tellabs* provides the standards for pleading scienter. *Stoneridge* narrows the scope of aiding and abetting liability. *Janus* defines what is a primary violator of the securities laws. *Dabit* limits the liability of holders. *Dura* toughens the loss causation standard. *Wal-Mart* tightens the class certification standard. *Morrison* limits access to U.S. courts for foreign securities issued by foreign companies. *Matrixx* addresses materiality. *Halliburton* addresses loss causation as a prerequisite to class certification. *Merck* deals with statute of limitations issues. Then this Term, *Amgen* deals with class certification and materiality issues. Just last week, *Gabelli v. SEC* addressed the statute of limitations governing SEC-filed actions.

So the Roberts Court has gone out of its way to reach out to decide issues that pertain to financial institutions and the securities laws more generally. The only good news you're going to hear from this little presentation is that the decisions issued by the Roberts Court have overwhelmingly been helpful for financial institutions. The Supreme Court decisions have made it much more difficult, in particular, for plaintiffs' class action lawyers to prosecute securities class actions against financial institutions.

So what that has led to will be observation number three. There has been a dramatic increase in opt-out litigation or individual institutional litigation against financial institutions, and that has dramatically changed the whole manner in which these litigations are defended. You have a lot of very well-heeled corporate institutions that have purchased CDOs, that have purchased RMBS, that have purchased other complex securities instruments from financial institutions and, rather than enlisting class action lawyers, they are bringing individual lawsuits against financial institutions, to the tune of thousands of such lawsuits seeking, in the aggregate, trillions of dollars.

There are a lot of implications that flow from this trend; one is that these cases actually can be tried. Class action lawsuits are not tried for a very good reason — if a financial institution tries a class action lawsuit and loses, the damages can be franchise-threatening.

Another issue when you have institutional investor litigation is that you have a whole range of different defenses; there is no fraud on the market presumption, so you can focus on the sophistication of the purchaser; and, in many of these cases, the plaintiff institutional investor knew far, far more about the nature of the instrument that it was purchasing than the financial institution seller. So you can get into reasonable reliance and the sophistication of the purchaser.

The fourth observation or headline I'd like to focus on is the fact that there are a lot more lawsuits by regulatory and quasi-regulatory entities that are operating as private investors. By that, I'm referring to the FHFA, which famously brought a $300 billion lawsuit against eighteen financial institutions which is pending before Judge Cote in the Southern District of New York. The FDIC has brought a number of lawsuits against financial institutions; so has the NCUA, the FHLB and on and on and on. Courts are now trying to grapple with what it means when you have a quasi-regulatory institution operating as a quasi-private plaintiff. There's going to be a great deal of law made in this area over the coming years.

The fifth observation I would like to make is the manner in which the banks' adversaries has changed, which is a corollary to the fact that you no longer have the focus being on the Plaintiffs' Class Action Bar. So you no longer have Bill Lerach practicing law; you no longer have Mel Weiss practicing law; and, by and large, the Plaintiffs' Securities Class Action Bar has seen its prominence reduced in terms of targeting financial institutions.

In its place, you have seen sophisticated plaintiffs' firms emerge and take center stage, and I'm referring to Quinn Emanuel; Boies, Schiller; Kasowitz Benson; and Susman

Godfrey. Those firms are now taking over the battle against financial institutions, and they're here to stay. A lot of those firms have been recruiting partners from firms like ours — partners who have independent relationships with corporate institutions — so you're seeing the Prudentials; you're seeing the Allstates; you're seeing a lot of traditional corporate defendants suddenly emerge on the left side of the "v" and operate as plaintiffs. That creates a very different dynamic in the litigation context, because you now have plaintiffs that have tremendous financial wherewithal, with gargantuan stakes involved in these one-off litigations, and they're represented by very sophisticated commercial litigators.

So, the financial institutions need to match fire with fire, because these cases actually can go to trial. On behalf of Citigroup in the last five years, we actually tried several multibillion-dollar litigations against Quinn Emanuel and Boies, Schiller: the *Parmalat*, *ADIA*, *Terra Firma* cases. We actually won all three and a fourth billion-dollar case involving Jack Graham and Worldcom. But you can't be a sissy in approaching these litigations, because the stakes are enormous, and from a franchise perspective — both a financial institution and a law firm franchise perspective, recognizing that I'm the Lord Chancellor of Paul, Weiss — you can't lose these cases.

So when it comes to providing counsel and advice to clients and "bet the company" cases, you'd better pick and choose wisely which cases ought to be settled and which cases you actually can take to trial, because as the Lord Chancellor astutely noted, financial institutions are not necessarily, in today's climate, the favorite of judges or juries. So you have to be careful and pick your battles wisely.

The sixth observation I'd like to make is that the regulatory environment in the United States has become extraordinarily punitive, extraordinarily political, and extraordinarily unyielding. And that's the good news, because it's getting worse. You heard Markus, in his remarks, talk about the eighteen different regulators that he had to appear before on behalf of UBS on the Libor investigation. Well, in the United States, there appears to be well more than eighteen different regulators. Of course, you have the Securities & Exchange Commission, which has been under political assault by the Congress and by Professor Coffee. You have the CFTC. You have the DOJ — Lanny Breuer and Eric Holder have been under enormous political attack for not doing enough to target financial institutions. So you wind up with situations like HSBC and the $1.92 billion money laundering settlement recently.

You then have these other recent entrants into the regulatory regime, like the fifty attorneys general. Obviously, Eliot Spitzer and Andrew Cuomo made names for themselves as New York Attorneys General targeting financial institutions. Eric Schneiderman, we thought, was focused on social justice; it turned out that he is also following the Spitzer/Cuomo playbook, and is targeting financial institutions — witness the $30 billion lawsuit he filed a couple of months ago against JPMorgan Chase for RMBS-related activity. So you now have to contend with the fifty attorneys general.

Then you have various institutions, like the New York Department of Finance that decided that it ought to have jurisdiction over Standard Chartered and imposed a $300+ million penalty when the Fed and the OCC and other more traditional regulators thought, "Wait, that's our turf; that's our jurisdiction." So you have a turf war going on among literally hundreds of existing and potential regulators in the United States, each trying to justify its own existence, many occupied by individuals who are seeking higher office and are seeking political comfort and applause. It is an impossible environment to operate in.

If that's not challenging enough, when these cases wind up before courts, you'll have situations – as recently happened with Judge Rakoff in the Southern District of New York – where the SEC and Citigroup entered into a consensual resolution of a CDO sales practices settlement involving the Class V CDO. Citigroup agrees to disgorge its profits, pay interest, pay a $95 million penalty, sufficient for the SEC, which conducted an industry-wide inquiry – having targeted Goldman Sachs with respect to Abacus, and JPMorgan with respect to the CDO Squared transaction previously. The SEC and Citigroup march into Judge Rakoff's courtroom to present the settlement, and the judge says, "Wait a minute – just because the federal regulatory agency charged with enforcing the federal securities laws and Citigroup have decided that this settlement is fair, reasonable and adequate doesn't mean that I'm going to be a potted plant or rubber stamp and simply approve the settlement – no, no, no. If the parties are going to settle this matter, I'm going to require, as a condition of approving the settlement, that Citigroup – the corporate settling defendant – actually admit wrongdoing sufficient to provide collateral estoppel benefit to the private plaintiffs," the "so-called victims," in the words of Judge Rakoff.

So, the issue, again, is where do you draw the line? This situation became intolerable for the SEC, for Rob Khuzami and

> "We did not shade the truth, repackage it for different audiences, or minimize in one jurisdiction what we appropriately featured in our disclosure to another jurisdiction. We did not play games. We conveyed what our CEO and Executive Board have made very clear: At UBS, ethics and reputation are far more important than any additional dollar of profit." – *Markus Diethelm*

Mary Schapiro; and for Citigroup, for its board of directors and its CEO: because a corporation gets nothing out of a federal regulatory settlement if it has to acknowledge wrongdoing. There is no downside in those circumstances to actually trying the case, because even if you lose at trial, you'll likely wind up in the same position as if you settled the case on the condition of acknowledging liability or wrongdoing. So we get to argue that case in the Second Circuit on February 8th and, God willing, corporations and financial institutions will not have to admit wrongdoing in connection with entering into regulatory settlements.

The last observation that I'd like to make is the litigation and regulatory climate in the United States confronting financial institutions is horrible and it is not getting better. There is no incentive for any of the constituencies that exercise leverage to make it better. So what do you do? There's a traditional playbook – and again, Markus adverted to the *un*conventional playbook, which, frankly, is how I think everyone has to approach representing financial institutions in today's climate.

The traditional playbook used to be, you fight, you fight, you fight, you fight, you fight, and then you settle. Well, you alienate the regulators in the process, and that doesn't do your client any good. If you go to war with the regulators, the record that is created usually is sufficiently untenable to make defending the collateral civil litigation impossible or onerously expensive. So you have to approach the regulatory piece of the puzzle – and almost all of these matters now are parallel proceedings, where you have a regulatory piece and a civil litigation piece – with the goal of making peace with the regulators in such a way that by means of the settlement, you're not locking yourself into findings that will disable you in the civil litigation. But in the civil litigation piece, still far too few lawyers are recognizing that the traditional playbook rarely works. If you fight these lawsuits and you engage in scorched earth tactics, you're going to wind up spending tens of millions of dollars of your client's money. In almost every circumstance, the case will not be triable. There are the exceptions; I mentioned a couple of exceptions earlier. But you wind up alienating the plaintiff's lawyers; you can't negotiate a deal with the party with whom you're going to need to deal; you get bad rulings from the judges; and the judges, by and large – and Barry's going to talk about this shortly in the RMBS context – have been issuing very challenging pro-plaintiff rulings; and the trend is becoming worse and worse for financial institution defendants. Most of these matters are industry-wide inquiries, so precedents are being created around you that are going to hurt you in the end.

So I think you really have to start to focus on first-mover discounts – getting out early, recognizing that you only have a couple of opportunities, a couple of inflection points, to settle matters, and you may be doing your law firm a service by allowing these cases to drag out and generate lots of fees, but you're not doing your clients any favors.

So, those are my seven observations. If you gave me an hour, I'd be even more pessimistic. Thank you for your time!

JACK FRIEDMAN: What I'm going to mention right now is actually true — it's not just an anecdote. Apropos of the risk parties run in trying to present to a jury, there was the famous *Arthur Andersen* case arising from *Enron*, which eventually led to the demise of Arthur Andersen. The jury was instructed not to talk to each other until they went to the jury room at the end of the trial and started deliberating. They were hearing about the SEC on and on during the trial. When they finally went into the jury room after all those weeks one juror said, "'SEC' ... I hear it all the time, 'SEC,' isn't that the agency that put a man on the moon?" Other jurors said, "No, that's NASA. The SEC is the Securities & Exchange Commission."

You can take that as a lesson from the litigator's point of view about how risky is it to get in front of a jury.

Moving ahead, our next speaker will be Barry Ostrager of Simpson Thacher.

BARRY OSTRAGER: We're all here to recognize and honor Markus for his extraordinary accomplishments in navigating UBS through what has had to have been four or five of the most difficult years any General Counsel of any financial institution has ever had, and as you've heard directly from Markus and indirectly from Brad, Markus has done an extraordinary job in restoring the credibility and financial stability of UBS against great odds, and he clearly is very much deserving of the recognition he's receiving today.

I had the privilege of working with Markus not only at present but in a prior incarnation, when Markus was the General Counsel of Swiss Re, and in that capacity, Markus was equally courageous and equally hands-on and effective, and persuaded the Swiss Re Board of Directors to fight the good fight with respect to a matter of principle which also involved what by today's standards is a very modest sum of money, $2 billion. We took a case to trial on behalf of an insurance company in New York City, seven blocks away from the World Trade Center, relating to the insurance coverage for the World Trade Center. Through Markus' vision, commitment and hard work, we were able, after seven weeks, to persuade a Manhattan jury to do the right thing under the law and the facts of that particular case.

So, Markus has a long history of wanting to do the right thing, and exercising leadership and persuading doubters within his own organization that if you work hard enough and stand for the right principles, you will get the right outcome. So, congratulations to Markus.

I want to begin my remarks, which are intended to be much more granular than remarks that the two Lord High Chancellors have made, one of whom is a Lord High Chancellor by virtue of the fact that he has hundreds of lawyers dealing with all these problems he's complaining about.

But the genesis of the financial crisis has a lot to do, ironically, with legislation that politicians passed having to do with loosening standards for various types of regulation and loosening standards for certain types of lending. It has, perhaps, even more to do with the failure of regulators who were supposed to be regulating the conduct of financial institutions to do precisely what they were supposed to do. The financial institutions, themselves, share some, if not significant, responsibility for what ultimately is referred to as "the financial crisis," which coincided with the collapse of the United States housing market. So it's somewhat of a bitter irony that most active prosecutors of the financial institutions are the politicians who were vociferous about the failure of the legislation that they passed. Another irony is observing regulators punitively pursuing financial institutions as a result of the regulators' failure to successfully regulate practices that they were created to regulate. We have the kind of environment we are presently experiencing because of vociferous politicians seeking headlines and regulators literally competing with each other to bring regulatory complaints for staggering financial penalties against financial institutions; and prosecutorial agencies with ambitions to become the very politicians who will pass future legislation competing with each other to prosecute financial institutions.

Then again, the Private Litigation Bar on the left-hand side of the "v." is the beneficiary of all of this *Sturm und Drang* that is being created by the politicians who created failed policies, the regulators who failed to regulate, and the prosecutors who had significant political ambitions.

The net result is that there is a torrent, which Brad cataloged, of regulatory, prosecutorial and private litigation against financial institutions, and these suits have been brought against issuers of securities, loan originators, sponsors, securities underwriters, and most recently, rating agencies who played a not-insubstantial role in the collapse of the housing market and the resulting financial crisis.

Into the mix are government entities such as the United States and state attorneys general; the Securities & Exchange Commission

— which was supposed to be monitoring things. It is now being accused of falling asleep at the switch. The Federal Housing Finance Agency, which is standing in the shoes of other federal agencies, like Fannie Mae and Freddie Mac, who were instrumental in the securitization of residential mortgage-backed securities; and the FDIC.

So we've got claims that are being asserted under the federal securities laws, state blue sky laws, and the common law of contract fraud and negligent misrepresentation.

I mentioned that regulators are competing with each other to bring regulatory actions; the prosecutors are competing with each other to bring prosecutorial actions; and most recently — and this is where I want to get somewhat granular — the courts are starting to compete with each other to render decisions that facilitate adverse results against financial institutions. So while you've heard about the auction rate securities issues, the subprime issues and CDS issues, and all of the other financial products that have been the subject of litigation over the past number of years — I'm just going to focus a little bit on the cases that implicate residential mortgage-backed securities.

As you all know, a number of financial institutions originated mortgages and then packaged those mortgages in securitizations which were sold very profitably by securities underwriters to private individuals. Those securitizations were ensured to a significant extent by monoline insurers. The monoline insurers were insurers that historically were in risk-free and very profitable business of insuring public debt issued by municipalities. So companies like Ambac and MBIA and Syncora, which historically insured municipal bonds, got into the business of providing credit enhancement for residential mortgage-backed securitizations. These residential mortgage-backed securitizations were triple-B-minus securities, and for a fee, the monoline insurers magically made them triple-A securities in exchange for enormous

premiums. The monoline insurers, of course, had to know that triple-B-minus securities don't magically become triple-A securities vis-à-vis credit enhancement by the monoline insurers. But as long as the premiums were coming in, the monoline insurers were happy to issue this insurance, and were hoping and expecting that their performance as insurers of these residential mortgage-backed securities would be just as successful as their almost zero-loss experience in insuring municipal bonds.

Of course, it didn't work out that way, and there has been a torrent of litigation, to which I alluded. In connection with this litigation — which is multifaceted — there are securities litigations — I'm happy to report that one of the very positive achievements under Markus' watch was the dismissal of a class action that was initiated against UBS and its underwriters alleging failure to disclose in securities offerings, defects in RMBS underwritings, auction rate frauds, and failure to disclose the consequences and involvement of UBS in the tax evasion issues that Markus spoke briefly about. That case was happily dismissed with prejudice. It's on appeal, but Judge Sullivan in the United States District Court for the Southern District of New York issued a 75-odd-page decision finding that there was no scienter, so kudos to Markus for that. I had the pleasure of working with colleagues at my firm and at Sullivan & Cromwell in getting the case against UBS and its underwriters dismissed.

But in the monoline context, traditional remedies and traditional causes of action are, in my view, being bastardized by the courts in response to all of this pressure that's been brought to bear against financial institutions by politicians, regulators and prosecutors. So there's been a spate of decisions, all of which are in various states of appeal, in which courts have abandoned the traditional rule that a plaintiff, whether it's a monoline insurer or an individual investor, has to show that losses sustained were proximately caused by the defendant. That's the so-called "loss causation" issue.

In any commercial case, somebody seeking damages needs to prove that the damages were proximately caused by the party against whom recovery is sought, and in a case involving Bank of America and in two federal cases, one involving Syncora, courts have come to a different view about what a plaintiff has to show. Courts have held — wrongly, in my view — that a monoline insurer can recover if there is conduct that might adversely affect the interests of the monoline insurer, as opposed to proximately causing damages. The perversity of this logic is evident just from the fact that in these cases, monoline insurers are seeking to recover 100% of their losses and, in many cases, 80%+ of the mortgages in the so-called toxic RMBS packages are fully performing mortgages. So if the relief is granted, the trustee and the investors will actually be worse off rather than better off, by not applying traditional loss causation standards.

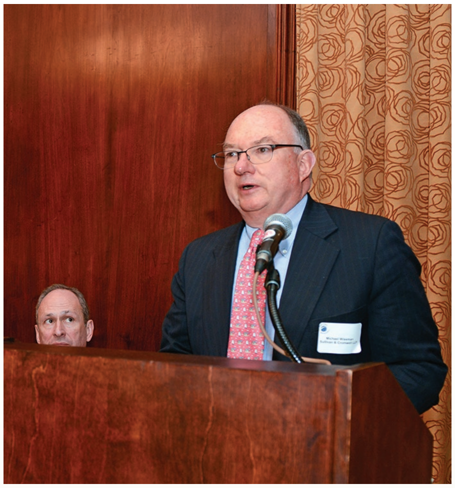
JACK FRIEDMAN: All these mistakes were made by sophisticated people in the marketplace. Have they changed their way of doing business going forward?

BARRY OSTRAGER: Well, I think they have changed their way of doing business, because they're all on the verge of insolvency. But beyond that, you raise a question that goes to another legal issue, which is the issue of justifiable reliance. If you are, for example, a monoline insurer who has conducted diligence and has underwritten insurance for a dozen packages of securitizations and you know as much or more about the nature of these securitizations and the underlying value of the securities in these securitizations, can you really claim that you've been defrauded? That's an issue.

BRAD KARP: On that point, I guess Markus gets kudos there, too, because the best precedent in the United States is the First Department's ruling in *HSH Nordbank v. UBS*, where Markus' team established reasonable reliance is an absolute defense to a claim of fraud in those circumstances.

BARRY OSTRAGER: We're here to toast Markus, and Markus is going to have the opportunity as the lead defendant in the FHFA case to establish some positive law on the statute of limitations.

But another bastardization of the law in these monoline cases has to do with a recently invented concept of rescissory damages. When a monoline insurer provides



credit enhancement, it's done on an unconditional, irrevocable, non-rescindable basis, and there are 200 years of case law holding that you can't get rescission-type damages when you've affirmatively renounced any intention to seek rescission, and you are not even seeking rescission. But nevertheless, in the context of these cases, a couple of courts have blessed the concept of making rescissory damages potentially available in cases where no rescission is sought and no rescission can be had.

So, I think that the financial institutions are, as Brad suggested, going to have to fight some of these cases to conclusion in order to establish the rule of law and not have politicized, judge-made law be the future in this area. Thank you.

JACK FRIEDMAN: We're going to have a couple of speakers on certain regulatory matters — domestic and international — and then return to Markus on Libor and Board of Director issues.

Michael Wiseman of Sullivan & Cromwell is up next.

MICHAEL WISEMAN: I'm delighted to join in honoring Markus. I echo the sentiments that were earlier expressed by the other speakers. I think also Markus should be congratulated independently for his articulate and succinct statement this morning as to how institutions and lawyers should conduct themselves facing major problems and inquiries from the government. His willingness to state that for the record, his own and his bank's commitment to follow those principles, is itself emblematic of the reasons why we've gathered to honor him.

I'd like to talk this morning about the financial services industry, the regulatory climate, and some aspects of changes it is undergoing. I'm afraid I'll repeat, and perhaps reinforce some of the things that you've already heard.

Since the financial crisis rocked the world in the fall of 2008, fundamental changes have been occurring in a number of areas, including structure, so-called subsidiarization, capital liquidity, resolution, supervision and enforcement, and I know Tom is going to talk a bit about subsidiarization and the structural changes.

The impact of these individually complex initiatives is interrelated and hence particularly hard to assess in terms of their cumulative effect. Today, I wanted to discuss the enforcement environment and, in particular, attorney-client privilege.

In thinking about enforcement in the banking industry, it is useful to recognize two basic facts. First, popular and political sentiment is extraordinarily hostile to banks; and second, the dynamics of the enforcement process are such that banks have limited opportunity to take advantage of their due process rights.

The public antipathy to banks should not surprise us. As has been noted this morning, it is international in its scope, but a distrust of banks in the United States is rooted in Jeffersonian and Jacksonian traditions that run through American history. In every period of acute economic distress and hardship in our history, these currents have risen visibly to the surface.

Moreover, we must acknowledge that the industry has not managed to go for any appreciable period of time, since the financial crisis began, without a new, highly visible problem. The reaction of our opinion leaders is, to me, disappointing. It is deeply troubling to see the *New York Times*, a long-time, and justifiably proud advocate of civil rights, call on its editorial page for, "creative thinking on the part of federal prosecutors about the web of federal statutes that could be brought to bear on potential cases," against banks and bankers.

Another unfortunate example was the strident criticism by some members of Congress of the Federal Reserve Bank of New York for its failure to leverage its regulatory authority over the banking industry to extract better prices for AIG assets during the rescue of that firm. The regulatory system and the administration of law and regulation are not there to be used as bludgeons in financial negotiations.

In this toxic environment, regulatory and law enforcement authorities must understandably feel pressure to be more and more aggressive, and levy ever higher penalties. The problematic nature of the environment is heightened, moreover, when one considers the limits on the ability of the banking industry to mount a defense.

To some extent, a bank's ability to defend itself against a regulator is limited by the nature of the regulatory system. So much of the regulation to which a bank is subject incorporates great regulatory discretion. The discretion extends not only to the interpretation of the banking laws, with respect to which regulators are accorded *Chevron* deference, but to making factual judgments. For example, the Tenth Circuit last month upheld an FDIC cease and desist order against a challenge by Frontier Bank. The court held that the FDIC's determination on capital adequacy was unreviewable, and accorded exceptional deference to its judgment on safety and soundness issues. Moreover, given the ongoing relationship between a bank and its regulators, getting into a real fight is, in many ways, a no-win proposition, as Brad pointed out.

And, of course, the appetite of a bank to take on a real public fight has to be influenced by the fact that it needs public confidence to operate, and that a public fight is a very ugly thing to follow in the press.

In addition, the regulatory position that bank examination rights trump attorney-client privilege makes defense more difficult, and I recognize that the privilege issue is more an American issue than a European issue, where the privilege is already traditionally much more limited.

Today, I want to focus for a few minutes on attorney-client privilege in the context of bank enforcement actions. In the United States, the attorney-client privilege has been treated as affording a client "absolute and complete protection" for communications between the client and his attorney when the client is seeking legal advice, subject to some very limited exceptions. Such exceptions include, for example, when the client places a communication at issue by asserting on advice of counsel defense, or when the crime-fraud exception applies.

The privilege is not overridden by a statutory scheme requiring disclosure unless the statute is specific with respect to overriding the privilege. The statutes authorizing bank examination and visitation do not specifically address the attorney-client privilege, and should not, in my view, be interpreted as affecting the privilege.

The one relevant statute addressing privilege explicitly is 12 U.S.C. § 1828(x), which states that submitting materials to a U.S. or foreign bank regulator does not waive, destroy or otherwise affect privilege. It protects banks that elect to produce privileged material as part of their cooperation, but by its terms and consistent with its legislative history, it does not compel production.

Historically, the banking agencies have asserted that their examination authority *can* override privilege. Even in the context of asserting its claim to privileged materials,

however, the Federal Reserve, at least, has acknowledged that, "the law in this area is at present unclear."

In practice, the agencies and the banks have historically worked out a *modus vivendi* with respect to the access to privileged materials, and the enactment of § 1828(x) was, in my view, a legislative buttress for that approach.

In the context of the current enforcement climate, this *modus vivendi* seems to be dissolving in favor of a more aggressive approach by the regulators. Much of the regulatory activity in this area is non-public, but the press recently reported that the OCC — the arm of the U.S. Treasury that oversees national banks — was seeking to obtain privileged material from one bank, and that, curiously, the Treasury Department's Inspector General was weighing into the dispute, threatening sanctions against the bank. The full letter from the Inspector General was subsequently leaked and is in your materials.

The Inspector General cites 12 U.S.C. § 1828(x) as compelling productions of privileged material, which I believe is simply wrong. He cites two cases for the right of an inspector general to obtain privileged data — both cases are included in the materials. In fact, those cases stand for exactly the opposite proposition, namely that privileged material need not be produced, and must be protected. I invite you to take a look at the cases. I find them impossible to reconcile with the way they were characterized in the Inspector General's letter, and it's going to be very interesting to watch this matter evolve and see if this is going to be the judicial test on this issue.

Stepping back from the legal analysis and focusing on policy, the further erosion of the privilege in the context of disputes between banks and their regulators would further tilt an already unlevel playing field in any dispute. While this issue should be of concern to banks and their lawyers, I respectfully submit that it should be of concern to all regulated enterprises, and more generally to anyone concerned with preserving the notions of due process.

In thinking about this issue, I think it's not really too dramatic to remember Justice Holmes' admonition, in the context of free speech, that the guarantees of our liberty are only tested with respect to that which we hate. Unfortunately, banks seem to have fallen within the ambit of the Justices' reviled class.

I will close — since we've been talking about Lord Chancellors — by remembering a somewhat earlier Lord Chancellor who actually lost his head over his principles. One of the sayings that was attributed to him was to warn his son-in-law that when chasing the devil, you have to be very careful about cutting down the forest of the law, because when he turns on you, you will have no place to hide.

THOMAS DELANEY: I'm Tom Delaney from Mayer Brown. It's a privilege to go last as part of the august panel, because now I can sit here and tell you how illustrious I am, and in the aftermath of two Lord Chancellors, that will take a while, so sit back.

It truly is a pleasure to be here. Markus has spent his career as a General Counsel, first at Swiss Re and now at UBS, confronting difficult issues. Challenge is not something he shies from; he dives in.

As most of us know, when the game is on — be it finding answers to covering terrorism risk in the immediate aftermath of 9/11, to the World Trade Center litigation, dealing with cross-border tax, rogue trader, and most recently, the Libor issues — Markus is not content to sit as an air traffic controller, remotely controlling the roles of others. He wants to take a seat in the cockpit.

Now, there was a time when that cockpit was a Concord, but that has meant, in many cases — as he alluded to — camping for weeks at a time from Zürich to sit shoulder-to-shoulder with his outside counsel team, his internal counsel, and working through the issues. He's clear-sighted; he won't shy away from making a tough call, nor will he shy away from standing up and taking the heat when his judgment may be questioned. It's been quite a run the past few years — one that would exhaust even the most conditioned marathoner.

Markus, I'd like to say that it will get better, but I'm not so sure. My portion of today's discussion is to provide some perspective on the current direction of regulation, and I have to say, in that area, the challenges are not getting easier.

Last month, the Federal Reserve issued a 300-page proposal to implement the provisions of Section 165 of the Dodd-Frank Act on the operations of nine U.S. banks. Section 165 authorizes the Federal Reserve to establish prudential standards for certain non-bank financial companies and bank holding companies with total consolidated assets equal to or greater than $50 billion. The Federal Reserve has provided a fair amount of latitude in how to accomplish this task. Some standards are mandatory, such as risk-based capital, liquidity requirements, overall risk management requirements, resolution plans and credit exposure reporting, and concentration limits. This statute also instructs that the application of prudential standards can be tailored on an individual basis by category of institution, taking into consideration such factors as risks posed, complexity, capital structures, etc. In certain cases, the statute allows the Federal Reserve to adjust the $50 billion threshold upward.

In the case of foreign financial companies, the statute provides that the Federal Reserve is to give due regard to the principle of national treatment and competitive opportunity, and to take into account the extent to which the foreign bank is subject, on a consolidated basis, to home country standards that are comparable to those applied to financial companies in the United States.

It's this aspect of the statute that appears to have been given very little heed, because the proposal covers the greatest number of foreign banks possible under the interpretation of the statute without regard to the regulatory supervision they are subject to at home and the general principles advocated by international standard-setting bodies, such as the Basel Committee and the Financial Stability Board.

> "Changing culture does not come overnight to our industry or to an institution as large as ours. But change comes if a company's leadership is fully and unequivocally committed to positive change, and is led by individuals who truly believe in legal compliance and a culture of honesty, transparency and accountability." *– Markus Diethelm*

So what did the Federal Reserve propose? First, if you are an institution with global assets of $50 billion or more, you will be subject to some aspect of prudential standards, even if your U.S. operations are nowhere close to that $50 billion threshold. Some staff at the Fed have said that they have no choice; the language in the statute tied their hands. I can see that the statute refers to a standard of total assets being at or more than $50 billion, but to say that the statute required the standard to be applied to foreign banks on a global basis is a reading that's so rigid, it's almost illogical.

Let's keep in mind what brought us the Dodd-Frank Act. It was a reaction to a massive financial crisis at two-fold concern: i) that some banks were so large and systemic, that the U.S. would have to step in to prevent their failure — the so-called "too big to fail" problem and ii) that certain entities that wielded significant influence over the U.S. economy were beyond the scope of regulators. Non-U.S. banks didn't fall into those categories.

Two weeks before the proposal was issued, Governor Tarullo, in a speech at Yale, acknowledged that the foreign banking operations were not a cause of the crisis in the United States, and that the Federal Reserve has had indisputable supervisory authority over foreign banking operations since 1991. As far as I'm aware, the Congress did not cite national treatment or international cooperation as causes of the financial crisis, but in reading this proposal, one might think they were.

So, what does the proposal mean? It means that all non-U.S. banks with $50 billion in global assets and at least $10 billion in assets in the United States, in U.S. subsidiaries, must organize all U.S. subsidiary activities under a single intermediate holding company, which is being referred to as an "IHC". It will not be hard to reach the $10 billion level, because the calculation includes all U.S. subsidiaries, regardless of where they may be held, including through merchant banking investments and, presumably, non-U.S. subsidiaries that are held through a U.S. subsidiary. It's important to point out that the proposed regulation would not require branch or agency operations of a foreign bank to be rolled up into the IHC.

In the case of capital requirements for the IHC, the proposal abandons the historic approach of primarily relying on consolidated capital requirements measured under home country standards when assessing capital adequacy. Instead, any foreign banking operation required to form an IHC must maintain sufficient capital in the United States to comply with all U.S. capital requirements for bank holding companies. Also, large IHCs — above $50 billion in assets — would have to submit capital plans. Even foreign banking operations that are not required to form an IHC — meaning their subsidiaries are under the $10 billion level — would have to certify that they are meeting home country requirements that are consistent with Basel III standards.

Another major implication of having to form an IHC is the requirement to meet liquidity standards. For foreign banking operations with U.S. assets of less than $50 billion, this obligation would be annual reporting and certification to the Fed on global stress testing. Failure to comply will result in limits on funding positions for non-U.S. affiliates, including the head office.

For larger foreign banking organizations — those with combined assets of $50 billion or more — all U.S. operations, including branch operations, would be required to adopt liquidity management plans, engage in regular cash flow projections, monthly liquidity stress testing, and the maintenance of a buffer of highly liquid assets as well as contingency planning and collateral monitoring.

These are the highlights. There are also standards governing single counterparty credit limits and risk management. I have no illusion about the stresses that banks are under since the financial crisis, and the challenges confronting regulators throughout the world working to protect their local markets. What I do not understand is why the game of regulatory one-upmanship that seems to be embodied in the Fed's proposed regulation is taking place.

Since we're here today to honor UBS's general counsel, let's reflect on what the Swiss regulators have done to address two very large banks whose combined failure could exceed the country's resources to bail them out. In Switzerland, the concern is not so much whether UBS and Credit Suisse are too big to fail, but whether they're too big to be saved.

What have the Swiss done? They adopted a multipronged plan that features higher-quality capital and a much larger capital buffer reaching up to 19%. They are working on higher liquidity buffers, more risk diversification, and resolution strategies that involve aggressive thresholds for selling assets and converting convertible debt to equity.

By the way, the Swiss regulators have not imposed the so-called "Swiss finish" on any other globally significant banks with operations in Switzerland. The story is not much different in the EU, where control over regulation of financial services has been centralized, where they have less member state discretion. A directive is being negotiated to implement Basel III and the capital requirements of Directive IV, which impose capital and additional prudential standards on deposit-taking institutions. Notably, for institutions based in third-party countries, the EU will rely on the concept of equivalent consolidated supervision through home country regulation, reserving the right to apply additional measures only in case-specific situations. The EU is not, so far, going to the broader approach that the Fed has adopted.

The point of these comparisons is that while not exactly identical, global regulators generally are moving ahead in the direction of requiring major banks and non-bank financial services firms to up their game, to meet increased capital and liquidity standards, limit credit exposure and improve risk management. In this environment, it is unclear why the Fed should go as far as it proposes to abandon longstanding principles of regulatory deference and cooperation with respect to the supervision of international banks, and impose new holding company requirements regardless of attendant local capital and liquidity standards.

If other major regulators feel betrayed by the Fed's reversal, they will have little choice but to take similar actions to protect their local markets. This will not be retaliation, but simply a logical conclusion. If such a pattern develops, one could say that abandonment of deference to equivalent capital standards could bring less, rather than greater, stability to the regulation of globally active banks.

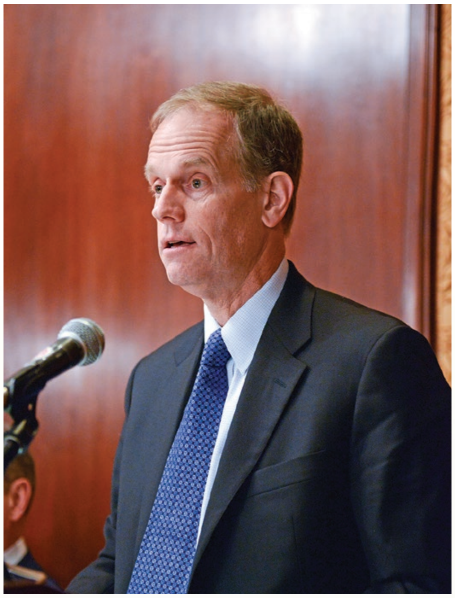
Markus, I hope the Federal Reserve confers with its peers, and I further hope that such talks result in an end to the current arms race and a return to home country deference; but I'm not optimistic, and as a result, I suspect that the challenges of your job will only continue on the regulatory front as the years go on. Thank you.

JACK FRIEDMAN: I'd like to spend time with Markus focusing on the question of how the General Counsel can interact with the Board and the operating units of a company for the business success of a company. Some business people say, "The lawyers are only there to say 'no', cause trouble, and make it hard for us to make a living." The question of cooperation between the business side and the legal side is important.

From the standpoint of the top leadership of a company, how can they anticipate in advance, before there's a crisis, what's going on in the company? How do they ever know what's going on in a world enterprise with tens of thousands of people?

MARKUS DIETHELM: It's a very good question. Before I answer the question, let me say thank you to everyone for your incredibly generous compliments. I take it that those remarks were based on each of you having incredible sophistication in the subject matters that you're dealing with, and hence, an understanding of the challenges that I face as a General Counsel. I would like to build on what the first Lord Chancellor speaker said, and that so few Lord Chancellors were actually traveling to face the perils of the United States. One of the major challenges that I have, and every General Counsel has, is that our boards, at times, travel greatly, but they rarely arrive in a room like this and seek the counsel of what Brad has summarized in the seven points. For me to then translate that advice to a board is a challenge.

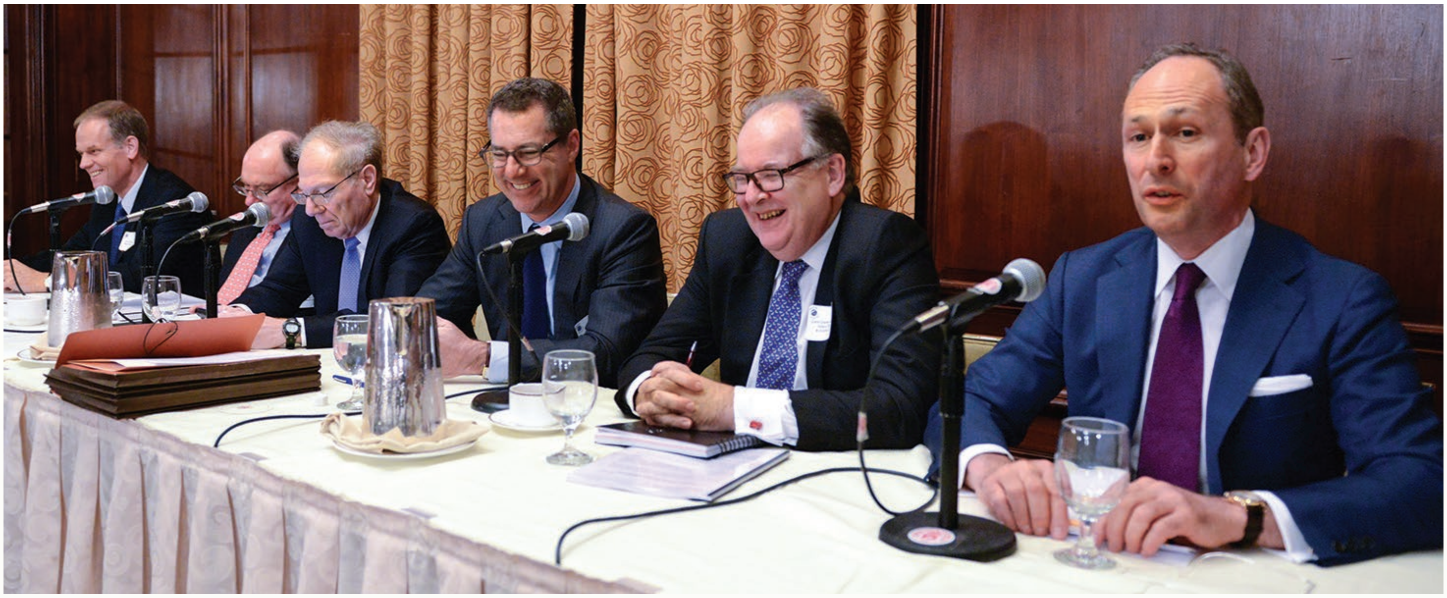
To get a Board interested in some of this advice is a challenge. As we've seen from every single speaker, things are complicated; they require a lot of detailed knowledge; and there are two things that I recommend to the Board as mandatory: No BlackBerry time, and taking time to watch the Parliamentary hearing in the U.K. and imagining that they are actually sitting there as the witness, being questioned by government representatives. They are doing the chastising and you're the chastisee.



JACK FRIEDMAN: Or they maybe helped cause the problem.

MARKUS DIETHELM: One of the things that I did when I had my second appearance in front of high-level people at the Department of Justice, in connection with the Libor matter: I asked the Board Chairman, Axel Weber, who is the former head of the Bundesbank, to come to the United States and participate. Having him present helped when we then had to go back to the board and translate what transpired in a way that actually sank in.

Axel was in that room, and we both made — as some of my lawyers here can attest to — a very, very powerful appearance to the effect that we're changing the bank, that we're the fire brigade. The building is still on fire and we have to finish putting out the fire. The Board Chairman helped convey these points and then he was of course present when I then went to the Board to seek approval. I think a challenge for the Board is that the General Counsel has limitations with respect to time allotted at board meetings and faces challenges in telling them the severity of the impact of the industry-wide issues that we've heard through the various panelists' speeches. It would be valuable for them to hear from a powerful network of



lawyers, including those in this room, who will actually tell them, "Yes, it's actually pretty bad, and keep going with it," so that they develop their own understanding.

There are, of course, requirements for the Chairman of the Risk Committee and others, that they have to be financially astute. There are significant operational risk assets that we carry which to a large extent are actually under my watch. The reports provided to the board are often long, such that many normal people become tired when they start reading them. It makes it harder to create that curiosity. I appreciate what your organization is doing. I'm impressed with how many people sit through this program, because other than people really being in these matters and having to deal with it and having a responsibility, it is hard to generate the interest. What we now see is a development in society seeking retribution from certain organizations that are in the business of actually making profits. We're out there to contribute to the greater good of society, in that we finance homeowners' mortgages and other endeavors, but we're a business like any other business, as well. A recognition of the role of banks and the role of regulators requires a very deep understanding. If any of my board members sat in this room and listened to these presentations today, I think they would want to have no time limitation at the next Board meeting when I report on the various things that are still facing us.

So, the understanding and the interest are important. As Barry and Brad said, when I was a General Counsel at Swiss Re, I actually was threatened to be fired twice by the CEO during the litigation. He got tired of the public persona that we had to play as a plaintiff in New York and in the press, because it was very traditional for a Swiss company to give the two words, "no comment," on litigation. That, of course, sometimes translates into "I'm guilty" on the defense side, but is standard practice. Then, as we sought to be the plaintiff, you have to be able to tell an affirmative story.

So, it's something that emerges now, or morphs into — to use your words, Brad — something that is at the core of the obligation of a board to oversee the sustained profitability of a company, to be deeply interested in litigation. I only wish there would be more lawyers on the boards or more lawyers they would seek advice from, not in the purely operational matter of how to conduct litigation, but just to get a sense of the severity of the environment. I think we got good doses of that this morning.

JACK FRIEDMAN: Today is the modern age of Twitter — even the Pope now tweets. One of the problems for top management, including the General Counsel, is that every employee is free to impulsively write something to someone else. You have to keep the records and not look like you're destroying them. How do you control the sea of communication, any one of which could be pulled out by officials?

MARKUS DIETHELM: When I grew up, I never dared to say certain things to my parents. I have two daughters, 12 and 15 years old, that display an amazing level of audacity. Of course, they are daughters of two lawyers, and say words that I sometimes almost have to look up. They're very direct, and you simply cannot stop it. We're living in a society with social media, where a General Counsel has to tell the people to only put wise things in e-mails. You have to do that because you have to have it on record. But in the end, if you look at Twitter activity, you can see the advice was ignored.

I want to create confidence in our organization. We're not there yet, but we're going in the right direction. When I came in and resolved the cross-border issue, it is true, I was the most-hated person. One of the nicer compliments I received from one of my bosses is that what qualifies my ability to guide the firm is that I don't give a damn about what happens to me.

JACK FRIEDMAN: That's a Swiss turn of phrase. For those who don't know foreign languages.

MARKUS DIETHELM: By that, I mean that if you're in this position, you can never aspire to build a career. The career happens. But if you come in and you look at everyone who is ultimately determining your bonus and feel that you need to please them, logically you have to say whatever you say on the basis of what you perceive they would like you to say to them. That doesn't allow you to steer a clear course. You have to give the confidence to the employees in the firm that you're guiding them safely. There will always be some people who are just obsessed with Twittering around, but the record that you create in the culture of the firm will stand on its own feet.

JACK FRIEDMAN: I had a conversation with the Chair of the SEC in which I mentioned the idea of some executives that you can't have perfect control over your sales force. If you perfectly control every nitty-gritty, you totally take away their incentive to be driving and aggressive. In other words, it's intrinsic in salesmen to want to push the limits of whatever rules there are, that's part of the capitalist system. My question is, how do you control the people who can wipe out billions of dollars of value because they're on the trading desk, or the salesmen that make deals because they want to reach their bonus or they don't want to give you bad news? How do you create an incentive and control system so people don't do that?

MARKUS DIETHELM: Stirling Moss, a famous British race car driver, is known to have said that if you are in perfect control of the race track and you have no dents in your car, you're not going fast enough. There will always be mistakes, and there is no such thing as perfect control. But you have to do two things: you have to create a limits and control framework, and a reporting framework, that give you safety and the confidence that the accidents are not fatal. The most important thing to remember, as I did with the cross-border wealth management offering, is that those people thought they were paid to do what they did. Every one of them knew that it was wrong. Every one knew that you cannot travel to the United States and claim to be a tourist and wear ridiculous clothes so as to give credibility to your lie, and then go advise Americans, even though you're not licensed to do so. They all knew that. But they did it, because the excuse that we've often heard is, "Everyone is doing it, and the other banks are doing it; that's what we're supposed to do." It may help to give you a statement in the public, as I did several months ago when I was in front of the German Finance Commission of the Parliament. I didn't go there with a hope to convince the German Parliament to approve the Abolition Tax Treaty between the two governments. I went there primarily with an ambition to speak into a camera, fully knowing that all the people back home would actually watch what I said, and to be so clear and so uncompromising in my statement, that there is no way back. Those people who thought it was a great way to make money to do so in an illegal or immoral way will then come to the conclusion, "It's no longer okay; I'm not with the right employer; they're making my life difficult." And eventually, they will go away.

JACK FRIEDMAN: Did you follow what they did afterwards?

MARKUS DIETHELM: It's like not allowing them to work for another financial institution. I think that the primary thing is that you say very clearly, "You know who you are, you know the rules and consequences," and you say very clearly what we stand for. Then over time, those people will leave the firm, and you will not attract other people who will do the same things.

JACK FRIEDMAN: If you're the type of person who likes to cut corners, you're not going to want to stick around, because it's not going to be tolerated.

MARKUS DIETHELM: Yes.

JACK FRIEDMAN: Let me ask you this, and if this is not a question that could be answered, I'll just take it off.

MARKUS DIETHELM: I'll answer differently.

JACK FRIEDMAN: But it's an interesting question. I went to Harvard Business School. I have a businessman's question about the financial incentives. When a company is held responsible for a certain action of employees, it may be that the bank, itself, had little incentive to do those acts. But the employee may have an incentive, because he wants his bonus or does not want to lose his job because he lost money and he doesn't want to report it to the bank. So there's a divergence between the company's financial interest and the employee's personal financial interest.

Now, if this question can be asked: In the Libor case, did some employees think they were doing a favor to the bank? Or was it their own personal incentive to look good?

MARKUS DIETHELM: It's not that difficult. Those people who did what they did, were wrong. They pursued that activity, in UBS's case, without any direction from top management, but felt they could get away with it.

JACK FRIEDMAN: It was in their financial self-interest to make their own performance look better?

MARKUS DIETHELM: Financial self-interest, because they played the book and they did various things that helped them personally. In going back to the Twitter society, if you are a firm like UBS, three years older than this building, and you're interested in staying around as long as Harvard will stay around, you just have to do things that are right. For those of you who have attended a Swiss-style annual general meeting, it lasts any time between four to ten to sixteen hours, and anyone can speak and publicly embarrass you, and you have to be able to explain what you have done. It has to be understandable, what you stand for, what your position is and we have a record of rejecting billions and billions of assets coming in because we believe that these are not the right people with whom to conduct business.

JACK FRIEDMAN: Some assume that secret money goes to Switzerland.

MARKUS DIETHELM: People assume the Egyptian army colonel will probably park it in Switzerland. We had those requests, and we rejected *all* of them in the years leading up to that.

People only years from now will be able to look back and say, "Okay, here you had this great event in New York, and we had this courageous General Counsel receiving all those phenomenal praises, and let's just see how he does, and let's just see whether the company actually follows that." It's easier if you are courageous and you say this publicly.

JACK FRIEDMAN: You want your best people to stay.

MARKUS DIETHELM: Yes.

JACK FRIEDMAN: Let me thank our Guest of Honor, and the panelists. I also want to thank the audience for joining us today. It's a historically frank conversation and quite valuable. Thank you.

Lord Charles Falconer

Partner, Gibson, Dunn & Crutcher LLP (London); Former Lord Chancellor of the United Kingdom

GIBSON DUNN

Charlie Falconer is an English qualified barrister and partner based in Gibson, Dunn & Crutcher's London office. The former U.K. Lord Chancellor and first Secretary of State for Justice spent 25 years as a commercial barrister, becoming a QC in 1991. His practice focuses on complex commercial litigation, international arbitration and investigations. Lord Falconer advises financial institutions and investment advisors in connection with securities litigation and investigations. He represents a range of clients in connection with high-risk disputes and crisis management issues.

In June 2003, he became the Lord Chancellor and the first Secretary of State for Constitutional Affairs. He was called to the Bar (Inner Temple) in 1974 and was appointed Solicitor General in May 1997. Between 1974 and 1997 he was a commercial barrister, and was involved in many significant commercial, industrial and financial issues of the day. In 1997 he joined the Blair government as Solicitor-General, moving a year later to the Cabinet Office, becoming involved in all the critical issues which faced the government from 1998 until the 2001 election. He later served as Housing, Planning and Regeneration Minister and Criminal Justice Minister. In both these jobs he was engaged in leading genuine public service reform.

In 2003 he became Lord Chancellor, with the remit of abolishing the office. In conjunction with the then Lord Chief Justice, he worked out a detailed new relationship between the judiciary and the executive, which was embodied in the Constitutional Reform Act 2005. His reform included the creation, for the first time, of a Supreme Court for the U.K., making a full-time independent judge the Head of the Judiciary for England and Wales, and introducing an elected Speaker for the House of Lords.

In 2007 he became the first Secretary of State for Justice, bringing together courts, prisons and justice policy for the first time. He dealt on a wide range of issues for the U.K., at the highest level, meeting frequently with foreign leaders, including those of the EU and the USA.

The Times has named Charles Falconer to *The Times Law* 100 2012, its annual list of the 100 most influential lawyers in the United Kingdom. In addition, Lord Falconer has been identified as an expert in the field of commercial litigation by *UK Legal Experts* 2012 and is also recommended by *UK Legal* 500 2011.

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Thomas J. Delaney
Partner, Mayer Brown

MAYER • BROWN

Tom Delaney is a partner in Mayer Brown's Washington, DC, office and represents a broad range of financial services organizations. He assists both U.S.-based and international firms to anticipate and resolve regulatory, supervisory, and structural impediments to their corporate objectives. Tom possesses a comprehensive knowledge of U.S. financial services law, with particular emphasis on funds transfer matters that arise in the context of anti-money laundering (Bank Secrecy Act and USA Patriot Act) and sanctions compliance. His practice includes assisting internationally active firms to reconcile and comply with overlapping and potentially conflicting provisions of U.S. and international law. Recently, he has devoted substantial time to counseling clients on complying with the new requirements mandated by the Dodd-Frank Act. Tom oversees the conduct of internal investigations and defends financial services firms that are the subject of enforcement proceedings and Congressional investigations. Tom is highly respected for his insightful corporate and regulatory counsel and for his demonstrated success in providing thoughtful strategic advice to organizations facing long-term threats to their operational viability or reputational integrity. *Chambers USA* 2012 notes that Tom "has a good understanding of the process of governmental agencies and sets a very good tone in working with the government."

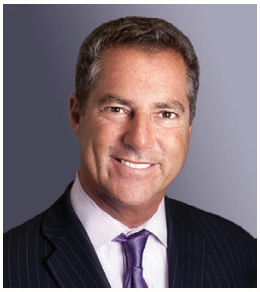
Tom has been practicing law for more than 25 years, initially as an attorney with the U.S. Treasury Department's Office of Thrift Supervision. He entered private practice in 1991 and joined Mayer Brown in 2006. Prior to practicing law, he served on the staff of the Committee on Financial Services of the U.S. House of Representatives and on the staff of the U.S. Senate. He has represented clients before the Federal Reserve, the Department of Treasury, the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Financial Crimes Enforcement Network (FinCEN), the Office of Foreign Assets Control (OFAC), and the Consumer Finance Protection Bureau (CFPB). Also, he has appeared before various state authorities, including in New York, California, Illinois, Florida, and the District of Columbia. In addition to financial services firms, Tom has advised foreign governments on their establishment of regulatory and enforcement systems that conform with international standards, including those specified by such bodies as the OECD's Financial Action Task Force.

Mayer Brown

Mayer Brown is a leading global law firm with offices across the Americas, Europe and Asia. The firm is known for its client-focused approach to providing creative solutions to complex problems on behalf of businesses, governments and individuals. Mayer Brown is particularly renowned for its Supreme Court & appellate, Litigation & Dispute Resolution, Corporate & Securities, Banking & Finance, Real Estate and Tax practices. The firm serves many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies together with global leaders in major industries. Mayer Brown provides global service to its clients through eight offices in Asia, five offices in Europe, and seven offices in the United States. In Asia, the firm operates as Mayer Brown JSM as a result of its 2008 combination with JSM (formerly Johnson Stokes & Master), a leading Asian law firm. In Brazil, the firm has an association with Tauil & Chequer Advogados.

Through its commitment to innovation and excellence in client service, Mayer Brown has earned accolades in the most recent editions of *Chambers*, *Legal 500*, *Financial Times'* "Innovative Lawyers," and many other surveys and publications. In the 2013 edition of the *BTI Client Service A-Team* survey, Mayer Brown is ranked #2 for client service among 650 global law firms, based on responses from corporate counsel at global and Fortune 1000 companies. The firm is also highly ranked in the 2012 Global Elite Brand Index compiled by legal market research firm Acritas. General counsel surveyed by Acritas ranked Mayer Brown highly in terms of global brand awareness and favorability among the world's leading law firms.

The firm's main areas of practice include Banking & Finance, Corporate & Securities, Employment & Benefits, Financial Services Regulatory & Enforcement, Global Trade, Government Relations, Intellectual Property, Litigation & Dispute Resolution, Real Estate, Restructuring, Bankruptcy & Insolvency, Tax (Tax Controversy, Tax Transactions & Consulting) and Wealth Management (Trusts, Estates & Foundations). Key industry areas include Agribusiness, Business & Technology Sourcing, Chemicals, Construction & Engineering, Energy, Health Care, Hospitality & Leisure, Infrastructure, Insurance, Life Sciences, Mining, Privacy & Security, Private Investment Funds, Sports, Entertainment & Media, Technology, Media & Telecommunications and Transportation.



Brad Karp

Paul, Weiss, Rifkind, Wharton & Garrison

Paul|Weiss

Chair of Paul, Weiss, Rifkind, Wharton & Garrison since 2008 (and former Chair of the firm's Litigation Department), Brad Karp has achieved national prominence as a litigator and corporate adviser. Brad has extensive experience defending financial institutions and other companies in "bet the company" litigations and regulatory matters.

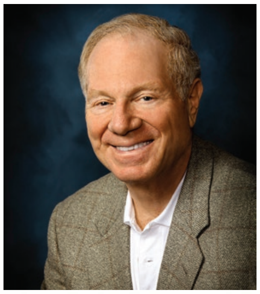
Brad has been profiled as one of the leading lawyers in the United States by numerous publications including *The Wall Street Journal*, *The New York Times*, and the *Financial Times* and one of the "Most Influential People in the Boardroom" by the National Association of Corporate Directors. His successful representation of financial institutions in complex litigations and regulatory matters was featured in a 2010 *American Lawyer* cover story, "Wall Street Bailout." In 2012, *Lawdragon* selected Brad its "Lawyer of the Year." In 2013, Brad was named "Litigator of the Year" by *Benchmark Litigation*. And *Chambers* lists Brad as the only "Star" in its Nationwide Securities Litigation category.

Brad is a frequent lecturer and writer, having spoken at more than 350 conferences and published more than 400 articles on business litigation and securities law issues. Brad lectures on business law issues and corporate governance at Harvard Law School and Columbia Law School. He is a 1984 graduate of Harvard Law School.

Paul, Weiss, Rifkind, Wharton & Garrison

Paul, Weiss, Rifkind, Wharton & Garrison LLP is a firm of more than 700 lawyers, with diverse backgrounds, personalities, ideas and interests, who collaborate with clients to help them conquer their most critical legal challenges and business goals. Our long-standing clients include many of the largest publicly and privately held corporations and financial institutions in the United States and throughout the world. We continue to serve as counsel to numerous start-up companies and investment funds, and over the years have nurtured many through their growth into industry players. While Paul, Weiss is widely recognized as having leading litigation and corporate capabilities, the firm has developed equally strong practices in the areas of bankruptcy and corporate reorganization, employee benefits and executive compensation, intellectual property, personal representation, real estate and tax law.

As a firm we have long maintained an unwavering dedication to representing those in need, and our pro bono efforts continue to benefit individuals and society as a whole in profound ways. We have long been a leader in promoting diversity within our firm and the legal profession, and have been acknowledged by distinguished organizations for our efforts.



Barry R. Ostrager

Senior litigation Partner at Simpson Thacher & Bartlett LLP

SIMPSON THACHER

Barry R. Ostrager is a senior litigation Partner at Simpson Thacher & Bartlett LLP and from 1999 to 2011 was Head of the Litigation Department. He has tried dozens of cases and argued scores of appeals throughout the country and has been prominently involved in many high-profile securities, anti-trust, and commercial cases.

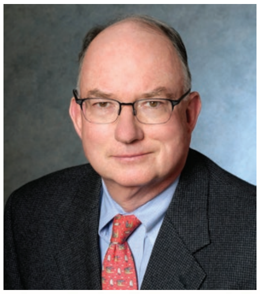
He was lead trial counsel for Swiss Re in the highly publicized insurance coverage dispute involving the World Trade Center tragedy, which resulted in a unanimous jury verdict in favor of Swiss Re, and lead counsel for Hanwha in a multi-billion dollar dispute with the Korean government that was the subject of a multi-week trial. In 1993, Mr. Ostrager was lead trial and appellate counsel for Paramount Communications in the widely publicized *QVC v. Paramount* tender offer litigation. Mr. Ostrager successfully argued before the United States Supreme Court the closely followed *Epstein v. Matsushita* case that arose out of Matsushita's successful tender offer for MCA, Inc. In 2010, he successfully argued again before the Supreme Court the *Travelers v. Bailey* case, which resolved important issues relating to the rights of settling insurers in asbestos-related bankruptcy. He also successfully represented Andersen Consulting against a $14 billion claim by Arthur Andersen in connection with Andersen Consulting's successful bid to win a separation without cost from the Andersen Worldwide organization in the largest ICC arbitration in history. Mr. Ostrager successfully represented J.P. Morgan Chase in a breach of guarantee contract action against Motorola, in which J.P. Morgan Chase obtained a $370 million verdict against Motorola. In July 2010, Mr. Ostrager was one of the trial counsel who produced a $110 million jury verdict in Arizona State court after a six-week trial. Most recently, in July 2011, Mr. Ostrager obtained a deca-million-dollar jury verdict in a commercial dispute on behalf of a member of the Jordanian Royal Family.

Mr. Ostrager has been prominently involved in supervising the firm's major insurance and reinsurance practices in both its New York and Los Angeles offices. He has been lead trial counsel in more than a dozen major insurance coverage cases, including *Shell Oil Co. v. Winterthur Swiss Insurance Company*, a multi-billion dollar environmental insurance coverage dispute in which the jury returned a verdict for the insurers after a sixteen-month trial.

Mr. Ostrager is co-author of the *Handbook on Insurance Coverage Disputes* (Aspen Law & Business, 2010), a widely used, three-volume treatise now in its fifteenth edition. Mr. Ostrager is also a frequent lecturer on federal securities law and insurance law.

Simpson Thacher & Bartlett LLP

Simpson Thacher & Bartlett LLP is a leading global law firm with offices in New York, Beijing, Hong Kong, Houston, London, Los Angeles, Palo Alto, São Paulo, Seoul, Tokyo and Washington, D.C. Established in 1884, the Firm currently has more than 850 lawyers. On a world-wide basis, the Firm provides coordinated legal advice on the largest and most complex corporate transactions and litigation matters in industries which include financial services, insurance, power and natural resources, consumer products, services, technology, telecommunications, media, pharmaceuticals and healthcare industries. Cross-border finance, banking and bank regulation, mergers and acquisitions, securities issuance and regulation, project and asset based finance, real estate, asset management, joint ventures, taxation, litigation and dispute resolution are important aspects of the Firm's practice.



Michael Wiseman
Sullivan & Cromwell LLP

SULLIVAN & CROMWELL LLP

Recognized as a "Dealmaker of the Year" by *The American Lawyer* (April 2009) for his role in connection with the AIG bailout, Michael Wiseman is widely recognized as a leading attorney in banking and financial institutions law. He represents domestic and international commercial banks, investment banks and insurance companies. His practice encompasses regulatory and enforcement issues, mergers and acquisitions, capital markets, new products initiatives, derivative products, payment system issues and corporate governance and counseling.

As managing partner of the Firm's Financial Institutions Group, Mr. Wiseman has a long history of advising global financial institutions on their largest transactional and their most sensitive regulatory matters. In recent years, for example, Mr. Wiseman has advised AIG in connection with the $85 billion emergency financing plan with the Federal Reserve and subsequent $30 billion equity capital commitment facility, as well as Goldman Sachs in its conversion to a bank holding company. Mr. Wiseman has also advised UBS in its recent capital-raising activity and other matters arising in connection with the financial crisis.

Selected Transactions

Mr. Wiseman has advised clients on significant matters in a number of areas, including:

- Public Regulatory and Enforcement,
- Mergers and Acquisitions
- Securities and Capital Markets
- Corporate Governance and Counseling

Even before the recent financial crisis, Mr. Wiseman advised in connection with the resolution of a number of troubled banks, including Compubank, the Ohio thrift crisis, various savings banks, Bank of New England and First Oklahoma.

Mr. Wiseman is the former chair of the Banking Law Committee of the Association of the Bar of the City of New York. He is a member of the New York State Bar Association's Banking Law Committee and a reporter for the Capital Market Lawyers Group on guidelines for OTC transactions involving dealers and investment advisers. Mr. Wiseman is also a member of the Council on Foreign Relations.

Mr. Wiseman is a frequent speaker at various forums on banking and financial regulation matters and is the author of articles and commentaries on banking and related issues as well as numerous amicus briefs on important issues in the financial services industry.

Sullivan & Cromwell LLP

Sullivan & Cromwell LLP provides the highest quality legal advice and representation to clients around the world. The results we achieve have set us apart for more than 130 years and become a model for the modern practice of law. Today, S&C is a leader in each of its core practice areas and in each of its geographic markets. Our success is the result of the quality of our lawyers, the most broadly and deeply trained collection of attorneys in the world.

We work as a single partnership without geographic division. We hire the very best law school graduates and train them to be generalists within broad practice areas. We promote lawyers to partner almost entirely from among our own associates. The result is a partnership with a unique diversity of experience, exceptional professional judgment and a demonstrated history of innovation. Clients of the Firm are nearly evenly divided between U.S. and non-U.S. entities. They include industrial and commercial companies, financial institutions, private funds, governments, educational, charitable and cultural institutions, and individuals, estates and trusts. Our client base is exceptionally diverse, a result of our extraordinary capacity to tailor work to specific client needs.

S&C comprises approximately 800 lawyers. They serve our clients around the world through a network of 12 offices, located in leading financial centers in Asia, Australia, Europe and the United States. We are headquartered in New York.

In addition to thanking the Guest of Honor and our Distinguished Panelists, we wish to express our appreciation to **PwC's Financial Services Regulatory Practice** for their cooperation in this program.

About PwC

PwC helps organizations and individuals create the value they're looking for. We're a member of the PwC network of firms in 158 countries with more than 180,000 people. We're committed to delivering quality in assurance, tax and advisory services.

PwC assists top-tier financial institutions in navigating, managing and implementing change driven by legislation regulation and supervisory expectations. PwC is unique in that our team and our approach combines our:

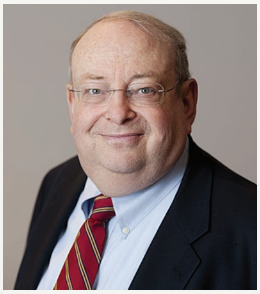
Deep subject matter expertise — Our U.S. regulatory practice consists of over 25 partners and 250 professionals across banking, asset management and insurance — most of whom were in leadership and supervisory roles at the major regulators (Fed, SEC, OCC, CFTC, UK FSA) and/or in regulatory-related roles in industry.

Unparalleled knowledge of industry-leading practices gained from our long leading position as auditor to three of the top five banks, 40% of the major mutual funds and hedge funds, and 40% of the leading insurers, as well as our deep advisory relationships with all of the other key industry players.

Full-service Advisory practice, which consists of over 1,500 strategy, risk and finance, operations and technology, and change management consultants in the U.S. and 6,500 in our global network — all of whom are dedicated to the financial services industry.

Public Sector practice, which advises and assists key regulatory bodies, such as the Fed, Treasury, FDIC, SEC, CFPB, FINRA, and others execute on their statutory mandates.

Vast global network of more than 50 regulatory partners and 600 professional staff, which has representation in all of the major financial hubs and emerging markets, to support our engagement teams and our clients effectively navigate through the maze of global regulations and supervisory expectations.



Jack Friedman
President
Directors Roundtable Institute

Jack Friedman is an executive and attorney active in diverse business and financial matters. He has appeared on ABC, CBS, NBC, CNN and PBS; and authored business articles in *The Wall Street Journal*, *Barron's* and *The New York Times*. He has served as an adjunct faculty member of Finance at Columbia University, NYU, UC (Berkeley) and UCLA. Mr. Friedman received his MBA in Finance and Economics from the Harvard Business School and a J.D. from the UCLA School of Law.